ESSAY

NORMATIVITY AND OBJECTIVITY IN LAW

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The agreement of people in calculation is not an agreement in opinions or convictions.
-Ludwig Wittgenstein1

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INTRODUCTION

The protagonists battle on. Trumpeting right answers, objectivists lash out against the unrelenting tide of nihilism, postmodernism, and deconstruction. Armed with the tools of literary theory, antifoundationalism, and Kuhnian "relativism," subjectivists dismiss the dreams of objectivism as philosophical illusions. But the "conflict" between these two camps is vastly overstated. In fact, the entire debate depends upon a shared premise, one that is both false and unnecessary. The objectivism/subjectivism debate assumes a picture of mind and law that should be extirpated rather than explicated. In this Article, I argue in favor of objectivity but do so

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2. RONALD DWORIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORIN, SERIOUSLY] (arguing that even in so-called "hard cases" there is a right answer to every legal question).

3. For a discussion of the work of Michael Moore, see infra notes 23-25 and accompanying text.

4. Dworkin must be given credit here, for he was the first to notice the connection between questions of "truth" in the philosophy of language and issues in jurisprudence. Ronald Dworkin, Introduction, in THE PHILOSOPHY OF LAW 1 (Ronald Dworkin ed., 1977) ("Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.").

5. Although certainly not an objectivist, Ronald Dworkin does give voice to the impatience felt by some in the objectivist camp. Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 PHIL. PUB. AFF. 87, 87 (1996):


7. For more on the particulars of subjectivism, see infra notes 33-52 and accompanying text.

8. Objectivism and subjectivism (relativism) need each other: without its opposite, neither position would get off the ground. See BRIAN FAY, CONTEMPORARY PHILOSOPHY OF SOCIAL SCIENCE 220 (1996):

[Objectivism and relativism are not true opposites; indeed, they exist on the same spectrum albeit at opposite ends. Both assume that objectivity requires]
from a more perspicuous framework. I seek to change the terms of the debate from one of mind to one of action. After this change is effected, the current debate will simply fade away, and a new, more revealing focus shall take its place.

Objectivity is often theorized as a relationship between an assertion and some state of affairs in virtue of which the assertion is "objectively true." The nub of the argument is that assertions or beliefs are true in virtue of the way things are (i.e., facts). Facts make assertions and beliefs true, and objectively so, for facts are not mere matters of mind: they are a function of the way things are. By conceptualizing objectivity in terms of a connection unmediated access to the world, the only difference between them being that objectivists believe this access attainable at least in theory, while relativists deny this access attainable even in theory. Objectivism and relativism are simply opposite sides of the very same coin.

9. This is "the venerable notion that truth is the property of corresponding with reality." PAUL HORIZHICH, TRUTH 8 (2d ed. 1998). For a succinct discussion of the correspondence theory of truth in a wider context of theories, see Paul Horwich, Theories of Truth, in BLACKWELL COMPANION TO METAPHYSICS 491-96 (Jaegwon Kim & Ernest Sosa eds., 1995).

10. Objectivity and truth are often seen as metaphysically related. Andrei Marmor, Three Concepts of Objectivity, in LAW AND INTERPRETATION 177, 181 (Andrei Marmor ed., 1995) ("Objectivity in the metaphysical sense ... implies that there is a truth of the matter consisting in the fact that there is an object with properties corresponding to its description by the statement in question."); NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996) (discussing the links between law and metaphysics).


[Two senses are crucial, an epistemic sense of the objective-subjective distinction and an ontological sense. Epistemically speaking, "objective" and "subjective" are primarily predicates of judgments. We often speak of judgments as being "subjective" when we mean that their truth or falsity cannot be settled "objectively," because the truth or falsity is not a simple matter of fact but depends on certain attitudes, feelings, and points of view of the makers and the hearers of the judgment. An example of such a judgment might be, "Rembrandt is a better artist than Rubens." In this sense of "subjective," we contrast such subjective judgments with objective judgments, such as the judgment "Rembrandt lived in Amsterdam during the year 1632." For such objective judgments, the facts in the world that make them true or false are independent of anybody's attitudes or feelings about them. In this epistemic sense we can speak not only of objective judgments but of objective facts. Corresponding to objectively true judgments there are objective facts. It should be obvious from these examples that the contrast between epistemic objectivity and epistemic subjectivity is a matter of degree.

In addition to the epistemic sense of the objective-subjective distinction, there is also a related ontological sense. In the ontological sense, "objective" and "subjective" are predicates of entities and types of entities, and they ascribe
between a belief or assertion and a mind-independent state of affairs, proponents of objectivity all but guarantee creation of objectivism's opposite, subjectivism. Subjectivists deny the efficacy of the objectivist account of the relation between mind and world, locating the seat of truth and belief in the individual subject. The debate is intractable.

I argue that the choice between objectivism and subjectivism is false. Just because we are free to describe a situation in a variety of ways (rejecting objectivism) does not dictate the conclusion that, within each vocabulary, there are no standards for correct and incorrect assertion (rejecting subjectivism). I propose to approach objectivity from the point of view of normativity. By "normativity" I mean to identify the ways in which speakers of a language appraise assertoric utterances in terms of "correct" and "incorrect" or "true" and "false." I want to replace the conventional understanding of objectivity with an account of the notion that grows out of the actual practice of law. My claim is that the normativity and objectivity of legal judgment is a function not of the way the world is, but is forged in community agreement over time. Action, not mind, is the basis of this alternative approach to normativity and objectivity.

Law exhibits an argumentative framework employed by participants in legal practice to show the truth of legal propositions. Identifying this framework, and describing how it is
used to appraise propositions of law, is a central feature of my argument. Objectivity is a product of the recursive use of this argumentative framework. I shall describe the framework in detail, explain how action, not mind, is the central feature of normativity, and then explain both the presence and limits of objectivity in law.

This Article has five parts. I begin by describing the current state of the objectivity debate in legal theory. The two leading positions, objectivism and subjectivism, are discussed in the context of exemplary examples of each position. The conclusion of this part of the Article is that the debate between objectivism and subjectivism rests on a false premise. Having identified that premise, I explain in Part II why normativity can best be thought of in social rather than cognitive terms. Here I discuss the oft-trodden topic of rule-following to set the stage for Part III, where I argue for the social basis of normativity. In Part IV, we reach the practice of law. Here I detail why a social approach to normativity provides a more perspicuous account of the nature of objectivity in legal practice. Finally, in Part V, I consider possible objections to my account of normativity and objectivity. Specifically, I explain why law seems less objective than practices such as science and arithmetic.

15. The discussion of the current state of the debate is broader than that found in analytic jurisprudence, although I believe analytic jurisprudence is the place where one finds the most well-developed positions. That said, analytic philosophy does not comprise the entire field of legal theory. The discussion of objectivity, as well as related topics such as interpretation, indeterminacy, and linguistic meaning, is much wider than what is captured in the discourse of analytic philosophers. I think it important to consider this wider perspective in any discussion of objectivity. A recent and quite successful example of such an approach is GUYORA Binder & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000) (presenting a sophisticated and wide-ranging discussion of literary and philosophical approaches to the reading of texts).

16. The discussion in Part II centers around two logically distinct forms of explanation: causal and normative. My argument is that normative explanation is logically distinct from, and not reducible to, the language of causal explanation. For a discussion of the variety of forms of explanation, see DANIEL LITTLE, VARIETIES OF SOCIAL EXPLANATION (1991).

17. For an argument that law is less objective than naturalistic inquires such as the natural sciences, see Brian Leiter, Objectivity and the Problems of Jurisprudence, 72 Tex. L. Rev. 187 (1993) (reviewing KENT GREENAWALT, LAW AND OBJECTIVITY (1992)). See also Jules L. Coleman & Brian Leiter, Determinacy, Objectivity and Authority, 142 U. Pa. L. Rev. 549 (1993) (arguing for an account of law as "modestly objective").
I. OBJECTIVISM AND SUBJECTIVISM

Current discussions of objectivity in the jurisprudential literature come down to the question of grounds for legal judgments. There are two views, in both the philosophical and jurisprudential literature, that dominate the discussion. These views—which I will label “objectivism” and “subjectivism”—name two radically distinct approaches to the question of what it means to follow a normative standard such as a legal rule. Before we can consider a fresh approach to the question of normativity and the possibility of objectivity in law, thorough familiarity with the leading views in the objectivity debate is both necessary and appropriate.

A. Objectivism

When we look at various applications of a rule, it is quite natural to ask “In what sense are these different applications each an application of the same rule?” This question is an aspect of a broader philosophical inquiry, namely how are we able to look at a variety of different objects and say “These are the same.” Consider fruit. If the rule in question is “Only fruit will be served for snacks,” then we know the following items may be served: oranges, bananas, peaches, and grapes. This all seems quite straightforward. What is the philosophical issue? The philosopher asks “In virtue of what

18. These include questions about what the law permits or requires; whether a given legal standard has been violated; or whether a judge’s decision is correct as a matter of law.
19. Everything said herein about rules applies equally well to principles and policies. In some jurisprudential theories, distinctions among types of legal norms makes a difference. E.g., DWORKIN, SERIOUSLY, supra note 2, at 22 (arguing that rules and principles are logically distinct). Nothing I say turns on such distinctions.
20. The philosophical debate has traditionally been framed in terms of Realism and Nominalism. For example, Renford Bambrough explains that:

It is assumed as obvious by both the nominalist and the realist that there can be no objective justification for the application of a general term to its instances unless its instances have something in common over and above their having in common that they are its instances. The nominalist rightly holds that there is no such additional common element, and he therefore wrongly concludes that there is no objective justification for the application of any general term. The realist rightly holds that there is an objective justification for the application of general terms, and he therefore wrongly concludes that there must be some additional common element.
are all these items ‘fruits’?” Or, put differently, the philosopher might ask “What is it about all these items that makes them properly called ‘fruits’?”

