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Wittgenstein on Rules: The Phantom Menace

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Abstract—Ludwig Wittgenstein's work on rules has been put to a variety of uses by legal theorists. One wave of theorists employs Wittgenstein in an effort to show that law is radically indeterminate. They base their arguments on Saul Kripke's influential reading of Wittgenstein's Philosophical Investigations. This essay begins with a consideration of Kripke's view and its implications for law. Like many before, I conclude that Kripke's view is defective, and as such teaches us little about law. But it is important to explore the view in detail nonetheless, because only by doing so can we understand the mistakes of the second wave of theorists who employ Wittgenstein's remarks on rules in jurisprudential argument. The second wave includes Brian Bix and Andrei Marmor, who turn to Wittgenstein's remarks on rules to explain how it is that law can be determinate and also to show that law can often be understood without interpretation. I argue that both Bix and Marmor fail, and more importantly, that Wittgenstein's remarks on rules have little to offer legal theory. Nothing much can be learned about legal rules or legal interpretation by attending to Wittgenstein's remarks, because they were aimed at wholly different phenomena.

Ludwig Wittgenstein is the phantom menace of legal theory. He never wrote about law, but his influence is felt throughout the discipline.[1] At first his influence was indirect; H.L.A. Hart's philosophy bears its imprint.[2] Increasingly, however, legal theorists have turned directly to Wittgenstein's works for insight into the nature of law.[3] Many facets of Wittgenstein's thought raise interesting questions about law. His work on the nature of intention, for example, casts doubt on the coherence of the idea of *mens rea* and intention-oriented theories of interpretation. The subject of this essay is Wittgenstein's remarks on rules.

Wittgenstein's philosophy presents unique challenges, especially when attempting to apply it to a field as far beyond the scope it sets for itself as legal theory. The main challenge comes from the obscurity of the writing. Wittgenstein's work proceeds not through linear argument advancing a thesis, but through a series of short sections jumping from topic to topic and approaching the same

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[1] Wittgenstein occasionally mentions law. For a helpful (though not exhaustive) list of places he does so, see B. Langille 'Political World' in D. Patterson *Wittgenstein and Legal Theory* (Boulder: Westview, 1992) 233–47.

[2] For an account of the relationship between Hart's notion of the 'open texture' of legal language and Wittgenstein's philosophy, see B. Bix *Law, Language and Legal Determinacy* (Oxford: Clarendon, 1995) 7–35.

[3] This trend reached its zenith with D. Patterson (ed.), *Wittgenstein and Legal Theory* (Boulder: Westview, 1992).

subject in many different ways. Indeed, it is often hard to locate Wittgenstein's voice in his work and separate it from his frequent imagined interlocutors (whose interjections he usually denotes by quotation marks). Because of this, a significant portion of the secondary literature on Wittgenstein is exegetical rather than critical, and the identity of Wittgenstein's view is often as contentious as whether or not he is correct.

Given the nature of Wittgenstein's writings, it is not surprising that legal theorists appeal to his work for a diversity of purposes which often run counter to each other. In this essay, we shall explore two such lines of thought which use Wittgenstein for opposed purposes. The first advances a scepticism about rules and argues that law is radically indeterminate.[4] The second claims that Wittgenstein's remarks explain how law can be determinate, that they can ground the oft-drawn distinction between easy and hard cases and perhaps even show that laws can be understood without interpretation.

Many persuasive rejections of the rule-sceptic view have been offered.[5] Though I agree in substance with many previous rejections of rule-scepticism, I shall nevertheless recap the sceptical argument and its rejection here. A proper understanding of them is necessary to see the second topic—Wittgensteinian explanations of determinacy in law—in its proper light. We shall see that many of the theorists who rightly reject rule-scepticism err in the opposite way, misapplying Wittgenstein's remarks to explain certainty in the application of some legal rules. Wittgenstein's remarks lend no support to the distinction between easy and hard cases or the view that laws can be applied without interpretation.

1. *Kripke's Rule-Scepticism*

There is a sceptic present in Wittgenstein's writings, but whether Wittgenstein is the sceptic is the subject of much controversy. Wittgenstein's discussion of rules occurs primarily in sections 139–242 of the *Philosophical Investigations* (hereafter PI), though rules are a recurring topic in the *Remarks on the Foundations of Mathematics* (hereafter RFM) and the *Blue and Brown Books* (hereafter BB).[6] In the course of the discussion a sceptical position is developed which suggests that it is impossible to follow a rule because any action can on some interpretation of the rule be shown to accord or conflict with it. Saul Kripke has famously argued that this sceptical position is Wittgenstein's, that he accepts it, and offers

[4] C. Yablon 'Law and Metaphysics' (1987) 96 *Yale LJ* 613; M. Radin, 'Reconsidering the Rule of Law' in D. Patterson *Wittgenstein and Legal Theory* (Boulder: Westview, 1992) 125–55; M. Tushnet 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1982) 96 *Harvard L Rev* 781.

[5] G. A. Smith, 'Wittgenstein and the Sceptical Fallacy' in D. Patterson *Wittgenstein and Legal Theory* (Boulder: Westview, 1992) 157–88 presents a detailed account of the importance and failure of the rule-sceptic view which is more comprehensive than the one I present here; see also N. Stavropoulos, *Objectivity in Law* (Oxford: Clarendon, 1996) 147–55; Bix, above n 2 at 36–62.

[6] Quotations from PI use the following edition: L. Wittgenstein, *Philosophical Investigations,* GEM Anscombe (tr.) (Oxford: Blackwell, 1998).

what Kripke terms a sceptical solution to the problem.[7] Many disagree with Kripke on the exegetical point.[8] They argue that Wittgenstein rejects the sceptical position Kripke identifies, seeing it as symptomatic of a flawed metaphysical picture of what is involved in following a rule. We shall put aside the exegetical question, for the most part, and focus on the sceptical position itself, using Kripke's work to explore it. We will discover that the rule-scepticism many writers find in Wittgenstein fails on its own.

Kripke uses the rule of addition to present the sceptical argument. I grasp the rule of addition. As Kripke notes, part of my grasping the rule is that 'although I myself have computed only finite many sums in the past, the rule determines my answer for indefinitely many new sums I have never previously considered'.[9] Suppose that I have never considered the addition of two numbers larger than 57 (though this is false, there is a number which is the largest number I have ever added to another, so this simplifying assumption is innocuous). Now I am asked to compute the following sum:

$68 + 57$

Of course, I would answer '125'.

Kripke's sceptic challenges this answer. He says that given how I used the term 'plus' and the symbol '+' in the past, I should have given the answer '5'. Of course, this is absurd, but suppose we indulge the sceptic. What I should do is use '+' as I have in the past, but the sceptic notes, *ex hypothesi*, I have never considered this case, indeed never considered a case with arguments this large. Thus, everything I have done and thought in the past is consistent with my having used 'plus' and '+' to denote a function which Kripke terms 'quus' and represents with '$\oplus$'. Quus is defined as:

$x \oplus y = x + y$, if $x, y < 57$

$= 5$ otherwise.[10]

Kripke sums up the sceptical challenge:

> The sceptic doubts whether any instructions I gave myself in the past compel (or justify) the answer '125' rather than '5'. He puts the challenge in terms of a sceptical

[7] S. Kripke, *Wittgenstein on Rules and Private Language: an elementary exposition* (Oxford: Blackwell, 1982) (hereafter Kripke).

