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Dennis M. Patterson

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INTERPRETATION IN LAW—TOWARD A RECONSTRUCTION OF THE CURRENT DEBATE

DENNIS M. PATTERTSON†

Only if we implicitly accept some version of Cartesianism does the exclusive disjunction of objectivism or relativism become intelligible.

I. INTRODUCTION

RECENT SCHOLARSHIP on interpretive problems in law has evidenced a struggle between two competing conceptions of linguistic meaning. Those arguing for the possibility of “objective” interpretation of juridical concepts see their task as saving law from the clutches of nihilism. Specifically, theorists of objectivity maintain that an interpreter of legal materials is not free to fashion meaning out of whole cloth, but is constrained by interpretive rules constitutive of the interpretive process. Those discounting the possibility of objective interpretation point to the radical indeterminancy of legal texts; for them the interpretation of legal concepts is little more than the imposition of power under the guise of “neutral interpretation.”

I shall argue that the dichotomy between objective and subjective interpretation of legal texts is a false one. If the analysis of interpretive problems in law is to advance, we must jettison our preoccupation with labels borrowed from the natural sciences and begin anew the search for meaning. In reconstructing the terms of the current debate, I endeavor to show how the objective/subjective


I wish to thank John R. Troll, Esq. for his critique of earlier drafts of this article and for his continuing support of the analysis of ideas with which he disagrees.


3. For an insightful analysis of the problem of systematic unpredictability in human affairs, see generally A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 84-102 (1982).
dichotomy can be avoided and to reorder the priorities of the discourse on meaning. After all, meaning is the central focus of current concerns; that is as it should be. But we must not lose sight of the fact that the investigation of meaning in law is, at bottom, a descriptive one. That is, what we are concerned with is the means by which the language of the law comes to have significance for those who use it. This concern, in my view, is best addressed by a theory that describes how we in fact employ words in legal contexts and how those words come to have significance for us as participants in a discourse. In this way we will come to see not only that the objective/subjective dichotomy is unnecessary, but further that it impedes our ability to render intelligible the very idea of legal discourse.

The first of two positions currently taken to be exhaustive of the realm of interpretive choice, the objectivist position, is best expressed by Professor Owen Fiss, who has been a staunch critic of what he describes as “the new nihilism.” As he sees it, the views of the new nihilists undermine the activity of adjudication by denying, a priori, the possibility of objective interpretation in law. Professor Fiss sets forth an interpretive theory designed to counter the nihilists’ argument that interpreters of legal texts are given, by virtue of the nature of language, absolute interpretive freedom to “create” the meaning of a legal text. The gravamen of Professor Fiss’ argument is that objective interpretation of legal norms is possible, but only within an “interpretive community.” It is by virtue of membership in such a community and allegiance to its interpretive principles, that a judge


Gary Jacobsohn has recently advanced a “middle position” between strict interpretivism and what he terms “free-wheeling judicial review.” Briefly, his contention is that the framers’ conception of the constitution as a “document” included ideas of “natural justice,” which ideas are part of “higher law” reflected in the document. See Jacobsohn, *E.T.: The Extra-Textual in Constitutional Interpretation*, 1 CONST. COMM. 21 (1984).


6. *Id.* at 742.

7. *Id.* at 745. Fiss’ conception of objectivity is somewhat different than what the bare semantic sense of the concept implies. While imparting a notion of impersonality, the idea of objectivity need not require the presence of an interpretive standard wholly external to a judge. All that is connoted is that interpretation is an act that takes place under certain constraints. See text accompanying notes 26-33 infra.
can render decisions faithful to the ideal of the rule of law.\textsuperscript{8}

Critics of the objectivist approach regard the lack of any "essential characteristics" in legal texts as proof positive of the futility of the objectivist line of thought.\textsuperscript{9} Since legal concepts lack any "intelligible essence,"\textsuperscript{10} intersubjective verification of their meaning is impossible. Indeed, to the subjectivist,\textsuperscript{11} the ideal of judicial neutrality is an unattainable goal simply by virtue of the linguistic indeterminacy of the legal text. In short, law is power masquerading as neutral decisionmaking.\textsuperscript{12}

In this article I do not purport to resolve all the issues raised by commentators on the interpretive strategy known as "interpretivism" or "originalism." Rather, I address the limited question of how, if at all, legal discourse is free from ideological construct. However, I do hope to add a dimension to the debate that has been conspicuously absent: the perspective of the philosophy of language. As I see it, the

\textsuperscript{8} See Fiss, supra note 5, at 744-47.

\textsuperscript{9} See, e.g., Levinson, \textit{Law as Literature}, 60 Tex. L. Rev. 373, 385 (1982).

\textsuperscript{10} The phrase was first used by Roberto Unger, who defined it in this way: "The theory of intelligible essences states that there are a limited number of classes of things in the world, that each thing has characteristics that determine the class to which it belongs, and that these characteristics can be known directly by the mind." R. UNGER, \textit{KNOWLEDGE AND POLITICS} 79 (1975).


\textsuperscript{12} Describing Friedrich Nietzsche as the "patron saint of all strong textualists," Levinson ascribes to him the view that it is not the text that exerts power over the interpreter, but just the opposite: all interpretation is, to use Nietzsche's phrase, "will-to-power." Levinson, supra note 9, at 381-83.

Nietzsche's own writings suggest that his views on language are far different from the irrationalist reading given them by Levinson. In fact, Nietzsche himself suggests that we are everywhere constrained by language: "We cease to think when we refuse to do so under the constraint of language; we barely reach the doubt that sees this limitation as limitation. Rational thought is interpretation according to a scheme we cannot throw off," F. NIETZSCHE, \textit{THE WILL TO POWER} 283 (W. Kaufmann & R. Hollingdale trans., W. Kaufmann ed. 1967) (emphasis in original).

merits of interpretivism as a hermeneutic strategy cannot be assessed without taking a position on linguistic meaning. Arguments such as those over whether the values of the framers are ours, or should be ours, cannot even begin until those values are reasonably accessible. This problem of accessibility is overtly linguistic and hermeneutic in nature.

