Title

History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law

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This Article draws on Wittgenstein's Philosophical Investigations, Ulpian's definition of law, and Aristotle's definition of the polis in order to improve our understanding of the relationship between history, law, and justice. It makes three points. First, real progress can be made by taking one's instruction from Wittgenstein's lifelong attempt to banish meaninglessness from thought and speech. He has far more to offer than has been recognized to date. Second, historians of law deceive themselves if they believe that they can write the history of law without writing the history of justice at one and the same time. Law and justice are thoroughly intertwined. Their intertwinement constitutes their meaning. Treating one of them in isolation from the other impairs the meaning of both. Third, writing the history of law means making a commitment to a political community by settling disagreements with the dead. It furnishes a kind of knowledge that is essential for maintaining justice because it gives a meaning to "law," "justice," and "politics" without which law, justice, and politics fall to the judgment of the dead or that of arbitrary rulers. It does not consist of writing about justice, but of making judgments in writing about the history of law. It is neither to be confused with expressions of opinion nor with statements of pure fact: not expressions of opinion, because it requires statements of fact; not statements of pure fact, because there are no facts to state without agreement in the judgments that make a political community.

The confusion and barrenness of psychology is not to be explained by its being a "young science"; its state is not comparable with that of physics, for instance, in its beginnings. (Rather, with that of certain branches of mathematics. Set theory.) For in psychology, there are experimental methods and conceptual confusion. *(As in the other case, conceptual confusion and methods of proof.)*

The existence of the experimental method makes us think that we have the means of getting rid of the problems which trouble us; but problem and method pass one another by.

—Ludwig Wittgenstein[1]

INTRODUCTION

Debates about law and the history of law rely on any number of basic distinctions. Examples include distinctions between facts and norms, objective values and subjective opinions, public and private, law and morality, natural law and positive law, legislation and jurisdiction, state and church, empirical observation and theoretical explanation, rules and principles, legal doctrine and legal practice, and the like. Without such distinctions, the differences between legal positivism, legal realism, natural law theory, human rights theory, critical legal studies, law and economics, legal formalism, legal pragmatism, legal feminism, and other schools of thought on law and legal history would be impossible to understand. The same is true of the differences between primary areas of doctrinal law like property law, contract law, tort law, criminal law, international law, and constitutional law.[2]

The problems posed by such distinctions have been debated ever since the distinctions were first made. We tend to be familiar with the debates provoked by scholars like John Austin, Hans Kelsen, Carl Schmitt, H.L.A. Hart, Michel Villey, John Rawls, Alasdair MacIntyre, Ronald Dworkin, and Catharine MacKinnon, among others. We may be less familiar with the forms in which they were debated by Kant, Hume, and Rousseau; Grotius, Hobbes, and Locke; Augustine, Thomas Aquinas, and William of Ockham—let alone Avicenna, Averroes, Maimonides, Confucius, Mencius, and Lao-Tze. But though the forms are different and the specifics vary enormously, depending on time and place, the underlying problems are the same. They turn on the same basic question that was asked by ancient Greek sophists more than two thousand years ago: is law a matter of nature or a matter of convention, of *physis* or *nomos*? Is man the measure of all things, as Protagoras

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1. LUDWIG WITTGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN [PHILOSOPHICAL INVESTIGATIONS], at xiv (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Wiley-Blackwell 4th ed. 2009) (1953). In this much-improved edition, the title *Philosophical Investigations* is reserved for what used to be called "Part I"; what used to be called "Part II" is now called *Philosophy of Psychology—A Fragment*. Hereinafter, I cite "Part I" as *PI*, followed by the paragraph number, for example, WITTGENSTEIN, *PI*, *supra* note 1, ¶ 78, and "Part II" as *PPF*, followed by the section and paragraph number, for example, WITTGENSTEIN, *PPF*, *supra* note 1, § xi. ¶ 338.

2. These examples are based on the table of contents in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, at vii–x (Dennis Patterson ed., 2d ed. 2010).

maintained? Or does justice exist quite independently of human beings in the realm of ideas that Plato conceived?[3]

It would be foolish to contest the significance of such debates. They are quite obviously fundamental to our knowledge of law and the history of law. But it would be equally foolish to overlook how well these debates fit the definition Einstein is said to have given to insanity: doing the same thing over and over again and expecting different results. They have never once been brought to any satisfactory conclusion. They give rise to metaphysical illusions that lead us straight into conceptual confusion and that are easy to expose to ridicule. This pathology defaces, if it does not destroy, our meaning. It is never far removed from violence, and it lays the foundations for tyranny and war.

The purpose of this Article is to gain a grip on this pathology by reconsidering the relationship between history, law, and justice. Needless to say, even an article as long as this cannot do more than scratch the surface of problems that go so deep. But since scratching the surface is very much worth doing, I will scratch it as well as I am able by making three main points.

My first main point is this: real progress can be made by taking one's instruction from Wittgenstein's lifelong attempt to banish meaninglessness from thought and speech.[4] I suspect that you now think, "Oh no, not again!" If so, you have my sympathy. I understand the impatience of historians who think that spending time on Wittgenstein's *Tractatus Logico-Philosophicus* and the *Philosophical Investigations* is a needless distraction that will leave us exactly where we were before we started.[5] But my sympathy is tempered by my belief that Wittgenstein is widely and deeply misunderstood—almost as much by friends as by opponents—and has far more to offer than has been recognized so far.[6] That means that in the next part of this Article (Section I), I must explain Wittgenstein's account of truth, knowledge,

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3. The dialogues of Plato are the *locus classicus* for these questions, particularly GORGIAS, PROTAGORAS, and THE REPUBLIC, all probably written by 380 B.C.E. *See generally* PLATO, GORGIAS (Thomas L. Pangle ed., James H. Nichols, Jr. trans., Cornell Univ. Press 1998) (c. 380 B.C.E.); PLATO, PROTAGORAS (Nicholas Denyer ed., Cambridge Univ. Press 2008) (c. 380 B.C.E.); PLATO, THE REPUBLIC (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press reprt. ed. 2003) (c. 380 B.C.E.).

4. There is a mountain of literature about Wittgenstein and at least a respectable hill about the bearing of his thought on the theory of law. *See, e.g.*, WITTGENSTEIN AND LAW (Dennis M. Patterson ed., 2004); WITTGENSTEIN AND LEGAL THEORY (Dennis M. Patterson ed., 1992); PHIL. TOPICS, Fall 2010 (collecting essays on the topic of moral disagreement).

5. *See, e.g.*, WITTGENSTEIN AND LAW, *supra* note 4; WITTGENSTEIN AND LEGAL THEORY, *supra* note 4; PHIL. TOPICS, *supra* note 4.

6. As Newton Garver, speaking about philosophy in America, puts it: "Wittgenstein has no significant following. People recognize him, read him, cite him, and discuss him; but few take up philosophy in his manner, or modify their thinking in line with the main thrusts of his work." NEWTON GARVER, THIS COMPLICATED FORM OF LIFE: ESSAYS ON WITTGENSTEIN 73 (1994). THE NEW WITTGENSTEIN (Alice Crary & Rupert Read eds., 2000) and Cora Diamond, *Criss-Cross Philosophy*, *in* WITTGENSTEIN AT WORK: METHOD IN THE PHILOSOPHICAL INVESTIGATIONS 201 (Erich Ammereller & Eugen Fischer eds., 2004), offer good guidance to much of the evidence in support of this claim. The situation in philosophy obviously differs from the situation in legal history. But the basic diagnosis is valid in both.

reality, and freedom at some considerable length and ask you for your patience in indulging the explanation before I can turn to the relationship between history, law, and justice.[7] Given how many conflicting views of Wittgenstein there are, there is no other way to start without lapsing into immediate confusion.

Having relied on Wittgenstein to clarify the meaning of "truth," "knowledge," "reality," and "freedom," I will examine the relationship between history, law, and justice. I will do so in two separate steps, which correspond to Sections II and III of this Article. First, in Section II, I will tackle the relationship between law and justice as such, apart from history. I will draw on my reading of Wittgenstein, the etymology of "law" and "justice," and Ulpian's definition of law in order to establish, not only that law and justice are thoroughly intertwined, but also that their intertwinement constitutes their meaning. Treating one of them in isolation from the other impairs the meaning of both. The results of such impairment may not be easy to imagine for anyone who has not actually experienced them, or finds it difficult to follow where Nietzsche, Kafka, and Beckett have led. But they are certainly not good.

This understanding of the relationship between law and justice has an important implication for historians of law: they deceive themselves if they believe that they can write the history of law without writing the history of justice at one and the same time. This is my second point.

In Section III, I will explain what "writing the history of justice" means. It does *not* mean writing about justice. It means making political commitments in writing about the history of *law*. If law and justice are thoroughly intertwined, it follows that they are *essentially* political, in the capacious sense that Aristotle gave to the word "political."[8] They must not be confused with ethics. Their history turns in large part on disagreements among the living and the dead about what law and justice truly are. Not to engage those disagreements, in an effort to maintain historical objectivity, is not to serve the truth by staying out of politics. Quite the contrary: this puts the truth at risk by failing to maintain it.

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7.   My understanding of Wittgenstein has benefited most from the writings of Rush Rhees, Norman Malcolm, Georg Henrik von Wright, G.E.M. Anscombe, Peter Winch, Stanley Cavell, D.Z. Phillips, Ernst Tugendhat, Cora Diamond, James Conant, and Joachim Schulte, and the following titles in particular: G.P. BAKER & P.M.S. HACKER, AN ANALYTICAL COMMENTARY ON THE PHILOSOPHICAL INVESTIGATIONS (1983); STANLEY CAVELL, THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY (reprt. ed. 1999); CORA DIAMOND, THE REALISTIC SPIRIT: WITTGENSTEIN, PHILOSOPHY, AND THE MIND (1991); THE NEW WITTGENSTEIN, *supra* note 6; James Conant, *The Method of the* Tractatus, *in* FROM FREGE TO WITTGENSTEIN: PERSPECTIVES ON EARLY ANALYTIC PHILOSOPHY 374 (Erich H. Reck ed., 2002) [hereinafter Conant, *Method*]; James Conant, *Throwing Away the Top of the Ladder*, 79 YALE REV. 328 (1990); Cora Diamond, *Throwing Away the Ladder*, 63 PHILOSOPHY 5 (1988); John McDowell, *Non-Cognitivism and Rule-Following, in* WITTGENSTEIN: TO FOLLOW A RULE 141 (Steven H. Holtzman & Christopher M. Leach eds., 1981); and Barry Stroud, *Wittgenstein and Logical Necessity*, 74 PHIL. REV. 504 (1965).

8.   *See* 11 ARISTOTLE, POLITICS § 1.i.1–12 (H. Rackham trans., Harvard Univ. Press reprt. ed. 1944) (c. 350 B.C.E).

It does not follow that writing the history of law amounts to replacing scholarship with the expression of opinions. Much less does it follow that scholarship must be restricted to pure facts. Facts and opinions—facts and values, if you prefer the terminology conventionally used since the beginning of the twentieth century for a distinction similarly drawn between "facts and theory," "facts and interpretation," or "facts and fiction"—are just as deeply intertwined as law and justice. Treating facts in isolation from opinions has the same result as treating law in isolation from justice: it impairs the meaning of both. It diminishes not only our ability to state facts, as is well understood after more than a century of criticism claiming that objectivity is but a "noble dream," but also our ability to express opinions, as is barely understood at all, and only very rarely pointed out as clearly as by Harry Frankfurt in *On Bullshit*.[9]

What does follow, as summed up in the Conclusion, is something altogether different. Namely this: the history of law furnishes a kind of knowledge that is essential for maintaining justice. This is my third point.

I. WITTGENSTEIN

A. *Facts and Opinions*

Justice does not rank very highly on the list of subjects to which historians of law pay close attention. That may seem strange to naïve observers. They will wonder what point there is to legal history if it does not concern itself with justice. Is the history of law not about breaking and observing law? About bad laws that were abolished and good laws that were put into effect? Is it not the point of law to protect the innocent from injustice and make the guilty pay just compensation for their crimes? Justice would appear to be the central issue in the history of law.

Historians of law will hardly see it like that. They will point out that justice is not the same as law. They would need a reason to turn themselves into historians of justice, too. But what could such a reason be? Historians deal with things that change. Law definitely changes. That makes it a good subject for historical investigation. But justice? There is perhaps no better candidate to claim that it is always one and the same, timeless, immutable, immortal. This makes justice a subject fit for philosophers, theologians, and theorists of law and politics; but not for historians.

One may of course reject the view that justice never changes. In that case, historians of law would have a reason to turn themselves into historians of justice, too. But if they tried, they would have to confront a problem no one has ever solved: people cannot agree what justice is. Judges cannot avoid that problem. They are obliged to render judgment where people cannot come to terms. But historians do not seem to have that obligation. As historians, we are obliged to furnish knowledge

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9. HARRY G. FRANKFURT, ON BULLSHIT (2005); *see also* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988).

of the past. We can fulfill our obligation by examining past people's disagreements about justice, opinions they were holding at one time or another, laws by which they tried to solve their disagreements, court proceedings, and so on. But justice itself? Where has it ever been recorded? We had better stick to things that can be documented. Opinions about justice can. Law can. Justice cannot. Historians of law are wise, it seems, if they keep mum about the place of justice in the history of law.

Considerations of this kind would not be hard to multiply. Yet those naïve observers have a much better case than it may seem. I do not mean that justice has to be the subject of our histories. Nor do I mean that we should turn our histories into expressions of opinion about the rights and wrongs committed in the past. And I definitely do not mean what may well seem to be the only possible alternative: that we should focus entirely on facts and leave opinions out of consideration. What I do mean is that the distinction between facts (of law) and opinions (about justice) hides the truth about the relationship between history, law, and justice. The truth is that without justice there is no history of law.

B.   *The Fundamental Question*

One can of course distinguish facts from opinions. Indeed one must, so long at least as one believes that claims to truth and knowledge need to be justified. This makes it tempting to take the distinction between facts and opinions as the basis on which to figure out how justice might be related to law. How else are we supposed to figure it out? It seems completely reasonable to postpone investigations of the relationship between law and justice until we have been able to sift as many facts as possible from the vast store of myths, legends, ill-founded suppositions, stereotypes, commonplaces, stock phrases, and other types of opinion spilling out of our libraries. Why not begin by setting our opinions to one side and paying close attention to what we can actually prove?

But this is not at all as reasonable as it seems. On the contrary, it begs a fundamental question. The question is: How can we tell what we are talking about in the first place? Not just when we are talking about history, law, and justice, but about anything at all. To say, "We can tell what we are talking about by separating facts from opinions," is not an answer to the question. It looks like one. But it merely raises the same question in a new form. The new form is: What is the difference between facts and opinions? The underlying question is still the same: How can we tell *what* we are talking about? How can we tell whether it is a fact or an opinion? What is "it"? Without an answer to that question, the distinction between facts and opinions merely distracts our attention from the minimum amount of knowledge we need in order to distinguish anything whatever from anything whatever else. That minimum is knowledge of just *what* is in question.

C.   *Definitions*

How *can* we tell what we are talking about, not just in the case of something as complicated as history, law, and justice, but in the case of something so simple

that the answer may seem blindingly obvious? Take Mount Everest, for example.[10] How can we tell that we are talking about Mount Everest when we say "Mount Everest"? The answer may well seem to be: we can tell if we define the meaning of "Mount Everest." We can define it by saying, "Mount Everest is the highest mountain on earth," or "Mount Everest is the mountain first climbed by Edmund Hillary," or "Mount Everest is the mountain at latitude 27.9881 North and longitude 86.9253 East." That's how we know what we are talking about. And if that is not good enough, we can always go to the Himalayas and point at Mount Everest itself. What better definition could there be?

But that is not the issue. The issue is: *What* are we pointing at when we are saying "Mount Everest"? How can we be certain that when we say "Mount Everest" next time, and the time after that, we mean the same thing we meant when we were pointing at it before? How can we be certain that others understood what we were pointing at? *What* did we define?

