Bewitched By Language: Wittgenstein and the Practice of Law

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Bewitched By Language: Wittgenstein and the Practice of Law

Bruce A. Markell*

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B. Judging, Disagreement and Wittgenstein

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I. INTRODUCTION

At one time, Harvard University offered an interdisciplinary seminar, *Thinking About Thinking*, taught by three leading names in philosophy, law and science: Robert Nozick, Alan Dershowitz and the late Stephen Jay Gould.¹ This seminar presumably allowed participants to observe and understand how leading figures in different disciplines approached common problems, and to consider and appreciate the merits, as well as the deficiencies, of their different methods of analysis and problem solving.² Achieving this goal was apparently not without cost. As noted by Stephen Jay Gould: "Philosophers will dissect the logic of an argument, an exercise devoid of empirical content, well past the point of glaze over scientific eyes.... [In contrast,] the law gives decisive weight to the history of its own development....³

Although this statement may be overblown, it may gain some force if applied to efforts to combine philosophy and law. Claims of intellectual voyeurism and the use of cartoons to illustrate jurisprudential arguments are not uncommon.⁴ Yet not all efforts at integrating law and philosophy are nonsense. As with most syncretic efforts, the initial problem is how to conduct the discussion. One method might be to start with philosophy, and attempt to adapt its theoretical structures to law. If successful, this move could accomplish two goals. It could help to explain and rationalize law by viewing it from a different perspective, and it could also broaden the audience with whom to discuss the new explanations.

Such a move would be useful, however, only if the resulting clash or interplay of views and practices could cause the participants to willingly alter an existing point of view or their perspective on it. Put another way, unless debate is to be had for debate’s sake, insights from the philosophy of law are valuable only to the extent that they are able to modify or change legal

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² See id.
minds. Debates on the nature of judging, for example, might bear not only on how we select judges, but also on how they perform once selected.\(^5\)

But, as Gould hinted at in the passage in the opening paragraph, sometimes the practices or methods of one discipline do not transport well into another.\(^6\) One problem may be the jargon, argot or the particular practices of one side. Notations in modal logic, for example, can cause lawyers fits. Another problem lies with the level of generality at which the two disciplines operate. In physics, for example, quantum mechanics has to date proved superior to Newtonian or Aristotelian mechanics in predicting events, yet no pool player calculates Schrödinger’s equations when setting up her next shot.\(^7\) Yet another problem, to paraphrase Grant Gilmore,\(^8\) may be the quality of the lawyer’s work in the non-legal discipline; it may be no more than multidisciplinary cross-dressing.\(^9\)

Traditional scholarly debate and exchange can go a long way to minimize these problems. Terminological differences can be identified and worked out, and related disciplines can agree on transitional rules to mediate degrees of generality. Inquiry and debate can help resolve quality issues.\(^10\)

There may be, however, an intractable problem in trying to combine the study of lawyers’ language with the study of language by philosophers.\(^11\) If

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6. See supra text accompanying note 3.

7. Cf. ERNST MAYR, TOWARD A NEW PHILOSOPHY OF BIOLOGY: OBSERVATIONS OF AN EVOLUTIONIST 11 (1988) ("For instance, it would be futile to try to explain the flow of air over the wing of an airplane in terms of elementary particles.").

8. This comment apparently was never written down. See Roger C. Cramton, Demystifying Legal Scholarship, 75 GEO. L.J. 1, 15 n.47 (1986).


10. There is also the problem of fame by association. To get published, aspiring writers may invoke the names of currently fashionable philosophers in hopes of attaining fame by association. See Frederick Schauer, Formalism, 97 YALE L.J. 509, 525 n.56 (1988) (criticizing the use of phrases like “post-Wittgensteinian” as “attempting to lean on the argumentative props of associations with philosophers whose names are currently fashionable in legal circles”). For an article poking fun at this practice, see Sidney W. DeLong, Jacques of All Trades: Derrida, Lacan and the Commercial Lawyer, 45 J. LEGAL EDUC. 131 (1995).

11. Professor Charles Collier has written on this topic, as well as the value of inter-disciplinary studies in general. See Charles W. Collier, Interdisciplinary Legal Scholarship in Search of a Paradigm, 42 DUKE L.J. 840 (1993); Charles W. Collier, The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship, 41 DUKE L.J. 191 (1991). With respect to similar questions raised about the use of Wittgenstein’s scholarship, see Michael Steven Green, Dworkin’s Fallacy, or What the Philosophy of Language Can’t Teach Us About the Law, 89 VA. L. REV. 1897 (2003); Ahilan T. Arulanantham, Note, Breaking the Rules?: Wittgen-
law is a discrete discipline,\textsuperscript{12} with its own autonomous rules and practices on how to interpret language, philosophical theories may not have much to say about any normative aspect of those legal rules and practices. In this sense, law's autonomy acts as a preliminary defense to the relevancy of the philosophical inquiry. It is akin to saying that the rules of one club do not apply in another.

But even if one accepts the proposition that language is philosophy's primary province, it does not automatically follow that insights from philosophy about language can inform the practice of law. Much academic writing in the philosophy of language is about what meaning is, not about what particular words mean in specific contexts. Yet law deals daily with the meaning of particular words in concrete circumstances. Rather than providing endless interesting philosophical studies, it may be the case that most legal inquiry does not present any interesting or particularly difficult philosophical issues.\textsuperscript{13}

The problems inherent in importing the practices and mores of certain types of philosophical inquiry into law may stem from the different context in which philosophical theories are spawned and take root. As Gould notes, the method employed by philosophers differs from that employed by either law or science.\textsuperscript{14} As a result, the transfer from one discipline to another of a theory, for example a theory of meaning, may be disastrous or it may be banal. It could be similar to planting a hothouse flower in a refrigerator or discovering you planted cattails when bulrushes were intended.

In this article I want to illustrate some problems with the transference of theory between disciplines. My examples derive from legal literature and

\begin{itemize}
  \item For scholarship which employs or at least invokes Wittgenstein in aid of its analysis, see \textsc{Wittgenstein and Legal Theory} (Dennis M. Patterson ed., 1992) (containing eleven essays regarding Wittgenstein's and legal theory); Brian Langille, \textsc{Revolution Without Foundation: The Grammar of Scepticism and Law}, 33 \textsc{McGill L.J.} 451 (1988); Charles M. Yablon, \textsc{Law and Metaphysics}, 96 \textsc{Yale L.J.} 613 (1987) (reviewing Saul A. Kripke, \textsc{Wittgenstein on Rules and Private Language} (1982)).

12. Passions can run deep on this topic. See Richard Posner, \textsc{The Decline of Law as an Autonomous Discipline: 1962-1987}, 100 \textsc{Harv. L. Rev.} 761 (1987); Owen Fiss, \textsc{The Death of Law?}, 72 \textsc{Cornell L. Rev.} 1 (1986); Charles Fried, \textsc{The Artificial Reason of Law or: What Lawyers Know}, 60 \textsc{Tex. L. Rev.} 35 (1981).

13. This is not to say that law (or any other discipline) cannot be informed by philosophy; quite the contrary. At a basic level, law and philosophy have always enjoyed a natural partnership. But not all of philosophy can inform law. In particular, grand philosophical theories may not have much to say in particular cases. Imagine calling a linguistic philosopher as an expert witness in a contract interpretation case, and you see my point. Cf. Richard Rorty, \textsc{The Banality of Pragmatism and the Poetry of Justice}, 63 \textsc{S. Cal. L. Rev.} 1811 (1990) (suggesting that pragmatic philosophy may not have much to say about specific applications of the law once one acknowledges philosophy's message about theoretical debate).

14. See Gould, \textit{supra} note 3. Gould lamented this fact, and his last book was an attempt to bridge the gap, or at least outline the stumbling blocks, between the sciences and the humanities. \textsc{Stephen Jay Gould, The Hedgehog, The Fox, and The Magister's Pox} (2003).
reported legal opinions which rely upon or incorporate the philosophy of Ludwig Wittgenstein as an aid to understanding some facet of law.

In order to set up the discussion, I first sketch some salient points of Wittgenstein’s philosophy that have attracted attention by scholars and courts. With this interpretation in place, I then show how different, and equally or more plausible, interpretations can lead to different results in particular cases. I do this by surveying some attempts, by academics and judges, to incorporate Wittgenstein into legal scholarship and into individual cases. In most cases, I find the use of Wittgenstein to be either irrelevant to the matter discussed, or superfluous—bordering on the gratuitous or the theanthropic. The obvious suggestion is that such citations or discussions are not very useful in the sense adumbrated above: they don’t have the power or the capacity to change or inform views.

My goal is not to rid legal scholarship of philosophical insights. That would be as wrongheaded as it would be wrong. Rather, by the descriptions offered, I hope to illustrate the contingent nature of legal scholarship based solely upon philosophy, and to suggest that the impact of extending these contingencies in particular cases, or classes of cases, is not beneficial to academic debate, nor is it necessary to decide particular cases.

II. A SHORT SKETCH OF WITTGENSTEIN’S LATER PHILOSOPHY

Ludwig Wittgenstein is a major figure in twentieth century philosophy. His early work, the *Tractatus Logico-Philosophicus*, formed one of the rallying points for logical positivists such as Rudolf Carnap and other members
of the Vienna Circle. His later work, the Philosophical Investigations, re-examines some of the premises of his early work, and in some ways is almost directly contrary in effect. It too has spawned movements and interpreters.

But Wittgenstein himself was a puzzle. Of his major philosophical works, only the Tractatus was published during his lifetime. After writing the Tractatus, he was convinced he could add nothing more to philosophy, and he thus removed himself from philosophy for over ten years, taking on jobs as a grammar school schoolmaster, a gardener's assistant, an architect, and an author of a children's primer. He continued to think about philosophy, however, and problems he saw in the Tractatus analysis caused him to return to Cambridge in 1929 to become a fellow of Trinity College. When he died in 1952, he left a huge amount of unpublished work, much of which has now been published in one way or another.

These later, posthumously published, works are also a puzzle. Constructed in tightly written prose, they have an aphoristic character which can invoke both mysticism and illumination. They also contain interesting and valuable insights on classical philosophical problems, such as the essence of meaning, the nature of philosophy and many others. Whether they consist of an integrated and consistent body of writing can be and is hotly debated. Whether they contain "the answer" as to the questions addressed is even more controversial. Notwithstanding this controversy, I hope to sketch two
areas of Wittgenstein's later philosophy which have attracted lawyers' attention.

A. Meaning and Interpretation

A central concern of the Philosophical Investigations — used as a work roughly representative of Wittgenstein's later philosophy — is an examination of the concept of meaning. The book opens with an examination of a commonly held view of meaning: that words name things or actions, and that sentences have meaning only if their words are put together according to rules of grammar which adequately account for this naming.26 One problem with this theory is that words do not always stand for things or actions, even in simple declarative sentences. "Even Homer nods" would be nonsense under this theory, for example, if there had never been a Greek poet named Homer.27 Metaphors also fair badly under this theory. "Raining cats and dogs" is almost universally understood in America to mean heavy rain, but I doubt that canines and felines have ever fallen from the sky.

Unfortunately, this view of meaning lay at the heart of the Tractatus Logico-Philosophicus — a work which is representative of Wittgenstein's early philosophy, and which is the only philosophical book published during Wittgenstein's lifetime.28 The Tractatus relied on what has been called the picture theory of meaning, in which the logical simples of reality exist in a strict isomorphism with the essential elements of language.29 In short, this concordance between the atomistic parts of reality and the basic elements of language allowed language to "picture" reality. In the years immediately prior to 1929, Wittgenstein became dissatisfied with many of the consequences of this view. In particular, he became convinced that its handling of color and color gradations was unsatisfactory.30

28. GRAYLING, supra note 17, at 70. Cf. TLP, supra note 18, at § 4.05 ("Reality is compared with propositions.").
29. Ironically, the picture theory owes something to law. Wittgenstein first formed the idea that language models the world after reading a magazine article about a lawsuit in Paris. The case involved an automobile accident, and the article described how the advocates had used miniature models of the cars and the location to describe the accident to the court. Wittgenstein's insight was to transport this analogy to the tie between language and the world. The new analogy was that propositions serve as pictures of reality, much in the same way that the model of the accident served to picture the actual crash. VON WRIGHT, supra note 17, at 21; MONK, supra note 17, at 118.
In the *Philosophical Investigations*, Wittgenstein starts by demonstrating how the lack of a referent for every word is not fatal to communication. He goes on to argue for the proposition that communication exists on the basis of agreed conventions of word and sentence usage. In his words: "For a large class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."

One objection to this view is that, if adopted, it produces a rootless theory of meaning. Because every speaker of language uses language differently, tying meaning to use entails that each word or phrase could have a different meaning for each speaker because each speaker could "use" it differently. As Humpty Dumpty said to Alice, "When I use a word... it means just what I choose it to mean—neither more nor less." Some courts have chosen to read Wittgenstein in this sort of Humpty Dumpty way.

Wittgenstein's answer to this objection is, in effect, to appeal to our observations on how we actually communicate. As he saw it, we communicate through a web of interconnected customs and conventions, which Wittgenstein called "language games." It is central to Wittgenstein's thought that what knits these games together is not expressible by a general, abstract theory of language—something he had tried in the *Tractatus*. He admits as much:

Instead of producing something common to all that we call language, I am saying that these phenomena have no one thing in common which makes us use the same word for all,—but that they are related to one another in many different ways. And it is because of this relationship, or these relationships, that we call them all "language".