[8] G. Baker and P.M.S. Hacker 'On Misunderstanding Wittgenstein: Kripke's Private Language Argument' (1984) 58 *Synthese* 407; C. McGinn, *Wittgenstein on Meaning* (Oxford: Blackwell, 1984); J. McDowell 'Wittgenstein on Following a Rule' (1984) 58 *Synthese* 325.

[9] Kripke at 7.

[10] It may appear problematic that the definition of quus includes the symbol '+'. However, Kripke claims it is not problematic, as the sceptic is not questioning what I currently mean by '+', just whether or not this accords with what I meant by '+' in the past. Kripke, above n 8 at 12. As we shall see, the sceptic's position quickly leads to the conclusion that there is no fact of the matter about what I mean by '+' now. Thus, it is unclear to me, whether the sceptic is entitled to appeal to it in defining quus, but there are other ways of defining quus, consistent with Kripke's aims, which would not appeal to any meaning of '+' (for example, we could replace 'x + y' in the definition of quus with a table of the arguments and solutions for all of our previous applications of '+'), and thus we need not worry about its appearance here. A more significant worry for the sceptic's argument, which will be discussed below, is that it is presented in language.

> hypothesis about a change in my usage. Perhaps when I used the term 'plus' in the *past*, I always meant quus: by hypothesis I never gave myself explicit directions that were incompatible with such a supposition.[11]

The sceptic holds that no fact about me, about my mental states or behaviour, makes it the case that I meant plus rather than quus, or vice versa for that matter. Kripke considers a number of candidate facts that might make it so (e.g. dispositions), and in turn rejects each as either susceptible to the sceptic's reinterpretation or in some other way inadequate.[12] It is a very short step from here to see that not only is the accordance of my present usage of 'plus' and '+' with my past usage called into question, but the possibility of my meaning either plus or quus by using them in the present is impossible as well.[13] If there is no fact of the matter as to whether I mean plus or quus (or any number of other non-standard interpretations of my past behaviour we could generate), I cannot use words in accord with rules for their meaning. Rule-following is impossible. Kripke suggests that this is what Wittgenstein was asserting in the following passage from PI:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.[14]

Let us put this in the context of law. In order to simplify things, suppose that our society has a single legislator and adjudicator, Rex. Rex imposes the following law:

> [Tax]: Everyone must pay 10% of their income to the state.

However many times [Tax] has been applied, the number is finite. Furthermore, even if Rex considered how [Tax] would apply to many cases, he could not have considered how it would apply to all cases. Suppose Gates has an income which is larger than any income to which [Tax] has been previously applied and is larger than any income for which Rex has considered the application; let us suppose this number is $1,000,000.

Suppose Gates receives his tax bill, and it says that he should pay $100,000. Gates challenges this, suggesting that in order to comply with [Tax], he should pay $50,000. We would of course reply that this sum is 5% and not 10% as [Tax] requires. Gates, however, might assert that '%' as it appears in [Tax] denotes quercent, which I will symbolize with '⊙'. Quercent is defined as:

[11] Kripke at 13.

[12] Dispositions are not susceptible to reinterpretation, but they are inadequate in other ways. First, they are finite; I do not have dispositions to answer many addition problems (likely very large ones) in one way rather than another. Second, they include mistakes. Third, dispositions cannot provide normativity. If being disposed to answer a question a particular way made the answer correct, then we could have no account of making an error, as one always does what one is disposed to do. Kripke at 22–37.

[13] Kripke at 21.

[14] PI 201.

x⊙ of y = x% of y , if y<1,000,000

= 50,000 otherwise.[15]

We would think Gates crazy. But, he would assert, no fact about Rex's mental state when he imposed the rule, nor his subsequent applications of the rule, make it the case that Rex meant percent rather than quercent as the function for tax calculation. The problem is even worse than this. Absolutely any action can be made out to accord with a rule, even if the case in question is one which has already been considered. All we need do is generate a non-standard interpretation of the rule of the following form:

x⊙ of y = x% of y , before time t

= 50,000 afterward,

where t is the moment just before we offer our interpretation. No fact about Rex's mental state or the previous application of the rule, the sceptic argues, will make it the case that this function was not what Rex meant by '%' in the past.

If the sceptic is right, law, as a system of rules, is radically indeterminate. Any action can be made out to accord or conflict with any rule or set of precedents on some interpretation. Rules are useless as guides to behaviour. Rules cannot be used as justification for decisions in adjudication.[16] In short, law cannot be authoritative. Fortunately, the sceptic *must* be wrong. Or at least, there must be more to the story. After all, the sceptic's argument, if it works, undermines not just law, but all rule-following, and this includes using words according to rules, using language. Some think, and I am inclined to agree, that the sceptical argument fails on its own, that it is mistaken in some way and that we need not accept the paradox it urges. Before we explore why this may be the case, let us look briefly at the way Kripke continues the story.

2. *The Sceptical Solution*

Kripke argues that Wittgenstein accepts the sceptical argument just outlined. According to Kripke, Wittgenstein offers a *sceptical solution*. A sceptical solution is one which accepts the conclusion of the sceptical argument but suggests that the practice called into question, in this case rule-following, is still justified, because it does not require the justification rejected by the sceptic.[17] In contrast,

[15] Remember, it is possible to state this definition without using the symbol '%' by providing a table of all the previous arguments and solutions for calculations involving '%', the arguments of which are by hypothesis all less than 1,000,000.

[16] Some mistakenly identify the consequence of the sceptical position, thinking instead that it shows that *any* decision can be justified, e.g. Tushnet, above n 5. What has really been shown, if the sceptical arguments are correct, is that rules do not provide any basis for choosing one decision over another; if this is the case, it does not make sense to talk of justification. See also Smith, above n 5 at 171.

[17] Kripke at 66.

a straight solution aims to undermine the sceptical argument itself. We shall briefly examine the sceptical solution Kripke finds in Wittgenstein.

Kripke argues that in the early sections of PI, Wittgenstein replaces the truth-condition model of meaning found in Wittgenstein's earlier *Tractatus Logico-Philosophicus*[18] with an assertability-condition model of meaning. Roughly, the idea is that the meaning of a sentence is not given by what facts make it true (the *Tractatus* picture) but rather is given by the conditions under which one can assert it, the role it plays, and the utility of asserting it in those circumstances. There is no need to explore this shift in detail here. The upshot is that Kripke suggests that instead of looking for facts which make it the case that an assertion about somebody's meaning such-and-such is true, we should look for the conditions under which such assertions of meaning are made and what role they play. Or as Kripke puts it:

> All that is needed to legitimize assertions that someone means something is that there be roughly specifiable circumstances under which they are legitimately assertable, and that the game of asserting them under such conditions has a role in our lives. No supposition that the 'facts correspond' to those assertions is needed.[19]

So what are the conditions under which it is legitimate to make an assertion of meaning? Kripke suggests that what licenses such ascriptions is agreement between the rule-follower in question and the community in applications of the rule. He writes:

> *Smith* will judge Jones to mean addition by "plus" only if he judges that Jones's answers to particular addition problems agree with those he is inclined to give, or if they occasionally disagree, he can interpret Jones as at least following the proper procedure . . . If Jones consistently fails to give responses in agreement (in this broad sense) with Smith's, Smith will judge that he does not mean addition by "plus".[20]

So the conditions for the assertability of meaning statements are that the putative rule-follower agree with the community's application of the rule in a sufficient number of cases; now we need only see what the utility of such statements is. Kripke asks us to consider a transaction between a customer and a grocer. The utility of such ascriptions is that the customer, if he attributes to the grocer command of addition, expects certain behaviour from the grocer in their dealings. He does not expect him to 'behave bizarrely, as he would were he to follow a quus-like rule'.[21] Indeed, returning to the previous example, Kripke writes:

> Of course if we were reduced to a babble of disagreement, with Smith and Jones asserting of each other that they are following the rule wrongly, while others disagreed with both and with each other, there would be little point to the practice just described.