I will first describe the nature and terms of the argument between the rival camps of nihilism and objectivism, and then turn to the later work of the linguistic philosopher Ludwig Wittgenstein as the source of a philosophical position on meaning that undercuts the dichotomy of objectivism and subjectivism. After confronting a possible objection to the weight and importance of Wittgensteinian theory in meeting the claims of nihilism, I conclude with some observations on the limits of linguistic theory as a heuristic tool in solving the riddles of legal theory.

II. THE TERMS OF THE CURRENT DEBATE

Professor Fiss points to Professor Sanford Levinson as one who avows the new nihilism.13 In a recent article, Professor Levinson proffered the view that “truthful” or “correct” interpretation of authoritative texts is not possible for, at best, an interpreter of textually situated legal norms “simply beats the text into a shape which will serve his own purpose.”14 The craft of interpretation, Professor Levinson instructs us, is in no real sense an intersubjective enterprise, for there exists “a genuine plurality of ways of seeing the world,”15 each of which is no more “correct” or “true” than another.16

To put the matter formally, Professor Levinson’s argument is that because there is no inner essence of a legal (or literary) text capable of public disclosure by a reader/interpreter, then “anything is permitted.”17 Further, “what eventually gets construed as the correct

14. Levinson, supra note 9, at 385 (quoting R. RORTY, Nineteenth Century Idealism and Twentieth-Century Textualism, in CONSEQUENCES OF PRAGMATISM 151 (1982)). The initial focus of Levinson’s remarks is on the interpretation of constitutional norms, but he in no way intimates that his view is limited to this particular doctrinal area, and I see no reason for reading him as so limiting the scope of his argument.
15. Levinson, supra note 9, at 386.
16. Id.
17. Id. at 388. Definitionally, “inner essence” is synonymous with “intelligible essence.”
interpretation in any given instance is a function merely of the institutional fiat or 'coerciveness' of the interpreter."\(^{18}\)

Professor Fiss will have no part of Professor Levinson's textualist nightmare. Fiss' criticism of the new nihilists is so far-reaching that he accuses them of having "turned their backs on adjudication [and] begun a romance with politics."\(^{19}\) Despite the stinging tone of his characterization, Professor Fiss does concede a basic premise of the nihilists: adjudication is by no means a mechanical process and does, by its nature, reflect the "freedom" of the interpreter.\(^{20}\) However, Professor Fiss insists that we can have subjectivity without inexPrably committing ourselves to Professor Levinson's brand of, interpretive pluralism.

Fiss' argument for "bounded objectivity"\(^{21}\) in legal interpreta-

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In theory, no reason exists for limiting Levinson's argument to language alone. In fact, much in modern social thought centers on the problem of essences, linguistic or otherwise. In his magisterial Knowledge and Politics, Roberto Unger identifies the problem of intelligible essences as central to liberal thought. R. UNGER, supra note 10, at 79-81. In the realm of moral values, the lack of intelligible essences renders all values subjective; in every sense, choice is arbitrary.

Facts are no less immune than values to the deleterious effects of the absence of essence. As Unger puts the matter,

Because facts have no intrinsic identity, everything depends on the names we give them. The conventions of meaning rather than any perceived quality of 'tableness' will determine whether an object is to count as a table. In the same way, convention rather than nature will dictate whether a particular bargain is to be treated as contract. \(\textit{Id.}\) at 80.

Not surprisingly, the abandonment of the doctrine of intelligible essences leads to the fetishization of language; Unger comments that language is then worshipped as "the demiurge of the world." \(\textit{Id.}\)

The turmoil that ensues from the rejection of any sort of recognizable objectivity all but destroys the principal element of legalism: the classification of facts under legal rules. Without intelligible essences, Unger states, there exist "no obvious criteria for defining general categories of acts and persons when we make the rules . . . . Nor are there clear standards by which to classify the particular instances under rules when we come to the stage of applying the rules we have made." \(\textit{Id.}\) Hence law is power, for the power to name a thing is the power to decide what it is. Lacking objective standards for classification, judges are vested with unbridled power to develop their own normative metaphysics and, most importantly, to impose their private vision on litigants.

19. Fiss, supra note 5, at 740.

20. Of course, the extent of this freedom is the gravamen of the debate.

21. The concept of bounded objectivity "is suggested by the idea of the herme-
neutic circle, which denotes the parameters within which an interpretation achieves its validity and is based on the assumption that, at some point, an interpretation must make an intuitive appeal to common understandings." Fiss, supra note 5, at 745 n.12. \textit{See also} D. HOY, THE CRITICAL CIRCLE: LITERATURE, HISTORY AND PHILO-
SOPHICAL HERMENEUTICS (1978); Taylor, Interpretation and the Sciences of Man, 25 REV. METAPHYSICS 3, 6-13(1971). \textit{See generally} H. GADAMER, TRUTH AND METHOD (1975). In similar vein, Wittgenstein remarks, "Justification by experience comes to
tion is made by way of contrast with the interpretation of literary texts. A literary critic who casts about for authority and support for an interpretation of the meaning of a text may well find an alliance only with those who share the same interpretive premises (e.g., psychoanalysis, Marxism or historicism). Being a member of an interpretive literary community means that one is committed to a set of underlying premises through which the meaning of texts is disclosed. In a real sense, texts are "out there" waiting to have their meaning distilled by a set of assumptions which the interpreter and others sharing like views have validated by agreement. Of course, where one is always free to abandon one set of premises for another, the literary community will have no hold over its members, save a continuing belief in the efficacy of its premises. Thus, interpretations of texts are "true" or "correct" only within each interpretive community. Correlatively, the most that can be said of another community's interpretive work by way of criticism is that the premises taken as basic are misapplied, or that a given interpretation is internally inconsistent. With no common ground from which to speak, literary critics can only talk to "their own kind."

an end. If it did not it would not be justification." L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 485 (G. Anscombe trans. 1958).

Ronald Beiner has recently argued, following Gadamer, that disputants must necessarily "share" a concept before disputing the criteria for its application. "Even divergent judgments of the most deep-seated and fundamental kind are rooted in some relation of community, otherwise one would lack the concepts with which to disagree." R. BEINER, POLITICAL JUDGMENT 141 (1983). See also T. SEUNG, STRUCTURALISM AND HERMENEUTICS 210-12 (1982). See generally R. BERNSTEIN, supra note 1.

