What We Do Not Doubt: A Critical Legal Perspective

Louis E. Wolcher

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol46/iss6/3

This Essay is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
What We Do Not Doubt: A Critical Legal Perspective

by
LOUIS E. WOLCHER*

These remarks offer a perspective. It is a perspective from which the existence of limits on thought and speech about law can be recognized and accepted—not just as a theory, but as a fact of life. There can be no doubt about it: the illusion that there is, in principle, nothing of importance that human beings cannot think and speak about has led people to make grossly stupid pronouncements about the nature of law, and then to do vile and hurtful things to one another in the name of what they have said. These remarks want to dispel that illusion, but at the same time they do not want to create a brand new illusion to take its place. Thus, they try to show (not describe) the limits of legal thought—an endeavor which is not at all the same as describing (or even showing) the law that lies within the limits. In doing what they do, however, they will request their readers to journey along with them all the way to where the limit lies.

The second half of the title is meant to identify this article as belonging to the corpus of work that is known under the name “critical legal studies.” In legal scholarship, as elsewhere, being critical means taking very little for granted about what is discussed. These remarks do indeed take very little for granted about legal thought, including many of the concepts that are associated with the critical legal studies movement. In this they aspire to follow the example of Ludwig Wittgenstein, a thinker of whom it would not be unfair to say: “This guy took just about nothing for granted.” While Wittgenstein laid the conceptual foundation upon which the thoughts in this article stand, he did not write much about legal matters. If these remarks happen to make an original contribution to critical thought, it will be because

* Professor of Law, University of Washington School of Law. Special thanks are due to the many students and faculty at Hastings College of the Law whose words and deeds allowed me to conceive of this project, and whose support and encouragement allowed me to complete it. The usual tedious list of names will be omitted.
they take law as their theme, and not because they can claim to have invented a new way of looking at things.1

This is not an interdisciplinary article. But if some readers come to think of it as one, I hope they do not think of it as the kind of interdisciplinary article wherein the author applies ideas taken from one field to problems taken from another. The very best interdisciplinary pieces of this sort, perhaps with titles like "The Relevance of Wittgenstein's Philosophy to Law," would not be as good as the following two-sentence publication: "To professional lawyers: Please read Wittgenstein and then think about law. To professional philosophers: Please read law and then think." Applying an idea is not the same as understanding it, even if we do measure other people's understanding of an idea by how well they are able to apply it.2 But more importantly, if someone else's thoughts change your way of looking at the world, then it would not be right to say that you apply or even understand those thoughts while you are looking at the world anew.

Articles which say what no one but the author understands are not worth writing. On the other hand, articles which do not credit their readers with possessing the passion, and the will, to think for themselves are not worth reading.


2. But cf. REMARKS ON THE FOUNDATIONS OF MATHEMATICS, supra note 1, at 283 ("Now when does one understand [a mathematical proposition]?—I believe: when one can apply it.").
"I must plunge again and again in the water of doubt."3

1. The concept of “not doubting” is a key that unlocks many doors.

2. A hard case is hard because it can be said that its result is doubtful. But there are two kinds of easy cases: those of which it can be said that the result is not doubtful, and those of which this cannot be said. The latter kind of easy case will be called a case wherein I do not doubt the result. That it is called this is literally nonsense: for if I cannot say of an easy case that its result is not doubtful, how can I call it a case wherein I do not doubt the result? Nevertheless, it is the kind of nonsense that is extremely serious and important. From the standpoint of people who write words for others to read, that which cannot be said—and the value of showing it—must be shown by that which can be said. Their words must allude to what is truly important.

3. A says: “I cannot say ‘x’.” B rejoins, with the sneer of one who knows he has caught his opponent in the trap of saying something illogical: “But you’ve just said ‘x’, so obviously you yourself have proved that you can say it.” A then says: “Yes, it’s true: I can say ‘x’ in your sense of the words ‘can’ and ‘say’. But you’re not listening to what is important about the nonsense I uttered when I said ‘I cannot say “x”’. You must be very patient, and then you will able to hear what I mean when I say that I cannot say ‘x’.”

4. If a thought can be thought at all, it can be spoken about. This does not mean that all thinking consists of words. It means, rather: If it is possible to think a thought, it is also possible to speak about it, whatever the phenomenon of thinking itself may have consisted of while it was happening. A “case” is anything—legal or otherwise—that can be thought about from a point of view. A “result” is the resolution of a case. If a result is thought about, it too is a case. A “point of view” is not a state of mind, but rather the point of view from which I do not doubt my point of view. A case, including a result that is thought about, is something that can be spoken about. But I cannot think or speak about the point of view from which I do not doubt my point of view.

5. If it is possible to speak meaningfully about reading as something separate from comprehending, these remarks are often difficult

3. Remarks on Frazer’s Golden Bough, supra note 1, at 1e.
to read because they employ so many negatives, including double negatives. This is unavoidable. The expression "I do not doubt not liking her" has a different sense, in common usage, than "I doubt liking her." The first says the same as "I am certain that I do not like her," while the second says the same as "I am not sure I like her." And while "I am certain that I do not like her" would be a much clearer way than "I do not doubt not liking her" to say that I am certain that I do not like her, this is not the kind of thing I want to say when I say that I do not doubt a result. Like what Garfield says in the last frame of this cartoon,

"not doubting" must keep its form throughout these remarks if the concept of "not doubting a result" is to be thought clearly.

6. Words trick us into believing that they do more than they can do. For example, what would it be like if there were a different word for every kind of law? Would the word "law" in the expressions "the law of contracts," "the law of the case," and "the law of the jungle," be replaced by three different words that signify three different types of law? If there were a special word in each case, it could not signify a type of law unless our language included a word for law.

"Mango" and "banana" could not signify types of fruit unless there were a word for fruit in our language; without a word for fruit, the most anyone could say is: "A mango and a banana are types of these," while pointing now at an apple, now at a pear, now at an orange, and so on. One might say that the word "fruit" in the sentence "These things are types of fruit" is used to say that these things are

similar; but that the words "these things" in the sentence "Look at these things" (spoken while pointing at a mango and a banana) are used to draw attention just to these things, and that does not name their similarity.

If we had no word for law there would be only "the a of contracts," "the b of the case," "the c of the jungle," and so forth. If someone now said, "Since we do have the word 'law', the foregoing thought experiment shows that we use it in different ways," it would be quite true, as far as it goes. But it is also the case that our different uses of the word "law" do not just correspond to the letters a, b, and c in the thought experiment. There is a sense in which our uses of the word "law," all added together, are law. The sense of this is: Even if there really were more to law than the sum of all our uses of the word "law," we would be unable to say or show what it is without using the word "law" in an expression—including the expression, "Law is this," spoken while pointing at something. But any expression we could utter in explaining what law is would also amount to yet another use (by us) of the word "law." How could this use of "law" succeed in describing the more to law that exceeds any possible use of "law," without itself being vulnerable to the charge that it is just another use of the word? (Metaphysical expressions are still, after all, just expressions—gravity keeps them fixed to the surface of the very same earth on which all of the more mundane forms of speech must also dwell.) "Law" is a snowball rolling downhill, gathering uses as it goes. But "law" also shouts to us, as it goes, "Look at me, and pay no attention to my snow."

7. "Not doubting" shouts the same thing as "law." This paragraph and the last do not deny the possibility of making empirical, ontological, and normative statements about not doubting or about law. Nor do they deny the possibility of giving ostensive definitions of these terms—they do not deny, for example, that I could say "not doubting" while pointing at Picasso's mural Guernica, and "law" while pointing at the walls of a prison. Rather, these are logical remarks on the most that any possible empirical, ontological, or normative statement about not doubting or law would reduce to, if it were pushed hard enough. The most it would reduce to is: "Not doubting

---

5. From the Latin ostendere: "to show." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1597 (1976).

is this,” or, “Law is this.” (We push hard when we are relentless in asking people to give meaning to the signs in their expressions, including the signs they use to express the meaning of the signs they just used a moment before.)

8. Suppose someone said: “Not doubting is this,” while pointing at something, “and law is this,” while pointing at something else. Do the speaker’s two words “this” and “this” have different meanings? Here there is a grave danger of going astray, for above all we must resist the temptation to say that the word “this” means something different in the two parts of the expression just quoted. If words alone have any meaning at all, the word “this” means the same whether it is spoken here or there, now or then. What is the case is that the word “this” is used differently: It is used now this way; and now this way; and now this way, and so on. Moreover, what is true for “this” is also true for words like “law,” “justice,” and “due process.” When Roberto Unger remarks that, for the critic, “the only solution to the problem of language is the use of old words in new ways,” he fails to see that every time we use words we use them in a way that can be called “new.” This situation now is never identical with that situation then, no matter how similar they may appear to be, for if we push the concepts “same” and “different” hard enough we can see that a thing and what it is like must be two things in order for it even to occur to us to call them the same or different. “Ways of using words” signifies those uses of words which we group together because we think they are alike; but our occasional acts of grouping them together are not there along with the uses—these acts come after, or before, but never with the uses. Here it must be said that what gives the previous sentence its most important sense is the recognition that our expressions of the ways in which words are used—our verbal groupings—together of word-uses—are themselves uses of words. (Indeed, verbal groupings of what are thought to be the most important of these groupings of uses are what those who write the intellectual history of a particular period do—they do this, for example, when they say things like “The deep structure of treatise a, restatement b, and leading case c is that they all share assumption d about the relationship between reason and desire.”) Contrary to what Unger supposes,8 an argument could never confer on words meanings (in my sense of the word “meaning”) they previously lacked. Rather, an argument is a kind of use of words that constitutes the meaning of the words it uses. Unger’s remark would be

7. ROBERTO UNGER, KNOWLEDGE AND POLITICS 16 (1975).
8. Id. at 12.
closer to the mark if it told would-be critics: "The only solution to the problem of language is to use words, such that critics and non-critics alike begin to doubt things about the legal system that they previously did not doubt."

9. Suppose someone spoke the following words, perhaps in the context of trying to elucidate Wittgenstein’s concept of a "language game":

"When words are woven into actions on a particular occasion, an explanation of the particular word-action combination could be called an explanation of 'how words are used on that occasion.' But it is also the case that certain word-action combinations are regularly repeated enough times to justify their being grouped together into a set—a set we might call a 'language game.' It could also be said that sometimes different language games are similar enough to one another to justify being grouped together into a set of language games—a set whose expression we might call 'stating the family resemblances' that connect various language games to one another. Finally, it could be said that the 'meaning' of a word is the role or roles that it plays in one or more language games; and further, that to utter a word outside of the context of any of the language games to which it belongs—to rip it away, as it were, from all of the forms of life in which it is embedded—is to speak nonsense. Speaking nonsense is what philosophers and law professors do when they ask questions like 'What is the essence of law?', rather than 'How is the word "law" used in the many language games in which it appears?'"

If someone spoke these words, I would tell him, "You’ve done a reasonably good job of elucidating Wittgenstein’s use of the words 'language game' and their related concepts; but you’ve not gotten down to what I mean in these remarks when I talk about 'not doubting a result.' To help you begin to do that, read this passage from Peter Strawson’s paper, On Referring:

To give the meaning of a sentence is to give general directions for its use in making true or false assertions. It is not to talk about any particular occasion of the use of the sentence... The meaning of a sentence cannot be identified with the assertion it is used, on a particular occasion, to make."

9. See Philosophical Investigations, supra note 1, at 5e ("language game" represented as a whole process of using words, “consisting of language and the actions into which it is woven”).
10. See id. at 32e, 72e-73e.
11. See id. at 20e.
Now imagine yourself saying to Strawson: “Isn’t there something going on when you use these words on this particular occasion? And why isn’t what is going on then worth talking about? Why, for example, can’t I pay attention to what’s going on then, and even call what’s going on when you use these words on this particular occasion the ‘meaning’ of the words? (Maybe you would prefer that I called it the ‘gnxz’ of the words—would that make you happier?) What is there to stop me from playing the language game of drawing attention to this particular word use—including what happens each time philosophers and law professors speak nonsense (in Wittgenstein’s sense of the word ‘nonsense’)—as a way of showing people how to understand the concept of ‘not doubting a result’?”

10. Wittgenstein’s concept of the “family resemblance” that can exist among various language games is meant to draw attention to the fact that language games can be similar in some respects, yet at the same time different in other respects, just as the members of a family can look alike in some ways, yet unalike in others. The concept, in

13. Here is Wittgenstein’s elucidation of the concept of the “family resemblance” that can exist among different language games:

66. Consider for example the proceedings that we call “games”. I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don’t say: “There must be something common, or they would not be called ‘games’”—but look and see whether there is anything common to all.—For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look!—Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all “amusing”? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; can see how similarities crop up and disappear.

And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.

67. I can think of no better expression to characterize these similarities than “family resemblances”; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross in the same way.—And I shall say: ‘games’ form a family.

And for instance the kinds of number form a family in the same way. Why do we call something a “number”? Well, perhaps because it has a—direct—rela-
these remarks, of "this particular word use" is meant to draw attention to the ways in which particular word uses can also be different from one another, even if they are also very, very similar to one another—similar enough, for example, for us to group them together by means of an expression like, "These word-uses belong to the language game of saying 'x' in context y."

11. Suppose someone were now to say: "What you've just said is all well and good. But when you describe what you call 'this particular word use' you do not, after all, invent a brand new set of words for each description. You use old words. These old words have a history of use in this or that kind of context—they establish a frame of reference, one might say, by means of which everything (no matter how particular it is) acquires its shape in the expression that is used to describe it. The language games in which words exhibit their regularly repeating (and thus general) uses are thus always prior to your use of those words to give a description of this particular word use. This is what Strawson meant when he said 'The meaning of a sentence cannot be identified with the assertion it is used, on a particular occasion, to make.'14 This is why Wittgenstein concerned himself with language games, rather than with what you call 'this particular word use.'"15

If someone were to say this, I would wholeheartedly agree with him. I would also say: "You've given the beginnings of a good account of the way language organizes—perhaps even constitutes—our perceptions of reality. You've shown that the solution to puzzles like 'Which came first, the chicken or the egg?' is not to be found in the nature of chickens or eggs, but rather in the grammar of the words 'chicken,' 'egg,' and 'first.' But these remarks are not about the way language structures our perceptions of reality. They are about something altogether different. Only if you accept that will you be able to see what I mean by the concept of 'not doubting a result.'"

12. When I look at a chicken, my eyes do not see the conditions of the possibility of the chicken. When I say "There's a chicken!", my

---

15. Cf. ZETTEL, supra note 1, at 12e ("Like everything metaphysical the harmony between thought and reality is to be found in the grammar of the language.").
voice-box does not send out sound waves which contain the conditions of the possibility of my saying it.

13. There is a sense in which a word cannot be taken out of context, for what happens when we take a word out of context is itself a kind of context. What we call a "context" is the environment in which a word is used—it is used this way in these circumstances, for example—and what we call "taking a word out of context" is what happens when we use a word one way, rather than another way. It could be said that the relation between what we call "understanding a word in its context" and what we call "taking a word out of context" is like the relation between using a hammer to drive nails and using a hammer to stir soup. Try this experiment: Think of the meaning of the word "law" outside of any possible context. What happened when you were doing this? (When I did it, I closed my eyes, and an image of the sign "LAW," inscribed on the brown cover of a West Publishing Company casebook, floated before my mind's eye; then I wrote this sentence.)

What happens when we think and speak of the meaning of a word outside of its context is a kind of context for the word; and what we do when we think and speak in this way is a kind of use of the word. This shows that the expression "You're taking this word out of context!" is used as a reproach for someone who misuses a word in some context—and a misuse is a kind of use.

14. The biblical story of the tower of Babel: God saw the tower that the monolingual people of Shinar were building, and became worried that there was nothing that they would not be able to do. So he went down and confounded their language, that they would not be able to understand one another's speech.

Is this the only reason that they left off building the tower? The story mentions that the people had already made bricks and mortar. After he confounded their language, did God also destroy their stock of building materials? Did he erase the people's memories of how to build? Did he paralyze them, too, so that they lost their ability to point at, lift, and place the bricks and mortar? The story does not say. This is what the penultimate verse tells us: "So the Lord scattered them abroad from thence upon the face of the earth: and they left off to build the tower." One wants to ask: If you and I speak in different tongues, has God made it impossible for us to build something together? One wants to say: The people of Shinar stopped building the

16. I do not doubt that this is not a plug for West Publishing Company.
17. Genesis 11:1-9 (King James).
tower, but this was not because all of a sudden they began to use different symbols to express the same thing.

* * * *

15. Every now and then people who study law call themselves names like "man," "woman," "black," "white," "Asian," "Hispanic," "Native-American," "gay," "straight," "lawyer," "judge," "law professor," "economist," "social scientist," "conservative," "liberal," "radical," "Marxist," "crit," "feminist," "critical race theorist," "postmodernist," "nihilist," and so forth. But whatever they call themselves, when they are reading the report of a law case they do not doubt that they have eyes to read with: their not doubting this is one of the things they all have in common.