31. He also points out that naming cannot be the foundation of meaning because we would first have to grasp, through language, the concept of naming. GRAYLING, supra note 17, at 73.
32. PI, supra note 19, at § 43 (emphasis in original).
33. LEWIS CARROLL, THROUGH THE LOOKING GLASS 269 (Forum Books 1963). What follows this quotation is also instructive. "'The question is,' said Alice, 'whether you can make words mean so many different things.' [¶] 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'" 34. See infra section IV.
35. LUDWIG WITTGENSTEIN, THE BLUE BOOK 17, reprinted in PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" generally known as THE BLUE AND BROWN BOOKS (Rush Rhees ed., Alden Press 2d ed. 1969) (1958) [hereinafter BBB]; see also PI, supra note 19, at §§ 7, 130; see also G.H. BAKER & P.M.S. HACKER, WITtGENSTEIN: UNDERSTANDING AND MEANING 89-98 (University of Chicago Press ed., 1980). Although the scope of any language game is unclear, all language games are linked in one language through connections which may fade with replication, but which still can provide a traceable print. Wittgenstein called these connections family resemblances; he drew analogies between cousins who appear differently, but still share common features with their parents and with their grandparents. PI, supra note 19, at § 67; see also ACKERMAN, supra note 30, at 82-83. Judge Bucklo has also used this metaphor when interpreting a local ordinance against a First Amendment challenge. See Weigand v. Village of Tinley Park, 114 F. Supp. 2d 734, 738 (N.D. Ill. 2000).
36. PI, supra note 19, at § 65 (emphasis in original).
Language games can take many forms. They include primitive languages, as well as the whole of language taken together with the physical actions made in concert with its use. Indeed, language is sufficiently rich to include countless types of games. For Wittgenstein, language games include "forming and testing a hypothesis," "translating from one language into another," and "asking, thanking, cursing, greeting, praying." Wittgenstein also admits the possibility of "technical" languages which describe a limited range of reality with intended precision and logic.

Speakers use language games, as well as words, phrase and gestures, according to sets of conventions, or customs. These conventions and customs regulate the contexts in which certain words or word groupings can be used and not be nonsense. In short, these conventions and customs—what Wittgenstein called "grammar"—weave words, phrases and language games into the whole fabric of language.

Grammar in this sense in not a set of rules regarding verb declensions and conjugations. Rather, it is more like an accounting of acceptable and accepted uses of language. It governs the syntax of sense. Thus, Wittgenstein often refers to grammar to dissolve philosophical questions that are incapable of being answered because they lack a proper sense. In short, he resorts to accepted usage and the internal relationships between and among words to analyze a particular utterance. The effect is not unlike the process by which an architect determines whether a particular bolt should be used to fasten two beams. Some bolts—like some words—can be used in many different situations. Others are specially made for only a few. A trained architect—like a mature and competent speaker of a language—can select which bolt, or word, is appropriate because it has been designed to apply to the particular case at hand.

The relationship between the design and the use of the bolt and the particular situation is analogous to what Wittgenstein means by philosophical

37. Id. at § 7.
38. Id.
39. Id. at § 23.
40. Id.
41. Wittgenstein included "the use of charts and diagrams, descriptive geometry, [and] chemical symbolism" in the class of such technical languages. BBB, supra note 35, at 81.
42. PG, supra note 26, at 87 ("Grammar is the account books of language. They must show the actual transactions of language, everything that is not a matter of accompanying sensations.").
43. See, e.g., PI, supra note 19, part II, § xi, at 222 ("A whole cloud of philosophy condensed into a drop of grammar."); see also LUDWIG WITTGENSTEIN, ON CERTAINTY §§ 57-58, 313 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1974) [hereinafter OC].
One would not use a screw where a bolt should go—even though it seems to fit the hole—because that is simply not what the screw was designed for. These limitations can be perceived as usage rules. Thus, for Wittgenstein, "[g]rammar is a free-floating array of rules for the use of language."46

For Wittgenstein, grammar mediates our utterances with the world around us.47 The conventions and rules of grammar ensure that what we speak of is understood by those who listen—for their training, if similar to ours, has inculcated in them the same rules. As Wittgenstein says: "Like everything metaphysical the harmony between thought and reality is to be found in the grammar of the language."48 If this line of argument seems to lead to the conclusion that no one way of expression is superior to others, Wittgenstein is prepared to accept that. "The rules of grammar are arbitrary in the sense that the rules of a game are arbitrary. We can make them differently. But then it is a different game."49

But if grammar mediates between reality and language, how do we learn grammar and acquire language? This question appears particularly thorny. We were all children once, and each of us had to learn language. But if one has to know language games to connect language games with reality, that simply moves the question back to an investigation of how we acquire language games.50 On this score, Wittgenstein’s answer seems simple: we learn how to apply words and phrases through observation, and through continued

45. See PI, supra note 19, at § 373 ("Grammar tells what kind of object anything is.").

46. BAKER, supra note 44, at 40; see also id. at 56. Cf. Ludwig Wittgenstein, Philosophy, reprinted in PHILOSOPHICAL OCCASIONS 1912-1951, 169 (James C. Klacce & Alfred Nordmann eds., 1993) ("I could ask: why do I sense a grammatical joke as being in a certain sense deep? (And that of course is what the depth of philosophy is.)") [hereinafter PO].

47. PG, supra note 26, at 97 ("The connection between ‘language and reality’ is made by definitions of words, and these belong to grammar, so that language remains self-contained and autonomic."); see also id. at 190; P.M.S. Hacker, The Agreement of Thought and Reality, reprinted in WITTGENSTEIN’S INTENTIONS 38 (John V. Canfield & Stuart G. Shanker eds., 1993); Robert Arrington, The Autonomy of Language, reprinted in WITTGENSTEIN’S INTENTIONS, supra at 47; HILMY, supra note 22, at 154-55; ACKERMAN, supra note 30, at 80; MERRILL B. HINTIKKA & JAAKKO HINTIKKA, INVESTIGATING WITTGENSTEIN 221-24 (1986). Cf. TLP, supra note 18, at § 4.05 ("Reality is compared with propositions.").

48. LUDWIG WITTGENSTEIN, ZETTEL § 55 (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1967) [hereinafter Z]. See PI, supra note 19, at § 445 ("It is in language that an expectation and its fulfillment make contact."). See also ACKERMAN, supra note 30, at 48 ("Over a long period of time, successful action is the strongest evidence we could have that our language has some relationship with reality."). Professor Robert Arrington has a good exegesis of Section 445. Robert L. Arrington, Making Contact in Language: The Harmony Between Thought and Language, reprinted in WITTGENSTEIN’S PHILOSOPHICAL INVESTIGATIONS: TEXT AND CONTEXT 175 (Robert L. Arrington & Hans-Johann Glock eds., 1991). Cf. PI, supra note 19, at § 206 ("The common behavior of mankind is the system of reference by means of which we interpret an unknown language.").

49. WITTGENSTEIN’S LECTURES, CAMBRIDGE, 1930-32, FROM THE NOTES OF JOHN KING AND DESMOND LEE 57 (Desmond Lee, ed. 1980) [hereinafter 1930 LECTURES]. Cf. OC, supra note 43, at § 229; PI, supra note 19, part II, § xi, at 223 ("If a lion could talk, we could not understand him."); Z, supra note 48, at § 219 ("We don’t understand Chinese gestures any more than Chinese sentences."): see also ACKERMAN, supra note 30, at 83-84.

50. See HINTIKKA, supra note 47, at 213.
practice and application. If others trained in language respond to what we say in the way we wish them to respond, then we have learned at least one use, and hence at least one meaning, of that word or phrase. We thus learn language by trial and error, by induction and repetition.

For simple situations, this account yields an adequate explanation. In a café, if I say “coffee” to the server, and I get what I want, language works. But in that same café, if I ask the server: “What did Wittgenstein mean by ‘language game’?”, I am not sure how to analyze any answer given. To produce an adequate explanation of the higher uses of language, or even of simple metaphor, Wittgenstein needs more. A simple one-to-one isomorphism between logical simples and essential elements of reality is part of what the *Philosophical Investigations* rejected. One needs to explain how individuals can apply language to new situations.

In answer to this, Wittgenstein again returns to the game analogy. Games have rules. That is, we conduct ourselves in games in certain ways because we are precluded—under pain of losing or under pain of being excluded from the game—from other moves. In language, we use certain words only in certain situations—under pain of not being understood or ostracized as simpletons. In our interactions with others, our obedience to the customs and rules of language and the language games within it becomes a practice. We learn these practices by a method similar to induction. From processing example after example, we learn acceptable usages, and then can apply the usage in another situation. The usage of words and sentences becomes ingrained in us, so that we do not think of what we are doing when we communicate, or we deliberately juxtapose words to convey different shades of meaning, shades not standard in our ordinary discourse. In this sense, we follow rules of application for particular words—rules developed and maintained by the linguistic community to which we belong.

The counterintuitive aspect of this characterization is that these rules are not transcendent. Because they can only be expressed in language, they can never be outside of it. This, in turn, requires that forces which can alter

51. See *PI*, supra note 19, at §§ 143-44, 630; see also *Z*, supra note 48, at § 186; see also *ACKERMAN*, supra note 30, at 192-93.
52. See *PI*, supra note 19, at §§ 5-6; *BBB*, supra note 35, at 77-78; *PG*, supra note 26, at 117-118.
53. See *PI*, supra note 19, at § 46.
54. See id. at § 48.
55. See id.
56. See id. at § 665.
57. See id. at § 208; *RFM*, supra note 22, at 320-23.
58. *PI*, supra note 19, at § 199 (“To understand a language means to be master of a technique.”).
59. See id. at § 445; see also *PG*, supra note 26, at 43 (discussing understanding of Lewis Carroll’s poem “Jabberwocky”); see also *GRAYLING*, supra note 17, at 82-83.
60. See *PI*, supra note 19, at §§ 83-85; *BAKER*, supra note 44, at 329-38.
meanings in language, such as new usages or the development of different customs, can also alter the substance of rules.\textsuperscript{61} Understanding Wittgenstein’s concepts of meaning and rule-following, however, does not necessarily lead to an understanding of what someone meant by a particular utterance. That is an act of interpretation, a winnowing of all the possible uses of an utterance into one specific use.\textsuperscript{62} Wittgenstein had much less to say about interpretation than he did about meaning, although what he did say was significant. In \textit{Philosophical Investigations}, Wittgenstein states: “In a law-court, for instance, the question might be raised how someone meant a word. And this can be inferred from certain facts.—It is a question of intention.”\textsuperscript{63} This indicates that when interpreting what someone has said—especially in the context of the law—one can fix what was meant by a particular utterance.\textsuperscript{64}

As Wittgenstein said in connection with planning the treatment of psychological verbs: “[p]sychological verbs [such as “to intend”, “to mean”, and “to believe”] are characterized by the fact that the third person of the present [\textit{e.g.}, “He means it”] is to be verified by observation, the first person [\textit{e.g.}, “I mean it”] is not.”\textsuperscript{65} A common example in law would be the interpretation of the words used in an oral contract. To determine the intent with which they were used, one would look to the words used and the context in which they were spoken. This context would include the grammar of the words and the collective usages in the linguistic community in which they were uttered.\textsuperscript{66}

\begin{itemize}
  \item \textsuperscript{61} PG, supra note 26, at 184-85.
  \item \textsuperscript{62} See HANS-JOHANN GLOCK, A WITTGENSTEIN DICTIONARY 179-84 (1996) [hereinafter GLOCK]
  \item \textsuperscript{63} PL, supra note 19, part II, § xi, at 214 (emphasis in original). See also BAKER, supra note 44, at 77-78. See also WITTGENSTEIN’S LECTURES ON THE FOUNDATIONS OF MATHEMATICS: CAMBRIDGE 1939, FROM THE NOTES OF R.G. BOSANQUET, NORMAN MALCOM, RUSH RHEES, AND YORICK SMYTHIES 25 (Cora Diamond, ed. 1976).
  \item I have been considering the word ‘intend’ because it throws light on the words ‘understand’ and ‘mean’. The grammar of the three words is very similar; for in all three cases the words seem to apply both to what happens at one moment and to what happens in the future.
\end{itemize}

\textit{Id.} [hereinafter 1939 LECTURES.].

\item \textsuperscript{64} For Wittgenstein, intention was not a psychological state; one could not say that an intention to do something involved a particular state of mind. “Did you intend... refers to a definite time... not to an experience during that time.” PL, supra note 19, at 216-17. Cf. BBB, supra note 35, at 147 (“We use the words ‘meaning’, ‘believing’, ‘intending’ in such a way that they refer to certain acts, states of mind given certain circumstances; as by the expression ‘checkmating somebody’ we refer to the act of taking his king.”). See also Z, supra note 48, at § 236; PG, supra note 26, at 143, 148; LUDWIG WITTGENSTEIN, PHILOSOPHICAL REMARKS 69 (Rush Rhees ed., Raymond Hargreaves & Roger White trans., 1975) [hereinafter PR].

Robert Fogelin has noted that Wittgenstein’s treatment of reconstructing what someone once intended is problematic. He ascribes this difficulty to Wittgenstein’s focus on first party psychological concepts (such as what goes on when a particular speaker utters something) rather than third party psychological concepts (such as my reconstructing what someone else meant by a past utterance). ROBERT J. FOGELIN, WITTGENSTEIN 199 (2d ed. 1987). Of course, the function of a court focuses primarily on such third party investigations.