[18] L. Wittgenstein, *Tractatus Logico-Philosophicus*, Pears and McGinnis (tr.) (London: Routledge, 1995).
[19] Kripke at 77–78.
[20] Kripke at 91.
[21] Kripke at 92.

> In fact, our actual community is (roughly) uniform with its practices with respect to addition.[22]

Thus the sceptical solution is as follows. While there is no fact of the matter as to what someone means or whether or not they are following a rule, we are justified in ascribing meaning or rule-following when the application of the rule by the putative rule-follower agrees with his community's application in a sufficient number of cases. The utility in such ascriptions derives from the role they play in shaping our expectations about interaction with those to whom we attribute the rule following.

How might this apply to law? While there is no fact of the matter about what a legislature meant in enacting a rule, nor is there a fact of the matter about whether or not any judge follows that rule, we are justified in asserting that a judge is following the rule if the decision the judge gives when applying the rule agrees with the decision the community (judges, lawyers, etc.) is inclined to give on sufficiently many occasions.[23] A judge who routinely reaches different conclusions when applying a law than the rest of the community will be said not to be following the rule, and though this assertion may not be true or false (there is no fact of the matter), it serves to indicate that we cannot rely on the judge to do what the rest of us would do when confronted with similar circumstances. When there is wide disagreement about what a law requires, attributions of rule-following to anyone lose their utility; where people in the legal community disagree as to what action a rule requires, there is no such thing as following or breaking that rule.

None of the consequences so far seem too odd; indeed they bear surface similarity to many prominent theories of law.[24] However, Kripke's view does have an odd consequence. Right answers to mathematical questions, for example, become a matter of what nearly everyone would say they are. Yet, the question of what makes one answer to a mathematical question rather than another correct seems to call for a normative answer, not an empirical one. That is, it seems that '125' is the answer to '68 + 57' because that is how addition works, not because most people are inclined to say that it is the answer.[25] Indeed, we tend to think that '125' would be the right answer even if very few people recognized this.[26]

[22] Kripke at 91.

[23] And here we have a position curiously like Stanley Fish's suggestion that an interpretation is acceptable in virtue of the community's acceptance of it and not because of any facts about the meaning of the text. For commentary on the similarity between Kripke's view and Fish's, see Yablon, above n 4 at 628, 633–34.

[24] For further commentary on how Kripke's views might apply to law, see Yablon, above n 4. See also Radin, above n 4, who argues a pragmatic approach to adjudication is warranted in the face of what she sees as radical indeterminacy in law based on a Kripkean reading of Wittgenstein.

[25] Cf. Stavropoulos, above n 5 at 149 ('Meaning seems like a matter of *etiquette*').

[26] Rules can often be used to make predictions about how people will behave. Wittgenstein thought this was essential to understanding how rules figure in practices. See RFM III 64 where Wittgenstein discusses how a statute book might be used to predict how people will deal with a thief. Though a statute book might be a good prediction of how people will behave, Wittgenstein notes, this is not how people within the practice use it.

Aside from this odd consequence, Kripke's view suffers from a serious defect.[27] It takes for granted that members of a community can be justified in judging that one application agrees with another. Given the terms of the sceptical argument, it is far from clear that this is the case. Suppose Jane says '68 + 57 = 5'. Are we justified in saying that Jane's answer does not agree with ours? The sceptic will say that, given how we used 'same' and 'agree' in the past, we ought to accept Jane's answer as agreeing with ours, because in the past, we followed the rule of quagreement, such that . . . well it is clear how this works by now.[28]

Determining whether two answers agree with each other, or are the same, requires following a rule for identifying relevant sameness.[29] Perhaps Kripke would respond that what we are concerned with is not whether the answers agree (the fact of the matter) but whether or not people judge that they do (thus giving rise to utility in such ascriptions). But judging that answers agree, it would seem, can only have utility if people agree in their judgments that answers agree. This, however, seems to be the beginning of a hopeless regress of 'agrees'; in order for our judgment that we agree that our answers agree to have utility, we shall have to agree in our judgments that we agree that our answers agree. (And after a few more rounds of this, our heads will certainly hurt too much for there to be much utility in the effort.) The point is this: it does not seem possible to give a satisfactory non-circular account of judging that S's answer agrees with the one I am inclined to give, an account that does not rely on a concept of agreement. Judging that answers agree presupposes a concept of agreement, that is, it presupposes the ability to follow a rule for identifying agreement. As Stavropoulos puts it, 'sameness and differences *require* a language, rather than being able to ground one'.[30] Kripke's sceptical solution to the paradox fails because it helps itself to a notion of rule-following by invoking agreement as a condition for assertability.[31] Let us now turn to different responses to Kripke's sceptic.

[27] Perhaps I should say *at least one*. As Stavropoulos notes, for the community, there is no distinction between what seems right and what is right. Stavropoulos, above n 5 at 49. This does away with normativity for communities, though not for individuals. Some may be willing to accept this, but the issue is inconsequential if the objection presented in the text to Kripke's solution is correct.

[28] Stavropoulos makes the same point, though he uses 'schmagree' rather than 'quagree'. As he notes, it is no defence to say that the sceptic will yield in the face of the opposition of the entire community—if this was the case, the sceptic would have yielded long ago. See Stavropoulos, above n 5 at 149–50 for further discussion, including exploration and rejection of other possible responses on behalf of the Kripkean view.

[29] Wittgenstein indicates the close relationship: 'The word "agreement" and the word "rule" are *related* to one another. They are cousins'. (PI 224). 'The use of the word "rule" and the use of the word "same" are interwoven'. (PI 225). See also Bix, above n 2 at 42 ('any attempt to justify [the conclusion that two people are going on in the same way] is likely to end up with the assertion that they are following the identical rule').

[30] Stavropoulos, above n 5 at 151, citing also D. Davidson, *Inquiries into Truth and Interpretation* (Oxford: Clarendon, 1984) at 280 ('philosophers who make convention a necessary element of language have the matter backwards. The truth is rather that language is a condition for having convention').

[31] Bill Child has suggested to me that an extra move may be needed to show this. Kripke might suggest that what matters is that X finds himself inclined to utter the sounds 'S's answer agrees with mine', and that this inclination, rather than a judgment that S agrees (which is unavailable since the judgment requires the ability to follow a rule), suffices to make a practice useful. Of course, it is hard to see how the normativity of rules can arise from an inclination to utter these sounds unaccompanied by any judgment that answers agree. See also Stavropoulos, above n 5 at 150–51.