16. Anyone who understood and agreed with the last paragraph did not doubt, as he or she understood and agreed with it, that all people who study law have the gift of sight.

17. A speaker and a listener both use the words that are spoken, just as a carpenter and an occupant both use the door that is installed in the house. Thus, hearing or looking at a word and understanding it can be called a kind of use of the word. However, ordinarily this kind of use covers up any experience of understanding that may have happened in us while we heard or looked at the word and understood it in this way. Try this experiment: Say, "Law is merely the expression of elite ideology." Was there an identifiable experience of understanding the particular words "is," "merely," "the," and "of" that happened in you as you pronounced this sentence? If not, are you nonetheless inclined to say that at least you experienced something distinct about the meaning of the sentence as a whole (e.g., certain images floated before your mind's eye) as you said it? If you do say that you detected an experience of understanding that went along with your pronunciation of this sentence, try reading the sentence out loud again. Now pronounce it again; and again; and again. Did an identifiable experience of understanding happen in you each of these times as well? (One might say that repetition drains meaning out of words like time and gravity drain water out of an unplugged bathtub.) If sometimes there is something we are inclined to call an "experience of understanding" that goes along with our speaking, hearing, and looking at words, far too little attention is paid to the fact that its duration and its intensity vary widely, and to the fact that this experience is identifiable by us only sometimes. Here it can be both helpful and misleading to draw a distinction between utterances (the expressive use of
words—words conceived as pieces of behavior (speech acts)—as in the phrase “Stop that!”) and *propositions* (the use of words to convey information about the world, as in the expression, “The number of justices sitting on the United States Supreme Court is nine”). The distinction is helpful because it is relatively easy to see from our experience that utterances tend to come out of our mouths spontaneously, unaccompanied by a discrete inner experience of understanding the words of the utterance. But the distinction is misleading if one assumes that, in contrast to what does not happen in the case of utterances, a discrete experience of understanding usually does accompany the speaking or writing of a proposition. This means: The use of the word “use” in these remarks is useful, but only so long as one sees that it conceals an error within itself. “Use” is far too active a verb to describe what usually happens as we speak and write words—utterances and propositions—in an everyday manner. (One might just as well say, for example, that while we are asleep we use our pillows to drool on.) This shows one of the reasons why these remarks employ the concept of “not doubting a result”: The concept turns away from the most enduring picture that the verb “use” gives us—the picture of a user first choosing, and then consciously utilizing, that which is used.18

18. “My not doubting a result is not necessarily a state of mind in which I am thinking about the result”: This expression is really quite misleading, but at least it is a start. Suppose that a result depended on my having a big toe on my right foot. If someone were to ask me, “Do you doubt whether you have a big toe on your right foot?”, I should answer her “No,” and I would not even have to take off my shoe and sock to make sure. And if she were then to ask me, “Did you doubt whether you had a big toe on your right foot five minutes ago, before I

18. Cf. these remarks by Heidegger, which index the word “use” for his purpose of translating a fragment of text written by the pre-Socratic Greek philosopher Parmenides: 

Starting with this use that is practiced by man, we shall try to point out the nature of using. It is not anything that man first produces and performs. “Using” does not mean the mere utilizing, using up, exploiting. Utilization is only the degenerate and debauched form of use. When we handle a thing, for example, our hand must fit itself to the thing. Use implies fitting response. Proper use does not debase what is being used—on the contrary, use is determined and defined by leaving the used thing in its essential nature. But leaving it that way does not mean carelessness, much less neglect. On the contrary: only the proper use brings the thing to its essential nature and keeps it there. So understood, use itself is the summons which demands that a thing be admitted to its own essence and nature, and that the use keep to it. To use something is to let it enter into its essential nature, to keep it safe in its essence.

*MARTIN HEIDEGGER, WHAT IS CALLED THINKING?* 187 (J. Glenn Gray trans., 1968).
started asking you questions on this subject?" I would still answer her
"No," even though I am forced to admit that my right big toe was not
on my mind at all before my inquisitor brought it up. This shows that
it would not be right to say of my not doubting, five minutes ago, that
I had a big toe on my right foot: "My not doubting this consisted of a
state of mind in which I was thinking about my right big toe."

19. "Well, then, I believed, assumed, and took for granted, five
minutes ago, that I had a big toe on my right foot": Yes, we do use
this kind of expression sometimes for cases of this sort. But whatever
it does mean in this context—in this use of it—it does not mean that
my right big toe was on my mind when I believed, assumed, and took
it for granted. The expression, "A penny for your thoughts," does not
offer a penny for what you are not thinking about.

20. A skeptical philosopher might say: "That $8 \times 12 = 96$ every
time you calculate it is not absolutely certain, for after all you could be
making a computing error. Even if you used a very good calculator, it
could be broken when you use it. And it would be no answer to say
that checking your calculation very carefully would make it absolutely
certain, for no matter how many times you checked it you could not
be absolutely certain that you did not make a mistake while you were
checking." By means of examples like this she might even get you to
agree that the words "the laws of nature" always come down to mean-
ing the same kind of thing as this statement means: "That time will
continue to run in only one direction, and that we will continue to be
held to the surface of the earth by the force of gravity, are only very
highly probable, and not absolutely certain." Still, at the end of the
day—when she asks you to pay her for your eight-hour philosophy
lesson at her hourly rate of $12—both of you do not doubt that you
owe her $96. And after you hand her the money, both of you also do
not doubt that you can walk home to dinner. The important thing to
notice here is that the ground for your payment and your walking-
home is not an inference from what you observe about yourself—you
do not watch yourself and say, "This is what I am probably going to do
next," and then do it.¹⁹ In other words, my not doubting something is
connected to the fact that I hardly ever infer my probable actions
from my words and deeds—although of course other people often do,
just as I often draw inferences about their probable future actions
from what they say and do.

¹⁹. Cf. 1 Remarks on the Philosophy of Psychology, supra note 1, at 135e.
21. The half-life, as it were, of a result's doubtfulness can be very short. The previous paragraph comes down to this: There is a game in which I can ask you "How do you know that?", and then keep on asking you "But how do you know that?" each time you give an answer. A skillful inquisitor in this game can get people to admit that they do not know for sure things that they did not doubt before they played the game: such as that they have a big toe on their right foot, that there once was a judge who called himself "Benjamin Cardozo," that $8 \times 12 = 96$, that there is an external world, and so forth. People are disposed to say, "These results are doubtful" during a very short span of time—the time it takes to play the game for most people, perhaps a bit longer for professional philosophers. A judge who attended an evening class on philosophical skepticism would not doubt during the daytime, while he was reading Cardozo's opinion in the Allegheny College case, that Cardozo existed and wrote this opinion. And if a lawyer could be found to argue to him that it is not absolutely certain that Cardozo existed and wrote the majority opinion in the Allegheny College case, he would be a rare judge indeed if he did not respond, "That Cardozo existed and wrote this opinion is not doubtful."

22. Imagine a judge who does not doubt that white people are superior to all other people. Let this judge be told every now and then by persons whose opinions he is required to pay attention to—say, judges from a higher court—that anyone who believes that white people are superior to all other people is a racist and not fit to hold judicial office, and moreover, that if such a person does by accident happen to attain judicial office he must not let this belief affect his judging in any way. Even let this judge think and say to himself, while he is listening to the opinions of his superiors, "That white people are superior to all other people is doubtful." (One might say that at these times, but not at other times, he is nagged by doubt.) This case is analogous to the case discussed in the previous paragraph. One similarity is this: Just as it is not likely that it would occur to a lawyer to argue that Cardozo did not exist, so too it is not likely, these days at least, that it would occur to a lawyer to argue that white people are not superior to all other people. (It could be said that the falsity of the first proposition, and the truth of the second, are taken for granted in the courtroom, but this would be a misleading way to state why it would probably not occur to anyone to argue these propositions.)

20. Allegheny College v. National Chautauqua Bank, 156 N.E. 173 (N.Y. 1927) (promise to give money to college is supported by consideration consisting of the college's implied promise to set up a memorial fund in the name of the donor).
One difference between the cases is this: If a lawyer were to argue that Cardozo did not exist, it is highly likely that a judge would say, “That Cardozo existed is not doubtful”; whereas if a lawyer were to argue that white people are not superior to all other people, it is highly unlikely (these days) that the judge described in this paragraph would say “That white people are superior to all other people is not doubtful.”

23. A close comparison (but not a paraphrase!) of the cases discussed in (21) and (22) shows one of the most important meanings of the expression “Racism runs very deep in our society.”

24. Is a racist judge a racist while he does not doubt his racist views? It can be said that he is. But who says so? We can say of him, “He is a racist.” He can say of himself, “I held racist views once,” and even, “This thought I am having is racist.” But he cannot say of himself, “The racist views I do not doubt are racist,” because while he does not doubt them there are no racist views for him to say this about. Or is it the case that a judge who is also a member of the Ku Klux Klan always thinks to himself, over and over, “The white race is superior to all other races” while he is brushing his teeth, driving to work, eating his lunch, etc.?

25. I can watch him sleeping and will myself to say, “He sleeps.” I can wake up and will myself to say, “I slept.” But while I am sleeping I cannot will myself to say “I sleep.” Even if I muttered the words “I sleep” out loud as I slept, to say that I willed myself to say this would make just as much sense as to say: “While I was dreaming that it was raining poodles, I willed the sky to keep raining poodles.”

26. Is a judge who holds racist views a racist while he is unconscious? What would it mean to say of him, while he is unconscious, “He is a racist”? We say of the human being who called himself “Adolf Hitler” that he was a racist. But would anyone say of him today that he is a racist? And if someone today did say “Adolf Hitler is a racist,” would this mean anything more than that Hitler’s racism lives on in others, even though he himself is dead? If we say of an unconscious judge who is less influential than Hitler, “He is a racist,” does this mean anything more than that he was a racist before he became unconscious, and that he will become one again once he regains consciousness? (How we know these things about him, and what the word “racist” means, are not the point here.) Does his being a racist while he is unconscious consist of his having a disposition to be one? What does “his having a disposition to be a racist” signify in this context—that his racism is located (stored up) somewhere in his brain?
Where, exactly, is it located, and what does it mean, anyway, for a disposition to be "located (stored up)" in his brain? While he is unconscious, does he take down his disposition from a shelf in his brain when he wants to have a racist dream? If a neurosurgeon located and snipped out the exact spot in the judge's brain tissue that is responsible for his racism, would the still-unconscious judge immediately stop being a racist? And suppose that a racist judge who is unconscious does not undergo this radical operation, and that he dies before regaining consciousness. Would we still say of him that he nonetheless "had a disposition to be a racist while he was unconscious"? Well, does a rock that was used to murder someone—if no one ever picks it up again—have a continuing disposition to be a murder weapon?

27. Consider the secret racist, who never lets on to anyone else that he holds racist views. Would it be right to say of him, "He is a racist"? Well, who could say that about him? Being a secret racist: What would it be like to be a racist if no one else could say of me, "He is a racist"? Well, I would experience certain feelings, think certain thoughts, and do certain things. I might also think, "These feelings (or thoughts, or actions) are (or are not) racist," and even "These feelings (or thoughts, or actions) are (or are not) true (or right, or good, or moral)." Would there be anything more to my being a secret racist than this? And if there were anything more, could anyone but me say what it was? This remark is not about the metaphysics of being a secret racist, but about the most that any possible metaphysical statement about being a secret racist could mean.

28. This shows why racism is such an intractable problem. And the same can be said about sexism and homophobia. If someone were to answer, "But you have not said yet what racism, sexism, and homophobia are—you have given me no definitions of these terms," I would have to reply that that completely misses the point.

29. While we are both speaking our minds, there is no essential difference between my not doubting the meaning of the words "the" and "is," and a racist judge's not doubting the meaning of the words "Black man" and "Jew." This shows how important it is to think clearly about the concept of not doubting a result. If someone were to reply, "On the contrary, your example proves the uselessness of the concept, for if everything is doubted then nothing is certain, and human beings can't live that way," I should readily agree with him that human beings can't live that way. But who ever said that every-thing should or could be doubted?
30. If I do not doubt that a glass is a glass, should I also decide on principle never to doubt what substance it contains before I lift it to my lips? If I do not doubt that she is a black woman, should I also decide on principle never to think about what I have not doubted about her?

31. I sometimes say of my own thoughts that they are true (or false), right (or wrong), good (or bad), moral (or immoral), and so forth. But can I say these things of something that I do not doubt? Well, if I do not doubt that I have eyes to see with, I would have to think, "I do not doubt that I have eyes to see with" to be able to say of this thought, "What I am thinking is true (or good, etc.)." But while I can think this thought, it is not the case that I always must think it while I am reading the newspaper, viewing a painting, looking at the students in my class, etc. On those occasions when I do not think "I do not doubt that I have eyes to see with," it would not be possible for me to say of it that "This thought is true (or good, etc.)." This is not an assertion about psychology, but a logical remark on the grammar of "saying something about something."

32. When I do not doubt a result it makes no sense to say that I am "rejecting" other possible resolutions of the case. A judge who does not doubt that the plaintiff's name is Mary Smith does not reject the possibility that her name is John Smith, or that she is a defendant. Only that which is noticed can be rejected, and while I do not doubt your name and your role, it would not be right to say that I am also noticing and rejecting other possible names and roles for you. (This is a remark on the grammar of "noticing something" and "rejecting something.") So, for example, it would not be right to say that on those occasions when antebellum southern state court judges did not doubt that people whose ancestors came from Africa were slaves, they were "rejecting the possibility that they really were free men and women." Likewise, it would not be right to say that on those occasions when a law professor does not doubt that he is teaching the law of contracts to his students, he is "rejecting the possibility that he is really teaching the ideological superstructure of advanced capitalism."

And if, notwithstanding what this paragraph asserts, you still say that the not-doubted results herein entail a "rejection" of other possible results, I would reply: "You certainly are using the word 'rejec-

21. Here "grammar" does not mean the rules of syntax or semantics which grammarians assert that we violate when we say things like, "These ideas is my dog." Rather, these remarks follow Wittgenstein's idiosyncratic use of "grammar" to mean "any investigation of the use of language." PHILOSOPHICAL OCCASIONS, supra note 1, at 69 (emphasis added).
tion' in an unusual way here! Are you sure you're clear on what the concept of 'not doubting a result' consists of?"

33. While I do not doubt, I perpetuate nothing. But that which I do not doubt is perpetuated. If a judge says, "This result is not doubtful," when he actually thinks that it is doubtful, it could be said that it is the judge who legitimates the result. Whereas if the judge says, "Judgment for the defendant," when he does not doubt the result, it would be better to say that it is the statement itself which does the legitimating.

34. The previous paragraph is really very poorly expressed: It leaves the impression that somehow I could escape the place, as it were, of my not doubting and talk about what it is that I do not doubt; whereas in truth the paragraph is just a remark on the grammar of "perpetuating something" and "legitimating something." It would make sense for us to say that a result is perpetuated or legitimated, even though the judge himself does not doubt it, because we can find it doubtful. But if we, too, do not doubt the result, how could we say these things about it? In a group of people who do not doubt that the United States is a free society there would be no one who could say "You know, it is possible that this is an unfree society."

35. The following remark has just enough truth in it to be dangerously misleading: "Suppose it is the case that everyone in the world would apply a rule the same way to these facts, because they do not doubt that this is the correct result. That this is the case should not be taken as evidence that the application of the rule is securely grounded in something outside of its own performance (e.g., 'consensus'). For example, this fact should not be cited as evidence in support of the proposition that here, at least, the rule is determinate. Rather, the fact that everyone in the world would apply the rule the same way to these facts is in and of itself the ground for our saying that this result is 'grounded in a determinate rule.'" The reason that this remark is dangerously misleading is shown by the following bit of nonsense: "If the remark's author includes himself among the people referred to by the signs 'everyone in the world' contained in his expression, then he could not have written the remark. For if everyone in the world does not doubt that this result follows from the rule, then there would be no one in the world who could assert that the result is determined by the rule... If everyone in the world fell asleep at the same time, then there would be no one in the world who could will themselves to assert 'Everyone is asleep now.'"
36. When I do not doubt, the concept of “my saying that I do not doubt a thought” makes no sense, for there is no thought for me not to doubt. And when I do not doubt, the concept of “my saying that I do not doubt an idea, a concept, a paradigm, a perspective, a viewpoint, an attitude, a belief, a creed, an ideology, etc.” also makes no sense, for there are none of these for me not to doubt either. If someone were to object: “But antecedent thoughts, ideas, concepts, paradigms, perspectives, viewpoints, attitudes, beliefs, creeds, and ideologies can cause me not to doubt,” I would reply that this misses the point, for the cause of my not doubting something is not the same as my not doubting it. Or is it the case that, if I am a religious person, my belief that God created everything in the Universe is on my mind while I am brushing my teeth—do I always think, as I brush, “God made my teeth”? 