\item \textsuperscript{65} Z, supra note 48, at § 472 (bracketed material not in original).
\item \textsuperscript{66} Cf. id. at § 350.
In short, divining intention is not a matter of divining psychological states. Rather, it is a reconstruction of facts in accordance with linguistic conventions to see if the parties' actions, in a strong sense, constitute the claimed intent. In this sense, interpretation is the converse of meaning. To say one intended something by a particular utterance, one looks at the use of language surrounding the event and the actions of the parties, rather than what lawyers would call the subjective testimony of one party.

B. Theory

This digression into meaning and interpretation suggests that Wittgenstein's methods were non-standard. The later Wittgenstein did not proceed in axiomatic fashion with defined terms and with a superstructure based upon derivation from the definitions or the axioms. Indeed, he rejected this method. For Wittgenstein, philosophy does not attempt to solve puzzles and answer questions. Instead, it clarifies the usage of language so that we can see the connections between words and their usage afresh and clearly, so that the difference between sense and nonsense can be shown.

Wittgenstein's approach can be understood as an attack on a venerable, if much debated, philosophical issue: the existence of abstract or transcendental entities. The classic exposition of this view is in Plato's Republic. Wittgenstein's objection to such transcendentalism runs parallel to his objection about psychological explanations of meaning: he did not believe that meaning could exist in the abstract, in part because there is nothing that can

A law is given for human beings, and a jurisprudent may well be capable of drawing consequences for any case that ordinarily comes his way; thus the law evidently has its use, makes sense. Nevertheless its validity presupposes all sorts of things, and if the being that he is to judge is quite deviant from ordinary human beings, then e.g. the decision whether he has done a deed with evil intent will become not difficult but (simply) impossible.

Id. See also PI, supra note 19, at § 337 ("An intention is embedded in its situation, in human customs and institutions.").


68. ACKERMAN, supra note 30, at 196-97. See OC, supra note 43, at § 441 ("In a court of law the mere assurance 'I know ... ' on the part of a witness would convince no one. It must be shown that he was in a position to know.").

69. PI, supra note 19, at § 692 ("For 'to mean it' did not mean: to think of it.").

70. Cf. BAKER, supra note 44, at 485 ("It is characteristic of Wittgenstein's methods of philosophizing that he rarely attacks a philosophical position by frontal assault, preferring, like all great strategists, the 'indirect approach.'").

71. Put another way, Wittgenstein was concerned with what constituted meaning generally, not with what individual words meant. Cf. PI, supra note 19, at §§ 120-26; Z, supra note 48, at § 467 ("Our investigation does not try to find the real, exact meaning of words; though we do often give words exact meanings in the course of our investigation.") (emphasis in original).

72. G.E. Moore, Wittgenstein's Lectures in 1930-1933, 64 MIND 1, 9-10 (1955); BAKER, supra note 44, at 668-70. See PO, supra note 46, at 158, 199.
be set up as an external standard of correct language usage. As he says early in the *Philosophical Investigations*:

> And we may not advance any kind of theory. There must not be anything hypothetical in our considerations. We must do away with all *explanation*, and description alone must take its place. . . . Philosophy is a battle against the bewitchment of our intelligence by means of language.73

This gives rise to questions about how, or even whether, to use "theory." Currently, we talk about theories in a number of overlapping contexts.74 In one sense, theories can describe. That is, descriptive theories attempt to make some sense out of, or find order in, seemingly chaotic data. The legal realists attempted descriptions of this sort. They let us know what factors they thought influenced legal decisions. Another example of this type of theory is Llewellyn’s opinion that the history of the English Constitution could be written with reference to the relative case load of judges at different points in history.75

Theories can also be formulated so as to predict future actions. If someone gives me the number sequence 2, 4, 6, and asks me what comes next, I hypothesize that each successive number is two more than the previous number to predict the next number to be 8. If this hypothesis proves to produce correct results, it is often said this theory or hypothesis explains the relationship between the acts which preceded the result and the result.76 This use of theory is most prevalent in sciences like engineering, in which theories produce predictions of what will happen, for example, if a stress is applied to a metal.77 Similarly, given the dynamic nature of evolving case law, one can use a predictive theory to anticipate results in the future. Early efforts to develop a “science” of law, characterized by the work of Harvard’s Christopher Columbus Langdell, may exemplify this use of theory in law.78

Theories can also be used to justify abstractions or predictions. In these cases, the theory acquires exclusivity. Not only is a prediction made, but it is coupled with an assertion that the prediction and its attendant process is the *only* correct process and result. Theories which justify are only of con-

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73. Pl. *supra* note 19, at § 109. *See also* id. at § 119 ("The results of philosophy are the uncovering of one or another piece of plain nonsense and of bumps that the understanding has got by running its head up against the limits of language. These bumps make us see the value of the discovery."). 126, 131; PG, *supra* note 26, at 66; BBB, *supra* note 35, at 18, 125; BAKER, *supra* note 44, at 481 (stating that if Wittgenstein’s claims are correct, philosophy does not discover new facts, but reveals the true face of nonsense). *See also* GLOCK, *supra* note 62, at 111-14.


76. BAKER, *supra* note 44, at 478.


cern when more than one theory potentially explains the world, and when the competing theories yield different results. Then the exclusive nature of the theory requires hegemony. This hegemony is normative: it seeks to separate proper from improper conduct; or in the context of this paper, proper readings of statutes from improper readings.79

Wittgenstein was committed to the first sense of theory, and to a rejection of the second and third senses. As he stated: "We must do away with all explanation, and description alone must take its place."80 He believed it misleading to create a new abstraction to explain or justify the relation between two events or things. Inevitably, something is lost, and what is left out can lead us astray.81 For Wittgenstein, "[d]escription renounces theoretical abstraction. Wittgenstein wants to keep the differences, the jagged edges, and accept what is obviously fragmentary, contextual and incomplete."82 The role of the philosopher is not to be partisan, but to use the conventions and contexts of everyday language and experience to dispel or dissolve false problems and highlight true ones.83 By false problems I mean those that arise because our cleverness outraces our understanding, because we too quickly try to advance insights from one aspect of our experience to another. One can imagine being momentarily captivated by the question: "Where does the candle flame go to when it's blown out?"84 For Wittgenstein, this question is nonsensical. It contravenes basic assumptions necessary to make sense of experience, and thus has no answer. Many questions we pose about experience can be shown to be of this type—where to give or attempt any answer is to perpetuate the error.

So what is a philosopher to do? As Robert Ackerman suggests, a linguistic philosopher should stick to the description of various language games. "A good book on philosophy would have the structure of a diction-

79. Cf. PI, supra note 19, at § 131.
For we can avoid ineptness or emptiness in our assertions only by presenting the model as what it is, as an object of comparison—as, so to speak, a measuring-rod; not as a pre-conceived idea to which reality must correspond. (The dogmatism into which we fall so easily in doing philosophy).
Id. (emphasis in original).
80. Id. at § 109 (emphasis in original). See also id. at § 128; PO, supra note 46, at 177-83; Ludwig Wittgenstein, Lectures and Conversations on Aesthetics, Psychology and Religious Belief 10 (Cyril Barrett ed., 1972). See also Marie McGinn, Wittgenstein and the Philosophical Investigations 13-30 (1997); Glock, supra note 62, at 111-14.
82. ACKERMAN, supra note 30, at 205.
83. Z, supra note 48, at § 455 ("The philosopher is not a citizen of any community of ideas. That is what makes him into a philosopher."). See also ACKERMAN, supra note 30, at 209.
84. BBB, supra note 35, at 108. See also PG, supra note 26, at 126 ("How do I know that the colour red can’t be cut into bits?"); BAKER, supra note 44, at 281 ("Many syntactically permissible structures are senseless because they lack any acceptable use.").
The attempt to "get outside" or create something external to explain is not just inefficacious, it is wrong. The generality of theories masks their frailties due to their lack of completeness. As Wittgenstein said, the aim of philosophy is "[t]o shew the fly the way out of the fly-bottle", it is to show that many of the questions we ask cannot be sensibly answered because they flout grammar. They appear to be well-formed and logical, but are in fact nonsense.

Left unaddressed by this discussion, of course, is any connection between Wittgenstein's philosophy and law. In simple terms, can Wittgenstein's philosophy illuminate the types of problems faced in legal practice? Does law work better, or with different assumptions, after we hear the philosophers out?

I want to answer this question affirmatively, but also indicate that not all, or even most, invocation of Wittgenstein's name in examining law is useful. To do this, I examine not only academic writings which cite Wittgenstein's writings, but also the treatment his writings have received in judicial opinions. The purpose of this inquiry, which immediately follows, is to assess generally (but not exhaustively) the effect of Wittgenstein's philosophy on the practice of law. Is it foppery, or something else?

III. FITTING WITTGENSTEIN INTO THE PRACTICE OF LAW: DENNIS PATTERSON'S GOOD FAITH AND LENDER LIABILITY

Professor Dennis Patterson's Good Faith and Lender Liability: Toward a Unified Theory is an effort, in part, to use Wittgenstein's philosophy to advance the state of commercial law theory. In particular, Good Faith and

85. ACKERMAN, supra note 30, at 211.
86. PI, supra note 19, at § 309. See also id. at § 90.
Our investigation is therefore a grammatical one. Such an investigation sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, caused, among other things, by certain analogies between the forms of expression in different regions of language.—Some of them can be removed by substituting one form of expression for another; this may be called an 'analysis' of our forms of expression, for the process is sometimes like one of taking a thing apart.

Id.
87. Cf. id. at § 38 ("For philosophical problems arise when language goes on holiday.") (emphasis in original).
88. DENNIS M. PATTERSON, GOOD FAITH AND LENDER LIABILITY: TOWARD A UNIFIED THEORY (1990) [hereinafter PATTERSON, GOOD FAITH AND LENDER LIABILITY].
89. The book borrows heavily from two previous articles. Dennis M. Patterson, Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code, 68 TEX. L. REV. 169 (1989) [hereinafter Patterson, Lender Liability]; Dennis M. Patterson, Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine, 137 U. PA. L. REV. 335 (1988) [hereinafter, Patterson, Good Faith Performance]. Given the book’s later publication date, I will refer to it as the primary source of Patterson’s thought, although this assumption is not without problems. See infra note 90.

Patterson has written elsewhere on the benefits of using theories developed in philosophy to study legal problems. DENNIS M. PATTERSON, LAW AND TRUTH (1996) [hereinafter TRUTH]; Dennis M. Patterson, Law’s Pragmatism: Law as Practice & Narrative, 76 VA. L. REV. 937 (1990) [hereinafter Patterson, Law’s Pragmatism]. See also WITTGENSTEIN AND LEGAL THEORY (Dennis M. Patterson ed. 1992) (containing a version of Law’s Pragmatism) [hereinafter LEGAL THEORY].
Lender Liability applies Wittgenstein’s philosophical theories, among others, regarding the meaning of words and sentences to “reconceptualize” the meaning of the term “good faith” in the UCC.90 Patterson wants to assert that the term includes, in a very strong sense, “the notion of reasonable expectations against the background of ongoing practices.”91

I do not think that Patterson’s effort succeeds. This lack of success is due in part, I think, to his flawed reading of Wittgenstein. Moreover, even if it were not flawed, I think Patterson’s method is contrary to what Wittgenstein himself would have done, and that this calls into question his very use of Wittgenstein to legitimate his views.

A. The Book

Patterson opens with a “genealogy”92 of the UCC’s view of the binding nature of promises and the role of good faith in their interpretation. As a prelude to his analysis of how Wittgenstein’s philosophy can affect his view of good faith, Patterson first examines the Code’s flexible, relationship-oriented focus. He ascribes the Code’s perspective on this point to the efforts of the Code’s principal drafter: Karl Llewellyn.93

He is also the editor of an excellent collection of essays on the philosophy of law, A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson, ed., 1996). He has written separately on good faith. Dennis M. Patterson, A Fable From the Seventh Circuit: Frank Easterbrook on Good Faith, 76 IOWA L. REV. 503 (1991). I have previously been critical of Professor Patterson’s reading of Wittgenstein. See Bruce A. Markell, Truth?, 72 IND. L.J. 1115 (1997) (reviewing DENNIS PATTERSON, LAW & TRUTH). 90. His broader plan, however, draws heavily upon philosophical theories about meaning and interpretation. The continuation of his theoretical work can be found in Patterson, Law’s Pragmatism, supra note 89. See also TRUTH, supra note 89; Dennis M. Patterson, Explicating the Internal Point of View, 52 SMU L. REV. 75 (1999); Dennis M. Patterson, Postmodernism/Feminism/Law, 77 CORNELL L. REV. 254 (1992); Dennis M. Patterson, Toward a Narrative Conception of Legal Discourse, 5 SOCIAL EPistemology 61 (1991) [hereinafter Patterson, Legal Discourse]; Dennis M. Patterson, Hegel and Postmodernity, 10 CARDOZO L. REV. 1665 (1989).

91. PATTERSON, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 7. See also id. at ix (“the traditional notion of ‘reasonable expectation’ is the core of good faith.”); id. at 149 (formulating jury instruction regarding reasonable expectations); id. at 38 (“‘good faith’ is the protection of expectations seen against the background of an ongoing practice, whose normative nature is properly the subject of contention and competing narrative accounts.”). In addition, Patterson wants to look to Section 205 of the Restatement (Second) of Contracts as an interpretive aid. Id. at 121, 147.

