

That's Just The Way It Is: Langille on Law

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This article is a defence of the sceptical critique of the legitimacy of law and adjudication. It is a direct reply to the arguments of Professor Brian Langille, whose article "Revolution Without Foundation: The Grammar of Scepticism and Law" appeared in Volume 33 of this Journal. In that article, Langille defended the viability of law, legal discourse and legal critique primarily by attacking the claim that scepticism based on the "indeterminacy of language" can be grounded in the philosophy of Ludwig Wittgenstein. Professor Hutchinson concentrates his spirited response on the indeterminacy of language. He contends that law fails to meet its self-proclaimed standards of rational justification and cognitive clarity. Instead, law must always be supplemented by external influences and shared values; even law's grammar cannot be value-free. By coming to terms with collective values, we can therefore engage in a meaningful political critique not ostensibly grounded in objectivity or implicitly appropriated by an elite class of legal practitioners.

Le présent article se veut une défense de la critique que le scepticisme fait de la légitimité du droit. Il s'agit d'une réplique à l'article du professeur Brian Langille intitulé « Revolution Without Foundation: The Grammar of Scepticism and Law » publié au volume 33 de la présente revue. Dans cet article, Langille défendait la viabilité du droit, du discours légal et de la critique du système juridique en rejetant l'argument qui veut que la philosophie de Ludwig Wittgenstein puisse servir de base au scepticisme fondé sur l'imprécision du langage. Le professeur Hutchinson concentre sa réplique sur l'imprécision du langage. Il prétend que le droit ne réussit pas à rencontrer ses propres normes quant à la justification rationnelle et à la clarté cognitive. Le droit doit plutôt avoir recours à des influences extérieures et à des valeurs communes; même la grammaire du droit ne peut être exempte de valeurs. Aussi, la reconnaissance des valeurs collectives permet d'entreprendre une critique politique sensée qui ne soit pas ostensiblement fondée sur l'objectivité ou appropriée implicitement par une élite de praticiens du droit.

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*"That's just the way it is
Some things will never change
That's just the way it is
But don't you believe them"*

Bruce Hornsby

* * *

The petard-hoist is a favourite move among jurisprudential antagonists. As in judo, the idea is to turn the impugned writer's offensive in on itself and out of intellectual contention. It is a manoeuvre that is as painful for the victim as it is satisfying for the critic. However, there is a very clear danger for those partial to the petard-hoist. In exercising the move, critics become vulnerable to its use against themselves: the engineers can easily become the engineered and have their own arguments "blow[n] at the moon".¹ I myself am very fond of the petard-hoist and have found it a very effective device on several occasions. In a recent article, Brian Langille seeks to turn the tables and make an attempted petard-hoist on my own and others' work.² The knack to such a manoeuvre, of course, is to ensure that you follow through and allow your opponent no chance for recovery. Langille has raised some useful points, but he has not delivered the knock-out blow. Indeed, in seeking to bring about my intellectual quietus, he has left himself exposed to a timely *coup-de-grâce*.

The point of Langille's exercise is to salvage the legal enterprise from the storm whipped up by strong sceptics. He wants to show that for all their huff-and-puff, the sceptics fail to shake the foundations of law's legitimacy and are themselves "driven to arational, psychological, modes of explanation ... reification, mystification, and other 'subtle' ideas".³ While acknowledging that law involves politics, a Wittgenstein-inspired Langille insists that legal argument and adjudication are not fatally indeterminate, but share in a distinctive and defensible mode of discourse. From this perspective, jurisprudence can be said to be directed toward answering two separate, but related questions. The first is analytical and asks whether legal argument is a coherent enterprise; the second is normative and inquires whether the law is ethically or politically good. According to Langille, the conceptual apparatus I employ to demonstrate the incoherence of the legal enterprise,

¹W. Shakespeare, *Hamlet*, Act 3, sc. 4. I am not unmindful of the belligerence of this tone and stance, but Langille talks of "self-destruction" and "self-conflicted wounds". See B. Langille, *infra*, note 2 at 473.

²See B. Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill L.J. 451.