22. Fiss, supra note 5, at 745-46. For a recent survey of the treatment given the idea of an "autonomous text" by the New Criticism school of literary thought, see T. SEUNG, SEMIOTICS AND THEMATICS IN HERMENEUTICS 1-16 (1982). An excellent bibliography of works by, among others, the New Criticism school is found in READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM 233-72 (J. Tompkins ed. 1980).

23. For a similar view of the current state of literary criticism, see Crews, Criticism Without Constraint, COMMENTARY, Jan. 1982, at 65. See also T. SEUNG, supra note 21, at 183-212.

The tendency of much contemporary literary criticism to embrace nihilism has not gone uncriticized. See, e.g., T. EAGLETON, LITERARY THEORY (1983). The claim that we can make a literary text mean whatever we like is in one sense quite justified. What after all is there to stop us? There is literally no end to the number of contexts we might invent for its words in order to make them signify differently. In another sense, the idea is a simple fantasy bred in the minds of those who have spent too long in the classroom. For such texts belong to language as a whole, have intricate relations to other linguistic practices, however much they might also subvert and violate them; and language is not in fact something we are free to do what we like with. If I cannot read the word "nightingale" without imagining how blissful it would be to retreat from urban society to the solace of Nature, then the word has a certain power for me, or over me, which does not magically
While this interpretive pluralism may win the day in literary criticism, Professor Fiss maintains that nothing of the sort exists in the legal interpretive community—nor can it. Unlike literary critics, judges “do not belong to an interpretive community as a result of shared views about particular issues or interpretations but belong by virtue of the commitment to uphold and advance the rule of law itself. . . .[I]n legal interpretation there is only one school and attendance is mandatory.” 24 Only through allegiance to the ideal of the rule of law can a judge properly exercise authority: the power to speak with the authority of law and to coerce citizen compliance with it stems from participation in, and allegiance to, the norms of the community of legal interpreters. To command authority, however, judges must demonstrate more than mere membership in an authoritative interpretive community; they must show that their decisions are objective and not, as the nihilists charge, the imposition of ideology under the guise of judicial neutrality. The main point of Professor Fiss’ response to the nihilists is not only that objective interpretation by judges is possible, but moreover, that this possibility is a clear demonstration of the unique character of interpretation in the juridical community. 25

The conception of objectivity advanced by Professor Fiss does not require that a judge’s interpretive act be the product of a source totally external to the judge. 26 In other words, Professor Fiss does not maintain that interpretation in law is possible without human intervention; he simply denies that it is totally a product of human choice. 27 As discussed above, the first aspect of legal interpretation that Professor Fiss points to as differentiating it from literary interpretation is the idea of a single interpretive community, of which one either is or is not a member. Unlike literary criticism, where interpretive communities abound, law admits of only one interpretive group having the requisite authority to declare the meaning of the law. One cannot rightly be said to be a “member” of the legal interpretive community; one either discharges the duties of the judicial office or one evaporate when I encounter it in a poem. This is part of what is meant by saying that the literary work constrains our interpretations of it, or that its meaning is to some extent “immanent” in it. Language is a field of social forces which shape us to our roots, and it is an academicist delusion to see the literary work as an arena of infinite possibility which escapes it.

Id. at 87-88. See also D. Bleich, Subjective Criticism (1978).

24. Fiss, supra note 5, at 746.
25. Id. at 746-47.
26. See id. at 744.
27. See id.
does not. 28

The primary constitutive element of the interpretive legal community, according to Professor Fiss, is that of **disciplining rules**, “which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged.” 29 Disciplining rules preclude judges as interpreters of legal texts from assigning to those texts any meaning they wish. While Professor Fiss does not dispute the nihilist’s claim that the meaning of a legal text does not reside in the text itself, 30 he does reject the nihilist’s apparent conclusion that without a demonstrable textual essence the interpreter is free to assign any meaning to it. In short, Professor Fiss finds limits on the subjectivity of the interpreter in the set of disciplining rules that constitute the fabric of the interpretive community of judges.

Disciplining rules constrain interpretive license by specifying “the relevance and weight to be assigned to the material (e.g. words, history, intention, consequence)” 31 and by defining the basic conceptual apparatus and procedures by which interpretation must proceed. While interpretive rules may vary—for example, from contractual interpretation to statutory interpretation—their function or purpose remains unchanged: “they constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged.” 32 In other words, the disciplining rules provide an “interpretive grammar” that regulates the discourse of the interpretive community. To deny their presence, Professor Fiss claims, is to preclude both intersubjective recognition of meaning 33 and the possibility of critique from within the interpretive community.

Nothing in Professor Fiss’ position denies the possibility of disagreement within the interpretive community. 34 However, that disagreement can take either of two forms, only one of which poses any serious threat to the stability of the interpretive legal community. The less onerous form of disagreement is over the application of disciplining rules. As an example, Professor Fiss considers the problem of the proper approach to interpreting the history of the fourteenth amendment. He asks whether it is more plausible, as a matter of history, to suggest that in promulgating the amendment, the framers’

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28. See id. at 746.
29. Id. at 744.
30. See id.
31. Id.
32. Id. at 745.
33. See id. at 750.
34. See id. at 747-50.
focus was on desegregation of schools or on the elimination of the caste system.\textsuperscript{35} Disputes of this sort do not challenge the basic premise of the disputants that history is pertinent to a proper understanding of the drafters' intendment;\textsuperscript{36} they merely pose the issue of the proper application of history to an understanding of that intendment.

A more serious problem arises when the challenge comes not to the proper application of history, but to the need to consult history at all in fashioning intendment. Here the \textit{application} of history is not in question, but the \textit{relevance} of history to constitutional interpretation.\textsuperscript{37} This disagreement challenges the very basis of objectivity in interpretation: the validity of the disciplining rules themselves. However, according to Professor Fiss, such a dispute is ameliorated, if not eliminated, by the hierarchy of judicial authority.\textsuperscript{38} Once a determination of the validity of an interpretive rule is made by the highest court, its inherent authority mandates the acquiescence of lower tribunals to that interpretive choice. The juridical community overcomes challenges to the authority of its interpretive rules by virtue of the hierarchy of interpretive prerogative. No such hierarchy exists in literary criticism and, for that reason, disputes over the validity of interpretive rules remain intractable.