3. *Straight Solutions*

We should not lose sight of the fact that there *must* be a solution to the sceptical paradox. After all, we do communicate with language. Many writers have offered what Kripke terms a straight solution to the sceptical paradox, a solution which argues that the sceptical argument is flawed in some way. These solutions take many forms. Some are non-reductive, suggesting that Kripke's sceptic is misled because he assumes that facts about meaning and rule-following can be reduced to other facts.[32] On this view, the fact that makes it the case that I meant 'plus' rather than 'quus' is that I meant 'plus' rather than 'quus', and though we can say something about how we know this, we cannot reduce the meaning to anything constitutive. Others offer reductive accounts, suggesting candidate facts which can account for meaning that Kripke overlooked. One such view bears similarity to Kripke's in that it relies on a community to provide the background necessary for there to be a fact about whether I mean 'plus'.[33]

We cannot examine all of the proposed solutions here. However, I shall make some general remarks about what it seems Wittgenstein thought was wrong with the sceptical argument. On my view (the view shared by most Wittgenstein scholars), Wittgenstein rejects the sceptical argument his interlocutor presents. Let us return to PI 201 and consider it in full:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.
>
> It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.
>
> Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another.

The first sentence states the sceptical paradox—any action can be made to accord with a rule on some interpretation of it. The second sentence, 'the answer', is a *reductio ad absurdum* of the sceptic's position: it follows from the sceptic's position that there can be neither accord nor conflict. Since the sceptic relied on the notion of accord in articulating his position, something serious has gone awry.

In the second paragraph, Wittgenstein diagnoses what has gone wrong: there has been a 'misunderstanding'. The misunderstanding is thinking that a rule

[32] e.g. Mcdowell, above n 8; Baker and Hacker, above n 8.

[33] e.g. C. Wright, 'Rule-Following, Objectivity and the Theory of Meaning' in S. Holtzman and C.H. Leich (eds), *Wittgenstein: to follow a rule* (London: Routledge, 1981).

can only be followed by interpreting it, that interpretation is necessary to bridge a gap between a rule and the action it requires. Wittgenstein says emphatically that this is not the case. Interpretation cannot bridge any such gap. In PI 198, Wittgenstein writes:

> "But how can a rule shew me what I ought to do at *this* point? Whatever I do is, on some interpretation, in accord with the rule".—This is not what we ought to say, but rather: any interpretation merely hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.

Wittgenstein's point here, and in 201, is that any interpretation is itself subject to interpretation (in the sense that any interpretation can be interpreted, not that all need be). Any action could be made out to accord with any interpretation, and so on for each new interpretation we offer. Interpretations 'hang in the air along' with the rule because they fail to bridge the gap to action.

So now we have identified the misunderstanding which led to the sceptical position. What do we replace it with? As is almost always the case with Wittgenstein, it is more difficult to identify what he accepts than what he rejects, and this is the point at which many critics diverge. Fortunately, for our purposes we do not need a full account of rule-following; seeing that the sceptical argument rests on a misunderstanding is enough to alleviate the concerns about radical indeterminacy in law which arise from it. Accordingly, I shall keep my remarks brief, and shall focus on the feature of Wittgenstein's view which will be most important for us—the *unreflective nature* of rule-following.

Clearly Wittgenstein thinks it is possible to follow a rule without interpreting it (though as we shall see, this is not true on all occasions, and Wittgenstein means something very specific by 'interpretation'[34]). We can follow rules because we are trained to react to rules in a specific way. Through other people's expressions of approval, encouragement, rejection, etc, we are trained to give responses to rules that match theirs.[35] They smile when we get it right and pat us on the back; they frown when we get it wrong and correct our behaviour. Following rules is a social practice, a custom.[36] We know how to follow a rule because we have mastered a technique, not because we have an interpretation of the rule.[37]

Training, however, does not guarantee that we will learn to follow rules. Wittgenstein writes:

[34] See below, at 634.

[35] The use of 'match' here is not problematic in the way the use of 'same' was for Kripke's view. When we are trained to follow rules for identifying sameness, other people who already can follow those rules are the arbiters of whether or not our responses match theirs.

[36] PI 202. One of the dominant strands of the debate over Wittgenstein's remarks on rule-following is whether or not, in calling rule-following a practice, Wittgenstein is indicating that a community is necessary in order to follow rules. Though this issue is ultimately very important for understanding rule-following, I think it has little consequence for our present inquiry.

[37] See Smith, above n 5 at 173.

> For instance you say to somebody "This is red" (pointing); then you tell him "Fetch me a red book"—and he will behave in a particular way. This is an immensely important fact about us human beings.[38]

What Wittgenstein is driving at here is that it is a fortunate fact about humans that we tend to make the same generalizations from training; that we are trainable to follow rules. We can imagine that despite training, an individual might fail to grasp a rule to our satisfaction; Wittgenstein's point is that when this happens, there is nothing we could say to the deviant rule-follower to show her that she is not following the rule correctly. To make this more perspicuous, let us look at one of Wittgenstein's examples.

Suppose we train a student to expand the series $+2$. He demonstrates to our satisfaction that he grasps the rule by successfully expanding the series as far as we require from a number of starting points. If we ask him to expand the series from '5', he writes:

> 7, 9, 11, 13 . . .

and so on until we tell him to stop. Suppose further that we have never asked him to expand the series beyond 1000. Wittgenstein writes:

> Now we get the pupil to continue a series (say $+2$) beyond 1000—and he writes 1000, 1004, 1008, 1012.
>
> We say to him, 'Look what you have done!'—He doesn't understand. We say: 'You were meant to add *two*: look how you began the series!'—He answers: 'Yes, isn't it right? I thought that was how I was *meant* to do it'.—Or suppose he pointed to the series and said: 'But I went on the same way'.—It would be no use to say: 'But can't you see. . . . ?'—and repeat the old examples and explanations.[39]

Of course, our inability to justify how we go on when following a particular rule to the deviant pupil also means we are unable to justify how we continue to ourselves. Wittgenstein accepts this. He writes:

> If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do".[40]

> How can he *know* how he is to continue a pattern by himself—whatever instruction you give him?—Well, how do I know?——If that means "Have I reasons?" the answer is: my reasons will soon give out. And then I shall act, without reasons.[41]

Rather than act for reasons, we just act; we do what comes naturally. When justification runs out, we follow rules blindly.[42] Following blindly means we do not have a reason for considering one act rather than another in accord with a

[38] L. Wittgenstein, *Wittgenstein's lectures on the foundations of mathematics, Cambridge, 1939*, C Diamond (Chicago: Uchicago, 1989) 182.
[39] PI 185.
[40] PI 217.
[41] PI 212.
[42] PI 219.

rule, but Wittgenstein's point is that a reason is not necessary.[43] Rule-following is, on this account, unreflective; this will be of paramount importance in the discussion of easy and hard cases in law which follows. Importantly, we should note, Wittgenstein does not shown that *all* rule-following is unreflective, just that some cases are, cases like the ones he highlights where reasons run out. We shall return to this again below.

I have presented a bare sketch of Wittgenstein's remarks on rule-following. A full account of how we follow rules is unnecessary for our purposes; we know we do follow rules, and we know roughly what is wrong with the sceptical position. We can leave it to others to work out the details. We are now prepared, however, to consider our next topic—Wittgenstein and the determinacy of law—in its proper context.