³*Ibid.* at 475.

described as “a negative non-foundationalism”,⁴ deprives me of any ground from which to mount my political “tirade against both the Charter and the dark force of ‘liberalism’”.⁵ While I do “good work” in criticizing judicial efforts to apply the Charter, my arguments are of dubious conceptual provenance:

Yet, on their own theoretical terms, it is difficult to know what status these arguments have. For them, at least when they speak theoretically, the Charter and all attempts at Charter discourse are to be regarded as islands of false consciousness in a sea of nothingness. The lesson is that they are better off jettisoning basic theoretical assumptions which are their own unique mixture of very strong versions of the four critical arguments of indeterminacy, subjectivity, contradiction, and mystification. Their strong identification with extraordinarily strong versions of these theses undermines their critique and makes their plea for a more egalitarian conception of law and social justice theoretically empty.⁶

Unfortunately, Langille proves too little and too much for his own analytical and political good. He proves too little in that the normative consequences of my analytical critique are far from fatal; while my critique and therefore its normative consequences are “ungrounded” in the sense that they possess no absolute or foundational authority, they are by that very fact not illegitimate or illusory. On the other hand, he proves too much for his own normative good. His own attempts to discredit my deconstructive line of critique leave him with no critical perspective from which to analyze the alleged coherence of the legal enterprise or to evaluate its merit; he is reduced to defending what is because it is. Criticism becomes an act of description. As Wittgenstein might put it, legal theory “may in no way interfere with the actual use of [legal] language; it can in the end only describe it. For it cannot give any foundation either. It leaves everything as it is.”⁷ Law and legal theory is what lawyers and legal theorists do — nothing more and nothing less. In this instance, Langille offers a Canadian version of the long-running American juristic comedy, “A Fish Called Stanley”.⁸

Langille’s rendition of the anecdote of the drunk and the lost keys inadvertently captures the nature of his position and the vacuity of law’s grammar. A drunk loses a set of keys in the dark. When questioned as to

⁴*Ibid.* at 474.

⁵*Ibid.* at 482. He also goes on to say that as well as having no ground on which to stand, I have also managed to “paint myself into an irrationalist corner”. [*Ibid.* at 484.] To be without ground and painted in a corner seems to me a miraculous feat.

⁶*Ibid.* at 485.

⁷*Ibid.* at 488 (quoting L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Blackwell, 1953), para. 124).

⁸For an account of Fish’s theory and a criticism along these lines, see Hutchinson, “Number Two: Gone Fishing” in *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988) 142.

the point of looking for the keys under a street light, the drunk replies that it is light there. While this is amusing, it is probably less so than Langille's rejoinder — "[t]he Wittgensteinian response is terribly straightforward — you must look where the keys are."⁹ It is a trifle trite and largely unhelpful to proffer such advice when the whole incident is premised on the fact that the drunk does not know where the keys are. As with keys and drunks, so with law and lawyers. In the case of the legal theorist, it is not only the location of law's key that is in dispute, but the very existence of such a key. For Langille and others who drink the intoxicating draughts from this particular Wittgensteinian well, the mere uttering of "Open Sesame" will be enough to unlock law's treasure-trove of elusive conceptual jewels. While the first half of this short essay will focus on my rehabilitation of the sceptical critique in light of Langille's treatment, the second half will demonstrate the infirmities of his proposed non-sceptical account of law.¹⁰

I.

For Langille, "strong internal scepticism" comprises four critical arguments. While the dimensions of mystification and contradiction are not unimportant, the main targets of his critique are the indeterminacy of language and the radical subjectivity of ethics. Consequently, I will confine my comments to the latter two. However, before doing so it is necessary to make some general remarks about Langille's resort to the later philosophy of Ludwig

⁹*Supra*, note 2 at 501.

¹⁰This is a suitable juncture to highlight what is for me a particularly troubling aside by Langille. In introducing my work, he states that, along with other critics, I "[t]o a large and yet unacknowledged degree ... accept the four theses [strong internal scepticism]. Yet these assumptions, critical to the success of the enterprise are rarely explicitly defended." [*Ibid.* at 475-76.] In an accompanying footnote, he limits this criticism to my articles on the Charter and notes: "Professor Hutchinson has been tremendously and admirably prolific in defending his theoretical views elsewhere." [*Ibid.* at 475-n. 103] If that is the case — and it is (at least in the sense that I have defended these views elsewhere) — why did he choose not to deal with those theoretical views? In the article he relies on, A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278, the dependence on these deeper theoretical views expressed and defended elsewhere was very apparent to Andrew Petter and myself and, accordingly, regular references were made to those other sources. The bulk of those arguments can be found in *Dwelling on the Threshold*, *supra*, note 8. The arguments there are taken further in "The Importance of Not Being Ernest" (1988) 34 McGill L.J. (forthcoming); "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43 U. Miami L. Rev. (forthcoming); "Of Persons and Property: The Politics of Legal Taxonomy" (July 1988) [unpublished]; "A Poetic Champion Composes: Unger (Not) On Ecology and Women" (1989) 39 U.T.L.J. (forthcoming); "Mice Under a Chair: Democracy, Courts and the Administrative State" (1989) 39 U.T.L.J. (forthcoming). While this essay is consistent with the views developed in those pieces, it expresses them rather differently and pushes them further in relation to Langille's argument.