We are now in a position to summarize the status of the current debate between the nihilists and their objectivist counterparts. To the nihilist, interpretive choice is tantamount to license. Lacking anything that can be denominated linguistic essence, interpretive choice is little more than absolute freedom to create a metaphysics of justice fashioned out of a private vision of moral reality.\textsuperscript{39} In a sense, the nihilist is a moral/legal skeptic \textit{tout court}. The nihilist, seeing nothing in legal discourse on which participants can agree, concludes that the power to assign meaning is absolute.

Although the bounded objectivists admit the lack of intelligible

\textsuperscript{35} See id. at 747.

\textsuperscript{36} I use the word "intendment" here as a more accurate substitute for what is usually denominated "legislative intent." Since I argue words do not derive their meaning from a speaker's intention but from linguistic conventions, sentence meaning is not reducible to the intentions of a "speaker" (e.g., a legislature). See notes 47-50 and accompanying text infra. See also Patterson, The Decline of the Privity Rule in the Maine Law of Tort Products Liability: A Conceptual History, 35 Me. L. Rev. 1, 11 n.49 (1983). For a different view, see E. Hirsch, Validity In Interpretation (1967) (authorial intent as determinative of textual meaning). Hirsch has recently recanted much of his earlier position. See Hirsch, Past Intentions and Present Meanings, 23 Essays In Criticism 79 (1983). See also J. Searle, Literal Meaning, in Expression And Meaning: Studies In The Theory Of Speech Acts 117 (1979).

\textsuperscript{37} Fiss, supra note 5, at 747.

\textsuperscript{38} See id.

\textsuperscript{39} See note 10 and accompanying text supra.
essences, they do not concede that the lack of such essences mandates interpretive abandon. Particularly in law, the interpretive community, with its disciplinary rules, saves the legal text from the untrammeled whims of the interpreter. Objectivity, we are told, is not only attainable but mandatory. To deny the limits placed on interpretive freedom by the interpretive legal community is to deny both the possibility of intersubjective discourse and the authority of law. In short, meaning is the product of both the interpretive act (subjectivity) and the constraints of the interpretive community with its disciplining rules (objectivity).

Both the objectivist and subjectivist appear to have the same objective: to explain the status of meaning in legal interpretation. To the objectivist, “interpretation . . . is neither a wholly discretionary nor a wholly mechanical activity.” Meaning is neither the product of a speaker nor does it reside “out there” in legal texts waiting to be disclosed; rather, it is the product of “a dynamic interaction between reader and text.” The nihilist, on the other hand, sees the objectivist as forever damned to chasing the chimera of objectivity. Meaning, the nihilist asserts, “is created rather than discovered”; and it is created within rival interpretive communities, none of which counternances the point of view of the other.

Fortunately, we need not enter the objectivist/subjectivist debate to see that the argument has gone awry. In a sense, the fault for this lies with those who, like Professor Fiss, attempt to meet the nihilist on

40. See Fiss, supra note 5, at 744.
41. Id. at 749.
42. Id.
43. Levinson, supra note 9, at 383.
44. See S. Fish, Is THERE A TEXT IN THIS CLASS? (1980). For a similar view in the philosophy of science, arguing that scientific “communities” are demarcated along the lines of rival “paradigms,” see T. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

It is indeed regrettable that Levinson puts Thomas Kuhn in the “subjectivist” camp. See Levinson, supra note 9, at 384 n.40, 394 n.85. More than any other philosopher of science, Kuhn has sought to dissolve the false dichotomy between subjectivism and objectivism.

When my critics say I deprive theory choice of objectivity, they must, therefore, have recourse to some very different sense of subjective, presumably the one in which bias and personal likes or dislikes function instead of, or in the face of, the actual facts. But that sense of subjective does not fit the process I have been describing any better than the first. . . Objectivity ought to be analyzable in terms of criteria like accuracy and consistency. If these criteria do not supply all the guidance that we have customarily expected of them, then it may be the meaning rather than the limits of objectivity that my argument shows.

his own ground; for the nihilist is much like the radical skeptic in morals who, when presented with an otherwise cogent argument, will respond. "That is merely your point of view!" Rather than try and find fault with the nihilist's shaky syllogism that because there are no intelligible essences, everything is permitted, opposition to nihilism is best advanced not by argument but by demonstration. Let me explain.

The nihilist avers that meaning is solely the product of one's private vision of linguistic truth. Interpretation of legal concepts is, the nihilist urges, wholly dependent upon the interpretive subject. The words of the speaker have no meaning in themselves but only in relation to the intent and understanding of the speaker or reader. Again, the meaning of a word is, ceteris paribus, simply "what you say it is."

This view of meaning is not only nihilistic; it is a "red herring." Meaning neither resides in a text nor with a speaker. To coin a phrase, it is a matter of convention. To know the meaning of a word is to know how that word functions in a discourse. To know a language or technical discourse (the law, for example) is to possess the demonstrable ability to participate in an intersubjective enterprise (speaking) in which the participants are engaged in an ongoing practice. Being a participant in a practice means that one knows or can recognize when concepts are employed correctly, when they are not,
and when their use can rightly be called into question. To understand the role and function of language we must look not to subjectivity, nor to objectivity, but for meaning.

In advocating an approach to meaning different from the views of Professors Fiss and Levinson, I will draw on the later philosophy of Wittgenstein. My purpose is to advance a theory of meaning that is both superior in its explanatory power to that offered by Professor Levinson and, at the same time, responsive to the need for "objectivity" so important to Professor Fiss’ account of the interpretive legal community. Unlike my necessarily critical discussion of the subjectivist position, my analysis will show the objectivist arguments to be not so much wrong as beside the point. We simply do not need the idea of an interpretive legal community to fashion an adequate response to nihilism; for the latter, I hope to show, is a form of skepticism that contains within itself the seeds of its own demise.