92. Id. at 11.

93. Among his sources for Llewellyn’s views is an unpublished working paper of Llewellyn’s. Id. at 24 n.41. Patterson reprints this work as Appendix 2 to the book. Other portions of Llewellyn’s previously unpublished writings on the Uniform Sales Act have recently been published in connection with the American Bar Association’s task force on revision of Article 2 of the UCC. Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group, 16 DEL. J. CORP. L. 981, 1251 (1991).
Patterson endeavors to show how Llewellyn consciously rejected both the Willistonian view regarding the primacy of express terms and the modified subjective approach of Corbin, in which intent determined meaning.\(^9\) In their place was the "great theoretical advance" that "the meaning of contract language [is] derived from commercial context, from the fusion of the intentions of individual actors with the background of evolving commercial practices."\(^9\)

One key in this transformation was the role of good faith. Using a variety of Llewellyn's writings, Patterson concludes that "the traditional notion of 'reasonable expectation' is the core of good faith."\(^9\) This core also includes, in a very strong sense, "the notion of reasonable expectations against the background of ongoing practices."\(^9\)

To make his point, Patterson draws ties from Llewellyn's drafting to Wittgenstein's philosophy. He asserts that Llewellyn's theory, so interpreted, entails that meaning is a function of words in context.\(^9\) For example, disputes over whether a contract for the sale of chicken requires delivery of broiling chicken, frying chicken or stewing chicken can be resolved only by reference to the way others interested in the chicken trade use that term.\(^9\)

As shown above,\(^100\) Wittgenstein makes a facially similar claim in the *Philosophical Investigations*. Patterson believes that Wittgenstein's philosophy, as exemplified by his statement that for a large class of cases a word's meaning is its use,\(^101\) contains strong similarities to the way in which Llewellyn looked at the world; indeed, he states that Wittgenstein's statement "could just as easily have come from Llewellyn."\(^102\) Based upon this asserted identity of thought, Patterson interprets Wittgenstein to understand Llewellyn so as to comprehend the Code's use of good faith.\(^103\)

Patterson's development of his Wittgensteinian perspective starts with Section 43 of the

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95. Id. at 18.

96. Id. at ix. At this point, it may be appropriate to ask when the tradition starts. As Patterson acknowledges, id. at 104, the issue of good faith in commercial matters was initially raised in connection with holder in due course status of commercial paper. *See, e.g.,* Gill v. Cubitt, 107 Eng. Rep. 806 (K.B. 1824) (rejecting objective standard). The result of those inquiries was the adoption of a subjective standard, and even Revised Article 3 adopts this view. UCC § 3-302(a)(2)(ii) (2004).

97. PATTERSON, GOOD FAITH AND LENDER LIABILITY, *supra* note 88, at 7. Patterson also describes Llewellyn's vision of good faith as "consistency with the expectations of the parties measured against the background of commercial practice." Id. at 13. To use Patterson's metaphor: "[G]ood faith functions as a canvas on which the parties shape their agreement." Id. Patterson believes this conceptualization to be consistent with the general law of contracts. Id. at 33 n.64.

98. Id. at 35.

99. See Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.) (interpreting the meaning of "chicken"—that is, the extent to which it included stewing chickens—determined after examination of parties' negotiations, trade usage, and governmental definitions).

100. See *supra* notes 35-80 and accompanying text.

101. PL, *supra* note 19, at § 43.

102. PATTERSON, GOOD FAITH AND LENDER LIABILITY, *supra* note 88, at 35.

103. As Patterson states: "[T]he Wittgensteinian approach to the analysis of linguistic behavior [is] employed in the reconceptualization of good faith", id. at 67, and, "A Wittgensteinian perspective is employed as a heuristic for developing the proposition that in order to know what a concept means we first have to have some conception of the point or purpose that it serves in our discourse", id. at 66. *See also* id. at 39-40.
Philosophical Investigations quoted above: that meaning is use. One consequence of this observation is that meaning is in large part a public affair. Under Wittgenstein's theory, Patterson argues, one does not understand the meaning of a word unless one can give a correct performance of it on appropriate occasions. Correct performance, in turn, is assessed against a background of "public, intersubjective" practices. The sum total of these possible interpretations, or as Patterson puts it, possible projections, is the meaning of the word.

Patterson is quick to point out that this does not turn language into some solipsistic morass, in which my intended meaning of a word is hidden by my subjective intent. Rather, my utterances have effects, and the correspondence between those utterances and the acts I desire form the nucleus of meaning. If the linguistic community of which I am a member hears what I say and then acts in a way which is consistent with my intent, and if I react similarly to their utterances, this pattern and practice of checking the result against reality provides limits to the subjective. Rules of inference and practice, called "language-games" by Wittgenstein, midwife this transformation.

It thus becomes important for Patterson to focus on Wittgenstein's handling of rule-following in language games since he believes that Wittgenstein's discussion of that practice has strong parallels to following a statute. If a part of an expression or order seems vague or ambiguous, there are rules one can follow to resolve the issue. But, as Patterson asserts, rules make sense only because there is a common history and a set of reasons for their place in the discourse. Knowing the reasons or point of a rule enables us to "go on" and apply it to new and unforeseen circumstances.

At this point, a simple-minded analysis of the Code would simply examine the legislative history as used in the relevant state to determine the "point" or the "reasons" for any particular Code section. Patterson rejects

104. Id.
105. Id. at 68-69.
106. Id. at 69.
107. Id. at 73. Cf. Z, supra note 48, at § 467 ("Our investigation does not try to find the real, exact meaning of words; though we do often give words exact meanings in the course of our investigation.") (emphasis in original).
108. This reflects Wittgenstein's goal of disassociating meaning from physiological or psychological states. As Wittgenstein put it: "If God had looked into our minds he would not have been able to see there whom we were speaking of." PI, supra note 19, part II, § xi, at 217.
109. PATTEN, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 76.
110. Id. at 82.
111. Id. at 85-86.
112. Id. at 86.
113. Cf. Z, supra note 48, at § 48 ("Might it not even be imagined that several people had carried out an intention without any one of them having it? In this way a government may have an intention that no man has.") (emphasis in original).
this approach. He asserts that with respect to a statute like the Code, the point of any rule within it is not reducible to the intentions of legislatures or common law courts.114 His vantage point is much broader: all of legal discourse. This includes traditional concepts of legislative intent, but also embraces subsequent actions based upon the statute, analytical commentary, and the actions of merchants. In short, it seems to include anything that could be used to justify some action with respect to the statute in question.

With his sources thus expanded, Patterson next attempts to connect the Code’s definition of good faith to a background of reasonable commercial practices. He begins by trotting out the Code’s drafting history surrounding the current definition of good faith as honesty in fact.115 He argues, from the comments, that the definition was intended to be necessary, but not sufficient.116 That is, good faith always requires honesty, but honesty is not enough. Patterson then analogizes to the text of Section 205 of the Restatement (Second) of Contracts for its treatment of the implied duty of good faith, and finds that it incorporates notions of reasonable expectations of the parties; it “articulate[s] several of the purposes that ‘good faith’ is intended to serve.”117 From this, we are to infer that the Restatement version is the modern, evolved version of the Code’s concept of good faith.118

Patterson thus states that the concept of good faith is “amenable to reconceptualization on nonlegislatively based axiological models [if], as with good faith, those models are consistent with the specific value choices articulated in the Code.”119 I take this to mean that one can propose an in-

114. Patterson, Good Faith and Lender Liability, supra note 88, at 86 n.65.
115. Id. at 104-06.
116. Id. at 107.
117. Id. at 109. He does not discuss, however, that Section 205 finds not only a duty of good faith, but also a duty of fair dealing. It is not difficult to suggest that the objectivity inherent in the Restatement view can be based upon this addition.
118. Oddly, Patterson views this discourse in a crabbed fashion. After summarizing the Restatement’s position on good faith as embodying each party’s “justified expectations,” Patterson then picks a strange community against which to test these expectations. Id. He states that the determination of the reasonableness of a lender’s actions “should be determined by reference to the ‘community’ of which the secured party is a member: the financial community.” Id. at 110-11 (internal citations omitted). But what about the other half of the transaction? In short, what role should the borrower’s community play? Patterson’s restriction of the relevant community to the secured party’s seems at odds with his goal of shared expectations.

This restriction is even stranger when compared to the parallel section of Good Faith Performance. There, Patterson had stated that what is reasonable “should be determined by reference to the financial community, the ‘community’ of which the secured party is a member: the financial community.” Id. at 386 (emphasis added) (internal citations omitted). Thus, since Good Faith Performance predates GOOD FAITH AND LENDER LIABILITY, it would seem that the exclusion of the debtor’s community was deliberate.

119. Patterson, Good Faith Performance, supra note 89, at 393. To avoid the argument that his theory trivializes the role of legislatures, Patterson sketches an “enlarged view of the constitutive nature of the relationship between courts and legislatures.” Patterson, Good Faith and Lender Liability, supra note 88, at 118. Through the use of two charts, id. at 114-16, Patterson attempts to demonstrate that the meaning of “good faith” in the Code—or for that matter, the meaning of any term in any legislation—“in any context is a direct function of the historically situated reader’s ability to recover the subjective intent (Geist) of the (the) legislative subject(s). The recovery of that intent, the mens sutoris, is the gravamen of the disclosure and discernment of textual meaning.” Id. (internal citations omitted). Patterson accepts that this theory diminishes the role of the legislature,
terpretation of good faith which goes beyond the Code’s definition of subjective honesty, and deny opponents refuge in any plain meaning theory.

The consequences of this position are a bit unclear. Patterson applies his theory in Part II of the book, entitled *Doctrine*, but it is not until page 149, some twenty-four pages into his discussion of how to apply Part I, that Patterson gives us his test. Formulated as a jury instruction to test the commercial reasonableness of any particular interpretation of a contract provision, it is as follows:

Given what the parties each knew, and with a full appreciation of the several sources for the meaning of the original Agreement, which of the two proposed reconstructions of the meaning of the original Agreement is consistent with the original materials?

B. Patterson’s Fidelity to Wittgenstein

Patterson’s test is a far cry from the Code’s definition of good faith as “honesty in fact.” But does it explain how courts, lawyers and legislatures treat statutes? I doubt it. Does it give us a convincing alternate system for statutory interpretation? I again must answer in the negative.

I initially want to show that what I view as confusions in Patterson’s analysis of Wittgenstein doom Patterson’s analysis of the Code. Moreover, even if Patterson got his Wittgenstein right, he fails to account sufficiently for legal structure to profitably transport his philosophical analysis from philosophy to law.

Patterson’s problems start with his extension of an analogy made by Wittgenstein. Wittgenstein observed that “[f]ollowing a rule is analogous to obeying an order.” Patterson picks up on this analogy in order to extend and essentially entails that legislative value choices do not control the interpretation of statutes: “legislative purpose is but one element in the mix of legal discourse.” *Id.* at 119 (emphasis added). This discourse, in turn, is in part between the courts and the legislature, and is the nature of this discourse is captured by the metaphor of “conversation.” *Id.* at 119-20. Given the Code’s receptiveness to new commercial practices, this leaves the Code “open to discursive possibilities beyond its four corners.” *Id.* at 120.

120. *Id.* at 125-98.
121. *Id.* at 149.
122. As defined in the Uniform Commercial Code at the time Patterson analyzed it, the Code provided that “‘Good faith’ means honesty in fact in the conduct or transaction concerned.” UCC § 1-201(19) (2000). In connection with the 2001 revisions to Article 1 of the Uniform Commercial Code, the definition has been expanded to add an objective component. § 1-201(20) (2001) (“‘Good faith,’ except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.”). Although some states have declined to adopt parts of Article 1, this change in the text of the Code could be seen as vindication for Patterson’s views, although I argue, infra at text accompanying notes 132-71, that such a view is questionable.
123. PI, supra note 19, at § 206.
Wittgenstein’s notions on rule-following to obeying a statute. In short, he wants to insert “statute” for “order” in the above quotation. But this extension is inconsistent with Wittgenstein’s use and development of the notions of rule-following. Wittgenstein was worried about rule-following because he was devoted to eradicating the idea that meaning is a mental activity private to the speaker. He thus wanted non-psychological criteria for meaning. To that end he explored what it is to follow a linguistic rule with the goal of severing meaning from mental activity.

Patterson uses this material, and distills from it the following equivalency: “[a]cting... in accordance with a rule is a practice...” As far as that statement goes, it is not objectionable. But Patterson defines practice as having a psychological component; he states that practice “is a matter of having and giving reasons for action.” Patterson believes that we are justified in our selection of the correct interpretation by our “training” in language. Thus, he concludes, “[k]nowing the reasons or the point of the rule enables us to ‘go on’ and apply it to new and previously unforeseen circumstances.” This insight then forms the basis of Patterson’s analytical framework of good faith: in order to know what good faith means, we need to consider the purpose that term serves in legal discourse.