37. “The whole is the sum of its parts” does not mean the same as “The whole is the sum of its causes.” This is why the following expression sounds wrong: “What I see when I see a beautiful daffodil on a fine spring day is exactly equal to the sum of: earth + seed + water + fertilizer + sunshine + the passage of time + light reflecting off of the flower and onto my retina + chemical changes or electrical impulses beginning at my optic nerve and passing through to my brain cells + etc. etc.” A description of how it is that we see what we see, and a description of what it is that we see, respond to two different questions and adopt two different points of view. One might say that the causal point of view on what we see divides a finite amount of attention and energy between what is to be explained and the antecedents of what is to be explained; whereas the acausal point of view cares only to look very closely at what we see. For example, if someone were to say “What I see when I see a daffodil consists of a visual image of the daffodil,” the words “visual image of the daffodil” would show that she has a causal point of view on what she sees, but no clear idea of what it is that she sees, or even (as yet) what its causes are. The following drawing by Descartes adopts the causal point of view on seeing:  

22. As Gaston Bachelard puts it, this is the kind of statement that “explains the flower by the fertilizer.” GASTON BACHELARD, THE POETICS OF SPACE xxvi (Maria Jolas trans., 1969).

But Descartes’ drawing and its point of view should be contrasted with Wittgenstein’s remark that “nothing in the visual field allows you to infer that it is seen by an eye,” and with Wittgenstein’s drawing of what the form of the visual field is not like:24

One might say that for Descartes the arrow that is seen is merely an example of the kinds of things we see. Whereas for Wittgenstein the arrow would not be a kind of thing at all: It would be this arrow that is seen. One might further say that Wittgenstein wants to really see the arrow (what is in the visual field), and to say what he sees;25 but Descartes is so eager to say why he sees anything at all that the arrow (and all the rest of the things in the visual field) get represented as mere data that feeds into his head. And if, with Kant, we divide the world into unknowable noumena (things-in-themselves) and knowable phenomena (our perceptions of things in the world),26 it would still be the case that the best point of view for describing the cause of our perceptions is not necessarily the same as the best point of view for describing what our perceptions are.

24. From Tractatus Logico-Philosophicus, supra note 1, at 57 (Propositions 5.633 & 5.6331).
25. The later Wittgenstein is content merely to explain the grammar of “see,” allowing us to see for ourselves what it is we see, and what it is that it would be inappropriate for us to say that we “see.” E.g., Remarks on Colour, supra note 1, at 16e (“I don’t see that the colors of bodies reflect light into my eye.”).
38. Wittgenstein writes: "People who are constantly asking 'why' are like tourists who stand in front of a building reading Baedeker and are so busy reading the history of its construction, etc., that they are prevented from seeing the building."\textsuperscript{27} In the following cartoon, for instance,\textsuperscript{28}

\begin{center}
\textbf{QUALITY TIME} \\
Gail Machlis
\end{center}

\begin{center}
\includegraphics[width=0.5\textwidth]{cartoon.png}
\end{center}

Daddy! Look how beautiful the moon is!

That's a quarter moon, son, it's WAXING. That means it's getting bigger.

WANING is when it gets smaller after a full moon. It's called a gibbous moon when it's almost full. The phases of the moon influence the tides, too. You see the moon orbits the earth at a speed...

Reprinted by permission of Chronicle Features, San Francisco, California.

\textsuperscript{27} CULTURE AND VALUE, supra note 1, at 40e. Notice that Wittgenstein's remark seems meant to have a merely epistemological payoff—it seems to say the equivalent of "Don't ask 'why' quite so much, and then you will be able to see (and know) much better how it stands with things that exist right now, before your very eyes." Compare this interpretation of Wittgenstein's remark with the seemingly ontological import of what Nietzsche has Zarathustra say: "[T]he thought is one thing, the deed is another, and another yet is the image of the deed. The wheel of causality does not roll between them." FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA 65 (1969).

\textsuperscript{28} Machlis, S.F. CHRON., June 12, 1994, (comic strip in weekly feature Sunday Punch) at 1.
one could say that it is only the son who really sees the moon, although it is also the case that his father is trying to teach him how not to see it. Someone who said, "This legal decision is explained by legal doctrine x operating in conjunction with ideology y" at an appropriate time would give us evidence that he knows how to respond to the question, "Why was the case decided this way?" But it would still be in doubt whether he knows how to respond to the questions, "What is this decision? (I mean, what really happened here?)" and "How was it with the judge when he made this decision?" One might say that the causal point of view is constantly looking over the shoulder of legal words towards their causes and effects, whereas the acausal point of view locks its gaze straight into the eyes of the way these legal words are used. There is a difference between, on the one hand, studying the use of words as an effect of something (e.g., "The importance of property rights in the U.S. Constitution is explained by . . .") (legal historiography); or studying the use of words as a cause of something (e.g., "The rule of strict liability in tort gives people an incentive to . . .") (law and economics); and, on the other hand, just studying how words are used (e.g., studying how they are used by people who are constantly talking about causes and effects).

39. Talking about causes and effects is not necessarily a bad way of talking. It's just that it's not the only way of talking.

40. The expression "This result is not doubtful" is often used to say the same thing as "This result is certain." But when I do not doubt a result I am certain of nothing. Neither am I uncertain of anything. Only something that can be spoken about can be called "certain" or "uncertain." And even if something that cannot be spoken about really is certain or uncertain, despite the fact that no one can speak about it, there is no one who could think or say "It really is certain (or uncertain) that . . . ." Imagine that there once existed an exotic kind of dinosaur, but that no human being knows about it yet. Before anyone discovers that it existed, it is possible to imagine someone saying, with sense, "It is certain that any new species of dinosaur that is hereafter discovered must have become extinct no later than the end of the Mesozoic period." But can we imagine someone saying, with any sense that he or we would understand, "It is certain that this unknown exotic species of dinosaur became extinct no later than the end of the
Mesozoic period”? No one could point at anything like the following picture, for example,29

![Dinosaur Drawing](image)

Fossils of a previously unknown dinosaur species, Cryolophosaurus ellioti, have been uncovered near the South Pole. Not only do they show for the first time that large meat-eating dinosaurs lived in Antarctica 200 million years ago; they also show that the climate of the region was far milder, similar to that of the Pacific Northwest.

© 1995 AP/Wide World Photo

to give sense to the words “this unknown exotic species of dinosaur” in the previous expression. This paragraph does not assert that it would be empirically impossible for someone to speak these words—someone could mutter them in his sleep, for example, and he might even be able to describe the exotic new kind of dinosaur that he was dreaming about when he spoke them. But if this happened, would he also say, “It is certain that my dream dinosaur became extinct no later than the end of the Mesozoic period”? And even if he did say this, would anyone understand what he meant? Although the expression “I do not doubt it” is indeed often used to say the same as “I am certain of it,” the words “certain” and “uncertain” are more of a hin-

29. The picture and accompanying text are from *Meat-Eating Dinosaur Once Roamed Antarctica*, N.Y. Times, May 6, 1994, at A12 (also reporting that the fossils were first unearthed in 1991).
drance than a help to understanding the concept of my not doubting a result.

41. Suppose someone said: "I can speak about my not doubting a result in the same way that I can speak about my wordless thoughts. That is, the things in me (hidden assumptions, etc.) that I do not doubt are available to me introspectively, and thus can be put into words—can be spoken about—in a way that is like the way that my wordless thoughts are available to me introspectively and can be spoken about." What an extremely misleading expression this is! But before the sense of the last remark can be shown, we must ask: What does it mean to say that there is such a thing as a thought about something? Well, it must first be noted that our uses of the word "thought" itself are extremely varied—it is just not the case that "thought" signifies only one kind of thing. Here are three examples:

(a) A neuropsychologist might use the word "thought" as a name for the physiological process of thinking (e.g., the different chemical and electrical changes that happen in us while we are thinking about this or that). He might say, for instance, "As the subject thought about various dates in history, sensors detected increased activity in the medial aspect of his orbital front cortex. I conclude that his thoughts on the subject of time took place in that region of the brain, and consisted of this increased activity."

(b) Or the patient of a psychotherapist might use the word "thought" to report on the phenomena that went on in him as he was thinking. Suppose the patient says, in the middle of a therapy session, that he is hungry. His therapist asks him to describe exactly what his hunger-thoughts consisted of. The patient might now say, "The thought I just had consisted of the image of a Reese's Peanut Butter Cup passing through my mind, while I said to myself, inwardly, 'Mmmmmm, that would be good to eat!'"

(c) Or someone might use the word "thought" to say what he thought, without meaning to refer to the mental processes or phenomena that went on inside him at the time that he thought it. Thus, he might say, truthfully, "I thought to myself that this cow was barren and would not breed,"\(^30\) even though these words constituted no part of what happened in his mind as he was thinking this. It would not be right to say that he is lying just because his statement fails to describe accurately the state of his mind when he had the thought he had; rather, in this use of the word "thought" he would be summarizing, as

it were, what it was that preoccupied him during the time that he is reporting on. Another way to put this would be to say that neither he nor we care what phenomena were going on in his mind at this time; he is interested in telling, and we are interested in hearing, only a coherent statement of what he thought. And this interest might come from our involvement in a conversation with him—the kind of conversation, for example, in which a lawyer uses the word “thought” in the course of doing what is called “eliciting testimony from someone about something.”

42. The speaker at the beginning of the previous paragraph—the one who said “I can speak about my not doubting a result in the same way that I can speak about my wordless thoughts . . .”—is using the word “thoughts” in the sense described in paragraph 41(b). He is saying that a person can describe his not doubting a result in the same way that he can describe the phenomena of his wordless thinking (the images, etc., that happen in him when he is having these kinds of thoughts). But before the truth of this claim can be evaluated, it must be asked: What does it mean to say that someone can “describe the phenomena of wordless thinking”?

43. Imagine this case: Although no music is being played outside of me as I go for a walk in the woods (nor am I humming music to myself), phrases from Rachmaninoff’s Vocalise keep floating through my mind—I hear the music in my mind’s ear, one would like to say. Someone asks me: “What are you thinking about?” I answer her: “I was thinking about Rachmaninoff’s Vocalise.” Now she asks a new question: “Of what did your thinking about this music consist?” Suppose I reply: “My thinking was wordless: It consisted of my hearing phrases from Rachmaninoff’s Vocalise in my mind.” Does “my hearing phrases from Rachmaninoff’s Vocalise in my mind” mean that, as I was wordlessly thinking about the Vocalise, there was also going on in my mind, at the same time, my seeing of the words “Rachmaninoff’s Vocalise,” and my reception of sound waves made by an orchestra playing that music somewhere in my head? Well, surely there is not, inside of me, a page with inked words on it, and a group of tiny people playing musical instruments. Nor do I have a third eyeball inside my brain to see my thoughts with, nor a third cartilaginous ear inside my brain to hear my thoughts with. My wordless thoughts are not seen by my eyes; nor are they heard by my ears. And whatever else they may be, my wordless thoughts are definitely not worded.

No: When wordless thinking is described in words, the most that can be said is that words of the present stand in as proxies for the wordless thoughts of the past. (And one probably ought not to say even that, on the ground that descriptions of wordless thinking occur in language-games in which the words are not used as a proxy for anything else—for a proxy can be replaced by what it is a proxy for, whereas wordless thoughts cannot replace what represents them in speech.)

44. The concept of "describing a thought accurately" is not the same as the concept of "describing the process of thinking accurately." A scientist might know how to describe what happens physiologically inside of someone who is thinking (chemical changes going on in this or that region of the brain, etc.) much better than I could ever describe it. But can a scientist also describe this thought—the one I am having right now—much better than I can? Well, is there always a scientist at my elbow who could talk about my thoughts? And suppose that a brain surgeon and a neuropsychologist do happen to be passing by, and I tell them about the image of a lawyer arguing a case that just came into my mind: Are they now better placed than I am to describe the gestures the lawyer is making, or what shade of blue her suit is? The best expert for describing what is in my mind—my images, thoughts, and memories—is usually me. And what of the case in which I grope unsuccessfully for just the right word to describe what I am thinking, and someone else gives it to me? Well, if someone else occasionally does help me to describe what is in my mind, in the end I am the one who must ratify our jointly produced expression as being an accurate description of my thoughts when I say, "Yes, that's exactly what I was thinking." For if I withhold ratification on the ground that the expression that another offers me does not describe my thoughts accurately, then in that case the other's expression would no more truly depict my thoughts than the brown glove that someone offers me from the lost-and-found bin would truly replace the black one that I lost.

45. A law student's acquiescence in her professor's restatement of her views and their implications, after the student has been led through the usual series of Socratic hoops, does not prove that the glove the professor offers her is the same one that she lost.

32. This is a variation on Wittgenstein's argument against the doctrine of private objects. See, e.g., PHILOSOPHICAL INVESTIGATIONS, supra note 1, at 100e, 207e. To say that Wittgenstein argued against the doctrine of private objects, however, is not to say that he denied the existence of private experiences. See, e.g., id. at 165e.
46. How does someone else compare my description of my wordless thought with what it describes? Indeed, if all I want to do is simply show someone else what the name "wordless thought" names, how shall I do even this? Consider these two cases of the ostensive definition of words:

(a) A says "This is called an 'apple,'" while pointing at an apple.
(b) B says "This is called a 'wordless thought,'" while pointing at his head.

Let us say, provisionally, that the difference between these two cases is the difference between pointing at a public object and trying to point at a private experience. Someone's gesture of pointing at something outside of himself—a public object, like an apple—gives us a picture that looks like this: ☁→a. Now it is true that if we had to give an account of the sense of even this picture we would encounter a lot of problems—for example, how are we supposed to know that the speaker is pointing at the apple, rather than at its color, or its shape, or its texture, or the table it is lying on, etc.? But we may set these problems aside for the moment. Whatever problems we might encounter in explaining the sense of this picture, the picture that we get from the concept of "pointing at a public object" does not help us look at what the speaker intends when he says that his wordless thought is this (while pointing at his head). The picture of the gesture in Case (b) does not look like this: ☁→a; rather, it looks like this: ☁←. But surely the pointer does not mean to assert that we can find his wordless thought on his scalp. The most that we can learn from this picture is that the speaker wants us to infer that his wordless thought is inside of him; we cannot learn what his wordless thought is by seeing and touching it, or any part of it, for ourselves. For example, if someone says, "This is just what my wordless thought was like," and then starts humming phrases from the Vocalise, we could take this, in part, as an invitation to listen to his humming noises. But of course our listening to his humming would not be the same as our listening to the speaker's listening to his humming; and still less would it be the same as our listening to his previous wordless thought about the Vocalise. If the speaker's wordless thought about Rachmaninoff's Vocalise is like (or unlike) the way his humming sounds to him, we can only take his word for it. One might say: If the two are alike, the way they are alike is like the way that the exhibition of pictures that Modest Mussorgsky saw was like his subsequent musical composition, Pictures.
And the same can be said for the way they are not alike, if they are not alike.

47. Now suppose someone says: "My wordless thought (let \( x \) stand for it) is not the same kind of thing as my description of it, \( \text{ 'x.' } \)" Although the speaker's pointing at his head will not help us decide whether what he says is true or false, the sentence he speaks does make sense. It makes sense because people can experience, and can remember experiencing, what it is like to have a worldless thought; and this experience, or the memory of it, shows them that the speaker's proposition makes sense. People can inwardly compare, one might say, a series of signs that merely describes Rachmaninoff's Vocalise, and the experience of hearing that music in their mind's ear. This comparison shows them that in their case, at least, their wordless thoughts and their descriptions of their wordless thoughts are experienced as two different kinds of things—and hence, that these probably are experienced as two different kinds of things by other people, too.

48. Wallace Stegner kids the Philistines by asking: "How do I know what I think till I see what I say?" A philosophical behaviorist might rewrite this as: "I cannot know what you think till I see what you say and do." But does this expression also mean that the behaviorist must see himself smile before he is able to find the following cartoon funny?

---

33. *Pictures from an Exhibition* was written by Mussorgsky in 1874 as a suite for piano, and was orchestrated by Maurice Ravel in 1922. 12 *The World Book Encyclopedia* 808 (1963).

34. See *Philosophical Investigations*, supra note 1, at 120e ("I knew within myself what you meant" when you said "But when I imagine something, or even actually see objects, I have got something which my neighbor has not," even though words like this "serve no purpose.").


36. Gary Larson, *The Far Side*, S.F. *Sunday Examiner & Chron.* April 17, 1994, (comics section) at 5. Wittgenstein makes the same point in this passage on behaviorism: 308. How does the philosophical problem about the mental processes and states and about behaviourism arise?—The first step is the one that altogether escapes notice. We talk of processes and states and leave their nature undecided. Sometime perhaps we shall know more about them—we think. But that is just what commits us to a particular way of looking at the matter. For we have a definite concept of what it means to learn to know a process better. (The decisive movement in the conjuring trick has been made, and it was the very one that we thought quite innocent.)—And now the analogy which was to make us understand our thoughts falls to pieces. So we have to deny the yet uncomprehended process in the yet unexplored medium. And now it looks as if we had denied mental processes. And naturally we don't want to deny them.

