

Law and Truth

Mexico Project

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Introduction

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In a recent introduction to the philosophy of law, Andrei Marmor characterizes legal positivism as the view that “[l]egality is constituted by a complex set of facts relating to people’s actions, beliefs, and attitudes, and those social facts basically exhaust the conditions of legal validity.”² Law is ultimately about matters of social fact. The legal philosopher who did the most to develop this way of looking at law was H.L.A. Hart. More than any other legal philosopher in his day (and many since), Hart understood that central questions such as those of validity could not be answered without looking at the law from the point of view of participants in a legal system.³

While I am sympathetic to Hart’s project and in broad agreement with his jurisprudential position, Hart left a great deal about legal practices unexplained. In this project, dedicated to the topic of *Law and Truth*, I want to talk about how I think the idea of truth not only has a role to play in law but is central to any complete understanding of law. I further want to make the case that the later work of Wittgenstein, from which Hart took inspiration, is a fertile source of ideas for how to think about law and truth.

Wittgenstein is one of a handful of philosophers whose work appeals to a broad range of theoretical approaches to law. While it may seem obvious that Wittgenstein’s remarks on rule-following, justification and grammar have obvious application to law, some doubts have been raised about the usefulness and the appropriateness of Wittgenstein’s thought for law. By way of preamble, I will address these claims.

² Andrei Marmor, *Philosophy of Law* __ (2011).

³ I have in mind Hart’s notion of the “internal point of view.”

Wittgenstein and Legal Philosophy

Two American scholars have cautioned and criticized using Wittgenstein to address problems in legal theory. These are Scott Hershovitz⁴ and Brian Bix.⁵ Hershovitz writes that Bix argues “persuasively . . . that [Brian] Langille and [Dennis] Patterson are guilty of over-reading and misapplying Wittgenstein’s remarks.”⁶ I will consider Bix’s remarks shortly. Before doing so, I want to consider Hershovitz’ more general objections to the use of Wittgenstein.

One of Wittgenstein’s well-known theses is his denial of the claim that all understanding involves interpretation.⁷ A pervasive feature of many approaches to law, literature and even natural science is the notion that humans make sense of the world through interpretation.⁸ Of course, there are hundreds of articles and books that discuss the importance of this distinction not only for understanding Wittgenstein but beyond.⁹

⁴ See Scott Hershovitz, “Wittgenstein on Rules: The Phantom Menace,” *Oxford Journal of Legal Studies*, Vol 22, No. 4 (2002), pp. 619-640.

⁵ See Brian Bix, *Law, Language and Legal Determinacy* (Oxford: Clarendon, 1995), 7-35; “Cautions and Caveats for the Application of Wittgenstein to Legal Theory,” in *Topics in Contemporary Philosophy* 217-229 (Joseph Keim Campbell, Michael O’Rourke & David Shier, eds., MIT Press, 2005); “Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?,” 16 *Ratio Juris* 281 (2003).

⁶ Hershovitz at 630.

⁷ Citation needed

⁸ In *Law and Truth*, I labeled this tendency “interpretive universalism.” See LT, Chapter 5, notes 1-5. The most articulate contemporary exponent of the hermeneutic perspective, Charles Taylor, describes the human condition in the following terms: “[W]e can therefore say that the human animal not only finds himself impelled from time to time to interpret himself and his goals, but that he is always already in some interpretation, constituted as human by this fact.” Charles Taylor, *Self-Interpreting Animals*, in *Human Agency and Language* 45, 75 (1985).

⁹ Discuss Tully on Taylor.

Hershovitz wants to call into question the widespread embrace of the importance of this distinction. Let us examine his reasons.

Hershovitz's fundamental claim is that "Wittgenstein means something very specific by 'interpretation.'"¹⁰ He quotes this portion of PI 201:

Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of a rule for another.¹¹

Hershovitz directs his attention to Wittgenstein's unique – perhaps (as Hershovitz understands him) even idiosyncratic- understanding of "interepretation." As I will show, the problem with this approach is that Hershovitz fails to understand Wittgenstein's account of interpretation because he fails to see it as part of a larger and more complex argument. Hershovitz gets right to his task with this gloss of PI, Section 201:

This use of 'interpretation' as denoting a process of substitution or translation might make sense for Wittgenstein's theoretical purposes, allowing him to discuss the phenomena in question with a certain precision. However, Wittgenstein's use of 'interpretation' does not in any way capture what we do when interpreting generally. When we interpret a painting, we do not replace it with another

¹⁰ Hershovitz at 628.

¹¹ Wittgenstein, PI 201.

painting; when we interpret a play, we do not substitute one expression of the play for another. Similarly, interpreting a law need not involve substituting one expression of the law for another.¹²

Reading Hershovitz on Wittgenstein on interpretation, one might think that the only time Wittgenstein mentions interpretation is in the snippet quoted above. But this is not the case.¹³ Second, Hershovitz seems to think that Wittgenstein is making only one argument about interpretation and rule-following. Even before Hershovitz had published his article, another distinct argument had been identified and shown to have worked in tandem with the argument partially identified by Hershovitz in the paragraph quoted above.

In *Philosophical Investigations*, Wittgenstein makes two arguments about rule-following. Meredith Williams refers to these as the Infinite Regress Argument and the Paradox of Interpretation argument.¹⁴ While the arguments are distinct, they work in tandem and are directed against the same target. That target is a certain conception of meaning that Wittgenstein wants to undermine. To make his case, Wittgenstein ranges

¹² Hershovitz at 634.