4. *What We Can Learn From Wittgenstein*

One question we might ask is: what is the upshot of the foregoing remarks about Wittgenstein's view of rule-following for law? Some theorists, Brian Langille[44] and Dennis Patterson[45] among them, have attempted to develop more or less full-blown theories of law based on Wittgenstein's remarks. Brian Bix persuasively argues that Langille and Patterson are guilty of over-reading and misapplying Wittgenstein's remarks, so persuasive, in fact, there is little reason to detail their positions here.[46] Two more recent suggestions about what we can learn from Wittgenstein are worth considering—Bix's own and Andrei Marmor's. Bix and Marmor are both aware that other theorists have over-zealously (mis)applied Wittgenstein's remarks on rules to problems in legal theory. I shall accuse them of doing the same, although in ways far more modest than the theorists they criticize. The goal here is not to play a philosophical game of gotcha. Rather, I hope that identifying what is wrong with Bix and Marmor's treatment of Wittgenstein will show why it is not fruitful, in general, for legal theorists to dwell on his rule-following remarks.

A. *Confusing Clarity: Bix on Wittgenstein*

Bix begins by noting that Wittgenstein chose what we might call clear or easy cases of rule following as the subject of his inquiry, cases where there is no

[43] We might also say that someone is following a rule blindly if she does not enquire into the reasons for having the rule. This is not the sense of 'following a rule blindly' which is being invoked here, however.

[44] B. Langille 'Revolution Without Foundations: The Grammar of Scepticism in Law' (1988) 33 *McGill Law Journal* 451.

[45] D. Patterson 'Law's Pragmatism: Law as Practice and Narrative' (1990) 76 *Virginia Law Review* 937.

[46] Langille aims to extend Wittgenstein's remarks to explain the 'grammar' of law. Bix argues that Langille misuses Wittgenstein's notion of grammar and that the analogy he draws between Wittgenstein's rules and law fails. Patterson attempts to stake a middle ground between community theorists and individualists, arguing that interpretation through reference to the point of a rule can fix its meaning. Bix argues that this fails to help solve the problem for the types of cases Wittgenstein was working with, like the expansion of mathematical series. He further argues that Patterson uses a different sense of 'rule' that Wittgenstein. See Bix, above n 2 at 50–53.

disagreement about what counts as the correct application of the rule.[47] Wittgenstein chose the expansion of mathematical series, using a colour word correctly (though there are hard cases when applying colour words), and following a signpost as his primary examples. Wittgenstein, of course, had good reason to choose such examples. First, if he was concerned to respond to sceptical doubt about rules, it is important to formulate the scepticism to challenge the cases where we are most apt to think we are certain about what a rule requires. Second, Wittgenstein was interested in examining the normativity of rules, what makes some actions accord with them and others conflict, and it makes sense to use examples where it is uncontroversial what accords and what conflicts in order to abstract out complications which may arise in controversial cases. Last, among Wittgenstein's interests were the foundations of language and mathematics; hence, his examples were the natural ones.[48]

In the course of an excellent chapter reviewing the various uses legal theorists make of Wittgenstein's remarks about rule following, Bix writes:

> While the application of legal rules in some situations may seem as easy and as obvious as the easiest cases of applying colour terms, this will not be the case with the "hard cases".[49]

Here, and in other places, Bix suggests that easy cases in law are akin to the easy cases Wittgenstein used as examples. Nothing is wrong with Bix's remarks per se; however, depending on how they are understood, they may be misleading. We must digress briefly to see why.

Legal theorists often talk about easy (or clear) and hard cases. Different theorists draw the distinction in slightly different ways, but we can follow Bix, who says easy cases are 'legal questions that seem so obvious there is no question as to what their proper resolution should be'.[50] As Marmor notes, the distinction between easy and hard cases does not rest on how difficult they are to decide; an easy case in tax law might require a great deal of effort to resolve. Rather, the question is whether what accords with the rules is controversial or obvious.[51] Thus, 'easy' and 'hard' may not be the best terms to use for the distinction, but we have unfortunately inherited them.

[47] Bix, above n 2 at 36.
[48] Cf. Stavropoulos, above n 5 at 157
[49] Bix, above n 2 at 52
[50] Bix, above n 2 at 63
[51] Marmor attributes this insight to Raz, and indeed it has it origins in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon, 1997) 182. In the relevant passage, however, Raz is discussing the difference between regulated and unregulated disputes in law, not the easy/hard case distinction. Marmor conflates the two, saying an easy case is 'a case which is wholly determined by the legal standards'. See A. Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon, 1992) 127. This definition of an easy case begs the most interesting question about easy and hard cases—whether or not there is a right answer in hard cases which is determined by legal standards, as Ronald Dworkin and others claim. R.M. Dworkin, 'Is There Really No Right Answer in Hard Cases?' in *Matter of Principle* (Oxford: Clarendon, 1986) 119–45. Marmor earlier offers a definition similar to Bix's, which is a more helpful way to draw the distinction, see Marmor at 126. For further discussion of the problems with Marmor's discussion of easy and hard cases, see below at 633. I do not know whether Raz thinks the two distinctions—regulated/unregulated and easy/hard—are the same, but we are better off keeping them separate.

On the surface, the distinctions between easy and hard cases in law and easy and hard cases of rule-following seem the same. This may not, however, be the case. Let us use the well-worn jeep on a plinth introduced by Lon Fuller. Suppose a community has the following law:

> *Vehicles in the Park Act 1993*. (1) With the exception of bicycles and ambulances, no vehicles shall be permitted to enter any state or municipal park. (2) Any person who brings a vehicle into a state or municipal park shall be liable to a fine of not more than $100.[52]

Fuller asks, 'What . . . if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the no vehicle rule?'[53] Fuller further stipulates that the jeep is in full working order.

The case of the jeep on a plinth is a classic hard case in law. What makes it hard is that the jeep is obviously and non-controversially a vehicle if anything is. Judges might eventually construct a legal fiction that jeeps on platforms, or vehicles as part of monuments, are not vehicles, but this will be just that, a fiction (or more generously, a technical use of 'vehicle'), and it will probably be controversial as well. What makes the case hard is that though the jeep is in the extension of the prohibited class of items, some believe that the law does not really prohibit it. Perhaps some believe this because prohibition would not serve the purpose of the law, or perhaps because some believe that implicit in the law is the condition that vehicles are prohibited when used as vehicles are normally used, or perhaps some believe that the bicycle exception establishes a principle that excepts all vehicles which are not noisy, or any number of other reasons a talented advocate might concoct. Nor is it the case that everyone who thinks the jeep is not prohibited thinks that it really is prohibited, but that judges have reason not to enforce the law. Some might believe that, but others will honestly believe that the jeep is not prohibited. The upshot of this is that even though the application of the key descriptive term in a law (the term on which the case seems to turn, so to speak) may be an easy case of rule-following in the Wittgensteinian sense, the application of the law itself can still be a hard case in the legal sense. The distinctions come apart.

Now let us return to Bix's remarks about easy and hard cases. He claims, 'Some clear cases are clear—in large part—because of the (short-term) determinacy of descriptive terms'.[54] As long as we focus on the 'in large part' portion of this quote, then it is okay. It recognizes that something besides the short-term determinacy of descriptive terms in a law (which is what Bix takes Wittgenstein to have provided for) is necessary to constitute an easy legal case. Vehicle has a core of determinacy, and jeeps are within it, but our case is not easy.