*Philosophical Investigations*, supra note 1, at 103e.
The behaviorist, who reduces mental concepts to publicly observable behavior, does not doubt that it is he who is thinking that mental concepts must be reduced to the behavior that he observes. ("Architecture is thought made visible".\textsuperscript{37} This is a very good epigram, but a very bad metaphysical assertion.) The remarks in this essay do not advocate a behavioristic explanation of how words are used. If explanations tidy some things up, they close other things off. No: These remarks do advocate paying close attention to how words are used—to behavior, one might say—but only so that what cannot possibly be said can be shown by what can be said.

\textsuperscript{37} Charles Kuralt, \textit{Sunday Morning} (CBS television broadcast, Mar. 27, 1994).
49. I can point at an apple and say, with sense, "The word 'apple' is a different kind of thing than this." Although I cannot point at my wordless thought, I can still say, with sense, "A description of my wordless thought is a different kind of thing than my wordless thought"; I can say this with sense because I can describe my wordless thoughts, and I can know from my experience that the wordless thoughts I have, and the words I use to describe my wordless thoughts, are not at all the same kinds of things. As for my not doubting a result, however, not only can't I point at my not doubting a result, but also I cannot say, with any sense at all, that my description of my not doubting a result is a different kind of thing than my not doubting it. If I could say this, I would, but the truth is: I cannot describe the result that I do not doubt, nor can I say what it is like for me not to doubt it.

50. Paragraphs 41-49 will be misunderstood completely if they are read to assert that in this case the words plus the gesture are unambiguous:

(a) [words] "This is called an 'apple'" + [gesture] 0→a;
whereas in this case the words plus the gesture are ambiguous:

(b) [words] "This is called a 'wordless thought'" + [gesture] ⊗←.

We call Case (a) "unambiguous" because most of the time we do not doubt that the speaker is gesturing at . . . this. But we can doubt what his words and gesture mean, just as we usually do doubt what the words and gesture in Case (b) mean. We can doubt, for example, if we think: "Is the worm in the apple also called an 'apple'?"; or "Are the water molecules in the apple also called an 'apple'?"; or "Does he mean that the skin of the apple is called an 'apple'—is that what he's pointing at?"; and so on. The way words and gestures are used seems unambiguous to us only because most of the time we do not doubt how they are used. This remark begins to shed light on the relationship between the concepts "the plain meaning of a legal rule" and "the indeterminacy of a legal rule": Law professors who call "55 miles per hour" an unambiguous rule do so because they do not doubt, as they lecture, that the signs "55 miles per hour" could not mean 56 miles per hour, or 55 yards per minute. But they could doubt this.

51. The previous paragraph clumsily tries to say what Magritte's _La Trahison des Images_ does a much better job of just showing:

---

38. See, e.g., Hurst v. Lake & Co., Inc., 16 P.2d 627 (Or. 1932) (not less than "50 percent protein" means not less than 49.5 percent protein in the horsemeat scrap business).

La Trahison des Images (Ceci n'est pas une Pipe)
René Magritte
Los Angeles County Museum of Art
Purchased with funds provided by the Mr. and Mrs. William Preston Harrison Collection
52. There is a sense in which expressions about past and future events (e.g., “Cain slew Abel,” and “When Cain slays Abel he will be punished”) are like expressions about private experiences (e.g., “I am listening to Rachmaninoff’s Vocalise in my mind”). This means that, as is the case with respect to expressions about private experiences like wordless thoughts:

(a) I cannot give an ostensive definition of my expressions about future events. For example, I cannot point at tomorrow’s sunrise while saying “This is what the words ‘tomorrow’s sunrise’ mean.”

(b) I cannot give an ostensive definition of my expressions about past events. For example, I cannot point at yesterday’s sunrise while saying “This is what the words ‘yesterday’s sunrise’ mean.”

(c) If I point at today’s sunrise and say “The words ‘yesterday’s sunrise’ refer to an object that looked like this, and the words ‘tomorrow’s sunrise’ refer to an object that will look like this,” I exhibit only what I say yesterday’s sunrise was like, and what tomorrow’s sunrise will be like. But exhibiting what I say an object is like is not the same as exhibiting the object. (Exhibiting a photograph of the sun is not the same as exhibiting the sun.)

53. Someone who states how the law will be applied in the future (e.g., “X will be illegal”) cannot point at the future events to which the law will be applied as a way of showing the sense of the sign “X” in his expression. And someone who states how the law applies to the past (e.g., “Y was illegal”) cannot point at the past events to which the law applies as a way of showing the sense of the sign “Y” in his expression. The sense of any expression about law’s application to future and past events cannot be exhibited by pointing at those events. This sheds more light on the concept of “the indeterminacy of a legal rule”: If you say that you doubt what my expressions about a legal rule’s past and future applications mean, I cannot point at the events themselves as a way of showing you what I do not doubt about the meaning of my expressions. (The evidence of a crime can be pointed at, but not the crime; what is, including the evidence of what was, can be pointed at, but not what will be.) A thing is not what it is like.

54. Judicial opinions: The relationship between what we are trying to do when we call something a “holding” and what we are trying to do when we call something a “dictum” is akin to the relationship between the ostensive definition of a word and a series of signs defining the word. One might say: When we say that “X” is a holding, we are trying to point at this case (e.g., these parties and what happened
to them); whereas when we say that "Y" is a dictum we do not try to point at any case. On the other hand, what trying to point at this case looks like is: pointing at some signs in the court's opinion, but not at others—for if we tried to point outside the opinion (e.g., to the prisoner strapped to a gurney and awaiting execution) then we would not be playing the game of stating the opinion's holding, but rather some other game (e.g., the game of describing the opinion's effects).

55. The previous three paragraphs can be very misleading. Suppose I say, sincerely, "Legal rule X [and I describe it] was violated here [and I describe the facts], and moreover, legal rule X will have a clear application in future transactions of this type," and you say, sincerely, that you agree with me. In that case we both would not doubt that the past and future events referred to in my expression were, and will be, what I say they are like, and not what they themselves were and will be in the fullness of their own time. (Sometimes, when we are deeply engrossed in the contemplation of someone's photograph, we do not doubt that the image of the person is the same as the person—it is almost as if the person is there in her image.) What we call "consensus" about how a legal rule is and will be applied to past and future events is connected to the fact that we can (but often do not) explicitly compare our own reaction to a legal expression with someone else's reaction to it. This means: Only if the reactions (behaviors, statements, etc.) strike us as being unalike do we say there is no consensus about how the legal rule applies; and when the reactions begin to look alike after a period of having not looked that way, then it occurs to us to say that there is a growing consensus.

* * * *

56. "After all, crits do not doubt certain results, too, as is shown by their occasional expressions of outrage about how rules were broken to deny their fellow crits promotion or tenure":\(^{40}\) No points for inconsistency are scored against critical legal studies by this expression. If something like a "critical legal studies movement" did exist it would not require its members to doubt all results, for no one who acted in accord with this tenet would be able to overcome his doubts about joining long enough to join. "Nihilist" could not name a person who sincerely doubted every result, because there could be no such person. The reason that there could be no such person is not because

---

we would not be able to determine whether his statement “I doubt every result” is true or false (a variation of the Liar’s Paradox). Rather, anyone who sincerely said “I doubt every result” would not doubt that he said it, and that it means something. (For example, someone might use this expression to mean roughly the same as what “I’m a very skeptical person” means.) Either the word “nihilist” should be put away, or else it should be reserved as an honorific for a person who doubts results that most people do not doubt: for we need more people like that.

57. “It is possible that you do not doubt something that I doubt”: So might the author’s preface of every narrative begin. (This includes the narratives sometimes written by authors who are called “critical race theorists.”) One kind of power is our power to ignore other people’s expressions of doubt about a result that we do not doubt. Another kind of power is the power that comes to us when people feel they want or need to understand our doubts about results that they do not doubt. Everyone has both kinds of power, in amounts and proportions that vary greatly from person to person, and from time to time. When law professors are teaching in the classroom they have a great deal of both kinds of power. If power comes to people who write and publish narratives of the sort identified with critical race theory, it is because there are other people who feel they want or need to understand the narrator’s doubts about results that they do not doubt.

58. Only if we can imagine a judge disobeying a bit of text are we inclined to call that text a “law that determines a result.” For example, we do not say, “The judge followed the law of gravity,” even though without it he would have flown skyward out of the courtroom. If there were a statute saying that all judges who decide cases must

41. The paradox of the Liar, attributed to Eubulides, is: “A man says that he is lying. Is what he says true or false?” 5 THE ENCYCLOPEDIA OF PHILOSOPHY 46 (Paul Edwards ed., 1967). The paradox can be reduced to the proposition, “This statement is false,” and thence to, “I am false” (where the sign “I” signifies the propositional sign in which it occurs). From this a person can infer “If that’s false, it’s true, so it is false, etc. etc.” and thus can learn that the paradox consists of there being not one, but two, inferences that can be drawn from the proposition. See 1 REMARKS ON THE PHILOSOPHY OF PSYCHOLOGY, supra note 1, at 15e.

42. When Lyotard defined postmodernism as “incredulity towards metanarratives,” for example, he did not also and at the same time express incredulity towards his expression of expressed incredulity. JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984).

43. For lists of pieces from this genre, see Richard Delgado and Jean Stefancic, CRITICAL RACE THEORY: AN ANNOTATED BIBLIOGRAPHY, 79 VA. L. REV. 461 (1993); DUNCAN KENNEDY, SEXY DRESSING, ETC. 216 n.5 (1993).
follow the law of gravity as they do so, this statute would determine the result of a case in the same way, and to the same extent, as not doubting a result determines the result. (This is a remark on the grammar of the word "determine.")

59. If I do not notice something, I cannot speak about it while I am not noticing it. "The kind of easy case where I do not doubt the result is characterized by the fact that there is an absence of doubt in me about the result": This is a very misleading expression. It is misleading because the word "absence" makes sense only if there is the presence of something left over that could be talked about. I can say of the glass sitting before me on my desk that I notice that it has an absence of water, but I cannot say of myself, while I do not doubt a result, that I notice I do not doubt it.

60. If I am unaware of something, I cannot say I am unaware of it while I am unaware of it. "The kind of easy case where I do not doubt the result is characterized by the fact that I am not conscious of any doubts": This, too, is a very misleading expression. Someone else (a psychiatrist, perhaps) can talk about my not being conscious of something, and even I can talk about my suppressed memories of things that I was not conscious of in the past. But for someone else to talk this way there must be something that he can say I am not conscious of. And for me to talk this way there must be something that I can say I was not conscious of. Whereas if I do not doubt a result there is nothing for me to be not conscious of—not even the result. Neither is there anything for me to be conscious of. It is only possible to be conscious or not conscious of something if that something can be spoken about. And even if it were possible for me to be conscious or not conscious of something that I could not speak about, I could not say what that something was. This is not a psychological assertion about the unconscious mind, but a logical remark (a true tautology) on the most that my not being conscious of something could mean in any possible psychological assertion. Thus, Schopenhauer's remark "[W]e are conscious not of the healthiness of our whole body but only of the little place where the shoe pinches," ought to be rewritten to say: "We are conscious of the little place where the shoe pinches, and we were not conscious of the healthiness of our whole body while we were conscious of where the shoe pinched." (Whoever says "I am not conscious of $x$" does have, after all, a kind of consciousness of $x$—the kind that allows him to speak of it.)

61. While I am doubting something, I do not doubt that I am doubting it. One might say that I do not doubt anything lying beyond the horizon of the thing that I am doubting. It is what fascinates me. (Here is a good analogy: While I am staring intently at an unfamiliar object I am conscious of seeing it, but not all the other things that happen to lie within my visual field. Thus, although what I see at the edges of my visual field is in fact blurred, when I am asked to describe what I am looking at I never reply like this: "I see an unfamiliar object that looks like x, and I also see the following familiar but blurred objects: ...")

I doubt this, but not that.

62. The relationship between the expressions, "This result is not doubtful" and "I do not doubt this result" corresponds to the relationship between the concepts "objective" and "subjective." It is also akin to the relationship between the respect afforded to what a powerful person says and the respect afforded to what a less powerful person says. Lawyers, judges, and law professors tend to say, "This result is not doubtful"—and not, "I do not doubt this result"—in the first kind of easy case mentioned in (2). If they do say, "I do not doubt this result," this usually means the same as, "I know how to proceed." In this use of the expression, "I do not doubt this result," the speaker reassures himself or others that he can do a task—argue a client's cause, decide a case, present an appellate opinion to a class, etc. The expression, "This result is not doubtful" may convey this same sense. But it is more often used to say the same as "This is how things are," or "I will hear no more on this subject."

63. Far too little is made of the fact that our conversations are usually very short in duration: that they get truncated by boredom, by disinterest, by the feeling that a consensus or an understanding has been reached, by the feeling that a disagreement or a misunderstanding is unbridgeable—in short, by the relentless pressures that time exerts on all of our interactions. Thus, for example, we hear a lawyer say, "I do not doubt this result" (in the sense of "I know how to proceed"), and we imagine that the case is in good hands—we do not doubt that she knows how to proceed. If it turns out that the result goes the other way, we call this a case of bad judgment by the lawyer and misunderstanding on our part—now it seems to us that we should have taken more time to talk with the lawyer before we let her pro-

45. The analogy was suggested by 1 Remarks on the Philosophy of Psychology, supra note 1, at 86e-87e.

46. In the expression, "I think, therefore I am," Descartes resolves his doubts about whether he exists by not doubting that he thinks. DESCARTES, supra note 23, at 167.
ceed. Moore's paradox\^47 can cease to bother us if we recognize that
the way we use what we call "the hypothesis that I believe (or do not
doubt) that \(p\) is the case" is different than the way we use the asser-
tions "\(p\) is the case" and "I believe (or do not doubt) that \(p\) is the
case." One might say: We tend to use the hypothesis in a leisurely,
philosophical way ("Suppose I believed \(p\). Then it would be the case
that . . ."); whereas we tend to use the assertions at a pace that is
much, much brisker.

64. All authoritative legal texts have this in common: They all
consist, at a minimum, of signs. What makes us call some of them
"rules" and some of them "standards" is how much we expect the
results of their application to be not doubted: We expect relatively
more of this for rules than for standards. Because we think that very
few people will doubt that the written signs "Speed Limit 55" appear-
ing on a metal sheet alongside the highway apply one way to someone
going fifty-five miles per hour, and a different way to someone going
fifty-six miles per hour, we call these signs a rule. And because we
think that many people will doubt that the written signs "unconscion-
able contracts will not be enforced" apply one way to a contract \(X\), and
a different way to contract \(Y\), we call these signs a standard. The dif-
ference between the criterion for a rule and the criterion for a stan-
dard is akin to the difference between sincerely saying, "This result is
not doubtful," and doubting a result. It is a characteristic mark of the
inclination to do policy analysis in law that a result is, at first, doubtful.
And the more that policy analysts do not doubt the results of their
analysis of the result that was at first doubtful, the more inclined they
are to say, after completing their policy analysis, "This result is not
doubtful." For example, this is the kind of statement that many policy
analysts are inclined to make: "If the costs of a result may outweigh
its benefits, the result is doubtful without more investigation; but if we
find that the benefits do outweigh the costs, the result is not doubt-
ful." When policy analysts tell us that a rule has a problem of under-
inclusion or overinclusion with respect to its policies, while they are
telling us this they do not doubt what the rule and the policies are, and
they also say to us: "That there is a problem is not doubtful."

\^47. Moore's paradox can be put like this: the expression "I believe that this is the
case" is used like the assertion "This is the case"; and yet the hypothesis that I believe this
is the case is not used like the hypothesis that this is the case. So it looks as if the assertion
"I believe" were not the assertion of what is supposed in the hypothesis "I believe"! PHI-
LOSOPHICAL INVESTIGATIONS, supra note 1, at 190e.
65. "If someone hands me a large sum of money with no strings attached, I will take it": Anyone who said this with sincerity would not doubt, as he said it, that he would have the ability to know whether any strings were attached. He would also not doubt that he would want the money if he knew that there were no strings attached. (He would not doubt, for example, what the sign "money" means, or that he would not be a monk who had taken a vow of poverty by the time the money is offered to him.) This shows, in the best possible light, the ground on which all of law and economics stands. If, instead of the words "a large sum of money," the words "ownership of a very profitable slaughterhouse," or "title to land that Native-Americans hold sacred, but which I could sell to a shopping-center developer for a large sum of money" appeared in the expression at the beginning of this paragraph, the light would change, but not the ground.

66. Read this account of the methodological premise of law and economics: "Rational maximization should not be confused with conscious calculation. Economics is not a theory about consciousness. Behavior is rational when it conforms to the model of rational choice, whatever the mind of the chooser."48 Now ask yourself why people are inclined to laugh at the following cartoon:49

August 1995

WHAT WE DO NOT DOUBT

Risk Factors
- black
- male
- aggressive body language
- baseball cap on backwards
- short hair
- baggy jacket
- wrong neighborhood

RF = 3

Mitigating Factors
- female
- over 40
- loafers
- tie and coat
- whistling
- Fed Ex
- envelope
- polo shirt

MF = 4

4 > 3

Risk: Acceptable.

Good evening.