The first answer we shall consider comes from the objectivist. It is not enough for the objectivist that all these things are called fruits. The objectivist believes that they are all called fruits because they are, in some sense, really fruits. What, one might ask, is the difference between something merely being called a fruit and it, in fact, being a fruit? To this question the objectivist has a distinct and well-wrought answer.

When we set out to follow a rule, we never believe that whether we have complied with the rule is a matter of opinion. We may believe that we have complied with the dictates of a rule, but that belief cannot be grounds for our claim that we have in fact complied. This shows that rules exhibit what we might term “epistemic primacy.” By this, I mean that the broad application of rules “seems to imply a standard of correctness that is independent of applications.”

To explain this phenomenon, the objectivist asserts the existence of a standard independent of the rule which enables rule application in a variety of contexts. Let us consider a jurisprudential example.

More than anyone, Michael Moore has championed the objectivist position in modern analytic jurisprudence. Moore explicitly


21. Ronald Dworkin makes frequent use of the word “really” in sentences such as the following: “[Riggs v. Palmer] was a dispute about what the law was, about what the real statute the legislators enacted really said.” Dworkin, Empire, supra note 14, at 20. In putting the matter as he does, Dworkin hints that there may be a difference between what we may think the law requires and what the law “really” requires. Does Dworkin thereby intend to suggest a realist jurisprudence? The point is that such phrasing suggests at least the possibility of a gap between the way things are (i.e., what the law “really” requires) and the way things seem to be (i.e., what we think the law requires). My point is that such a distinction is vacuous. Despite his hinting otherwise, Dworkin never attempts to supply the metaphysical scaffolding to support his hints at realism.


23. Moore self-identifies his position as “realism.” His view is certainly “realist” in the sense that he believes “reality” is mind-independent and has a structure which, in principle, can be grasped by the mind. For a definition of “realism,” see Michael Dummett, Truth and Other Enigmas 146 (1978) (“Realism I characterise as the belief that statements of the disputed class possess an objective truth-value, independently of our means of knowing it: they are true or false in virtue of a reality existing independently of us.”). I think Moore is
rejects the claim that the meaning of our words turns on anything but a standard of correctness independent of our discourse. Consider his treatment of the concept of "death." He writes:

A realist theory asserts that the meaning of "death," for example, is not fixed by certain conventions. Rather, a realist theory asserts that "death" refers to a natural kind of event that occurs in the world and that it is not arbitrary that we possess some symbol to name this thing. (It may be arbitrary what symbol we assign to name this class of events, but it is not arbitrary that we have some symbol to name it). Our intentions when we use the word "death" will be to refer to this natural kind of event, whatever its true nature might turn out to be. We will guide our usage, in other words, not by some set of conventions we have agreed upon as to when someone will be said to be dead; rather, we will seek to apply "dead" only to people who are really dead, which we determine by applying the best scientific theory we can muster about what death really is.

Finally, a realist theory of meaning will not view a change in our conventions about when to apply a word as a change in its meaning. If we supplant "heart stoppage" with "revivability" as our indicator of "death," we will do so because we believe revivability to be a part of a better theory of what death is than

more an "objectivist" than a "realist." Objectivism presupposes realism, but realism in no way entails or requires it. Objectivists share with realists the view that the world exists beyond our ideas and quite apart from anything we may believe about it. But the objectivist believes not only that the world exists independently of our ideas of it, but that the world has an order or structure that is, in principle, discernible. That said, not all objectivists adhere to the same set of philosophical ideals. The following is a description of "pure objectivism":

[O]bjectivism is a complex of ideas. It includes a realist ontology; a positivist epistemology; a correspondence theory of truth and scientific progress; and an axiology of disinterest. Within this complex, objectivity is conceived as a property of the results of inquiry, namely the property of these results being true. A theory or a fact is said to be objective if it fits with reality as it is in itself. Secondarily, persons or methods are said to be objective if they eliminate the subjective elements which typically prevent achieving objective truth.

FAY, supra note 8, at 204.

24. For a position with objectivist aspirations, see Brian Leiter, Objectivity, Morality, and Adjudication, in OBJECTIVITY IN LAW AND MORALS 66, 88 (Brian Leiter ed., 2000) ("Objective domains must generally answer to the world at some point: only then can we distinguish between mere hegemonic conventions from practices of argument about genuinely objective domains.")
heart stoppage. We will not have changed the meaning of "death" when we substitute one theory for another, because by "death" we intended to refer to the naturally occurring kind of thing, whatever the true nature of the event turned out to be. Our linguistic intentions are constant, on the realist theory, even if our scientific theories change considerably.  

In *Philosophical Investigations*, Wittgenstein characterizes views like Moore's as advancing a "rules on rails" thesis. The idea is that the applications of a rule extend into the future much as a rail extends the length and direction of a train. The train (rule) is connected to the rail (the essential property or natural kind term) and proceeds in a predetermined direction. The rule operates "as if" it were on a rail in that future applications of the rule (its extension) are already determined by the independent property (e.g., the natural kind term).

Wittgenstein reveals a basic problem with this picture (of a mind grasping an objective standard) of what it means to follow a rule with the argument that even if there were a standard like that imagined by the objectivist, the standard would be of no use to us unless we knew how to use it. And once we entertain the question

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What counts as doing the same thing, within the practice in question, is fixed by its rules. The rules mark out rails along which correct activity within the practice must run. These rails are there anyway, independently of the responses and reactions a propensity to which one acquires when one learns the practice itself; or, to put the idea less metaphorically, it is in principle discernible, from a standpoint independent of the responses that characterize a participant in the practice, that a series of correct moves in the practice is really a case of going on doing the same thing. Acquiring mastery of the practice is pictured as something like engaging mental wheels with these objectively existing rails.


27. See John McDowell, *Projection and Truth in Ethics* 11 (1987) (arguing that "we have some way of telling what can count as a fact, prior to and independent of asking what forms of words might count as expressing truths, so that a conception of facts could exert some leverage in the investigation of truth").
of how to use the "objective standard," the whole point of the exercise evaporates.\textsuperscript{28} Put differently, the problem is that anything that serves as a standard can be variously interpreted.\textsuperscript{29} And if a standard is amenable to various interpretations, one interpretation must be chosen. But the standard does not tell us which interpretation is the "correct" one. Thus, the very thing (the objective standard) introduced to solve the problem serves only to recapitulate the dilemma.\textsuperscript{30}

Thus, objectivism fails. What to do? One possibility is to embrace objectivism's opposite, that is, subjectivism. There are of course, many meanings to subjectivism, with possible candidates ranging from deconstruction\textsuperscript{31} to idealism.\textsuperscript{32} In addition to questioning the determinacy of linguistic meaning, subjectivist positions all embrace the view that linguistic meaning is located in the individual subject. Let us now turn to an example of this view.

B. Subjectivism

If objectivity is unattainable, then what? A favorite alternative—subjectivism—is well-represented in contemporary legal theory. The positions are various, to be sure. Yet each seems to make the failure of objectivism the starting point of analysis. An oft-quoted expression of this view is found in the work of Joseph Singer:

\begin{quote}

29. Hilary Putnam argues that the problem may be even deeper than I suggest: [E]ven when we see such a "reality" as a tree, the possibility of that perception is dependent on a whole conceptual scheme in place (one which may or may not legislate an answer to such questions as "Is the tree identical with the space-time region that contains it?" and "Is the tree identical with the mereological sum of the time-slices of elementary particles that make it up?").

HILARY PUTNAM, REPRESENTATION AND REALITY 113 (1988).

30. Wittgenstein discusses the use of drawn figures and the language of calculation in WITTGENSTEIN, FOUNDATIONS, supra note 1, at I-38. I discuss this further in Dennis Patterson, Wittgenstein and Constitutional Theory, 72 Tex. L. Rev. 1837, 1848-49 (1994).

31. See, e.g., JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Spivak trans., 1976) (criticizing "logocentrism" and "presence" in Western metaphysics).

32. "Idealism" is "the view that mind is the most basic reality and that the physical world exists only as an appearance to or expression of mind." CONCISE ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 379 (2000).
\end{quote}
We cannot expect the new to emerge phoenix-like from the old. Traditional legal theorists have assumed that theory is, or should be determinative—that the goal of theory is to generate answers. For this view to make sense, we must believe that it is possible to find out what to do by thinking in the right way....

But in the end, all the sophisticated versions of theory that seek to describe it as a decision procedure based on a sure foundation are supremely unconvincing; they cannot convince precisely because they are so sophisticated. The dilemma comes down to this: For a theory to generate answers, it must be mechanical, yet no mechanical theory can render an adequate account of our experience of legitimate moral choice. We cannot even escape the dilemma by trying to make some of our choices (the "core") mechanical and some (the "periphery") open-ended: No mechanical choices appear to be unequivocally valid.33

Bereft of a mechanical decision-procedure for making choices, we are left to our own devices. Our only compasses in a world of indeterminate values, and equally indeterminate meaning, are our own predilections, what has come to be known as our "politics."34

There is one figure in the subjectivist camp who affirms the basic tenets of the position but has a totally different response to the


34. At least one early champion of the indeterminacy/politics thesis has recently tempered his opinion, stating:

The radicalization of indeterminacy is ... a mistake; not merely a mistake about law and language but also a mistake about the relation between what the radical indeterminists mean and what they say. Emerging as the all but inexorable outcome of a long progression of ideas, the radicalization of the indeterminacy thesis makes us realize that something has long since gone wrong in the terms of this discussion.

....

We cannot, just by saying so, turn a political defeat into a word game. We must sacrifice the metaphor to the campaign, and recognize that law can be something, and that it matters what it is. Having rejected the radicalization of indeterminacy as a misstatement of radical intentions, we must then go on to repudiate the central role of the problem of determinacy and discretion in legal theory.