[52] This formulation is from J. Waldron, *Law and Disagreement* (Oxford: Oxford UP, 1999) 124.
[53] L. Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard L Rev* 630, 663.
[54] Bix, above n 2 at 61–62 (emphasis added).

Explaining 'the source and nature of our confidence'[55] in easy cases and identifying what distinguishes them from hard cases is a longstanding problem in jurisprudence. Bix suggests that the source and nature of our confidence in easy cases in law is something like the source of and nature of our confidence that '67 + 58 = 125'. But the nature cannot be exactly the same; otherwise the jeep on a plinth would be an easy case. At most, Bix might have reason to conclude that short-term determinacy in the descriptive term at issue is a necessary but not sufficient condition for being an easy case in law. However, it is unclear to me that easy cases in law have much to do at all with the determinacy of descriptive terms. Determinacy may play only a small part. Cases like the jeep on a plinth are not uncommon. It seems possible that the distinction between easy and hard cases may rest on nothing deeper than its definition. People disagree about some cases and not about others; perhaps there is no more we can say. I am not committed to this deflationary view of the distinction; more investigation would be required. But Wittgenstein's remarks on rules do not provide deeper insight into the legal distinction. To the extent that they tell us something about clear cases of rule-following, they do not by any immediate implication tell us anything about clear cases in law. To think so is to confuse two different types of clarity.

B. *People Come to Blows Over It: Marmor on Wittgenstein*

Andrei Marmor also uses Wittgenstein's remarks on rule-following in an effort to ground the distinction between easy and hard cases. Marmor's discussion is wide-ranging, and Wittgenstein's remarks on rules play a limited role. The critique I present here is directed only at this use of Wittgenstein.

One difficulty in assessing Marmor's argument is that he is unclear about how he draws the distinction between easy and hard cases in law, and at times, he seems to slide between different definitions of the distinction. In opening his discussion, Marmor writes:

> [legal positivism] can be said to be committed to the thesis that a distinction exists between (so-called) easy cases, where law can be applied straightforwardly, and hard cases, where the issue is not determined by legal standards. The objection I intend to examine here consists in the claim that this is in fact an illusory distinction, there being, in all the relevant respects, no easy cases as the positivist would presume.[56]

The distinction as drawn in this passage is so muddled it is useless. The definitions provided of easy (cases which can be decided straightforwardly) and hard (cases where the issue is not determined by legal standards) do not really divide cases into two exhaustive categories. What about cases which cannot be decided straightforwardly, but are determined by legal standards? Marmor seems to eliminate the possibility of there being such cases at the outset—the distinction

[55] Stavropoulos, above n 5 at 140.
[56] Marmor, above n 51 at 124.

makes no room for them.[57] Further, by 'law can be applied straightforwardly', Marmor appears to mean 'without interpretation'; if this is the case, he has built into the distinction the very contentious claim that when a case requires interpretation, it is not governed by legal standards. Finally, as Marmor has drawn the distinction here, he misidentifies the objection many would level—Ronald Dworkin, and others, would argue there are no hard cases if a hard case is one whose outcome is not determined by legal standards.[58]

Marmor slides between this definition[59] and one more in line with Bix's, on which the defining characteristic of an easy case is that 'application of the rule is obvious and unproblematic'.[60] At other times during the discussion it seems that an easy case is just one in which interpretation is not necessary, Marmor's goal being to show that not all cases require interpretation. I am not sure that these latter two methods of drawing the distinction amount to the same, as I am not sure that cases which require interpretation are necessarily non-obvious or problematic.[61] Marmor's argument purports to show, based on ideas drawn from Wittgenstein, that not all law needs to be interpreted. Let us restrict our examination to this claim, as any inference from the need for interpretation to a claim about where a case falls on the easy/hard divide is problematic.

Before beginning, we need to note an important problem which goes largely unmentioned in Marmor's presentation. Wittgenstein, in his remarks on rules, uses 'interpretation' in a very odd way. Remember in PI 201, he writes:

> Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another.

This use of 'interpretation' as denoting a process of substitution or translation might make sense for Wittgenstein's theoretical purposes, allowing him to discuss the phenomena in question with a certain precision. However, Wittgenstein's use of 'interpretation' does not in any way capture what we do when interpreting generally. When we interpret a painting, we do not replace it with another painting; when we interpret a play, we do not substitute one expression of the play for another. Similarly, interpreting a law need not involve substituting one expression of the law for another. Perhaps Marmor thinks that because laws share much in common with rules, Wittgenstein's use of 'interpretation' is a

[57] Joseph Raz has suggested to me that it could be that Marmor believes there are cases which are neither easy nor hard, thus retaining the possibility of cases which cannot be decided straightforwardly but are governed by legal standards. This strikes me as odd. If these cases are not easy or hard, what are they? In any case, Marmor's method of drawing the easy/hard distinction is rife with enough other difficulties that it needs revising.

[58] An earlier version of Marmor's essay noted that this would be Dworkin's likely objection. I do not know why he deleted this from the latter version. A. Marmor 'No Easy Cases?' (1990) 3(2) *Canadian Journal of Law and Jurisprudence* 61.

[59] Which is, for example, used again at Marmor, above n 51 at 127.

[60] Marmor, above n 51 at 126.

[61] Is there anything non-obvious or problematic about understanding the restaurant patron who says, 'Please give my condiments to the chef'. It seems obvious and non-problematic that, barring any evidence to the contrary, the patron misspoke and intended to offer compliments. Stavropoulos writes, 'Clarity may only be the result of interpretation; it simply consists in the report that undoubtedly, and without need for complicated justification, the law is thus and so on such and such case'. Stavropoulos, above n 5 at 140.

natural one, and perhaps he is concerned to show that we need not interpret laws to apply them in the sense that we need not substitute one expression of the law for another. This, however, does not seem to be the aim of most interpretation of law; judges may express their interpretations by reformulating laws on occasion, but they need not. Judicial interpretation is not limited to substituting one expression of a law for another, and the theorists Marmor criticizes, like Dworkin and Fuller, are not suggesting interpretive methods which amount to substitution. The fact that Wittgenstein uses 'interpretation' as a term of art bearing significantly different meaning than the term bears generally should give us pause in attempting to extend his remarks to law. Marmor tries to do so, so we shall take up his argument with these misgivings duly noted.