There we stood, trying to define the meaning of "Mount Everest" for our ignorant companion. We stretched out our hand in a particular direction. Our companion looked in the same direction. What did we see? We saw a great many different things: a mountain was one of them; its size was another; so were its shape and color, the snow with which it was covered, the earth on which it stood, its peak, the rocks on its flanks, the sky behind it, and so on. We could have been pointing at any one of these things. How could our companion tell that we were pointing at a mountain, and not its size or shape? At *this* mountain, as opposed to *a* mountain? What is to stop our companion from thinking, "'Mount Everest' means 'a mountain,'" and going on to point at Mount Fuji saying, "Look, there is Mount Everest"? Why should he or she not be puzzled if we were to reply, "Wait a minute, that's not Mount Everest, that's Mount Fuji. Don't you remember that I was pointing at Mount Everest when I defined the meaning of 'Mount Everest'?" Why should our companion not respond, "But of course I remember what you were pointing at. You were pointing at Mount Everest. You were there. Don't you see that the thing which I am pointing at right now is the *same* as the thing which you were pointing at then?" How can we make our definitions stick to the things that we are trying to define? How can we stop them from sliding off in all directions? How are they connected with reality?

D. *Reference*

Wittgenstein was obviously far from the first to recognize that definitions are not enough to guarantee that we can tell what we are talking about.[11] This

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10.   The example of Mount Everest is taken from PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 24–39 (2d ed. 1990). Wittgenstein himself used Mont Blanc as an example. *See* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 78; WITTGENSTEIN, *PPF*, *supra* note 1, § xi. ¶ 338.

11.   Many of Plato's dialogues focus precisely on the problem. *See, e.g.*, PLATO, EUTHYPHRO, *translated in* EUTHYPHRO, APOLOGY, CRITO 1 (F.J. Church & Robert D. Cumming trans., 2d rev. ed.

recognition has a history of well over two thousand years. It goes back at least as far as Socrates; it led Plato to argue that ideas exist quite independently of our definitions; and it has given rise to a rich harvest of many different kinds of metaphysics, epistemology, and hermeneutics, from Aristotle to Augustine, from Thomas Aquinas to Descartes, and from Hume, Kant, and Hegel to Nietzsche, Heidegger, and Gadamer. But as far as I can tell, all kinds of metaphysics, differences notwithstanding, try to answer the question how we can make our definitions stick to reality by referring to some kind of thing that neither can nor needs to be defined because it is immediately given—and all of them fall short because they beg the very question they are supposed to answer: *What* is immediately given? Calling something "immediately given" as opposed to "plain given" makes not a bit of difference to the question *what* is given, however it is given: immediately, mediately, by the senses, by pure thinking, and so forth.

The result is a curiously mixed-up state of affairs, a twilight zone we enter whenever we try to answer the question of just *what* we are talking about by referring to something immediately given, and from which we cannot escape as long as we try to distinguish facts from opinions without first settling what we are talking about.

This is the condition Wittgenstein deplored in his diagnosis of the state of contemporary psychology on the last page of the *Philosophical Investigations*:

> The confusion and barrenness of psychology is not to be explained by its being a "young science"; its state is not comparable with that of physics, for instance, in its beginnings. (Rather, with that of certain branches of mathematics. Set theory.) For in psychology, there are experimental methods *and conceptual confusion*. (As in the other case, conceptual confusion and methods of proof.)
>
> The existence of the experimental method makes us think that we have the means of getting rid of the problems which trouble us; but problem and method pass one another by.[12]

History, of course, is not the same as psychology. Its method is not experimental. But it is empirical, and empirical methods are closely related to experimental methods. They rest on the same concept of experience. In that regard, Wittgenstein's diagnosis of psychology applies directly to history as well: the existence of an empirical method makes us think that we have the means of getting rid of the problems that trouble us—such as the relationship between evidence and interpretation, legal reality and legal theory, past and present, and so on—but problem and method pass one another by.

We read the evidence. We are no longer so naïve as to believe that it is really immediately given. More than a century has passed since Dilthey, Nietzsche, and

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1956) (on the definition of piety); PLATO, MENO, *translated in* MENO AND PHAEDO 1 (David Sedley & Alex Long eds., 2011) (on the definition of virtue); PLATO, THE REPUBLIC, *supra* note 3 (on the definition of justice); PLATO, THE SYMPOSIUM (M.C. Howatson & Frisbee C.C. Sheffield eds., M.C. Howatson trans., 2008) (on the definition of love).

12.   WITTGENSTEIN, *PPF*, *supra* note 1, § xiv. ¶ 371 (emphasis added).

Troeltsch made that impossible.[13] But we still use it as the foundation on which we study history. We have a rich body of theories devoted to the question how we can get from evidence to history. Some think the problem is purely practical and can be solved by doing better what we were doing all along. Others think the problem is impossible to solve, and maybe the past does not even exist at all. Most of us opt for more or less attenuated versions of these opposed extremes. But none of us directly face the questions: How can we tell what our evidence is giving us? *What* does it document? *What* do we read in it? Instead of facing these questions, we jump to the conclusion that it must be one of two things: facts or opinions; reality or interpretations of reality; social reality or intellectual reality; consequences of thinking or effects of material causation; culture or nature; history or physics; and so on.

And then we enter the twilight zone. We do not realize how little of a difference it makes whether we opt to talk about ideas or matter, agency or structure, the present or the past. Take your pick. Join the idealists, the materialists, the structuralists, or the poststructuralists. You still rely on reference, regardless of what it may be a reference *to*, even if you are fighting it. The question keeps coming back: How do you know that you are talking about ideas, material causes, structure, or even reference itself? Call it *res cogitans*, or call it *res extensa*.[14] How do you know it is a *thing* at all? Whoever relies on reference in order to answer the question how we can tell what we are talking about is setting out on an infinite regress. Unless we face the futility of that regress and come to a full stop, we are bound sooner or later to end up in what is often called the "prison-house of language," where reference drops out, insanity drops in, and all of us are welcome to join Vladimir and Estragon in *Waiting for Godot*.[15]

13.　*See generally* 1 WILHELM DILTHEY, INTRODUCTION TO THE HUMAN SCIENCES (Rudolf A. Makkreel & Frithjof Rodi eds., 1989); FRIEDRICH NIETZSCHE, THE USE AND ABUSE OF HISTORY (Adrian Collins trans., 2d rev. ed. 1957) (1873); ERNST TROELTSCH, DER HISTORISMUS UND SEINE PROBLEME [HISTORICISM AND ITS PROBLEMS] (1922) (Ger.).

14.　The famous distinction drawn by RENÉ DESCARTES, PRINCIPIA PHILOSOPHIAE [PRINCIPLES OF PHILOSOPHY] (1644) (Neth.), *translated in* 1 THE PHILOSOPHICAL WRITINGS OF DESCARTES 177, 208 (John Cottingham et al. trans., 1985).

15.　*See* FREDRIC JAMESON, THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM (1972). Nietzsche is often invoked as the inventor of the concept, but he did not actually use it. It results from a loose translation of *sprachlicher Zwang* by Erich Heller. *See* David Lovekin, *A Response to Timothy Casey's Review of:* Technique, Discourse and Consciousness: An Introduction to the Philosophy of Jacques Ellul, ELLUL F., Jan. 1995, at 11. It is one of the great ironies in the history of philosophy that Wittgenstein, so far from being admired for having exposed "the prison-house of language" as pure nonsense, was almost universally regarded as one of its main architects until Cora Diamond began to set the record straight. *See* Diamond, *supra* note 7. Wittgenstein is still so regarded by most of those who have made the so-called "linguistic turn."

E.   *Judgment*

It was Wittgenstein's genius to find an answer to the question how we can tell what we are talking about that requires no reference to anything at all. His answer was:

> It is not only agreement in definitions, but also (odd as it may sound) agreement in judgements that is required for communication by means of language. This seems to abolish logic, but does not do so.[16]

To the extent that it is possible to divide the *Philosophical Investigations* into successive parts, the short paragraph from which this quotation is taken concludes a long line of thought of more than a hundred paragraphs devoted to the question what it means to understand a sentence correctly. It sums up two important points.

First, Wittgenstein says that "communication by means of language"—saying something and understanding what is being said—requires two different kinds of things: not only agreement in definitions, but also agreement in judgments. He means "judgments" in the most comprehensive and elementary sense: making a distinction by means of some criterion.[17] The significance of criteria in Wittgenstein's thinking is notoriously controversial.[18] But the basic point is simple: a criterion is anything we use in order to tell things apart. We tell them apart by comparing them with our criterion and judging which of them do, and which do not, meet the criterion. The criterion can be a sample, a ruler, a table, a thermometer, a tuning fork, a star, a book, a human being, a law, a judicial precedent—pretty much anything, really. There are no inherent, given, or predetermined characteristics that turn a given thing into a criterion. It depends on the kind of things we are trying to tell apart.

When we say, "This thing is red," we judge the color of this thing: we make a distinction between this thing and things that are blue, yellow, orange, fuchsia, or any color other than red. If we are asked to justify our judgment, we do so by comparing the thing with whatever we use as our criterion of red. The criterion could be a sample of red; it could be the CIE 1931 color space chromaticity diagram; or it could be an electromagnetic wavelength. Similarly, if we say, "This thing is a foot long," we judge the length of this thing: we make a distinction between this thing and all things that have lengths other than one foot. If we are asked to justify our judgment, we do so by comparing the thing with whatever we use as our criterion of length: our foot, a ruler, a tape measure, or the standard meter bar in Paris. And so on. There are as many different criteria as there are different kinds of

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16.   "Zur Verständigung durch die Sprache gehört nicht nur eine Übereinstimmung in den Definitionen, sondern (so seltsam dies klingen mag) eine Übereinstimmung in den Urteilen. Dies scheint die Logik aufzuheben; hebt sie aber nicht auf." WITTGENSTEIN, *PI*, *supra* note 1, ¶ 242.

17.   The German *Urteil* reflects this meaning more clearly than "judgment." The prefix *Ur-* qualifies whatever follows as being the "first," "original," "fundamental," or "primary" in its kind; the noun *Teil* means "part"; and the verb *teilen* means "to divide." The noun *Urteil* thus means something like "a primary distinction" or "original division."

18.   GARVER, *supra* note 6, at 177–96, offers an effective introduction. CAVELL, *supra* note 7, at 1–125, remains one of the best accounts of the place of judgments in Wittgenstein's thinking.

things. What makes something a criterion is simply that we use it to make distinctions.

This means that there is no such thing as being able to tell *what* something is except by reference to a criterion—a standard, a rule, a sample—that we can use in order to distinguish it from other things. Note how fundamentally reference to a criterion differs from reference to "reality." Reference to reality is supposed to be reference to something given, something that could conceivably exist independently of us. Reference to a criterion is reference to something we use. Apart from our use of it there is no criterion, and apart from a criterion the very concepts of difference and identity are meaningless. In itself, which means precisely "apart from a criterion of judgment," nothing is different from anything else. For that matter, in itself nothing is the same as anything else either, including itself. Not even "2" on the left side of the equation is "in itself" the same as "2" on the right side of the equation. What could it mean to say that "2" is "the same" as itself, just like that, without reference to a criterion to tell us whether we are talking about a number, a font, or a squiggle? Would it mean that *2+2=2*, just as *0+0=0*, or as "James" is one person today and one person tomorrow, but even so does not add up to two people? What could it mean to say that *a=a*, and call that the law of identity? It means nothing at all.[19]

If that is what Heraclitus had in mind when he said that you cannot step into the same river twice and that war is the father of all things,[20] then Heraclitus was right. Without criteria, everything does flow. No evidence, no data, and no definition can tell us *what* something is. Only *we* can tell what something is. We do so by making a judgment, and we make the judgment by using a criterion in order to make distinctions between things. Making such judgments allows us to tell what the evidence is evidence *of*; what the data are data *for*; and what the definition is a definition *of*: of *this*, but not of *that*; of a *mountain*, not of its *shape*. That gives meaning to evidence, data, and definitions. Without judgments, we spin our wheels in vain.

19.

> But isn't at least the same *the same*?
>
> For identity we seem to have an infallible paradigm: namely, in the identity of a thing with itself. I feel like saying: "Here at any rate there can't be different interpretations. If someone sees a thing, he sees identity too."
>
> Then are two things the same when they are what *one* thing is? And how am I to apply what the one thing shows me to the case of two things?

WITTGENSTEIN, *PI*, *supra* note 1, ¶ 215. Wittgenstein goes on to make fun of the law of identity:

> "A thing is identical with itself."—There is no finer example of a useless sentence, which nevertheless is connected with a certain play of the imagination. It is as if in our imagination we put a thing into its own shape and saw that it fitted.
>
> . . . .
>
> "Every coloured patch fits exactly into its surrounding" is a somewhat specialized form of the law of identity.

Id. ¶ 216. For an instructive look at the concept of identity, see Cora Diamond, *How Long Is the Standard Meter in Paris?*, *in* WITTGENSTEIN IN AMERICA 104 (Timothy McCarthy & Sean C. Stidd eds., 2001).

20.   HERMANN DIELS, DIE FRAGMENTE DER VORSOKRATIKER: GRIECHISCH UND DEUTSCH [THE FRAGMENTS OF THE PRESOCRATICS] (Walther Kranz ed., 1964) (Ger.).

F.   *Agreement*

Wittgenstein also spells out that definitions and judgments by themselves are not enough for communication. In order to understand each other, we also need to be in agreement on the definitions we use and the judgments we make.[21]

As far as definitions are concerned, that is relatively easy. Our agreement on definitions is both wide and obvious: we have dictionaries in which it is lovingly spelled out. Of course our definitions are often not precise enough for scholarship and science, and there are many definitions on which we do not agree. But none of this seems to prevent us from communicating with each other, even about definitions that are contentious or imprecise.

With judgments, however, it is more difficult. Our judgments appear to be a matter of opinion, as diverse and variable as the weather. How, then, can agreement in judgments serve as a foundation for communication? Do we not need to communicate first in order to reach agreement in our judgments later? If agreement in judgments really were required for communication, there would seem to be only two equally depressing possibilities: Either we do not reach agreement, in which case there is no communication at all. We would be locked inside our own little private worlds. Or we do reach agreement. In that case there would be communication, but it would only be communication of a sort, because it would be restricted to exchanging nothing but opinions. The distinction between true and false could be replaced with the distinction between opinions we like and opinions we don't like. We could be talking a great deal without saying anything at all.

Wittgenstein explicitly acknowledged that identifying agreement in judgments as a requirement for communication sounds "odd" and "seems to abolish logic."[22] But he also insisted that the threat is imaginary. He explained why it is imaginary in the paragraph immediately preceding his statement about agreement in definitions and judgments:

"So you are saying that human agreement decides what is true and what is false?"—What is true or false is what human beings *say*; and it is in their *language* that human beings agree. This is agreement not in opinions, but rather in form of life.[23]

Here the interlocutor with whom Wittgenstein keeps arguing in different guises throughout the *Philosophical Investigations* draws one of the conclusions that seem to follow from his insistence on the need for agreement in judgments in order to communicate. The conclusion is "that human agreement decides what is true and what is false."[24] If that were true, it would indeed abolish logic. Logic has no place

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21.   *See* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 242.

22.   *Id.*

23.   "'So sagst du also, daß die Übereinstimmung der Menschen entscheide, was richtig und was falsch ist?'—Richtig und falsch ist, was Menschen *sagen*; und in der *Sprache* stimmen die Menschen überein. Dies ist keine Übereinstimmung der Meinungen, sondern der Lebensform." *Id.* ¶ 241.

24.   *Id.* Note that actually Wittgenstein does not speak of what is "true" but of what is *richtig*, meaning "correct." "Correct" has a wider meaning than "true." If I am telling the truth, then I am doing

in a system of reasoning in which the relationship between premises and conclusions depends on human agreement.

Many readers of Wittgenstein believe that this, or some version of it, is the conclusion at which Wittgenstein did in fact arrive. They regard him as a skeptic and relativist.[25] But Wittgenstein bluntly rebuts his imaginary interlocutor. He does so by drawing attention to the difference between saying something and speaking a language. Truth is a quality of something we *say*. So is falsity. Agreement in what we *say* surely does depend on our opinions. If our opinions differ, we will not agree in what we say. Nothing could be more commonplace. And nothing could be more obvious than that agreement in what we *say* is not enough to establish the truth of anything. It does happen that a single scientist proves all the others wrong and that only one solitary juror is right. But Wittgenstein is precisely *not* speaking about agreement in what we *say*. He is speaking about agreement in language, and agreement in language is nothing that *anybody* says. He calls it agreement "in form of life."[26] He does not deign to spell out the implication: human agreement does *not* decide what is true and what is false. What then does decide? That question requires a closer look at the concept of "form of life."