Risk Factors
- black
- white
- male
- long hair
- wrong neighborhood
- police officer
- baseball hat

RF = 3

Mitigating Factors
- female
- white
- briefcase
- groceries
- humming Motown
- tie + coat
- over 40

MF = 4

4 > 3

Risk: Acceptable.

Good evening.

© 1994 Garry B. Trudeau. All Rights Reserved. Used by permission.
The answer ought to show you why the kinds of explanations that economists offer could not be derived from any plausible theory about consciousness. And the signs “Good evening” and “Good evening” appearing in this cartoon, added together with what we do not doubt about what they mean here, show why the concept of “behavior conforming to the model of rational choice” makes sense to us. “I would rather have this than that”: Underlying the sense of this kind of expression is a whole way of life, the rationality of which I do not doubt. (After all, a monk who holds sincerely to his vow of poverty can say, with a sense that he or we might readily call rational, “I would rather have no money than money.”)

67. Suppose someone said: “But an easy case is easy because it really is not doubtful, and not just because someone says it is not doubtful.” What could this possibly mean? If I were to say to you, “This result really is not doubtful,” and if you were to agree with me, in that case neither of us would doubt what “really is not doubtful” means. (Neither a dog nor its master misunderstand what the master’s pat on the dog’s head means.) But if you doubted the result and were to disagree with me about it, the phrase “really is not doubtful” in my expression not only would not convince you, but would mean exactly the same to you as my saying “This result is not doubtful” in an emphatic tone of voice. This sheds light on the grammar of the coda “... really is not doubtful”: The phrase has one use when both of us do not doubt a result, and another (different) use when one of us doubts a result and the other does not.

68. Suppose that you and I are talking sincerely with one another about the result of a case. I may doubt a result that you do not doubt. Or I may say I doubt a result that you say is not doubtful. Or we may both say we doubt a result but resolve our doubts differently. It could be said that the difference between these cases, from my perspective, is that in the first case I have not yet communicated my doubts to you, in the second case you understand my doubts but find them foolish, and in the third case you disagree with me about the result but not about its doubtfulness. One might also say that in the second case you respect neither my doubts nor my disagreement with you, whereas in the third case you respect both.

50. Cf. PHILosophical Investigations, supra note 1, at 226e (“What has to be accepted, the given, is—one could say—forms of life.”). It would be a gross mistake to read this passage, or Wittgenstein generally, as saying that what “has” to be accepted “should” be accepted, however. See Steven Winter, One Size Fits All, 72 Tex. L. Rev. 1857, 1867-68 (1994) (making this gross mistake about Wittgenstein).
69. The form of a causal statement is: "That caused this." The words "That" and "this" designate what can be spoken about. For me to express the cause of my not doubting a result would be like someone expressing the cause of God's behavior "before" she made time. This means: If nothing can be said about something, nothing can be said about its cause either. On the other hand, it is possible for me to express the cause of his not doubting a result because I can observe him, and it is possible to talk about someone who I can observe. I can also talk about the cause of my having not doubted a result because I can remember things, and it is possible for me to talk about my memories. If something can be talked about, its causes also can be talked about. A great deal of confusion about, and within, critical legal studies is based on a failure to see that words like "forms of legal consciousness," "ideology," and "false consciousness" make sense only as names for causal statements which express why he does or did not doubt a result, or why I did not doubt a result.

70. The concept of having a "perspective" on something brings with it the picture of our looking at a physical object from a point of view. When we use this concept for talking about people's "different perspectives" on this or that legal or social problem, we would do well to remember that while we occupy a point of view for looking at a physical object—a ball, for example—we see only the side of the ball that is facing us. We do not see the side of the ball that is not within our line of sight. When we describe people's "different perspectives" concerning a legal or social problem, however, we sometimes think that from our point of view we can see all sides of the problem at once. It is as if we imagine ourselves not just seeing two people viewing a ball from opposite sides of it, but also seeing what they both see, and at the same time they are seeing it. Whereas nothing in the form of representation we use, grounded as it is on our experience of occu-

51. "Causal statement" is used very broadly here. For example: In Gilbert Ryle's philosophy, expressions like "The apple fell because I dropped it" and "The apple fell because of gravity" have the same grammatical form, but different logical forms. For Ryle, the former explains the apple's falling in terms of a "cause" (something that happens, occurs, or takes place), whereas the latter explains it in terms of a "law" (a rule of inference in the light of which one is justified in making an inference from one occurrence to another occurrence). See GILBERT RYLE, THE CONCEPT OF MIND (1949) (discussed in JUSTUS HARTNACK, WITTGENSTEIN AND MODERN PHILOSOPHY 109 (2d ed. 1986)). For our purposes, however, both expressions are "causal statements," for both explain something in terms of something else.

pying perspectives and points of view on physical objects, justifies this pretension of omniscience.

71. The ground (not the cause) of all epistemological expressions is that I can say something about my not doubting a result in the past. This means: The question, "How do I know what I know?" interrogates what I remember about knowing, as it were, and not what I do not doubt. And the ground (not the cause) of all expressions on the sociology of knowledge is that I can say something about his not doubting a result. The concept "the social construction of reality," in the context of legal studies, is connected to the fact that the line between hard and easy cases changes from person to person and from time to time, and to the question why some cases are hard and some easy. It is a condition of the possibility of this concept that we can say of someone else that he does not doubt a result that we doubt. That we can do this allows us to ask "Why?"

72. The concept of the "fundamental contradiction between self and others" comes down to this: The fact that "relations with others are both necessary to and incompatible with our freedom" explains (causally) why no expression could convince someone not to doubt a result that mediates the fundamental contradiction in this way, if that result for him will always be doubtful. The fundamental contradiction is a biological, sociological, or psychological concept—and not a logical one—because it is offered to explain why people have a "drive to mediate". That it is not a logical concept is shown by the following thought experiment: If everyone in the world did not doubt that their institutions gave them undiluted freedom, no one would be able to think or say that the fundamental contradiction—prevented their institutions from being compatible with their freedom. ("Logic" means how people divide up the world with language, and a logical investigation is one which describes how people do this.)

73. When I talk about the causes of his not doubting a result, this can sound arrogant and condescending to him. This shows one of the reasons why a lot of people despise critical legal studies. When I talk about the causes of my having not doubted a result, this can sound

53. Duncan Kennedy, who originated the fundamental contradiction concept (see Duncan Kennedy, The Structure of Blackstone’s Commentaries, 28 Buff. L. Rev. 205, 211-13 (1979)), has since renounced it as one of those ‘‘philosophical abstractions’ which you can manipulate into little structures.” Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1, 15-16 (1984).
self-referential and irrelevant to him. This shows one of the reasons
why a lot of people ignore critical legal studies. What critical legal
studies ought to do is show people that talking about his not doubting
a result (either now or then) and my having not doubted a result
(then) are the only two ways that human beings have to learn about
the fact that they themselves do not doubt (right now!). One might
even say, with some warrant, that serious critique is possible only in
the form of a critique of the Other, so long as the concept of the
"Other" is made big enough to include both other people and that
other self of ours that we remember not doubting something before.

74. The horrors going on right now in Bosnia-Herzegovina, in
Rwanda, in our inner cities, and in countless other places in the world,
show why it is important for human beings to think clearly about the
fact that they do not doubt. And even if there was no horror in the
world, and all human beings on earth did not doubt that there was no
horror, it would still be important for people to think clearly about the
fact that they do not doubt. Only by that path can today's common-
place be seen tomorrow in the form of a horror (and not a mere com-
monplace), and in such a way that it is seen as a horror on purpose
instead of by accident.

75. The last remark is connected to the reason why those in
power in this society took so long to see rape, wife-beating, and child
abuse as serious problems: As far as the elite was concerned, these
things emerged as horrors by accident, and not on purpose. Still, it
will always be the case that someone who does not doubt that rape,
wife-beating, and child abuse are not serious problems in this society
cannot say that he does not doubt it, or why he does not doubt it. He
can only say that he did not doubt it, and why he did not doubt it, and
that kind of saying must come on purpose.

76. There is a practice in critical legal studies called the "phe-
nomenology of law." This practice makes the error of thinking that
I can observe myself not doubting a result and then express exactly
what my not doubting the result consists of. It makes as much sense
to say that I can observe myself not doubting a result as to say that
while I am sleeping I can observe myself sleeping. When I think, "I do
not doubt that . . . ," what is going on in me while I think this (reflec-

56. See, e.g., Peter Gabel, Intention and Structure in Contractual Conditions: Outline
of a Method for Critical Legal Theory, 61 MINN. L. REV. 601 (1977); Peter Hoefnagels, The
Phenomenology of Crime, 3 INT. J. LAW AND PSYCHOL. 39 (1980); Duncan Kennedy, Free-
dom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518
(1986); Louis Wolcher, Being Mistaken, 5 LAW & CRITIQUE 173 (1994).
tions on phenomena as they emerge in immediate consciousness, etc.) is not the same as what goes on in me when I do not think this. One might say that my reflections on my not doubting make ripples and cross-currents on the otherwise placid surface of my not doubting—and that a turbulent pool is not a placid pool. The error made by the phenomenology of law is an extremely important one to make, however, because what it misses—my not doubting a result—is at least a target that it shoots at.

On the other hand, talking about an experience should never be characterized as a "defective" or "inadequate" way to describe the experience. Talking about an experience is the only way to represent it in words (a true tautology).

77. Imagine a group of people who have no word corresponding to the present tense singular of our verb "to smile," and moreover, that some quirk in the way their minds work leaves them without any way to express or understand what "I smile" or "I am smiling" says in our language. A person can say of others, and they can say of him, "You smile," or "He smiles." A person can even say of himself, "I smiled" (perhaps while looking at a photograph of himself). Everyone understands perfectly well what "smile" means in these contexts—that is, they know how to use "smile" in these contexts. Now suppose that someone from this group thinks that there is something—something that we would say corresponds to the meaning of our expression "I smile"—but that this something cannot be spoken about. Nevertheless, he thinks it is very important for people to be shown this inexpressible aspect of their lives, and so he says, "I cannot say this—this is literally nonsense—but when I am neither frowning nor wearing an impassive look, I smile. In other words, there is such a thing as my smiling." Everyone in this group, including the speaker, would be in grave danger of misunderstanding this expression. For example, their comedic actors—who do not have the capacity to tell themselves that they are smiling—might wrongly conclude that the speaker is advising them to throw away the Greek masks of comedy that they put on for performances in order to assure themselves that they are wearing the right facial expression.57

78. The concept of my not doubting a result: It is as if it has no voice that corresponds to the first person singular of the present tense of the negated form of the verb "to doubt."

57. Cf. PHILOSOPHICAL OCCASIONS, supra note 1, at 387 ("Anyone who doesn't doubt is simply overlooking the possibility that things might be otherwise!—Not in the least—if this possibility doesn't exist in his language.").
79. The phenomenon of aspect-seeing is a very important one for legal studies. One of the most famous examples of this phenomenon is evoked by Wittgenstein’s drawing of the duck-rabbit:

This figure can be seen as a picture either of a rabbit’s head or a duck’s. In *Philosophical Investigations*, Wittgenstein distinguishes between the “continuous seeing” of an aspect of the figure, and the “dawning” of a new aspect: he notes that someone who is shown the picture of the duck-rabbit might begin by seeing nothing but a rabbit in it, *until* the moment when it dawns on her, for the very first time, that the picture is also that of a duck’s head. The phenomenon of aspect-dawning seems paradoxical to us because we are prone to say this kind of thing about it: “*Something* has changed about this picture, even though I know that nothing about the physical object on the paper has changed at all!” Another way to put this is: *if* we think that the eye makes copies of the external world to present to the mind, and that these copies are what is seen by us (inwardly), then in the case of the duck-rabbit there is no change in what the eye copies in terms of its color, shape, or organization. Nor would it be right to say that we “organize” or “interpret” the figure differently as a new aspect of it dawns on us: for the concepts of organizing and interpreting bring with them the picture of an organizer or interpreter who sets about to organize or interpret, and surely *this* is not what is going on inside of us when a new aspect of the figure dawns on us. When a new aspect dawns on us, we just say “Now it’s a duck! (or a rabbit!),” and it is this exclamation (which looks like what we sometimes say when we inter-
pret something, but isn't the same) that gives this phenomenon its distinctive characteristic. The immediacy of the description we are prone to offer here is a clue that this is more aptly described as a case of "seeing" rather than as one of "knowing" or "interpreting."

80. It is very easy to misunderstand how Wittgenstein's drawing of the duck-rabbit helps us think about law. Most people learn very quickly that they are able to see the figure now as a duck, now as a rabbit, now as a duck again, and so on. But the really important thing to learn from the figure of the duck-rabbit is not that we can see it "as" something, but that while we are continuously seeing the figure as a duck or as a rabbit we do not doubt what it is we see. So long as I see the figure as a duck, I do not doubt that I see a duck-figure, even though it would also be right for me to say that when I will stop seeing it as a duck and begin seeing it as a rabbit is doubtful. Here the expression "How I will see the drawing of the duck-rabbit is doubtful" is very inexact and misleading. A better expression would be: "When I will see the figure as a duck, and when as a rabbit, is doubtful, but that I will see a duck-figure when I see it as a duck, and a rabbit-figure when I see it as a rabbit, is not doubtful." One could say that I do not see the figure as anything at all while I am looking at it and see either a duck-figure or a rabbit-figure.

81. If we have seen the duck-rabbit both ways in the past, would it be right to say that we "interpret" it when we look at it now and see a duck-figure in it? (The case I am imagining here is one in which we do not will ourselves to see it as a duck, but merely glance at it and see a duck in it.) We often say, in legal studies, that we interpret a statute, a case, a contract, etc. In this use of the word "interpret" we tell people that the meaning of a text is unclear, and that we clarify it by our interpretation. Our interpretation subdues, as it were, the ambiguity of the text. When we use the word "interpret" in this sense we mean that we have acted on the text, and not vice versa. Is this what is going on when we look at the figure of the duck-rabbit and see it as a duck? Well, when we notice that the sky is pale blue, we may say, "I see a pale blue sky," but hardly ever, "I interpret the sky as pale blue." This means: An act of recognition usually does not occur in us prior to our seeing the pale blue sky—we do not think, for example, "This looks like other skies I have seen that are called 'pale blue sky,'" and only then see the pale blue sky for the first time. The pale blue sky strikes us—one might say that it acts on us, and our seeing a pale blue sky is just a state that we are in as a consequence of this. Seeing a duck-figure in the figure of the duck-rabbit is like seeing a pale blue
sky, because in both cases our seeing consists of our being in a state, rather than of our doing an activity—indeed, this is what entitles us to call both of these cases of "seeing," as distinguished from "looking and interpreting." And if it just comes to us as we look at the figure that we see a duck, but we still say, "Now I am interpreting the figure as a duck," the word "interpret" in this use would have a different sense than when we use it to talk about interpreting an ambiguous legal text.\(^6\)

82. The previous three paragraphs shed more light on the concept of "indeterminacy" as it is used in critical legal studies. A case that I can think of as a contract case or as a tort case I do not interpret (or see) as a contract case or as a tort case while I am thinking of it as one or the other. Rather, while I think of it as a contract case I do not doubt that I have a contract case before me, and while I think of it as a tort case I do not doubt that I have a tort case before me. It is as though some defect of vision prevents me from seeing a "Contort" case, even if I do know beforehand that I can think of the case either as a contract case or as a tort case. On the other hand, it would also be right for me to say beforehand that when I will think of the case as a contract case, and when as a tort case, is doubtful. Indeterminacy is linked very closely to both doubting and not doubting.

83. In *The Death of Contract*, Grant Gilmore made the mistake of thinking that sometime soon lawyers and judges would look at what is now called a "contract case" and see only a tort case. So long as the words "contract case" are used differently than the words "tort case," Gilmore's empirical prediction says absolutely nothing about our ability to think of a case as a contract case, or as a tort case, but not as both at the same time. (People who believe that certain human beings are able to assume the form of animals do not see them as animals while these shape-shifters are occupying their animal forms: In the 1931 motion picture *Dracula*, for example, there is Dracula-the-human and then Dracula-the-bat, but there is no bat.\(^6\))

---

62. See 1 REMARKS ON THE PHILOSOPHY OF PSYCHOLOGY, supra note 1, at 2e ("[I]nterpreting is an action. . . . Seeing isn't an action but a state. (A grammatical remark.)").


64. The next time you watch the motion picture *Dracula* (Universal Studios, 1931), imagine that you believe in vampires and then try to see the bat as just a bat.
Some owners of this kind of watch, do not doubt that they see something like numerals on their watch faces as they check the time. Although most Movado watch owners

65. N.Y. Times, May 1, 1994, at 15 (advertisement). The designer of the Movado Museum Watch, Nathan George Hewitt, wanted the gold dot at 12 o'clock to symbolize the sun at high noon, and the moving hands to suggest the movements of the earth: "We do not know 'time' as numbers," he said, "but as the rising sun and orbiting earth." N.Y. Times, June 11, 1995, at 11 (advertisement). However, old ways of seeing, like old habits, die hard.
probably could be induced by suggestion to see their watch faces, at
least for a while, as enigmatic black surfaces that are utterly devoid of
anything like numerals, how remarkable it is that people can look at
this watch and see something like numerals! There is a close relation-
ship between this case of seeing and what we see when we look at a
legal case in an everyday manner. (Here, "looking at a legal case"
means: reading words written in documents, depositions, briefs, opin-
ions, etc., and talking with witnesses, opposing counsel, judges, etc.)
These artifacts of a case (we might call them "facts") can actually look
like "contract" to us!