Patterson’s link between knowing purpose and being able to understand meaning has critical consequences for law. If adopted, it is the death knell for plain meaning in statutory interpretation and the four corners rule in

125. Indeed, as Professor Robert Fogelin has noted, much of the Philosophical Investigations is an attempt to disabuse us from the view that meaning has a psychological component. FOGELIN, supra note 64, at 153-54. See also Z, supra note 48, at § 472.
126. See supra section II (B).
127. PATTERSON, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 84.
128. Id. at 84-85.
129. Id. at 85.
130. Id. at 86.
131. Id. Patterson makes a similar claim in TRUTH where he states that a proposition of law “is true if a competent legal actor could justify its assertion.” TRUTH, supra note 89, at 152. I have criticized this approach. Markell, supra note 89.

We have stated time and again that courts must presume that a legislature says in a statute what is means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: “Judicial inquiry is complete.”

Id. (Thomas, J.).

At least one other Justice sees the debate as having far-reaching implications:

[T]he phenomenon [of raising far-fetched interpretations of seemingly unambiguous text] calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of “a government of laws, not of men.” . . . I trust that in our search for a neutral and rational interpretive methodology we have now come to rest, so that the symbol of our profession may remain the scales, not the see-saw.

parol evidence. I may be sympathetic with these goals. I do not, however, think a close reading of Wittgenstein supports them.

Patterson, I think, confuses following a rule in language games with following rules contained in statutes. As indicated above, Wittgenstein did not indicate that considered rules and practices which could be looked up and then followed. Cognition of the rule being applied was not essential; indeed, it was excluded. For Wittgenstein, following a grammatical practice or obeying a linguistic rule is almost unconscious; as he states: "to think one is obeying a rule is not to obey a rule." Or in another context: "When I obey a rule, I do not choose. I obey the rule blindly." As David Pears has said:

My obedience is blind not because I shut out consideration that might have influenced me, like the officers who lead the Charge of the Light Brigade, but because, when I have worked my way down to the foundations, where the only question left is ‘What in this case would count as the same again?’, there are no more considerations, doubts or justifications. I do not even have to listen to the rule, because it speaks through my application of it.

One way to illustrate the problem is to imagine two robbers who, in order to avoid detection, create a code in which they agree to change the names of the prospective victim when in public. Do we wish to say that when the two robbers utter the changed names in public they are following a rule? I do not think so, at least not in the elemental sense suggested by Wittgenstein. But, on the other hand, their discourse is not meaningless simply because they do not obey the convention of only calling people by their given names. By consent, these individuals have created a special language game in which real names are switched for aliases. Those who do not know the game may be confused by their conversations, but that is insufficient to deny their utterances meaning.

133. "Just as J.L. Austin showed that it is proper to ask after the point of an utterance, it is basic to the practice of law to ask the interpretive question ‘what is the point of the rule.’" Patterson, Legal Discourse, supra note 88, at 63.
134. See supra section II (B).
135. PI, supra note 19, at § 202.
136. Id. at § 219 (emphasis in original).
Language is sufficiently rich to allow within it many games, even those which by design vary conventions held in language generally. Speakers can consent to variations, or variations can arise through repeated usage. For example, the comment at a sporting event that a particular player is "bad" can either mean the player stinks or is wonderful. The practices and experiences of the parties will help find the intended result.

Patterson's view does not sufficiently account for this ability to create language games that contain practices incorporating knowing and intentional variances from general usage. If he is correct that the Code's concept of good faith is essentially objective, then its mandatory nature would seem at odds with the Code's general promotion of party autonomy, certainty and regularity of dealings. Agreeing in advance on definitions, and also agreeing not to vary those definitions, would seem to be an essential element of this goal. It is not unlike disabling non-essential features of a tool to ensure that future users of that tool will use it only in certain, intended ways.

This effort to promote certainty of result and stability of interpretation can be seen from the Code's own treatment of good faith. Although the duty of good faith cannot be disclaimed when applicable, the Code permits the parties to fix standards for its application in advance. Thus, if parties wish to adopt a standard different than that used in the market place, they may.

This is my point of departure from Patterson. Patterson seems to believe that the duty of good faith imports a standard of reasonableness into Article 9 agreement, regardless of the parties' intent. I disagree. While my reading is the most straightforward given the subjectivity inherent in the words chosen by the Code to define good faith, I also think Wittgenstein's philosophy supports my reading.

Patterson treats the Code as though it were an indistinguishable subset of everyday English language, and thus subject to all the rules and influences that can affect language. I take issue with this assumption. While the Code is formed of English words, it is more. It is a highly artificial construct designed to bring systematic organization to commercial law. In this respect I think that it resembles, to use Wittgenstein's terms, a highly-structured language game that is but one of the myriad language games that make up the English language.

Wittgenstein was not particularly helpful in defining language games, in large part because he believed that no adequate account, or theory, describing such games could be produced. He does, however, give us some ex-

139. PI, supra note 19, at § 23.
140. "Subsection (3) [of UCC § 1-102] states affirmatively at the outset that freedom of contract is a principle of the Code: 'the effect' of its provisions may be varied by 'agreement.'" The Code goes on to state that the "meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement." UCC § 1-102 cmt. 1 (2004).
141. UCC § 1-102(3) (2004).
142. Cf. Bix, supra note 89, at 209, 216 (criticizing Brian Langille for talking about the "grammar of law" without sufficient appreciation for the change in context between Wittgenstein's uses and Langille's argument.).
143. Cf. BBB, supra note 35, at 81. See also Markell, supra note 89, at 1130-31.
144. BOGEN, supra note 30, at 201. Cf. HINTIKKA, supra note 47, at 215-16 (arguing that for the
amples, and these are telling: "Giving orders, and obeying them... [c]onstructing an object from a description... [t]ranslating from one language into another..."¹⁴⁵ He also speaks of "special technical languages," giving as examples "the use of charts and diagrams, descriptive geometry, chemical symbolism, etc."¹⁴⁶ In each of these games, one can say that the participants understand what conduct is appropriate given particular utterances. Coming to attention when a superior officer barks the order or building a toy for your children from the instructions each involve relating action to a stimulus based upon the intentions of the parties.

Similarly, I believe that the Uniform Commercial Code is a purposeful construct which can best be described as a language game unto itself.¹⁴⁷ While the Code imports most of its rules and practices from the English language, it also modifies some of those rules. In particular, in order to promote certainty and stability, the Code sometimes uses words in a much different way than would be justified by resort to ordinary language.¹⁴⁸ In addition, the parties may increase this deviation; they may fix the meaning of their terms by excluding other interpretations or by affirmatively adopting their own standards.¹⁴⁹ If all of this means that the words become brittle and

¹⁴⁵. PI, supra note 19, at § 23.
¹⁴⁶. BBB, supra note 35, at 81. I have previously argued that codes such as the Uniform Commercial Code can be viewed as types of language games. Markell, supra note 89, at 1130.
¹⁴⁷. Cf. BBB, supra note 35, at 81; Z, supra note 48, at § 644. I have previously sketched this theory in Markell, supra note 89.
¹⁴⁸. An example is that, under Article 4 of the Uniform Commercial Code, 11:59 p.m. is considered to be in the "afternoon." U.C.C. § 4-104(a)(2) (2004) ("'Afternoon' means the period of a day between noon and midnight.").
¹⁴⁹. See, e.g., U.C.C. § 1-302 (2004):

SECTION 1-302. VARIATION BY AGREEMENT
(a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.
(b) The obligations of good faith, diligence, reasonableness and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires any action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.
(c) The presence in certain provisions of [the Uniform Commercial Code] of the
monochromatic, so be it. The periodic efforts to revise the Code anticipate this, and these revisions tend to conform usage to reality.\textsuperscript{150}

Under this view, the world of Article 9 security agreements divides roughly into two groups. The first group consists of those agreements in which the parties have dealt expressly with the standard of good faith. By this I mean that they have agreed in advance as to the appropriateness of a standard against which to assess proffered performance, or attempted enforcement. The second group consists of those agreements in which they have not so expressed a standard.

The first category is not particularly interesting. In such agreements, the parties have adopted a language game in which they have agreed to hold firm to some practice in interpreting good faith. In short, they have agreed on a language game consisting of a test for determining the appropriateness of performance or of enforcement. The question in any dispute is to discover and apply the rules of that language game.

By contrast, I believe parties in the second group adopt the Code’s subjective definition of good faith; that is the default rule unless the parties agree otherwise. Resolution of disputes in this class of cases dissolve into questions of intention. Did a secured party honestly believe that enforcement would be appropriate for covenants for which the parties were in default before they signed? Did a debtor honestly believe in a fifteen day grace period for periodic installments?

Prior to 2001, these questions of good faith were referred to and decided by the Code’s subjective standard.\textsuperscript{151} In many cases, my views and Patterson’s views will be the same. They will differ in the Article 9 context in those cases in which a custom or practice is not sufficiently widespread to rise to the level of incorporation. Differences will also arise when a custom is not incorporated and a party honestly, but unreasonably, attempts to enforce a contractual term. After 2001, the revisers of Article 1 modified the definition of good faith, retaining the subjective portion, but adding an objective element. In addition to honest belief, the U.C.C. now requires “the observance of reasonable commercial standards of fair dealing.”\textsuperscript{152} Is this addition what Patterson held was already in the former section? Although

\begin{itemize}
\item \textsuperscript{150} The amendment to the definition of good faith in the 2001 revision to the U.C.C. is discussed infra notes 151-53 and accompanying text.
\item \textsuperscript{151} But the matter does not end there. The parties’ agreement, as defined in the Code, may have incorporated terms regarding performance or enforcement; the sources of these terms include trade custom and usage, as well as the parties’ prior dealings. Although implied by the Code, these incorporated terms are no less part of the parties’ agreement. The court, even if the parties proceeded with a pure heart, still has to determine whether these terms are part of the agreement. If a party demands a certain performance when trade custom in similar matters is to the contrary, this is not bad faith but simply an unwitting breach of an implied term of the agreement—other than the obligation to act honestly implied by Section 1-203. For example, if trade custom allows debtors to pay by regular check, a lender would be in default of that implied term if it sought to enforce default remedies upon tender of the check, not because the lender violated its duty of good faith, but because the lender breached the implied obligation of accepting regular checks.
\item \textsuperscript{152} U.C.C. § 1-201(20) (2004).
\end{itemize}
the closeness of content cannot be disputed, I think Patterson’s rather open-ended re-articulation is not fully reflected in the 2001 amendments. First, note that the 2001 revision did not adopt a general objective standard—an obligation to act reasonably. Rather, the text of the amendments added a somewhat narrower requirement: that the action be consistent with objective “commercial standards of fair dealing.”

What is the difference? It might lie in those cases in which one party insists on a particular rule of interpretation that is contrary to customary usage or trade usage; if the other party agrees to this objectively non-standard rule, it can hardly be said to be a violation of “fair dealing.” The standard then collapses into the subjective standard, that is, whether the party honestly believed that its standard was agreed to, and therefore applicable.153

I think Wittgenstein’s view of language is consistent with these observations about the Code’s use of language. As Wittgenstein states in the Philosophical Investigations:

In a law-court, for instance, the question might be raised how someone meant a word. And this can be inferred from certain facts—It is a question of intention.154

This passage indicates that when interpreting past acts, especially in the context of the law, one can fix meanings.155 To do so, one refers to “certain facts”—presumably the permissible uses of the words employed, and the circumstances under which the parties uttered the words.156 In the language

153. See, e.g., Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (incorporating the practice of price protection into the contract even though express terms of contract seemed to exclude such protection); id. at 806 (explaining that incorporation of terms based on trade usage depends on a showing that such practices were widespread). Then-Judge Kennedy stated: “Our opinion should not be interpreted to permit juries to import price protection or a similarly specific contract term from a concept of good faith that is not based on well-established custom and usage or other objective standards of which the parties had clear notice.” Id. (Kennedy, J., concurring).

154. PI, supra note 19, part II, § xi, at 214 (emphasis in original). See also BAKER, supra note 44, at 77-78.

155. For Wittgenstein, intention was time specific: “Did you intend... refers to a definite time... not to an experience during that time.” PI, supra note 19, at 217-18. Cf. BBB, supra note 35, at 147 (“We use the words ‘meaning’, ‘believing’, ‘intending’ in such a way that they refer to certain acts, states of mind given certain circumstances; as by the expression ‘checkmating somebody’ we refer to the act of taking his king.”). See also Z, supra note 48, at § 236; PG, supra note 26, at 143, 148; PR, supra note 64, at 69.

Robert Fogelin has noted that Wittgenstein’s treatment of reconstructing what someone once intended is problematic. He ascribes this difficulty to Wittgenstein’s focus on first party psychological concepts (such as what goes on when a particular speaker utters something) rather than third party psychological concepts (such as my reconstructing what someone else meant by a past utterance). FOGELIN, supra note 64, at 199. Of course, the function of a court focuses primarily on such third party investigations.

game of the UCC, this may or may not include testimony as to the subjective intent of the parties.\(^{157}\) But Patterson expressly rejects this move. "In construing the meaning of a contract, courts should focus their attention not on what the parties mentally intended by their words but on what the trade took the words to mean."\(^{158}\) In short, Patterson seems to confuse the meaning of a word with what a person meant by its utterance.