¹³ In fact, one needs to read Sections 139-242 for a complete understanding of Wittgenstein's account of rule-following, of which his remarks on interpretation are just a part.

¹³ I shall refer to the arguments by name and give the citations to the Investigations sections in footnotes.

¹⁴ Meredith Williams, *Wittgenstein, Mind and Meaning* 159 (1999). Wittgenstein introduces the regress problem in PI Sections 141 and 198. Hershovitz does not discuss these sections). The Paradox of interpretation argument, which Williams claims to build on the Regress Argument, is found in Section 201 (Hershovitz quotes a fragment of this section).

across a wide variety of examples such as numbers, colors, signs (e.g., a sign in the form of an arrow indicating direction), a cube, an arithmetical series and ostensive definition.

As Williams shows,¹⁵ there are two dimensions to any rule-governed practice. The psychological dimension is the way in which someone is acculturated into a practice. The concern here is with the practical techniques used to impart mastery of the skill sets in a practice (think of carpentry). The second dimension is the justificatory/epistemic dimension. Here the concern is with how judgments of correctness are assessed. On the so-called Classical (Realist) View, “a rule serves both as a guide to the individual in determining what he does or says, and as a basis for justifying or assessing what he does or says.”¹⁶ On the Classical View, the standard for applying a rule is independent of applications of the rule. Justification/correctness is not simply a matter of what anyone does; rather, conduct (e.g., rule applications, judgments) are evaluated by a practice-transcendent standard. Wittgenstein’s target is clear: he wants to undermine the notion that “a rule determines its applications and guides the individual.”¹⁷ Wittgenstein wants to upset the idea that following a rule is a matter either of an epistemic state or mental process.¹⁸

¹⁵ Williams’ complete discussion is at 157 – 161.

¹⁶ Williams at 157.

¹⁷ Id. at 158. In the text, do I want to point out that in a way a rule does determine its applications, but not considered in isolation; the rule does not guide us as “something that can come before the mind, isolable from any context and history of use”, but it is not per se wrong to say that a rule determines its applications and guides the individual?

¹⁸ Of course, Wittgenstein himself doesn’t claim that correctness is simply a matter of what anyone does; a reader who is unfamiliar with Wittgenstein might otherwise take him to claim that something is correct or true *because* people agree on it, which he clearly denies; see PI 24

Understanding often occurs in a flash: we see an equation or formula, a road sign or a hand waving at us and we instantly know what the sign means. What accounts for this?¹⁹ In the voice of his imaginary interlocutor, the Realist philosopher of meaning, Wittgenstein says “what we grasp in this way is surely something different from the ‘use’ which is extended in time!”²⁰ No, in fact, Wittgenstein shows that nothing but use “grounds” meaning. There is no “something” over and above the uses to which we put signs that gives them their meaning. Understanding, then, is revealed in practices where the distinction between correct and incorrect use is appropriated and learned. But when we grasp meaning in a flash, is it not the case that something comes before our mind, something that tells us how to go on? Wittgenstein denies this.²¹ His claim is that “any picture, chart, schema (i.e., any *isolable* representational object) is susceptible to more than one interpretation.”²² For Wittgenstein, the important point “is to see that the same thing can come before our minds when we hear the word and the application still be different.”²³ This is not an argument but stage-setting. Wittgenstein is preparing the ground for the Regress and Paradox of Interpretation arguments, which come later. Again, Wittgenstein’s target is the notion that the ground of correct and incorrect application of

¹⁹ What accounts for it is training. Cite the passages and some text.

²⁰ PI, Sec. 138.

²¹ Just to be clear, Wittgenstein does not deny that something may come before our mind when we hear a word, consider a rule or see a sign. What he denies is that that something tells us how to react correctly.

²² Williams at 158.

²³ PI, Sec. 140.

signs (i.e., words, objects, etc) is something independent of our ways of using signs.

There is no such ground. Meaning is a matter of use.

The Realist picture of meaning has three components. The motivation of the Realist is to identify something that

1. can come before the mind and be grasped “in a flash,” in other words, something isolable, but which
2. can serve as a guide for certain future actions, and also
3. can set a standard for the correctness of these actions.²⁴

Wittgenstein introduces the Regress Argument in PI 141 and 198.²⁵ Having shown that the same picture can have different applications, Wittgenstein then asks whether “not merely the picture of the cube, but also the method of projection comes before our mind.”²⁶ Of course, for the same reasons as the cube itself, the method of projection is also susceptible of multiple interpretations. Wittgenstein asks “does this really get me any further? Can’t I now imagine different applications of this scheme too?”²⁷ Interpretation cannot ground meaning. As he says in PI 198: “any interpretation [of a rule] still hangs in the air

²⁴ Williams at 159.

²⁵ Reproduce sections.

²⁶ PI, Sec. 141.

²⁷ Id.

along with what it interprets, and cannot give it any support. Interpretations do not determine meaning.” So how is the regress generated? Williams provides the answer:

The regress is generated, not by the multiplicity of interpretations per se, but by the assumption that that which guides is something that can come before the mind, isolable from any context and history of use. In other words, if our picture of being guided by a rule requires interpretation because the rule as something that can come before the mind and be grasped in a flash – an isolable entity – is subject to multiple interpretations -- then *for the same reason* our interpretation requires interpretation, and so on.²⁸

Wittgenstein deepens his critique of the Realist picture of meaning by adducing a different argument, that being the Paradox of Interpretation argument.²⁹ He writes:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can

²⁸ Williams at 160.

