

# How Legal Language Works

By Louis E. Wolcher\*

## *Abstract*

*What* a legal object is — its identity or essence — is co-determined by *how* it is: its mode of existence, or the way it manifests itself in time as a lived phenomenon. Thus, any serious effort to think about the human institutions that we call “law” requires a philosophy of how legal language (statutes, precedents, contracts, etc.) is related to legal events such as the interpretation and the enforcement of law. This article addresses the “how” question from a standpoint that has been profoundly influenced by the work of Wittgenstein. It notes that a major international political movement currently exists, the primary purpose of which is to make legal language clear (or clearer) to laypersons. Accepting this movement’s binary opposition between linguistic clarity and obscurity as its initial point of departure, the article begins by describing its philosophy of philosophy; it then develops six well-defined ideas that build upon Wittgenstein’s distinction between the implicit rules that make up a system of language (a “language game” embedded in a “form of life”) and statements that are made, by means of the rules, within the system. Appropriating Heidegger’s concept of the hermeneutic circle to elucidate the critical phenomenological difference between *interpreting* legal language and *recognizing its meaning*, on the one hand, and, on the other hand, automatically *receiving* linguistic signs, the article then maintains that the latter phenomenon is in fact the ultimate ground of the legal form of life. The two sections that follow this discussion unpack the distinction found in Wittgenstein’s philosophy of language between the *magical* and the *logical* views of language. The magical view imagines that legal language must always “mean” something; following this view leads thought into obscurity, confusion, and occasionally even into absurdity. In contrast, the logical view of language attempts to identify the different descriptive techniques (methods of comparison and methods of application) that people employ in various forms of life, and it seeks philosophical clarity about, rather than a “theory” or “explanation” of, the many ways in which legal language is actually used by lawyers and judges. Finally, the article attempts to show that clarity is not a property of linguistic signs as such, but rather is a function of the differences between forms of life whose constitutions and continuities are produced by history in the largest sense of the word. It also submits that the demand for clarity in legal language is ultimately a demand for admission into the politically powerful form of life that is inhabited by lawyers, judges, and legislators.

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*Nam omnia praeclara tam difficilia quam rara sunt*  
—Spinoza<sup>1</sup>

### *Clarity about the Problem of Clarity*

In this article we will attempt to achieve something as rare and excellent as it is difficult: philosophical clarity about how it is possible for lawyers, judges, and laypersons to receive and operate with legal texts (constitutions, statutes, common law decisions, written contracts, and so forth) in terms of the conceptual dualism “clear versus obscure.” Although most of us know how to use the words “clear” and “obscure” in daily life, thinking about what makes a given legal text clear or obscure in the first place is something we hardly ever do. From the points of view of the legal technician and the consumer of legal language, clarity of expression is instrumental for achieving certain goals. Indeed, even obscurity of expression can be used as a tool, as Jeremy Bentham noticed when he attacked the opacity and complexity of the old English common law for its tendency to serve ruling class interests.<sup>2</sup> But despite the many uses of legal language, getting clear about the problem of its clarity and obscurity is a different kind of enterprise than trying to craft it in a manner that is either clear or obscure. The first task requires genuine thinking; the second is merely an exercise in calculation.

Before embarking, three notes on method are warranted. First, this article operates on the premise that thinking to acquire perspicuity on a theme is different than thinking in order to develop a theory of that theme. Philosophical theories of law or language are not only descriptive but also instrumental: they suppress differences in the interest of explaining and controlling their subject matter. Mere scholarship transcends its theme like a jail surrounds a prisoner, enclosing it in a cage of “correct” statements. The scholarly clarification of existing concepts and the construction of new conceptual systems constitute a kind of quasi-mathematical calculation with symbols. It manifests technological behavior, and, however useful this procedure may be to the pre-existing projects of law and politics, it is not what I call thinking.