G. *Form of Life*

Like "criterion," "form of life" is a notoriously controversial concept whose basic point is easier to understand than the controversies make it seem. The basic point is simply that we are speaking creatures. The faculty of speech comes naturally to us. Since it comes naturally to us, telling the truth comes naturally to us as well. This is one of the things that we can do by speaking. At bottom, there is no more to it than that.

What makes this point so difficult to understand is not that it is difficult, but that it conflicts with our expectations. We are not satisfied to take our form of life for what it is. We want an explanation for our ability to tell the truth. We do not realize that trying to explain our ability to tell the truth is trying to explain the reasons why we are able to explain the reasons why we are able to explain the reasons why we are able to explain the reasons why . . . and so on. It makes no

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something correctly. But I can do something correctly without telling the truth—for example, by telling a good lie or plagiarizing a novel. This is important. It helps, for example, to distinguish between truth (which cannot be false) and inference (which can be correct, even if the result is false), or the difference between something that is good in an absolute sense (so that it cannot be bad) and good in a relative sense (so that it can be good to achieve a certain end, even if the end is bad). I cannot pursue this further here.

    25.   For concise and characteristically contemptuous accounts of Wittgenstein along such lines, see generally Ernest Gellner, *A Wittgensteinian Philosophy of (or Against) the Social Sciences*, 5 PHIL. SOC. SCI. 173 (1975) [hereinafter Gellner, A Wittgensteinian Philosophy]; and Ernest Gellner, *The Gospel According to Ludwig*, 53 AM. SCHOLAR 243 (1984) (book review) [hereinafter Gellner, The Gospel]. The latter is a sympathetic review of SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982), which in turn is probably the single most influential interpretation of Wittgenstein as a skeptic.

    26.   *See* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 241.

sense. It leads to an infinite regress that will not stop until we stop asking the question that fuels the regress—unless, of course, we stop it arbitrarily by endowing our ability to tell the truth with metaphysical significance. This is what makes it hard to understand the concept "form of life": our desire to look for explanations where explanations make no sense.

As far as I can tell, this desire leads to three basic misunderstandings of the concept "form of life." One is to confuse our form of life with some one thing, or with a single system of many different things. Another is to confuse it with something we can make up or change at will. The third is to confuse it with something we can neither make up nor change in any way at all.

The first is the most basic: it leads straight back to metaphysical investigations into the nature of reality. It begs the question how we can tell what something is. The second leads to a particular variety of metaphysics: it confuses our ability to speak with a magical power to turn reality into whatever we say it is. The third leads to the directly opposite variety of metaphysics: it confuses our ability to speak with life imprisonment inside a "prison-house of language" in which, so far from having magical powers over reality, we cannot even make contact with reality at all.[27] I shall deal with the second and the third before I turn to the first.

H.   *Given, Not Made*

A good way to clarify why agreement in form of life is not changeable at will is to consider the etymology of "agreement." The root of "agreement" is the same as that of the Latin *gratia* and its English derivative "grace." It refers to something that is "agreeable" in the sense of "pleasant." Whether or not something is pleasant in the sense that it "agrees" with us is not a matter of opinion. It is a matter of our nature. It just so happens that we are pleased by a certain range of temperatures and displeased by others, regardless of whatever opinions we may have about them; that we like the taste of sugar but not of sulfuric acid; that garlic does not agree with all of us; and so on. This kind of agreement is not immutable. But neither is it something that we can change at will.

The same point is embedded in the etymology of other words for "agreement." Wittgenstein's German word is *Übereinstimmung. Stimme* means "voice," and *Übereinstimmung*, taken literally, means something like "being joined in sound" or "sounding in one voice." It is the kind of agreement produced by different singers singing the same song with different voices and by different musicians playing the same tune with different instruments.[28] What the singers *sing*

27.   For a particularly influential statement of this position, see Roland Barthes, *The Discourse of History, in* 3 COMPARATIVE CRITICISM: A YEARBOOK 7 (E.S. Shaffer ed., Stephen Bann trans., 1981); compare JAMESON, *supra* note 15.

28.   Wittgenstein was never shy to insist that speaking is far more closely related to performing music than we tend to believe: "Speech with and without thought is to be compared to playing a piece of music with and without thought." WITTGENSTEIN, *PI, supra* note 1, ¶ 341; *see also id.* ¶ 527 ("Understanding a sentence in language is much more akin to understanding a theme in music than one

and the musicians *play* is very much a matter of choice, will, and deliberation. But how it *sounds* is not. (One wishes that it were!)

"Consent" teaches a special lesson. In English it is difficult to imagine consent without deliberation, choice, will, and expressions of opinion. Consent in this sense is obviously something that is consciously given and for which one can be held responsible. But the root of "consent" is the same as that of the Latin word *sentire* and its English cognates "sentiment," "sensation," and, above all, "sense," meaning both "bodily sense" and "meaning."[29] What Wittgenstein has in mind when he contrasts agreement in form of life with agreement in opinions is like the contrast between agreeing in bodily sense and agreeing in making the same choice. Both are agreements in a sense. Hence we can refer to both of them by using words derived from one and the same root. At the same time, they differ from each other as deeply as feeling something differs from choosing something. Agreement in form of life means consenting in the kind of sense we feel. Agreement in opinions means consenting in the kind of sense we mean.

Thus, agreement in form of life basically means no more than that we are alike as human beings. This is not something we bring about by thinking or acting. Much less does this determine whether one or another thing is true or false. It just happens to be the case. We are born, we die, we eat, we drink, we mate, we sleep, we dream, we laugh, we cry, we hear sounds, we see colors, and so on. These are some of what Wittgenstein called "extremely general facts of nature: such facts as are hardly ever mentioned because of their great generality," and "facts that no one has doubted, which have escaped notice only because they are always before our eyes."[30] They go directly into our agreement in form of life. They make it possible for us to form the agreement in judgments we need in order to be able to communicate with each other by means of language about opinions, which may be true or false, and on which we may or may not agree.

In order not to misunderstand what this means, it is crucial to recognize that agreement in judgments, let alone opinions, is not *derived* from agreement in form of life, and that the "extremely general facts of nature" that go into our agreement in form of life do not constitute a *reason* or an explanation *why* we agree in our judgments. Reason, explanation, and justification have their place *within* our form of life. There is no such thing as a reason *for* our agreement in judgments, language,

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may think."); *cf. id.* ¶ 224 ("The word 'accord' [*Übereinstimmung*] and the word 'rule' are *related* to one another; they are cousins. If I teach anyone the use of the one word, he learns the use of the other with it.").

    29.   The definitions of "sense" offered by the CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1152–53 (H.W. Fowler & F.G. Fowler eds., 5th ed. 1964) include "bodily . . . sensation," "ability to perceive or feel," "consciousness," "insight into some specific matter," "practical wisdom," "judgement," "common [sense]," "meaning," "intelligibility," and "prevailing sentiment."

    30.   WITTGENSTEIN, *PI*, *supra* note 1, ¶¶ 142, 415. The main text of *PI* ¶ 142 is the source of the often-quoted observation that "[t]he procedure of putting a lump of cheese on a balance and fixing the price by the turn of the scale would lose its point if it frequently happened that such lumps suddenly grew or shrank with no obvious cause." *Id.* ¶ 142.

and form of life. Looking for reasons to justify our agreement in form of life is tantamount to looking for them beyond the limits of our language, where there are no reasons whatsoever—and looking for them in physics is to confuse logic with natural events. The point of distinguishing agreement in form of life from agreement in opinions is logical, not physical. Of course there are physical and biological explanations of the reasons why we have the same sensations; why a certain electrical impulse applied to our brain may change our visual impressions; why certain drugs can alter our moods. But these explanations do not explain the logical role of our agreement in form of life. *Logically* speaking, there is no reason for our agreement in form of life at all. It simply happens to be what it is.

Wittgenstein goes out of his way to stress this point towards the very end of the *Philosophical Investigations*:

> I am not saying: if such-and-such facts of nature were different, people would have different concepts (in the sense of a hypothesis). Rather: if anyone believes that certain concepts are absolutely the correct ones, and that having different ones would mean not realizing something that we realize—then let him imagine certain very general facts of nature to be different from what we are used to, and the formation of concepts different from the usual ones will become intelligible to him.[31]

Agreement in form of life, agreement in language, and agreement in judgments are of course three different kinds of agreement. The differences are crucial in order to account for cultural and historical differences between human beings living in different times and places.[32] But what matters here is that none of these three agreements is a matter of opinion. None of them is a matter of (consciously) believing anything, (deliberately) choosing anything, or (intentionally) doing anything. They constitute a kind of social contract, but a contract that is given, not made; learned, not invented; open, not closed. They are something in which all of us participate but not something anyone of us does intentionally, for a purpose. They are the manner in which—but not the reason why—we are able to speak and understand each other, no matter which particular language we happen to have learned when we were young. As Wittgenstein put it, "Shared human behaviour is the system of reference by means of which we interpret an unknown language."[33]

It is tempting to characterize as "intransitive" the kind of agreement Wittgenstein is at such pains to distinguish from agreement in opinions. It is

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31.   WITTGENSTEIN, *PPF*, *supra* note 1, § xii. ¶ 366; *see also id.* § xii. ¶ 365 ("If concept formation can be explained by facts of nature, shouldn't we be interested, not in grammar, but rather in what is its basis in nature?—We are, indeed, also interested in the correspondence between concepts and very general facts of nature. (Such facts as mostly do not strike us because of their generality). But our interest is not thereby thrown back on to these possible causes of concept formation; we are not doing natural science; nor yet natural history—since we can also invent fictitious natural history for our purposes."); *cf.* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 142 ("What we have to mention in order to explain the significance, I mean the importance, of a concept are often extremely general facts of nature: such facts as are hardly ever mentioned because of their great generality.").

32.   I will address the significance of such differences. *See infra* Part III.B ("Politics").

33.   WITTGENSTEIN, *PI*, *supra* note 1, ¶ 206.

tempting because in *The Brown Book* he did in fact distinguish between "transitive" uses of language (referring to something) and "intransitive" or "reflexive" uses of language (not referring to anything) in order to clarify the logical trouble into which we get ourselves if we fail to distinguish these uses clearly from each other.[34] But in the *Philosophical Investigations* he abandoned the terminology of "transitive" and "intransitive" uses of language and replaced it by distinguishing the "empirical" use of a certain combination of words (in a statement about an object in the world) from the "grammatical" use of the same combination of words (in a statement about language).[35] That is a powerful reason not to revert to the terminology he used in *The Brown Book*. But the distinction between "transitive" and "intransitive" uses of language does help us to understand what Wittgenstein meant by using a combination of words "grammatically"; why "agreement in form of life" is not a matter of opinions; and why failure to observe the distinction between "empirical" and "grammatical" uses of words is an abundant source of metaphysical illusions that can wreak havoc with our agreement in form of life.[36]

I.   *Not "The Prison-House of Language"*

So much for confusing our form of life with something we can change as we please. Now for the opposite misunderstanding: that we are prisoners of our form of life. Many readers regard Wittgenstein as a conservative enemy of the Enlightenment who loved tradition and denied the possibility of subjecting custom and religion to rational critique, allegedly on the grounds that we can never step outside our form of life.[37] As far as I can tell, such readers are simply wrong.[38] Wittgenstein's point is not that there is anything we cannot subject to rational

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34.   *Compare* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" 158, 160–62 (2d ed. 1960), *with* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 251. I owe the reference to *The Brown Book* to Diamond, *supra* note 19, at 110–13.

35.   *Cf.* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 58 ("But what we really *want* is simply to take 'Red exists' as the statement: the word 'red' has a meaning. Or, perhaps more correctly, 'Red does not exist' as "'Red" has no meaning'. Only we do not want to say that the expression *says* this, but that *this* is what it would have to be saying *if* it made sense—that the expression actually contradicts itself in the attempt to say that just because red exists 'in and of itself'. Whereas the only contradiction lies in something like this: the sentence looks as if it were about the colour, while it is supposed to be saying something about the use of the word 'red'."); *id.* ¶ 251 ("Of course, here 'I can't imagine the opposite' doesn't mean: my powers of imagination are unequal to the task. We use these words to fend off something whose form produces the illusion of being an empirical proposition, but which is really a grammatical one.").

36.   *Id.*

37.   *E.g.*, DAVID BLOOR, WITTGENSTEIN: A SOCIAL THEORY OF KNOWLEDGE 85–94 (1983); Terry Eagleton, *Wittgenstein's Friends*, NEW LEFT REV., Sept.–Oct. 1982, at 64; J.C. Nyíri, *Wittgenstein 1929–31: The Turning Back*, *in* 4 LUDWIG WITTGENSTEIN: CRITICAL ASSESSMENTS 29 (Stuart Shanker ed., 1986); J.C. Nyíri, *Wittgenstein's Later Work in Relation to Conservatism*, *in* WITTGENSTEIN AND HIS TIMES 44 (Brian McGuinness ed., 1982); *cf.* Gellner, *A Wittgensteinian Philosophy*, *supra* note 25; Gellner, *The Gospel*, *supra* note 25.

38.   *See* DIAMOND, *supra* note 7, at 34 ("The idea of Wittgenstein's philosophy as inherently *conservative* is nutty."); *cf.* Alice Crary, *Wittgenstein's Philosophy in Relation to Political Thought*, *in* THE NEW WITTGENSTEIN, *supra* note 6, at 118.

criticism. It is that there is an indefinitely large number of judgments on which we happen to be agreed, not because they *cannot* be debated but because there *is* no debate. We can subject *anything* to criticism, including our nature, our form of life, our judgments, our religion, what have you. The fact that we happen to be agreed in our form of life constitutes no limit on the extent of critical reason at all. On the contrary, it is a logical prerequisite for the very exercise of critical reason. It gives critical reason its point.[39] The point of subjecting something to criticism is precisely to withdraw it from agreement. So long as there is an agreement from which something can be withdrawn, there is nothing to stop us from withdrawing it. There is nothing to stop us from adding new judgments to our agreement either. It happens all the time. We still say, "The sun rises." But now we also say, "The earth turns." And since we *do* say that the earth turns, "the sun rises" no longer means what it used to mean.

On Wittgenstein's understanding, such subtractions and additions constitute the very essence of our history. They make for a lively traffic in which judgments that no one ever doubted come to be subjected to intense debate, while judgments that once upon a time could only be pronounced at the risk of torture and execution acquire the status of self-evident truths.[40] The liveliness of that traffic depends entirely on the exercise of our critical reason *within* our form of life. That is why it makes sense to say that our form of life is *not* subject to debate (because it constitutes the logical prerequisite for the exercise of critical reason), and why it also makes sense to say that our form of life *is* subject to debate (because it includes the ability to subject any aspect of our form of life to critical examination). This, once again, "seems to abolish logic," because it looks like a contradiction, "but does not do so," because the contradiction is not a matter of logic, but of the difference between "empirical" and "grammatical" statements.[41] It makes the same kind of sense as it made for Marx to maintain that our consciousness is determined by the mode of production and yet also to insist that our consciousness is perfectly capable of

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39.   *See* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 345 ("'If it is possible for someone to make a false move in some game, then it could be that everybody made nothing but false moves in every game.'— So we're tempted to misunderstand the logic of our expressions here, to give an incorrect account of the use of our words. Orders are sometimes not obeyed. But what would it be like if no orders were *ever* obeyed? The concept of an order would have lost its purpose."); *see also* LUDWIG WITTGENSTEIN, ON CERTAINTY § 115 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) ("If you tried to doubt everything you would not get as far as doubting anything. The game of doubting itself presupposes certainty.").

40.   This is the traffic to which Wittgenstein devoted much attention in ON CERTAINTY. *See, e.g.*, *id.* §§ 96–98 ("96. It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions hardened, and hard ones became fluid. 97. The mythology may change back into a state of flux, the river-bed of thoughts may shift. But I distinguish between the movement of the waters on the river-bed and the shift of the bed itself; though there is not a sharp division of the one from the other. 98. But if someone were to say 'So logic too is an empirical science' he would be wrong. Yet this is right: the same proposition may get treated at one time as something to test by experience, at another as a rule of testing.").