"problem." I have in mind Stanley Fish. Although it is certainly true that Fish's views have gone through a number of iterations,35 he has consistently adhered to a basic hermeneutic36 theme: all understanding is interpretation. The following is representative:

The point is a simple one: All shapes are interpretively produced, and since the conditions of interpretation are themselves unstable—the possibility of seeing something in a "new light," and therefore of seeing a new something, is ever and unpredictably present—the shapes that seem perspicuous to us now may not seem so or may seem differently so tomorrow. This applies not only to the shape of statutes, poems, and signs in airplane lavatories, but to the disciplines and forms of life within which statutes, poems, and signs become available to us.37

35. The following summary of the evolution of Fish's thought is instructive: Stanley Fish ... has long since committed himself to the initial assertions of reader-response criticism and ... continues to do so but, by changing his position a number of times, has struggled with the kinds of unacceptable consequences of those assertions.... But his latest reformulation [STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980)], which is offered as if no more than a refinement, amounts in fact to his abandoning its essentials completely. His most recent version, then, involves the postulation of interpretive communities, with assumptions and conventions that guide interpretation; this, in his view, allows communication to take place and so rescues him from the consequences of earlier formulations. Now it is, of course, true that a text means nothing without conventions shared by the speakers of the language concerned, but to acknowledge this fully would, as Fish sees, abolish his reader-response position: if readers are guided by the rules of language, they do not have the freedom envisaged by reader-response theory, and so the text together with its relation to the linguistic system can be the place to which disputes are appealed after all, contrary to the statement by Fish that I cited. In order to continue to cling to his reader-response position, then, Fish continues to deny that it is sharing a language and "knowing the meanings of individual words and the rules for combining them" that is involved in communication but, instead, a "way of thinking, a form of life." But this direct denial that the shared rules of language makes communication possible is surely bizarre, and the distinction he makes here is certainly untenable. Oddly enough, Fish's language here recalls Wittgenstein's, but in using it Wittgenstein was pointing out precisely that a language with its rules, conventions, and agreements is a way of thinking and form of life!

John Ellis, Against Deconstruction 121 n.6 (1989).

36. For discussion of the hermeneutic tradition, see infra note 43.

The meaning of everything is "interpretively produced." The conditions of interpretation themselves are unstable. Therefore, linguistic meaning is unstable. Today's "correct" interpretation is tomorrow's "error." All of this is quite controversial and hotly contested.\textsuperscript{38} Having already advanced an in-depth critique of Fish's views,\textsuperscript{39} I do not wish to rehash those arguments here. There is, however, an aspect of Fish's thought that is quite widely shared,\textsuperscript{40} and that is the idea that the world comes to us through acts of interpretation.\textsuperscript{41} The idea is most fully developed\textsuperscript{42} in the hermeneutic philosophical tradition,\textsuperscript{43} but is a commonplace in

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\textsuperscript{38} See Dennis Patterson, Law and Truth 99-127 (1996) [hereinafter Patterson, Truth]. For an exchange with Fish over my reading of his work, see Colloquy, 72 Tex. L. Rev. 1-77 (1993) (including article by Patterson, reply by Fish, and rebuttal by Patterson).

\textsuperscript{39} See, e.g., Drucilla Cornell, The Philosophy of the Limit 101 (1992) ("It is interpretation that gives us the rule, not the other way around.").

\textsuperscript{40} See, e.g., Frederick Schauer, Playing by the Rules 207 (1991) ("Every application of a rule is also an interpretation.").

\textsuperscript{41} For an excellent critique of Cornell on interpretation, see Martin Stone, Focusing the Law: What Legal Interpretation Is Not, in Law and Interpretation, supra note 10, at 31-96 (discussing the limits of interpretation in law).


\textsuperscript{43} Our everyday life is pervaded by interpretation, both of ourselves and of other entities. Everyday, 'circumspect' interpretation is prior to the systematic interpretation undertaken by the humane sciences, and prior to the
This notion, I believe, is philosophically flawed. 

explanations of the natural sciences. A scientist has to find the way to the library or laboratory, and interpret its contents as books or other equipment, before doing any science. According to Heidegger, we interpret all the way down. We do not first see uninterpreted black marks on a white background or first hear pure sounds, and then interpret them as printing or as speech. We perceive them right away as printed or spoken words, even if we cannot understand them: 'What we “first” hear is never noises or complexes of sounds, but the creaking wagon, the motor-cycle. [...] It requires a very artificial and complicated frame of mind to ‘hear’ a ‘pure noise’. [...] Even where the speech is indistinct or the language unknown, we immediately hear unintelligible words, not a multiplicity of tone-data.' Heidegger was at this stage influenced less by Nietzsche and far more by Dilthey, who had in his later writings travelled a good way along Heidegger’s own path. The ubiquity of interpretation does not, for Heidegger, imply Nietzschean scepticism. The fact that I immediately interpret speech as speech or a tool as a tool does not entail that my interpretation is unreliable or incorrigible or that it creates the meaning of what is interpreted. At most it undermines the view that interpretations are based on, or answerable to, uninterpreted foundations.

Id. (quotations as in original) (alterations in original) (citation omitted). Heidegger represents the high point in the development of the hermeneutic tradition starting from Dilthey. Although there are certain surface similarities between the thought of Heidegger and Wittgenstein, the commentary just reproduced highlights a key difference in approach to the nature of understanding. Because Heidegger comprehends “understanding” as an internal and personal operation of mind, he remains within the philosophical tradition that starts with Descartes in so far as he locates meaning in the individual. For his part, Wittgenstein’s later thought represents a break with the philosophical tradition starting with Descartes in that he locates meaning not within persons but outside them, that is, in public practices. One need only consider Dworkin’s approach to legal interpretation to realize that philosophy remains within the grip of the Cartesian picture of mind. See DWORKIN, supra note 4 (building a theory of law out of a theory of interpretation).

44. See, e.g., the classic collection of interdisciplinary essays in THE POLITICS OF INTERPRETATION (W.J. Thomas Mitchell ed., 1982) (including classic essays by Fish and Dworkin).

45. The notion of meaning being “up for grabs” or “indeterminate” is a pervasive feature of contemporary critical theory, in law and elsewhere. Despite its pervasive character in European thought, this view is coming under increasing scrutiny. The following is a superb critique:

Is this conception of language viable? If we take away the decorations around the way it is formulated, it boils down to a decision to homogenize the question of sense or meaning. It comes down to saying that there is one and only one passages [sic] from signs to meaning: interpretation. A crucial distinction is thereby lost: that between directly accessible meaning and meaning accessible only by inference. It is the difference between understanding and interpreting. The hermeneuticist whose philosophy is expressed by Foucault recognizes no difference between the act of interpreting, which is an intellectual operation by an active mind, and the fact of understanding, which is neither an act nor a performance but the possession of a capacity. This hermeneuticist takes a
The problem with the interpretivist (subjectivist) response to the failure of objectivism is identified by what has come to be known as the "infinite regress argument." Wittgenstein puts it this way:

"But how can a rule shew me what I have to do at this point? Whatever I do is, on some interpretation, in accord with the rule."—That is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.

Why does Wittgenstein question the importance of interpretation for meaning? His point is that if the understanding of an utterance or sign were a matter of advancing an interpretation (which is just another utterance or sign) then the interpretation itself would require its own interpretation, and so on, infinitely.


WITTGENSTEIN, *INVESTIGATIONS*, supra note 26, § 198; see also ROBERT BRANDOM, *MAKING IT EXPLICIT* 508-09 (1994) ("Linguistic understanding depends on interpretation ... only in extraordinary situations—where different languages are involved, or where ordinary communication has broken down.").


[Interpretation] is a practice we engage in when our understanding and use of signs is in some way problematic or in doubt. Here we attempt to come to an understanding of the sign in question by offering various interpretations (expressions) as opposed to different ones, adjudicating rival interpretations, in some cases calling the criteria of adjudication into question, and so on.... Interpretation should thus be seen as one important practice of critical reflection among many, resting comfortably in more basic ways of acting with words (self-understandings) that cannot themselves be interpretations.

Wittgenstein makes a second argument about interpretation which builds on the
The infinite regress argument is not designed to, and should not, move us to a point of frustration or failure. Rather, Wittgenstein urges us to rethink the notion that before we can understand an utterance we must first interpret it. As he says, "there is a way of grasping a rule which is not an interpretation ...." 50

There are few voices in contemporary legal theory speaking on behalf of objectivism. 51 More vocal, and more numerous, are the voices of subjectivism. 52 Subjectivism, I have argued, is a natural response to the failure of objectivism. Its ubiquity notwithstanding, subjectivism is a troubled and troubling philosophical stance. Whatever one's metaphysics, subjectivism eats away at our aspirations for law. We want law to be more than opinion, collective or otherwise. The question whether a legal standard has or has not been violated should turn on more than the caprice of who is asked

regress argument. This is the paradox of interpretation.

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.

WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 201. The paradox is that "[g]iven the fact of multiple interpretations, for any action, that action can be characterized both in a way that accords with a given rule and conflicts with it—even if the interpretation of the rule itself were transparent." WILLIAMS, supra note 22, at 160. It is perhaps due to the difficulties presented by the paradox of interpretation that Wittgenstein introduces the idea of a practice. Anthony O'Hear states that:

It is my contention that Wittgenstein introduces the practice of a community into his analysis of rule-following in order to put a stop to the difficulties that arise from the insight that on some interpretation, anything can be seen as following from a rule, difficulties which would dog my individualistic attempt to follow out the implications of a self-imposed rule, whether or not I was interested in communicating my understanding of the rule to others.


50. WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 201.
52. There are many facets of subjectivism, from the rejection of objectivity as a value to the embrace of "identity politics" in legal theory. Movements or schools of thought include Critical Race Theory, strong versions of "narrative" scholarship, and proponents of radical indeterminacy. Exemplars are mentioned in Richard A. Posner, The Skin Trade, THE NEW REPUBLIC, Oct. 13, 1997, at 40-43 ("Every intellectual movement has a lunatic fringe. Radical legal egalitarianism is distinguished by having a rational fringe and a lunatic core.") (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997)).
to decide the matter. Providing an alternative to objectivism that avoids the excesses of subjectivism is the task at hand. Let us turn to that endeavor.

II. FORMS OF EXPLANATION: CAUSAL AND NORMATIVE

Objectivism and subjectivism are both attempts to explain the normativity of rule-following. Objectivism searches for the means by which disparate applications of a rule (or concept) can be said to be applications of the “same” standard. Subjectivism despair of ever finding the Holy Grail of objectivism and resorts to individual and collective subjectivity to explain the phenomenon of rule-following and, hence, normativity. Despite their differences, objectivism and subjectivism share one fundamental: each theory adheres to the thesis that rule-following is an operation of mind. For the objectivist, the mind grasps the external measure of compliance. For the subjectivist, rule-following is the result of individual proclivity or the consensus of similarly-inclined subjects.

The central insight that enables us to break free of the existing debate is this: rule-following is not a mental phenomenon. Consistent with his critique of psychologism, Wittgenstein relocates normativity in action, specifically social action. A complete articulation of normativity as a social phenomenon leads to a surprising result: a new conception of objectivity. As we shall see, objectivity is neither a property, nor a relation: it is a collective achievement. In short, objectivity is produced and not found.

In *Philosophical Investigations*, Wittgenstein overcomes the limits of the objectivism/subjectivism debate by asking a different question. This question enables him to break new ground in our understanding of normativity and, ultimately, objectivity. He writes:

Let me ask this: what has the expression of a rule—say a signpost—got to do with my actions? What sort of connexion is there here?—Well, perhaps this one: I have been trained to react to this sign in a particular way, and now I do so react to it.  

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53. *See infra* notes 110-38 and accompanying text.  
54. *WITTGENSTEIN, INVESTIGATIONS*, *supra* note 26, § 198.
The remark is met with an immediate objection from Wittgenstein's imaginary interlocutor: "But that is only to give a causal connexion; to tell how it has come about that we now go by the sign-post; not what this going-by-the-sign really consists in." But Wittgenstein's point is that the sign-post exists as such by virtue not of training but by virtue of a social practice, a custom. He states: "On the contrary; I have further indicated that a person goes by a sign-post only insofar as there exists a regular use of sign-posts, a custom." What Wittgenstein is pointing to here is the connection between meaning and training. The meaning of the signpost is a "social" meaning: it is in the regular use of the signpost that normativity (correct and incorrect use of the signpost) is established. And how do we understand "correct" and "incorrect?" This is where training comes in. Wittgenstein maintains that the key to normativity lies in the ways in which we have been trained to respond to the sign or rule. The philosophical challenge is to extract an account of normativity from the details of training.

Normativity is concerned not with how we make judgments of correctness and incorrectness, but in what those judgments consist. An example will help make the point. Consider a chess

55. Id. The mistake identified here is often made. The error lies in trying to explain how to do something correctly or incorrectly by appealing to a causal story regarding training. A good example of this is Stanley Fish's use of the idea of "interpretive communities." Fish accounts for different persons being in the same interpretive community by appealing to a story about training: FISH, supra note 37, at 141 (In addition to facility in a language, one needs to be in possession of a certain structure of interests, described by Professor Fish as "distinctions, categories of understanding, and stipulations of relevance and irrelevance ...." These are acquired, Professor Fish tells us, "only after one has 'passed through a professional initiation or course of training' whose effect is to homogenize persons who were disparate and heterogeneous before entering—and becoming inhabited by—the community's ways."). The problem is that the narrative about training does not illuminate what seeing the world the same way means. It is only an account of the training involved. For a detailed account of this error, see PATTERSON, TRUTH, supra note 39, at 99-127.

56. Wittgenstein's conclusion is that "'obeying a rule' is a practice." WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 202.

57. Id. § 198.

58. For discussion of normative explanation, see GORDON B. BAKER & PETER M.S. HACKER, LANGUAGE, SENSE & NONSENSE (1984), who note that:

A normative explanation, therefore, explains a normative act, a normative situation, or a normative consequence by reference to some relevant rule or aspect of a rule. The manner in which the rule is invoked in, or involved in, the explanation will vary from case to case according to the nature of the question. Since such explanations are not causal (i.e. do not serve as explanations in
match between Smith and Jones. Jones is a good player, but Smith is said to be better. Each time Smith makes a move, he engages in all the normal mental processes that lead up to his decision of which piece to move and where to move it on the board. In addition, Smith has to remember where every other piece is on the board for, as it turns out, Smith is blind.

How Smith makes a correct move (the causal account) is a logically distinct question from whether he makes a correct move (the normative account). When it comes to normativity, our interest is not in how Smith is able to do what he does. This is not to deny that what Smith is able to do is impressive—but from the point of view of normativity, it is of no interest. The reason it is of no interest is that how someone does something does not tell us to what his “doing” amounts, that is, of what it consists, nor does it tell us whether the act is correct or incorrect. Standards for the correct/incorrect, successful/unsuccessful doing of anything are not a matter of how the doing is accomplished (causal explanation). Nothing in Smith’s head can tell us whether he has moved a piece correctly. For this, we must look elsewhere.

A causal account of a practice or activity fails to explain what constitutes correct and incorrect action, e.g., following a rule. By

virtue of subsuming an individual case under a general causal law), we do not seek these explanations by experimental observations and inductions. If we want to know what rules inform certain activities and give them meaning, we typically ask the participants. Their specifications of what rules they are following or are trying to follow typically have an authoritative status. An agent’s sincere assertion that he was making a promise, kicking a goal, buying a ticket, checking his opponent’s king, voting for the amendment to the motion, and so on, or that he was trying to effect these acts, are not hypotheses. And such an agent’s explanation of what makes his utterance a promise, his kick a goal, his handing over money a purchase, etc. are not theories which he concocts on the basis of past observations. They are rather explanations of the rules which he is following or trying to follow.

Id. at 258.

59. For discussion of the immanent role of rules in training, see Peter M.S. Hacker, Wittgenstein’s Place in Twentieth-Century Analytic Philosophy 209 (1996) (“The relevance of teaching is not causal or genetic, but rather immanent: ‘what matters is what is given in the explanation’.”) (quoting Wittgenstein’s Lectures, Cambridge 1930-32: From the Notes of John King and Desmond Lee 38 (Desmond Lee ed., 1980)).

60. The meaningful character of action cannot be reduced to physical phenomena such as bodily movement, brain waves, behaviorist responses, or other materialist grounds. For the hermeneutic tradition, this is expressed by the question “Is there a sense in which interpretation is essential to explanation in the sciences of man?” See, e.g., Charles Taylor,
emphasizing the social character of rules and the role of training in understanding how the correct/incorrect distinction is inculcated, Wittgenstein moves us to the following two conclusions. First, the normativity of rules is forged in community agreement over time. The second is epistemic—we normally follow “rules unreflectively.”

Rules of courtesy, driving, and the like are never the product of anything save our instinctive sense of appropriateness. The logic of our actions, and our ability to understand our actions as “rule-governed,” presupposes a social context in which the regularities, customs, and patterns of action over time are found. Some elaboration is in order.

Judgments of correctness and incorrectness are an everyday feature of social life. How do we go about making such judgments? And how should we characterize or account for judgments of correctness and incorrectness? Finally, what do we mean when we characterize the statements, behavior, and assertions of others?

In many, but by no means all, situations in which we characterize the action of others as correct or mistaken, we appeal to rules. For example, when a person speeds through a red light at an intersection, we say that by his action the person has violated the motor vehicle laws. Were our judgment to be challenged, we would cite the rule requiring one to stop at a red traffic signal and the fact that the person in question failed to stop. Here we want to say that the statement “X violated the Motor Vehicle Code” is true. The truth of the statement is not a matter of opinion. “Objectivity” names the difference between one’s thinking a rule has been violated and its in fact having been violated.

I have said that it is through the use of rules that we distinguish between correct and incorrect action. How is it that rules enable us to make such judgments? In other words, what is it about rules that we may successfully employ them in appraisive activities such as judging the actions of others? What is required is an account of the

Interpretation and the Sciences of Man, in 2 PHILOSOPHICAL PAPERS (PHILOSOPHY AND THE HUMAN SCIENCES) 28 (1985) (analyzing practices such as negotiation and voting to make the point that meaningful human action is not reducible to physical phenomena: interpretation is essential to meaning).

61. For discussion of this point in the context of law, see Philip Bobbitt, What It Means to Follow a Rule of Law, in RULES & REASONING: ESSAYS IN HONOUR OF FRED SCHAUER 55-60 (Linda Meyer ed., 1999).

62. WILLIAMS, supra note 22, at 169.
normativity of rules, one that explains and justifies claims for a social basis of normativity.

III. THE SOCIAL BASIS OF NORMATIVITY

If normativity is not reducible to causality, does that mean that no connection exists between the two? For Wittgenstein, the fact that we are trained in certain ways does not answer the question whether, in a given circumstance, we are acting in accord with the appropriate norm. Yet Wittgenstein maintains that an element of the causal story—training—holds the key to normativity.63 Unpacking the connection between training and normativity reveals an important connection between the normativity of rules and community agreement (properly understood). As we will see, action replaces both metaphysical foundations (objectivism) and community consensus (subjectivism) in the explanation of normativity and, ultimately, objectivity itself.