Thus, insofar as we do make what look like various theoretical moves in the course of these investigations (for example, by using the soon-to-be-explained concept of “bipolarity”), this will only be because the moves in question *open up* the complexities of language

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<sup>1</sup> “For all that is excellent and eminent is as difficult as it is rare.” This is the last sentence in Spinoza’s *Ethics*. BENEDICTUS DE SPINOZA, *ETHICS* 280 (James Gutmann ed. and trans., 1955) (1677). The original Latin is quoted by Schopenhauer. ARTHUR SCHOPENHAUER, 1 *THE WORLD AS WILL AND REPRESENTATION* 384 (E.F.J. Payne trans., 1969) (1819).

<sup>2</sup> See Martin Kayman, *A Memorial for Jeremy Bentham: Memory, Fiction, and Writing the Law* 15 *LAW AND CRITIQUE* 207 (2004).

rather than closing them down in the form of an explanation.<sup>3</sup> In short, this article will only employ theories to enhance perspicuity.<sup>4</sup> My indifferent or deflationary attitude towards theories is analogous to the one that Wittgenstein expressed in a lecture on philosophical psychology during the late 1940s:

We are not looking for a theory.... [For example,] Freud's theory of dreams as wish fulfillment is explained with reference to primitive dreams. But it is a theory, and we can justly object by saying: "Oh, but there are other dreams." This is not the case with us. We are not giving a theory. I am only giving a type: only describing a field of varying examples by means of centres of variation. Any other example is not a contradiction; it is only a contribution.<sup>5</sup>

Wittgenstein believed (as I do) that philosophical understanding amounts to a kind of perspicuity that is or should be the ultimate objective of any philosophical inquiry aspiring to be non-dogmatic. To have a perspicuous view of something is to take it into one's mind, so to speak, as a *limited whole* — to view something *sub specie aeterni*, as Wittgenstein puts it in the *Tractatus*.<sup>6</sup> What we do afterwards with our hard-won perspicuity about legal language is not so much a matter of critical reflection as it is a matter of concrete (and often tragic) action in the spheres of politics and morality. The connection between conventional knowledge and human action in these spheres consists of what the Greeks called *phronēsis*: the use of instrumental reason as a means for achieving particular (and largely unquestioned) ends in politics, in material production, and in daily life. But the attainment of philosophical perspicuity is *not* instrumental in this sense, for any questioning that is constantly destabilizing certainty about the truth or value of ultimate ends is never merely a means. Rather, this kind of questioning ought to be seen as an end in itself. The perspicuity that it achieves is an important product of a philosophical injunction that the Greeks expressed as *gnōthi sauton* ("know thyself"), an injunction which, if followed rigorously, can (and usually does) bring about unplanned and radical changes in the *thinker*.

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<sup>3</sup> "People who are constantly asking 'why' are like tourists who stand in front of a building reading Baedeker and are so busy reading the history of its construction, etc., that they are prevented from *seeing* the building." LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 40e (Peter Winch trans., 1980).

<sup>4</sup> Wittgenstein once illustrated the general idea of perspicuity by talking about the "surveyability" of mathematical proofs: "Perspicuity is part of proof. If the process by means of which I get a result were not surveyable, I might indeed make a note that this number is what comes out — but what fact is this supposed to confirm for me? I don't know 'what is *supposed* to come out.'" LUDWIG WITTGENSTEIN, *REMARKS ON THE FOUNDATION OF MATHEMATICS* 95 (G.E.M. Anscombe trans., 1983).

<sup>5</sup> LUDWIG WITTGENSTEIN, *WITTGENSTEIN'S LECTURES ON PHILOSOPHICAL PSYCHOLOGY*, 1946-47 142 (P.T. Geach ed., 1988).

<sup>6</sup> LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 73 (D.F. Pears & B.F. McGuinness trans., 1974) (1921) ("To view the world *sub specie aeterni* is to view it as a whole — a limited whole."). The Latin phrase *sub specie aeterni* can be translated to mean "under the aspect of eternity."