41.   *See* WITTGENSTEIN, *PI*, *supra* note 1, ¶ 208.

examining the contradictions inherent in the society by whose mode of production our consciousness is determined.[42]

Indeed, without belittling the differences between Wittgenstein and Marx, a few interpolations in a few choice quotations may show how closely Wittgenstein's understanding of philosophical criticism resembles that of Marx:

> The more closely we examine actual language [our actual form of life], the greater becomes the conflict between it and our requirement [the conflict between social reality and ideological superstructure]. (For the crystalline purity of logic was, of course, not something I had *discovered*: it was a requirement [of false consciousness].) The conflict becomes intolerable; the requirement is now in danger of becoming vacuous.—We have got on to slippery ice where there is no friction, and so, in a certain sense, the conditions are ideal [as ideal as the *German Ideology*]; but also, just because of that, we are unable to walk. [Our alienation is complete; our failure to understand that the real contradiction is embedded in our form of life provokes a crisis.] We want to walk: so we need *friction*. Back to the rough ground [of social reality]![43] . . .

> The *preconception* of crystalline purity [the ideology] can only be removed by turning our whole inquiry around. (One might say: the inquiry must be turned around, but on the pivot of our real need [metaphysicians like Hegel must be turned right-side up by criticizing our form of life in the light of real human interests, instead of criticizing mere ideas in the light of purely philosophical speculation].)[44] . . .

> It is not the business of philosophy to resolve a contradiction by means of a mathematical or logico-mathematical discovery [as if the contradiction were merely a matter of ideas], but to render surveyable the state of mathematics that troubles us [in our actual form of life]—the state of affairs *before* the contradiction is resolved. (And in doing this one is not sidestepping a difficulty [because the illusion that the contradiction is a matter of pure ideas cannot be dispelled until the real contradiction in our form of life has been understood].)

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42.   As Marx succinctly put it in his third thesis on Feuerbach as early as 1845:
   The materialist doctrine that men are products of circumstances and upbringing, and that, therefore, changed men are products of other circumstances and changed upbringing, forgets that it is men who change circumstances and that it is essential to educate the educator himself. Hence, this doctrine necessarily arrives at dividing society into two parts, one of which is superior to the other.
   The coincidence of the changing of circumstances and of human activity can be conceived and rationally understood only as revolutionising practice.
KARL MARX, THESEN ÜBER FEUERBACH [THESES ON FEUERBACH] (1888) (Russ.), *translated in* THE MARX-ENGELS READER 143, 144 (Robert C. Tucker ed., 2d ed. 1978). He went on to develop the same basic idea at much greater length and with more polemical verve in KARL MARX, DIE DEUTSCHE IDEOLOGIE: I. BAND [THE GERMAN IDEOLOGY: PART I] (1932) (Ger.), *translated in* THE MARX-ENGELS READER, *supra*, at 146.
   43.   WITTGENSTEIN, PI, *supra* note 1, ¶ 107.
   44.   *Id.* ¶ 108.

Here the fundamental fact is that we lay down rules, a technique, for playing a game [a practice, a mode of production based on real human interests], and that then, when we follow the rules, things don't turn out as we had assumed [and we get alienated from ourselves and our interests]. So that we are, as it were, entangled in our own rules [and develop an ideology in order to cope with contradictions in society that we ourselves have brought about]. . . .

The civic status of a contradiction [*bürgerliche Stellung des Widerspruchs*— "bourgeois status" would not have been a mistranslation], or its status in civic life [*in der bürgerlichen Welt*]—that is the philosophical problem.[45]

J. Not One Thing

This means that our form of life is not a single system, much less some kind of thing. Our agreement in form of life is neither total nor fixed. On the contrary, the liberty we enjoy in our language and put into effect by exercising our critical reason makes our form of life malleable and constantly changing in the same basic sense in which Marx considered our form of life to be malleable and changing. This applies even, and emphatically, to our tastes, our pleasures, and our senses. There is one sense in which our tastes, pleasures, and senses are not a matter of debate, namely, the sense in which they come naturally to us. There is another sense in which they are very much a matter of debate. We do in fact debate them all the time. We can acquire new tastes for new styles. We can be educated to appreciate things we detested as children. Some of us have no trouble managing temperatures in which others would freeze. Some of us can digest milk easily, others cannot. On Wittgenstein's account, all human beings do share in a single form of life. But that single form of life is being modulated all the time in countless ways that affect our bodies as much as our minds and make for countless different ways of being human.[46] It does not constitute a timeless essence, and it has no metaphysical unity.

What Wittgenstein means by "form of life" must thus be sharply distinguished from the concept of "human nature" figuring so prominently in contemporary debates over the relative weight to be attributed to "nature" and "nurture" in explaining differences among human beings. *That* concept of human nature belongs squarely in the tradition according to which there has to be a reason for our ability to tell what we are talking about. It postulates the existence of some physical or biological essence that explains why we do what we do and think what we think.

Critics commonly object that the differences among human beings are historically contingent and so variable that the notion of some identical human

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45.   *Id.* ¶ 125.
46.   For an explanation of the sense in which human beings can develop different forms of life without abolishing the single form of life they share, see Stroud, *supra* note 7, at 515–18; compare Cora Diamond, *The Skies of Dante and Our Skies: A Response to Ilham Dilman*, 35 PHIL. INVESTIGATIONS 187 (2012).

nature can only be regarded as absurd. They seek to explain our ability to reason by reference to culture.[47]

On Wittgenstein's understanding, neither of these positions makes sense because both of them look for explanations where none are to be found. When he speaks of our "shared human behavior" (*gemeinsame menschliche Handlungsweise*) and "form of life" (*Lebensform*) he is precisely *not* offering reasons for the concepts we deploy in our languages, or identifying causes for our behavior. His thinking simply has no room for biological, cultural, or any other kind of determinism.

It is of course entirely possible that, precisely on the basis of the form of life we share, we carry out investigations leading us to conclude that in fact there is something that is the same for all human beings, say, the number of amino acids that go into the making of DNA (pleasing those who prefer explanations by reference to nature), or the ability to deploy symbolic systems (pleasing those who prefer explanation by reference to culture). But that is beside Wittgenstein's point. *Whatever* may be found to be the same for all human beings is not to be confused with what he calls our "form of life" or "shared human behavior." It may determine the nature of our bodies; it may determine the nature of our minds; it may even determine the nature of both our bodies and our minds. But our bodies and our minds are not to be confused with ourselves. We *have* a body and a mind. Proving that our bodies and our minds are determined in one way or another is not to explain our nature, but to eliminate it from consideration.

Wittgenstein's concept of human nature thus makes for a radical break with the classical dichotomy between nature and culture that has dominated our thinking ever since ancient Greek sophists first opposed *physis* to *nomos*.[48] He insists that "[g]iving orders, asking questions, telling stories, having a chat, are as much a part of our natural history as walking, eating, drinking, playing," and he is at pains to stress that he is "talking about the spatial and temporal phenomenon of language, not about some non-spatial, atemporal non-entity."[49] What he calls "our natural history" differs deeply both from the conventional understanding of history (which excludes human nature), and from the conventional understanding of nature (which excludes human culture). *How* deeply it differs is impossible to grasp without taking him at his word when he claims that the *Philosophical Investigations* supply "remarks on the natural history of human beings; not curiosities, however, but facts that no one has doubted, which have escaped notice only because they are always before

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47.   *See generally* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (Irvington Publishers 1980) (1966); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Vintage Books 1994) (1966); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); FREDRIC JAMESON, THE CULTURAL TURN: SELECTED WRITINGS ON THE POSTMODERN, 1983–1998 (1998); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (2d prtg. 1980).

48.   As reported by Plato, particularly in the dialogues PLATO, GORGIAS, *supra* note 3, at 25–131, and PLATO, PROTAGORAS, *supra* note 3.

49.   WITTGENSTEIN, PI, *supra* note 1, ¶¶ 25, 108.

our eyes."[50] The thinking behind *that* concept of natural history has yet to be given the attention it deserves, let alone be given its proper place in our study of the past.[51]

K.   *Language and Reality*

Agreement in form of life thus yields agreement in language, and agreement in language makes it possible for us to tell what we are talking about. It does not decide what is true and what is false. It rather decides what makes sense and what does not make sense. It is not a matter of pure logic, but of what Wittgenstein calls "grammar," in order to avoid confusing logic with the foundations on which logic rests.[52] What we *say* can be true or false. Hence, we differ in what we say. That is where logic has its place. But in order to be able to say it, we need to be able to speak. That is where we are agreed, even when we do not agree in what we say— indeed, *especially* when we do not agree. Without agreement in form of life, there is no agreement in language. Without agreement in language, there is no agreement in judgments. Without agreement in judgments, there is no sense. Without sense, there is no difference between true and false. If we cannot speak, nothing is being said. If nothing is being said, the distinction between true and false does not apply.

Now you may very well say that this is unsatisfactory. Even if one agrees with Wittgenstein that agreement in judgments is required for communication, and that we do in fact agree in our judgments as he claims we do, and that we do so on the basis of our agreement in language and form of life, one may still want to know why that should be considered an improvement over other accounts of truth, knowledge, and reality. What entitles us to believe that the criteria we use in order to distinguish one thing from another are reliable? What could possibly make our agreement in *language* the foundation for our knowledge of *reality*?

Wittgenstein never answers these questions. He rejects them.[53] He does so because they are prompted by the very confusion he is trying to dispel: the

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50.   *Id.* ¶ 415.

51.   On the fundamental significance of the concept of "our natural history," see GARVER, *supra* note 6, at 149–58, 237–87. *Cf.* CAVELL, *supra* note 7, at 86–125. For an impressive attempt to write such a "natural history," and for a good illustration of the obstacles preventing it from being written, see generally NORBERT ELIAS, THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS (Eric Dunning et al. eds., Edmund Jephcott trans., Blackwell Publishers rev. ed. 2000) (1939).

52.   *See* Newton Garver, *Philosophy As Grammar*, *in* THE CAMBRIDGE COMPANION TO WITTGENSTEIN 139 (Hans Sluga & David G. Stern eds., 1996).

53.   Note that "rejecting them" does precisely *not* mean "refuting them." It rather means trying to pin down the meaning of such questions until it becomes clear that they have no meaning, so that there is nothing to be refuted in the first place:

> In giving explanations, I already have to use language full-blown (not some sort of preparatory, provisional one); this is enough to show that I can come up only with externalities about language.
>
> Yes, but then how can these observations satisfy us?—Well, your very questions were framed in this language; they had to be expressed in this language, if there was anything to ask!
>
> And your scruples are misunderstandings.

WITTGENSTEIN, *PI*, *supra* note 1, ¶ 120. Taking Wittgenstein to have rejected certain basic

confusion of agreement in what we *say* with agreement in the *language* we speak. The questions seem to have a meaning: they ask for an explanation of the relation between language and reality. They seem to be justified because there is in fact no guarantee that what we say is true; what we say may not agree with the reality at all. But that is not the point.

Of course we can ask for an explanation of the relationship between reality and what we *say*. That is precisely the relationship we have in mind when we call something "true" or "false." We call it "true" when it agrees with reality, and "false" when it does not. But the relationship between reality and something we *say* is not to be confused with the relationship between reality and *language*. Requesting an explanation of *that* relationship makes no sense. Our language does not rest on evidence, experience, or reasons to which we could appeal for justification. Hence there is no such thing as any justification of the language we speak. It is the other way around: our language is the basis on which we make use of evidence, experience, and reason in order to justify something we *say*. Looking for evidence or reasons with which to justify our agreement in judgments, language, and form of life is merely to abandon the agreement on which the very possibility of justification depends.

Wittgenstein has many different ways of making this fundamental point. He says, for example, that our reasons soon give out;[54] that his spade is turned when it hits rock bottom;[55] that we follow rules blindly;[56] that justification by experience comes to an end.[57] But these are different formulations of one and the same basic insight. The insight is that our language is not only all we have, but also all we need. Trying to go beyond our language to "things in themselves," or "pure ideas," or

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philosophical positions is one of the easiest and most insidious ways of getting him completely wrong. He was keenly aware how difficult it was to stop his readers from going on this way:

> The great difficulty here is not to present the matter as if there were something one *couldn't* do. As if there really were an object, from which I extract a description, which I am not in a position to show anyone.—And the best that I can propose is that we yield to the temptation to use this picture, but then investigate what the *application* of the picture looks like.

Id. ¶ 374. For specific instances of this "great difficulty," see *id.* ¶ 305 ("'But surely you can't deny that, for example, in remembering an inner process takes place.'—What gives the impression that we want to deny anything?") and *id.* ¶ 306 ("Why ever should I deny that there is a mental process? It is only that 'There has just taken place in me the mental process of remembering . . . ' means nothing more than 'I have just remembered . . . . '"). For an unusually clear description of the problem and Wittgenstein's way of dealing with it, see Conant, *Method*, *supra* note 7.

54. WITTGENSTEIN, *PI*, *supra* note 1, ¶ 211 ("'No matter how you instruct him in continuing the ornamental pattern, how can he *know* how he is to continue it by himself?'—Well, how do *I* know?—If that means 'Have I reasons?', the answer is: my reasons will soon give out. And then I shall act, without reasons.").

55. *Id.* ¶ 217 ("'How am I able to follow a rule?'—If this is not a question about causes, then it is about the justification for my acting in *this* way in complying with the rule. Once I have exhausted the justifications, I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'").

56. *Id.* ¶ 219 ("When I follow the rule, I do not choose. I follow the rule *blindly*.").

57. *Id.* ¶ 485 ("Justification by experience comes to an end. If it did not, it would not be justification.").

"real reality," or "sense data," and the like in hopes of putting our knowledge on a secure foundation is to set out on a course to pure meaninglessness:

> When I talk about language (word, sentence, etc.), I must speak the language of every day. So is this language too coarse, too material, for what we want to say? *Well then, how is another one to be constructed?*—And how extraordinary that we should be able to do anything at all with the one we have!
>
> In giving explanations, I already have to use language full-blown (not some sort of preparatory, provisional one); this is enough to show that I can come up only with externalities [*Äußerliches*] about language.[58]

There is no reason here and no justification.[59] There is only, and simply, our agreement, not in opinions but in language. *This* is what is given: "What has to be accepted, the given, is—one might say—*forms of life*."[60]

L.   *Truth and Freedom*

Wittgenstein thus disagreed sharply with the long-standing tradition according to which we must be able to refer to something given in order to connect our definitions to reality. He turned the tradition on its head: we do not need to refer to reality in order to be able to talk about it; we need to agree in language in order to be able to refer to reality. First we draw the distinction between "red" and "not-red" by means of a criterion. We do so on the basis of our natural ability to use criteria. Then we can tell if things do or do not correspond to our criterion. Otherwise there is no "object"—no *thing*—to talk about, not because red things

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58.   *Id.* ¶ 120.

59.   It may be worth pointing out how richly Wittgenstein's distinction between the realm of things that can be justified (the realm of thinking, saying, and doing something) and the realm of things that cannot be justified (our agreements in form of life, language, and judgments) resonates with the Protestant distinction between works and faith. Works (what we say and do) can be justified, but they do not save. Faith saves, but it cannot be justified.

60.   WITTGENSTEIN, *PPF*, *supra* note 1, § xi. ¶ 345. This is a very brief remark, and it belongs to the remarks that Wittgenstein did not consider ready for publication. One must therefore be careful not to place too much weight on it, and especially not on the fact that it refers to "forms of life" in the plural. GARVER, *supra* note 6, at 237–67, makes a strong case that, on Wittgenstein's understanding, human beings share a single form of life, not many different forms. In Garver's view, assertions to the contrary, though very widespread, are unnecessary, misleading, and often based on a careless reading of the relevant passages in the PHILOSOPHICAL INVESTIGATIONS. In particular, Garver, *id.* at 251–52, points out that there is only a single passage in the PHILOSOPHICAL INVESTIGATIONS where Wittgenstein refers to "forms of life" in the plural, namely, the very passage under consideration here, and that there is an alternative formulation in which he substituted "facts of life" (*Tatsachen des Lebens*) for "forms of life—which shows, writes Garver, "that Wittgenstein was less certain about the employment of the term in this passage than in the others, and on at least one occasion thought that another expression would serve better." Notwithstanding such uncertainties, this passage does show very clearly that Wittgenstein did not merely remove reference, particularly reference to data or evidence, from the foundations of our knowledge, but also had something else to put in its place, namely, acceptance of something given, regardless of whether it was to be called "form of life," "facts of human life," or "agreement in language."

have disappeared from sight, but because we lack the ability to speak of them. *That* is how we establish the connection between our definitions and reality:

> The agreement, the harmony, between thought and reality consists in this: that if I say falsely that something is *red*, then all the same, it is *red* that it isn't. And in this: that if I want to explain the word "red" to someone, in the sentence "That is not red", I do so by pointing to something that *is* red.[61]

This is a compelling account of truth. Wittgenstein insists that the difference between true and false is not a matter of opinion. It is a matter of what we say, and what we say is strictly subject to the tests of logic, evidence, and observation. There is no waffling here about our ability to expose lies, overturn illusions, tell the truth, and make contact with reality. Neither is there any denial of our ability to do the things that have traditionally been included under the headings of "objectivity," "real knowledge," and "science." If I want to explain the word "red," I point to something that *is* red, *really* red. That is what telling the truth about reality is like. Wittgenstein has no patience for the kind of relativism that makes it seem meaningful to say, "That is true for you, but not for me."

