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The New Wittgensteinians and the End of Jurisprudence

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I. INTRODUCTION

A number of scholars have recently proposed an approach to jurisprudence and a method of justification in law, which is inspired in large part by the later philosophy of Ludwig Wittgenstein.[1] Traditional theories of legal justification have sought to explain what it means to say propositions in law are true.[2] For example, Ronald Dworkin has argued that propositions of law are true if they follow from the principles of justice and fairness that provide the best constructive interpretation of the community's legal practice.[3] Thus, for Dworkin, the truth of a legal proposition depends on something external to law as it is usually understood—principles of justice and fairness.[4] Propositions of law are true because they stand in a certain relationship to political theory.[5] Thus, more generally, the traditional picture of legal justification is that the truth of a legal proposition is a function of something that goes beyond specifically legal justifi-

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1. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993) (reviewing PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991)). For other scholars who advocate a Wittgensteinian approach to legal philosophy, see WITTGENSTEIN AND LEGAL THEORY (Dennis M. Patterson ed., 1992); Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMAN. 353 (1994).

2. *See* Patterson, *supra* note 1, at 279.

3. RONALD DWORKIN, LAW'S EMPIRE 225 (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

4. Patterson, *supra* note 1, at 279.

5. *Id.*

cation—for example, appeals to precedents or the language of a statute.[6] For instance, according to Dworkin, without political theory it would be impossible to identify true legal propositions.[7]

According to the new Wittgensteinians, the traditional method of legal justification is related to a wider debate in philosophy—the debate between realists and antirealists.[8] These terms refer to different theories about how one determines the truth of a legal proposition.[9] According to realists, a proposition is made true by virtue of some feature of the world that makes it true.[10] On the other hand, antirealists contend that there are no features of the world that make propositions true.[11] According to antirealists, the only measure of the truth of a proposition is by reference to the sort of evidence we conventionally regard as determinative.[12] Traditional

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6. *Id.* at 281; *see also* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). Weinrib observes that the dominant tendency is to look upon the content of law from the standpoint of some external ideals that the law is to enforce. *See* Weinrib, *supra* at 955. He contends that implicit in contemporary legal scholarship is the idea that law embodies or should embody some goal that can be specified apart from law and can serve as the standard by which law is to be evaluated. *Id.*

7. Patterson, *supra* note 1, at 282.

8. *Id.* at 284. For more on realism versus antirealism, see MICHAEL DEVITT, REALISM AND TRUTH (2d ed. 1991); HILARY PUTNAM, REALISM AND REASON (1983); RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH (1991) [hereinafter RORTY, OBJECTIVITY].

9. Patterson, *supra* note 1, at 284.

10. *See id.*; *see also* MICHAEL DUMMETT, TRUTH AND OTHER ENIGMAS (1978). Dummett characterizes "realism" as the belief that statements—for example, statements about the physical world or mental events—possess an objective truth value, independently of our means of knowing it. DUMMETT, *supra*, at 146. Such statements are true or false in virtue of a reality existing independently of us. *Id.*

11. *See* Patterson, *supra* note 1, at 284.

12. *See id.*; *see also* DUMMETT, *supra* note 10, at 146. In contrast to realism, the antirealist contends that statements are to be understood only by reference to the sort of thing which we count as evidence for such a statement. DUMMETT, *supra* note 10. The realist, on the other hand, takes the position that the meanings of statements are not directly tied to the kind of evidence for them that we can have, but consist in the manner of their determination as true or false by states of affairs whose existence is not dependent on our possession of evidence for them. *Id.* The antirealist, however, argues that the meanings of statements are tied directly to what we count as evidence for them such that a statement, if true at all, can be true only in virtue of something of which we could know and which we should count as evidence for its truth. *Id.*; *see also* RORTY, OBJECTIVITY, *supra* note 8. "The term 'antirealism' was first put in circulation by Michael Dummett . . . ." RORTY, OBJECTIVITY, *supra* note 8, at 3.

legal theorists, then, offer a causal theory of legal justification—a legal proposition is true because something external to law makes it true.[13]

The new Wittgensteinians suggest that theorists turn away from this causal or external theory of justification.[14] They suggest that a proposition of law is true if one can show that on any particular occasion one is correctly using the words in question.[15] This means that jurisprudence is to be concerned with the internal description of law's public practices of justification—that is, the strategies or modalities that lawyers use to demonstrate the truth of a proposition.[16]

This Article seeks to critically evaluate the new approach to jurisprudence and legal justification. In particular, one of the most significant contributions of the Article is that it seeks to evaluate the new approach by, among other things, examining the history of the Wittgensteinian descriptive project in other areas of philosophy. The Article focuses primarily on the work of Philip Bobbitt who has offered the leading example of this type of neo-Wittgensteinian approach.[17] The arguments generated in the course of the Article, however, may be applied against any neo-Wittgensteinian internalist[18] approach to jurisprudence. Thus, the Article seeks to provide a general critique of the neo-Wittgensteinian internalist project in law.

Part II sets out a brief account of Wittgenstein's later approach to philosophy. It also explains that Wittgenstein influenced philosophers to take the linguistic turn. Thus, it describes the approaches of the ideal language philosophers and the ordinary language philosophers. Part II then locates Bobbitt's project within the Wittgensteinian tradition and sets out Bobbitt's basic descriptive approach to

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13. Patterson, *supra* note 1, at 288.

14. *Id.* at 289.

15. *Id.*

16. *Id.*; *see* Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 56 (1993) [hereinafter Patterson, *Poverty*]:

> The task of jurisprudence is the accurate description of the forms of argument used by lawyers to show the truth of propositions of law. Jurisprudence should turn its attention away from the fixation on interpretation and study the ways in which lawyers go about the task of justifying propositions of law.

17. *See* BOBBITT, *supra* note 1.

18. For more on the distinction between internalist and externalist approaches in jurisprudence, see *infra* notes 71-87 and accompanying text.

jurisprudence. Part II closes by contrasting internal with external approaches to jurisprudence. Part III sets out some alternatives to the internalist descriptive project. Part IV seeks to evaluate the neo-Wittgensteinian internalist descriptive approach to jurisprudence. The Article concludes that the neo-Wittgensteinian project should be rejected.

II. THE NEW WITTGENSTEINIANS: THE EXAMPLE OF PHILIP BOBBITT

Philip Bobbitt has provided the best example of the new Wittgensteinian project.[19] Thus, in order to evaluate this new approach to jurisprudence and legal justification, this Article focuses primarily on the views of Bobbitt. To understand and evaluate the neo-Wittgensteinian project, however, it is necessary to understand Wittgenstein's later approach to philosophy and subsequent philosophical developments that were heavily influenced by Wittgenstein.

A. Wittgenstein's Method

According to Wittgenstein's later philosophy, philosophical problems are not genuine problems.[20] They represent nothing to be solved.[21] Wittgenstein's goal was to make philosophical problems disappear so that we can stop doing philosophy altogether.[22]

According to Wittgenstein, the purpose of philosophy is to provide us with a surview or synoptic view.[23] In his view, the misunderstandings characteristic of philosophy arise out of the difficulty of surveying our use of language.[24] The reason for giving a surview is to dispel philosophical illusion.[25] Wittgenstein sought to cure philosophers of the diseases of the understanding.[26] According-

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19. *See* BOBBITT, *supra* note 1. For reviews of Bobbitt's CONSTITUTIONAL INTERPRETATION, see T.R.S. Allan, *Constitutional Interpretation*, 52 CAMBRIDGE L.J. 157 (1993); Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107 (1993); Patterson, *supra* note 1; Book Note, *Legitimacy and Justice in Constitutional Interpretation*, 106 HARV. L. REV. 1218 (1993).

20. ROBERT J. FOGELIN, WITTGENSTEIN 142 (Ted Honderich ed., 2d ed. 1987).

21. *Id.*

22. *Id.* at 143.

23. P.M.S. HACKER, INSIGHT AND ILLUSION 113 (1972).

24. *Id.* at 114.

25. *Id.* at 115.

26. *Id.* at 116.

ly, his principal view of the purpose of philosophy is to eliminate confusion and to cause the disappearance of philosophical problems.[27] In particular, the task of philosophy is to dissolve philosophical difficulties that arise out of language.[28]

In Wittgenstein's view, philosophical problems arise when philosophers misuse language.[29] Thus, Wittgenstein sought to provide a description of our ordinary uses of language.[30] In Wittgenstein's view, philosophy could not interfere with the actual use of language.[31] Philosophy can only describe the actual use of language.[32] Thus, philosophy "leaves everything as it is."[33]

For Wittgenstein, explanations had to come to an end somewhere.[34] Philosophers have made an error by seeking more explanation than the subject matter will allow.[35] Thus, philosophers must stop seeking to justify answers. The only thing for philosophers to do is simply describe our current practice. Wittgenstein writes, "[w]e must do away with all *explanation*, and description alone must take its place."[36] Wittgenstein, then, took the position that philosophy was purely descriptive.[37] Philosophy is a conceptual investigation—it describes our conceptual structures.[38]

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27. *Id.*

28. *Id.*

29. STANLEY CAVELL, THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY AND TRAGEDY 226 (1979); *see* C.S. Chihara & J.A. Fodor, *Operationalism and Ordinary Language: A Critique of Wittgenstein*, *in* WITTGENSTEIN: THE PHILOSOPHICAL INVESTIGATIONS 384, 387-88 (George Pitcher ed., 1966).