Wittgenstein. Langille charges that, while I rightly place strong reliance on Wittgenstein's insights, I "misuse this potent source of inspiration, reading in sceptical conclusions which Wittgenstein would regard as nonsense."¹¹ First, I do not consider myself to be a disciple of the Wittgensteinian creed; my "sources of inspiration" tend, like many practitioners of Critical Legal Studies, to be Jacques Derrida, Michel Foucault, Richard Rorty and early realists. Indeed, much of my writing is directed at the political inadequacies and other shortcomings of the conventionalist theory of meaning. While some of those scholars may begin with Wittgenstein's work, they end with a theoretical position that differs radically from his.¹² Langille recognizes much of this, but claims that such conclusions are "deeply shallow" and that a "sceptical reading of Wittgenstein's message is a misguided one."¹³ The irony of this assessment seems to be lost on Langille. While I do not suggest that Langille's reading of Wittgenstein is "wrong" in any final sense, I do challenge the validity of any claim that there is one true and rightful meaning of Wittgenstein that can be deviated from, especially one that rejects rather than supports scepticism. Surely, a major lesson of Wittgenstein is that, while meaning is not perennially elusive, a text (including his own) is more a site for the struggle between competing interpretations than an occasion for the resolution of them. In short, Langille wants to exempt Wittgenstein's writings from the very lesson that they are "conventionally" held to carry.

Moreover, even if Langille's reading of Wittgenstein was somehow "right", in the sense that Wittgenstein said what Langille says he said, Langille is unclear how this reading itself advances, let alone successfully completes, the attempt to make sense of the interpretive act. He must go on to demonstrate that his interpretation of Wittgenstein is a useful and convincing account of legal language and its operation. Like some fundamentalist Christians or dogmatic Marxists, he seems to believe that if the *Bible*, the *Communist Manifesto* or, in Langille's case, the *Philosophical Investigations* said it, then it must be so. In doing so, he engages in the same error of "pointing" which he chastises sceptics for committing — "[t]o criticize one must argue political theory, not point it out."¹⁴ Accordingly, even if Langille could be "right" about Wittgenstein, I do not think that such a

¹¹*Supra*, note 2 at 453.

¹²See Hutchinson, *Dwelling on the threshold*, *supra*, note 8 at 22-55, 125-63 and 261-93. While I rely substantially on Derrida, I ultimately reject (or, at least, substantially modify) his work because he remains part of the very metaphysical tradition he claims to have deconstructed and rejected. [*Ibid.* at 36-39.] A similar point is made by Langille, *supra*, note 2 at 496-97. But, whereas he seems to embrace gleefully such an apolitical stance, I am dissatisfied and endeavour to reveal the very clear ideological foundations of law and legal theory.

¹³*Supra*, note 2 at 456. Emphasis added.

¹⁴*Ibid.* at 504.

reading offers a plausible or useful account of legal and adjudicative practice. It is to this matter, under the rubrics of the “indeterminacy of language” and “radical subjective ethics”, that I now turn.

Although Langille is correct in arguing that I place great weight on legal theory’s significant failure to provide a workable explanation of law’s determinacy, he is wrong in his understanding of what that indeterminacy critique is. As this essay testifies, it is a ludicrous position to suggest that determinate meaning does not and cannot exist: Langille and I agree on enough to permit us to disagree. The important point is the status, source and fragility of that possibility. The crucial question is to ascertain whether there is a workable range of determinacy that can allow for some interpretive movement, but not be so generous as to be commensurate with the existing spectrum of views in the contemporary political rainbow. The proof that law is not so determinative as to permit only one single correct answer will not signal victory for the sceptics. Nor will the finding that law is not so indeterminate as to permit *any* answer at all be considered decisive for the non-sceptics. Determinacy and indeterminacy are polarities on the plane of praxis. While theory seeks to disentangle these extremes, it is our existential condition and fate to experience and embrace them simultaneously. Moreover, the drive to wrestle with this predicament can never be erased or denied: theorists must remain alive to the evanescence of any proposed resolution. In short, the very act of locating the bounds of determinacy will itself alter our experience and understanding of determinacy and its bounds.