²⁹ Hershovitz actually confuses these two arguments, thinking that Sec. 201 is the Regress Argument when in fact it is the Paradox of Interpretation argument.

also be made out to conflict with it. And so there would be neither accord nor conflict here.³⁰

Because any action (i.e., any purported following of a rule) can be interpreted as following or not following a rule, the idea that interpretation can ground a rule is paradoxical. Williams explains thus:

This is the source of the paradox: Even if the application of a rule is correct, the action could be made out to conflict with it. Nothing in the application of objectified meaning guarantees what the particular action really is. This renders the notion of accord or conflict, hence of rule-governedness itself, meaningless. It is not just that we cannot see what makes one interpretation preferable to another (the point of the Regress Argument), but that we cannot make sense of the very distinction between correct and incorrect action, even if the rule in the subject's mind were transparent, i.e., were self-interpreting. Even a transparent rule carries no constraint on *what* action is performed, as any action can be characterized to accord with that rule or not. So the idea that the rule imposes constraints on what we do is empty.³¹

³⁰ PI Sec. 201

³¹ Williams, 160 -161.

The upshot of the Regress and Paradox arguments is that the idea that meaning can be grounded in something external to a practice of use is an illusion. These are powerful arguments, especially for law, because law is a practice where the question whether a particular rule or norm is being followed or applied correctly is of fundamental importance. In order to know whether or not a judge is correctly following a rule, we first need to have some idea of what it is to follow a rule. Wittgenstein has demolished one preferred way of answering this question. He gives us his own, and we shall consider that later. For now, let me consider a few other claims by Hershovitz before moving on to Bix.

Hershovitz claims that Wittgenstein uses the word “interpretation” in what Hershovitz characterizes as “a very odd way,” one “denoting a process of substitution or translation [which] might make sense for Wittgenstein’s theoretical purposes.”³² Of course, one may wonder whether Wittgenstein has “theoretical purposes.”³³ As we have seen, his purpose is to upset an implausible account of meaning and rule-following. In the section of PI 201 quoted by Hershovitz, Wittgenstein is concluding a long argument about rule-following wherein he has shown that “interpretation” cannot ground meaning and, hence, rule-following. When Wittgenstein says, as he does in the passage quoted by Hershovitz, “there is an inclination to say: every action according to the rule is an interpretation,” he is

³² Hershovitz at 634.

³³ I would have thought at this late date that no one would think that Wittgenstein was “theoretical” in any sense of the word. He is often derided as a quietist, anti-philosophical thinker. Hershovitz provides not a single example of Wittgenstein’s “theoretical” interests.

setting out the paradox of interpretation. This is why he says that “we ought to restrict the term ‘interpretation’ to the substitution of one expression of the rule for another.” Again, this is the point of Wittgenstein’s *reductio*: “interpretation” is just the substitution of one expression of the rule for another, it is emphatically not “action in accordance with the rule.”

In further support of his claim that Wittgenstein is using “interpretation in an odd way, Hershovitz contrasts Wittgenstein’s use of the term with what Hershovitz thinks are clear uses of the term. He writes:

Wittgenstein’s use of ‘interpretation’ does not in any way capture what we do when interpreting generally. When we interpret a painting, we do not replace it with another painting; when we interpret a play, we do not substitute one expression of the play for another.³⁴

In addition to his confusion over the role of interpretation in Wittgenstein’s arguments against the Realist picture of meaning, Hershovitz manages to obscure even ordinary uses of the word “interpretation”. Hershovitz’s examples are misconceived. We do not interpret a painting by substituting it with another painting. That does not correspond to Wittgenstein’s claim that we substitute one expression of a rule for another. Rather, in interpreting a painting we substitute a verbal analysis of the different aspects of the painting for the visual expression of the painting.

³⁴ Hershovitz at 634.

In the case of a play, Hershovitz is likewise mistaken. In interpreting a play we substitute a verbal analysis of the play for the original text. Hershovitz never says what an expression of a play could be. Here he denies that it makes sense to conceive of interpretation as a process of substitution, but he fails to give (even) a misconstrued example (he does this only in the case of a painting). In the painting case, the mistake is that in expression of a painting does not have to be a painting.³⁵ So it makes sense to understand interpretation as some process of substitution or translation: in fact, one wonders how else we should understand the term “interpretation”?³⁶

Finally, Hershovitz claims that Wittgenstein’s remarks on rules and rule-following do not tell us anything about law because “law is a reflective activity.”³⁷ Again, the criticism is misconceived. Every instance of reflective rule-following presupposes pre-reflective, or unreflective, rule-following.³⁸ Or in other words: Every interpretation of a rule presupposes that we understand other rules, where understanding is a way of following a rule which is not an interpretation. Thus,

³⁵ In the case of law Hershovitz denies that we need to substitute one formulation of the law for another. I could come back to the question of whether interpreting a law amounts to substituting one expression of it (formulation) for another in the section on interpretation at the end of the article.)

³⁶ My thanks to Julia Hermann for this point and the next.

³⁷ Hershovitz at 636.

³⁸ Tully makes this point in a particularly powerful way in his critique of Taylor’s hermeneutical arguments. In fact, Tully’s critique was so powerful that it motivated Taylor to abandon his claims for the centrality of interpretation.

every interpretation of a legal rule presupposes that some other legal rules (plus rules of language, of course) are applied unreflectively, or without any hesitation.