At the same time, this account of truth goes hand in hand with an account of liberty as radical as one could wish. It grounds our ability to tell the truth in our agreement in language, and in our language we are emphatically *not* subject to the tests of logic, evidence, and observation. *We* make the rules we follow when we speak, and they are rules of *language*, not of reality.[62] Things do have an essence. But "[e]*ssence* is expressed in grammar."[63] Grammar gives us the rules on which the meaning of our words depends. These rules express our interests and our needs.[64] As far as their relationship to reality is concerned, they are entirely arbitrary.[65] There is nothing in our language by which we could be bound except our own agreement—which is to say, in our language we are not bound by anything at all: not by reality and not even by logic.[66]

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61. WITTGENSTEIN, *PI*, *supra* note 1, ¶ 429; *cf. id.* ¶ 244 (discussing the way we establish the connection between words and sensations).

62. But it is crucial to remember the sense in which we make those rules: we make them by learning and following them, not by deliberately establishing them as such. Normally we do not even know the rules we follow when we speak.

63. *Id.* ¶ 371.

64. "Concepts lead us to make investigations. They are the expression of our interest and direct our interest." *Id.* ¶ 570. Here the connection between logic, grammar, concepts, and social practice is very close.

65. "Consider: 'The only correlate in language to an objective necessity [*Naturnotwendigkeit*] is an arbitrary rule [*eine willkürliche Regel*]. It is the only thing which one can milk out of this objective necessity into a proposition.'" *Id.* ¶ 372.

66. *See id.* ¶ 108 ("[H]ow can logic lose its rigour? Of course not by our bargaining any of its rigour out of it.—The *preconception* of crystalline purity can only be removed by turning our whole inquiry around. (One might say: the inquiry must be turned around, but on the pivot of our real need.)"); *cf.* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS [LOGICAL-PHILOSOPHICAL TREATISE] ¶ 5.473 (Charles Kay Ogden & Frank P. Ramsey trans., 1922) (Lat.) ("In a certain sense we cannot make mistakes in logic.").

The freedom we have in our language is thus more basic than freedom in the sense of "the ability to live as you please," as Cicero put it in a classic definition.[67] Freedom in this more basic sense is not to be confused with our ability to act on our intention by doing without hindrance what we want to do, much less with our ability to exercise some kind of power. Perhaps it is best described as freedom *from* the ability to act on our intention—what Stanley Cavell may have had in mind when he entitled his first book *Must We Mean What We Say?* Perhaps it is the freedom Luther meant when he distinguished "Christian Liberty" so categorically from the freedom to do anything whatsoever;[68] Marx, when he looked with such contempt on the freedom of the bourgeoisie;[69] and Nietzsche, when he looked with the same contempt at "the truth."[70] Having this freedom means being free, not to act on our intention, but to change what we are able to intend; not to achieve our goals, but to change the goals to be achieved; not to live as we please, but to change what pleases us—in short, to change our form of life.

Wittgenstein's treatment of truth and knowledge is thus both optimistic and profoundly subversive. It is optimistic because it affirms our ability to tell the truth about reality. It is subversive because it opens the door to a kind of relativism far more basic than, and fundamentally different from, what normally passes as such. It makes pure nonsense of the idea that there might be a fixed relationship between the language *in* which we speak and the reality *of* which we speak. It means that our history does not only consist of what we did and what was done to us, but also of changes in who and what we are. That is why Wittgenstein called it "our natural history." It constitutes the essence of our humanity. Looking for our essence anywhere else is to seek safety in illusions that put both truth and liberty in danger.

II. Law and Justice

So much for Wittgenstein's answer to the question, "How we can tell what we are talking about?" Now let me turn to the relationship between history, law, and justice. I will divide my consideration of this relationship into two steps. First, in Section II, I will maintain that law and justice are thoroughly intertwined—so

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67. "Quid est enim libertas? potestas vivendi ut velis." 2 Cicero, Paradoxa Stoicorum [Stoic Paradoxes] (c. 48 B.C.E.), *edited and translated in* De Oratore: Together with De Fato, Paradoxa Stoicorum, De Partitione Oratoria 252, 284, ¶ 5.34 (H. Rackham trans., 1942).

68. Martin Luther, De Libertate Christiana [The Freedom of a Christian] (1520) (Ger.), *translated in* 31 Luther's Works 328 (Harold J. Grimm & Helmut T. Lehman eds., W.A. Lambert trans., rev. ed. 1957).

69. Karl Marx & Friedrich Engels, Manifest der kommunistischen Partei [Manifesto of the Communist Party] (1848) (Ger.), *translated in* 2 The Marx-Engels Reader, *supra* note 42, at 469.

70. *See* Friedrich Nietzsche, Über Wahrheit und Lüge im Außermoralischen Sinn [On Truth and Lies in a Nonmoral Sense] (1873) (Ger.), *translated in* The Nietzsche Reader 114 (Keith Ansell Pearson & Duncan Large eds., 2006). For a classic formulation, see Friedrich Nietzsche, Zur Genealogie der Moral [On the Genealogy of Morals] § 3.12 (1887) (Ger.), *translated in* Friedrich Nietzsche, On the Genealogy of Morals and Ecce Homo 118–19 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1967).

thoroughly that trying to deal with one of them in isolation from the other impairs the meaning of both. Second, in Section III, I will build on this understanding of the relationship between law and justice in order to show that the history of law supplies a kind of knowledge that is essential for maintaining justice.

A.   Law and Justice Intertwined

Up to this point I have limited myself to a generic consideration of the question how our definitions are connected to reality. I could afford to do so because I had only a single purpose: to clarify how Wittgenstein's treatment of that question differs from every other treatment with which I am familiar. I also needed to do so, because the difference is so fundamental that its significance is next to impossible to grasp unless it is singled out for attention. But all of this was merely for the sake of laying a foundation. Now I need to explain the case that I would like to make on that foundation. This changes the focus of the investigation. Instead of asking the general question, "How can we tell how our definitions are connected to reality?" I need to ask the particular question: "How can we tell how our definitions of law and justice are connected to reality?"

If one believes that Wittgenstein is right about the need for agreement in both definitions and judgments in order to be able to communicate by means of language, two basic answers immediately come to mind. One answer is negative: one *cannot* tell how our definitions of law and justice are connected to reality by reference to something given. The other is positive: one *can* tell on the basis of agreement in both definitions and judgments.

These answers are all right as far as they go—and one ought not to underestimate how far that is. They rule out any possibility of founding our understanding of law and justice on some given thing. Seeing how many things have been proposed as candidates to serve as such a foundation—the will of God, the will of the people, the freedom of the individual, the idea of justice, natural law, human rights, sovereignty, the state, the categorical imperative, utility, the history of class struggle, custom, tradition, logic, natural selection, and so on—that is by no means insignificant. But it obscures two fundamental points. First, law and justice refer to the reality, not of things as they are, but of things we do; not scientific or theoretical reality, but practical reality. Second, we do not need agreement in judgments and definitions of practical reality in order to be able to communicate about law and justice; we need agreement in law and justice in order to communicate about practical reality. Agreement in law and justice *is* the agreement in judgments and definitions we need in order to communicate about practical reality.

How so? At the most basic level, justice consists of making the right judgments about things to do and not to do. Making the right judgments means making the *same* judgments about all things that *are* the same, without respect to persons and their "race, color, religion, sex, or national origin," to use a familiar formulation. If justice declares that you should pay your debt, then all debts should be paid, even if justice has spoken only once. Since making the right judgments entails making the

same judgments, justice is essentially related to fairness and equality. If the same things are judged differently only because of differences between the people and the circumstances involved, it strikes us as unjust, unfair, and inequitable at one and the same time.

As you will hardly have forgotten, there can be no such thing as calling anything the same as anything else without the use of a criterion with which to judge *what* something is. This is what justice does. It judges *what* is right and *what* is wrong by using a criterion. Hence it is commonly portrayed as a blindfolded woman holding a scale in one hand and a sword in the other. She is blindfolded so that her judgment will not be unduly swayed by anything she sees. She holds a scale in one hand because that is the criterion with which she judges what is right. She holds a sword in the other hand because that gives her the power to execute her judgment.

An actual scale, of course, is a criterion of justice that we can only rarely use in a real case. The number of criteria that could be used in other cases depends on the variety of cases, which is to say, indefinitely large.[71] But one criterion stands out, because we use it whenever we distinguish things to do from things not to do. This criterion is what we call "good." Metaphorically speaking, we place the good on one side of the scale of justice and the thing to be judged on the other. If the scale balances, we judge that the thing conforms to our criterion of "good." If we have judged correctly, then the thing we call "good" *is* good, and if it is good, the judgment we have made is just.

So much for justice—now for law. Law differs from justice as definitions of what is just differ from judgments of what is just. Law results from our having made a judgment. If we have judged correctly that some certain thing is good, our judgment is just. If it is just, it needs to be repeated whenever the same thing is being judged again. Hence there is no such thing as rendering a judgment without at one and the same time establishing a law. A law is the expression of our judgment in the form of a rule demanding that our judgment be repeated whenever we are judging the same kind of case. This is the sense in which law limits our judgment. But in another sense it is our judgment that constitutes the law, namely, the sense in which there is no law unless we use our criterion of "good" in order to judge what is right and what is wrong.

This may appear to cast law and justice into a vicious logical circle. But it does nothing of the kind.[72] *Logically* speaking, law and justice are entirely distinct, precisely

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71.   The number is much larger than what is suggested by the familiar distinctions between distributive and commutative justice, public and private law, or civil and criminal law.

72.   Wittgenstein explicitly rebuts the charge of logical circularity. WITTGENSTEIN, *PI*, *supra* note 1, ¶ 208 ("Then am I explaining what 'order' and 'rule' mean in terms of 'regularity'?—How do I explain the meaning of 'regular', 'uniform', 'same' to anyone?—I'll explain these words to someone who, say, speaks only French by means of the corresponding French words. But if a person has not yet got the *concepts*, I'll teach him to use the words by means of *examples* and by *exercises*.—And when I do this, I do not communicate less to him than I know myself. In the course of this teaching, I'll show him the same colours, the same lengths, the same shapes; I'll make him find them and produce them; and so on. For example, I'll teach him to continue an ornamental pattern 'uniformly' when told to do so.—

as agreement in form of life is logically distinct from agreement in what we say. Logically speaking, no judgment implies any particular definition, and no definition implies any particular judgment. Logic does not come into question until there is something that can be true or false. But nothing can be true or false unless it has a meaning; nothing can have a meaning unless we are agreed in judgments and definitions; and no such agreement can exist if we do not agree in language. Hence there is no such thing as any law that can be followed or applied without judging the justice of that law. The reason is not, as it is all too often claimed to be, that every case is different, much less that there is always room for an exception from any general rule. It is that without justice, law is not merely arbitrary, capricious, or abstract, but not law at all. Law's meaning depends upon the judgment establishing its justice. Without that judgment, law loses its standing as a rule. And where there is no rule, there can be no exceptions. The converse is just as true: there is no such thing as justice unless a law is being made, applied, or followed. The reason is not, as you might think, that justice is impossible to do unless there is a body of established rules preventing human beings from acting according to their arbitrary will. The reason is that the very concept of a just judgment is meaningless unless it results in the expression of a rule requiring us to make the same judgment whenever the same kind of case comes up again. Whether the rule ought to be written down or codified is a subordinate consideration.

For those who are familiar with the *Philosophical Investigations*, this says no more than that the concept of a rule is meaningless unless the rule is actually being used. That can of course not stop us from calling it a rule even if it has lost its uses, or never had any use to start with. But if we call it a rule in such a case, then only in the secondary sense that Aristotle clarified by the example of a hand attached to a dead body. Such a hand cannot do anything that makes a hand a *hand*. It is only a hand so-called, in a sense that Aristotle calls equivocal, because it is not the same as that in which we call a living hand a "hand."[73] For the same reason, a rule that no one actually uses can only be called a rule in an equivocal sense: even if it is written in some code, it lacks precisely that element which makes a rule *rule*.

> "Put a ruler against this object; it does not say that the object is so-and-so long. Rather, it is in itself—I am tempted to say—dead, and achieves nothing of what a thought can achieve."—It is as if we had imagined that the essential thing about a living human being was the outward form. Then we made a lump of wood into that form and were abashed to see the lifeless block, lacking any similarity to a living creature.[74]

And also to continue progressions. That is, for example, when given: • •• ••• to go on: •••• ••••• ••••••. I do it, he does it after me; and I influence him by expressions of agreement, rejection, expectation, encouragement. I let him go his way, or hold him back; and so on. Imagine witnessing such teaching. None of the words would be explained by means of itself; there would be no logical circle.").

73.   *See* 11 ARISTOTLE, *supra* note 8, § 1.i.11–12.

74.   WITTGENSTEIN, *PI*, *supra* note 1, ¶ 430.

This makes for a nice analogy to the relationship of law to justice: it is as if we imagined that the essential thing about law is its outward form, as if the letter could really be divided from the spirit and still remain a *letter*—as if the dead hand of law were actually law. We arrange the letters in the form of the dead hand, and then we find ourselves abashed to see that they lack any similarity to law.

This is how law and justice are intertwined. Their intertwinement consists of the very combination of agreement in definitions with agreement in judgments that is required for communication in any case, except that in this case the communication does not lie in the realm of theory but in the realm of practice, and that it does not result in statements of fact, but statements of what we ought to do (or ought not to do) because we know that it is right (or wrong). Saying that they are intertwined is *not* saying that one can be derived from the other. They differ as deeply from each other as having rules differs from following rules, meaning from understanding, and thinking from acting. What justice means is what law says. Law embodies our agreement in definitions of what we ought to do, and justice embodies our agreement in judgments of what that *is*. But without justice we cannot make the law stick to reality. There would be nothing for law to say. And without law, justice would be random. That is, there would be no justice at all. That constitutes their intertwinement. It gives us the language we need in order to refer to practical reality: the reality that we intend to turn into actual reality because we judge it to be good.

Needless to say, this account of law and justice is exceedingly broad and elementary. I must therefore point out that it is not intended to replace any familiar account. That would be preposterous. Law and justice have perfectly good meanings that are far more specific, down to earth, and technical than anything I said above. But there are two good reasons for offering an elementary account. One is to serve as a reminder that the normal meaning of law and justice is not the only one. The other is that law and justice may lose their normal meaning when times change. In such times an elementary account helps to protect their meaning from vanishing completely.

B.   *Etymology*

It may be worth adding two pieces of corroborating evidence. One piece consists of the dense network of etymological relationships between the different words we use for speaking about law and justice in different languages.[75] "Law" is related to "to lie," as in "lying down" (not, fortunately, as in "telling a lie"), meaning that law is something that has been laid down and fixed in place. The etymology of

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75.   The following details have been collected from FRIEDRICH KLUGE, ETYMOLOGISCHES WÖRTERBUCH DER DEUTSCHEN SPRACHE [THE ETYMOLOGICAL DICTIONARY OF THE GERMAN LANGUAGE] (Elmar Seebold ed., 22d ed. 1989); HERMANN MENGE, MENGE-GÜTHLING: ENZYKLOPÄDISCHES WÖRTERBUCH DER LATEINISCHEN UND DEUTSCHEN SPRACHE [ENCYCLOPEDIC DICTIONARY OF LATIN AND GERMAN] (15th ed. 1965); OXFORD ENGLISH DICTIONARY (2014), *available at* http://www.oed.com; ERIC PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH (4th ed. 1966); and JACQUELINE PICOCHE, DICTIONNAIRE ÉTYMOLOGIQUE DU FRANÇAIS [ETYMOLOGICAL DICTIONARY OF FRENCH] (1992).