Langille’s suggestion that sceptics view legal doctrine as so fundamentally indeterminate that it can be given any or no meaning is a *reductio ad absurdum*. It exaggerates the consequences of a responsible scepticism, ignores the historical point of the critical exercise and takes the political edge off the critique. It is definitely not the sceptics’ argument that there can be no general consensus on the shape and substance of past legal doctrine or that the resolution of particular cases cannot be predicted with a reasonable degree of confidence. To ignore such facts is to counsel a dangerous otherworldliness. But it is very much the case that law fails to meet its own proclaimed standards of rational justification and cognitive clarity. Unsupplemented by external influences and values, legal doctrine can *never* of itself determine the “correct” and “unique” answer to a particular dispute. Any fragile consensus about meaning or any confidence in prediction does not arise *from* inside doctrine, but is given *to* doctrine from outside.

Legal doctrine is not simply “out there”, but is always in need of collective retrieval and re-creation. The past is unknowable in and of itself. The past has passed and was what it was, but it is up to those who follow to decide what it will become: the future of the past is a present and continuing responsibility. Tangled in a skein of fact and fancy, history can never

be unravelled in its unadulterated immediacy, but can only be experienced second-hand. Consequently, meaning is always provisional, in that it is always open to interpretation and reinterpretation, and conditional, in that it is only knowable from an interpretive perspective. Legal reality is the historical function of the ideological commitments that comprise a legal community at any given time, a community whose identity and expression is itself an interpretive artifact that is never "self-present as a positive fact".¹⁵ To put it in Langille's terms, even agreements in judgments are themselves the object of interpretation, not its ground. None of this is intended to deny the shared, if elusive, sense of doctrinal intelligibility that everyone experiences at some time. Indeed, in the theoretical interrogation of "shared meaning", there is an implicit and unavoidable reliance on the practice of shared meaning.¹⁶

What this discussion is intended to do is to show that there can be no law without interpretation, no interpretation without interpreters and no interpreters without politics. The crux of the matter is not the existence of institutional meaning and general predictability, but the source and authority of the normative reading offered or supposed. On what basis can one reading be privileged over another? Legal doctrine need not be as it is; it always contains the resources for its own re-interpretation and revision. Doctrinal consistency and regularity are not attributable to law, but to the politics of lawyers. While every case could be decided doctrinally in contradictory ways, the relatively homogeneous values of lawyers and judges ensure that some results will be much more likely than others. Law's reconstructive potential can never be squeezed out by its present actuality; closure of doctrinal openness is only bought at the price of intellectual self-delusion and philosophical puzzlement. Accordingly, the critical truth is that doctrine is not nothing, but a special kind of something. It means nothing until it is interpreted and, although it will always have meaning, its meaning will be determined by those who interpret it.

Once this understanding of the indeterminacy critique is grasped, it becomes obvious that the force of Langille's second and related argument about the sceptics' attachment to the radical subjectivity of ethical judgments is largely dissipated. Like others, he makes the allegation of subjectivity with little evidence or support in sceptical writings.¹⁷ In his whole

¹⁵See D.L. Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988) 136 U. Pa. L. Rev. 1135 at 1207. See also S.E. Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1983).

¹⁶See J. Derrida, "Signature Event Context" (1977) 1 GLYPH 172.

¹⁷See, for example, A.B. Rubin, "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987) 37 J. Legal Educ. 307.

discussion of so-called sceptical belief, Langille refers only to the late Arthur Leff as a proponent of such a view.¹⁸ While indeterminacy leads to choice, it does not mean that that choice is the sovereign prerogative of a radical subjectivity.¹⁹ I reject the caricatured suggestion that judges are consciously manipulative ideologues who combine in Machiavellian manner with their colleagues to implement a clear and self-serving scheme of social (in)justice. This is a particularly crude version of ethical judgment that draws on the very liberal theory of individual identity and responsibility that critics, like myself, are at pains to discredit.

A major point of my sceptical critique is to demonstrate that an abandonment of historical and textual objectivity does not presage a necessary embrace of the belief in the subjective authority of a prophetic and unsituated interpreter. Writers, like Wittgenstein and Leff, share the same profound ideological commitments and assumptions as those who seek to rest meaning on textual objectivity; they are mirror-images of the same interpretive face. My criticism is not only sceptical of textual objectivity, but of individual judgment at large and the belief that individuals are the privileged source of meaning beyond the constraints of their social, historical, political and discursive setting. Moreover, by offering an ahistorical and asocial approach to interpretation, Langille fails to take doctrine seriously and manages to blunt the political edge of any deconstructive critique. It is revealing that Langille's article offers no doctrinal illustration of his thesis or arguments.