BIX

Brian Bix has written about the use of Wittgenstein in the context of legal philosophy on a number of occasions.³⁹ Like Hershovitz, Bix correctly criticizes some of the more unpersuasive attempts to use Wittgenstein in the service of global skepticism and indeterminacy. Like Hershovitz, Bix points to the fact that what Wittgenstein “did write on both philosophy of language and philosophy of mind remains frequently exegetically uncertain”⁴⁰ Bix does not leave matters there, arguing that there are further reasons for leaving Wittgenstein out of legal philosophy.

Bix makes two arguments that demand a reply. The first concerns interpretation. Bix contends that Wittgenstein’s remarks on interpretation cannot apply to law. He makes two claims in this regard. The first is that Wittgenstein’s examples all come from simple practices like arithmetic and reading sign-posts. Thus, they cannot be exported to more complicated practices like law. I must confess, I have always found this an odd claim. It is as if to say if one learned how to count using pencils, one could not count automobiles because they are more “complex” than pencils.

³⁹ Cites

⁴⁰ Bix, CC, at 219 – 220.

Quite apart from this, the secondary literature on Wittgenstein contains thousands of examples where the lessons of the *Philosophical Investigations* have been fruitfully applied. To pick just one (mentioned above), James Tully has shown how Wittgenstein's remarks on rule-following undermine both Habermas' claims about the necessity of critical reflection as well as Charles Taylor's hermeneutic arguments that all understanding involves interpretation.⁴¹

Bix's second argument builds on the claim just canvassed and is the one he presses hardest. This argument is that interpretation in law is, as he puts it, "some distance" from the practices Wittgenstein describes in PI. He says: "Law and legal interpretation are not practices characterized by consensus or lack of disagreement. To the contrary, one might say that the practice of law is substantially, perhaps even pervasively contested."⁴²

Is law a practice riven with disagreement? It's difficult to agree with this, as so many of our legal obligations and entitlements are settled. In a riposte to Dworkin's claims about theoretical disagreement, Brian Leiter had this to say:

One may think of the universe of legal questions requiring judgment as a pyramid, with the very pinnacle of the structure captured by the judgments of the highest court of appeal (where, one may suppose, theoretical disagreements in Dworkin's sense are rampant), and the base represented by all those possible legal disputes that enter a lawyer's office. This is,

⁴¹ Tully, in Heyes. Another great example is Vincent Descombes, "Why We Are Not Nietzscheans," in _____

⁴² Bix, CC at 220.

admittedly, a very strange-looking pyramid, as the ratio of the base to the pinnacle is something like a million to one. It is, of course, familiar that the main reason the legal system of a modern society does not collapse under the weight of disputes is precisely that *most* cases that are presented to lawyers never go any further than the lawyer's office; that *most* cases that lawyers take do not result in formal litigation; that *most* cases that proceed to litigation settle by the end of discovery; that most cases that go to trial and verdict, do not get appealed; and that most cases that get appealed do not get appealed to the highest court, i.e., to the court where theoretical disagreements are quite likely rampant.⁴³

If Leiter is right, and I think he is, Bix's claims for the pervasiveness of disagreement in law are simply factually inaccurate. The overblown claims by CLS to rampant and pervasive indeterminacy are a thing of the past. If that were not enough, one need only imagine the millions of dollars, euros and sterling Forex contracts that are settled each day together with land conveyances, probate, and a host of other examples to put the lie to the notion that law is a practice of fundamental disagreement.

Bix does say something about interpretation with which I agree. He believes we need an account of how to resolve disagreement in law.⁴⁴ He is surely right

⁴³ Brian Leiter, Explaining Theoretical Disagreement, SSRN, at 14-15.

⁴⁴ Bix, 220-221.

about this. But Wittgenstein provides an answer. As Wittgenstein teaches us, interpretation is dependent upon understanding already being in place. We need to get clear about understanding before we can tackle the (reflective) activity which depends on it, that of interpretation. I have more to say about this below

The Conceptual Realm

Truth and meaning are interwoven in different ways depending on the domain of objects with which they are joined. Put another way, we might say that truth and meaning must be understood differently from the point of view of ontology. The most accessible way to think about this is in the contrast between the objects of science and those of the social world.⁴⁵ Consider money. Qua physical object, a one hundred euro note can be described in terms of its physical characteristics, noting everything from chemical composition to observable physical characteristics. Any description of a one hundred euro note in terms of its physical characteristics depends upon the methods of science (usually physics and chemistry) for its truth.

But what of the claim “this bill is legal tender in the amount of one hundred euros.” In virtue of what is that true? Years ago, John Searle employed the useful distinction between “brute”⁴⁶ and “institutional” facts. Brute facts such as one’s signature

⁴⁵ One could also follow Dilthey in drawing the distinction between *Geistes-* and *Naturwissenschaften*. [Citation Needed]

⁴⁶ Elizabeth Anscombe first described brute facts. See Anscombe, G. E. M. (1958): "On Brute facts". *Analysis* 18: 69-72.

on a piece of paper are descriptively irreducible: the signature is ink on paper.⁴⁷ But a signature can mean vastly different things, depending upon the context. Is the signature an autograph or an endorsement on a negotiable instrument? To answer this question, one needs to know the institutional or conventional framework within which the signature is made.⁴⁸