30. *See* HACKER, *supra* note 23, at 151-52.

31. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS para. 124, at 49 (G.E.M. Anscombe trans., 3d ed. 1968).

32. *See id.*

33. *Id.*; *see also* A.M. Quinton, *Excerpt from "Contemporary British Philosophy"*, *in* WITTGENSTEIN: THE PHILOSOPHICAL INVESTIGATIONS 13 (George Pitcher ed., 1966). Quinton observes that Wittgenstein concluded that it is no part of the business of philosophy to reform language. Quinton, *supra*, at 15. Philosophy must leave everything as it is. *Id.*

34. *See* HACKER, *supra* note 23, at 150.

35. *Id.* at 150; *see* PAUL JOHNSTON, WITTGENSTEIN AND MORAL PHILOSOPHY (1989). Johnston observes that one general source of confusion against which Wittgenstein argues is the temptation to seek explanation where this is no longer appropriate. JOHNSTON, *supra*, at 12.

36. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 31, para. 109, at 47.

37. *See* HACKER, *supra* note 23, at 117.

38. *Id.*

In Wittgenstein's view, the invention of new theories could contribute nothing to the solution of philosophical problems.[39] Philosophy only describes.[40] Philosophy is concerned with examining the concepts we have, not those we do not have.[41] Thus, philosophy is purely descriptive and it lacks a stratified structure of theory.[42]

B. Linguistic Philosophy

In the wake of Wittgenstein, philosophers took the "Linguistic Turn."[43] According to the linguistic philosophers, philosophical problems are problems which may be solved or dissolved either by reforming language or by understanding more about ordinary language.[44] In philosophy, two opposing schools developed: ideal language philosophy and ordinary language philosophy.[45] Some knowledge about these schools is important because the ideal language philosophers rejected the Wittgensteinian descriptivist approach of the ordinary language philosophers.

1. Ideal language philosophy

The philosopher Gustav Bergmann suggested that it would be possible to eliminate philosophical problems not by describing our ordinary language but by constructing an ideal language.[46] According to Bergmann, ordinary language is "unperspicuous" in that it

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39. *Id.* at 118; *see also* JOHNSTON, *supra* note 35, at 2. Johnston observes that the fundamental premise underlying Wittgenstein's method is the claim that philosophy should be descriptive, and that it should advance no theses. JOHNSTON, *supra* note 35, at 2. The philosopher is not called upon to discover truth nor to offer explanations. *Id.* Rather the philosopher's job is to eliminate conceptual confusion by depicting the relations between concepts. *Id.*

40. *See* HACKER, *supra* note 23, at 118.

41. *Id.* at 119.

42. *Id.*

43. *See generally* THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty ed., 1967) [hereinafter LINGUISTIC TURN] (explaining movement away from Wittgensteinian scientific evaluation of philosophical theories to more language oriented approach).

44. *Id.* at 3; *see also* THE PHILOSOPHY OF RUDOLF CARNAP (Paul A. Schilpp ed., 1963) (observing that the aim of both naturalists and constructivists was to solve philosophical problems); Gustav Bergmann, *Logical Positivism, Language, and the Reconstruction of Metaphysics*, *in* LINGUISTIC TURN, *supra* note 43, at 63 (discussing group of philosophers who have taken the linguistic turn initiated by Wittgenstein).

45. *See* Bergmann, *supra* note 44, at 64 (discussing division between ideal linguists and analysts of ordinary usage); LINGUISTIC TURN, *supra* note 43, at 4.

46. *See* Bergmann, *supra* note 44, at 63-64; LINGUISTIC TURN, *supra* note 43, at 6.

makes possible the formulation of philosophical questions.[47] Thus, to say that philosophical questions are questions of language is just to say that these are questions which we ask only because we speak the language we do.[48] According to Bergmann, we do not have to speak the language we do—unless we want to ask philosophical questions.[49] Instead, an ideal language could be constructed. Thus, philosophical problems could be dissolved by reforming our present language.[50] Such a language would be one in which philosophical propositions and philosophical questions could not be asked.[51] Under this view, the history of philosophy may be viewed as suggestions about what an ideal language would be like.[52] For Bergmann, philosophy becomes linguistic recommendation.[53]

2. Ordinary language philosophy

In contrast to the ideal language philosophers, a group of philosophers developed—ordinary language philosophers—who, following the later Wittgensteinians, took the linguistic turn but refused to construct an ideal language.[54] They took the position that philosophical problems arise not because English is unperspicuous, but because philosophers have not used ordinary English.[55] In their

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47. LINGUISTIC TURN, *supra* note 43, at 6.

48. *Id.* at 7.

49. *Id.*

50. Bergmann, *supra* note 44, at 67-68. Bergmann states that, for a scheme to qualify as an ideal language, it must fulfill two conditions. *Id.* First, it must be complete in accounting for all areas of experience. *Id.* Second, it must permit the solution of all philosophical problems. *Id.*

51. Bergmann, *supra* note 44, at 65 (observing that in an ideal language, the philosophers' propositions could no longer be stated); LINGUISTIC TURN, *supra* note 43, at 7.

52. LINGUISTIC TURN, *supra* note 43, at 7.

53. *Id.* at 8; *see* Alice A. Lazerowitz, *Linguistic Approaches to Philosophical Problems*, *in* LINGUISTIC TURN, *supra* note 43, 147. Lazerowitz observes that the ideal language philosophers view philosophical theories as proposals to alter language. LINGUISTIC TURN, *supra* note 43, at 8, 151.

54. J.O. Urmson, *The History of Philosophical Analysis*, *in* LINGUISTIC TURN, *supra* note 43, at 294. Urmson observes that the ordinary language philosophers were inspired by the thought of the later Wittgenstein. *Id.* at 297. He states that Wittgenstein did not believe that the use of an ideal language would be helpful in philosophical analysis. *Id.*; LINGUISTIC TURN, *supra* note 43, at 12.

55. *See* James W. Cornman, *Uses of Language and Philosophical Problems*, *in* LINGUISTIC TURN, *supra* note 43, at 227. Cornman writes that the ordinary language philosophers claimed that philosophical problems can be solved and dissolved by properly classifying the uses of the language in which the problems are expressed. *Id.*; LINGUISTIC TURN, *supra* note 43, at 3.

view, philosophers have formulated philosophical problems in what looks like ordinary English, but have in fact misused the language by using terms jargonistically.[56] Thus, if philosophers would use terms as the ordinary person uses them, they would not be able to raise philosophical problems.[57] Accordingly, following the later Wittgenstein, ordinary language philosophers adopted as their method the description of the logical behavior of the linguistic expressions of ordinary language.[58] In so doing, philosophical problems could be dissolved.

C. Bobbitt's Method

Bobbitt's approach seems to follow the later Wittgensteinian descriptive project and appears to be an attempt to allow us to stop doing legal philosophy—to stop seeking to justify our answers to legal questions.[59] Thus, Bobbitt's project is to describe actual legal practice: the ways in which lawyers argue for propositions—the modalities. Bobbitt describes six forms or modalities of arguments that lawyers use to argue for the truth or falsity of constitutional claims. The six modalities of constitutional argument are:

> the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).[60]

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56. LINGUISTIC TURN, *supra* note 43, at 12; Nelson Goodman, *The Significance of* Der Logische Aufbau Der Welt, *in* THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 44, at 545. Goodman observes that the ordinary language philosophers believed that philosophical problems arose from a lack of care in the use of ordinary language. Goodman, *supra*, at 553. They recommended explaining in ordinary language the nature and misuse or misunderstanding of use. *Id.*

57. LINGUISTIC TURN, *supra* note 43, at 12.

58. *Id.* at 19.