Latin *lex* ("law") and cognates of *lex* like "legal," "loyal," "legitimate," and "legacy" is ambiguous. *Lex* may be related to *legare*, meaning "to dispatch someone or something," but is perhaps more likely related to *ligare*, meaning "to bind someone or something," in which case its cognates also include such words as "ligament," "liable," "liaison," "lictor," "lien," "league," "obligation," "reliance," and so on. "Religion" may belong to the same group of words, but the etymology of "religion" is also uncertain. *Gesetz*, on the other hand, is straightforward: it means something that has been "seated" or "set up"—the same idea as in "statute" and *statutum*. *Νόμος* and *θέμις*, Greek words for "law," are equally straightforward. *Νόμος* is related to *νέμειν*, meaning "to assign" or "to distribute," and *θέμις* is related to *τιθέναι*, meaning "to set up," "to fix," "to settle," "to determine," and the like.

The basic meaning of all of these words is to impose some kind of restriction on our movements by laying something down some place, setting something up some place, dividing some place, preventing someone from entering some place, or preventing someone from leaving some place.

"Justice" is obviously related to "judgment" and "to judge." These words in turn derive from the Latin word *ius*, meaning both "right" and "law," nicely confirming the intertwinement of law and justice. The original meaning of *ius* is said to be that of "a religious formula having the force of law," which matters because a formula is by definition something that must be repeated in the *same* way, and because it establishes a relationship between law, justice, and religion.[76] "Right" is obviously related to "righteous," in which sense its meaning is close to "just." But it is equally closely related to the German *Recht* and the French *droit*, whose meaning is closer to "law" than to "just"—except that the German word for justice, *Gerechtigkeit*, is directly derived from *Recht*. These words in turn are related to the word "to rule" and a number of cognates of "to rule" with a wide variety of meanings referring to objects we use as a rule (such as *règle* and "ruler"), the activity of using that object (as in *richten*, *régir*, *corriger*, "to correct," and *diriger*, "to direct"), the person engaged in the activity (*rex* and *roi*, meaning "king," and *Richter*, meaning "judge"), the place for the activity (*Gericht*, meaning "court"), and the results of that activity (such as *Richtung*, meaning "direction").

Δίκη, a Greek word for "law" that can also mean "right," and *δικαιοσύνη*, the Greek word for "justice," which can also mean "righteousness," are similar to the German *Recht* and *Gerechtigkeit* in that they are derived from one and the same root. That makes it easier to explain the conceptual connection between these terms than it is in English, where the most important thing to know about "law" may well seem to be how different it is from both "right" and "justice." This is also true, although to a lesser degree, in French, where the equivalents are *loi*, *droit*, and *justice*. *Δίκη* and *δικαιοσύνη* in turn are related to "digit," "index," *zeigen* (meaning "to show"), and *dicere* (meaning "to say"), which hints at the deep conceptual bonds between saying something, showing something, and following a rule.

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76.   PARTRIDGE, *supra* note 75, at 325 (s.v. "jury (2)").

The basic meaning of both "right" and δίκη is probably related to walking or guiding someone in the right direction. That seems appropriate, since walking in the right direction is just about as simple and obvious a case of correctly doing the same thing as one can imagine. We associate going in the right direction with doing the right thing in a similar way when we speak of "straightening someone out." I will stop here and spare you any comments about "good," "bad," "evil," and the like.

Such etymological relationships do not of course constitute a reason for the intertwinement of law with justice that I have tried to explain above. But they do constitute "intermediate links" of the kind that Wittgenstein considered to be crucial for remedying our failure to understand the use of our own words.[77] They give us a "surveyable representation" of law and justice by allowing us to "see connections" between law and justice that help to clarify their meaning.[78]

C. Law

The other piece of corroborating evidence is Ulpian's definition of law. It is taken from the very first words of *The Digest of Justinian*: "Whoever wants to pay serious attention to law (*ius*) needs to know why it is called 'law' (*ius*). It is in fact named after justice (*iustitia*). For law (*ius*), according to the elegant definition of Celsus, is the art (*ars*) of what is good (*bonum*) and equal (*aequum*)."[79]

This definition is deservedly famous. Renaissance humanists criticized it for misconstruing the etymology of *ius*.[80] Etymologically speaking, that is entirely correct: *ius* is not derived from *iustitia*, but *iustitia* from *ius*.[81] But it is also entirely beside the point. Ulpian was not interested in historical etymology. He wanted to explain the reason why law is called "law." He thought the reason was necessary for understanding what law *is*. He found it in the relationship between law and justice. In his opinion, the meaning of "law" depended on the meaning of "justice." His proof consisted of what he called "the elegant definition of Celsus."[82]

According to that definition, law is the art of what is good and equal. When we hear "art," we think of artists and the skill with which they make or perform a work of art: painters, sculptors, singers, dancers, composers, architects, and so on.

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77. WITTGENSTEIN, PI, *supra* note 1, ¶ 122 ("A main source of our failure to understand is that we don't have *an overview* of the use of our words.—Our grammar is deficient in surveyability. A surveyable representation produces precisely that kind of understanding which consists in 'seeing connections'. Hence the importance of finding and inventing *intermediate links*.").

78. *Id.*

79. 1 THE DIGEST OF JUSTINIAN 1.1.1 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (530) ("Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi."). This translation is my own.

80. *See, e.g.*, CORPUS IURIS CIVILIS ROMANI: IN QUATUOR PARTES DISTINCTUM [BODY OF CIVIL LAW: IN FOUR DISTINCT PARTS], at Dig. 1.1.1, note c (Denis Godefroy ed., Sumptibus Societatis, Typis Balthasaris Christophori Wustii, Sen. 1688) (Ger.) ("Hoc ἔτυμον e Philosophia, non e Grammatica petitum est.").

81. PARTRIDGE, *supra* note 75, at 325.

82. 1 THE DIGEST OF JUSTINIAN, *supra* note 79.

We may also think of the skill with which craftsmen perform their craft. But we hardly think of lawyers. History has driven a deep wedge between our understanding of art and the ancient understanding according to which "art" was one of three basic kinds of knowledge, namely, knowledge how to *make* something (τέχνη in Greek, *ars* in Latin, and "technique" or "technology" in English), as distinct from knowledge of what things *are* ("theory") and knowledge of what to *do* ("praxis").[83]

Strictly speaking, the "art" of law is the "technique" a jurist needs to know in order to "make" a case in law. But Ulpian seems to have used *ars* more loosely to refer not only to "technical" knowledge of things to make, but also to "practical" knowledge of things to do. For he identifies the good (*bonum*) and the equal (*aequum*) as the objects of the legal art, and these are objects of practical knowledge. If he had asked me to explain what he meant, I would have said: he meant that knowledge of law requires knowing how to judge a case justly by using the criteria "good" and "equal."

The same combination of "law," "justice," "judgment," "good," "equal," and "practical knowledge" is evident in other definitions for which Ulpian is famous. This includes above all his definition of justice as "a constant and perpetual will to give each and everyone their due [(*ius*, 'their law' or 'their right')]."[84] To put this definition in the terms that I have used above, justice amounts to a certain kind of will because maintaining the agreement in judgments we need in order to communicate about practical reality depends on our willingness to do so. This will has to be constant because communication about practical reality is always at risk of being undermined by disagreements in opinion. "Constant" here means "able to stand up to disagreements in opinion." For the same reason it must be perpetual. "Perpetual" here means "able to render the *same* judgment all the time." If the criterion for justice is used in different ways at different times, it loses its use and justice will vanish. Finally, justice must result in giving everyone their *ius*, because making the same judgment all the time is not enough if the judgment does not result in legal action.

Ulpian immediately goes on to define the commands of law (*praecepta iuris*) as living an honest life (*honeste vivere*), not hurting one's neighbors, and giving each their *ius*.[85] Thus, justice consists of giving everyone their *ius*, and *ius* itself includes the command to give everyone their *ius*. The intertwinement of law and justice could

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83. For an influential statement of this threefold distinction see ARISTOTLE, NICOMACHEAN ETHICS § 6.ii.1–4 (H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.). Needless to say, the details are far more complicated, and were already recognized to be complicated in antiquity.

84. 1 THE DIGEST OF JUSTINIAN, *supra* note 79, at 1.1.10 ("Iustitia est constans et perpetua uoluntas ius suum cuique tribuendi.").

85. *See id.* at 1.1.10.1 ("Iuris praecepta sunt haec: honeste uiuere, alterum non laedere, suum cuique tribuere."). The distinction between *honestas* and *utilitas* is perhaps the most fundamental distinction in Stoic moral philosophy. "Living honestly" does not merely mean "always telling the truth," but something like "doing nothing merely for the sake of expediency." For a classic account of *honestas*, see generally CICERO, DE OFFICIIS (Walter Miller trans., Harvard Univ. Press 1921) (c. 44 B.C.E.).

hardly be spelled out more clearly. In Ulpian's view, this includes living honestly and not hurting one's neighbors. We might call at least the first of these requirements not law, but ethics or morality. No wonder Ulpian goes on to declare that jurisprudence (*iurisprudentia*) is "acquaintance (*notitia*) with things both human and divine and knowledge (*scientia*) of the just and the unjust."[86] This helps to make sense of his claim that jurists "are deservedly called priests, because we cultivate justice and profess knowledge of the good and the equal, separating what is equal from what is unequal, distinguishing the licit from the illicit, wishing to make people good, not merely by fear of punishment, but also by the incentive of rewards, teaching, if I am not mistaken, true, not feigned, philosophy."[87] That, I suppose, just about sums it up.

III. THE HISTORY OF LAW

Now you may say: "Sounds great. But Ulpian is going overboard. How true is this so-called true philosophy? How far does this agreement in definitions and judgments actually extend? I am willing to concede that it is fundamental for meaning, understanding, and communication by means of language. But here we are not just talking about language. Here we are talking about law and justice—and we need law and justice only because so often we do *not* agree. Does that not mean that our so-called practical knowledge is a matter of opinion after all?"

A. Ethics

Answering this question requires a distinction between ethics and politics. Fortunately Wittgenstein had a firmly held and clearly stated view on ethics, namely, that it is impossible to say anything meaningful about it whatsoever. He said so early on in a letter he wrote to Ludwig von Ficker when he was looking for someone to publish the *Tractatus Logico-Philosophicus*. He explained that the point of the *Tractatus* was ethical precisely because it did *not* say anything about ethics:

> [T]he ethical gets its limit drawn from the inside, as it were, by my book; and I am convinced that this is the ONLY *rigorous* way of drawing that limit. In short, I believe that where *many* others today are just *gassing*, I have managed in my book to put everything firmly into place by being silent about it . . . .[88]

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86.   1 THE DIGEST OF JUSTINIAN, *supra* note 79, at 1.1.10.2 ("Iuris prudentia est diuinarum atque humanarum rerum notitia,iusti atque iniusti scientia.").

87.   *Id.* at 1.1.1.1 ("Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, uerum etiam praemiorum quoque exhortatione efficere cupientes, ueram nisi fallor philosophiam, non simulatam affectantes.").

88.   Cora Diamond, *Ethics, Imagination and the Method of Wittgenstein's* Tractatus, *in* THE NEW WITTGENSTEIN, *supra* note 6, 149, 152. Diamond's translation is based on letter nr. 23, probably dating to October or November 1919, in LUDWIG WITTGENSTEIN, BRIEFE AN LUDWIG VON FICKER [LETTERS TO LUDWIG VON FICKER] 35 (Georg Henrik von Wright & Walther Methlagl eds., 1969) (Ger.).

He made the same point again in a lecture he gave in 1929:

> My whole tendency and I believe the tendency of all men who ever tried to write or talk Ethics or Religion was to run against the boundaries of language. This running against the walls of our cage is perfectly, absolutely hopeless. Ethics so far as it springs from the desire to say something about the ultimate meaning of life, the absolute good, the absolute valuable, can be no science. What it says does not add to our knowledge in any sense. But it is a document of a tendency in the human mind which I personally cannot help respecting deeply and I would not for my life ridicule it.[89]

As far as I am aware he never changed his mind about this fundamental issue. His reasoning was simple. Ethics is the most basic form of inquiry into practical knowledge. It deals with the question: "What is good?" Wittgenstein was perfectly willing to grant that it is not difficult to answer this question in a relative sense. In a relative sense, ethics asks merely what is good, provided you already have certain goals in mind. It deals with the relation between means and ends. That relation is straightforward. It can be figured out and put into words. But it is not really what we mean by "ethics." Ethics does not have to do with means. It has to do with ends. It does not consist of asking: "What should I do, assuming I want X?" but simply and absolutely "What should I do?" "What is really valuable?" or "What is good?" It deals with absolutes. On Wittgenstein's understanding, there is no hope of saying anything meaningful about that.[90]

This makes Wittgenstein's concept of ethics similar to his concept of agreement in language. As our agreement in language is the ground on which we can *say* things that may be called "true" or "false," so ethics is the ground on which we can *do* things that may be called "good" or "bad." As our agreement in language gives meaning to what we *say*, so our agreement in ethics gives value to what we *do*. Ethics in an absolute sense consists of this agreement. But precisely for that reason there is nothing we can say to explain *why* we call something "good" or "bad" in an absolute sense. Explaining why we call something "good" would require us to explain why "good" means "good." Trying to give such an explanation would be exactly as futile as trying to give an explanation why "true" means "true."

Our practical reasoning thus runs out at the same point where our theoretical reasoning runs out: in our agreement in form of life. Trying to go beyond that point is meaningless. As we can only come up with externalities about language, so we can only come up with externalities about ethics.[91] In this sense ethics cannot be taught. One can of course try to put ethics into words and say: "Ethics teaches an

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    89.   LUDWIG WITTGENSTEIN, *A Lecture on Ethics*, *in* PHILOSOPHICAL OCCASIONS, 1912–1951, 37, 44 (James C. Klagge & Alfred Nordmann eds., 1993).

    90.   *Cf.* RUSH RHEES, *'Natural Law' and Reasons in Ethics*, *in* WITHOUT ANSWERS 91 (1969) [hereinafter RHEES, *'Natural Law' and Reasons in Ethics*]; RUSH RHEES, *Some Developments in Wittgenstein's View of Ethics*, *in* DISCUSSIONS OF WITTGENSTEIN 94 (1970). For an impressive attempt to show how it *is* possible to say something meaningful about ethics without doing violence to Wittgenstein's thinking, see Diamond, *supra* note 88, at 149.

    91.   *Cf.* WITTGENSTEIN, PI, *supra* note 1, ¶ 120 (quoted *supra* in notes 53).

absolute duty to do good." One can call this a universally accepted truth and state it in the form of a categorical imperative, as Kant did. But it is a universally accepted truth only because, *pace* Kant, it states an externality. It does not say anything specific. If it is universally agreed that "good is what you should do," then it is agreed only because it does not tell us anything about what *is* good. Ethics, you might say, commands an absolute duty to do no particular thing.

If there is any merit to this line of thought, then all of our practical knowledge is specific to a particular time and place, and none of it is universal. Does it then follow that there is no kind of agreement in ethics at all? That follows no more than it follows from the absence of a universal language that there is no agreement in language at all. When Wittgenstein said that agreement in language is agreement in form of life, he of course did not mean that all of us speak the same language. He meant that there is no such thing as any language someone can speak that no one else can learn, and nothing someone can say that no one else can understand, no matter what language we have actually been taught to speak, no matter how unintelligible a foreign language may sound to us at first, in principle if not in practice. A language that can be spoken is a language that can be learned; a language that can be learned is a language that can be taught; and a language that can be taught is a language that can be translated. Learning a new language means learning a new agreement in judgments and definitions. For *this* is what is required in order to communicate by means of language. A universal language is not needed at all.

It is similar with ethics. As agreement in language must not be confused with the existence of a universal language, so agreement in ethics must not be confused with the existence of a universal moral code. Agreement in ethics rather means that there is no such thing as an agreement in judgments and definitions of what is right and wrong that none of us can join, and nothing someone can do that no one else can judge, no matter how deeply we may differ in our particular forms of morality, and no matter how alien a different culture may seem to us at first. All of us know the difference between right and wrong. In that regard we are agreed in ethics. But agreement in ethics does *not* mean that all of us make the same judgments and definitions of what *is* right and wrong.[92] In that regard we differ from place to place and time to time.

B.   *Politics*

That makes law and justice *essentially* political. They do not exist in some Platonic heaven. They consist of agreements in judgments and definitions of what is right and wrong that are specific to specific communities of human beings at specific times and places. As agreement in judgments and definitions is not to be confused with agreement in language, so agreement in law and justice is not to be confused with agreement in ethics, as Ulpian seems to have done. As an actual

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92.   RHEES, *'Natural Law' and Reasons in Ethics, supra* note 90, makes this point extremely well.

spoken language is not to be confused with expressions of opinion, so law and justice are not be confused with expressions of opinion either.