Some philosophers deny the need to draw the distinction between brute and institutional facts. Richard Rorty, for example, abjures the suggestion that we need two metavocabularies, one for physical objects and one for social talk.⁴⁹ Rorty argues against any *in principle* distinction between the natural and social realms, at least in terms of drawing a distinction between “natural” and “social” facts. Facts, Rorty argues, “are hybrid entities; that is, the causes of the assertability of sentences include both physical stimuli and our antecedent choice of response to such stimuli.”⁵⁰ Whether it is texts or lumps, it all comes down to varieties of desiderata for our multitude of language-games. Rorty quotes Stanley Fish with approval for the proposition that “all facts are institutional, are facts only by virtue of the prior institution of some such [socially conceived dimensions of assessment].”⁵¹

⁴⁷ For discussion, see the entry “Brute Fact” in *The Oxford Companion to Philosophy*, Ted Honderich ed. (1996): 106.

⁴⁸ Cite BH, RGN.

⁴⁹ See Richard Rorty, “Texts and Lumps” in *Objectivity, Relativism and Truth: Philosophical Papers Volume 1* (1991): 78-92.

⁵⁰ *Id.* at 81.

⁵¹ *Id.* at 84, citing and quoting Stanley Fish, *Is There a Text in This Class?* 198 (1980).

Rorty wants to elide the distinction between the natural and the social to vindicate his Pragmatist epistemology. However persuasive Rorty's arguments might be, those arguments are made in the service of a position we need not defend. Law is a thoroughly social and institutional practice. There are no serious arguments for the proposition that a "fee simple interest" is comparable to hydrogen. Hydrogen is what it is quite apart from anyone's beliefs or attitudes. But without the legal system, there would be no fee simple interest, no consideration and no punitive damages. When it comes to the facts regarding these objects, we can agree with Searle that these are facts "by human agreement."⁵²

Meaning and Practices

Practices lie between word and world. But how do practices contribute to meaning? And how does meaning relate to truth? Let us consider the first question. The example I have in mind is length.⁵³ Consider the question "What are the dimensions of your dining room?" If offered in terms of feet and inches, the answer would presuppose the meaning of the terms "inch" and "foot" as those terms are understood in the American system of measurement. How does one learn the meaning of "foot" and "inch"?

Presumably one is shown (ostensively) how to employ a tape measure for the purpose of calculating lengths. It is in the course of that instruction that one learns the meaning of "inch" and "foot" and, indeed, the notion of "measurement" as well. Not only are the terms used, in a practice one learns how to apply the terms in various activities and how

⁵² John Searle, *The Construction of Social Reality* 1 (1995).

⁵³ Of course, this discussion is indebted to Wittgenstein's example of the Standard Metre in PI __ - __.

the terms are all-of-a-piece. It is only when one has learned the meaning of the constituent terms as well as obtained some facility in the use of a measuring tape that one may answer the question “what are the dimensions of the room?”

One might object with this question: Does the room not have dimensions prior to or independently of a system of measurement? The answer has to be “No.” But am I then advocating some form of Idealism? I think not. Of course the room has dimensions. The important point is that we cannot answer the question “What are the dimensions of the room?” without employing some system of measurement. To do that, we need to know the meaning of the constituent elements of a system of measurement. To employ those elements, we first have to know what the terms mean, what they refer to and how to use them. My point is that we cannot say anything true about the dimensions of the dining room without employing a system of measurement. To employ such a system we need to know the meanings of each of the constituent terms. We learn those meanings not by consulting the world but by mastering the practice of measurement. It is completely consistent to maintain both (1) that the dining room has definite dimensions, and (2) nothing true can be said about those dimensions outside a system of measurement. The practice of measurement is the link between words (e.g., “inch” and “foot”) and world (the dining room). Nothing true can be said of the dimensions of the dining room without using the practice of measurement. The practice of measurement cannot function intersubjectively without users of its constituent terms understanding those terms in the same ways, for just such understanding makes truth and falsity

possible. Without the practice of measurement, nothing true or false could be said about the dimensions of one's dining room.

Another example, one that shows how our conventions and practices infuse material objects with meaning, is chess. When we learn how the King moves on the chessboard, nothing in our learning is explicable in terms of the physical material out of which the King is made. Chess-Kings can be made of wood, stone or soap. What makes the physical object a Chess-King is its place in a practice. The referent for the word "King" is dictated not by the way the (natural) world is, but by the rules of chess. As Hanna and Harrison explain, objects like the Chess-King are "nomothetic": they are creatures of *nomos*, not *physis*.⁵⁴

The Chess-King has no existence *qua* Chess-King outside the practice of chess. In fact, Wittgenstein is right when he makes the point that someone could learn the rules of chess without ever seeing a chess set.⁵⁵ One knows what the Chess-King "is" when one knows the rules for moving the King around the board.⁵⁶ In cases such as these, "knowledge of some rules, some conventions, gets thought as close to its object as it can be got."⁵⁷ Thus, the "meaning" of Chess-King is a function of how the word is used. To know the meaning of "Chess-King" is to know the rules for employment of the term.

⁵⁴ HH, p. 96.

⁵⁵ Ludwig Wittgenstein, *Philosophical Investigations* 31.

⁵⁶ This contradicts Frege's claim that the meaning of *Bedeutung* of a proper name is an individual that it picks out. [citation needed]

⁵⁷ HH, 97

Those rules are the rules of chess. The practice of chess determines the meaning of the term and the ground of propositions or claims about what can and cannot be done with the Chess-King.