Before we turn to the role of training (specifically in the legal context), one preliminary matter needs to be addressed. The question can be put simply: Is it an essential aspect of normativity that rule-following requires an actual practice?64 When Wittgenstein says “there is a way of grasping a rule which is not an interpretation,”65 the question we need to ask is whether the act of grasping a rule can take place independent of an actual practice. Consider the practice of law. If normativity exists only in actual practices, and we accept law as a practice, then the task of jurisprudence becomes importantly descriptive,66 for we cannot

63. Wittgenstein, Investigations, supra note 26, § 190 (indicating the criterion for how to apply a formula lies in “the way we are taught to use it”).
64. For an argument that an “internal relation” does the normative work of connecting a rule and its applications, see G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 102-03 (1985) [hereinafter BAKER & HACKER, GRAMMAR] (containing commentary on Wittgenstein’s PHILOSOPHICAL INVESTIGATIONS, Volume 2).
65. WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 201.
66. H.L.A. Hart had a similar insight. This may be why he described his work in THE CONCEPT OF LAW as “descriptive sociology.” H.L.A. HART, THE CONCEPT OF LAW v (2d ed. 1994) (“Notwithstanding its concern with analysis the book [THE CONCEPT OF LAW] may also be regarded as an essay in descriptive sociology ....”). The task of philosophy is noncognitive. Hacker, supra note 59, at 110 (“The Investigations delineates a purified non-cognitive conception of philosophy.”).
know what rules "mean" apart from an actual practice of law.\textsuperscript{67} This is what I mean when I say the focus should shift from mind to action. In short, apart from an actual community of legal rule-followers, it is impossible for an individual to discern whether he or she is following a rule, interpreting a rule, or correcting error.\textsuperscript{68}

It is clear that Wittgenstein believed that, to be meaningful, rules must be used repeatedly, and over time. He wrote: "Is what we call 'obeying a rule' something that it would be possible for only one man to do, and to do only once in his life?... It is not possible that there should have been only one occasion on which someone obeyed a rule."\textsuperscript{69}

Could a radically-isolated individual—say, Robinson Crusoe—follow rules in much the same way as one does in normal social contexts? The literature on the question is vast,\textsuperscript{70} but the explanatory options are well-defined. According to two leading philosophical commentators, solitary rule-followers require "regularities of action of sufficient complexity to yield normativity."\textsuperscript{71} Where do we find such complexity? In other words, must rule-following be both public and social?

Consider the following pattern: \ldots \textsuperscript{72} Imagine Robinson Crusoe using this pattern to decorate the walls of his house. As he applies the pattern on and around his walls, he applies the pattern uniformly, keeps the lines level, and corrects any errors in application which require reapplication or other emendation of his work. We can evaluate what Crusoe is doing just as if he were here among us. Likewise, he can apply the pattern just as we might. It is as though he were one of us.

\textsuperscript{67} Williams, supra note 22, at 183 ("What is correct is shown in what we do."); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 24 (1991) [hereinafter BOBBITT, INTERPRETATION] ("Law is something we do, not something we have as a consequence of something we do.").

\textsuperscript{68} See WITTGENSTEIN, FOUNDATIONS, supra note 1, Part VI § 41 ("The word 'agreement' and the word 'rule' are related, they are cousins. The phenomena of agreement and of acting according to a rule hang together.").

\textsuperscript{69} WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 199.

\textsuperscript{70} A representative sample of the various points of view is found in HOLTZMAN & LEICH, supra note 26. The most controversial work on Wittgenstein and rule-following is KRIPKE, supra note 46. A thorough critique of Kripke's reading of Wittgenstein is G.P. BAKER & P.M.S. HACKER, SCEPTICISM, RULES & LANGUAGE 1-55 (1984) [hereinafter BAKER & HACKER, SCEPTICISM].

\textsuperscript{71} BAKER & HACKER, SCEPTICISM, supra note 70, at 42.

\textsuperscript{72} This is borrowed from WITTGENSTEIN, FOUNDATIONS, supra note 1, Part VI § 41.
But think about this from the point of view of "corrective behavior." How does Crusoe decide whether or not he has made a "mistake"? And how does he decide what constitutes "correction" of "error"? Is it not the case that the evaluation of Crusoe's behavior as correct or incorrect issues not from some neutral standpoint but from assimilation of his behavior into our practices? Imagine if we were able to view Crusoe's work, and saw that after every use of a dot he used six dashes? If we were to claim that he had erred in his use of the pattern, we would appeal to nothing beyond our way of using the pattern. "Correct" use of the pattern begs the normative question. Without appeal to some way of using the formula, the meaning of "correct" and "incorrect" does not seem to take hold.

Wittgenstein tells us as much when he rejects characterization of Crusoe's conduct as "rule-following": "There might be a cave-man who produced regular sequences of marks for himself. He amused himself, e.g., by drawing on the wall of the cave: _ _ _ _ _ _ or _ _ _ _ _ _ _ _ But he is not following the general expression of a rule." Why are we precluded from characterizing Crusoe's conduct as following a rule, i.e. engaging in normative behavior? Apart from a practice of use, Crusoe has only "the master pattern." He could interpret it as he sees fit but, as we saw earlier, interpretation...
cannot provide grounds for meaning. The only other alternative, one we have also rejected, is the idea that the master pattern is "self-interpreting;" that its meaning can be discerned, as it were, in the abstract. This leaves us with the conclusion that the meaning of the pattern, like the meaning of the signpost, and legal standards, is a function of use; of our practices. Wittgenstein says as much when, at the end of his analysis of rule-following, he states ""obeying a rule is a practice."

The normativity of rule-following—the ground of correctness and incorrectness—is not to be found in the agreement of others as such. Agreement is a necessary feature of the normativity of our practices, but the ""agreement"" must be regularity in reaction to use. In short, when we say there must be ""agreement in actions"" what we are really saying is that there must be harmony in application, over time. This harmony in reaction and application is constitutive of legal practice and, thus, is the basis of our legal judgments.

76. See supra notes 33-52 and accompanying text.
77. See supra notes 20-32 and accompanying text.
78. See WILLIAMS, supra note 22, at 175 ("Wittgenstein's point is that a rule or master-pattern is such only from within a practice that is itself a kind of complex regularity, namely, community regularity as expressed in agreement in action and judgment.").
79. WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 202.
80. For discussion of the relationship between normativity and ""consensus,"" see DAVID BLOOR, WITTGENSTEIN: RULES AND INSTITUTIONS (1997). He notes that:

[In] following a rule we move automatically from case to case, guided by our instinctive (but socially educated) sense of 'sameness.' Such a sense does not itself suffice to create a standard of right and wrong. It is necessary to introduce a sociological element into the account to explain normativity. Normative standards come from the consensus generated by a number of interacting rule followers, and it is maintained by collectively monitoring, controlling and sanctioning their individual tendencies. Consensus makes norms objective, that is, a source of external and impersonal constraint on the individual. It gives substance to the distinction between rule followers thinking they have got it right, and their having really got it right.

Id. at 17.
81. This is precisely the point at which a theory like Stanley Fish's Reader-Response theory founders. Fish is right to reject practice-transcendent accounts of meaning but wrong in thinking that the collective presuppositions of members of an interpretive community are the key to meaning. For discussion of this point, see PATIERSON, TRUTH, supra note 39, at 99-127.
82. WILLIAMS, supra note 22, at 176.

It is in this sense that community agreement is constitutive of practices, and that agreement must be displayed in action. There are two important features
Harmony in action is a function of an intersubjective grammar of appraisal, one that is used consistently and over time. Grammar is immanent in our practices.\textsuperscript{83} It is agreement in reaction among participants to occasions for the use of this grammar that enables us to follow rules, appraise action, and engage in the multiple normative practices of rule-following. But from where does this grammar—specifically legal grammar—come? And how is its use inculcated in participants? For answers, we must return to training but this time in the context of law.

IV. THE NORMATIVITY OF LAW

Consider the most basic of learning tasks. Even something as simple as basic arithmetic requires instruction, which itself includes correction of error. Training takes a novice and inculcates a skill. In many activities, skills are imparted by one fully competent in the practice and capable of transmitting those skills to an initiate. When asked to describe why the student carries out the mathematical series as she does, she is likely to answer “That

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about this account that need to be highlighted. First, it is the social practice that provides the structure within which individual understanding can obtain or individual judgment be made. Central to Wittgenstein's thought is the claim, repeatedly argued for, that no isolated event or behavior can correctly be described as naming or obeying or understanding. The rule as formula, the standard as chart, or the paradigm as an instance have no normative or representational status in their own right. They have this status only in virtue of the way the formula or the chart or the instance is used. It is the use that creates the structured context within which sign-posts point, series can be continued, orders obeyed and paradigms be exemplary. Only then can we see a particular action as embodying or instancing a grammatical structure. In short, the mandatory stage setting is social practice.

Second, community agreement does not constitute a justification for particular judgments. What is indispensable for correct, or appropriate, judgment and action is that there is concord, not that each individual justifies his (or anyone else's) judgment and action by appeal to its harmony with the judgment of others.

Id. (footnote omitted).

83. The understanding of language from an immanent perspective is a hallmark of the later work of Wittgenstein. ROBERT JOHN ACKERMANN, WITTGENSTEIN'S CITY 8 (1988) (“Wittgenstein always operated with an immanent understanding of language, according to which, when we have a puzzle that seems to call for philosophical treatment, some localized language use is recognized as perfectly clear, and other language use as obscure.”).
is how I was taught to do it."  

We might say that "how we are trained, how we learn, is constitutive of what we mean." Understanding the normativity of our practices requires attention to the ways in which we are trained to employ the rules of the game. In this way, we can explicate the connection between rules and action, thereby grounding normativity in the latter. As I will show, the philosophical task is ultimately descriptive: we seek nothing less than a perspicuous view of legal practice.