True, the judgments and definitions of which law and justice consist can be put into words and acted upon. Hence, unlike ethics, they can be taught and learned, and they can also be subjected to meaningful debate and argument. That makes it tempting to identify them with opinions. But subjecting law and justice to debate and argument means only that our judgments can be wrong. It is no reason to forget that in the area of law and justice our definitions are connected to reality in the same way as in all other areas: by agreement in both judgments and definitions. Without such an agreement, our statements are simply meaningless. They do not even rise to the level of opinions, let alone opinions that might be true or false, right or wrong, good or bad. Trying to give them meaning by reference to some kind of immediately given reality is just as futile here as everywhere else. Our self-interest, naked or not, may very well seem to be given, just as sense data and ideas are claimed to be. But that is only so because in fact we *are* agreed in judgments and definitions of what is right and wrong. Once you begin to ask exactly what your self-interest is, you quickly find that you run out of things to say—unless you draw on that agreement. Without it the very concept of self-interest is meaningless.[93]

This does not of course mean that self-interest and expressions of opinion play no role in law and justice. It does mean though that law and justice cannot be reduced to self-interest and opinions, not because that would be wrong or contemptible, but because it would be meaningless. As law and justice lose their meaning if we try to found them on ethics or similarly absolute equivalents like natural law and human rights, so they lose their meaning if we try to reduce them to pure self-interest and mere opinion. There is no such thing as acting on self-interest and expressing an opinion about right and wrong without belonging to a particular community of human beings who can communicate with each other about questions of right and wrong in a specific language because they are agreed in both judgments and definitions of what they consider to be right and wrong. This means nothing more, and nothing less, than that we have no criterion of justice beyond our agreement in judgments and definitions of what *is* good.

I know of no one who explained more clearly why law and justice are *essentially* political than Aristotle. He did so early in the *Politics*, in a single passage that is as fundamental as it is unique in his writings. It is long, but worth quoting in full. I shall interpolate some of the original Greek terms in square brackets, along with various English equivalents, in order to prepare for an interpretation of its meaning below:

> [I]t is clear that the city-state [πόλις] is a natural growth, and that man [ἄνθρωπος: "human being"] is by nature [φύσει] a political animal [ζῷον πολιτικόν], and a man that is by nature [διὰ φύσιν] and not merely by fortune [διὰ τύχην] citiless [ἄπολις] is either low in the scale of humanity [φαῦλος:

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93. *Mutatis mutandis* the same is true with regard to the concept of values.

"slight," "paltry," "bad," "worthless," "poor," "uneducated"] or above it [κρείττων: "stronger," "better," "braver," "superior"] (like the 'clanless, lawless, hearthless' man reviled by Homer, for he is by nature citiless and also a lover of war) inasmuch as he resembles an isolated piece [ἄζυξ: "unyoked," "unpaired," "unmarried"] at draughts [ἐν πεττοῖς: "game of draughts," "board for draughts"]. And why man is a political animal in a greater measure than any bee or any gregarious animal is clear. For nature, as we declare, does nothing without purpose [μάτην: "in vain," "idly," "senselessly," "at random"]; and man alone of the animals possesses speech [λόγος: "word," "reason"]. The mere voice [φωνή], it is true, can indicate [ἐστὶ σημεῖον: "is a sign of"] pain [τὸ λυπηρόν: "the painful"] and pleasure [τὸ ἡδύ: "the sweet," "the pleasant"], and therefore is possessed by the other animals as well (for their nature has been developed so far as to have sensations [αἴσθησις: "perception by the senses"] of what is painful [τὸ λυπηρόν: "the painful"] and pleasant [τὸ ἡδύ: "the sweet," "the pleasant"] and to signify [σημαίνειν: "to give a sign," "to point out," "to announce"] those sensations to one another), but speech [λόγος] is designed to indicate [δηλοῦν: "to show," "to make known," "to prove," "to declare," "to signify"] the advantageous [τὸ συμφέρον: "the useful," "the agreeable"] and the harmful [τὸ βλαβερόν: "the hurtful," "the noxious"], and therefore also the right [τὸ δίκαιον: "the just"] and the wrong [τὸ ἄδικον: "the unjust"]; for it is the special property of man in distinction from the other animals that he alone has perception [αἴσθησις: "perception by the senses"] of good [τὸ ἀγαθόν] and bad [τὸ κακόν] and right [τὸ δίκαιον] and wrong [τὸ ἄδικον] and the other moral qualities [τὰ ἄλλα: meaning simply "the others," "the rest," or "the like," not "qualities," let alone "moral qualities"], and it is partnership [κοινωνία: "communion," "fellowship," "intercourse"] in these things that makes a household [οἰκία: "house," "household," "family"] and a city-state [πόλις].

Thus also the city-state is prior in nature to the household and to each of us individually. For the whole must necessarily be prior to the part; since when the whole body is destroyed, foot or hand will not exist except in an equivocal sense [ὁμωνύμως: "having the same name," "ambiguous," "equivocal"], like the sense in which one speaks of a hand sculptured in stone as a hand; because a hand in those circumstances will be a hand spoiled [διαφθαρεῖσα: "utterly destroyed," "killed," "spoiled," "harmed," "ruined," "disabled"], and all things are defined [ὥρισται: "divided," "separated," "limited," "defined," "marked out," "settled"] by their function [ἔργῳ: "work," "employment," "occupation," "deed"] and capacity [δυνάμει: "strength," "power," "ability," "faculty," "worth"], so that when they are no longer such as to perform their function they must not be said to be the same things [τὰ αὐτά], but to bear their names in an equivocal sense. It is clear therefore that the state is also prior by nature to the individual [ἕκαστος: "every one," "each one"]; for if each individual when separate [χωρισθείς] is not self-sufficient [αὐτάρκης: "sufficient in oneself," "independent of others"], he must be related to the whole state as other parts are to their whole, while a man who is incapable [μὴ

δυνάμενος] of entering into partnership [κοινωνεῖν: literally "to be a partaker," "take part in"], or who is so self-suffing that he has no need to do so, is no part of a state, so that he must be either a lower animal [θηρίον: "wild animal," "beast," "brute"] or a god [θεός].

Therefore the impulse [ἡ ὁρμή: "attack," "impetus," "beginning," "first start," "effort," "passion," "impulse," "setting out"] to form a partnership of this kind is present in all men by nature; but the man who first united people in such a partnership was the greatest of benefactors. For as man is the best of the animals when perfected, so he is the worst of all when sundered from law [νόμος] and justice [δίκη]. For unrighteousness [ἀδικία] is most pernicious when possessed of weapons, and man is born possessing weapons for the use of wisdom [φρόνησις: "being minded to do something," "prudence," "practical wisdom"] and virtue [ἀρετή], which it is possible to employ entirely for the opposite ends. Hence when devoid of virtue man is the most unscrupulous and savage of animals, and the worst in regard to sexual indulgence and gluttony. Justice [δικαιοσύνη] on the other hand is an element of the state [πολιτικόν]; for judicial procedure [δίκη], which means the decision of what is just [τοῦ δικαίου κρίσις], is the regulation [τάξις] of the political partnership.[94]

This passage has become so commonplace that it has lost a lot of its meaning. It does not help that the translation leaves much to be desired, not because it is bad, but because it is difficult to render Aristotle's meaning in English.[95] I have quoted this passage so fully because it is anything but commonplace. Rather, it amounts to an account of the relationship between justice, law, and politics that combines the precision of Ulpian's definition of law with Wittgenstein's understanding of the relationship between language, nature, and human agreement. I have no intention of demonstrating this in detail. But I would like to render some of Aristotle's points in terms that I have used above in order to clarify the sense in which law and justice are *essentially* political.

Like Wittgenstein, Aristotle views language as something that is not only natural to human beings, but also constitutes the basic difference between human beings and other animals. Other animals can feel pain and pleasure, and they can communicate this to each other by expressing their pain and pleasure. But only human animals can *say* that pain is to be avoided as harmful, and pleasure to be sought out as advantageous, and communicate *that* to each other, for that requires language. For the same reason, only human beings can say what is right and what is wrong.

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94.   11 ARISTOTLE, *supra* note 8, § 1.i.9–12.

95.   The Greek equivalents point to some of the difficulties: Aristotle was not talking about man (ἀνήρ), but about human beings (ἄνθρωπος); he uses one and the same word (δίκη) for what the translation calls "justice" on one occasion and "judicial procedure" on another; conversely, the English uses one and the same word ("justice") for what Aristotle calls δίκη ("law") on one occasion and δικαιοσύνη ("justice") on another; and where the English speaks of a "decision of what is just," Aristotle speaks of τοῦ δικαίου κρίσις, which literally means "the crisis of the just," and which, in the context of this Article, I would translate as "the use of a criterion to make a judgment that is just."

Aristotle thus derives our ability to make what we call "moral" or "normative" statements about right and wrong directly from our natural faculties. He explicitly treats human beings as animals, and he uses the same word for our perception of good, bad, right, and wrong, as he does for our perception of pain and pleasure, namely, *αἴσθησις*. On his understanding, our natural ability to perceive things by the senses enters both into the difference between pain and pleasure and the difference between right and wrong. He leaves no room for the dichotomy between nature and culture—or facts and norms—that we have been trained to treat as fundamental to morality. Very much like Wittgenstein, Aristotle maintains that our form of life is grounded in our nature; that language is part of our nature; that there is a natural link between our agreement in sensations (in feeling pain and pleasure) and our agreement in language (in calling these sensations "pain" and "pleasure"); that the link is forged by a natural development that leads from perceptions shared by all animals to perceptions of good, bad, right, and wrong, which are unique to human beings; that this development constitutes our natural history; and that it culminates in the formation of political communities.[96]

That explains why Aristotle considers politics to be a matter of human nature, and why he insists that it is prior to the individual. It is important to be clear about the nature of this priority. It is emphatically not priority in time. True, all human beings have a natural impulse towards living together in political communities, and they have this impulse from the beginning, long before such communities exist. But it takes more than a natural impulse to form such associations. Aristotle states explicitly what it takes, namely, agreement in what is called "good," "bad," "right," and "wrong." *This*, he asserts, is what "makes a household and a city-state." Thus, even though language and the perception of good and bad are natural to us as human beings, it is by no means a foregone conclusion that we will live in households or political communities. In order to arrive at that conclusion, our natural ability to perceive right and wrong needs to be developed, exactly as our natural ability to speak needs to be developed, in order for us to learn how to speak a particular language.[97]

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96.   Compare WITTGENSTEIN, *PI*, *supra* note 1, ¶¶ 244–45, the famous paragraphs in which Wittgenstein turns the conventional understanding of the relationship between words and sensations on its head:

> How do words *refer* to sensations?—There doesn't seem to be any problem here; don't we talk about sensations every day, and name them? But how is the connection between the name and the thing named set up? This question is the same as: How does a human being learn the meaning of names of sensations? For example, of the word "pain." Here is one possibility: words are connected with the primitive, natural, expressions of sensations and used in their place. A child has hurt himself and he cries; then the adults talk to him and teach him exclamations and, later, sentences. They teach the child new pain-behaviour.
> "So you are saying that the word 'pain' really means crying?"—On the contrary: the verbal expression of pain replaces crying, it does not describe it.
> How can I even attempt to interpose language between the expression of pain and the pain?

97.   Note how closely the distinction between the natural impulse to form a *polis* and the agreement that constitutes a *polis* parallels Wittgenstein's distinction between agreement in form of life and agreement in judgments and definitions.

This development proceeds in time.[98] It does not begin with political communities; it ends with them. There was a time when there were no political communities. The development of political communities is natural, but it is not necessary and it involves founders. If it succeeds, it results in the formation of political communities whose members are agreed with each other in their judgments and definitions of what is right and wrong. But it may not succeed. Aristotle finds it entirely conceivable that some human beings may not be able to join political communities, and perhaps not even households. These he considers to be deficient, because they do not develop their nature to its full extent. In order to explain how they differ from human beings who do live in a *polis*, he uses the analogy of an isolated piece at draughts—not coincidentally the same analogy that Wittgenstein uses in order to explain the difference between the words "true" and "false" when they are being used in the language-game of telling the truth and when they are *not* being so used, except that in his case the game is chess.[99] Aristotle finds it equally conceivable that some human beings may live apart from political communities because they develop beyond the level that normal human beings are able to achieve. These human beings he considers to be like gods.

When Aristotle asserts that it is agreement on the meaning of right and wrong which makes a household and a city-state, he mentions households and city-states in the same breath. This matters, because it suggests that agreement on right and wrong is not necessarily political. It may be limited to households, in which case it is "economical." But Aristotle does distinguish between households and city-states later on. The difference is that city-states have institutions that do not exist in households but only in political associations. These institutions consist of law and justice. For justice, as the English translation puts it, "is an element of the state," and "judicial procedure, which means the decision of what is just, is the regulation of the political partnership."[100] The Greek is clearer. It says that justice [δικαιοσύνη] is political [πολιτικόν] because the organization [τάξις] of a political community [πολιτικῆς κοινωνίας] depends upon the law [δίκη], and the law in turn consists of judgments of what is just [τοῦ δικαίου κρίσις].

These are the words with which Aristotle ends the first chapter of the first book of the *Politics*. On my understanding, they make for an exceptionally clear statement, not only of the way in which law and justice are intertwined with each other, but also of the way in which both are essentially political. They are intertwined with each other because agreement in definitions of law is meaningless unless it is accompanied by agreement in judgments of what is just. They are essentially political because such agreements are made by specific communities of human beings

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98.   *See* 11 ARISTOTLE, *supra* note 8, § 1.i.4–8.

99.   *See* WITTGENSTEIN, PI, *supra* note 1, ¶ 136. I have no idea if Wittgenstein actually took the analogy from Aristotle. I suspect rather not. He read Plato with admiration, but according to RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 496 (Penguin Books 1991) (1990), he "claimed proudly never to have read a word of Aristotle."

100.   *See* 11 ARISTOTLE, *supra* note 8, § 1.i.12.

coming to specific terms on the meaning of law and justice. There is no reason whatsoever to believe that all human beings will come to the same terms. The terms will differ from time to time and place to place, and the communities of human beings will be as different from each other as the languages they speak.

In Aristotle's view, politics was essentially related to the institutions of law and justice. When he made the first systematic effort to survey the organization of law and justice in as many different political communities as possible, he was not engaged in an "empirical" investigation of their "constitutional law." He was studying the essence of politics, justice, and law. Plato's dialogue *The Republic* discusses the best state in order to arrive at a definition of justice, and the dialogue Plato wrote about the best state later in life is called *The Laws*. Plato and Aristotle both understood something that seems to have escaped Ulpian: no account of law and justice is complete without an account of politics.

C. History

Taking the intertwinement of law and justice to be essentially political has definite implications for historians of law. These implications are as deeply rooted in our practice as they are widely put into effect. But they are thoroughly obscured by the pathology I mentioned at the beginning of this Article. If our theory is to reflect our practice, instead of damaging its meaning, they need to be spelled out, as follows.

As historians, we deal with changes in the affairs of human beings over time. In a standard formulation we are supposed to figure out what really happened. This complicates the general problem of how to make our definitions stick to reality. It does so because we cannot tell what happened in the past unless we consider two different ways of telling it: our own and that of those to whom it happened. These two ways differ from each other as the agreement in judgments and definitions we use in writing history differs from the agreement in judgments and definitions used by the people whose history it is. How ought we to address this difference?

At this point it is easy to get confused by our profession's standard teachings about evidence, context, interpretation, objectivity, anachronism, and so on. In order not to get confused, it may help to distinguish between saying or doing something and understanding what is being said or done. This difference is like that between understanding a language and speaking a language. To understand what is being said or done we need to know the agreement in criteria of judgment determining the meaning of what is being said or done. But we do not have to join in the agreement and use the same criteria ourselves. One can understand French without speaking French.

That changes as soon as we are saying something ourselves. If we want our words to have a meaning, we do not merely need to understand someone else's criteria of judgment; we need to use criteria ourselves. That means we have to choose: shall we use our criteria or theirs? Shall we speak French or English?