59. Patterson, *supra* note 1, at 303 (Wittgenstein is the "philosophical inspiration for Bobbitt's position.").

60. BOBBITT, *supra* note 1, at 12-13.

According to Bobbitt, these modalities are the ways in which a legal proposition is true.[61] The task of jurisprudence is simply to describe our legal practice—the forms of legal argument.[62]

For Bobbitt, then, a judicial decision is justified if one of the six modalities is used to reach the decision.[63] Similarly, according to Bobbitt, a legal decision is legitimate to the extent that it follows the forms of argument recognized within our legal culture—that is, the modalities.[64]

What happens when the modalities conflict? The modalities can be used to generate different outcomes.[65] Bobbitt asserts that the fact that the modalities sometimes conflict is preferable to having some overarching meta-rule to resolve modal conflicts that would eliminate the possibility of moral choice in constitutional decision making.[66] "The incommensurate modalities give us various possible worlds against which to measure our sense of justice and fitness."[67] Thus, Bobbitt has dissolved the problems of jurisprudence. The modalities are the ways in which propositions of law are shown to be true or false.[68] Contrary to the received view in jurisprudence, they are not true by virtue of something independent of the modalities and external to law as it is generally understood.[69] Thus, jurisprudence is to be concerned only with describing internal modalities—describing actual legal practice. There is no effort to justify that any particular argument is objectively a right answer. Any answer that is based on one of the modalities is legitimate. Thus, the jurisprudential

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61. *Id.* at 34; Patterson, *supra* note 1, at 295.

62. Patterson, *supra* note 1, at 295.

63. BOBBITT, *supra* note 1, at 183-84; Patterson, *supra* note 1, at 295.

64. BOBBITT, *supra* note 1, at 27-28; *see* Nichol, *supra* note 19, at 1111. The modalities Bobbitt identifies are the ways that law statements are assessed. *Id.* No appropriate constitutional argument exists outside of the modalities. *Id.*; *see also* Thomas D. Eisele, *The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities*, 54 TENN. L. REV. 345 (1986). Eisele has developed a similar Wittgensteinian account regarding the authority of law. Eisele, *supra*, at 376. Eisele argues that the authority of law is a function of the ways in which we generate law. *Id.* The means of creating law are equally the means of creating the authority of law. *Id.* According to Eisele this conception replaces a positivistic notion of authority, whereby the authority of law is derived from the position of the one positing it, with a notion of authority whereby the authority of law is derived from the methods by which it is generated. *Id.*

65. BOBBITT, *supra* note 1, at 155.

66. *Id.* at 157-62.

67. *Id.* at 157.

68. *See* Patterson, *supra* note 1, at 301.

69. *Id.*

problem—justifying answers to legal questions—disappears. It is replaced by a simple description of the types of arguments that lawyers use.[70]

D. *Internal Versus External Approaches*

Although he does not discuss the views of Bobbitt, Douglas Lind has recently offered a similar view of constitutional adjudication.[71] Lind identifies an external point of view which has dominated approaches to constitutional adjudication.[72] Externalist approaches to constitutional interpretation seek to evaluate legal practice on the basis of criteria external to that practice.[73] They typically seek to discover some fundamental axioms of political morality or rules of interpretation that should be used in legal decision making.[74] Thus, legal theorists usually evaluate the results of legal decision making by deriving constitutional meaning from standards lying outside the practice of adjudication.[75]

In contrast to this approach, Lind recommends "internality."[76] Influenced by the later Wittgenstein approach, he argues that adjudication stands independently of externalist theory.[77] According to this internal point of view, there is no way to evaluate legal decision making except by internal investigation of judicial practice.[78] One who takes the internalist point of view studies the practice of a craft to ascertain and describe the interpretive methods and linguistic

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70. *See* Nichol, *supra* note 19, at 1107. Nichol observes that Bobbitt has turned away from traditional efforts to legitimize constitutional review in favor of a description of accepted conventions. *Id.* at 1110; *see* Patterson, *supra* note 1, at 294 n.78. Professor Patterson emphasizes that it is essential to understand that for Bobbitt there is nothing more to constitutional argument than the six modalities. Patterson, *supra* note 1, at 294 n.78. He notes that Bobbitt argues that there is nothing more for philosophy to do than describe the practice of constitutional argument. *Id.*

71. Lind, *supra* note 1, at 353-57.

72. *Id.* at 356.

73. *Id.* at 359.

74. *Id.* at 356.

75. *Id.* at 356-57.

76. *Id.* at 357.

77. *Id.*

78. *Id.*; *see also* Thomas D. Eisele, *"Our Real Need": Not Explanation, But Education*, *in* WITTGENSTEIN AND LEGAL THEORY, *supra* note 1, at 29, 38 (advocating a Wittgensteinian internalist approach to law). Eisele states that since philosophical questions arise in everyday language, we ought to be able to solve it in the same language without having to appeal to some other external discourse—for example, a scientific discourse. WITTGENSTEIN AND LEGAL THEORY, *supra* note 1, at 38.

conventions employed by the practitioners.[79] According to this point of view, practitioners of a craft adopt methods of interpretation that respond to the internal demands of their practice.[80] Internality further sees meanings as bound up in practice.[81]

Given this, Lind says that the internalist approach to adjudication is based on the idea that meaning and judgment are inextricably interwoven with practice.[82] Thus, he seeks to ascertain and describe the conventions actually employed by the practitioners of adjudication.[83] According to Lind, his internal investigation of adjudicative practice reveals that judicial decisions are justified to the extent that they satisfy the internal conditions of adjudicative excellence—impartiality, reasoned explanation, articulative boundaries, coherence, and workability.[84]

In contrast, external legal theorists seek to discover principles for legal decision making that are external to judicial practice and outside of law.[85] Thus, they have sought to bring principles and methods

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79. Lind, *supra* note 1, at 359.

80. *Id.* at 360.

81. *Id.* Lind relies on the later Wittgenstein approach for justification of the internalist view. *Id.* at 361. According to Lind, Wittgenstein emphasized the integration of judgment with practice. *Id.* In Wittgenstein's view externalist approaches involve a fundamental mistake of understanding. *Id.* at 362. Externalist methods involve standing outside any human activity or practice—for example, law—and evaluating the results of judgment. *Id.* at 363. In Wittgenstein's view, the confusion of externalism results from a misunderstanding regarding the nature of language. *Id.* at 362. In his view, externalism treats language as a calculus proceeding according to exact rules. *Id.* The externalist seeks the meaning of a word or concept by trying to ascertain its real definition. *Id.* This generates a problem: Since the definition is separate from the concrete usage of the word, there is always the possibility that the next application of the word will contradict or fall outside the boundary fixed by the definition. *Id.* at 363. In his view, no definition going to the "essence" of the term could avoid this possibility of refutation. *Id.*

In contrast to the externalist approach which posits a definition for a word or concept, Wittgenstein says the meaning of a word is determined by its use in particular cases. *Id.* at 364-65. Understanding the meaning of a proposition requires an investigation in how it is used in particular cases. *Id.* at 366. Propositions, then, get their meaning from their use within a system of language. *Id.* Wittgenstein used the term "language game" to emphasize that speaking a language is an activity or a form of life. *Id.* Language cannot be separated from action. *Id.* Thus, understanding the meaning of a proposition requires inquiry into the activity or practice which constitutes the form of life within which the language game serves as the language of discourse. *Id.* Practice, then, is the form of life wherein language games are played. *Id.* at 367. In Wittgenstein's view, no area of human activity can be understood except by always thinking of the practice. *Id.* at 368.

82. *Id.* at 369.

83. *Id.* at 359.

84. *Id.* at 378.

85. *Id.* at 370.

from such disciplines as philosophy or literary criticism.[86] Thus, Bobbitt's approach may be seen as an internalist view. Like Lind, Bobbitt seeks to evaluate judicial practice by internal investigation and description of judicial practice.[87]

III. ALTERNATIVES TO THE INTERNALIST DESCRIPTIVE PROJECT: PROPOSALS TO REFORM THE SYSTEM

To place the discussion in context, it is helpful to consider some examples of jurisprudential theories that might be viewed as externalist attempts to reform our current legal practice.[88] Theorists on both the right and the left have sought to explain constitutional decision making by tying it to inquiries external to the practice itself.[89] One of the best known examples is the view of Ronald Dworkin.[90] Dworkin has proposed a theory of adjudication that he calls "law as integrity."[91] According to Dworkin, judges who accept the interpretive ideal of integrity decide hard cases by attempting to find a principle that both fits and justifies a threshold amount of some complex part of legal practice.[92] The fit test means that an interpretation of some part of the law must fit most of the existing legal materials.[93] In Dworkin's view, hard cases arise when the threshold

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86. *Id.* at 370-71.

87. *See* Nichol, *supra* note 19, at 1111 (citing PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982)). According to Bobbitt constitutional decision making is a practice. *Id.* "No external reference is necessary to legitimize it—whether Dworkin's moral and political philosophy [or] Fish's interpretive community . . . ." *Id.* at 1111-12.

88. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 255.

89. *See* Nichol, *supra* note 19, at 1112.

90. *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3; RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]. For recent articles on Dworkin's views, see Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553 (1991); John Fellas, *Reconstructing Law's Empire*, 73 B.U. L. REV. 715 (1993); Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993); John Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3 (1977).

91. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 176-275.

92. Fellas, *supra* note 90, at 734.

93. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 255; Keating, *supra* note 90, at 24. Keating points out that the fit test means that the interpretation must, by and large, vindicate the law as it is. Keating, *supra* note 90, at 24. No interpretation, however, will justify all of the existing legal materials. *Id.* Thus, the interpretation may show some part of the legal history as mistaken. *Id.* The interpretation, then, will justify most, and criticize some, of the relevant legal materials. *Id.* at 25.

fit test does not discriminate between two or more interpretations of some line of cases.[94] The dimension of justification becomes relevant here.[95] The judge must choose between competing interpretations by asking which shows the community's structure of institutions and decisions in a better light from the standpoint of substantive political morality.[96] Thus, Dworkin calls for the fusion of law and moral theory.[97] According to Dworkin's theory, then, propositions of law are true if they figure in, or follow from, the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.[98] The truth of legal propositions is a function of something that goes beyond the modalities identified by Bobbitt or specifically legal discourse—that is, principles of justice or morality.[99]

Another leading example of an externalist is Robert Bork. According to Bork, adjudication should be restricted to an inquiry into the political morality of the Framers of the Constitution.[100] The goal of judicial decision making is to relate the Framers' values to today's world.[101] This is accomplished by translating the morality of the Framers into rules applicable to contemporary circumstances.[102] In essence, Bork's theory holds that legal answers are deemed right insofar as they conform to principles of political morality and sound governmental structure.[103]

Externalist proposals to reform the system also come from the political left.[104] According to Bobbitt, some of these theorists simply elevate one form of the modalities—the prudential mode—and advance it as the method of justification in law.[105] According to prudentialist arguments, judicial decision making is justified to the

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94. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 255-56.
95. *Id.*
96. *Id.* at 256.
97. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 90, at 215-16; *see also* Fellas, *supra* note 90, at 734 (stating that the selection of an interpretation directly engages the judge's own moral convictions).
98. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 224.
99. Patterson, *supra* note 1, at 279.
100. Lind, *supra* note 1, at 376.
101. ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 10 (1984).
102. Lind, *supra* note 1, at 376.
103. *Id.* at 377.
104. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).
105. *See* BOBBITT, *supra* note 1, at 123, 128.

extent that it produces effects worth having.[106] As Bobbitt notes, the prudentialist also must rely on some standard external to the law to enable the measurement of "better."[107]

IV. AN EVALUATION

Although the views of Wittgenstein have recently been applied to the problems of jurisprudence, philosophers have considered the later Wittgensteinian descriptive approach in a number of other areas of philosophy. The arguments generated by those philosophers would appear to apply by analogy to the current Wittgensteinian descriptive project in law. This section holds that these arguments support the conclusion that the Wittgensteinian project should be rejected because: (1) the descriptive program is actually a proposal to reform the system and does not differ significantly from externalist proposals to reform the system; and (2) there is no reason why legal philosophers should be satisfied with merely describing the modalities of ordinary legal argument. Legal philosophers should instead seek to reconstruct our legal practices. This section also argues that the Wittgensteinian project should be repudiated because legal propositions seem to require more of a justification than that they are derived from an internal modality; the neo-Wittgensteinian view of truth is unacceptable; adjudicative practice is actually externalist; and the neo-Wittgensteinian approach seems to be a type of formalism.

A. The Critique of the Ordinary Language Descriptive Project

Philosophers have cautioned against ignoring the lessons of history.[108] They warn that without such historical knowledge, we will repeat the errors of earlier times.[109] Thus, philosophers have recognized that modern legal theory can benefit from remembering

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106. Patterson, *supra* note 1, at 274; *see also* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1768 (1990) (Matsuda suggests that judicial decision making in the area of civil rights is justified to the extent that it rectifies past injustice and eliminates all forms of subordination.); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2325 (1989) (outsider jurisprudence seeks a just world free of existing conditions of domination).

107. BOBBITT, *supra* note 1, at 128.

108. *See, e.g.*, Douglas Lind, *Free Legal Decision and the Interpretive Return in Modern Legal Theory*, 38 AM. J. JURIS. 159, 184 (1993).

109. *Id.*

the work of our intellectual predecessors.[110] Accordingly, this section suggests that in order to illuminate and evaluate the neo-Wittgensteinian project in law, it is helpful to examine the history of the Wittgensteinian descriptive approach in other areas of philosophy.

In this regard, ideal language philosophers offered a number of objections to the ordinary language descriptive project. First, Grover Maxwell and Herbert Feigl argued that the purported descriptions of ordinary usage were actually disguised reformations.[111] They argued that the ordinary language philosopher purported to describe various separate and distinct meanings or uses that were already there in ordinary language.[112] They questioned whether ordinary persons were aware of such meanings.[113] They contended that calling attention to various uses of relevant terms did not demonstrate that this was an accurate description of the situation.[114] This was because it was unclear whether in so doing they had offered "tightened up" or "reformed" meanings.[115] Given this, purported descriptions of ordinary language were disguised reformations.[116] As a result, the ordinary language project differed only in degree from the ideal language project. Thus, contrary to Wittgenstein's view, the ordinary language philosophers could not "leave everything as it is" in ordinary language.[117] When they identified separate meanings or uses of terms, they were really claiming that English could be made into an ideal language and not discovering that it was one.[118]

These concerns seem applicable by analogy to Bobbitt's—or any other—neo-Wittgensteinian descriptive project. Bobbitt purports to describe our ordinary methods of legal argument. This seems analogous to the ordinary language philosophers' attempt to describe

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110. *See, e.g., id.* at 161-62 (examining the work of the early twentieth-century "Free Legal Decision Theorists" to shed light on the concerns and content of modern legal theory).

111. *See* Grover Maxwell & Herbert Feigl, *Why Ordinary Language Needs Reforming*, *in* LINGUISTIC TURN, *supra* note 43, at 193; LINGUISTIC TURN, *supra* note 43, at 19-20.

112. LINGUISTIC TURN, *supra* note 43, at 19.

113. Maxwell & Feigl, *supra* note 111, at 193. They asked in what sense are these various meanings already there in ordinary language waiting for the philosopher to unearth them. *Id.*

114. LINGUISTIC TURN, *supra* note 43, at 20.

115. *Id.*

116. Maxwell & Feigl, *supra* note 111, at 194 (stating that they suspect that many cases of purported ordinary language analysis are, in fact, disguised reformations); LINGUISTIC TURN, *supra* note 43, at 20.

117. LINGUISTIC TURN, *supra* note 43, at 20.

118. *Id.*

the actual meaning or use of words in ordinary language. These descriptions, however, of our ordinary legal practices may actually be a disguised reformation of our legal practices.

Indeed, there is reason to believe that Bobbitt's modalities do not accurately describe our current practice. For example, Martin Redish has observed that the forms of constitutional argument described by Bobbitt have been artificially distinguished along lines which do not exist in reality.[119] For example, Redish contends that the "doctrinal" modality refers to neutral principles of general application to a legal, rather than political, context.[120] Redish argues, however, that there is no reason why those neutral principles of general application cannot be derived from the other modalities—that is, historical understanding, a structural approach, an ethical analysis, or textual construction.[121] Given this, it appears that Bobbitt is not accurately describing our forms of argument and is actually claiming that our legal practice could be reconstructed along the lines of his proposed modalities.

In this regard, Douglas Lind, another neo-Wittgensteinian, also purports to describe the interpretive methods and linguistic conventions that are actually used by practitioners of constitutional adjudication.[122] According to Lind, judicial decisions are justified to the extent that they satisfy the conditions of adjudicative excellence.[123] These internal conditions require that judicial decisions be arrived at impartially, rest on reasoned explanation, and satisfy objectives of coherence and workability while setting articulative boundaries for future applications.[124] Like Bobbitt, Lind purports to describe adjudicative practice. Yet Lind has identified different modalities from those described by Bobbitt. Thus, it seems that the new Wittgensteinians are not able to simply describe modalities which would then be used to justify legal propositions. Contrary to Wittgenstein's dictum, they cannot leave everything as it is. They are actually proposing that our legal practice could be reconstructed along the lines of their suggested modalities. Such modalities would then be used to justify legal propositions. Under these circumstances, the

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119. Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 668 (1984).
120. *Id.*
121. *Id.*
122. Lind, *supra* note 1, at 359.
123. *Id.* at 378.
124. *Id.* at 369-70.

neo-Wittgensteinian project seems to differ only in degree from the externalist theories which may also be viewed as attempts to reconstruct our legal practice by offering external ways of justifying legal propositions.

