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WITTGENSTEIN, REALISM, AND CLS: UNDERMINING RULE SCEPTICISM

INTRODUCTION

In this paper I argue against a certain approach to understanding law and legal systems in terms of the concepts of rule and rule-following. A recurrent mistake that prevents improved understanding of the nature of rules and rule-governed behavior, consists in focusing on rule formulations, and in understanding the various phenomena surrounding rule-governed behavior as essentially linguistic. We tend to think of rules as essentially formulated, and either as linguistic entities or the mental "correlates" of linguistic entities. It is certainly difficult to say just what a rule is, if not an expression of, e.g., a sovereign will (as John Austin held), or at any rate an expression of something. Nonetheless, focusing on the "expressive" aspect of rules misleads us into such difficulties that it sometimes seems impossible for a rule-centered theory of law to have a chance of being conceptually coherent, let alone descriptively adequate.

It is my contention that the demands typically placed on rule-centered models of law have been mistakenly onerous, and that a failure to appreciate the conceptual impossibility of satisfying these demands stands in the way of a better understanding of rule-governed behavior. If the sort of pressure put on the concept of a rule in legal theory cannot be withstood by the concept of a rule even in so humble an area as, say, chess or baseball, so that we (inadvertently) become committed to denying that there "really" are chess or baseball rules, then that is a sure sign that we are demanding too much...

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theoretical work, or the wrong sort of theoretical work, from the concept of a rule.

This paper concerns a problem that must be shown to be spurious before we will be in a position to reconceive the concept rule in a way that can avoid the mistakes of traditional conceptions. I will be concerned with the supposedly fundamental indeterminacy of all rules, in particular the supposed impossibility of adequately justifying a claim to have used or followed a specific rule. The problem has been discussed within legal theory, notably by Legal Realists and lately by proponents of the Critical Legal Studies (CLS) movement, within the context of discussions of judicial decision making: how can an observer know whether a judge has appealed to a legal rule merely ex post facto to rationalize a decision “really” arrived at on independent grounds, or has instead “really” followed the rule cited in his or her opinion? As a deep philosophical problem concerning the nature of rules in general, the problem has been considered by Saul Kripke, who attributes the “invention” of “the most radical and original sceptical problem”, concerning rules or otherwise, to Ludwig Wittgenstein.1 The “sceptical paradox” (as Kripke often refers to it) is, roughly, that no one ever really can know what rule she (or any other person) follows when she thinks she (or another person) follows a rule, or even whether her behavior involves following a rule at all.2

Kripke believes that Wittgenstein offered a “solution” to the sceptical problem. I believe that although much of what Kripke attributes to Wittgenstein is correct enough, Wittgenstein would not have regarded himself as providing a solution at all. Rather, Wittgenstein was attempting to show that the “problem” is a spurious one. We are seduced into regarding it as serious only because we lack an adequate übersicht, a clear view, of our own rule-governed behavior. It is not

2 According to Professor Kripke, the problem affects the possibility of meaning in general. In this paper I will be considering only the problem as it applies to rules and rule following.