Patterson's view essentially seeks to incorporate shifting perceptions of commercial practice into the notion of good faith. Under his view, "reasonable expectations" can fill gaps left by parties' failure to agree in a manner we can reconstruct without quarrel.\(^{159}\) But this view was clearly rejected by Wittgenstein:

Is a statute book a work of anthropology telling how the people of this nation deal with a thief, etc.—Could it be said: "The judge looks up a book about anthropology and thereupon sentences the thief to a term of imprisonment"? Well, the judge does not USE the statute book as a manual of anthropology.\(^{160}\)

But Patterson seems to want to import "anthropology" into statutory construction.\(^{161}\) Under his theory, evidence of how traders act (or put another way, the reports of anthropologists consigned to study commercial practices with respect to how traders act) will be in many cases determinative of the issue.\(^{162}\) Statutes can admit such evidence, but they usually do it explicitly, such as in Section 1-205 of the Code. But it is a feature of language games as conceived by Wittgenstein that they can exclude such references as well.\(^{163}\) Section 1-201(19) and the history of its adoption seem to be one such exclusion.

Patterson confuses the possibility that a Code term will acquire and lose certain interpretations over time with the likelihood that the parties agreed on the scope of that same term in a contract at a particular point in time (by

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A law is given for human beings, and a jurisprudent may well be capable of drawing consequences for any case that ordinarily comes his way; thus the law evidently has its use, makes sense. Nevertheless its validity presupposes all sorts of things, and if the being that he is to judge is quite deviant from ordinary human beings, then e.g. the decision whether he has done a deed with evil intent will become not difficult but (simply) impossible.

Id. at 149 (rejecting that actual state of mind of parties to a contract is relevant to inquires as to good faith interpretation of the propriety of performance.).

\(^{157}\) See UCC § 1-201(19) (2004) (defining good faith as honesty in fact).

\(^{158}\) PATTERTON, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 18, 149.

\(^{159}\) Id. at 149 (rejecting that actual state of mind of parties to a contract is relevant to inquires as to good faith interpretation of the propriety of performance.).

\(^{160}\) RLM, supra note 22, part III, at § 65. See also id., part I, at § 118.

\(^{161}\) "[I]n law the determination of what a rule requires (what it means to claim that "'X' is following [or not following] a rule") is made by disclosing the point of the rule. This 'disclosure' is essentially a matter of social anthropology." Patterson, Legal Discourse, supra note 90, at 62 (brackets and emphasis in original).

\(^{162}\) See supra note 158.

\(^{163}\) See U.C.C. 1-205 (2004).
implication or otherwise).\textsuperscript{164} Patterson’s interpretive tool for the Code is thus not sufficiently true to the Code’s effort to promote certainty in commercial transactions. Although the use of commercial practices to interpret the intent of the parties is useful—of that there can be no denial—those practices cannot unsettle divisions of labor made by the Code itself. For whatever reason, before 2001 the Code defined good faith as honesty in fact, and not as the satisfaction of reasonable commercial standards.\textsuperscript{165}

There are at least two consequences of Patterson’s flawed reading of Wittgenstein. The first consequence is that Patterson’s argument about rule-following loses much of its force. As I point out above, it is not the case, as Patterson apparently asserts,\textsuperscript{166} that rule-following in language is a conscious act—much in the same way that it does not make sense to ask whether Tuesday or Wednesday is fat or lean.\textsuperscript{167} The grammar of language governs both cases; it is simply not the case that common usage allows us to say that either day is hefty or lean. The process by which we label such assertions non-sensical involves what Wittgenstein would call rule-following.\textsuperscript{168} Thus, while it may be productive under theories other than those of Wittgenstein to ask what the point or purpose of a rule is, there is no firm connection between that endeavor and Wittgenstein’s investigations into language.

The second consequence is that Patterson’s concentration on rule-following blinds him to other characterizations of the Code. As I have set forth above, the Code can be viewed as one of the myriad language games that contribute to English—perhaps a “technical” language game\textsuperscript{169} or one in which some moves allowed in English are denied in the Code.\textsuperscript{170} If either of these characterizations are true, Patterson’s goal of making good faith inquiries objective through application of a contextual theory of meaning fails, not because the theory is wrong, but because Patterson’s chosen context is cast too wide. I believe that Wittgenstein would resort to intent to resolve this issue,\textsuperscript{171} and while the whole of language contains many necessary as-

\textsuperscript{164} He also confuses establishing a possible meaning of “good faith” with how “good faith” is actually used by courts.

\textsuperscript{165} It also may be that good faith is an evaluative concept which will vary across different ethical systems, so as to always be the center of dispute. See Paul Johnston, Wittgenstein and Moral Philosophy 99-101 (1989); Bix, supra note 142, at 222-23.

\textsuperscript{166} Patterson, Good Faith and Lender Liability, supra note 88, at 84-86.

\textsuperscript{167} The example is Wittgenstein’s. PI, supra note 19, part II, § xi, at 216. Wittgenstein “incline[d] decisively” towards a fat Wednesday. Id.

\textsuperscript{168} Id. at § 85 (“A rule stands there like a sign-post . . . . [T]he sign-post does after all leave no room for doubt. Or rather: it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one.”).

\textsuperscript{169} BBB, supra note 35, at 81.

\textsuperscript{170} I have expanded on this theory elsewhere. See generally Markell, supra note 89.

\textsuperscript{171} PI, supra note 19, part II, § xi, at 214.
sumptions for this quest,\textsuperscript{172} the information possessed by the parties will often be determinative.

C. The Use of Theory

Even if Patterson’s interpretation of Wittgenstein is superior to mine, which it well may be, I still find Patterson’s conclusions unsatisfactory for at least two additional reasons. First, although it requires speculation of the highest sort, I think Wittgenstein would not have approved of Patterson’s use and development of theory to explain the Code.\textsuperscript{173} For Wittgenstein, philosophy did not attempt to solve puzzles and answer specific questions; instead, it clarified the usage of language so that we can see problems afresh and clearly.\textsuperscript{174} Second, while Patterson’s work may be valuable as a semantic analysis of the Code, he seems to attempt more a normative theory of how courts ought to interpret the words “good faith.” The transition from a semantic exposition of the Code to a normative precept of interpretation proceeds too far, too fast, and ultimately crumbles in this haste.

I do not think that Patterson’s use of theory in a way contrary to Wittgenstein’s spirit is fatal, so long as what is done is made explicit. No rule says that brilliant philosophers such as Wittgenstein are always right. But in extrapolating from Wittgenstein, Patterson confuses his method with his goal. He begins with solid semantic observations about word usage in the Code.\textsuperscript{175} He slices and dices these observations, however, to formulate what most lawyers would label policy arguments about Code interpretation. I think this move is not wholly legitimate, and thus reject it.

\textsuperscript{172} Cf. Z, supra note 48, at § 350.
\textsuperscript{173} Patterson acknowledges Wittgenstein’s rejection of theorizing, and even attempts to recharacterize his endeavor:

What I offer is more an “account” or, as Wittgenstein would have it, a “description” of the grammar of legal expression. What is offered is not a “theory” about language. Instead, the effort is directed at describing linguistic practice and giving an accurate account of it. In the end, the effort is pragmatic and not theoretical.

PATTERSON, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 61 n.1.

This statement does not appear in the correlated footnote in Patterson, Good Faith Performance. See Patterson, Good Faith Performance, supra note 89, at 352 n.56.

With all respect, I do not know how much weight can be given to Patterson’s disclaimer. A book of descriptions would look a lot different than Patterson’s. I also doubt that offering a proposed jury instruction, PATRERSON, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 149, fits within any usage of the word “description.” See also id. at ix (bemoaning the “low state of theory in commercial law” and stating his purpose as “advanc[ing] the outline of a general theory...”). Patterson also acknowledges this by calling his work “simultaneously prescriptive and descriptive.” Id. at 62 n.1. In Good Faith Performance he adds the tag line “and therefore evolutionary.” Patterson, Good Faith Performance, supra note 89, at 352 n.56. Maybe so, but the prescriptive elements seem to be just the type of theorizing that Wittgenstein rejected.

\textsuperscript{174} PG, supra note 26, at 115 (“[T]he task of philosophy is not to create a new, ideal language, but to clarify the use of our language, the existing language. Its aim is to remove particular misunderstandings; not to produce a real understanding for the first time.”). Put another way, Wittgenstein was concerned with what constituted meaning generally, not with what a particular utterance of individual words meant. Cf. Z, supra note 48, at § 467.

\textsuperscript{175} PATRERSON, GOOD FAITH AND LENDER LIABILITY, supra note 88, at 99 n.80.
Patterson tries to accomplish too many of the goals with his conclusions. His explanatory powers are most convincing when he is explaining the benefits of incorporating a resort to a practice or telling us why Summers' excluder analysis is unhelpful. But Patterson tries to do more. His goal is to shape the law, to point out that good faith should be expansively used and that so-called narrow interpretations are not correct.

Patterson's building blocks are arguments based upon usage of language generally. These arguments are formed in what I would call a prospective sense: What can language do? What are the possible permutations of trade usage, course of performance, etc.? But with every contract, the language of the agreement has been set, the possible permutations have collapsed into the actual actions of the parties. Patterson uses hermeneutics to discern parties' intentions and the meaning of their words. In short, he begins by equating meaning with use (generally), but concludes by equating meaning with intent and reasonable expectations. While this conclusion may be sustainable by resort to the works of Gadamer, Habermas and others, it is untrue to its Wittgensteinian foundations.

His conclusion also mixes methods. To show that his view of good faith can be derived legitimately is not the same thing as showing that it is the only view that makes sense, or that it is the view that should prevail. Only if we believe that his method of interpreting "good faith" has a claim on our exclusive fealty should we go that far. It is not clear to me that hermeneutics provides the type of answer that would command our sole attention.

Another way to look at the issue is as follows: Do we have a philosophical problem when we look at the meanings and usages of good faith? I do not think so—our thinking is not muddled over what we mean so much as it is muddled over the selection of one of several well-defined choices. Before

176. *Id.* at 99. His insight that the meaning of good faith is sufficiently diverse to invoke Wittgenstein's notions of family resemblances is also good, but I do not think he pursues it far enough. *Id.*

177. In short, Patterson tries to do philosophy in the guise of law. I do not condemn this enterprise—this essay is in large part doing exactly that—but I think one ought to realize its limitations. Philosophy, at least as seen by Wittgenstein and his successors, may not have much to offer law. As Richard Rorty has put it, in describing the decline of the "analytic philosopher":

Perhaps the most appropriate model for the analytic philosopher is now the lawyer, rather than either the scholar or the scientist. The ability to construct a good brief, or conduct a devastating cross-examination, or find relevant precedents, is pretty much the ability which analytic philosophers think of as "distinctively philosophical." It is sufficient to be a good lawyer or to be a good analytic philosopher that you be able to see at a glance the inferential relationships between all the members of a bewilderingly large set of propositions.


179. See generally Patterson, *Good Faith and Lender Liability*, *supra* note 88.

180. See Bayles, *supra* note 74, at 35-36.
2001, the Code stated simply that good faith is honesty in fact; after 2001, it added adherence to reasonable standards of fair dealing, following in part Section 205 of the Restatement (Second) of Contracts. With the choices thus set, philosophy—at least as conceived of by Wittgenstein—provides no further help.\textsuperscript{181} The choice in any particular case will ultimately be influenced by the types of standards lawyers are trained to use—policy considerations, doctrinal inferences and the like. As for philosophy, it "may in no way interfere with the actual use of language; it can in the end only describe it. . . . It leaves everything as it is."\textsuperscript{182}

IV. IGNORING WITTI\-GENSTEIN: JUDGES, THE PRACTICE OF LAW AND WITTI\-GENSTEIN

Regardless of the accuracy of these misgivings, there remains the unanswered question I posed in the introduction: Has the resulting clash or interplay of views and practices caused participants to modify willingly or otherwise alter their points of view, or has it made more efficient the process by which their viewpoints were reached? One way to answer this question is by looking at the audience Patterson seems to have had in mind: courts. Have courts considered Wittgenstein’s philosophy when deciding cases?\textsuperscript{183}

While academic literature abounds with citations to Wittgenstein,\textsuperscript{184} case citations are fairly rare—only forty state and federal cases even mention Wittgenstein\textsuperscript{185} and the direct effect of philosophers’ writings has been close to nil.\textsuperscript{186}

181. See Rorty, supra note 177.
182. PI, supra note 19, at § 124.
184. Searches in Westlaw’s TP-ALL library, using the search “ludwig or l! w/2 wittgenstein” returns 729 results. The same search in the Lexis US Law Reviews and Journals library returns 652. Both searches were conducted on September 1, 2004. For a listing of some of these articles, see supra notes 229-58.
Of these forty available opinions, former academics authored at least seven, and two California judges account for seven more. As a consequence, it appears that Wittgenstein’s philosophy has not had much direct impact on individual cases.


Two additional cases that cite Wittgenstein are California opinions which were either de-published or vacated by action of a higher court, and no longer have any official force. See People v. Aston, 154 Cal. App. 3d 818, withdrawn on reh’g, 208 Cal. Rptr. 754 (Cal. Ct. App. 1985); People v. Cooke, 182 Cal. Rptr. 217 (Cal. Ct. App. 1985), ordered depublished on reversal of companion case.

186. As to the issue of whether there is a constitutional right to die, the United States Supreme Court rejected the arguments of six prominent philosophers - Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson. See Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksberg, 521 U.S. 702 (1997). See also Rao, supra note 5.


The portion of Justice Blease’s opinion in Perry v. Robertson, which quotes Wittgenstein, has been adopted almost verbatim by two other California Courts of Appeal. See, e.g., Lerner v. Ward, 16 Cal. Rptr. 2d 486 (Cal. Ct. App. 1993); Jackson v. Rogers & Wells, 258 Cal. Rptr. 454 (Cal. Ct. App. 1989). In addition, the two withdrawn opinions cited above in note are also Justice Blease’s.