To understand other difficulties with the descriptive project, it is helpful to consider the attack on the ordinary language descriptive approach made by moral philosophers. In the middle part of this century, it was popular for moral philosophers—under the strong influence of Wittgenstein—to argue that the job of moral philosophers was to simply describe the actual meaning or use of ethical words as they appear in moral language.[125]

Again, this is very similar to Bobbitt's project: He seeks to describe our ordinary methods of legal argument—that is, the modalities. Other moral philosophers identified certain general problems with the approach. The project of the Wittgensteinians in ethics was to describe a conceptual scheme or network—that is, to describe accurately the moral language of a community. There was no reason, however, to be satisfied with such a conceptual scheme for ethics.[126] For example, Richard Brandt, a leading ethicist, argued: A moral philosopher should be satisfied with a conceptual network only "if it enables him to raise all the questions concerning conduct and choice and preference he thinks it is important to raise and distinguish."[127] Thus, Brandt contended that philosophers should not simply seek to describe but, instead, should engage in a more reconstructive enterprise—reconstruct our conceptual schemes in order to solve the types of problems that life in society poses.[128]

Rudolf Carnap, who played a leading role in twentieth century philosophy,[129] also argued against the ordinary language descriptive

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125. Richard B. Brandt, *Moral Philosophy and the Analysis of Language*, *in* FREEDOM & MORALITY 1, 10 (John Bricke ed., 1976).

126. *See id.* at 13.

127. *Id.*

128. *Id.*; *see* JOHN RAWLS, A THEORY OF JUSTICE 579 (1971). John Rawls also rejected the view that moral philosophy depends primarily on the analysis of the ordinary meanings of moral words in order to establish their logical properties, and, therefore, the rules of valid moral argument. *See* R.M. Hare, *Rawls' Theory of Justice*, *in* READING RAWLS 81, 82, 85 (Norman Daniels ed., 1974). As Rawls explained, he sought to leave questions of meaning and definition aside in order to get on with the task of developing a substantive theory of justice. READING RAWLS, *supra*, at 579.

129. *See* THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 44, at xv. For recent reappraisals of Carnap's philosophy, see Guy S. Axtell, *In the Tracks of the Historicist Movement: Re-assessing the Carnap-Kuhn Connection*, 24 STUD. HIST. PHIL. SCI. 119

approach and, like Brandt, emphasized the importance of the introduction of new linguistic frameworks or conceptual schemes in order to resolve philosophical problems.[130] Carnap treated scientific theories as languages.[131] He developed views about revolutionary scientific thinking analogous to Thomas Kuhn's view of revolutionary science.[132] According to Carnap, scientific revolutions occur when one theoretical language becomes another language.[133] Thus, Carnap discussed the procedures involved in formulating and in choosing alternate languages or linguistic frameworks.[134] In his view, problems involved in choosing and constructing languages belong to the context of language planning.[135] Through his work in logic he came to see the problems connected with selecting language forms suitable for certain purposes.[136] He came to understand that one cannot speak of the correct language form because various forms have different strengths in different respects.[137] Language planning is based on the insight that language forms are not right or wrong.[138] The evaluation of language forms must turn on practical considerations.[139]

Thus, contrary to the ordinary language philosophers, Carnap argued that one should not decree dogmatic prohibitions against new linguistic forms.[140] Instead, new linguistic forms should be tested by their success or failure in practical use.[141] According to Carnap,

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(1993); Michael Friedman, *Carnap's Aufbau Reconsidered*, 21 NOUS 521 (1987); Michael Friedman, *The Re-evaluation of Logical Positivism*, 88 J. PHIL. 505 (1991); George A. Reisch, *Did Kuhn Kill Logical Empiricism?*, 58 PHIL. SCI. 264 (1991).

130. *See* Rudolf Carnap, *Empiricism, Semantics, and Ontology*, *in* LINGUISTIC TURN, *supra* note 43, at 72-84 [hereinafter Carnap, *Empiricism, Semantics, and Ontology*].

131. *See* Reisch, *supra* note 129, at 270. Reisch observes that theories comprise observational and theoretical vocabularies. *Id.* They involve rules of sentence formation and invoke certain logical rules. *Id.*

132. *Id.* at 270; THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

133. *See* Reisch, *supra* note 129, at 271; *see also* Axtell, *supra* note 129, at 121 (Carnap believed that scientific revolutions bring with them proposals for a new conceptual as well as linguistic framework.).

134. Reisch, *supra* note 129, at 271.

135. *Id.*; *see also* Axtell, *supra* note 129, at 121 (Carnap argued that scientists become language planners.).

136. *See* Reisch, *supra* note 129, at 271.

137. *Id.*

138. *Id.*

139. *Id.*; *see also* Axtell, *supra* note 129, at 121 (Scientists choose linguistic frameworks based upon what is practical.).

140. *See* Carnap, *Empiricism, Semantics, and Ontology*, *supra* note 130, at 83.

141. *Id.*

those who work in any field of investigation should have the freedom to use any form of expression or language or conceptual scheme which seems useful to them.[142] Thus, Carnap argued that in selecting a conceptual scheme, we should be pragmatists and select the conceptual scheme or linguistic framework that serves as an efficient instrument.[143]

In this regard, Carnap wrote that both ordinary language philosophers and ideal language philosophers or constructionists sought to clarify and resolve philosophical problems.[144] In Carnap's view, most of these problems resulted from an inappropriate use of language.[145] Carnap argued that to solve these problems, the constructionist may prefer the use of a newly constructed term not belonging to ordinary language.[146] How far the constructionist moved from ordinary language would depend on what he or she regarded as useful in the particular case.[147]

In taking this approach, Carnap responded to a principal argument for the ordinary language descriptivist approach which he set forth as follows.[148] The roots of philosophical problems lie in ordinary language.[149] Therefore, the difficulties must be eliminated by the analysis of ordinary language.[150] Thus, to seek to resolve these difficulties by the proposal of a reformed or constructed language would be to do something totally irrelevant.[151] It would direct our attention from the original problems to different concepts.[152]

In response, Carnap argued that the ordinary language philosophers seemed to view ordinary language as something that could not

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142. *Id.* at 83-84.

143. *See* CHALLENGES TO EMPIRICISM 19 (Harold Morick ed., 1980); *see also* Axtell, *supra* note 129, at 121 (noting that Carnap argued that theory change is better viewed as improvement of instrument rather than as search for ideal system).

144. *See* Rudolf Carnap, *P.F. Strawson on Linguistic Naturalism*, *in* THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 44, at 933, 936.

145. *Id.*

146. *Id.* at 937.

147. *Id.*; Reisch, *supra* note 129, at 272. The freedom to adopt linguistic forms according to one's purposes is the substance of Carnap's "principle of tolerance." Reisch, *supra* note 129, at 272.

148. THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 44, at 937.

149. *Id.* at 937-38.

150. *Id.* at 938.

151. *Id.*

152. *Id.*

be changed or replaced.[153] Contrary to the ordinary language philosophers, however, Carnap argued that a language, whether natural or artificial, is an instrument that may be replaced or modified according to our needs, like any other instrument.[154] It is something we have learned.[155] Therefore, we can replace it with another language.[156] Carnap said that ordinary language is like a crude pocket knife.[157] It may be useful for certain purposes.[158] For some purposes, however, special tools are more efficient.[159] Thus, if the pocket knife is too crude, we should replace it with a more suitable tool.[160] According to Carnap, the thesis of the ordinary language philosophers is like saying that by using a special tool, we evade the problem of the correct use of the cruder tool.[161] In Carnap's view, however, that argument is not persuasive—we should not criticize someone for using a more sophisticated tool to solve problems that a more primitive tool could not resolve.[162] Thus, Carnap concluded that the choice of a method for the solution of philosophical problems—ideal language approach versus ordinary language approach—should be decided by practical considerations.[163]

Carnap's discussion is particularly relevant because an argument analogous to the pro-ordinary language argument that he describes has also been advanced by the new Wittgensteinians in the legal context. For example, Lind argues that external legal theorists allow for determination of legal meaning to take place wholly independent

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153. *Id.*

154. *Id.* at 938-39; *see also* Reisch, *supra* note 129, at 275 (value of linguistic frameworks resides in their utility with respect to practical purposes).

155. THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 44, at 938.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 938-39.

160. *Id.* at 939; *see also* Reisch, *supra* note 129, at 275 (noting that Carnap argued that philosophical instruments may prove useless and become extinct).

161. THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 44, at 939.

162. *Id.*

163. *See id.*; Reisch, *supra* note 129, at 274. Carnap's principle of tolerance—that is, the freedom to adopt linguistic forms according to one's purposes—ensures that there is no one ideal philosophical model of scientific theory. Reisch, *supra* note 129, at 274. Instead, various philosophical goals will engender species of philosophical instruments. *Id.* These instruments will each be intended to clarify and reconstruct scientific reasoning for a particular set of purposes. *Id.* at 274-75. Just as organic species may become more fit in their respective niches, these different philosophical instruments may become more fruitful in fulfilling their purposes. *Id.* at 275.

of the practice of adjudication.[164] According to the new Wittgensteinians' internalist account, however, the practice of adjudication provides the only authoritative standard of constitutional meaning.[165] Lind, therefore, contends that since external theorists base constitutional meaning on standards which lie outside the practice of adjudication, they issue judgments of constitutional right and wrong which are fundamentally irrelevant.[166] Thus, just as the ideal language philosophers' proposals to reconstruct language were said to be fundamentally irrelevant in that they direct our attention away from the original concerns, so too are externalist proposals to reconstruct the practice of law.

The arguments and considerations raised by Carnap and Brandt would seem to apply by analogy to Bobbitt's—and any other—Wittgensteinian internalist descriptive approach to legal philosophy. At the outset there is no reason why philosophers or lawyers should be satisfied with describing accurately the modalities of ordinary legal argument. Other legal practices or conceptual schemes might be better suited to solving the problems of our society. Thus, arguably, legal philosophers should seek to reconstruct our legal practices—modes of argumentation—in order to create a conceptual scheme that will better solve the types of legal problems presented in social life. As for the argument that externalist accounts are irrelevant, it seems that one can construct a response analogous to Carnap's argument against the ordinary language philosophers. Our current forms of legal argumentation may be too crude a tool. If externalist forms of legal justification would be a more helpful instrument, then we should attempt to construct such schemes to help resolve practical problems. We should not decree dogmatic prohibitions against externalist accounts. The choice of a method for the solution of jurisprudential problems—internal versus external approaches—should be decided by practical considerations.

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164. *See* Lind, *supra* note 1, at 390.

165. *Id.*

166. *See id.*; Patterson, *supra* note 1, at 292. Professor Patterson interprets Bobbitt to suggest that by importing an explanatory model from another discipline, we lose law and legal craft. Patterson, *supra* note 1, at 292. If law is an activity and not a thing, the replacement of legal with economic or philosophical vocabulary is not to change the law; rather it is to do economics or philosophy. *Id.*

B. Some Recent Views on the Importance of Developing New Conceptual Schemes

In recent years, theorists have continued to emphasize the importance of developing new conceptual schemes. These views also support the rejection of the new Wittgensteinians' project in law. For example, the importance of constructing new conceptual schemes recently has been further developed by the philosopher Alasdair MacIntyre.[167] According to MacIntyre, traditions begin in some condition of pure historical contingency.[168] They reflect the beliefs and practices of some particular community.[169] All such communities are always in a state of change.[170] Eventually, incoherences in the established system of beliefs becomes apparent.[171] In the face of these inadequacies, the community must reformulate their beliefs or remake their practices.[172] Thus, MacIntyre identifies three stages in the development of a tradition. First, the relevant beliefs have not been called into question. Second, inadequacies in the system of beliefs have been identified but not yet remedied. Third, a response to those inadequacies has resulted in reformulations.

Once the third stage is reached, those members of a community who have accepted the beliefs of the tradition in their new form can contrast their new beliefs with the old.[173] A tradition that has evolved to this point will become a form of enquiry.[174] Central to each tradition-constituted enquiry at each stage in its development

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167. *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); Charles Larmore, Book Review, 86 J. PHIL. 437 (1989) (reviewing ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988)). MacIntyre's principle claim is that rationality, in ethics and elsewhere, is possible only within a tradition. Larmore, *supra*, at 437-38. According to MacIntyre the controversies about justice follow from the absence of any coherent tradition fostering a shared conception of practical reason. *Id.* at 438. For other articles on MacIntyre's work, see Julia Annas, *MacIntyre on Traditions*, 18 PHIL. & PUB. AFF. 388 (1989); Brian Barry, *The Light That Failed*, 100 ETHICS 160 (1989) (book review); Jeffrey C. Isaac, Book Review, 17 POL. THEORY 663 (1989) (reviewing ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988)); Martha Nussbaum, *Recoiling From Reason*, 36 THE N.Y. REV. BOOKS 36 (1989) (book review).

168. MACINTYRE, *supra* note 167, at 354; Larmore, *supra* note 167, at 438 (According to MacIntyre, rational thought always begins from contingently given beliefs; beliefs which are ours just because we belong to some particular tradition of thought.).

169. MACINTYRE, *supra* note 167, at 354.

170. *Id.*

171. *Id.* at 355.

172. *Id.*

173. *Id.* at 356.

174. *Id.* at 358.

will be its current agenda of unsolved problems.[175] Conflicts over rival answers cannot be settled rationally.[176] The methods of enquiry and the forms of argument disclose new inadequacies, incoherences, and problems for which there is no solution within the established tradition.[177] MacIntyre refers to this state of affairs as an epistemological crisis.[178]

According to MacIntyre, the solution to such a crisis requires the invention of new concepts and the framing of a new theory.[179] For this new conceptual scheme to put an end to this crisis, it must provide solutions to problems that had previously proved intractable.[180] These new conceptual structures will not be derivable from the earlier positions.[181] Thus, imaginative conceptual innovation must occur.[182] The justification for the new conceptual scheme will lie in its ability to achieve what could not have been achieved prior to that innovation.[183]

In MacIntyre's view, every tradition confronts the possibility that it will fall into a state of epistemological crisis.[184] Such a crisis will be identifiable by its own standards of justification.[185] Not all epistemological crises are resolved successfully.[186] Their lack of resolution can defeat the tradition.[187]

If MacIntyre is right, then every tradition or practice may fall into an epistemological crisis. Thus, our current legal practices may prove unable to provide solutions to new problems. Under these circumstances, viewing jurisprudence as merely a descriptive effort—an effort to describe a current conceptual scheme—will not be helpful in resolving epistemological crises. To resolve such crises,

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175. *Id.* at 361.
176. *Id.* at 362.
177. *See* Annas, *supra* note 167, at 388. A tradition of rational inquiry can become static or sterile. *Id.* at 392.
178. MACINTYRE, *supra* note 167, at 362.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*; Annas, *supra* note 167, at 392 ("Rational superiority to other traditions consists not in the [impossible] feat of arguing the others down, but in having the conceptual resources to explain convincingly one's own tradition's success and the other traditions' failure in meeting this kind of challenge.").
184. MACINTYRE, *supra* note 167, at 364.
185. *Id.*
186. *Id.* at 365.
187. *Id.*

one must have a conception of jurisprudence that involves the construction or reformation of our present practices or conceptual structures.

The importance of developing new conceptual schemes in law is also advocated by pragmatists[188] and feminist theorists. For example, Margaret Radin has discussed the problem of "bad coherence" in our legal institutions.[189] Pragmatists generally have advocated coherence theories of truth.[190] According to a coherence theory of truth, we will count an idea as true if we can use it to assimilate a new experience to our old beliefs without disturbing them too much.[191] Coherence theories generate a problem: It is possible to have a coherent system of belief and have that system be coherently bad.[192] For example, racist or sexist systems can be coherently bad.[193] Thus, the pragmatist faces the question of how to find a standpoint to argue that a system is coherent but bad if pragmatism defines truth as coherence.[194] According to Radin, the solution for bad coherence is for the pragmatist to find a way to transform alternative conceptual possibilities into legal realities.[195] The pragmatist must find a way for the law to be understood to include the conceptions of the oppressed—women and minorities—even if legal institutions currently exclude them.[196] Women and minorities

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188. Recently, there has been a revival of pragmatism in American legal thought. *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

189. Radin, *supra* note 188, at 1710.

190. *Id.* at 1708; *see* Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755 (1992). Professor Chow observes that pragmatists measure the validity of a belief by determining how well that belief coheres with other beliefs. Chow, *supra*, at 775. He writes that all legal pragmatists adopt some version of a pragmatic, coherentist epistemology. *Id.*

191. Radin, *supra* note 188, at 1709.

192. *Id.* at 1710.

193. *Id.*

194. *Id.*

195. *Id.* at 1721.