To be plausible, any critical theory of adjudication must be able to account for the judges' feeling of being bound. It cannot discard the real experience that decision-makers have of being compelled by doctrine to reach particular results. Legal ideology operates so effectively precisely because it persuades the "rulers" as well as the "ruled" that the judicial function is a constrained and impersonal exercise of official authority. Whereas the formalist locates truth and authority almost exclusively in the doctrine, the anti-formalist confers that logocentric privilege on the judge. It is as flawed to propose that the lawyer is everything as it is to suggest that the law is everything. Although there are frequent instances of overt manipulation, legal doctrine amounts to more than the residual traces of the judicial mind's unbounded freeplay. The posited distinction between "that to be interpreted" (doctrine) and "that which interprets" (lawyer) cannot be sus-

¹⁸*Supra*, note 2 at 466-70.

¹⁹Langille's equation of "arational, psychological, modes of explanation" with "the idea of 'visions' and 'complex cultural codes' and to forces that work behind the scenes which move these props around" is puzzling [*Ibid.* at 475.]: the latter seems to be the very negation of the former or, at least, a challenge to the very idea of what amounts to rational and psychological explanation.

tained.²⁰ Neither doctrine nor lawyer exclusively controls meaning. Each is implicated by and in the other. Both doctrine and lawyer are shaped by their political milieu; they interact and interpenetrate to generate legal discourse and its "reality". Judgment and values are neither the objective essences of an intelligible world nor the subjective fantasies of a chaotic existence. They are the contingent effect of varied and overlapping *economies* of intellectual, social and political thought.

II.

Apart from the invocation of trusted Wittgensteinian wisdom to scotch the sceptics' claims, Langille relies on the *Philosophical Investigations* to suggest an alternative view of legal argument — one that might underscore rather than undermine the viability of legal discourse. He contends that a proper understanding of Wittgenstein reveals that the role of the jurist is "not to build up theories, but to dispel confusions".²¹ Their task is not to go on some frolic into political cottage-country, but to remain in their professional dens and explain how legal language functions when it is "at work, doing its normal job in our lives".²² In a very concrete sense, Langille wants to rekindle the Hartian notion of law as a social practice and form of life in which jurisprudential explanation is made from a distinctly internal perspective.²³ While the work of contemporary writers like Owen Fiss²⁴ and Ronald Dworkin²⁵ evinces sharp disagreement with the details of such an enterprise, they are considered to be "continuing this tradition".²⁶ It is an attempt to resuscitate in grand style the formalist tradition of bygone days.

For Langille, the crux of a Wittgensteinian-inspired account of law is that it is not about interpretation as a mental mode of passive reflection, but it is about the worldly *activity* of playing the language game; "obeying a rule is not a product of thinking, but of acting."²⁷ To understand legal language means to be an expert on legal techniques; it is a matter of application, not interpretation. As such, law can only be understood and participated in as a form of life which one does not so much know, but rather

²⁰See D. Kennedy, "Toward A Phenomenology of Adjudication" in A.C. Hutchinson & P.J. Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 141.

²¹*Supra*, note 2 at 486.

²²*Ibid.* at 487.

²³See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

²⁴See O.M. Fiss, "Objectivity and Interpretation" (1982) 34 *Stan. L. Rev.* 739 and "Conventionalism" (1985) 58 *S. Cal. L. Rev.* 177.

²⁵See R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

²⁶*Supra*, note 2 at 499.

²⁷*Ibid.* at 490.

lives: the lawyer is more a mundane bricklayer than a metaphysical architect. In the final analysis, legal discourse is a grammatical exercise in which “[t]here is nothing we can do beyond giving examples and insisting upon practice in order to communicate all we ourselves know”²⁸ Legal theorists must be content with conveying the soothing message that “[t]his is just the way things are”.²⁹

The major problem with Langille’s account is that it is not so much an invalid or controversial explanation of law’s viability as it is a denial of the possibility of *any* explanation. By reducing legal theorists to mere grammarians — or, at least pretending to — he seems not only to wallow in a profound resignation and obeisance to the status quo, but to glory in the presumed apolitics of this stance. The concession that law and its interpretation is purely a matter of social fact robs Langille of any way of evaluating its content or conclusion. When he approves of Petter and my pointing out “the weird and untenable distinctions the courts have managed to draw”,³⁰ it is baffling to try to discover the basis upon which he founds these remarks. For Langille, good law is simply what good lawyers do and good lawyers are those who have become efficacious at whatever it is that lawyers do. It is a tautological gospel of expertise in which the expert is someone who has made a habit of engaging in a particular activity. Langille begins and ends his arguments at one and the same place, namely “the way things are”. Far from being a celebration of the professional ideal, he has effected its ultimate disparagement.