In a world of coincidences, Justice Blease and Judge Karlton were once law partners. Telephone Interview with Douglas Mirell, former extem to Justice Blease (July 23, 1993).
What use has been made, however, is I think interesting. Courts’ use—and misuse—of Wittgenstein’s philosophy illustrates the best and worst of the intersection of philosophy and the law. The worst is hostile misunderstanding, the overt twisting of words or reputation to a tendentious aim. This type of hostility was present in Kendall McGaw Laboratories, Inc. v. Community Memorial Hospital. There, a party sought partial summary judgment as to damages in a contract dispute. Liability, however, had not been established. In refusing summary judgment, the court characterized the movant’s strategy as: “conceptually-backward nonsense; damages do not bring forth liability any more than an injury produces a duty. In this regard the court, like the law, will follow Aristotle rather than Wittgenstein.”

In reality, of course, the court was following neither. The court’s reference seems to be to the notion that Wittgenstein’s later philosophy displaces traditional logic as represented by Aristotle, and admits of no accepted way of establishing priority of argument. Wittgenstein, however, would probably view the issue as one of grammar, and would say that use of liability and of injury in the language game of law is prior to the use of damages and duty, and that to talk otherwise is to not understand the grammar of the terms.

Just as association with Wittgenstein is used as scorn, some courts take the opposite turn and dismiss arguments made because they conflict with views supposedly maintained by Wittgenstein. In both Bunnell v. Sullivan and United States v. Heredia-Fernandez, judges made reference to the Philosophical Investigations’ discussion of the subjectivity of pain. The use of the reference in each case is different. In Bunnell, Judge Kozinski mocks Congress’ use of “excess pain” in a statute. In a one line dismissal of this


191. Id. at 421.

192. Id.


194. Cf. PG, supra note 26, at 60-63. This point was not sufficiently appreciated by Judge McConnell in Wansing v. Hargett, 341 F.3d 1207, 1214 (10th Cir. 2003), cert. denied, 124 S. Ct. 960 (2003), when he referred to Wittgenstein’s “game” example as an example of the fact that some words or terms have meaning but deny definition.

195. 947 F.2d 341 (9th Cir. 1991).

196. 756 F.2d 1412 (9th Cir. 1985).

197. Bunnell, 947 F.2d 341 at 343 (Kozinski, J., concurring).
concept, he cites Wittgenstein for the proposition that "[p]ain, however, like beauty, is entirely subjective; it is impossible to compare one person's suffering with that of another, much less determine the 'correct' amount of pain someone should feel because of a particular impairment." By contrast, in Heredia-Fernandez Judge Nelson was faced with what she described as a "philosophical" argument: that a federal agent could not testify that a criminal defendant had read Miranda warnings given to him on a card and which were printed in Spanish. Given the seemingly philosophical nature of the claim, she responded in kind:

By the same token, however, it would likewise be impossible to attest that someone was in fear or pain, or that a person understood what he was saying; yet the abstract plausibility of such epistemological skepticism does not justify actual doubts in either everyday life or the law which governs it. See L. Wittgenstein, *Philosophical Investigations* ¶ 303, 246-50, 84 (3d ed.).

In both of these usages, the judges cited Wittgenstein for the proposition that private sensations cannot be doubted. But thereafter the judges depart. Judge Kozinski seems to think that pain in others cannot be quantified, while Judge Nelson indicates that the ability to sense pain in others is a given in our discourse, and that to doubt it would rise to the level of nonsense since it is foundational belief.

Judge Nelson gets the better of the citations. She understands that Wittgenstein's use of the pain examples was to show that there are some things that we cannot seriously doubt and still function normally. In contrast, nothing in Wittgenstein labels pain as essentially subjective. Indeed, given the notion that pain, language and our sensations are all part of a form of life, we can agree in our judgments about pain and its various manifestations. In short, the fact that we can talk sensibly about various levels of pain presupposes that we can compare pain across individuals.
In one sense, these decisions focus on the periphery. Wittgenstein is more closely associated with his writings on the nature of meaning than with his writings on private sensation. Courts’ usages of his philosophy of meaning are more varied. In three opinions, for example, Judge Easterbrook has touched briefly on Wittgenstein and the nature of statutory interpretation. In In re Erickson, Judge Easterbrook was faced with construing the term “mower” in a Wisconsin exemption statute. In surveying the ways in which a term can be employed, Judge Easterbrook cites Saul Kripke’s controversial discussion of Wittgenstein for the proposition that: “Which feature [of a possible interpretation] is important depends on the function of the designation and how it will be interpreted by the audience to whom the word is addressed.” That Judge Easterbrook is referring directly to Wittgenstein is confirmed by his subsequent use of Erickson in Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund. In that case, Judge Easterbrook cited to the passage quoted above from Erickson in a case involving the use of subsequent legislative history in federal statutory interpretation, noting that: “Words do not have meanings given by natural law. You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.” From this assertion, he argues that since later statements about intent by definition could not be shared by those involved in the passage of the legislation, they are useless in interpreting the statute. Judge Easterbrook’s third use again cites Kripke’s work, but for a different proposition: that the difference between fact and opinion in one of convention, not one based upon transcendental differences between the two.

Judge Easterbrook’s use of Wittgenstein, although in areas closer to the core of his later philosophy, is suspect. The brevity with which Judge Easterbrook deals with Wittgenstein itself shows that the citations are not serious, in the sense of being necessary or sufficient to establish the assertion

205. Cont’l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154 (7th Cir. 1990); Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988); In re Erickson, 815 F.2d 1090 (7th Cir. 1987). A more recent example of a court’s use of Wittgenstein with respect to statutory interpretation is PSI Energy, Inc. v. United States, 59 Fed. Cl. 590, 601 n.20 (2004) (referring to “custom, usage, convention, and especially in its context, that language establishes a common and shared meaning” for statutes, and then stating that Wittgenstein “recognized that the meaning of a word is its use in the language.” L. WITTEGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, 20e (G. Anscombe trans. 1953)).

206. Erickson, 815 F.2d at 1092.

207. Id. Judge Easterbrook’s supporting citation is SAUL KRIPKE, WITTEGENSTEIN ON RULES AND PRIVATE LANGUAGE 19, 28, 98-109 (1982). Erickson, 815 F.2d at 1092.

208. Cont’l Can Co., 916 F.2d at 1154.

209. Id. at 1157. Other judges have invoked similar references regarding the importance of context. See, e.g., United States v. Hubbell, 167 F.3d 552, 576 n.32 (D.C. Cir. 1999); Gulf Ins. Co. v. Noble Broadcast, 936 S.W.2d 810, 818 (Mo. S.Ct. 1997) (Robertson, J., dissenting).

210. Cont’l Can Co., 916 F.2d at 1157. As stated by Judge Easterbrook, “That is why statements after enactment do not count; the legislative history of a bill is valuable only to the extent it shows genesis and evolution, making ‘subsequent legislative history’ an oxymoron.” Id.

211. Stevens v. Tillman, 855 F.2d 394, 399 (7th Cir. 1988).

212. See id.
being made. They are the judicial equivalent of using a "big" name to cover an otherwise unexceptional argument.\textsuperscript{213} Moreover, on the issue of legislative intent, Wittgenstein was quite willing to say that a law could have an intent even if no legislator held that intent at the time of consideration and passage. As he stated, "Might it not even be imagined that several people had carried out an intention without any one of them having it? In this way a government may have an intention that no \textit{man} has."\textsuperscript{214} Wittgenstein's observation is on the grammar of how he understood the use of a term. Judge Easterbrook, I take it, would disagree. In any event, Easterbrook's citations of Wittgenstein are odd, and likely wrong.

The use of Wittgenstein by California's Justice Blease is more varied, and more interesting. In \textit{National Auto. & Casualty Ins. Co. v. Contreras},\textsuperscript{215} the issue was whether a pickup truck was a private passenger automobile within the coverage of a particular policy of insurance.\textsuperscript{216} Justice Blease answered the question in the negative after examining the way in which the insurance policy defined its terms.\textsuperscript{217} Along the way, Justice Blease had occasion to cite to Wittgenstein in a lengthy footnote, during which he said the following:

What is a simple matter of linguistic practice may not be easily explained. . . . Perhaps, '[o]ur disease is one of wanting to explain.' (Wittgenstein, Remarks on the Foundations of Mathematics (rev. ed. 1978) p.333.) One cure for the disease lies in the recognition that we sometimes define a term, not by an essential property (common to all of its applications) which captures its essence, but ostensively (by showing samples of the term), because that is how we learned its meaning. A sample embodies a concept, and hence a definition of that sampled, because we use it (symbolically) as a model or exemplar of the concept and not the thing itself. This could be viewed analogously as a common law of language usage. . . . We ordinarily learn the concepts of cars and trucks in this manner. A difficulty may arise when a hybrid or unusual case is presented which does not conform to the samples by which we acquired our conceptual knowledge. 'It is only in normal cases that
the use of a word is clearly prescribed; [ ] the more abnormal the case, the more doubtful it becomes what we are to say.' (Wittgenstein, Philosophical Investigations (3d ed. 1958) § 142.)

Before Justice Blease was a situation not unambiguously covered by ordinary usage. Sometimes a pickup truck is a private passenger automobile, sometimes not. He thus turns to the definitions contained within the policy of insurance to resolve the dispute, bringing more to the analysis than just testimony of particular past ostensive definitions. And in this regard, Justice Blease continues:

The fact that we define some words in... [an ostensive] manner does not necessarily rule out definitional explanations of a descriptive type. The danger is that some singular property might be seized upon as the essential characteristic of the word. The semantic antidote requires a more elaborate descriptive apparatus than is generally recognized, one which is aimed at revealing the multiplicity of (sometimes disparate) circumstances to which a word may be applied. What is likely to be discovered by this kind of explanatory effort is the subtlety of our language practices, by which the play of the language is revealed (shown) only within the particular circumstances in which it is used.

Justice Blease thus employs a method sympathetic to Wittgenstein's own examinations. He describes the usages and the context in which those usages occur. Since the primary context was the policy itself, it was appropriate to turn to it for assistance in determining whether to exclude the pickup truck.

But Justice Blease's most famous use of Wittgenstein may be his most flawed. In Perry v. Robertson, a seller of a house sued his real estate agent for failing to reduce a profitable oral offer to an enforceable writing. Among the damages requested were attorneys' fees, recoverable under California law only if the seller sought to recover under the listing contract, and not under tort law. In affirming a finding that such fees could be recovered, Justice Blease noted the following in a footnote:

In this context, whether the tort-contract action is the one or the other is purely one of legal perspective. This is analogous to the example of the line drawing which could be seen either as a duck or as a rabbit, a duck-rabbit, at the will of the viewer. (Wittgenstein,
Philosophical Investigations (Blackwell ed. 1953) Part II, p. 194e.)

The footnote contains the sketch from the book.

I think this use of Wittgenstein misses the point. As noted above, in the Philosophical Investigations one of Wittgenstein’s concerns was ridding philosophy of the notion that meaning was “in the mind” or the product of internal mental processes and thus private to the speaker or to the listener. In the passage quoted by Justice Blease, Wittgenstein was using optical illusions to illustrate this point. Whether we “see” a duck or a rabbit is not reducible to psychological or biological explanations. It is also not arbitrary. Rather, it is a function of the state of our language acquisition and mastery - a function of what are called rabbits, and what are called ducks.

In another sense, however, Justice Blease may be correct. Whether several actions taken together breach a contract or breach a tort duty (or both) is a question decided within the legal system according to the language games employed by lawyers and judges. One trained in the practice of law is able to make that distinction, among others, and resolve the dispute. So the characterization of a legal action is “purely one of legal perspective,” albeit along different lines than those apparently suggested by Justice Blease. It will be the uses common in the language game of the law that will decide the ultimate application.

V. USING WITTGENSTEIN TO INFORM LAW: THOMAS MORAWETZ’S UNDERSTANDING DISAGREEMENT

This discussion leads to the following question: Is there any role for the use of Wittgenstein’s philosophy in law or jurisprudence? I believe that the obvious answer is yes, and an examination of Professor Thomas Morawetz’s article, Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging, illustrates how.

222. Id. at 75 n.1.
223. See supra, Part II(A).
224. Cf. PI, supra note 19, at 197 (“Seeing as... is not part of perception. And for that reason it is like seeing and again not like.”).
225. Id. at 208. (“Now he’s seeing it like this’, ‘now like that’ would only be said of someone capable of making certain applications of the figure quite freely. [!] The substratum of this experience is the mastery of a technique.”).
227. Professor Morawetz has published a revised and shortened version of this essay in his recent book, THOMAS MORAWETZ, LAW’S PREMISES AND LAW’S PROMISE: JURISPRUDENCE AFTER WITTGENSTEIN (COLLECTED ESSAYS IN LAW) (2000).
Rather than focusing on the particulars of individual cases, Professor Morawetz uses Wittgenstein’s writings in a much different manner.\textsuperscript{228} The difference can be captured by looking at the goals of Morawetz’s article. Unlike Patterson, who attempted to characterize certain judicial decisions as correct or incorrect, Morawetz is more concerned with characterizations of how judges reach their decisions.