196. *Id.*; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). Professor West argues that women's lives are not reflected at any level in any field of legal doctrine. West, *supra*, at 58. She asserts that the distinctive values women hold are not reflected in legal theory because legal theory is about actual enacted or adjudicated law, and women have from law's inception lacked the power to make law protect or value women's experience. *Id.* at 60. Thus, she concludes that we will not have an ungendered jurisprudence until we have legal doctrine that takes women's lives as seriously as it takes

have not formulated the present legal conceptual scheme.[197] Such outsiders, then, must struggle to make room for themselves in the current legal institutions.[198] They must develop perspectives of the oppressed to infiltrate dominant legal institutional coherence.[199] Otherwise their perspective is not represented in legal institutions.[200] Through these alternative conceptions legal practices can be remade.[201] Thus, to the extent that Bobbitt's—or any other neo-Wittgensteinian's—project would confine the role of jurisprudence to description of our current practices, the problem of bad coherence is not addressed. Since outsiders—women and minorities—did not contribute to the formulation of our practices, the perspectives of women and minorities are excluded and the potential for bad coherence is raised.[202]

C. *The Need for Explanation and Justification*

According to Bobbitt, a judicial decision is justified if one of the six modalities is used to reach the decision.[203] There is no effort to offer a further justification that any particular decision is objectively a right answer. The lack of further justification is consistent with Wittgenstein's position that explanation must come to an end somewhere—that at some point the reasons give out.[204] In Wittgenstein's view, it is characteristic of philosophical investigation that a major difficulty is not that of finding a solution to philosophical problems but rather that of recognizing as the solution something that looks as if it were only a preliminary to it.[205] This is because we

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men's. *Id.*

197. *See* Radin, *supra* note 188, at 1725.

198. *Id.* at 1724-25.

199. *Id.* at 1724.

200. *Id.* at 1724-25; Chow, *supra* note 190, at 815. Chow observes that critical pragmatists reject positive law that does not reflect the excluded voices or viewpoints of minorities and women. Chow, *supra* note 190, at 815.

201. Radin, *supra* note 188, at 1725-26.

202. *Cf.* Chow, *supra* note 190, at 820-21 ("Traditions may reflect the values of the politically powerful who have engineered a private hierarchy that secures advantages at the expense of the politically disempowered.").

203. BOBBITT, *supra* note 1, at 183-84.

204. *See* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 31, para. 217, at 85.

205. *See* LUDWIG WITTGENSTEIN, ZETTEL para. 314, at 58e (G.E.M. Anscombe & G.H. von Wright eds. & G.E.M. Anscombe trans., 1970) ("Here we come up against a remarkable and characteristic phenomenon in philosophical investigation: the difficulty—I might say—is not that of finding the solution but rather that of recognizing as the solution

mistakenly expect an explanation, whereas the solution to the problem is a description.[206]

As Robert Fogelin has pointed out, however, Wittgenstein's general approach to justification is peculiar in that for him the reasons seem to give out very quickly.[207] In Fogelin's view, Wittgenstein stops his investigation just at the point where many believe the problems have only been stated.[208] In addition, Fogelin has argued that the Wittgensteinian justifications do not sufficiently seem to be fundamental to be accorded the status of being brute and inexplicable.[209] Beyond this, he raises a more general problem in that Wittgenstein does not tell us how we are to decide when we should stop and leave explaining alone.[210]

These general problems seem to be applicable to the new Wittgensteinians' approach to legal justification. Legal propositions seem to require more of a justification than that they are derived from an internal modality. This seems particularly evident in light of the fact that the modalities can be used to generate different outcomes in a particular case.[211] Given this, the modalities do not seem to be sufficiently fundamental to be accorded the status of being brute and inexplicable. In addition, the new Wittgensteinians seem to offer no method for determining when we should be satisfied with no further explanation for legal propositions.

D. Truth

Crucial to the new Wittgensteinians' program is their view of truth. They suggest that a proposition of law is true if one can show that one is correctly using the words in question.[212] This view seems to identify truth with justification—that is, a statement is true if its assertion would be justified. For example, Dennis Patterson, one of the leaders of the new movement, writes that "[t]here is nothing more to be said about the truth of a proposition of law than advancing the

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something that looks as if it were only a preliminary to it."); FOGELIN, *supra* note 20, at 205.

206. FOGELIN, *supra* note 20, at 285.
207. *Id.* at 206.
208. *Id.*
209. *Id.* at 207.
210. *Id.* at 208-10.
211. BOBBITT, *supra* note 1, at 155.
212. Patterson, *supra* note 1, at 289.

reasons for its assertion."[213] Thus, for Bobbitt, the modalities are the ways in which a legal proposition is true.[214]

To the extent that the neo-Wittgensteinian project identifies truth with justification, certain problems arise. Truth cannot simply be justification.[215] This is because: (1) truth is supposed to be a property of a statement that cannot be lost, whereas justification can be lost; and (2) justification is a matter of degree whereas truth is not.[216] To identify truth with justification would require us to give up the principle that some of the statements which are now justified may turn out not to be true.[217] This is an unacceptable result.[218] The justification conditions for sentences change as our total body of knowledge changes.[219] Thus, not only may we discover that statements we now regard as justified are false, but we may even discover that procedures we now regard as justificatory are not, and that different justification procedures are better.[220]

E. Is Adjudicative Practice Internalist?

Beyond this, the new Wittgensteinians' internalist approach raises the question as to whether adjudicative practice is internalist. In this connection, an investigation into legal practice would seem to reveal

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213. Patterson, *Poverty*, *supra* note 16, at 56. Significantly, in making this statement, Patterson relies on Nancy Murphy's assertion that "there is nothing more to be said about the truth of a theory than to display the justification for holding that theory." Nancy Murphy, *Scientific Realism and Postmodern Philosophy*, 41 BRIT. J. PHIL. SCI. 291, 299 (1990). "Some philosophers . . . have claimed that truth must be defined or analyzed *in terms of* justification or one of its near synonyms, such as warranted assertibility." RICHARD L. KIRKHAM, THEORIES OF TRUTH 49 (1992).

214. BOBBITT, *supra* note 1, at 34.

215. PUTNAM, *supra* note 8, at 84; KIRKHAM, *supra* note 213, at 51 ("[T]o equate 'true' with 'justified' or to analyze truth even partly in terms of justification is at best a hopelessly circular analysis.").

216. *See* PUTNAM, *supra* note 8, at 84.

217. *Id.* at 85.

218. *Id.*

219. *Id.*

220. *Id.* If the new Wittgensteinians seek instead to offer a notion of truth as idealized justified assertibility, other difficulties arise. Donald Davidson has rejected all such epistemic accounts of truth on the grounds that they are "untenable." *See* Donald Davidson, *The Structure and Content of Truth*, 87 J. PHIL. 279, 298 (1990). That epistemic views are "fundamentally mistaken" can be shown by the fact that they invite skepticism. *Id.* Davidson argues that epistemic theories are skeptical not because they make reality unknowable, but because they reduce reality to so much less than we believe there is. *Id.* at 298-99. Moreover, they deprive truth of its role as an intersubjective standard. *Id.* at 309.

that courts sometimes justify their decisions on the basis of matters external to law as it is generally understood. For example, *Calder v. Bull*[221] is often cited as the least equivocal Supreme Court reference to the possibility that a statute could be held unconstitutional because it violated natural law.[222] In *Calder*, Justice Chase said that the drafters of the federal and state constitutions intended to create governments of limited powers and that natural law as well as the specific provisions of written constitutions restricted governmental power.[223] According to traditional theory, natural law is dictated by God and is superior in obligation to any other.[224] Thus, contrary to the new Wittgensteinians,[225] inquiry into the practice of adjudication reveals some evidence of externalist inquiry into abstract higher law.[226]

More support for the view that adjudicative practice involves externalist methodology is found in *Brown v. Board of Education*.[227] There, the Supreme Court also justified its decision in part according to standards that lie outside the practice of adjudication as it is generally understood. In overturning legally compelled segregation, the Court relied in part on empirical social science data supporting the proposition that segregation of children generates a feeling of

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221. 3 U.S. (3 Dall.) 386 (1798).

222. JOHN H. ELY, DEMOCRACY AND DISTRUST 209-10 n.41 (1980).

223. 3 U.S. (3 Dall.) at 398-400; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 351 (4th ed. 1991).

224. ELY, *supra* note 222, at 48.

225. For example, Lind states that the Court does not engage in externalist inquiry into abstract principles of higher law. Lind, *supra* note 1, at 386. Bobbitt also rejects the view that natural law is enshrined in the Constitution. BOBBITT, *supra* note 1, at 168 ("The US Constitution . . . refus[es] to enshrine any particular comprehensive morality.").

226. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 717 (1975):

> To summarize, there was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status. From the very beginning, and continuously until the Civil War, the courts acted on that understanding and defined and enforced such principles as part of their function of judicial review. Aware of that history, the framers of the 14th amendment reconfirmed the original understanding through the "majestic generalities" of section I. And ever since, again without significant break, the courts have openly proclaimed and enforced unwritten constitutional principles.

Id. at 717; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). Professor Sherry argues that the historical context of the constitution suggests that it was never intended to displace natural law. *Id.* at 1177. According to Sherry, the Framers of the Constitution expected the courts to keep legislatures from transgressing the natural rights of mankind, whether or not those rights found their way into the written Constitution. *Id.*

227. 347 U.S. 483 (1954).

inferiority in them.[228] Thus, contrary to the new Wittgensteinians,[229] the Supreme Court seems to have authorized judicial decisions to be based on external considerations.