The consequences of this “grammatical jurisprudence” are far from benign. It is not so much that Langille removes most of the interesting and normative questions from the jurisprudential agenda, but that he answers them by default. What interests are served by legal discourse? How does legal discourse justify its power and authority? How does law shape the conditions and status of ordinary citizens? Why and how does law change? Insofar as legal discourse is what lawyers say and lawyering amounts to what lawyers do, law will reflect and embody the values, aspirations and interests of those who comprise the legal profession at any given moment — a predominantly male, white, middle-class group.³¹ In short, Langille has made a blatant attempt to convert technique into substance and has effected what Joel Bakan has termed a “retreat to the elite”.³² It is a desperate and

²⁸*Ibid.* at 491.

²⁹*Ibid.* at 493.

³⁰*Ibid.* at 485.

³¹See H.W. Arthurs, R. Weisman & F.H. Zemans, “The Canadian Legal Profession” [1986] *Am. B. Found. Res. J.* 447 and J. Hagan, M. Huxter & P. Parker, “Class Structure and Legal Practice: Inequality and Mobility Among Toronto Lawyers” (1988) 22 *Law & Soc. Rev.* 9.

³²See J. Bakan, “Retreat to the Elite” (June 1988) [unpublished].

transparent effort to preserve the legitimacy of legal values by invoking the naked authority of judicial Popes and lawyerly Princes.³³ As such, legal theory is the opium of the masses and legal theorists become the traffickers and traders in this narcotic.

Like linguistic grammarians, Langille wants to claim that, while law's grammar is neutral, this does not mean that it is value-free. The familiar norms and standards of law's grammar — "consistency, even-handedness, and equal treatment"³⁴ — are uncontroversial and can be acclaimed by all. But this is very wishful thinking. Grammar does not spring full-grown from the head of Zeus; it is customary usage that has ossified and forgotten its organic pedigree. It is not that such values are necessarily bad (although those referred to by Langille are woefully vague), but that they require a defence and not a ritual affirmation. All grammar is an ideology by which the custodians of the status quo impose their own values on the greater community. The idea of "correct" or "standard" English is little more than the English used by the educated, upper middle-classes. The language of other groups, like women and blacks, is not inferior or any less logical; it is simply not in a political position to assert itself.³⁵ Grammar is the calling-card of privilege and power.

On his own and in more specific terms, Langille's account is "deeply shallow". Even if law is an activity, it is a self-conscious activity of justi-

³³See Fiss, *supra*, note 24 at 755 and Dworkin, *supra*, note 25 at 407.

³⁴Langille, *supra*, note 2 at 33.

³⁵See, e.g., D. Spender, *Man Made Language*, 2d ed. (London: Routledge and Kegan Paul, 1985). A familiar example of this situation is subtly offered in W.H. Fowler, *Modern English Usage*, 2d ed. by E. Gowers (New York: Oxford University Press, 1983) at 404:

Each and the rest are all singular; that is undisputed; in a perfect language there would exist pronouns and possessives that were of as doubtful gender as they and yet were, like them, singular; i.e., it would have words meaning him-or-her, himself-or-herself, his-or-her. But, just as French lacks our power of distinguishing (without additional words) between his, her, and its, so we lack the French power of saying in one word his-or-her. There are three makeshifts: first, *as anybody can see for himself or herself*; second, *as anybody can see for themselves*; and third, *as anybody can see for himself*. No one who can help it chooses the first; it is correct, and is sometimes necessary, but it is so clumsy as to be ridiculous except when explicitness is urgent The second is the popular solution; it sets the literary man's teeth on edge, and he exerts himself to give the same meaning in some entirely different way if he is not prepared to risk the third, which is here recommended. It involves the convention ... that where the matter of sex is not conspicuous or important the masculine form shall be allowed to represent a person instead of a man, or say a man (homo) instead of a man (vir). Whether that ... is an arrogant demand on the part of male England, everyone must decide for himself (or for himself or herself, or for themselves).