85. The concept "Law is politics" in critical legal studies has very
little to do with the doubtfulness of hard cases. And to say that it has
to do with the doubtfulness of easy cases would be misleading. If one
were to say that it has to do with the possibility that easy cases are also
hard cases when seen from some perspectives, this would be some-
what true, but still misleading. One might say: If someone does not
doubt that law is never the same as politics, he also does not doubt
that the assertion "Law is politics" is false; likewise, if someone else
does not doubt that all law is politics, she also does not doubt that the
concept of "the Rule of Law" is false. But aren't these trivial observa-
tions? Isn't the really important question this: What pictures do the
words "law" and "politics" bring with them, and do these pictures
help us to understand what is going on when judges and lawyers go
about their everyday business? If "law" and "politics" belong to dif-
ferent language games in mainstream discussions, the critical legal
studies slogan, "Law is politics," invites us to notice the family resem-
blances between the different uses of these two words in their respec-
tive games.

86. Most people do not see a tablespoon as a tablespoon—they
just do not doubt that it is a tablespoon. Nevertheless, they can be
induced by suggestion to see a tablespoon as a catapult that a child
might employ against an army of toy soldiers. If this happens, they
can perhaps then go on to see the tablespoon first as a tablespoon,
then as a catapult, then as a tablespoon again, and so on. Why, then,
does this expression sound right: "Whether the drawing of the duck-
rabbit will be seen at first as a duck is doubtful, and is doubtful every
time it is looked at," while this one sounds wrong: "Whether a table-
spoon will be seen at first as a tablespoon is doubtful, and is doubtful
every time it is looked at"? If someone were to reply that an object
must be ambiguous before we can see it as something, this would be a
terribly wrong way of accounting for why the first expression sounds
right and the second one wrong: It would be like saying that before we can imagine a glob of applesauce on the empty tablespoon in front of us—an image that we project, as it were, onto the real tablespoon—the tablespoon must first be ambiguous.

87. Why does the expression “When I will see this object as a tablespoon, and when I will see it as a catapult, is doubtful” sound wrong? Surely it can happen, suddenly and without my willing it, that I see this object as a catapult. Does it follow that when I will see it as a tablespoon, and when I will see it as a catapult, is doubtful? Here there is great danger of going astray, for the very question is misleading. It pushes us to choose between two false paths: Because something can be doubted by someone, therefore it must be doubtful (the first path); and because something is not doubted by everyone, therefore it must be not doubtful (the second path). But there is a third path, and its location and direction might be expressed as follows: “That a result is doubted makes it doubtful while it is doubted, but not at any other time; and that a result is not doubted does not make it not doubtful until the person who does not doubt it thinks or says ‘This result is not doubtful’.” It is almost as if my not doubting a result lies in a separate space, located between my doubting a result and my thinking or saying “This result is not doubtful.”

88. The last remark has the unpleasant odor of a metaphysical statement, and this is unfortunate. Nevertheless I will not rewrite it, but will merely add that it is only a remark on the grammar of the word “doubt” and its cognates.

89. In the standard version of the children’s story called “The Emperor’s New Clothes,” the townspeople see a naked emperor, but they say things like “How beautiful his clothes are!” because they believe what the crafty swindlers implied to them: that only people who are stupid and unfit for their jobs will be unable to see the emperor’s fine suit of clothes. The moral of this version is that our desire to be well thought of can sometimes make us act like fools. But in the more interesting version of the story the townspeople actually see a clothed emperor. They do not see him as a clothed emperor. (Nor do they see a naked emperor with imaginary clothes on, nor yet do they see him as this.) With the exception of the little child, who sees a naked emperor, all of the townspeople do not doubt that the emperor is clothed. This version of the story loses its point completely if it is

interpreted as a story about townspeople erroneously thinking, believing, or assuming that a naked emperor has clothes on. The case of seeing shown in the second version of “The Emperor’s New Clothes” is very closely related to the case of seeing in which a judge looks at a case before him and sees only an \(x\) case. (\(x = \) contract, or tort, or constitutional law, or antitrust, or . . . .) It is also very closely related to the case of seeing in which a judge looks at a litigant before him and just sees a black man—and does not see him now as a man who has dark-hued skin, now as just a man. And again, it is very closely related to the case in which we just see homeless persons on our way to lunch—and do not see them now as human beings without a place of their own to sleep in, now as just human beings.

90. We always see a case with its clothes on; we do not doubt that it is clothed.

91. The previous paragraphs about “seeing” can be very misleading. If a judge says sincerely, “The law in this case is clear,” is it right to call this a case of “seeing” at all? Well, if the judge has no sight, would he still see that the law in this case is clear? The word “see” brings with it a certain picture—the visual image—and this picture may or may not help us comprehend what is going on when the judge says “The law in this case is clear.” A blind judge might say, “As I hear it read to me, and feel its braille expressions with my fingers, the law in this case is clear.” This shows why it is very easy to misunderstand how Wittgenstein’s figure of the duck-rabbit helps us think about law. A judge who says sincerely “The law in this case is clear” just does not doubt that . . . the law in this case is clear. (One might even say: It is as if this judge would be able to sense (see/hear/feel/smell) only the figure of a duck in the duck-rabbit.) And if, at this point, someone said that the judge “conceives” or “takes” the law in this case as being clear—urging us to turn away, as it were, from the verb “see” towards the verbs “conceive” and “take”—would these new words really get us any farther along in our quest to comprehend what is going on inside the judge when he says “The law in this case is clear”? Shouldn’t we first ask: Why would anyone but us ever want to comprehend this at all? Suppose a judge says “The law in this case is clear” to a lawyer, in a context that leaves the lawyer without any doubt about his meaning. Doesn’t the lawyer now know all that she needs to know about what she is supposed to do next? And if she still has some doubts left about how the judge’s words affect her, won’t these doubts be cleared up by her asking the judge, and him telling her, what the expression “The law in this case is clear” means? That
is, the judge will not give her a report on what was going on inside his mind as he was speaking these words—for what, after all, could he or she do with such a report? (Perhaps we would like to hear this report, but why should the fact that a bunch of legal scholars want to know what is going on inside of judges as they decide cases determine the kinds of things that judges say to lawyers?)

92. Is what is going on with the judge in the previous paragraph a case of “interpreting”? Or is it perhaps a case of “thinking”? What pictures do “interpreting” and “thinking” bring with them, and do those pictures help, or hinder, our comprehension of this case? Think of this case: Someone is talking to you, but you are paying her no attention; a silence follows the end of her words, and then you realize (perhaps in a panic) that now it is time for you to speak; you say, in a sincere tone of voice, “I know what you mean.” Suppose the judge in the previous paragraph made up his mind about this case some time ago, and, after daydreaming through counsel’s boring arguments, he reacts to the silence that follows their words by saying, “The law in this case is clear.” Would we still have the right to call what is going on with the judge when he speaks these words a case of “interpreting” or “thinking”? The judge neither interprets nor thinks: He reacts.

93. These signs appear in the New Testament: “In the beginning was the Word.” At first Goethe’s Faust is perplexed about how to translate them: “To set so high a value on a ‘word’ is impossible: I must translate it in some other way, if the spirit is giving me real enlightenment.” The word “Mind” will not do, as Faust proves to himself by a rhetorical question: “Is it by Mind that all things are done and made?” Nor does “Energy” sound right. Finally the answer comes, and Faust writes: “In the beginning was the Deed.”

94. If we are inclined to say that most judges who say “The law in this case is clear” are thinking something as they say it, what is our evidence for this? Well, what counts as evidence for our stating that someone else is “thinking”? Must we see his thoughts darting about in his mind before we can say that he is thinking? (And how could we

67. St. John 1:1 (King James).
68. Johann Goethe, Faust Translates the Gospel, in Goethe: Selected Verse 185 (David Luke ed. & trans., 1964). Wittgenstein writes: “The origin and the primitive form of the language game is a reaction; only from this can more complicated forms develop. Language—I want to say—is a refinement, ‘in the beginning was the deed.’” Culture and Value, supra note 1, at 31e (citing Goethe’s Faust). Compare Nietzsche: “You say ‘I’ and are proud of this word. But greater than this—although you will not believe it—is your body and its great intelligence, which does not say ‘I’ but performs ‘I.’” Nietzsche, supra note 27, at 62.
see the thoughts in his mind, anyway?) Do we have no right to call Auguste Rodin’s *The Thinker* a sculpture about thinking because we do not know what is going on inside the figure’s bronze cranium?69

---

The furrowed brow; the attentive expression; the eyes that meet ours; the black robes; the dignified setting; the words and gestures that seem connected to our case: What a judge says and does makes sense to us. We do not doubt that he is thinking. But we get into trouble—we go badly astray—when we say "His 'thinking' consists of his reasoning that..." This way of putting things leads us away from seeing what is going on with the judge; it makes us think that our words have settled all that matters about this and every judge's thinking. It is as if we believed that the picture on the box in which a jigsaw puzzle comes makes the pieces inside irrelevant. It is as if we believed that the picture on the box solves the puzzle.

95. Empathy for others is only possible while we are noticing them. If we notice them in our presence (close up, as it were) we can see ourselves as them; if we notice them in our thoughts alone (far away, as it were) we can imagine ourselves as them. If we do not notice them at all, we do not doubt that others exist, but at the same time it would not be right to say that we empathize with them. (This is a remark on the grammar of the word "empathize.") When a very decent and kind-hearted person passes by the homeless on the street without feeling sorry for them, it is not because he lacks the capacity to empathize, but because he does not notice them. Sometimes when we notice others in our thoughts, and thus empathize with them far away, we fail to see them before our very eyes, and thus fail to empathize with them close up. This may help explain the widely held belief that, although the equal application of just legal rules produces occasional instances of injustice, the injustices must be tolerated in order for there to be a Rule of Law. It is much easier for us to inflict an injustice on others than it is for us to inflict an injustice on ourselves.

96. Fraser's Spiral has great value for the study of law:70

---

70. The figure and accompanying text are from John Cassidy, Explorabook: A Kids' Science Museum in a Book 89 (1991). Thanks to Edward Haluk Wolcher for allowing me to see the connection.
Fraser's Spiral

Perhaps the most enduring of all the printed optical illusions, Fraser's spiral refuses to "correct" itself even after you understand the illusion. Much as your brain wants to deny it, the "spiral" is not a spiral, but in fact concentric circles, as the inset shows.

© 1991 Klutz Press, Inc. Reprinted by permission. All rights reserved.

Apparently no one sees Fraser's Spiral as concentric circles. The question why no one does—although it is an interesting one, about which psychologists and physiologists might have a lot to say—is not pertinent to anything here. Instead, imagine that some people are able to see Fraser's Spiral in a way that is like the way most people can see the figure of the duck-rabbit—first as a spiral, and then as concentric circles, and so on—but that none of these people have ever looked at the figure before, or if they have, they have never told anyone else about what they saw.

(a) The case of the law professor who says sincerely, "It is not doubtful: This legal rule has a plain meaning" is analogous to the case of someone who looks at Fraser's Spiral and says sincerely: "It is not doubtful: Fraser's Spiral is a spiral." One could say that in both cases

71. See, e.g., RONALD SMITH, PSYCHOLOGY 205-06 (1993) (in Gestalt theory there is a "law of continuity [which] holds that people link individual elements so they form a continuous line or pattern that makes sense"; hence "[t]he 'spiral' is created by your nervous system because that perception is more consistent with the continuity of the individual elements.").
the speaker has never learned, or has forgotten, the truth contained in
the adage "Things are not always what they seem."

(b) The case of the law professor who says sincerely, "I know that all legal rules really are indeterminate, but I sure can't figure out how this rule is indeterminate" is analogous to the case of someone who looks at Fraser's Spiral and says sincerely, "I know that it is really concentric circles, but I can only see it as a spiral." It is not stupidity that prevents us from seeing the way things really are, even if we do know that the way we see things is not the way things must be seen by everyone. If it is the case that God does not doubt that she is God, it would not be stupidity that causes her not to doubt her identity.

(c) The case of the most talented legal deconstructionist who ever lived is analogous to the case of someone who can see Fraser's Spiral now as a spiral, now as concentric circles, and so on—but who does not doubt that he sees a spiral when he sees it as a spiral and concentric circles when he sees it as concentric circles. The deconstructionist does not doubt that he sees now this, now that, now something else while he is looking at the text; and he does not doubt that whatever he constructs in order to deconstruct the text means something. We would not call Fraser's Spiral an "optical illusion" if the concept "concentric circles" meant nothing to us. We would not call deconstruction "deconstruction" if the concept "construction" meant nothing to us.

97. Now imagine that most people are easily able to switch back
and forth between seeing Fraser's Spiral as a spiral and seeing it as
concentric circles. The case of the judge in paragraph 22, who does
not doubt that white people are superior to all other people even
though others occasionally tell him that they are not, is analogous to
the case of someone who does not doubt that Fraser’s Spiral is really a
spiral even though others occasionally tell him, "You know, it's really
concentric circles that sometimes just look like a spiral." If this illus-
tration also leaves the impression that even non-racists sometimes see
other people as being "black," "brown," "yellow," "red," and "white,"
it was meant to.

72. Cf. 2 REMARKS ON THE PHILOSOPHY OF PSYCHOLOGY, supra note 1, at 86e ("And it is not like this: I simply see the picture as one of an infinitely large number of bodies, whose projection it is; —rather, I see it only as this—or as that. So the picture is alternately one and the other.").
98. If conservatives really wanted a good way to tell how much capacity a judicial nominee possesses for construing legal texts in accordance with their plain meaning, they should measure how long it takes the nominee to get puns. The longer it takes a nominee to get puns, the more capacity he is likely to have to be a strict constructionist. In contrast, when expert paronomasiacs—

-look at words they tend to see multiple meanings right away, and this capacity makes it harder for them to be strict constructionists. (Whether conservatives take, on average, a longer time to get puns than liberals would be a different empirical question, however, so conservative senators should be wary about relying on the pun test alone.)

99. Suppose someone said: "Signs are the form of language. The markings on this page, and the noises that people make when they talk to one another, are examples of signs. One might say that signs are possible language, and that language is what the signs mean—that they signify—if someone understands them. For instance, 'law' is both a sign and language to monolingual English speakers, but 'gezets' is just a sign to them. If someone gave them the order 'Obey the gezets,' they should not know who or what they were supposed to obey. And then there is the case of people agreeing to say 'white' and mean black. These examples seem to imply that there is a difference between signs and what they mean. However, if there really were a difference between the sign 'law' and what 'law' means to English speakers, no one would be able to explain what the difference is without using more signs. And if there really were a difference between the series of signs someone used to explain the difference between the sign 'aw' and its meaning, she would not be able to say what that difference is without using still more signs. And so on indefinitely. This shows that it is impossible to prove that there is any difference between a sign and what it signifies."

100. How terribly misleading the previous paragraph is! And it would be just as misleading to say "The error of the paragraph is demonstrated by the fact that anyone who understands it does not doubt that it means something." This series of signs no more proves that signs and their signified are different than the expression that it tries to refute proves that signs and their signified are the same. What is really at stake here is that I do not doubt how to make the transition, as it were, from a sign to its meaning; but about that transition I can say nothing while it is being made. (There is no essential difference between the last statement and what Wallace Stevens shows in his poem *Metaphors of a Magnifico.* This paragraph and the last are not about the possibility or impossibility of proving that the sign

74. The Yiddish noun *gezets* is usually translated as "law."
75. Mitchell v. Henry, 15 Ch. D. 181, 190 (1880) (James, J.) ("white wool" in a contract of sale can mean relatively dark wool). The decision reversed Sir George Jessel, who stated that "nobody could convince him that black was white." 3 *Arthur Corbin, Corbin on Contracts* § 544, at 156 n.96 (1960).
76. Twenty men crossing a bridge,
Into a village,
Are twenty men crossing twenty bridges,
Into twenty villages,
Or one man
Crossing a single bridge into a village.
“law” means something; rather, they are logical remarks on the most that any possible proof of the meaning of “law” would reduce to, if it were pushed hard enough.

101. A judge who does not doubt that the plaintiff was injured would be able to say, “The plaintiff was injured” at an appropriate time, but he would be unable to say that he does not doubt it while he does not doubt it. This shows what words like “law” mean: Judges and lawyers just know how to use them. And moreover, knowing how to use law-words effectively is not the same as knowing how to give an effective explanation of what law is.77 This means: Our criteria for the effective use of words are different in the two cases. We do not think badly of an actor who is giving a good performance in *Macbeth* because he is not also giving us a good explanation of the play’s meaning. We want our lawyers, and the judges who decide our cases, to be effective in a way that is not the same as the kind of effectiveness we look for in a law review article or a treatise on jurisprudence. (One might say that the way our criteria for effectiveness are different here is similar to the way our criterion for necessities is different from our criterion for luxuries.)