III. WITTGENSTEIN’S THEORY OF MEANING

Wittgenstein’s account of linguistic meaning, as developed in his later writings, provides the analytical framework needed to undercut the skeptical claims of nihilism. In fact, the nihilist critique of legal discourse, with its roots in Deconstructionist literary theory, is precisely the sort of criticism that "reveals the significance of the model of philosophical thinking projected by Wittgenstein’s later writings." While Wittgenstein did indeed repudiate the analysis of language into logical simples evident in his youthful writing, he ultimately opted not for indeterminacy but for a theory of grammatical competence produced by education in a linguistic culture. This

50. See S. Kripke, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 74 (1982).
51. Wittgenstein is a unique figure in the history of philosophy, for he managed to develop two distinct approaches to philosophical problems of meaning. In his "earlier" work, Wittgenstein maintained that the structure of reality determined the structure of language. This approach is best represented in WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D. Pears and B. McGuinness trans. 1961), which appeared in 1921. In his "later" thought, reposed most systematically in PHILOSOPHICAL INVESTIGATIONS, supra note 21, Wittgenstein reversed his earlier view, arguing that language determines our view of reality. See generally D. Pears, LUDWIG WITTGENSTEIN (1969).
52. C. Altieri, ACT & QUALITY 39 (1981). Altieri’s book is perhaps the most thoroughgoing Wittgensteinian response to the full range of Deconstructionist claims. See also T. Seung, supra note 21, at 241-79.
53. See L. Wittgenstein, TRACTATUS LOGICO-PHILOSOPHICUS, supra note 51. See also M. Black, A COMPANION TO WITTGENSTEIN’S TRACTATUS 58-61, 206-07 (1964); J. Griffin, WITTGENSTEIN’S LOGICAL ATOMISM (1964).
education (training) enables a subject "to establish criteria for appropriateness [of concept application] and then to rely on practical considerations for defining degrees of probable relevance in hypotheses about meaning."54

Concepts derive their linguistic significance from the social wholes of which they are a part.55 The principal analytical device for elucidating how meaning is derived from context is that of the "language-game," which Wittgenstein obliquely describes as "the whole, consisting of language and the actions into which it is woven."56 The meaning of words and concepts is woven into the activities of which they are a part: their meaning is disclosed by all the language-games of which they are (or could be) a part. Since language-games have many purposes, so do the words contained within them. Understanding the part

\[ \ldots \text{requires some grasp of the whole of which it is a part.}\]

In the case of a language-game, this entails understanding what that human activity is, what it is for, why it is played. Words—at least many words—are used in many different activities. To understand the full meaning of a word requires some grasp of all the activities, the social wholes, in which the word plays a part.

The meanings of words can only be understood if we understand the purpose or ends of the human activities of which they are a part. Ignoring the different language-games and their ends or purposes when seeking the meaning of a word is like trying to understand the brake lever in a locomotive without understanding what a locomotive does, or what it is for.57

Wittgenstein's urging to look for meaning in the uses to which words are put in a discursive practice is best expressed by the following deceptively simple statement: "For a large class of cases—though not for all—in which we employ the word 'meaning' it can be defined

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54. C. ALTIERI, supra note 52, at 40. See also Hacker, Wittgenstein On Ostensive Definition, 18 Inquiry 267, 276-78, (1975).
55. See Brest, supra note 4, at 206.
thus: the meaning of a word is its use in the language." 58 On its face, this definitional statement entreats us to look for meaning not in an inchoate intelligible essence, but in the use to which words are put in a discourse.

Earlier, in The Blue Book, 59 Wittgenstein decried the nihilist premise that the meaning of a concept could be found only in an "essence" shared by its multifarious applications.

The idea that in order to get clear about the meaning of a general term one had to find the common element in all its applications has shackled philosophical investigation; for it has not only led to no result, but has also made the philosopher dismiss as irrelevant the concrete cases which alone could have helped him to understand the usage of the general term. 60

To illustrate this point, Wittgenstein directs our attention to Socrates’ attempt in Plato’s Theaetetus 61 to answer the question, “what is knowledge?” There, as in other Platonic dialogues, Socrates presses his interlocutor for a definition of knowledge that will crystallize an essence present in all its uses. But why look for an essence? Why, Wittgenstein asks, does Socrates “not even regard it as a preliminary answer to enumerate cases of knowledge?” 62

The point of Wittgenstein’s remarks is to dissolve the false dichotomy between meaning as interpretive license and meaning as determined by an objective extra-linguistic source. 63 The concrete cases that offer clues to meaning do not have a life outside the discourse of which they are a part. That is why Wittgenstein regards it as error for philosophers to dismiss as irrelevant the concrete cases that can elucidate the meaning of a general term. Concrete cases are important not because of their unilateral enjoyment of some essential element, but rather by virtue of their unique role in a discourse. 64 In short, the solution to problems of meaning lies not in the correspondence between word and object but in the established ways in which concepts are employed in a discourse. As a substitute for the essen-

58. L. WITTGENSTEIN, supra note 21, § 43 (emphasis in original).
60. Id. at 19-20.
62. L. WITTGENSTEIN, supra note 59, at 20 (citing id. at 1460-7C) (emphasis in original).
64. See T. MORAWETZ, WITTGENSTEIN AND KNOWLEDGE 58-61 (1978).
tialist rendering of linguistic meaning, Wittgenstein invites us to view the instances to which a word or concept applies as connected not by a common property but by "relevant resemblances." In the course of demonstrating his analysis by reference to the concept of a "game," Wittgenstein introduces the central notion of "family resemblance," the principal elements of which can be summarized as follows:

1. The activities we call "games" have no common properties in virtue of which we apply the same word to them all. If we look carefully at various games, we see that the dogma of essentialism — that they must have something in common — is false;
2. Consequently, there is no correct essentialist definition of "game";
3. Consequently, too, the ability to give an essentialist definition of a word is not a necessary condition of understanding it;
4. Various activities are "games" because of a complicated network of similarities; that is, a large number of relationships between these different activities. This concept resembles a long rope twisted out of many shorter fibers. It is held together by the overlapping of many similarities;
5. The network of overlapping similarities constituting the concept of a game is compared with the various resemblances between members of a family. These may be of very different kinds: resemblance in build, facial features, color of eyes or hair, gait, temperament, manner of speaking, attitude, or manners. In specifying respects of resemblance between people recognizably of the same family, we speak of such things as the Churchillian manner or the Hapsburg chin. Although we can make such respects of resemblance precise, it is not by virtue of their all having some set of common properties that we group together members of an extended family; no single property is sufficient for membership in the group, nor is any one necessary. This is what makes the metaphor of family resemblance so illuminating when applied to such concepts as that of a game;
6. The explanation of what a game is primarily consists of giving examples. Examples used to explain "game" are meant to be taken and used in a particular way, viz, as paradigmatic examples. They are, as it were, "centers of variation." One who takes them as an exhaustive list of (possible) games, would not understand the explanation correctly. Multiplicity of examples is an important feature of explaining such a concept;
7. Consequently, "game" can be explained, though it cannot be

65. L. WITTGENSTEIN, supra note 21, §§ 65-71.
given an essentialist definition. It is a fallacy to think that an indefinable expression cannot be explained;

(8) The adducing of relevant similarities justifies applications of "game" since it is on account of the relationships among games, especially on account of those between activities and the paradigmatic examples of games, that we correctly call games "games." Presence of similarities justifies our using the same word for all these activities; we call something "a game" because it is very similar to other activities that are properly called "games";

(9) All games form a single family. What holds them together and gives them a unity is the overlapping of the many similarities among games. In view of this unity, it is appropriate to speak of the concept of a game, the concept of a number, etc.;

(10) The concept of a game has no sharp boundaries. Since it is not explained by an essentialist definition, there is no rigid, precise circumscription of its extension. Instead, the explanation is by paradigms; and even if it includes a similarity-clause, it does not specify the range or degree of similarities within the paradigms required for an activity to fall under the concept of a game. Explanations by examples are comparable to indicating a place by pointing, not to demarcating it by drawing a boundary;

(11) For special purposes we can draw boundaries around the concept of a game. But whether we should draw it here or there depends only on what facilitates achieving these purposes.66

Through regularity of application, in light of a consistent purpose, the multifarious applications of a concept come to be seen as constitutive of its meaning. A speaker who comes to the point of knowing the conditions under which the use of a word is appropriate demonstrates an understanding of the word's grammar, which "includes all of the various verbal expressions in which that word is characteristically used."67 As Wittgenstein puts it: "grammar tells us what kind of object anything is."68 In short, essence is no part of the word-object relationship, for it "is expressed by grammar."69

These considerations bring us back to the central contention of the nihilist that without a grounding in linguistic essences, the act of interpretation is surrendered to a privileged subject: the judge. The

68. L. WITTGENSTEIN, supra note 21, § 372.
nihilist seeks a beginning—an object standing outside the bounds of discourse free from the clutches of the knowing subject. Only in this way can meaning be certain, for without such grounding no forum exists for the resolution of doubt and uncertainty in the interpretive community. In his quest for absolute interpretive truth, the nihilist has not only denied himself a viable ground for meaning, but has set himself a goal unattainable even on his own terms. To deny the possibility of certainty without essence requires that there be some ground for doubt that stands outside language. But if essence is to be denied, what grounds do we have for resolving doubt? All that remains is faith.

There is a deeper issue, however, for the nihilist’s “doubt” that concepts can have objective meaning is in no real sense a defensible questioning of objectivist certainty. For a doubt to make any real sense at all, “it must itself accept its second-order status as a move within an established system for testing and confirming. Doubt only makes sense where certitude is possible; doubting the possibility of certitude is a doubt with no possible resolution, and hence not a doubt but an ungrounded metaphysical statement.” Consider the following:

What would it be like to doubt now whether I have two hands? Why can’t I imagine it at all? What would I believe if I didn’t believe that? So far I have no system at all within which this doubt might exist.

Doubt is a matter of giving grounds. When I am asked by a judge, “Why does this claim sound in tort?,“ I am called upon to give reasons why an avowed cause of action should stand alongside those that have traditionally been regarded as such. But if I am asked by a nihilist judge to elucidate the concept “tort,” and am further required to do so with no reference to legal discourse, I am mute. What is it that I am being asked to supply? What possible “explanation” could be offered to assuage this kind of “doubt”? Without reference to the shared forms of legal discourse, I am reduced to silence.

This shows not that the nihilist has demonstrated that my analysis of doubt is wrongheaded, but only that doubt, as he understands

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70. Kant’s “noumena” are an example of such an object. See I. Kant, CRI TIQUE OF PURE REASON 266-75, 291-95 (N. Kemp Smith trans. 1929).
71. Altieri, supra note 52, at 49.
it, precludes the use of the shared experience upon which the language-game of doubting depends. Does this mean that the concept is in some way defective? I think not. What it illustrates is that the concept of doubt depends upon the shared forms of human experience upon which legal discourse is based. Without intelligible essences, the only ground (and a wholly sufficient one) available for the justification of conceptual claims is that of discursive experience.

The most salient aspect of Wittgenstein’s argument is that insistence on linguistic essence as a ground for meaning leads one to dismiss as irrelevant the general forms of language that provide the public basis of meaning. The practical significance of this is to demonstrate the misguided nature of the nihilist’s claim that it is impossible to have meaning without essence. Wittgenstein’s account of meaning demonstrates that discourse rests upon shared linguistic practices that are, as he says, part of natural history. 73

IV. OBJECTIONS AND REPLIES

Some readers may object that I have not completely rebutted the nihilist’s claim that there cannot be objective word meanings because the theory of linguistic practices fails to account for conceptual change. In other words, the account of meaning advanced thus far might be found inadequate, for it does not offer a direct solution to the interpretive dilemmas to which nihilists point as evidence of the incommensurability of rival interpretive paradigms. To persuade the nihilist that things are not as bad as they seem to be, my alternative account of meaning must do more than explain the stability of meaning: I must show how arguments over the application of disputed concepts can move toward resolution.