Another example of external considerations being used to justify legal propositions is found in Learned Hand's famous formula for negligence.[230] Hand defines negligence in terms of an externalist economic model.[231] According to Hand negligence is defined by the following formula: $B < PL$.[232] This means that if the burden to the injurer of avoiding the accident was less than the loss if the accident occurred multiplied by the probability that the accident would occur, the injurer is negligent.[233] Thus, courts sometimes appear to justify their decisions in terms of matters that are external to law as it is generally understood.

F. A Return to Formalism?

The new Wittgensteinians seem to share certain similarities to formalism. Although formalism is difficult to define,[234] it refers to certain ideas that were prominent during the nineteenth century and during the early part of the twentieth century.[235] Legal formalism

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228. *Id.* at 494 n.10; Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157 (1955) (discussing social science evidence as a foundation for Supreme Court's decision in *Brown*); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991). The so-called "Brandeis Brief" also is an example of externalist legal practice. Louis Brandeis submitted a famous brief in the Supreme Court regarding the constitutionality of a state law limiting women's working hours in which he based his argument on social statistics analyzing the effects of prolonged labor on women. Luban, *supra*, at 1036-37. Such "Brandeis Briefs"—legal briefs based on empirical data rather than precedent—became an established form of argument. *Id.* at 1037.

229. *See* BOBBITT, *supra* note 1, at 173-74. Bobbitt writes that if we do law by reference to a coordinate discipline like psychology or economics, and use the imported discipline as a rule of decision, "it would de-legitimate the analysis, replacing the legal approach with one for which there is no constitutional authority."

230. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

231. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 107 (1990).

232. *Carroll Towing*, 159 F.2d at 173.

233. *Id.*; POSNER, *supra* note 231, at 54 n.18.

234. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 215 (1993); *see also* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 250 (1987). Atiyah and Summers observe that although formalism never reached the status of being a legal theory as such, it did have certain characteristics. ATIYAH & SUMMERS, *supra*, at 250.

235. Cloud, *supra* note 234, at 216. For a recent defense of legal formalism, see Weinrib, *supra* note 6; Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

emphasized formal reasoning—the deductive application of rules to decide legal issues.[236] Fundamental legal principles and the rules derived from them governed the outcomes of individual lawsuits, even if the results they produced conflicted with important social goals.[237] According to the formalist account, the rules governing any dispute could be found in the body of existing legal materials.[238] Such rules were complete and comprehensive, leaving no gaps in the law.[239] The law operated as a closed system.[240] Operating within this system, judges and lawyers resolved problems by applying rules.[241] Such decision making appropriately excluded from consideration any social goals or values external to the legal system.[242]

It has generally been thought that formalism lies in disrepute.[243] Pragmatists, among others, argued that formalism overemphasized deductive analytical methods, rather than the results the theory produced.[244] Formalism prevented the proper use of law as an instrument that could be used to attain social goals.[245] According to formalists, legal problems were to be resolved from an internal perspective and not by relying upon goals or standards external to law.[246]

The formalist program seems similar to the approach of the new Wittgensteinians. As Douglas Lind explains, externalist theory is

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236. Cloud, *supra* note 234, at 216; *see* ATIYAH & SUMMERS, *supra* note 234, at 250.

237. Cloud, *supra* note 234, at 216; *see* ATIYAH & SUMMERS, *supra* note 234, at 250.

238. Cloud, *supra* note 234, at 217; Christopher C. Langdell, *Address at the 'Quartermillenial' Celebration of Harvard University Nov. 5, 1886, reprinted in Harvard Celebration Speeches*, 3 L.Q. REV. 123, 124 (1887).

239. Cloud, *supra* note 234, at 217.

240. *Id.*

241. *Id.*; *see* ATIYAH & SUMMERS, *supra* note 234, at 250.

242. Cloud, *supra* note 234, at 217.

243. *Id.* at 218; ATIYAH & SUMMERS, *supra* note 234, at 251 (observing that discontent with formalism became increasingly evident during last decade of nineteenth century).

244. Cloud, *supra* note 234, at 219; *see also* ATIYAH & SUMMERS, *supra* note 234, at 251 ("In attacking formalism, Holmes emphasized that the law is not a comprehensive and complete 'system of reason' nor a deduction from 'admitted axioms.'").

245. Cloud, *supra* note 234, at 219; *see also* ATIYAH & SUMMERS, *supra* note 234, at 252 (Oliver Wendell Holmes stressed the primacy of underlying substantive considerations over mere logical form); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899) ("[T]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire.").

246. Cloud, *supra* note 234, at 220; *see also* Fried, *supra* note 235, at 38. Fried concludes that the law is a distinct subject, a branch neither of economics nor of moral philosophy. Fried, *supra* note 235, at 38.

result oriented.[247] Externality justifies judicial decisions on the basis of the outcomes reached in adjudication.[248] In contrast, the internalist takes the position that judicial decisions are justified not on the basis of their results, but on whether they satisfy certain internal conditions of adjudicative excellence.[249] Thus, according to the internalist account, external considerations—for example, abstract moral or economic theory—are irrelevant in adjudication. Thus, on an internalist view, judges must sometimes permit obvious injustices if it is required by the law.[250] According to an internalist account, judicial decisions may be critiqued only on the basis of how well they satisfy the internal conditions of adjudicative excellence, and not on the basis of their results.[251] The neo-Wittgensteinian internalist approach in its refusal to justify decisions on the basis of values external to law or results, then, seems to have much in common with formalism. Thus, to the extent that the formalist approach is defective, so too is the neo-Wittgensteinian approach.

G. Summary

This Article has concluded that the Wittgensteinian internalist descriptive approach should be rejected in law. First, the Article has argued that philosophers have considered the Wittgensteinian descriptive approach in a number of other areas of philosophy. The arguments generated by those philosophers appear to apply by analogy to the current Wittgensteinian project in law. They support the conclusion that the Wittgensteinian program should be rejected in law because: (1) the descriptive program is actually a proposal to reform the system and so does not differ significantly from externalist proposals to reform the system; and (2) there is no reason why legal philosophers should be satisfied with merely describing the modalities of ordinary legal argument. Legal philosophers should instead seek to reconstruct our legal practices. The Article also has argued that

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247. Lind, *supra* note 1, at 378.
248. *Id.*
249. *Id.*
250. *Id.* at 383; *see also* BOBBITT, *supra* note 1, at 28. Bobbitt states that "judicial review that is wicked, but follows the forms of argument, is legitimately done; and review that is benign in its design and ameliorative in its result but which proceeds arbitrarily or according to forms unrecognized within our legal culture, is illegitimate." BOBBITT, *supra* note 1, at 28.
251. Lind, *supra* note 1, at 389.

the current Wittgensteinian project in law should be rejected because legal propositions seem to require more of a justification than that they are derived from some internal modality, and the new Wittgensteinians' view of truth is unacceptable. In addition, the Article has contended that the Wittgensteinian internalist project should be rejected because inquiry into judicial practice reveals that adjudicatory practice is sometimes externalist. Courts sometimes appear to justify their decisions in terms of matters that are external to law as it is generally understood. Finally, the Article has argued that the new Wittgensteinian approach to law should be rejected because it seems to be a type of formalism.

In rejecting the Wittgensteinian program in law, this Article is consistent with philosophy's general repudiation of the Wittgensteinian conception of philosophy that has taken place over the last few decades.[252] As Richard Rorty has explained, philosophers have generally rejected the Wittgensteinian conception of philosophy in favor of a return to systematic attempts to solve traditional problems.[253] Likewise, Michael Dummett has observed that the trouble with the later Wittgenstein approach is that he cannot supply us with a foundation for future work in philosophy.[254] According to Dummett, Wittgenstein gave us no systematic theory of meaning, and therefore, nothing on which to build.[255]

V. CONCLUSION

Recently, a number of commentators have proposed a new approach to jurisprudence and justification in law which is inspired by the later philosophy of Ludwig Wittgenstein. The new Wittgensteinians suggest that a proposition of law is true if one can show that one is correctly using the words in question. Therefore, they conclude that the task of jurisprudence is to describe the forms of argument used by lawyers to show the truth of propositions in law. This Article has sought to evaluate this new approach to jurisprudence and legal justification by, among other things, examining the history of the Wittgensteinian descriptive project in other areas of philosophy. The

252. RORTY, OBJECTIVITY, *supra* note 8, at 3; DUMMETT, *supra* note 10, at 452-53.
253. RORTY, OBJECTIVITY, *supra* note 8, at 3.
254. DUMMETT, *supra* note 10, at 453.
255. *Id.* at 452-53.

Article concludes that the Wittgensteinian descriptive project in law should be rejected.