From these examples, we may draw some general conclusions. The “meaning-bearing elements of language are related to one another not directly, but only via their relationship to the third constituent of the relationship: practices.”⁵⁸ Linguistic expressions (e.g., concepts) acquire their meaning in the course of their use in practices. Practices are the bridge between meaning and the world. Language does not take its meaning from the world but from our practices. It is through our practices that we engage with the world.

Law and Practices

Law is “an exercise in practical reasoning.” One reads this all the time. What one sees less of is an account of just how law proceeds as a practice of practical reasoning. Law is like many other practices, be they carpentry, painting or fencing. There are rules for these practices and mastering a practice means mastering the rules of the practice. This is a form of practical knowledge.

What one masters in law is norms: how to identify them, how to apply them and how to appraise disputes about them. In the balance of this paper, I will describe the process of assertoric appraisal in law.

⁵⁸ Hanna and Harrison, 4.

Law as a Practice

Legal propositions⁵⁹ are assertions that something is the case, true, as a matter of law. Propositions of law can be general (e.g., “The First Amendment permits freedom of individual expression.”) or specific (e.g., “This contract is unenforceable for want of consideration.”). In neither instance (to determine the truth of the legal proposition) need we ask whether the proposition in question identifies a state-of-affairs that is to be applauded or decried. The truth of propositions of law depends not at all on the relative merits of the purported truth.

The truth of propositions of law is intimately connected with the forms of argument in legal practice. Lawyers appraise truth claims by resort to the forms of argument. But for those forms of argument to be efficacious, the meaning of their constituent terms must first be clear. Only well-formed and perspicuous claims can be appraised for truth and falsity.

The truth of propositions of law is relative to the systems of law from which the constitutive terms derive their meaning. Thus, the same proposition of law may be true in one legal system but not in another. This seemingly obvious fact explains, in no small part, the relationship between the meaning of constituent terms and the truth of propositions employing those terms.

⁵⁹ Wittgenstein’s description of a proposition is useful here:

We call something a proposition when *in our language* we apply the calculus of truth functions to it. And the use of the words “true” and “false” may be among the constituent parts of the game, and, if so, it belongs to our concept ‘proposition,’ but does not fit it.

Wittgenstein, PI, Sec 136.

There are six forms of legal argument in the American system of law. While some are more familiar than others in different departments of law,⁶⁰ these six forms comprise a complete list of the argumentative tools of American law. The forms of argument in law are:

Textual: taking the words of an authoritative legal text (e.g., a constitution, statute, contract or trust) at face value, i.e., in accordance with their ordinary meaning;

Doctrinal: applying rules generated from previously decided cases (precedents);

Historical/Intentional: relying on the intentions of the Framers (constitution), legislature (statute), or parties to an agreement (contract);

Prudential: weighing or assessing the consequences (in terms of “costs”) of a particular rule;

Structural: inferring rules from relationships created by the structures created by the Constitution or statute; and

Ethical: deriving rules from the moral ethos established by the Constitution or by statute.⁶¹

I have said that the forms of legal argument in the American practice of law are employed to show the truth and falsity of legal propositions. While this is certainly true, I need to say more about the argumentative framework within which the forms of legal argument are immanent.

As mentioned, legal argument begins in assertion. An assertion in law is a claim that a given proposition is true—that is, true as a matter of law. Consider this proposition: $p =$ “The contract between Smith and Jones is unenforceable.” I will call this proposition a Claim because it is asserted as a correct or true proposition. Before we can assess the truth or falsity of the Claim, we need to know what it is about the contract between Smith and Jones that might lead one to assert that the contract is unenforceable.

What we seek is a Ground, a reason (e.g., a fact) that connects the Claim of unenforceability with some aspect or feature of the contract by virtue of which the contract is allegedly unenforceable. Suppose Smith is fourteen years of age. This fact is the Ground for the Claim that the contract is unenforceable. But what is it that makes this so? In other words, in virtue of what are the Claim and Ground joined such that the Ground supports the Claim (i.e., contributes to the judgment that it is true)?

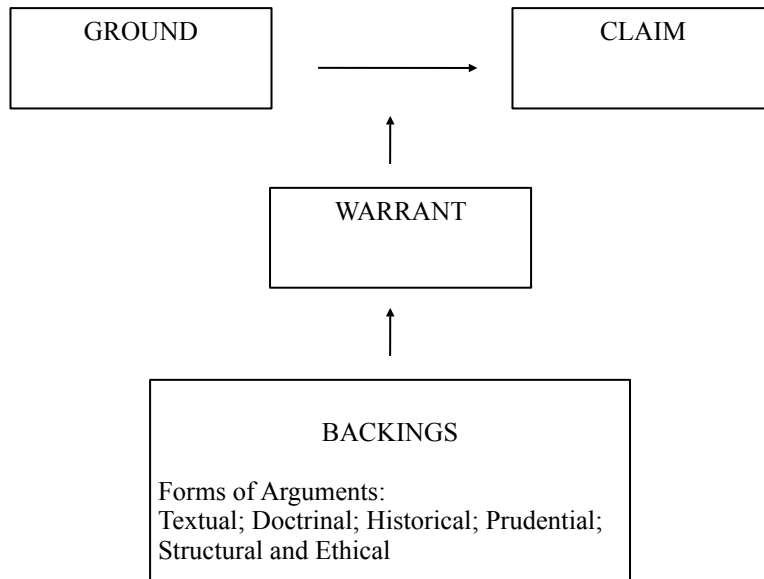
The answer to this last question is a Warrant. The Warrant makes the Ground significant vis à vis

⁶⁰ The phrase “departments of Law” is Dworkin’s. See DWORKIN, LE, *supra* note 1, at 250–54.