---

This is an old song
That will not declare itself . . .

Twenty men crossing a bridge,
Into a village,
Are
Twenty men crossing a bridge
Into a village.

That will not declare itself
Yet is certain as meaning . . .

The boots of the men clump
On the boards of the bridge.
The first white wall of the village
Rises through fruit-trees.
Of what was I thinking?
So the meaning escapes.

The first white wall of the village . . .
The fruit-trees . . .


77. Cf. Remarks on the Foundations of Mathematics, *supra* note 1, at 192:
Are the propositions of mathematics anthropological propositions saying how we men infer and calculate?—Is a statute book a work of anthropology telling how the people of this nation deal with a thief, etc.?—Could it be said: “The judge looks up a book about anthropology and thereupon sentences the thief to a term of imprisonment”? Well, the judge does not USE the statute book as a manual of anthropology.
102. There is the case of people who do not doubt that the signs in the book called "The Bible" are the language of God. There is also the case of people who do not doubt that the signs in legal texts, such as the document called the "United States Constitution," are the language of the Law (or the language of the Legislature, of the Founders, etc.). There is a very close relationship between these cases of not doubting. "'Sin' means . . ." says the same kind of thing about the word "sin" as "'Due process of law' means . . ." says about the words "due process of law." Definitions of words are only a kind of way that words are used. A dictionary that expressed all the ways we use words would look like a description of our lives.

103. A law student asks her teacher: "What is a contract?"

(a) An answer of the form "A contract is this" corresponds to the concept "legal formalism." What this means is: The concept "legal formalism" brings with it a picture of objects which bear the unmistakable marks of their legal significance. I do not doubt that this is a contract. My name for the thing, and my description of it, constitute the thing as being what it is, essentially. "And how," I ask, "could it be otherwise?"

(b) An answer of the form "The word 'contract' means this in context a, that in context b, something else in context c" corresponds to the concept "legal realism." What this means is: The concept "legal realism" brings with it a picture of unmistakably unmarked objects which people organize into groups, and then name for their own purposes. I do not doubt that there exist such things as these objects (which I point at and describe), and that they belong together under the name "contract." My words and gestures are determinate in meaning—they name and describe this (nominalism). "And how," I ask, "could it be otherwise?"

(c) The answer "The question is misleading. Let us make a commitment to try to look very clearly at all of the ways that people use the words 'contract' and 'context', and at all of the things that actually happen to people each time these words are used": This would be a very wise and intelligent answer. If more law teachers gave students this kind of answer to their questions about law, the critical legal studies critique of legal education would lose much of its force.79

---

78. For a particularly florid expression of this point of view, see Chief Justice Burger's opinion for the majority in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

79. If someone were to ask: "But what is the critical legal studies critique of legal education?", I should tell her to re-read this paragraph. And then I might say: "See, e.g.,
104. Suppose someone said: “The difference between a sign (or a series of signs) and language is the meaning of the signs.” What would be the meaning of “meaning” in this expression? Consider the expression “The ball is on the table and the ball is not on the table”: Is this a contradiction the sum of whose parts means exactly nothing? Well, the expression makes sense—it is not a contradiction—if the speaker takes the ball from the table and holds it in his hand right after he says the word “and” and before he says the words “the ball is not on the table.” The expression plus the behaviors that accompany it over time let us know that the speaker wants us to notice that at first the ball is on the table, and then the ball is picked up and is no longer on the table. One might say: “This example shows that ‘The meaning of a series of signs’ means that what a series of signs means consists of how the signs are used.” But this series of signs would not be the meaning of the word “meaning”—it would be a use of the word “meaning” in some situation. (As it appears here, for instance, it is a use of “meaning” to advance this article’s project of saying what can be said in order to show what cannot be said.)

105. Consider the meaning of the word “mean” in these three expressions:

(a) “Say ‘I’m going to the bank’ and mean both that you’re going to the land abutting a river and to a financial institution.”

(b) “Say ‘That food looks delicious’ and mean both that the food looks delicious, and that you would like to have some of it to eat.”

(c) “Say ‘He’s not to be harmed’ and mean that he is to be assassinated.”

It is very hard (but not impossible) to imagine a situation in which the order expressed in (a) would make sense. But situations in which the orders expressed in (b) and (c) would make sense are much easier to imagine. For example, a hungry person talking to a friend who is eating something might say, “That food looks delicious,” and both persons might not doubt that this means both that the first admires the food, and that she wants her friend to give her some of it. And a crime boss talking to one of his hit men in a place he fears is under electronic surveillance might say, “He’s not to be harmed,” and both persons might not doubt that this means that the hit man is to kill


80. Cf. Remarks on the Foundations of Mathematics, supra note 1, at 370 (“It might for example be said of an object in motion that it existed and did not exist in this place; change might be expressed by means of contradiction.”).
someone. Case (a) elucidates the concept of "verbal ambiguity that is resolved by a context"; case (b), the concept of "implying something in addition to what is said"; and case (c), the concept of "saying one thing and meaning its opposite." But it is extremely important to see here that the situations we imagine are what allow the words in the three expressions, and hence the concepts they elucidate, to have the sense they have. It is extremely important to see that it is situations (including the situation of imagining situations), and not the sign "meaning," which bring meaning out of "meaning."

106. If someone were unable to imagine a situation in which the order expressed in case (a) in the previous paragraph could be obeyed, for him the word "mean" in that order would be nonsense. This shows the meaning of "nonsense": We cannot imagine a situation in which an expression could be used, and thus we call the expression nonsense. It is usually the case that law professors who call their students' expressions "nonsense" are either unimaginative, or else they are just not working hard enough.

107. Suppose someone said: "What goes on inside of me when I mean something that I say, and how I use my expression (what happens outside of me when I express what I mean) are two different things." Does this mean, for example, that the hungry person in 105 must have food-looks-delicious thoughts and feed-me thoughts as she says to her friend, "That food looks delicious"? Suppose her friend is in doubt about what she means, and asks her "What do you mean?" If she replies, "I mean that the food looks delicious, and that I want you to give me some of it," is it the case that she still must have food-looks-delicious thoughts and feed-me thoughts that mean what her expression merely says? Consider also this case: Roll is being taken, and when your name is called out you say "Present!" Must you then have I-exist-here-and-now thoughts that mean what "Present!" merely says? Our belief that our meaning what an expression says must be a state of mind that is distinct from the expression itself—how remarkable it is that we should have such a belief! We sometimes feel the two are distinct, and so we think they must always be distinct. The practice of explaining now what we meant when we said something before: This is where our belief in the distinction gets nurtured. But of course the words of our present explanation were not before our minds when we meant this or that by our past words. One might say that our present explanation does not fit any phenomenon of meaning that existed in us when we spoke our past words. Moreover, when we explain now what we meant before, do we also always mean something now about
our explanation of our past meaning that is distinct from our explana-
tion? And if there were a distinction, even here, how far could we go in explaining it and its descendents—how far could we go in explain-
ing the distinction between our meaning of the explanation of the meaning-of-the-explanation, and our explanation of it, and so forth? At some point—the point where we act—our feeling that there is a distinction between our meaning and our words gets effaced to noth-
ing. We do not doubt that... our words are what we mean. This
means: Words are said, and we act in this way.

108. The meaning of a legal text is shown by how the legal text is used. The meaning of scholarly commentary on the meaning of a legal
text is shown by how the scholarly commentary is used. The regress ends when we act.

109. Our expressions about law are grounded in our actions. Our
actions are grounded in what we do not doubt. And what we do not doubt rests on no ground at all.

110. What is the difference between a law’s form and its sub-
stance? Consider a hammer, a diagram of a hammer, and how a ham-
ner is used. One might say that the difference between a law’s form
and its substance is less like the difference between the diagram of a
hammer and a hammer than it is like the difference between a ham-
ner and the way that the hammer is used. A diagram of a hammer
means nothing to someone who does not know how to read dia-
grams—a sentence on the diagram saying, “This diagram shows a
hammer’s form,” for instance, would tell him nothing about the ham-
ner’s form. And a hammer just lying on a shelf does not announce
what it is to someone who has never used or heard of one before—even if someone else were to say, “This hammer is for hammering,”
while pointing at the place on the shelf where the hammer lies, this
would tell him nothing about the hammer’s substance. One might say:
That a hammer and that a law are used at all allows these objects to be
noticed in the first place (i.e., it allows them to be called “objects”); and moreover, the way these objects are used predetermines the form
in which they will be noticed. As strange as it may sound, one could
say, with some truth, that uses make up the substance that corre-
sponds to an object’s form, and that an object’s form is prefigured by
its uses (its substance). 81 Thus, if a rock is noticed at all, it is usually

---

81. The concept of “information” about something could then be more easily con-
ceived of in accordance with the meaning of that word’s Latin root, informare: “the stamp-
ing, impressing of form,” onto that which is impressed into that form. MARTIN
HEIDEGGER & EUGENE FINK, HERACLITUS SEMINAR 13 (Charles Seibert trans., 1993).
noticed as being just a rock lying on the ground—its great age, among other things, is usually not included in what we think of as its form or its substance; whereas if a rock of the same age is found in a withered pouch resting alongside the mummified remains of a long-dead warrior, it will undoubtedly be noticed that the rock is an ancient object whose dimensions (these might even be measured) made it suitable as a weapon for the warrior. Only if it can be said of something that “The form of this is . . .”—only then can that something begin to have a history.

111. Do not read the last paragraph as asserting something metaphysical. Do not read it as denying (or affirming) that there is an essential difference between form and substance. The expression “Substance is form, and form is substance” does have a significant use in critical legal studies. But whatever that use may be, it does not mean that the words “form” and “substance” are exact synonyms—it does not mean that people always use these words in the same way. It is easy to imagine that someone would obey the order, “Show me the form of a hammer,” by drawing a diagram depicting the relations that subsist among the various parts of a hammer. But surely drawing such a diagram would be regarded as a very odd way to respond to the order, “Show me not the form of a hammer, but its substance”; it is much easier to imagine that this order would be obeyed by the act of offering up a hammer for inspection.

112. Imagine that this order is given: “Describe first the substance, then the form, of God’s command to the people of Israel, ‘Thou shalt not make unto thee any graven image.’” Let someone who wants to comply with the order make the following list of definitions:

(i) \( G = \) that which is called “God”;
(ii) \( R_1 = \) that relation between a speaker and what is spoken, which is called “commanding something”;
(iii) \( A = \) that which is called “Thou” = that which is called “the people of Israel”;
(iv) \( a = \) that which is called “any graven image”;
(v) \( R_2 = \) that relation which is called “making something unto thee”;
(vi) \( ¬ = \) not;
(vii) \( ⇔ = \) the relation of mutual entailment between the terms of an expression;
(viii) \( ⊕ = \) any person;
(ix) \( p = \) the form in which the command is noticed by a person;
(x) \( q = \) how the command is used by a person (e.g., obeyed or not obeyed in this way, described in this way, and so forth);

82. *Exodus* 20:4 (King James).
(xi) $R_3$ = the relation of a person noticing a command and a command being noticed;
(xii) $R_4$ = the relation of a person using a command and a command being used.

(a) If the person who made these definitions were to say “The substance of the command is that God orders the people of Israel not to make any graven images for themselves; and the form of the command is: $GR_1[\lnot (AR_2 a)]$,” this response—read together with the order to which it responds—would show the sense of the concept “the substance of a law, and its form, are two different things.” This means: There is a perspective from which I do not doubt that one set of signs is not like another set of signs. (I use them in different ways, as in establishing the distinction between syntax and semantics.)

(b) And if he were then to say, “The substance of the command is: $pR_3 \iff \Theta R_4 q$; and the form of the command is: $qR_4 \iff \Theta R_3 p$,” this response—read together with the order to which it responds—would show an important sense of the concept, in critical legal studies, that “substance is form, and form is substance.” This means: There is a perspective from which I think that all signs—indeed all things—look alike in their relation to the people who use them, except for the signs which I use to say just that. As for these signs, I do not doubt that they communicate something of substance. For example, Roberto Unger’s concept of “total criticism” requires a spot of high ground from which it can be said that all prior “partial criticisms” of society (e.g., Marx’s social theory) presuppose certain undoubted truths (e.g., “the liberal distinction of reason and desire”) that are constitutive elements of the very society they criticize. Unger calls what he sees from this high ground “liberal doctrine,” which he conveniently summarizes in eleven propositions. But the concept of a “liberal doctrine” operating throughout society makes sense only because liberal doctrine is what people like Unger are able to see (and thus to represent) while they are looking from, not at, the high ground on which they stand.

113. Suppose someone said, with sincerity, “If I am behind the veil of ignorance I do not know what my position in society will be after the veil is removed. It is from behind the veil of ignorance that I can and should form and manifest my preferences for social arrangements.” This is supposed to mean, among other things: the speaker

83. UNGER, supra note 7, at 1-28.
84. Id. at 3, 6-7.
85. See JOHN RAWLS, A THEORY OF JUSTICE (1971). The “veil of ignorance” is central to Rawls' theory of justice. It specifies the conditions under which “rational men,”
does not know whether he will be a man or a woman, a master or a slave, etc. What would it be like for him to satisfy himself, from behind the veil of ignorance, that he knows for sure what signs like "master" and "slave" signify? Well, he could point at people on the other side of the veil, and at their behaviors, and reassure himself: "That's what 'master' and 'slave' signify." (And if it turns out that everybody else is behind the veil of ignorance with him, he could point at passages in books and scenes in movies depicting what it means to be a master or a slave.) But here it must be asked: How is he to know for sure who and what to point at? Well, if he does not know this already, at some stage his doubting about what to point at simply must come to an end—just like it must come to an end when he is no longer behind the veil of ignorance. Even people behind the veil of ignorance do not doubt how to use their own expressions, and how to react to the expressions of others. For if they doubted even this—if their ignorance extended this far down, as it were—they would be unable to form any preferences for social arrangements. For instance, they would not know how to maximize their minimum position if they doubted whether "20 utiles" did not mean 10 utiles, and "10 utiles" did not mean 20 utiles—for in that case, they would also doubt which draft social arrangement containing these signs to vote for. Rawls' veil of ignorance always ought to be called, in addition, the "veil of not doubting."

114. Rawls' concept of the "veil of ignorance" makes sense to us because we can imagine ourselves not having any memory of who we are—we can imagine, for example, being amnesiacs who have lost all our memories as a result of a physical or emotional shock. But even amnesiacs usually retain the ability to use language. And would the words "lashes on my back" mean the same thing to an amnesiac who was a slave before he lost his memory as they would mean to an amnesiac who was a master before he lost his? Would both amnesiacs use these words the same way, for example, if they were talking to one another about the merits of a slave economy? Rawls assumes not only that parties behind the veil of ignorance do not know their social position, but also that they do not know "their conceptions of the

occupying a hypothetical "original position" of equality, would choose in advance how to regulate their claims against one another and the foundation charter of their society. *Id.* at 11-12.

good or their special psychological propensities.” But do rich amnesiacs know what to point at if someone asks, “Show me a bowl of gruel”? Do poor amnesiacs know what to point at if someone asks, “Show me a truffle”? The concept of the “veil of ignorance” would make no sense to us at all if we doubted everything that we do not doubt, including the sense of the words we use. We must already be who we are in order to be ignorant of something, including who we are. (This is not an empirical assertion, but a remark on the grammar of the word “ignorance.”)

115. A (a sailor) exclaims: “Not this knot again!” B (a landlubber-logician whose specialty is the study of multiple negations) asks: “What do you mean?” A replies: “I mean this,” pointing at a place on a rope. B now says: “Oh, now I see what you mean!” Now both A and B do not doubt what A means. The rope gets untangled.

116. C (a lawyer) exclaims: “This is not beyond a reasonable doubt!” D (a judge) asks: “What do you mean?” C replies: “I mean this,” pointing first at an exhibit of latent fingerprints, and then at the accused’s hands. D now says: “Oh, now I see what you mean! Motion to dismiss denied.” Now both C and D do not doubt what C means. The trial proceeds.

117. Suppose that in the morning, while trying a case, a judge says: “The law applicable to this case is x, and not y.” And in the afternoon, while trying another, nearly identical case, he says: “The law applicable to this case is y, and not x.” Does the law of contradiction—“nothing can be both P and not-P”—forbid the judge’s expressions? Well, does the law of contradiction forbid a ball from being first on the table, then not on the table? The expression “Like cases should be treated alike” does not mean that two cases should be treated alike because they are the same case. Rather, it means that sometimes this case should be treated like that case.