A look at training in the legal context brings us to the normative dimension of law. While complicated and richly varied, legal training provides novice lawyers with a unique set of argumentative skills. The practical dimension of lawyering is a matter of producing persuasive arguments to the effect that one's assertions about what the law permits, requires, or prohibits are correct. How do lawyers do this? How do lawyers show the truth of legal propositions?

As Ronald Dworkin has noted, legal argument is a matter of assertion. But how, in the law, do we go from asserting a legal proposition to sustaining a claim of truth? I treat the word "Claim"

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84. Wittgenstein, Investigations, supra note 26, § 190 ("It may now be said: 'The way the formula is meant determines which steps are to be taken.' What is the criterion for the way the formula is meant? It is, for example, the kind of way we always use it, the way we are taught to use it.").

85. Williams, supra note 22, at 179.

86. This is the proper task of philosophy. See Peter M.S. Hacker, Wittgenstein 9 (1997) ("The only kinds of explanation in philosophy are explanations by description—description of the use of words.").

87. This is not to deny that other skills are imparted. I would go so far as to say, however, that if the argumentative skills were not imparted, legal education would be incomplete.

88. This means that a practice-based account of law is an extension of a general account of the role of practices in creating meaningful discourses. Stephen Turner notes that: Our powers of persuasion and explanation, it seems, stop at the borders of our own localities. It is our shared practices that enable us to be persuaded and persuade, to be explainers, or to justify and have the justifications accepted. But the same justifications would not be accepted for a Roman, and thus there is no universal touchstone to which we could both refer either our disputes or failures of mutual understanding. The same holds true for the law. The point of legal training is to inculcate skills, skills that enable a lawyer to understand and formulate legal reasons and distinctions.


89. See Dworkin, Empire, supra note 14, at 4 (describing legal propositions as "statements and claims people make about what the law allows or prohibits or entitles them to have").
as a term of art. Consider the claim "Smith's will is invalid." This Claim asserts that, as a matter of law, Smith's will cannot be an instrument for probate transfer of her property. To sustain the claim of invalidity, more is required than mere assertion of the Claim (proposition of law). There has to be a reason supporting the claim of legal invalidity.

Suppose Smith's will is witnessed by only one person. This is the Ground of the Claim that Smith's will is invalid. The Ground supports the Claim. The relation may be represented this way:

\[
\text{Ground} \quad \rightarrow \quad \text{Claim}
\]

To show the truth of the Claim more than the Ground is required. Grounds function as reasons, but reasons of a special sort. In this case, the Ground is a fact (i.e., that Smith's will has only one witness). What is it that makes that fact significant? The answer is a Warrant.

A Warrant connects a Ground with a Claim. The Warrant makes the Ground significant vis-à-vis the Claim. In this case, the Warrant is the Statute of Wills, for in that statute one will find the appropriate Warrant, specifically the provision requiring two witnesses to a will. We may represent the relations between Claim, Ground, and Warrant thus:

\[
\text{Ground} \quad \rightarrow \quad \text{Claim} \\
\quad \uparrow \\
\text{Warrant}
\]

It is a commonplace that statutory texts are not self-executing. All texts, especially legal texts, must be construed. The way we give

90. The framework that follows (Claim, Ground, Warrant, Backings) is taken from STEPHEN TOULMIN ET AL., AN INTRODUCTION TO REASONING 23-67 (1979). The approach was originally advanced by Toulmin in STEPHEN EDELSTON TOULMIN, THE USES OF ARGUMENT (1958). For an exemplary employment of the framework in the field of theology, see NANCY C. MURPHY, REASONING AND RHETORIC IN RELIGION (1994). I discuss this approach to legal argument in PATTERSON, TRUTH, supra note 39, at 169-75.
meaning to legal rules is with Backings.\textsuperscript{91} This process is one of application; it is the way legal rules come to have meaning. There are four principal Backings (I shall call them "forms of argument") for legal Warrants. These forms of argument are: Textual, Historical, Doctrinal, and Prudential.\textsuperscript{92} While certain departments of law may have additional forms of argument,\textsuperscript{93} these four—which were present in the English Common Law\textsuperscript{94}—are found in every

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\textsuperscript{91} This is a corollary of the point Wittgenstein makes when he says ""obeying a rule' is a practice." WITTGENSTEIN, INVESTIGATIONS, supra note 26, § 202. Andrew Lugg elaborates: There is no such thing as a rule that fixes how it is to be followed (or a self-interpreting signpost). Far from determining its own application, a rule can always be interpreted in more than one way. Not even a straightforward rule about the use of a word dictates how it is to be obeyed. "Use the word "game" to apply to competitive activities involving skill, chance and endurance" no more fixes its own application than a signpost to Paris fixes how it is to be followed. The rule does not tell us that 'competitive' is to be understood as involving conflict, not cooperation, any more than the signpost to Paris tells us to go in the direction of the finger, not in the opposite direction .... (It is no argument against this observation that signs that exert forces making us go where they point fix their applications. Following such a sign is a natural phenomenon on a par with the Moon's tracking the Earth as it goes around the Sun. It is not a phenomenon involving interpretation, never mind one that can be sensibly praised or blamed.)

ANDREW LUGG, WITTGENSTEIN'S INVESTIGATIONS 1-133, 146 (2000).

\textsuperscript{92} The idea of forms of argument or "modalities" was developed in the American context by Philip Bobbitt. See PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); BOBBITT, INTERPRETATION, supra note 67. Bobbitt identifies six forms of argument (he refers to them as "modalities") in constitutional law. Two not mentioned above, structural and ethical arguments, are, in my view, unique to constitutional law. For discussion of interpretation in the context of German law, see KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 312-65 (6th ed. 1991).

\textsuperscript{93} I have in mind the structural and ethical forms of argument in constitutional law. BOBBITT, INTERPRETATION, supra note 67, at 73-75, 80-81.

\textsuperscript{94} See BOBBITT, INTERPRETATION, supra note 67, at 5 ("The ways in which Americans interpret the Constitution could have been different.... For Americans, however, these ways have taken the forms of common law argument, those forms prevailing at the time of the drafting and ratification of the US Constitution."); NORMAN F. CANTOR, IMAGINING THE LAW 373 (1997) ("The common law today is what it has been since since it crystallized in the fourteenth century."); H. Jefferson Powell, Constitutional Investigations, 72 TEX. L. REV. 1731, 1737 (1994) ("There is nothing sacred or philosophically fundamental about these modes; they derive historically from the professional discourse of early-modern English common lawyers, and over time they may change.") (citation omitted) (footnote omitted).
The argumentative structure of legal argument—the grammatical skeleton—may be represented thus:

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Ground _______→ Claim

↑

Warrant

↑

Backings
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Consider the most common form of argument, textual argument. Textual argument is not about plain meaning or the like. Rather, it is simply taking the meaning of words at face value (ordinary meaning). For example, when parties to a contract reduce their agreement to writing, the writing is the first place to go for an answer to the question “What is the parties’ agreement?” The same is true of trust instruments. The settlor of the trust expresses her intentions in words, which are given their ordinary meaning. Finally, even in constitutional law—as complicated as it can sometimes be—textual argument plays a prominent role. Few


97. See LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 11 (1991) (“Constitutional commentators sometimes seem to forget that history serves to illuminate the text, but that only the text itself is law.”).

98. Bobbitt compares the reading of trust instruments and written constitutions in BOBBITT, INTERPRETATION, supra note 67, at 4 (“[A] written constitution is like a trust agreement. It specifies what powers the trustees are to have and it endows those agents with certain authority delegated by the settlor who created the trust.”).
constitutional issues are resolved without perusal of the Constitution's text. Of course, this analysis is not likely to end the discussion, but in many instances, textual argument plays a necessary role.

Historical argument is the form of argument one often encounters in the context of constitutional law. In construing a particular clause or provision of the Constitution, the reader seeks the meaning the terms in question had for those who authored the provision. In the context of statutory interpretation, historical analysis focuses on the aspirations of the legislative body that promulgated the text in question. Doctrinal argument represents a record of past efforts to discern the meaning of texts (statutes, etc.) as well as divining principles that can be said to "inform" prior decisions. The variety of ways of coming to terms with past decisions (e.g., analogy) is the province of doctrinal argument. Of course, an important dimension of doctrinal argument is discerning when mistakes have been made.

Finally, there is prudential argument. Prudential arguments focus on the effects or consequences of deciding a case one way rather than another. Prudential arguments are, in effect, arguments of policy: the pursuit of collective goals. The most common form of appeal is to economy—decision one way raises the costs of judicial administration without a correlative benefit.


100. A sophisticated account of the vicissitudes of historical argument is found in William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987).

101. Arguments from "precedent" are not limited to those originating in case law. BOBBITT, INTERPRETATION, supra note 67, at 18 ("[T]here are also precedents of other institutions, e.g., the practices of earlier Presidents as well as the various corollaries incident to fashioning rules on the basis of precedent").

102. See DWORKIN, SERIOUSLY, supra note 2, at 118-23.

103. The most sophisticated example of an emphasis on this form of argument in constitutional scholarship is MARKUS TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (evaluating forms of argument as "ideologies" from the point of view of prudential argument).


105. For discussion of this point in the context of the common law process, see MELVIN
The importance of the forms of argument is quite simple: without them rule-following and, thus, law is impossible. How can this be? Rules are not self-executing. Like Wittgenstein's signpost, we have to know how to act with rules. The forms of argument are the ways in which we make meaning with rules (or do meaningful things with rules). The forms of argument make it possible for us to engage in the myriad activities we call "law" (e.g., arguing, asserting, deciding). The forms are the very thing that give law its normativity, for they enable us to show how assertions are correct and incorrect, true and false. The forms are the grammar of law.