Marmor musters his case that not all law needs to be interpreted by rehearsing many of Wittgenstein's arguments which we have already examined. He finds, as we did, that following rules does not always require interpretation, as supposing that it does leads to the many absurdities we identified earlier (the hopeless regress of interpretations, the meaningless of accord and conflict, etc.). He concludes that positions which claim that legal rules must always be interpreted (like Fuller's or Dworkin's) violate 'the distinction between following a rule and interpreting it'.[62]

Let us return to Wittgenstein for a moment and clarify some aspects of his remarks. Wittgenstein's remarks about rules are directed towards the functioning of language and mathematics (which is like a language in many respects). What Wittgenstein shows is that language is *unreflective* in the basic case. At the most fundamental level, we apply rules without justification, without reason, based on how we find it natural to go on given our training. Further, the fact that we do not have reasons for the way we follow a rule should not lead us to doubt that we are following it correctly; it may not even be possible to doubt that we are following it correctly (perhaps this is the source of our frustration with Kripke's sceptic).[63] Wittgenstein writes:

> Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. This is part of the framework on which the working of our language is based . . .[64]

Even if Wittgenstein's picture of rule-following within language and mathematics is correct, it is not necessarily true of all rules, not even all rules within language or mathematics. Colin McGinn, in outlining Wittgenstein's position, writes:

> where the bringing to bear of reasons *is* appropriate the possibility of doubt is correspondingly real. For when reasons are appropriately brought to bear we are dealing with beliefs and actions which are *reflective*, with respect to which reasons may be weighed and evaluated; and where the question of the goodness of a reason is appropriately raised it will be appropriate to entertain doubts about the quality of the

[62] Marmor, above n 51 at 153.
[63] See PI 212, 213.
[64] PI 240.

> reasons one has. But when an activity is as undeliberative as using language is it lies outside the sphere of the reason based and doubt ridden.[65]

Our question is what do Wittgenstein's remarks about rules tell us about law? If McGinn is right, and I think he is, they tell us almost nothing about legal rules.[66] Law is a reflective activity; one of our most reflective. We offer justifications and reasons for the way we apply legal rules, and we are willing to entertain doubts about whether or not we are applying them correctly. People come to blows over the right way to go on. And when doubts are raised, we almost always respond with reasons why one understanding of what the law requires is preferable to another.[67] This is not to say that the application of legal rules is on all occasions reflective; perhaps it is often not. But Wittgenstein's remarks are not directed at reflective instances of rule-following, and many applications of legal rules, especially by judges in courts, are carried out reflectively.

One might object, Wittgenstein has taught us something about law. 'We cannot think that all legal rules need to be interpreted; otherwise we would have an endless regress of interpretation. We must be able to apply some legal rules without interpreting them', the objection might go. There is a element of truth here, but we must work hard to find it. When Dworkin, Fuller and others suggest that all laws require interpretation, they are suggesting that judges must interpret statutes, or precedents, or other things we typically call legal texts before they can apply them. Wittgenstein's remarks have shown us that interpretation must bottom out somewhere; we must always reach a formulation we can follow without interpretation, otherwise we get caught in a regress. But neither Dworkin, nor Fuller, nor anyone else I am aware of runs afoul of this requirement. This requirement can be met on a theory that requires all statutes and precedents to be interpreted in order to be applied, as long as the interpretive process ends with something that can be understood without interpretation. This something is the judge's decision, 'The law requires X'. If the judge's decision can be followed without further interpretation, it serves its purpose as far as Wittgenstein's concerns go. The process has bottomed out in something that does not need to be interpreted in order to be followed. Nor is it helpful here to point out that sometimes a judge's decision does need to be interpreted. When judicial decisions are unclear, or when people disagree about what they require, litigation usually continues. The process always ends with a decision people understand without interpretation (in the Wittgensteinian sense).

'Still', one might object, 'Wittgenstein's remarks must tell us something about law because legal cases often turn on the application of simple concept words, very much like the colour words he addresses'. Sure enough, legal cases can

[65] McGinn, above n 8 at 22–23.

[66] McGinn is right subject to the caveat that not all language use is unreflective or undeliberative. Sometimes we do have reason for using a word one way rather than another.

[67] Cf. Bix, above n 2 at 48–49 which makes the same point. Bix also offers the injunction that 'most, if not all, of the problems in law and legal theory occur at a different level of abstraction' from the cases Wittgenstein considers. The problem is that Bix goes on from noting this to suggest that Wittgenstein's remarks might help us to understand clear cases. As we have seen, clear cases in law are different from clear cases of rule-following.

turn on the application of simple concept words. But Wittgenstein's remarks still teach us nothing about their application in law. For in law, we can have reasons for applying even simple concept words one way or another. Whereas it generally does not make sense to ask, 'Is a jeep a vehicle?', in law, it might. The answer might be something like, 'No, because the purpose of the law was to reduce noise and promote pedestrian safety and prohibiting a jeep on a monument does not serve these goals'.

What Wittgenstein really teaches us is something about language.[68] Law is carried on in language. Thus, we must eventually reach bedrock—formulations of rules we can follow without interpretation—if it is to be the case that we are communicating at all. But this is consistent with there being a lot of reason- and justification-based interpretation before we get there.

Now we can consider Marmor's arguments in some detail. I should make it clear that my quibble with Marmor is not necessarily with his conclusion; as we shall see, in a way, I think he is right in claiming that not all law needs to be interpreted. My disagreement with Marmor is over his suggestions that Wittgenstein's remarks about rule-following help show this and that the remarks cast doubt on interpretive theories of adjudication.

Marmor discusses Wittgenstein's rule-following remarks in order to illuminate the Hart-Fuller debate.[69] Hart argues that concept-words, like 'vehicle', have core applications and penumbral applications. An automobile is a core instance of a vehicle. Bicycles are in the penumbra; in some contexts they are vehicles, in others they are not. Hart uses this distinction, in part, to ground the distinction between easy and hard cases. Fuller criticizes Hart's distinction between easy and hard cases. He argues that laws cannot be understood except by reference to their purpose. A full consideration of the Hart-Fuller debate is not necessary here; in fact, this skeletal outline is enough.

Marmor argues that Fuller's 'assumption that one can understand a rule only in view of the purposes it is taken to advance, violates the distinction between following a rule and interpreting it'.[70] He claims that Fuller's position offends Wittgenstein's demonstration that following a rule does not necessarily require interpreting it. A careful reading of Fuller's argument, however, reveals that his view does not conflict with Wittgenstein's remarks on rules in any way. The reason for this is simple; in the course of his argument, every time Fuller refers to understanding rules through reference to their purpose, he is specifically speaking of laws or rules of a similar type (e.g. regulations within a university). Nowhere does Fuller claim that his assertion applies to rules of all types. He

[68] Cf. F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford: Clarendon, 1991) 64–68. Schauer makes a similar point—that Wittgenstein's remarks are instructive about how language operates, but within language, rules may operate differently. While I agree with Schauer on this point, I think his discussion suffers from a failure to appreciate the power and scope of the sceptical challenge; he brushes it aside much too quickly. Whereas Wittgenstein's remarks about rules apply only to rules at the most basic level, the sceptical argument challenges all rules.

[69] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983) 49–87; L. Fuller, above n 53.

[70] Marmor, above n 51 at 153.

does not claim that one cannot apply rules in mathematics without reference to their purpose and he makes no such claim for the rules that govern language. Fuller's examples and explicit statements (e.g. 'is it really ever possible to interpret a word *in a statute* without knowing the aim of the statute'[71]) all concern rules that are part of reflective activities, the types of rules Wittgenstein's remarks say nothing about. Marmor frames Fuller's assertion as a point about all rules; perhaps this was Fuller's view, but nothing in his writing indicates as much. As it stands, Marmor seriously mischaracterizes Fuller's position. Wittgenstein's remarks do not render it absurd; they leave it untouched.[72]

At points, Marmor seems aware that Wittgenstein's remarks do not entail that all rules can be understood without being interpreted. He writes:

> It might very well be the case that interpretation is required to determine the applicability of a rule in certain circumstances, and interpretation can, of course, be based on *reasons*.[73]

He fails to appreciate, however, that this makes Wittgenstein's position consistent with a wide range of views about the role of interpretation in law. Most importantly, it makes it consistent with views like Fuller's, on which all laws have to be interpreted.