118. When we read the expressions of legal rules, the rules seem to have no tense; they seem to be tenseless in the same way that the propositions of formal logic (e.g., “not (p and ~p)”) are tenseless. On the other hand, when we read the facts of the cases in which legal rules are expressed, sometimes the facts seem to have a tense, and sometimes they do not. One might say that sometimes it seems that what “Jones committed fraud” signifies occupies the same place and time as what “Smith committed fraud” signifies; and sometimes they

87. Rawls, supra note 85, at 12.
88. 5 The Encyclopedia of Philosophy, supra note 37, at 67.
occupy different places and times. This shows why we sometimes think that one case contradicts another case. We do not doubt that the cases are alike, and thus we think they should have been treated alike.

119. A judge says: "A's case is like B's case—they committed the same offense—so they should receive the same punishment: twenty lashes." Does this mean that if A gets twenty lashes, B should also get twenty lashes on A's back? Or does it perhaps mean that A's pain should be equal to B's pain? If the judge were to clarify matters by saying "Twenty lashes' means twenty lashes on both of their backs—it's the same punishment whoever receives the lashes," his clarification would consist of drawing our attention to the ways in which twenty lashes on A's back is like twenty lashes on B's back: e.g., in both cases the amount of force administered is pretty much the same, the duration of the punishment is pretty much the same, the amount of blood drawn is pretty much the same, etc. Likewise, if a law-and-economics scholar were to say, "If A's marginal disutility for pain is different than B's, then twenty lashes on A's back is not the same as twenty lashes on B's back," she would be drawing our attention to one of the ways in which the punishments might be different, even though A and B committed the same offense. On the other hand, if everyone does not doubt that A gets twenty lashes and B gets twenty lashes, because their offenses are the same, then there would be no one who could say whether the two punishments are the same or different. A gets twenty lashes and B gets twenty lashes, and that's that.

120. This shows what the words "same" and "different" (as well as phrases like "equal protection of the laws" and "like cases should be treated alike") mean: Sometimes they are used in expressions about how cases are the same; sometimes they are used in expressions about how cases are different; and sometimes no one thinks to use them at all.

121. The prisons are full of people whose punishments are neither the same as, nor different than, other punishments. The law is full of cases that are neither the same as, nor different than, other cases. Although what this paragraph says is a flagrant violation of the law of the excluded middle ("anything must be either P or not-P"), its violation is very serious and important. If expressions which abide by the law of the excluded middle have their uses, sometimes expressions which violate that law also have their uses.

122. Only if it can be said of something (say, \(x\), or \('x'\)) that it \textit{is}, can it also be said: "The expression \('x \text{ is and is not}'\) is a contradiction," and "The expression \('x \text{ neither is nor is not}'\) violates the law of the excluded middle." For example: I can utter the words "The standard meter in Paris is either one meter long, or else it is not one meter long," because I can say, of the standard meter in Paris, that \textit{it is}, and I can say this whether or not there really exists, in Paris, a standard meter.\footnote{I can say this in just the same way that T.S. Eliot can say, of mermaids, "I have heard the mermaids singing, each to each." \textit{The Love Song of J. Alfred Prufrock}, in T.S. Eliot, \textit{Selected Poems} 11, 16 (1930).} Now, in this particular case it may make more sense for me to \textit{violate} the law of the excluded middle by saying, "The standard meter in Paris is neither one meter long, nor is it not one meter long"—for if I said this I might be drawing attention to the fact that to say of the standard meter in Paris that it is either the same length as itself, or a different length than itself, is to speak nonsense. Consider what Wittgenstein has to say on this point:

\begin{quote}
There is one thing of which one can say neither that it is one metre long, nor that it is not one metre long, and that is the standard metre in Paris.—But this is, of course, not to ascribe any extraordinary property to it, but only to mark its peculiar role in the language-game of measuring with a metre-rule.—Let us imagine samples of colour being preserved in Paris like the standard metre. We define: "sepia" means the color of the standard sepia which is there kept hermetically sealed. Then it will make no sense to say of this sample either that it is of this colour or that it is not.

We can put it like this: This sample is an instrument of the language used in ascriptions of colour. In this language-game it is not something that is represented, but is a means of representation.\footnote{\textit{Philosophical Investigations}, supra note 1, at 25e.}
\end{quote}

Suppose someone were now to say: "But isn't Wittgenstein speaking nonsense here? Don't his own words prove that one \textit{can} say the words that Wittgenstein says one cannot say?" Well, suppose this were so. One \textit{can} speak nonsense about \(x\) (and maybe Wittgenstein is doing so here), but only because the sign \('x'\) exists in some language-game (even if only in the language-game of speaking nonsense)! What Wittgenstein says about the standard meter in Paris, in the first sentence in the quotation above, is \textit{important} nonsense.

123. "Small is not small" is not a contradiction if "Small" means a person, and "small" means his size; this expression has its use. "Small is neither small nor not small" does not violate the law of the excluded middle if "Small" means the concept "small"; in that case the expression would assert that size-words are inappropriate to con-
cepts, and thus would have its use. "I can say that I do not doubt this result, and I cannot say that I do not doubt this result": Although this expression is a contradiction—is indeed nonsense—it, too, has its use.

124. It makes no sense to talk about the difference between something that can be talked about and something that cannot be talked about. Neither does it make sense to talk about how they are the same. My testimony in court, "I did not doubt that the traffic light was green," says something that is neither the same as, nor different than, my not doubting that the traffic light was green while I was not doubting it. "I cannot express the way it really was with me; I can only talk about my memories of how it was": This would be a very misleading way to put the point of this paragraph. The most that the expression "the way it really was with me" could mean is "I did not doubt that . . . ." And even if there were anything more to the way it really was with me than that, I would not be able to say what this "more" consisted of. Neither could I say how it differed from, or was the same as, what I say I did not doubt.

125. Whatever is true in Ronald Dworkin's philosophy of judging 92 comes down to this: Judges can try to think very clearly about the cases before them. Suppose they do this. If they can then say sincerely, "The result of this case is not doubtful," the case is an easy case. If they cannot say this sincerely, the case is a hard case. If the case is a hard case, they can try to think very clearly about the general principles important to the legal system as a whole, and to society as a whole. Suppose they do this. They will then be able to say sincerely, "These general principles, at least, are not doubtful." And then, after thinking very clearly about how the general principles bear upon the case, they will be able to say sincerely, "The result of this case is not doubtful." Finally, whenever judges say sincerely, "The result of this case is not doubtful," they can resolve the case by handing down the result that is not doubtful.

126. The normative part of Dworkin's philosophy of judging comes down to this: Judges should do what the previous paragraph says they can do.

127. Whatever is true in Stanley Fish's critique of Dworkin's philosophy of judging 93 comes down to this: If a judge in any kind of

92. Or at least in the version that is set forth in RONALD DWORIN, LAW'S EMPIRE (1988) and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

case, easy or hard, does not doubt a result he will not be able to think or say that he does not doubt it. And if a judge does say, "These general principles are not doubtful," or "The result of this case is not doubtful," he will not doubt that the signs in his expression mean something, and he will not be able to think or say that he does not doubt what that "something" is. Moreover, being a good judge (at this point in history) consists of thinking very clearly, being sincere in resolving doubts, and, when all doubts have been resolved in the direction of a result, handing down that result. Thus, according to Fish, Dworkin's normative position comes down to telling all judges that they should try to be good judges. Says Dworkin the cheerleader: "Rah, rah, judges! Be all that you can be!"

128. If I believe that a legal expression is a true proposition about something in the world, I do not doubt that it pictures that something accurately. Correspondence theories of truth⁹⁴ make sense to us because we do not doubt that there neither is, nor is not, a difference between us and the world. What this means is: If we always doubted whether there was any difference between us and the world, we would not be able to learn how to tell whether a proposition we heard was the same as, or different than, the reality to which it is supposed to correspond. We would not be able to learn what the concept of "a proposition corresponding to reality" means: Propositions would always seem to say the same thing to us as "'Proposition p' is me." One might say: Propositions correspond to reality because we forget ourselves.

129. If I believe that one statement about law coheres with another statement about law, I do not doubt that they cohere. Coherence theories of truth⁹⁵ make sense to us because we do not doubt that there neither is nor is not a difference between us and our expressions. What this means is: If we always doubted whether there was any difference between us and our expressions, propositions like "'It is snowing' coheres with other statements about the world" and "'He was negligent' coheres with other statements about him and the law" would always seem to say the same thing to us as "'I am 'It is snowing,' etc.' and "'He is negligent,' etc.'—we cohere with one another."

⁹⁴ See, e.g., 2 The Encyclopedia of Philosophy, supra note 37, at 223 (quoting Russell: "truth consists in some form of correspondence between belief and fact").

⁹⁵ See, e.g., 2 The Encyclopedia of Philosophy, supra note 37, at 130 ("According to the coherence theory, to say that a statement (usually called a judgment) is true or false is to say that it coheres or fails to cohere with a system of other statements; [and] that it is a member of a system whose elements are related to each other by ties of logical implication as the elements in a system of pure mathematics are related.").
Because we do not doubt that our expressions are not us, we can learn to use expressions like "My proposition p coheres better with my proposition q than it does with my proposition r." One might say: Propositions cohere with one another because we forget ourselves.

130. When I am in severe pain, the world shrinks to me. When I experience great joy, I expand into the world. At many other times there is just a world, because I forget myself.

131. Whatever truth there is in the concept of the "collapse of the distinction between subject and object" in postmodern thought comes down to this: So long as I do not doubt the world, I am not able to say whether there is any difference (or any sameness either) between me and the world. Whatever truth there is in the reaction against the concept of the collapse comes down to this: Postmodern thought has not said what my not doubting the world consists of, and so it has not proved that the distinction between subject and object has collapsed. As things stand now the parties are at an impasse. The impasse will not be broken until the value of showing what cannot be said is shown by what can be said.

132. This is a picture of a circle, drawn by, and from the standpoint of, someone who is looking at it; the draftsman does not doubt that this picture shows what he sees:

If circles could see and draw, this would be a picture of a person looking at a circle, drawn by, and from the standpoint of, the circle which is being looked at; the draftsman does not doubt that this picture shows what it sees:

This is a picture of a person standing next to a circle, drawn by, and from the standpoint of, someone observing the person who is standing next to the circle; the draftsman does not doubt that this picture shows what he sees:

---

And so on. When we answer the question, "What do you see?", we usually do not include a representation of ourselves seeing what we see. (We usually do not include a description of our eyes when we say what we see; nor a description of our ears when we say what we hear; nor a description of our skin when we say what we are touching; nor a description of our mind when we say what we think; etc.) And if, on occasion, we do put a representation of ourselves in our answer, we do not also include a representation of ourselves representing ourselves. For example, in Parmigianino's *Self-Portrait in a Convex Mirror*,

Photograph © 1995 Kunsthistorisches Museum, Vienna. Reprinted by permission. All rights reserved.

the artist did not paint himself painting the picture of himself in the mirror. And even if he had tried to do this, as some artists have, he would not have painted himself painting the picture of Parmigianino-painting-himself-in-the-mirror (and so on and so on).

133. "The eye is not part of the visual field" means here: While I am looking at something, I do not doubt that . . . . there is no me who sees what I see. On the other hand, there is no eye either: There is no transcendental subject, ego, or will in which my not doubting a result is registered. And even if there were such a transcendental subject, ego, or will, I could not express it: If I cannot represent what I do not doubt, I also cannot represent that wherein my not doubting is happening. This shows the limit of all forms of representation. From the perspective of this limit, science, art, religion, and law stand together on the same ground.

134. "The Rule of Law" means: Judges can, but should not, represent themselves in their judgments—they must only represent the law. "The impossibility of the Rule of Law" means: Judges could not represent themselves in their judgments, even if they tried. If judges really could represent themselves in their judgments, the Rule of Law would be rather easy to maintain. We would only need to hire honest people as judges, and then train them always to represent both themselves and the law in their judgments, and to clearly delineate the boundary between the two. By this means we would always be able to know where the judges themselves stopped and the law began. We could throw away as waste material, as it were, all of the judges' self-representations, and whatever is left over would be pure law.

135. The concept of the "hermeneutic circle" in legal studies: If all judges always doubted the sense of every word, punctuation mark, and sentence in the texts they read, or if all judges always did...
not doubt the sense of anything they read, there would be no circle: There would be only the judge, in the first case, and only the text, in the second. It is because some results are doubtful and some results are not doubted that it is possible to articulate the concept of a circle running between text and text, or between judge and text. The meaning of a text is a result only if it is doubted, for if it is not doubted it has nothing to be a result of: this is a remark on the grammar of the word "result." The sentence "The text's meaning is a result that I do not doubt" says exactly the same as "I do not doubt the text's meaning." On the other hand, the sentence "The text's meaning is a result that he does not doubt" has a possible sense that exceeds the mere fact that he does not doubt the text's meaning: It could be used to say the same as "He does not doubt the meaning of the text, but it could be otherwise—we, for example, could try to get him to doubt the text's meaning by telling him about our doubts." This shows that the expression "The unity of reader and text together is what constitutes meaning" does not necessarily say the same thing as "Since there is no way out of the hermeneutic circle, we are all trapped and might as well just give up trying to understand anything." One might say: How lucky we are that your circle and mine are drawn differently!

136. Find someone who has never heard Dmitri Shostakovich's Leningrad Symphony, and who knows nothing at all about the Second World War. Have him listen to a recording of the symphony (let him see the title, too), and then get him to write a description of what he has just heard. Next have him read a vivid history of the Battle of Leningrad, such as Harrison Salisbury's The 900 Days. After he has done this, let him listen to the symphony again, and then have him put down a description of what he heard this time around. A comparison of his first and second descriptions of the music would show the sense of the previous paragraph much better than any possible description of the concept of the hermeneutic circle could show it.

* * * *

137. If there really is a difference between my bedroom when I sleep and my bedroom when I am awake, I would not be able to say what the difference is while I am sleeping. Nor could I, while asleep,

101. For an expression of the hermeneutic circle that does not say the same thing as a fatalistic curse, see HANS-GEORG GADAMER, TRUTH AND METHOD 269 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1990).
102. SYMPHONY NO. 7 IN C MAJOR, OP. 60 (1941).
say in what ways they are the same. If someone objected that I could say how they are different or the same by inferring it from the evidence (a video tape, for instance), he would miss the point. While I am awake I can also infer from the evidence that I slept last night, but this would not prove anything about my being able to say “I sleep” while I am asleep.

138. It is remarkable how trivial Henri Rousseau’s *The Sleeping Gypsy* seems if it is interpreted as a painting about what happens when we are sleeping.  

104. This work is reproduced in Dora Vallier, *Henri Rousseau* 62-63 (1979).
139. I am aware that my not doubting a result limits my ability to say "This result is not doubtful" in the same way that I am aware that my peripheral vision limits my field of vision. When I close my eyes in a darkened room there is no discernable limit to my field of vision. When I do not doubt a result there is no limit to my not doubting it.

140. The concept of "my not doubting a result" is always in great danger of gelling into a mass of words that signify nothing but metaphysical nonsense. There is no such thing as my not doubting a result. My not doubting a result refers to no thing at all, because only expressions can refer to something, and my not doubting a result is not an expression. Since it is not an expression, my not doubting a result makes no sense, because only expressions can make sense. My not doubting a result is inexpressible not because it is a mystical experience, but because it is not an experience at all. An experience is something about which something can be expressed, but my not doubting a result is not something about which anything can be expressed, so it is not an experience. My not doubting a result is left over after the grammar of the expressions "I do not doubt the result," "He does and did not doubt the result," and "I did not doubt the result" has been clarified. I simply do not doubt a result, and that's that, but saying even this is really very misleading: It's like saying that I am able to see what is behind my head just by turning my head.\footnote{105}

141. If I use a mirror to see what is behind my head, I see only what the mirror shows me, when it shows it to me. One might say that the glass chooses to reflect only what I see, and even then only in a recurring wave of arrival to my blinking eyes.\footnote{106} If I examine what I do not doubt, I examine only what my mind shows me, when it shows it to me.

142. No mirror can show me my not doubting a result, when I do not doubt it. Still, while I cannot examine—and can say nothing about—my not doubting a result, it is impossible to think deeply about law without having first clarified the concept of "not doubting."

143. That I do not doubt . . . something—this is neither good nor bad. And that I do not doubt is not a condition for me to celebrate or

\footnote{105. This entire paragraph—indeed, this entire article—is in flagrant violation of the law of identity: "If anything is \( P \), then it is \( P \)." \textit{5 The Encyclopedia of Philosophy, supra} note 41, at 67. But if the rules of logic were never violated, then nothing truly logical would ever get done. \textit{Cf. Culture and Value, supra} note 1, at 50e ("If people did not sometimes do silly things, nothing intelligent would ever get done.").}

\footnote{106. This sentence paraphrases two lines from John Ashbury's \textit{Self-Portrait in a Convex Mirror, in John Ashbury, Selected Poems} 188 (1985).}
lament. What I do and say, as well as what I don't do and don't say, when I do not doubt—this is what is good or bad; this is what is to be celebrated or lamented.

144. The key that unlocks the most doors is that part of the concept of “not doubting” that cannot be expressed.

107. Cf. this: “What the eye doesn’t see the heart doesn’t grieve over.” Remarks on the Foundations of Mathematics, supra note 1, at 205.