⁶¹ The six forms of argument in American law, paraphrased in modern terms here, were first explicated by Philip Bobbitt. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); PHILIP BOBBITT, CONSTITUTIONAL FATE (1982). Structural argument in the constitutional context was first articulated by Charles Black. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

the Claim. The Warrant (e.g., a relevant statutory provision, Restatement section or constitutional provision) is the means by which we can say with certainty that the Ground is a legally relevant reason for concluding that the Claim is true as a matter of law. But Warrants are not self-executing. For Warrants to be meaningful, there must be ways of construing Warrants that make Warrants meaningful. I shall refer to these as Backings.

The forms of legal argument are the Backings for Warrants, the grammar of legal justification with which we show the truth and falsity of Claims from the legal point of view. The following schema depicts these relationships explained in the preceding paragraphs:⁶²



With this schema in view, let us work through the question of whether *p* is a true proposition of law. Smith's status as a minor is the Ground for the Claim that *p* is true. If the Claim arose in a jurisdiction where the Restatement (Second) of Contracts is deemed to be the controlling law on this question, a textual argument that references the operative

⁶² The framework that follows (Claim, Ground, Warrant, Backings) is taken from STEPHEN E. TOULMIN ET AL., AN INTRODUCTION TO REASONING 23–67 (1979). Toulmin originally advanced the approach in STEPHEN E. TOULMIN, THE USES OF ARGUMENT (1958).

provision⁶³ would be sufficient to show the truth of *p*. In addition to the relevant Restatement text, there would no doubt be precedent construing the rule in question (doctrinal argument), noting exceptions, and describing qualifications. Taken together, the textual and doctrinal arguments show the truth of *p*. It is through the use of these forms of argument that we are able to say that *p* is true.

The normativity of law—the distinction between correct and incorrect assertions—is a matter of the proper use of the forms of legal argument. The forms of argument are the (immanent) grammar of legal justification. Understanding in law is best explained as a disposition on the part of individuals to employ the forms of argument in appropriate ways as context requires. The normativity of law assures objectivity in legal judgment.⁶⁴ Meaning—the basis of objectivity—is made possible by the harmony in action and judgment of participants in legal practice over time. Most importantly, it is in virtue of what participants in legal practice have *in common* that normativity and objectivity are possible.

Interpretation

Interpretation is a constitutive feature of legal practice. Notwithstanding its importance within legal practice, interpretation is a second order activity, one that depends upon understanding already being in place. The need for interpretation arises when our conventional ways of understanding break down. This occurs in law when, in

⁶³ See RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (describing capacity to contract).

⁶⁴ See Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325, 356 (2001) (showing how normativity arises from a practice of argument with criteria for appraising assertions).

the course of our use of the forms of argument, doubts arise about how to go on with the practice.⁶⁵ When this occurs, our understanding has broken down. How does understanding in law break down, and how does interpretation serve to repair the fabric of understanding?

Lawyers use the forms of argument both to make and appraise claims that purport to be true as a matter of law. In many cases (we may call them easy cases), the relevant forms of argument all point to a single conclusion. But the forms of argument can conflict, and, when they do, the tension must be resolved. Resolving this tension is the activity of legal interpretation. It is in the act of interpretation that the fabric of law is repaired, thereby enabling practitioners to go on with the practice. An example will make the point.

Riggs v. Palmer is a familiar case to readers of American legal philosophy.⁶⁶ Having executed a valid will, Francis Palmer intended to leave the bulk of his estate to his grandson, Elmer. Upon the remarriage of his widower grandfather, Elmer feared he would lose his inheritance. To prevent this turn of events, Elmer killed his grandfather by poison.

There was no dispute about the requisite statute at the center of issue in the case. The New York Statute of Wills articulated what all probate statutes require: where there is a valid will, a dead testator, and a named beneficiary, the latter is given the testator's property according to the dictates of the will. The proposition of law upon which the parties focused is simple: Elmer was entitled to his grandfather's property in accordance with the dictates of his grandfather's will. Elmer's argument was grounded in the

⁶⁵ For discussion, see James Tully, *Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection*, in *THE GRAMMAR OF POLITICS: WITGENSTEIN AND POLITICAL PHILOSOPHY* 17,39 (CRESSIDA J. HAYES ED., 2003). There are a variety of ways in which our understanding can break down. Ambiguity and opaqueness of relevant legal materials is a common occurrence. But interpretation in the appellate context is often a matter of conflict among the forms of argument. In the present article, I specifically address the need for interpretation in this context.

⁶⁶ *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

unambiguous language of the New York Statute of Wills.

Before we consider the arguments for and against the asserted proposition of law, a few preliminary remarks are in order. They concern the concept of understanding and its relationship to the forms of argument discussed earlier. As argued above, understanding is exhibited by participants in legal practice through their unreflective employment of the forms of argument to show the truth of legal propositions. To see this, consider a case in which murder is not an element of the facts--the normal probate context. Once validated by the probate court, the will of the testator dictates the devolution of property of the testator. This requirement is gleaned from a straightforward reading of the Statute of Wills. In short, textual argument is sufficient to show the truth of the proposition that the beneficiary of a valid will is to be given property in accordance with the dictates of the will. What, then, turns a case of understanding into one where the need for interpretation arises?