I began this part by connecting normativity with training. When we look at training in law, a distinct grammar of argument emerges. That grammar—the forms of legal argument—is the shared, intersubjective basis of legal judgment. The normativity of law depends upon an identifiable grammar of justification and consistent recognition (agreement) among participants in the practice that these are the forms of legal appraisal. In addition to agreement on the forms themselves, it is crucial that participants in our legal practice agree in their reactions to the use of the forms. As we shall see directly, agreement in judgment is an essential component of objectivity, and not always easy to come by.


106. The forms of argument are themselves neither true nor false. They are the means for making true and false assertions (similarly, consider arithmetic functions).

107. One commentator states that:

Anyone who failed to acknowledge the relevance of the various argument forms to the enterprise of justifying claims based on a legal text would, quite frankly, lack a rational capacity, in the same way as would a person who did not admit the relevance of visual observation to justifying claims about the natural world.


108. For important discussion of this point in the context of internal and external approaches to law as a practice, see Thomas Morawetz, Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging, 141 U. PA. L. REV. 371, 378-79 (1992) ("I refer to individuals within the practice as having a commitment to a particular interpretive strategy for applying rules and norms in the light of a conception of the purposes they serve.").

109. I am not suggesting that there is always agreement over every use of the forms of argument. Disagreement is a pervasive feature of legal practice. But if there were no agreement in the use of the forms of argument, disagreement would be impossible.
V. NORMATIVITY AND OBJECTIVITY

We come, then, to objectivity. If the forms of argument are the normative grammar of law, how do they engender objectivity? One might think this question has already been answered. If we understand “objectivity” as an account of the difference between one’s thinking one is following a legal norm and one’s in fact following the norm then, indeed, the question has been answered. By linking normativity to public forms of argument, we identify the means by which actors in a practice such as law conduct their discourse in constitutive, intersubjective terms. Legal norms are objective to the degree the forms of argument continue to be recognized as legitimate forms of legal justification. The forms of argument are a culturally endorsed form of legal appraisal. They “exist” only to the extent they continue to be employed by the “caste of lawyers.”

But perhaps this answer fails to satisfy. True, law seems more “objective” than literary criticism but less objective than science or arithmetic. What accounts for this sense, and how can it be explained? It might be objected that while some practices admit of objective judgment (e.g., arithmetic), law does not. Let us consider an illustration of this point from the realm of commercial law.

Under the Uniform Commercial Code (UCC) Statute of Frauds provision, a contract for the sale of goods in an amount greater than $500 must be in writing, otherwise the contract is unenforceable. If Smith sues Jones for breach of contract, and the value at stake in the contract is over $500, Jones may assert the Statute of Frauds as a defense and move for summary judgment. Jones’s claim is that the contract is unenforceable (Claim). His basis (Ground) for the claim is the fact that the contract is for an amount in excess of $500. The Statute of Frauds (Warrant) permits such a defense to preclude enforcement of the contract against the party to be charged (Jones). Smith’s argument will be the most basic argument

110. See BAKER & HACKER, GRAMMAR, supra note 64, at 170 (“[T]he fundamental issue is to clarify how a practice yields objective standards for determining what is correct.”).
of all: the ordinary meaning of the words (Backing-Textual Argument) of Section 2-201 of the UCC.

From the point of view of objectivity, there seems to be little room for disagreement over Jones's assertion of the defense of the Statute of Frauds. The textual argument is dispositive. There are exceptions, of course, to the formal requirement of a writing. One of these is found in UCC Section 2-201(3)(b). It states that notwithstanding the lack of a writing signed by the party to be charged, a contract is enforceable if the party to be charged "admits in his pleading, testimony or otherwise in court that a contract for sale was made." How do we use the forms of argument to handle a more difficult case?

In DF Activities Corp. v. Brown, DF sought to purchase a Frank Lloyd Wright chair owned by Brown. DF contended, and Brown denied, that Brown agreed by phone to sell the chair for $60,000, to be paid in two equal installments. DF followed up with a confirmation letter and a check for $30,000. Two weeks later Brown returned both with a note indicating that the chair was no longer available. Brown then sold the chair for $198,000. DF sued and Brown moved to dismiss, attaching an affidavit stating that she had never agreed to sell the chair to DF.

The issue was whether, under the Statute of Frauds, a sworn denial of the existence of a contract ends the case or whether the plaintiff may press forward and insist on discovery, intending to use the judicial-admission exception to the statute. Judge Posner held that once the defendant denies under oath that a contract had been formed, discovery may not proceed. Posner's argument is pure prudentialism. He writes: "[T]he chance that at a deposition the defendant might be badgered into withdrawing his denial is too remote to justify prolonging an effort to enforce an oral contract in the teeth of the statute of frauds."

113. U.C.C. § 2-201(3)(b).
114. 851 F.2d 920 (7th Cir. 1988).
115. U.C.C. § 2-201(3)(b) (indicating a contract that does not satisfy the requirements of the Statute of Frauds is enforceable if the party against whom enforcement is sought admits in a pleading, testimony or otherwise in court that a contract for sale was made).
116. DF Activities Corp., 851 F.2d at 923-24.
Is there an argument from the other side? In dissent, Judge Flaum argued against what he described as a "blanket rule" against further discovery where the party against whom enforcement is sought denies the existence of a contract. His basis for this was the simple, yet powerful observation that the rule announced by the majority renders the testimonial admissions provision "virtually meaningless." Sympathetic to the view expressed by his colleague (Judge Posner) but mindful of the pull of the text, Judge Flaum stated his preference for reposing discretion in the hands of the trial court, eschewing a general, blanket prohibition on discovery after the critical affidavit is filed.

This example illustrates two things about the normative character of the forms of legal argument. Judges Posner and Flaum agree on what text is relevant to the dispute (UCC Section 2-201). Their disagreement is over how that text is to be construed. The four forms of argument are always available to show how the text is to be construed, but the forms do not themselves indicate their appropriateness to a given case, nor do they tell us what to do when different forms pull in opposite directions. It is the breakdown of consensus at this level that fuels claims for lack of objectivity in law.

As proof of this thesis, one might point to the fact that in matters arithmetic, consensus is far easier to come by than in law. Why is it that disagreement—which seems pervasive in law—is comparatively absent in arithmetic? Are we not permitted to say

117. Id. at 925 (Flaum, J., dissenting) ("A blanket rule prohibiting any further discovery once the defendant denies under oath that a contract was formed is therefore too inflexible.").
118. Id.
119. Judges Posner and Flaum both employed prudential arguments. The relevant text posed the issue but contributed nothing to the resolution of the question raised by the ingenious lawyering of the defendant. The facts of the case actuated neither doctrinal nor historical arguments.
120. Conflict among the forms of argument is an occasion for interpretation. Bobbitt resolves the problem of conflict by resort to "conscience." BOBBITT, INTERPRETATION, supra note 67, at 184 ("The recursion to conscience is the crucial activity on which the constitutional system of interpretation that I have described depends."). I criticize this aspect of Bobbitt's position in Dennis Patterson, Conscience and the Constitution, 93 COLUM. L. REV. 270, 301-07 (1993) (reviewing BOBBITT, INTERPRETATION, supra note 67). Richard Fallon proposes to solve the problem of conflict among the forms of argument by resort to a theory of coherence. Fallon, supra note 95, at 1237-51. I have argued that Fallon's solution—lexically ordering of the forms of argument—"states, rather than resolves, the problems under consideration." Patterson, supra at 305 n.111.
that arithmetic, or for that matter, science, is simply "more objective" than law?

Could it be that the appearance of objectivity in arithmetic and its comparable absence in law, is due not to the subject matter but to desiderata?\footnote{Richard Rorty, Texts and Lumps, in \textit{1 Philosophical Papers (Objectivism, Relativism, and Truth)} 90 (1991) ("I think of objectivity as a matter of ability to achieve agreement on whether a particular set of desiderata has or has not been satisfied. So I think that we can have objective knowledge at any level without necessarily having it at any other."). Rorty's account of the constitutive role of the interaction between the interplay of causal and intentional elements is instructive: [An] object can, given a prior agreement on a language game, cause us to hold beliefs, but it cannot suggest beliefs for us to hold. It can only do things which our practices will react to with preprogrammed changes in belief. So when he is asked to interpret the felt difference between hard and soft objects, the pragmatist says that the difference is between the rules of one institution (chemistry) and those of another (literary criticism).} In doing sums, there is universal agreement about what counts as a correct answer. It is not the agreement \textit{as such} which "produces" objectivity,\footnote{This is the subjectivist view of someone like Stanley Fish.} rather, universal agreement is the corollary of a prior consensus on criteria of correctness.\footnote{See \textit{Wittgenstein, Investigations}, supra note 26, § 241 ("So you are saying that human agreement decides what is true and what is false?—It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life."); see also \textit{Richard Rorty, Thomas Kuhn, Rocks and the Law of Physics, in Philosophy and Social Hope} 175, 179-80 (1999).} In looking at practices like science and arithmetic, we are tempted to think the "hardness" of these practices is a function of the objects of investigation. We are tempted to believe that rocks and theorems enjoy an ontological and epistemological status that is simply of a higher order than propositions of law or literary criticism.

\begin{itemize}
\item\footnote{121. Richard Rorty, Texts and Lumps, in \textit{1 Philosophical Papers (Objectivism, Relativism, and Truth)} 90 (1991) ("I think of objectivity as a matter of ability to achieve agreement on whether a particular set of desiderata has or has not been satisfied. So I think that we can have objective knowledge at any level without necessarily having it at any other."). Rorty's account of the constitutive role of the interaction between the interplay of causal and intentional elements is instructive: [An] object can, given a prior agreement on a language game, cause us to hold beliefs, but it cannot suggest beliefs for us to hold. It can only do things which our practices will react to with preprogrammed changes in belief. So when he is asked to interpret the felt difference between hard and soft objects, the pragmatist says that the difference is between the rules of one institution (chemistry) and those of another (literary criticism).} Id. at 83-84.
\item\footnote{122. This is the subjectivist view of someone like Stanley Fish.} Id. at 83-84.
\item\footnote{123. See \textit{Wittgenstein, Investigations}, supra note 26, § 241 ("So you are saying that human agreement decides what is true and what is false?—It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life."); see also \textit{Richard Rorty, Thomas Kuhn, Rocks and the Law of Physics, in Philosophy and Social Hope} 175, 179-80 (1999).} The main reason admirers of physics distrust literary critics is that no consensus ever seems to form about the right interpretation of a text: there is little convergence of opinion. At the opposite extreme, mathematicians are usually unanimous about whether or not a theorem has been proved. Physicists are closer to the mathematics end of the spectrum, and politicians and social scientists closer to the literary criticism end. Analytic philosophers claimed (not very plausibly, as things turned out) that analytic philosophers were more capable of consensus than non-analytic philosophers, and in that sense were more scientific.
\item\footnote{Id.} The trouble is that intersubjective agreement about who has succeeded and who has failed is easy to get if you can lay down criteria of success in advance.
\end{itemize}
When the litmus paper turns blue we are inclined to say that the results of the test are "objective." The use of the word seems fine enough—but it begs the question: What is doing the "normative heavy lifting," the world or the fact that everyone already agrees on what it means when the paper turns blue? This is where the objectivist wants to give science the advantage and declare that "the world" has told us what is the case. The "facts" are now known.