fiction. Legal doctrine is not simply a collection of litigational outcomes; it is also a depository of justificatory arguments. There are not libraries of judgments instead of lists of decisions for nothing. Law is an institutional practice of warranting the deployment of threatened coercive power and of fixing certain readings of text with authoritative force. The struggle for meaning and the establishment of determinacy take place in the context of prevailing power relations. While Langille seems to deny their presence in his rendition of law's language-game, they provide the very context and conditions for its possibility. For instance, in typical lawsuits, litigants and judges will disagree over the meaning of a particular rule or set of principles. Of course, the judges' interpretation will always prevail as they have the inside track. In the language-game of law, the judge always holds the trump cards. The Jacksonian credo is regnant: "We are not final because we are infallible, but we are infallible only because we are final."³⁶ It is a matter of power and far from resiling from this fact, Langille embraces it and elevates it to an axiomatic insight of jurisprudential merit. When the scam of playing theoretical tailor to the legal Emperor is exposed, the only traditional response seems to be to rejoice in and solemnize their nakedness, not to condemn or chastise it. The critical task is to replace this pontifical idea of law with a more secular and democratic version.

Like Fiss, Langille assumes the very determinacy whose existence he sets out to prove.³⁷ The stipulation that there must be a pre-conscious agreement for any stability or possibility of meaning begs the central questions to be answered — what is the source, nature and worth of those judgments? While there must exist some shared judgment to make general communication possible,³⁸ it does not follow that this will be sufficient to foreclose disagreement in particular circumstances. Indeed, Langille's pronouncement that "[t]here is as much stability as there is"³⁹ does not preclude the assessment that there may be very little stability at all. For instance, Langille seems to approve of the observation that "[i]f, as a matter of fact, there were radical disagreements in application of expressions defined by reference to samples, there would no longer be these language games."⁴⁰ The current state of jurisprudential play and legal doctrine gives lie to the fact that there is a workable degree of stability/determinacy that renders the internal practice of legal discourse coherent or viable. It is not legal technique that resolves cases, but the values that give rise to and sustain the extant

³⁶See *Brown v. Allen*, 344 U.S. 443 (1953) at 540 *per* Jackson J.

³⁷For a critical analysis of Fiss' work along these lines, see A.C. Hutchinson & P.J. Monahan, "The 'Rights' Stuff: Roberto Unger and Beyond" (1984) 62 *Texas L. Rev.* 1477 at 1506-7.

³⁸See the previous discussion at 150.

³⁹*Supra*, note 2 at 493.

⁴⁰*Ibid.* at 492 citing G. Hacker, *Insight and Illusion*, rev'd ed. (New York: Clarendon Press, 1986) at 191.

techniques. As Langille might put it, that we have indeterminacy and disagreement is the way it is and that is just the way it is.

Many of the points made can be brought together and reinforced by Langille's example of mathematical rule-following. The puzzle is to determine which two numbers come next in a series 1, 3, 5, 7...⁴¹ The answer is obviously uncertain — 9, 11 (odd numbers); 11, 13 (odd prime numbers); almost any numbers (serial repetition of 6 random numbers). Langille accepts the force of the sceptical attack and concedes that the fact that "neither precedent nor intention can give or dictate the outcome ... is true", but he considers that to be "unimportant".⁴² For him, and Wittgenstein is again the source, the challenge is not to seek vainly to plug the gap between the rule and following the rule, but to look at and determine existing practices and understandings. The only way to know the correct answer is to learn and be instructed by what others do; "[t]here is nothing we can do beyond giving examples and insisting upon practice in order to communicate all we ourselves know about the use of [such] concepts."⁴³

Where does all this leave the student of mathematics or law? The only Langillean answer must be ... — who knows? If "precedent" and "intention" are no guide, the hapless student is on her or his own. In such circumstances, it makes no sense to require a following of existing practice when the character of such practice is the very matter in issue. Even to advise a choice for elegance or symmetry seems self-defeating and question-begging. Whatever the case in mathematics, the legal situation is doubly or even trebly problematic. Judges have a tendency to change the operating rules, as it were, in mid-series. Like peripatetic gamblers, they sometimes roll the adjudicative dice for odd numbers, at other times for prime numbers and occasionally for random numbers. Moreover, what is completely overlooked by Langille and others is that there is no sure method of ascertaining which cases correspond to which numbers. Accepting that chronology is an unreliable guide, a case might be number 3 today, 1 tomorrow, and 5 the day after. Consequently, even if Langille's espousal of an activity-based explanation of legal meaning is taken seriously, it not only cannot get past the finishing line, it cannot even get the hermeneutical project out of the starting gate. Running-on-the-spot passes for Langillean progress.