The need for interpretation is actuated by facts. In *Riggs*, the actuating fact was the murder of the testator by his grandson. But why is this fact an actuating event? Not only does the majority opinion show why the murder actuates the need for interpretation, the opinion shows how the state of the law explains the legal (that is, interpretive) significance of the murder. In other words, we need to explain how understanding (that is, the unreflective act of probating the will in the normal course of things) broke down as the court tried to come to terms with the significance of the murder as the event that precipitated the breakdown in understanding.

The majority opinion in *Riggs* is a sophisticated doctrinal argument. As Professor Dworkin has taught us, the opinion makes good use of the common law maxim: no man shall profit from his own wrong.⁶⁷ But there is more to the opinion than mere recitation of an equitable maxim. When we look at the ways in which Judge Earl showed the true state of the law, we see why the facts themselves make it clear that a straightforward reading of the requisite statute was all but impossible.

⁶⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1977); DWORKIN, LE, *supra* note 1, at 15-20.

The majority opinion begins in classic fashion with the distinction between law and equity. The distinction is embraced in full measure by the common law systems of both the United States and England and can be traced back to the writings of Aristotle. The sheer breadth and diversity of classic writers on the role of equity within all departments of law should cause an educated legal mind to experience a sense of unease when confronted with the facts in *Riggs*.

Having shown how the no man shall profit from his own wrong principle is a constitutive feature of law in the most general way (that is, the law and equity distinction), Judge Earl then demonstrated the reach of the principle throughout varied departments of law. Citing cases from the law of wills and insurance, Earl made a strong case for the proposition that precedents both directly on point (that is, the law of wills), as well as those from related departments of law, support an exception to the ordinary meaning of the words of the statute. That is, Earl made a doctrinal argument to the effect that the words of a valid legislative enactment (here, the Statute of Wills) are to be given their normal force and effect unless there is some exception demonstrated by the facts. In short, Judge Earl did not change the law; he clarified it (by pointing to an underlying and well-established legal principle).

By contrast, Judge Gray, in dissent, argued for a straightforward reading of the words of the statute. Claiming that the court was "bound by the rigid rules of law,"⁶⁸ Gray argued that Elmer is being twice punished for his offense. In a clever rebuttal to Judge Gray, the majority pointed out that he begged the question of whether Elmer was entitled to receive his victim's property under the will. The point was that the very question before the court was whether the property rightfully belonged to Elmer or not. Judge Gray did not seem to notice his error.

What does *Riggs* teach us about interpretation in law? First, in terms of the forms of argument, it is clear that without the complicating factor of the murder of the testator, the textual argument is decisive. Without the murder of the testator, it is true as a matter

⁶⁸ *Riggs*, 22 N.E. at 191 (Gray, J., dissenting).

of law that Elmer was entitled to receive his grandfather's property according to the dictates of the Statute of Wills. It is only when the complication of the murder is added to the facts that lawyers dispute the true state of the law.

How did Judge Earl persuade enough of his colleagues to see the law as he did? Three factors suggest themselves. First, the majority opinion did no damage to the existing state of the law. I will call this the interpretive principle of minimal mutilation.⁶⁹ In other words, deciding against Elmer did not put in question the efficacy of any other element of the New York Statute of Wills. Second, through its decision, the majority demonstrated that its conclusion was consistent with everything else it knew to be true about the law of wills. I shall refer to this as coherence.⁷⁰ Finally, the opinion shows how a decision against Elmer comports with similar decisions in other departments of law. I shall refer to this aspect as generality.⁷¹ Taken together, minimal mutilation, coherence, and generality are the three aspects of the majority's opinion that support the notion that its interpretation of the law is more persuasive than that offered by the dissenting opinion.

More important than the particulars of the majority and dissenting opinions is the

⁶⁹ See W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* 66-67 (2d ed. 1978) (discussing the virtue of conservatism); see also GILBERT HARMAN & JUDITH JARVIS THOMSON, *MORAL RELATIVISM AND MORAL OBJECTIVITY* 12 (1996) ("It is rational to make the least change in one's view that is necessary in order to obtain greater coherence in what one believes.") (citations omitted); cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 147 (1994) (discussing reasoned elaboration).

⁷⁰ The idea of coherence is apt. See CONAL CONDREN, *THE STATUS AND APPRAISAL OF CLASSIC TEXTS* 148 (1985) ("[A]t its most general level, coherence refers to the ways in which parts are interconnected to form a whole; and at a similar level of generality, the appraisive category of coherence is an abridgment of the range of questions one asks of a text in terms of its parts and the closeness of their interrelationships.").

⁷¹ QUINE & ULLIAN, *supra* note 43, at 73 ("The wider the range of application of a hypothesis, the more general it is.").

fact that neither advanced any theory of legal interpretation. Of course, it is always possible to elevate a form of argument into a theory if that means relentless adherence to a single form of argument.⁷² However, the move to theory hides the tension felt by practitioners of law as they struggle to persuade one another that their choice of how to go on with the practice is correct. To see such a struggle as a competition of theories obscures this important aspect of the practice.

⁷² For an exquisite example, see MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 179- 87 (1988) (reducing all the forms of constitutional argument to prudential argument). For discussion of this point, see Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989) (reviewing TUSHNET, *supra*).