Here, again, the causal and the normative are confused. One cannot, and need not, deny that causal processes are at work, both in the case of the litmus test and the reading of texts. But I want to agree with Richard Rorty when he suggests that there is

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124. Quine himself provides a wonderful example of how what we "see" is dependent upon a network of associations already in place:

[Someone mixes the contents of two test tubes, observes a green tint, and says 'There was copper in it.' Here the sentence is elicited by a non-verbal stimulus, but the stimulus depends for its efficacy upon an earlier network of associations of words with words; viz., one's learning of chemical theory .... [The verbal network of an articulate theory has intervened to link the stimulus with the response.

The intervening theory is composed of sentences associated with one another in multifarious ways not easily reconstructed even in conjecture.


For further discussion of Quine's thought and its implications for jurisprudence, see PATTERSON, TRUTH, supra note 39, at 158-59. See also Dennis Patterson, Law and Truth: Replies to Critics, 50 SMU L. Rev. 1563, 1589-98 (1997) (responding to Brian Leiter, Why Quine Is Not a Postmodernist, 50 SMU L. Rev. 1739 (1997)).

125. For an interesting and informative discussion of the cognitive status of science against the background of recent work in science studies, see JOHN ZIMAN, REAL SCIENCE (1999) (containing an exhaustive analysis of the cultural and cognitive dimensions of science practice). The following characterization of objectivity is relevant to the present discussion:

The notion of "objective knowledge" is linked with the academic norms of communalism, universalism, and disinterestedness. The culture built around these norms in the natural sciences has produced a solid core of established knowledge. There is no absolute basis for our belief in the cognitive objectivity of scientific entities such as gravitating planets, atomic nuclei, tectonic plates or the genetic code. Nevertheless, this is a well-founded belief, as natural as our attitude to the rest of the shared furniture of all human lives. What is more, these are entities that exist independently of our individual thoughts about them, and operate even-handedly for everyone. This consensus is so overwhelming that nobody can seriously deny that they are simultaneously 'socially' and 'cognitively' objective in full measure.

Id. at 179 (citations omitted).

126. See Leiter, supra note 124. I reply to Professor Leiter in Patterson, supra note 124, at 1589-98.
no way to transfer nonlinguistic brutality to *facts*, to the truth of sentences. The way in which a blank takes on the form of the die which stamps it has no analogy to the relation between the truth of a sentence and the event which the sentence is about. When the die hits the blank something causal happens, but as many *facts* are brought into the world as there are languages for describing that causal transaction.\textsuperscript{127}

There is a well-known anecdote about Wittgenstein wherein he explained how he first came to his ideas about the relationship of language to the world.\textsuperscript{128} It seems Wittgenstein read a magazine account of a trial in a French court on the question of liability for an auto accident.\textsuperscript{129} By way of explaining how the accident occurred, one of the lawyers assembled some wooden block figures, each representing the automobiles involved in the accident as well as the details of the accident scene. Upon seeing this arrangement, an idea came to Wittgenstein: perhaps our words relate to the world in the same way the figures stand for the participants in the accident. Words "stand for" things in the world: words are proxies for things.

I want to use the accident scene for a purpose different than that of Wittgenstein. I want to say that when it comes to the question "what happened?," there is no single "best" vocabulary or language of description. The simple accident scene can be described in at least three different vocabularies, each an expression of what Hilary Putnam would call "a point of view."\textsuperscript{130} No one of these points of view is "correct."\textsuperscript{131} Each is useful for different purposes. Finally,

\begin{itemize}
  \item \textsuperscript{127} RORTY, *supra* note 121, at 81.
  \item \textsuperscript{128} These ideas were published as LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (David Pears & Brian McGuinness trans., 1961).
  \item \textsuperscript{129} The story is recounted in RAY MONK, *LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS* 118 (1990). My thanks to Dr. Peter M.S. Hacker for assistance with this reference.
  \item \textsuperscript{130} See HILARY PUTNAM, *REPRESENTATION AND REALITY* 114 (1988):
    We can and should insist that some facts are there to be discovered and not legislated by us. But this is something to be said when one has adopted a way of speaking, a language, a "conceptual scheme." To talk of "facts" without specifying the language to be used is to talk of nothing; the word "fact" no more has its use fixed by the world itself than does the word "exist" or the word "object."
  \item \textsuperscript{131} However, I would argue that within each point of view it is possible to make correct and incorrect assertions or statements.
\end{itemize}
none is reducible one to the other, nor to the individual predilections of anyone employing a vocabulary.

Consider the familiar concept of "duty." Did one of the drivers proceed in such a way as to create risk for others? If the question receives a positive answer, it is likely that that party will be found liable for injuries caused thereby. The discussion will proceed in the juridical language of duty, risk, and causation. With this language, the trier of fact will devolve to a conclusion on the question of liability and a judgment will issue.

An entirely different description of the event is also possible. Imagine a physicist is asked "what happened?" She will answer that objects proceeding through space and time met at a certain point in mereological space and repelled one another. No mention of duty, risk, or causation will be made. Why? Because these are not concepts of physics. Physics and law are independent languages (discourses) of description, each with their own distinct vocabulary.

It is these vocabularies that allow for distinctly different answers to the question "what happened?"

A third answer is also possible. We could ask an economist "what happened?" She might say "the cheapest cost avoider failed to take suitable precautions." Other economic descriptions are possible, but the point is that the language of economic description will be in a vocabulary that is in no way coextensive with the discourses of law or physics. And that is the point: in answer to the question "what happened?," three plausible and logically distinct responses are possible. None of the three modes of description is "the" correct one. The very idea of "the" correct one simply makes no sense.

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132. A well-known approach to reductionism is Steven Weinberg's work. E.g., STEVEN WEINBERG, DREAMS OF A FINAL THEORY 55 (1992) ("The reason we give the impression that we think that elementary particle physics is more fundamental than other branches of physics is because it is.").

133. This is why I maintain that Fish is not a pragmatist: he is a subjectivist. The focus of the relativism is the individual—collective or isolated—not the practice.

134. These vocabularies are the appraisive tools of their disciplines. It is in the use of these vocabularies that true and false assertions or statements are made.

135. This is the nub of the problem. Economists, philosophers, and theorists of all stripes write as if some nonlegal language can "rescue" law from itself. For an argument to the effect that this is an illusory undertaking, see Gunther Teubner, How the Law Thinks: Toward a Constructivist Epistemology of Law, 23 LAW & SOCIETY REV. 727 (1989).
What, then, of objectivity? The conclusion we inevitably reach is that objectivity is relative to a domain. Within different fields, practices, or discourses, one finds different forms of argument—different ways of showing the truth of propositions. The truth of assertions within a domain cannot be proven nor disproven with the forms of argument of other disciplines. There is no "form of forms" or metaprinciple which can identify a given set of argumentative forms as "the" correct ones, for the choice of forms is a matter of history and utility.

The forms of argument in law could have been different and may yet become different. The forms of legal argument are an inheritance, not a dictate. As I hope I have shown, this does not make law any less "objective" than any other discipline. Law is more argumentative than physics or arithmetic. If law is less objective than physics, the explanation lies more with us than the world. In thinking about objectivity, it is a mistake to believe that objectivity depends more on "the world" than on those who inhabit the world. This, I have suggested, rests on a view of the relationship of mind to world that no longer seems plausible.

136. I would go so far as to say that it is the various forms of argument that demarcate one field or discipline from others. Why would we reject an opinion which, after recitation of the facts of the case, provides three differential equations and the statement "Motion denied?" The answer is that this decision—even if correct on the merits—expresses the judgment of the court in a nonlegal discourse. One is reminded that, in law as in most things, how a conclusion is reached is as important as what conclusion is reached.

137. BOBBIT, INTERPRETATION, supra note 67, at 5 ("The ways in which Americans interpret the Constitution could have been different; indeed the forms of constitutional discourse are very different in other societies.").

138. Dean Wellington spoke eloquently of this phenomenon in the context of the disconnect between legal academics and practitioners. Harry Wellington, Challenges to Legal Education: The 'Two Cultures' Phenomenon, 37 J. LEGAL EDUC. 327, 327 (1987):

On the one hand, [the] methodology [of the academic] is apt to mirror the style of political and moral philosophy, and accordingly, appear to the practitioner as overly general and abstract, insufficiently particularistic and attentive to institutional considerations....

[Another] factor is vocabulary: law teachers talk differently from practicing lawyers. In the Sterling Law Buildings and elsewhere one hears heated conversations about hermeneutics, externalities and deconstruction.