My alternative account of meaning does not provide such a methodological tool; but that has not been my purpose. To this point, I have endeavored to show only that the theory of meaning proffered by Professor Levinson is fundamentally unsound, based as it is upon a fallacious argument. I think it best to restate the nihilist argument in the following skeletal form:

(a) There can be no objective justification for the application of a general term to its instances unless those instances have something in common (e.g., an “essential characteristic” or “inner essence”);
(b) There is no such element;
(c) THEREFORE, there can be no objective justification for the

73. L. WITTGENSTEIN, supra note 21, § 415.
application of any general term. In short, "[m]eaning is created rather than discovered."\textsuperscript{74}

At the same moment that Professor Levinson advances this argument, he also admits that "our ordinary speech acts are full of meanings instantly grasped by listeners, given the standard contexts in which they occur."\textsuperscript{75} Taken together, the argument above and the claim that there exist "meanings instantly grasped by listeners" result in a contradiction. If there are no intelligible essences, and "[m]eaning is created rather than discovered,"\textsuperscript{76} then not even in cases of ordinary speech acts can there be anything in the way of objectivity; yet Professor Levinson says that there is. What goes unexplained in his account of meaning is why, given the existence of shared linguistic practices, there can be "no uniformity of rules of interpretation"\textsuperscript{77} and hence, no methodology for resolving conceptual conflict.

In responding to Professor Levinson's skepticism, I will advance an outline for the resolution of the conflicts he deems intractable by building upon the argument advanced earlier: that meaning is the product of shared linguistic practices that provide a basis for the interpretive strategy I propose. The nub of this strategy is contained in the idea that in resolving what are now often referred to as "hard cases,"\textsuperscript{78} the obligation of a judge is to look for "relevant similarities" between undisputed examples of a concept's meaning and a proposed analogue.\textsuperscript{79} The continuing importance of this methodology was recently demonstrated by Joseph Raz who, in \textit{The Authority of Law},\textsuperscript{80} provides the needed extension of Wittgenstein's theory of meaning in a manner that illustrates the important role of analogical argument in legal reasoning.\textsuperscript{81}

\begin{flushright}
\textsuperscript{74} Levinson, \textit{supra} note 9, at 383.
\textsuperscript{75} \textit{Id.} at 382 n.33.
\textsuperscript{76} \textit{Id.} at 383.
\textsuperscript{77} \textit{Id.} at 394.
\textsuperscript{78} The phrase "hard cases" is Ronald Dworkin's. He describes a hard case as one where "no settled rule dictates a decision either way." R. DWORKIN, \textit{TAKING RIGHTS SERIOUSLY} 83 (1977, 1978).
\textsuperscript{79} I use the phrase somewhat differently than Dworkin to refer to those instances where a concept's application is in question or otherwise challenged. I should like to have used the phrase "contested concepts," but that refers to a broad body of literature to which my argument is only partially directed. See Gaille, \textit{Essentially Contested Concepts}, 56 PROC. ARISTOTELIAN SOC'Y 167 (1965). See also W. CONNOLLY, \textit{THE TERMS OF POLITICAL DISCOURSE} 10-44 (1974).
\textsuperscript{80} J. RAZ, \textit{THE AUTHORITY OF LAW} (1979).
\textsuperscript{81} \textit{Id.} at 201-06. See also Murray, \textit{The Role of Analogy In Legal Reasoning}, 29 U.C.L.A. L. REV., 833, 850-58 (1982).
\end{flushright}
To avoid initial confusion over the point of his remarks, Raz urges that in making an analogical argument, it is not at all helpful to look for the extent (in terms of raw numbers) of similarities between the concrete case and the proposed analogue. As he puts the matter, "it is not the number of differences [or similarities] but their importance which counts. What, however, is the test of importance?"

In commenting on this point, James Murray notes correctly that "[t]wo analogues can be similar in many respects, and yet one difference between them may destroy the value of the analogy." In deciding the strength of an analogy, one must not look to raw numbers, but must adduce reasons why a proposed analogue ought or ought not to be brought within the ambit of a rule containing the unchallenged case.

The strength of any proposed analogy is a function of the degree to which the addition of the new analogue, and thus a new legal rule, will advance "the underlying justification of the rule which forms the basis of the analogy." In short, "if a given reason is good enough to justify one rule, then it is equally able to justify another that can be derived from it in a similar way."

An example may prove helpful. In *Davis v. Colonial Securities Corp.* the defendant corporation leased a house to the plaintiff for a monthly rental of $150.00. The written lease provided that the plaintiff was to pay all taxes assessed against the property, make repairs at her own expense, pay water and sewerage charges, insurance, plus interest on the unpaid balance at the rate of 11 3/4%. The lease further provided that it was for a one month period, renewable monthly and terminable by either party on ten days notice. At the expiration of ten years, the plaintiff was to receive a deed to the property upon payment of the sum of $1.00. The sole issue in the case was whether this arrangement constituted a "credit sale" under the provisions of the Federal Truth-In-Lending Act (the Act) and the regulations promulgated under it by the Federal Reserve Board.

82. J. RAZ, supra note 80, at 203.
83. Id.
84. Murray, supra note 81, at 852 (Murray's use of an analogy between man and ape is helpful in making his point).
85. J. RAZ, supra note 80, at 204.
86. Murray, supra note 81, at 852 (quoting J. RAZ, supra note 80, at 208-09).
88. Id. at 303. See 15 U.S.C. § 1602(g) (1983). Section 1602(g) provides: The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggre-
Despite the contrary holdings of many courts that had previously considered the question, Judge Giles of the Eastern District of Pennsylvania held that the transaction was a credit sale within the purview of the Act. The court dismissed defendant's argument that the lease could not fit within the meaning of "credit sale" where both parties had the right to terminate it on ten days notice. The court's analysis in reaching its conclusion is exemplary.

First, the court discerned the Act's legislative purpose to be that "of benefiting the consumer by eliminating unscrupulous and predatory credit practices." Further, the legislative history of the Act revealed a genuine concern on the part of its drafters to distinguish between "true leases," which are not covered, and disguised credit sales:

The definition of credit sale is also limited to include leases only if they are, in essence, disguised sale arrangements. The language covering disguised leases is nearly identical to the language used in the Uniform Conditional Sales Act and in many state retail installment sales acts to distinguish between "true leases" and other leases.