A. Disagreement and the Practice of Law

In particular, Morawetz asserts that “[t]he metaphors and assumptions of legal theorists have characteristically oversimplified judicial agreement and disagreement.”\textsuperscript{229} Judges, according to Morawetz, participate in a shared deliberative practice, to which each judge contributes his or her own background, insights and justifications, and in which each judge is bound by common and shared notions of relevancy and procedure.\textsuperscript{230} This view of judges and judicial practice deflects many “destabilizing” arguments regarding law: that law is not neutral in any real sense, and is just power politics; that law is conceptually monochromatic, excluding all but mainstream voices; and that law, being bound up in language, ultimately incorporates the rootless search for meaning.\textsuperscript{231}

Morawetz’s method patiently examines the nature of judicial decision-making. Flaws in jurisprudence, Morawetz asserts, arise because theories or theorists “ignore that the individual judge is more than a locus of idiosyncratic value or idiosyncratic techniques of understanding, representative only of himself or his group.”\textsuperscript{232} Morawetz correctly asserts that reality is more complex, and that such implication occurs only at the cost of accuracy of description.\textsuperscript{233} Judges simultaneously understand that they have their own way of understanding experience and that their way is not unique, universal or privileged. Aware that they are obliged to justify their decisions, judges use their own “idiosyncratic character of [their own] individual strategies of justification”\textsuperscript{234} to fit their reasoning into a common pattern of justification. In doing so, they both reaffirm their individual way of looking at the world and the collective need for common agreement on the practice of judicial decision-making.\textsuperscript{235}


\textsuperscript{229} Morawetz, supra note 227, at 454; PO, supra note 46, at 165.

\textsuperscript{230} Morawetz, supra note 227, at 455. Cf. Z, supra note 48, at § 350.

\textsuperscript{231} Morawetz, supra note 227, at 375-76.

\textsuperscript{232} Id. at 455.

\textsuperscript{233} \textit{See Pi, supra note 19, at § 124; Ackerman, supra note 30, at 205.}

\textsuperscript{234} Morawetz, supra note 227, at 411.

\textsuperscript{235} Morawetz believes that judges will come to consensus on three broad topics. “They will agree on broad generalities about need and social value. They will agree on formal procedures for debate and decision. And they will agree in the mutual recognition of relevant arguments.” \textit{Id.} at
Morawetz uses his concept of judicial decision-making as a shared practice to take on, among others, those who would use Wittgenstein's writings to establish "skeptical and destabilizing" arguments about the legitimacy of law. In particular, Morawetz uses the concept of a shared practice to debunk the arguments that law is nothing more than disguised power. He takes on the notions that value pluralism, conceptual relativism and semantic relativity each deprive any legal system claims to neutral creation and application of laws.

Value pluralism asserts that since different people in a polity have different value preferences, the establishment of laws that promise equal treatment is illusory. This failure would appear to be fundamental. Since the problem lies in the definition of what is "equal treatment," no amount of good faith effort can achieve the stated goal, since the goal itself is tainted.

Morawetz, following Wittgenstein, does not answer the questions posed by this position. Instead, he examines the premises underlying the position, and "dissolves" the objection. The dissolution consists of the awareness that different judges have different perceptions about these values, and that these values are tied inextricably to the way judges, and citizens, perceive reality. Accordingly, there is no creation and enforcement of a non-neutral goal. Rather, there is an ongoing practice and debate over its terms and over the way to satisfy those terms. The issue is thus not one of value pluralism, but pluralism or relativity in justificatory patterns or strategies. This, in turn, is already part of the shared practice of judicial decision-making. Judges will take into account the value systems of others as part of reaching their own conclusions. As Morawetz concludes, "[t]he normative lesson, such as it is, is to maximize empathic consideration of alternative ways of thinking."

433. One might ask whether this is sufficient, but again that question requires dissolution: sufficient for what? The basis for agreement is suggested by the continued participation in the endeavor: "Where two principles really do meet which cannot be reconciled with one another, then each man declares the other a fool and heretic." OC, supra note 43, at § 611.

236. MORAWETZ, supra note 227, at 430.

237. Id. at 432. Cf. PO, supra note 46, at 183 ("The problems are dissolved in the actual sense of the word—like a lump of sugar in water.").

238. That this view is open to the possibility of a divergence of values sufficient to undermine political stability is, I think, an empirical rather than an analytical question for Wittgenstein. See, e.g., LUDWIG WITTGENSTEIN, REMARKS ON COLOUR Part III § 32 (Linda L. McAlister & Margarete Schätte trans., G.E.M. Anscombe ed., 1977) ("Is it possible then for different people in this way to have different colour concepts? Somewhat different ones. Different with respect to one or another feature. And that will impair their mutual understanding to a greater or lesser extent, but often hardly at all.") (emphasis in original).

239. MORAWETZ, supra note 227, at 438. See also Morawetz, Law as Experience, supra note 229, at 49-52.

240. MORAWETZ, supra note 227, at 433.
The argument based on conceptual relativism takes value pluralism one step further.\textsuperscript{241} Whereas value pluralism asserts only that people hold irrec- oncilable values, it does not question the cognitive similarity of the people holding the different views. Conceptual relativism does. If accurate, law dissembles into power politics, since the ways in which the majority thinks will dominate, the ways in which the majority sees the issues will define the debate. Those who think differently are heard, but in a muted and handi- capped manner. If taken to its logical conclusion (with sufficient differ- ences) it calls into question our ability to communicate.

Morawetz again dissolves rather than answers these questions. As he states it, "[t]he fact that these questions seem intractable is a clue to the fact that, however much they betray important issues, they too are pseudo-questions, questions to be dissolved rather than answered."\textsuperscript{242} The key here is recognizing that judges are not bound by one discrete conceptual scheme, and cannot see or understand others. In fact, we acknowledge daily that oth- ers may view key aspects of legal life differently. This difference can be carried too far. We do not differ on key aspects—otherwise communication as simple as ordering a meal in a restaurant would be impossible, rather than just difficult.\textsuperscript{243}

Semantic relativity is also prone to dissolution. Morawetz views seman- tic relativity as incorporating the notion that words do not have determinate and invariant meanings.\textsuperscript{244} From this, some observers "den[y] the possibility of communication and any kind of shared belief altogether."\textsuperscript{245} Morawetz, however, labels this approach "counterintuitive,"\textsuperscript{246} and adopts a milder form that emphasizes that context, whether historical or polemical, "conditions the reader’s grasp of the text."\textsuperscript{247} This, in turn, entails "‘that the reader is not completely free to decide the meaning of the text.’\textsuperscript{248} The text is already determinate enough, for instance, to narrow the range of possible contexts.’\textsuperscript{249} And Morawetz’s view of judicial decision-making as a delib- erative practice incorporates this view by placing different individuals, each conditioned by their own history, in a common enterprise, the product of

\textsuperscript{241} This issue has a different resolution depending upon whether the focus is cultural relativism—differences in acculturation among people who think in essentially the same ways—or cognitive relativism—differences among individuals based upon different notions of logic, inference and rationality. If the latter is the case, it is hard to see how Wittgenstein’s work has any application, since it would deny the possibility of the conventions upon which his later work is based on all ex- cept the crudest of grounds. See GRAYLING, supra note 17, at 104-06; Markell, supra note 89, at 1125.

\textsuperscript{242} MORAWETZ, supra note 227, at 436.

\textsuperscript{243} Cf. PI, supra note 19, part II, § xi, at 223 (“If a lion could talk, we could not understand him.”); Z, supra note 48, at § 219 (“We don’t understand Chinese gestures any more than Chinese sentences.”).

\textsuperscript{244} MORAWETZ, supra note 227, at 439.

\textsuperscript{245} Id. at 440.

\textsuperscript{246} Id.

\textsuperscript{247} Id. (quoting David C. Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Per- spectives, 58 S. CAL. L. REV. 135, 138 (1985)). See also Morawetz, Law as Experience, supra note 228, at 66.

\textsuperscript{248} See id.

\textsuperscript{249} Id.
their own history, in a common enterprise, the product of which reflects both their diversity and their commitment to the shared practice.²⁵⁰

B. Judging, Disagreement and Wittgenstein

Each of these moves can be characterized as within the spirit of Wittgenstein. Wittgenstein stated that philosophy "leaves everything as it is."²⁵¹ As noted by Robert Ackerman:

Wittgenstein’s philosophers function as a sanitation corps. . . . They speak the local language while they sweep up and dispose of the trash, leaving the City clean and orderly. Philosophy is not the teaching of a set of philosophical doctrines but the activity of putting the City in order.²⁵²

Wittgenstein was also not particularly receptive to theory in the sense of explanations which simply satisfy our "craving for generality."²⁵³ Morawetz’s method does not “go outside” to explain what is going on “inside.”²⁵⁴ Rather, he describes the shared practice of judicial decision-making, and notes its complexity.²⁵⁵ He then uses this description to test the various anti-foundationalist arguments against law.²⁵⁶ If his description of how judges work is accurate, he has shown that these theories have glossed over important subtleties and features of experience.²⁵⁷

Note how this move differs from Patterson. Rather than posit a different meta-scheme for ordering experience, he offers a description of a practice, and uses that practice, and the experiences it generates, to assess other descriptions of law. In a way, this is non-normative. Morawetz makes no claims that his description is durable or transcendent. It is subject to change as practices change or if his description needs revision. As he concludes:

[D]escribing law as a deliberative practice can be neither conservative nor radical. The law itself, the deliberative practice that is law, will be conservative if the society is homogeneous or successfully repressive, if new voices and ways of thinking remain unrepresented. The law will be radical if society is heterogeneous and new

²⁵⁰ Cf. RFM, supra note 22, part III, at § 5.
²⁵¹ PI, supra note 19, at § 124.
²⁵² ACKERMAN, supra note 30, at 204.
²⁵³ BBB, supra note 35, at 17.
²⁵⁴ See PG, supra note 26, at 143 ("It is in language that it’s all done.") (emphasis in original).
²⁵⁵ Cf. PI, supra note 19, at §§ 125-27.
²⁵⁶ Id.
ways of justifying and conceiving aims are continually given legal expression. The law will, furthermore, be liberal in Mill’s sense whenever it is open to new ways of thinking, whenever judges recognize that their ways of reasoning and justifying, i.e. their stake, do not necessarily have hegemony.258

In this sense, Morawetz engages in “bottom-up” reasoning. He attempts generalizations only after first surveying experience. This again, is in line with Wittgenstein. One of the reasons Wittgenstein distrusted theory is that it tends to smooth over inevitable rough spots in reality, and in so doing presents a less than accurate picture of life.259

VI. CONCLUSION

Wittgenstein did not trust conventional praise of Shakespeare:

When, for instance, I hear the expression of admiration for Shakespeare by distinguished men in the course of several centuries, I can never rid myself of the suspicion that praising him has been the conventional thing to do; . . . an enormous amount of praise [has] been, and [is] still to be, lavished on Shakespeare without understanding and for the wrong reasons by a thousand professors of literature.260

In the end, Wittgenstein’s writings too must stand or fall on their own merit, and the worth of his writings need to be dissociated from the fame of his name.

Independent of the quest to interpret Wittgenstein, carried on largely by professional philosophers, law continues to affect everyday people every day. Their lives are governed, or altered, by its rules and precepts. Grappling with how law interacts with people, and how it should interact, is the legacy and function of law, or at least the “rule of law.” From this we return Gould’s observation that “law gives decisive weight to the history of its own development.”261 Maybe that quality is desirable, or maybe it is ingrained in our system. But to give “decisive” weight to history does not mean that there is no room for other considerations in the analysis.

The extent of analytic philosophy’s role, however, is open to debate. The contrast is especially sharp when dealing with the work of philosophers

258. MORAWETZ, supra note 227, at 456.
   Some philosophers (or whatever you like to call them) suffer from what may be called
   “loss of problems.” Then everything seems quite simple to them, no deep problems seem
   to exist any more, the world becomes broad and flat and loses all depth, and what they
   write becomes immeasurably shallow and trivial.

Id.
260. LUDWIG WITTGENSTEIN, CULTURE AND VALUE 48 (Peter Winch trans., G.H. von Wright ed.,
1980).
261. Gould, supra note 3, at 118.

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such as Ludwig Wittgenstein. Wittgenstein's philosophy is extremely far-reaching, attempting as it does to describe the ways in which we connect with the world and with other minds. His remarks on meaning cover all discourse, from grocery orders to Einstein's explanation of relativity.

Against this background, I have argued in this article that the use of Wittgenstein's remarks to resolve any particular legal dispute—such as the scope of good faith in the Uniform Commercial Code—is not only untrue to Wittgenstein's conception of philosophy, it is akin to using quantum mechanics to brew a pot of coffee. One could do it if you had a fully worked out theory of the intersection of quantum theory and thermodynamics, which does not yet exist, but why work that hard? Simpler and perfectly effective means—a coffee pot and a plug—exist to accomplish the goal. The scarcity with which the judiciary cites Wittgenstein, despite ample academic use, underscores this point.

In contrast, scholars such as Morawetz help us understand why tools as imperfect as those used everyday by judges and lawyers work, while at the same time showing us the limits of those tools. Within these limits, however, as the common law has long shown, there is plenty of room for debate and for change. One need not invoke the name of any philosopher, let alone Wittgenstein, to direct the law. To do so is to be consigned to that space occupied by "a thousand professors of literature" for whom the invocation of a name is a premise in an argument, and who perpetuate the kind of philosophical theorizing that causes lawyers', as well as scientists', eyes to glaze over.