⁴¹The telling of an old joke seems appropriate here. A mathematician, philosopher and lawyer apply for a university professorship. The mathematician is interviewed first and he is asked what two plus two equals. He provides an exhaustive and mind-numbing explanation of why the answer is four. The philosopher is asked the same question and she offers a lengthy disposition about it all depending on the base-system used. Finally, the lawyer is interviewed, and when asked the same question, is short and to the point — "tell me the answer you want and I'll argue that way".

⁴²*Supra*, note 2 at 488.

⁴³*Ibid.* at 491.

III.

In attempting to demonstrate the groundlessness of my own critique, Langille has highlighted the profoundly conservative politics of his own grammatical offering. In one sense, he needs no standard against which to measure the coherence or value of legal doctrine because, on his own terms, things are the way they are; there is no point in agonizing about them because they could not be any other way. This, of course, defies any sense or understanding of history: Langille's failure to discuss or mention legal doctrine is not coincidental. Things can be different and the fact that we have made things what they are means that we can re-make them differently. To believe or suggest otherwise is a capitulation to the tyranny of the status quo. And to produce theories, in the name of "meaningful criticism",⁴⁴ that seek to undergird such beliefs or suggestions is a shameful abdication of social responsibility.⁴⁵

As regards my own position, I willingly plead guilty to the charge that I work to "debilitate" and "trivialize" constitutional interpretation.⁴⁶ However, I do not accept that I "misdirect ... reflection upon [these] issues".⁴⁷ By depicting constitutional interpretation as an inextricable web of political power and legal principle, I hope to direct attention to the inescapable political quality of Charter adjudication. I am a sceptic, but not a cynic and certainly not a hypocrite. Contrary to what Langille implies, I offer solutions that I believe in to problems which I feel.⁴⁸ I claim no "ground" for my normative position in any classical or epistemological sense. Indeed, as I have tried to emphasize in all my work, I reject the possibility or need for such a grounding. The search for such a place bears witness to our cowardly unwillingness to take responsibility for ourselves and the fate of others. There is no way to escape the politics of our finitude and land in a timeless

⁴⁴*Ibid.* at 485.

⁴⁵In reaching this conclusion, I have taken Langille at "his" Wittgensteinian word – a curious thing for a sceptic like myself to do. Although the jurisprudential Langille of this article argues forcefully and explicitly for such a conservative position and deserves thoroughly the ensuing criticism, another labour law Langille takes a progressive approach to the world and its problems. See, e.g., B. Langille & P. Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988) 13 *Queen's L.J.* 62. It is very difficult to understand how these two stances fit or stand together.

⁴⁶Langille, *supra*, note 2 at 473.

⁴⁷*Ibid.*

⁴⁸See Langille's opening quotation, *ibid.* at 452, quoting S. Cavell, *The Claim of Reason: Wittgenstein, Scepticism, Morality and Tragedy* (New York: Oxford University Press, 1974): "Scepticism and solutions to scepticism ... make their way in the world mostly as lessons in hypocrisy; providing solutions one does not believe in to problems one has not felt."

domain of pure reason or unadulterated practice whose residents can make life's always difficult and often painful decisions for us. Although there is no relief from that responsibility, there can be an empowering satisfaction in facing those dilemmas and resolving them for ourselves.

Far from denying the validity or force of my criticisms of law's politics, this non-foundational approach offers the best possibility for political critique that there is or can be.⁴⁹ If we are the choosers of our own collective values and arrangements, it is resoundingly unjust to allow one group to hold a disproportionate sway over the terms and conditions of social life. On a sceptical account of law, the appropriation of political discourse by the elite voice of lawyers is to be lamented and resisted; it offends and inhibits the aspiration to progressive or egalitarian governance. It will be in spite of and not because of constitutional litigation that justice will most often be achieved. It is only through an unwavering commitment to democracy, as a substantive form of life, that we can really make "criticism ... and rebellion meaningful".⁵⁰ More than that, democracy can help give meaning to our lives as citizens of a common humanity.



⁴⁹See Hutchinson, "Talking the Good Life: From Liberal Chatter to Democratic Conversation" in A.C. Hutchinson & L. Green, eds, *Law and Community: The End of Individualism?* (forthcoming in 1989).

⁵⁰Langille, *supra*, note 2 at 505.