Additionally, the court noted that in drawing the distinction between disguised credit sales and true leases, the meaning of each concept is in part determined by state commercial law, for "congress intended to employ language already in use in state commercial law when it included leases in the Section 1602 (g) definition of a credit sale."

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90. 541 F. Supp. at 302, 305 (citing Johnson v. McCrackin-Sturman Ford Inc., 527 F.2d. 257, 262 (3d Cir. 1975)).


Whether a lease is intended as security is to be determined by the facts of each case; however:

(1) The inclusion of an option to purchase does not of itself make the lease one intended for security; and

(2) an agreement that upon compliance with the terms of the lease
In light of these considerations, the court discerned the following relevant resemblances between the "lease" in question and a credit sale:

(a) The lessee was granted an option to purchase for little or no consideration;
(b) Monthly rentals were credited toward the purchase price;
(c) Thus, the plaintiff acquired an equity interest in the property as the payments were made;
(d) The rental fees of $150.00 per month for ten years totaled $18,000.00, an amount far in excess of the property's fair market value of $2,000.00;
(e) The incidents of ownership shifted to the lessee under the agreement (e.g., responsibility for making repairs). 93

The only attribute of a sale transaction absent between the parties to this agreement was that the "lessee" was never obligated to pay the aggregate value of the property or its substantial equivalent. Yet, in light of the purposes of the Act this difference, standing alone, is insufficient to outweigh the importance of the five similarities between this agreement and a credit sale.

Unilateral focus on the absence of an obligation to pay an outstanding balance is precisely the sort of essentialist reasoning Wittgenstein's analysis is designed to prevent. Advancement of the underlying purpose of the Act—distinguishing between true leases and disguised credit sales—counts as the reason (justification) for finding this agreement to be an instance of the meaning of "credit sale.” By virtue of the purpose of the Act, these resemblances are relevant and, perhaps, overwhelming.

This solution to the problems of interpretive choice is hardly a panacea for all interpretive dilemmas. Much jurisprudential ink has been spilled over the proper justification or choice of reasons for extending a primary analogue;94 but that ink has not been wasted, for

the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

93. 541 F. Supp. at 306.
94. For example, Dworkin's contention that principles are morally antecedent to policies as a source of justification for judicial decisions is hotly contested. Dworkin's arguments for the axiological superiority of principles are contained in R. DWORKIN, supra note 78. Kent Greenawalt disputes the priority of principles in Greenawalt, Policy, Rights and Judicial Decision, 11 GA. L. REV. 991 (1972). For Dworkin's response to Greenawalt (and others), see R. DWORKIN, supra note 78, at 294-330. See also RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247-300 (M. Cohen ed. 1983).
these arguments contain an implicit justification of the Wittgensteinian approach to meaning and discourse. If no common ground exists for arguments over the proper choice of reasons for analogical extension of unchallenged cases, then there can be no argument at all that one reason is to be preferred over another. Normative claims for the superiority of any given form of justification cannot even begin until some agreement exists as to the meaning of primary analogues. To deny, as the nihilist does, any common ground of meaning is to preclude resolution of these larger jurisprudential inquiries into the nature of justification in legal argument. Were this the condition on contemporary legal discourse, it would indeed be unfortunate. Thankfully, it is not.

V. Conclusion

The limited nature of my characterization of the argument between nihilism and objectivism stems in large part from the radical nature of Professor Levinson's claims concerning linguistic meaning. As I understand his argument, Professor Levinson reposes absolute interpretive power in judges; they are, in a real sense, the lone keepers of the law. This is the claim to which my disputation has been directed.

In opposing Levinson's position, I have sought to justify the claim that legal discourse enjoys a modicum of stability that is not mere fodder for judicial ideology, but something from which judges fashion fresh legal arguments as they go about the business of adjudicating novel lawsuits involving claims that pull at the fiber of legal discourse. Argument by analogy is proposed as a possible tool to relieve this conceptual tension. Admittedly, as a form of argument, it is by no means free from abuse.

95. Jurgen Habermas makes the same point with respect to the understanding of "forms of life" other than our own (or earlier stages of our own social development). An interpreter of an alien culture must have the ability to isolate reasons for actions taken by the participants. A judgment that a validity claim has been made does not inexorably entail the conclusion that the claim is supported by good or bad reasons. See generally R. Bernstein, supra note 1, at 182.

96. For a similar understanding of Professor Levinson's position, see Graff, supra note 17, at 405-06.

97. See Kairys, Legal Reasoning, in The Politics of Law: A Progressive Critique 11-17 (D. Kairys ed. 1982) (criticizing the U.S. Supreme Court's disingenuous use of reasoning by analogy in certain of its labor law opinions). Unfortunately, Kairys jumps from this lone demonstration of a misuse of analogical reasoning to the extravagant conclusion that judicial decisions ultimately depend on judgments based on values and priorities that vary with particular judges (and even with the same judge, depending on the context) and are the result of a composite of social, political, institutional, experiential, and personal factors.
The relative stability of legal discourse affords us the opportunity to assess competing arguments for the expansion (and contraction) of the doctrinal sphere. When we consider the relative worth of the claims these arguments make upon us, we have moved from the realm of the (linguistic) given to that of political choice. That is the business of social and political theory. If anything is clear in my argument, I hope it is this: without the relative stability of legal discourse, the possibility of normative choice in law is absolutely precluded. As an interpretive strategy, nihilism's greatest sin is not to render us mute, but to persuade us that the role of politics in law is utterly transparent.

Id. at 14. For a similar view, see generally J. Frank, Law and the Modern Mind (1930).

The analytic tradition of philosophical thought is itself not entirely free from irrationalist tendencies. Owing to his perception that it leaves the determination of "relevant resemblance" to the imagination, the arch-empiricist David Hume found an irreducible element of irrationality in reasoning by analogy. See J. Harrison, Hume's Theory of Justice 226-28 (1981).

98. See P. Bobbitt, Constitutional Fate (1982).