Marmor does not just limit his discussion to Fuller. He aims to reject any view which holds that all laws need to be interpreted. Marmor overstates his conclusion. He writes:

> Hence, the thesis that one always needs to determine the purpose of the rule in order to be able to specify which actions are in accord with it, amounts to contending that the application of the rule always requires its translation into another rule, which is an obvious absurdity.
>
> Thus, unless it can be shown that there is something unique to adjudication which requires this constant translation procedure, as it were, we have no reason to doubt that legal rules *can* often be simply understood, and then applied, without the mediation of interpretive hypotheses about the rules' purposes.[74]

Marmor is right in the first paragraph of this passage, as long as he is using 'rules' to refer to all rules, rather then specifically legal rules; it is then just a restatement of the Wittgensteinian conclusion. Marmor's next claim, that this implies something about legal rules, is as we have seen false. The Wittgensteinian conclusion is compatible with all legal rules needing to be interpreted. Marmor does leave the door ajar slightly; he says his conclusion holds unless someone can show there is 'something unique to adjudication'. I question where the burden of proof lies—Marmor is suggesting that Wittgenstein's remarks give us insight into law, even though, as we have seen, they are compatible with any

[71] Fuller, above n 53 at 664 (emphasis added).
[72] Marmor offers other criticisms of Fuller's position in the debates. As they do not draw on Wittgenstein's remarks on rule-following, they are beyond the scope of our inquiry. See Marmor, above n 51 at 124–54.
[73] Marmor, above n 51 at 153 (emphasis original).
[74] Ibid at 153-154.

number of views of interpretation's role in law. Fortunately, however, we can meet his challenge. I shall suggest two ways.

The first story is simple. Law, we might say, is not an assemblage of individual rules unrelated to each other. Laws are part of a system of rules. Though we might ask what does *this* rule require, and consider a rule individually, this is not what judges are supposed to do in adjudication. Adjudication is about determining what *the law* requires, not just a particular law. To this end, any law must be considered as part of the system of laws, and this requires forming an interpretation of what role it plays in the system. Context can change meaning, and a law located in the context of a legal system may have a different meaning that we might attach to it individually. Interpretation is required to discover this.

The second story is slightly more ambitious. We need to interpret laws (statutes and precedents) when doubt arises[75] as to what their application requires (as Marmor agrees[76]). Our adjudicative procedures are only used when a doubt has been raised; indeed adversarial and advocacy-based legal systems invite the expression of doubt during adjudication. Thus it is not surprising that interpretation is an integral part of adjudication. Interpretation in adjudication is based on reasons; it is a reflective activity. The end product, the interpretation, must be something which can be followed without further interpretation. In practice, this means that no doubts have been raised about how the interpretation applies in the instant case.[77] When a decision is issued, we understand what it requires; it resolves the question.[78] Where no doubts have been raised, it is possible to apply a law without interpretation. But how often are judges asked to make decisions of law where no doubts have been raised, no competing arguments offered about how a law applies? When Dworkin and others suggest that every decision at law, every decision made by a judge, involves interpretation, their case is buttressed by the fact that an adjudicatory decision is required only because doubts have been raised and competing arguments offered. Further, nothing about the claim that all judicial decisions of matters of law offer interpretations offends against anything in Wittgenstein.

Marmor, on this story, is half-right: it is possible to apply legal rules without interpretation when no doubts have been raised about how they apply, and perhaps the vast majority of applications of laws outside of courts are clear and unreflective. But to the extent that Marmor's conclusion is one about adjudication, and it seems to be so, we can meet his challenge. What is unique about adjudication is that it occurs when there is doubt and it proceeds based

[75] We do not need to interpret to remove all *possible* doubts—just the doubts we actually have.

[76] Marmor, above n 51 at 154.

[77] It is no problem that in the future doubts might arise about how to apply the interpretation. No further interpretation is required until doubt is actually raised. We should also distinguish two types of doubt we might have about the interpretations offered in decisions. People might have doubt, as we have been discussing, about what the decision requires—'Did the judge order me to pay $10 or $15'. If they have these types of doubts, the decision will not serve its purpose. Alternatively, they might have doubts about whether or not the right interpretation has been reached—'The judge ordered me to pay $15, but I think he should have ordered me to pay $10'. Legal decisions can serve their purpose, even if they are subject to such doubts. I am indebted to Dale Smith for helping me to see the two different types of doubt possible here.

[78] Where it fails to, the litigation inevitably continues.

on reasons and justifications; in short it is a reflective activity. I hasten to add that I do not think the account I have just offered in any way follows from Wittgenstein's remarks, though it is consistent with them. My point here is that Wittgenstein's account is consistent with any number of accounts of the scope of interpretation in law, expansive ones and restrictive ones. Thus, it is an error to think Wittgenstein's remarks instruct us as to the scope of interpretation in law.

Wittgenstein's remarks were directed primarily at the unreflective activity of using language; an activity where reasons and justifications for applying rules in the manner we do often run out. Law is nothing like that. Law is reflective. People come to blows over whether laws are being followed. Further, the constraints imposed on law due to the fact that it is carried out through language are minimal. To be sure, the end result of the interpretation of a law must be able to be followed without further interpretation. Interpretation, however, can still play a large role in law. Indeed, given that we have adjudication precisely because people raise doubts about how laws apply, interpretation is a constant feature of adjudication.

We can now see why it is misguided to apply Wittgenstein's remarks to law. The arguments Bix and Marmor offer are undermined by the fact that law is a reflective activity, while Wittgenstein's remarks are directed at unreflective instances of rule-following. Wittgenstein's remarks occur at too basic a level to advance debates within jurisprudence

5. *Conclusion*

In the end, Wittgenstein's remarks tell us little about law. The sceptic has a flawed picture of what is required to follow a rule, and therefore cannot sustain an argument that law is radically indeterminate. Nor can Wittgenstein's remarks give us insight into what makes easy cases easy; nor do they tell us anything interesting about the scope of interpretation in law. Wittgenstein's remarks were directed at something wholly different. In the end, we should follow his frequent caveat, and avoid transferring conclusions we have drawn about one domain (language) to another (law). We have seen that Wittgenstein's remarks on rules have very little to offer legal theory.[79] We have exorcized the phantom menace.

[79] Stavropoulos suggests that Raz's and Fish's objections to Dworkin's interpretive theory suffer from a defect similar to that which afflicted the sceptic's argument. See Stavropoulos, above n 5 at 125–64. I have no opposition to using Wittgenstein's remarks in this sort of project. Moreover, Wittgenstein's remarks on rules throw up challenges to some tasks that legal theorists might take up. For example, Jules Coleman attempts to explain how a societal convention can project what we should do into the future. A project like this *must* overcome the sceptical argument; incidentally, I am not sure that Coleman succeeds. J. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Clarendon, 2001). The point remains, however, that Wittgenstein's remarks on rules do not have direct implications for law, even if they provide insight or present hurdles which must be met in taking on certain projects within jurisprudence.