To take an example from the history of law, we can understand the people who maintained that slavery is a legitimate form of employment. In their judgment, slaves did not qualify as human beings in the full sense of the word. They used different criteria from us in order to decide who is and who is not a human being. The justice of slavery depends on those criteria. Understanding the people who used those criteria means knowing the criteria they used. But knowing their criteria does not mean that we have to agree with them.[101] We can say: "I understand that they did not consider slaves as human beings. But in fact slaves are human beings, too." In saying "I understand that they did not consider slaves as human beings," we express our understanding of the criteria they used. In saying, "But in fact slaves are human beings, too," we use our own criteria.

Using our own criteria amounts to more than merely expressing an opinion, stating a fact, or conveying a piece of missing information, as we might very well be doing with interlocutors who do not know the meaning of "slave" or used the term mistakenly. It also means that we commit ourselves to the criteria we use. This is a political commitment. It establishes our membership in a political community united by agreement in judgments and definitions of what a human being *is*. It also places us in opposition to those who do not agree with our criteria.

We do not make this commitment by saying, "We do not approve of slavery," although we could say that, because in fact we don't approve. We also do not make it by saying, "We commit ourselves to the equality of human beings," although we could say that, too. If we said that, we would be making a commitment that is explicitly political. But here we only say that slaves are human beings, too, and we commit ourselves to nothing besides the truth of what we say. We need to say no more in order to affirm our membership in a political community.

The community in which we thus affirm our membership need of course not be the present political community. It may be some other political community. It need not even be an actually existing political community. It may be a future political community existing nowhere besides our imagination.[102] It also need not put us at odds with past political communities. In many areas of history we are united by criteria of judgment that have barely changed through the millennia, if they have changed at all. We all agree that when it rains, the earth gets wet. Most mountains have not moved. True, our concept of the sun has changed since Copernicus convinced us that it is not circling around the earth. In that sense what we call "sun" is something very different from what used to be called "sun" before Copernicus. Such differences can result in serious disagreements. In fact they did in early modern Europe. But they give us no reason to conclude that cultural and historical

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101.   There is an important sense in which knowing the criteria *does* mean agreeing with them. In this sense, not agreeing with the criteria makes it entirely appropriate to say, "I do not understand how you can consider any human being to be a slave," even if, in another sense, we understand perfectly well what proponents of slavery are saying. I cannot pursue this further here. But it would be dangerous to assume that the one sense is always easy to distinguish from the other.

102.   I thank Kathleen Davis for prompting me to make these points.

differences make for insuperable obstacles to communication by locking us up inside hermetically sealed communities, as Wittgenstein is frequently accused of having claimed.[103] The sun still rises, shines, and sets. We still are born, grow up, eat, drink, sleep, dream, cry, laugh, sing, mate, fall in love, fight, get hurt, get angry, get sick, and die in the end. On that score there is no disagreement whatsoever between ourselves and any other community of human beings present or past. But no matter which criteria we use, as soon as we say anything at all, we make a commitment to *some* political community.

The intimate relationship between telling the truth and committing oneself to a political community is nicely reflected in the etymology of the words "truth" and "fact" themselves. "Truth" is related to "trust," "truce," "troth" (a doublet of truth that signifies a pledging of fidelity), and *Treue* ("faithfulness," "loyalty"), and "fact" means "something done" or "something made."[104] This etymology deserves to be respected. Facts are given to no one who has made no commitments to any criteria, and nothing can be said to be true, or false, without placing one's trust on a political community. Such trust depends entirely on the conviction with which we maintain the facts *as* facts, the truth *as* truth. This does emphatically *not* make the truth a matter of opinion, nor does it make facts fictitious, for the reasons considered at length above. But it does explain why freedom of thought and expression is essential both to the health of a political community and to the maintenance of truth, as no one saw more clearly than John Stuart Mill, or explained better than he did in *On Liberty*. Without such freedom both politics and truth can only whither.

History is rife with disagreements about criteria of judgment that have changed over time. The case of slavery—once thought to be a reasonable institution, now thought to be abhorrent—is merely one particularly clear example. Such disagreements divide the living from the dead. That poses a special challenge to historians. How are we to adjudicate disputes between political communities divided in not space, but time, pitting the dead against the living?

According to an ancient saying, we are to say "nothing but good about the dead," *de mortuis nil nisi bonum*.[105] That is obviously not advice historians can heed. The best that we can do is what we have all along been taught: give a full hearing to

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103.   For incisive treatments of this issue, see generally Stroud, *supra* note 7, and Diamond, *supra* note 46.

104.   *See* PARTRIDGE, *supra* note 75, at 195 (s.v. "fact"); *id.* at 740 (s.v. "true"). During the Middle Ages, the word "fact" was chiefly at home in the courts, where it was used to refer to "something someone did" or "a deed for which someone is responsible." It was only in the early modern period, particularly in the wake of Francis Bacon, that the word "fact" lost its intimate relationship to the actions of human beings and acquired the meaning of "something entirely objective" or "something that just happens to be what it is," quite apart from anyone's having to do anything. For a highly pertinent study of this transformation, see Lorraine Daston, *Baconsche Tatsachen* [*Baconian Facts*], 1 RECHTSGESCHICHTE 36 (2002) (Ger.). Also, see generally LORRAINE DASTON & PETER GALISON, OBJECTIVITY (2007).

105.   Widely quoted in varying formulations, originally attributed to Chilon by DIOGENES LAËRTIUS, LIVES AND OPINIONS OF EMINENT PHILOSOPHERS 33 (C.D. Yonge trans., Henry G. Bohn 1901) (c. 350).

all sides, refrain from judging until we have considered all of the evidence, and not judge recklessly. But that does nothing to absolve us from the responsibility for taking sides. The reason is not by any means that we have to express opinions on the morality of what the dead have done. It is that we differ from the dead over the meaning they gave to terms we use day in, day out: not only "good" and "bad," "law" and "justice," or "slavery" and "freedom," but also terms like "property," "inheritance," "marriage," "family," "child," "state," "church," "war," "peace," "love," "friend," "foe," and "nature."

Such disagreements go to the very core of politics and freedom.[106] There is no way to write the history of law without confronting them, and no way of confronting them without affirming our membership in a political community. Once we start writing history, we put the dead on trials in which we act as judge, jury, counsel for the defense, and prosecutor at the same time. That is a responsibility one does not need to take if one is dealing only with disagreements among the living.

Historians who only want to understand the past do not want to take sides. They merely want to know the agreements by which the members of past political communities were united. Knowing what those agreements were means being able to figure out what those past people *thought* they were saying and doing.[107] But it does not amount to writing history. In order to write history, we need to say what they *were* saying and doing. This is as different from understanding what they meant as understanding what they meant is different from agreeing with what they did. There is no way for us to say what they were doing unless we commit ourselves to the criteria on which the meaning of our words depends. This is a political commitment. Reducing history entirely to understanding the people of the past means making no commitment to *any* political community.[108] That makes the truth about the past impossible to tell.

D. *Empirical Method and Conceptual Confusion*

I think this helps to understand why historians place so much emphasis on evidence. We hope that studying the evidence will relieve us of our responsibility for making judgments about the dead. Instead of saying, "This is what the evidence is saying in light of the criteria of judgment to which we are committed," we would prefer to say, "This is what the evidence is saying. Judgment has nothing to do with

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106.   Disagreements among the living can be as deeply rooted in the past as disagreements between the living and the dead, and they can be impossible to solve without invoking the dead. There are no disagreements that do not extend into the past at all. But the living can speak for themselves. The dead cannot.

107.   R.G. Collingwood defined this as the task of historians. R.G. COLLINGWOOD, THE IDEA OF HISTORY (T.M. Knox ed., 1946).

108.   Perhaps one can make the same case for historians who try to write history entirely in terms of quantitative measures. Their method may seem to be precisely opposite to that of historians who only seek to understand. But pure understanding and pure measurement have one thing in common: both hold out the promise of freedom from having to make political commitments.

it. It is simply a fact."[109] That looks like a commitment to empirical research based on a proper theory of knowledge. But it proceeds from fear of taking responsibility for our membership in a political community.

This fear is self-defeating. It fuels the pathology on which this Article is meant to gain a grip. Conducting empirical research means putting our criteria to use by making judgments about the meaning of the evidence. Once judgment goes out of the research, the result does not consist of knowledge. It rather consists of sentences that have no settled meaning. Trying to settle the meaning of such sentences without committing to any judgments is tantamount to falling under the spell of metaphysical illusions. Such illusions lead to debates with a characteristic combination of heat, profundity, and nonsense. They pit realists against idealists, skeptics against positivists, rationalists against voluntarists, historicists against transcendentalists, and so on. In the case of law they lead us to focus on such questions as whether law is a matter of ideas or social reality, principles or precedents, facts or norms, rules or decisions, form or substance, chance or deliberation, theory or practice, objective values or subjective opinions, will or reason, nature or history, and so on—and this is how such illusions divide us into schools of thought like those I mentioned in the introduction.

Debates like that can never end. They always recur in a new guise as soon as any party seems to have won. Wittgenstein captured the logic of such debates with admirable clarity:

> [W]e're tempted to say that our way of speaking does not describe the facts as they really are. As if, for example, the proposition "he has pains" could be false in some other way than by that man's *not* having pains. As if the form of expression were saying something false, even when the proposition *faute de mieux* asserted something true.
>
> For *this* is what disputes between idealists, solipsists and realists look like. The one party attacks the normal form of expression as if they were attacking an assertion; the others defend it, as if they were stating facts recognized by every reasonable human being.[110]

There are good reasons why we are "tempted to say that our way of speaking does not describe the facts as they really are." The most obvious is that our judgments can be wrong. The most compelling is that agreement in judgments can fall apart when political communities are subjected to rapid social change. Such reasons make the fear of taking responsibility for judgments embedded in our use of criteria completely understandable. They explain why human beings sometimes conclude that they had better withdraw their trust from judgments as thoroughly as Descartes did during the Thirty Years War.[111] They also help to understand why some of the most spectacular advances in the name of pure objectivity were made in the

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109.   *Cf.* Daston, *supra* note 104.
110.   WITTGENSTEIN, *PI*, *supra* note 1, at ¶ 402.
111.   RENÉ DESCARTES, DISCOURS DE LA MÉTHODE [DISCOURSE ON THE METHOD] (1637) (Fr.), *translated in* 1 THE PHILOSOPHICAL WRITINGS OF DESCARTES, *supra* note 14, at 109, 127.

aftermath of social collapse on a grand scale. Think of the invention of logic and science in ancient Greece after the collapse of Mycenaean civilization; the invention of the systematic logical analysis of writing in Latin Europe after the collapse of the Carolingian Empire; and the invention of differential calculus and the mathematical analysis of nature after the collapse of the church amidst religious warfare.

As these examples show, agreements on new criteria of judgment established in a concerted effort to put an end to chaos by substituting pure objectivity for judgment can last for many centuries. The very novelty of the agreement makes it only too easy to confuse what is in fact the formation of a new political community with the discovery of objective facts on the foundation of a sound theory of knowledge, all the more so since new criteria invariably lead to discoveries that could not have been made without them. Real progress can be made that way. But none of this means that those objective facts can be maintained as true without political agreement. Whatever debates might seem to have been settled by the formation of new political communities can be revived at any moment in new and more destructive forms as soon as new discoveries result in doubts that go beyond mere disagreements in opinion and prove impossible to settle by reference to objectivity. Such doubts resuscitate the fear of taking responsibility for judgment, the temptation to put metaphysical illusions into the place of truth, and the debates provoked by those illusions.

Pursuing such debates all the way to the bitter end wreaks havoc with politics. The havoc can take the form of anarchy and civil war. But it can also be embalmed in institutions like sovereignty and the distinction between a private and a public sphere. Both sovereignty and the distinction between the private and the public sphere are lasting institutional expressions of Europe's failure to take political responsibility for the havoc it wrought in the name of God by waging religious war. As the distinction between private and public entitles individuals to disavow responsibility for their religious faith, so sovereignty entitles sovereigns to disavow their responsibility for law. As we are not obliged to answer to anyone for our beliefs, so sovereigns are not obliged to answer to anyone for their decisions. The same is true of evidence. The absolute authority that evidence was given in early modern times is analogous to sovereignty: it answers to no one.[112] There really is a line that leads from the assertion of pure objectivity to the formation of political communities whose members surrender their judgment to rulers whose will is law by definition.

You may conclude that I intend to change how the history of law is written. That would be a misunderstanding. As far as I can tell, in practice historians have always done what I have tried to explain: make judgments about the meaning of the evidence and affirm their membership in a political community by trying to tell the truth about the past.[113] They may not know that this is so, and they may loudly

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112.   *Cf.* Daston, *supra* note 104.
113.   For examples of such affirmations by telling the truth about the past, consider ENNIO CORTESE, LA NORMA GIURIDICA: SPUNTI TEORICI NEL DIRITTO COMUNE CLASSICO [THE RULE OF

protest that it is not. But it is. As Arnaldo Momigliano once put it with a sarcastic flourish, "What history-writing without moral judgments would be is difficult for me to envisage, because I have not yet seen it."[114] I could hardly agree more. There is no history of law without agreement in criteria of judgment, and there is no agreement in criteria of judgments without committing oneself to a political community. What makes the work of historians compelling is never the absence of any judgments, but the presence of judgments embedded in criteria used for no other purpose than to make statements of fact. Good histories of law make their commitment to a particular political community without saying so at all. Such histories cannot be written by distinguishing empirical research from moral judgment. They rather require what Hannah Arendt called using the "imagination consciously as an important tool of cognition."[115]

CONCLUSION

Stanley Cavell has written that searching for criteria amounts to making "claims to community."[116] Writing history means making claims to community with the past. It is not only a matter of evidence and chronology but also of judging where our agreements with the dead come to an end. This is why writing the history of law amounts to writing the history of justice at one and the same time. This is also why the history of law furnishes a kind of knowledge that is essential for maintaining justice. Writing the history of law means making a commitment to a

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LAW: THEORETICAL POINTS IN THE CLASSIC COMMON LAW] (1962–1964) (It.); LAURO MARTINES, LAWYERS AND STATECRAFT IN RENAISSANCE FLORENCE (1968); R.I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE, 950–1250 (1987); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. Cambridge Univ. Press 1968) (1898); BRIAN TIERNEY, FOUNDATIONS OF THE CONCILIAR THEORY: THE CONTRIBUTION OF THE MEDIEVAL CANONISTS FROM GRATIAN TO THE GREAT SCHISM (1955); CHRISTOPHER L. TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865 (2010); and FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY (Tony Weir trans., 1995).

114.   ARNALDO MOMIGLIANO, *Historicism Revisited*, *in* ESSAYS IN ANCIENT AND MODERN HISTORIOGRAPHY 365, 370 (Univ. of Chi. Press 2012) (1947).

115.   Hannah Arendt, *A Reply*, 15 REV. POL. 76, 79 (1953) (a reply to Eric Voegelin's review of HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951)) ("Reflections of this kind [about the degree to which it is possible to describe the concentration camps of Nazi Germany objectively], originally caused by the special nature of my subject, and the personal experience which is necessarily involved in an historical investigation that employs imagination consciously as an important tool of cognition, resulted in a critical approach toward almost all interpretation of contemporary history."). For a terrific illustration of the damage a lack of imagination can do to scholarship, see DIAMOND, *supra* note 7, at ch. 12. The illustration consists of a moral philosopher so captivated by the distinction between "moral principles" and "empirical facts" that he failed to grasp the imagination with which Socrates reconfigured the meaning of law in the *Crito. Id.* For an example closer to home, consider the significance attributed to the distinction between "empirical facts" and "theory" by Tim Dare, *Disagreeing About Disagreement in Law: The Argument from Theoretical Disagreement*, 38 PHIL. TOPICS, Fall 2010, at 1, in an attempt to improve on the Hart-Dworkin debate.

116.   *See* CAVELL, *supra* note 7, at 20 ("The philosophical appeal to what we say, and the search for our criteria on the basis of which we say what we say, are claims to community.").

particular political community by settling disagreements with the dead. It furnishes a kind of knowledge that is essential for maintaining justice because it gives a meaning to "law," "justice," and "politics," without which law, justice, and politics fall to the judgment of the dead or that of arbitrary rulers. It does not consist of writing about *justice*, but of making judgments in writing about the history of *law*. It is neither to be confused with expressions of opinion nor with statements of pure fact: not expressions of opinion, because it requires statements of fact; not statements of pure fact, because there are no facts to state without agreement in the judgments that make a political community.