To put this article's attitude about philosophy in a nutshell: any philosophy that tries to "help" the pre-existing projects of law and politics achieve their aims is never the result of genuine *philosophizing*.<sup>7</sup> In fact it verges on what Herbert Marcuse, no friend of analysis, calls the "liquidation of philosophy by analytic philosophy."<sup>8</sup> That this is a debatable and even unpopular point of view on the philosophy of philosophy almost goes without saying. Robert Alexy, for example, recently argued that it is the job of philosophers of law to come up with a coherent picture of "what ought to be done and is good,"<sup>9</sup> while the late Ernest Gellner has loudly excoriated Wittgenstein and his ilk for engaging in what Gellner takes to be a sort of dangerous and solipsistic escapism.<sup>10</sup> But one does not have to accept Wittgenstein's (or this author's) radically antinomian philosophy of philosophy in order to use his methods to achieve significant insights into the problem of clarity and obscurity in legal language. In any case, gaining an understanding of that problem is what really matters to us in this paper — not arriving at a "correct" theoretical explanation of it.

A second note on method: in attaining perspicuity about the problem of clarity we will make use of an important distinction that was first drawn by Wittgenstein during his early-to-middle period (roughly, from 1913 to around 1940), and that in one way or another stuck with him throughout his life. Following Wittgenstein, we will distinguish between the rules that make up a system of language and the statements that are made, by means of the rules, within the system. The word "rule" in this context does not refer to the same kind of thing that the term "legal rule" (hereafter "legal norm") refers to. We tend to think of the primary legal norms that are expressed in authoritative legal texts as normatively binding, in the sense that we *ought* to obey (and perhaps enforce) them; likewise, when legal norms take the form of what Ronald Dworkin calls "principles,"<sup>11</sup> we feel that we *ought* at least to take account of them in making legal judgments, whether or not they are definitive. We may even feel obligated to apply certain secondary legal norms for construing primary legal norms — familiar canons of construction like "finding the original intent," "reading the plain meaning," and "determining the purpose of the law." But the *implicit* rules that allow people to understand these and any other kinds of explicit legal norms are not "binding" in the usual sense of the word. To say that language is rule-bound in Wittgenstein's sense thus does not mean that there is a book of

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<sup>7</sup> For more on this theme, see LOUIS WOLCHER, *BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY* 1-4 (2005).

<sup>8</sup> HERBERT MARCUSE, *TOWARDS A CRITICAL THEORY OF SOCIETY* 55 (Douglas Kellner ed., 2001).

<sup>9</sup> Robert Alexy, *The Nature of Legal Philosophy*, 7 *ASSOCIATIONS: J. L. & SOC. THEORY* 63, 65 (2003).

<sup>10</sup> ERNEST GELLNER, *LANGUAGE AND SOLITUDE* (1998).

<sup>11</sup> On the distinction between legal rules and legal principles, see Ronald Dworkin, *Is Law a System of Rules?*, 35 *U. CHI. L. REV.* 14 (1967). For purposes of this article, the term *legal norm* means *any* type of authoritative legal text, and includes both "rules" and "principles" in Dworkin's sense.

rules somewhere that determines whether speakers are or are not in compliance. Rather, *we* are the ones who find and articulate the rules while we are thinking philosophically. By studying the way various groups of people live and talk and reporting honestly about the regularities in linguistic usage that we observe, we discover and describe the linguistic rules of those groups of people. Indeed, the word “rule” in this context is merely shorthand for the observation that a linguistic usage *is* regular. People do not follow these rules as much as exhibit them in their behavior. The later Wittgenstein famously calls this kind of regularity in people’s linguistic behavior a *language-game*, which he defines as “language and the actions into which it is woven.”<sup>12</sup>

As this definition of “language-game” suggests, a regularity in the use of language necessarily clusters around what Wittgenstein calls a *Lebensform* (“form of life”). “To imagine a language means to imagine a form of life,” he says, by which he means a shifting pattern of communal interaction.<sup>13</sup> For example, the primitive language-game of the builders that Wittgenstein describes at the beginning of the *Philosophical Investigations* is connected intimately to their radically simple way of living: calling out the names of the building materials they require for a job is all the language they need to be able to engage in their undemanding form of life.<sup>14</sup> Since our own forms of life are hugely more complex than theirs, the example of the builders is meant to show that one-size-fits-all philosophical theories of language are *a priori* inadequate to the task of understanding the many different language-games that people play. The concept “form of life” is therefore a useful reminder that the actual speaking and writing of language is never isolated from the non-linguistic aspects of people’s lives; on the contrary, every linguistic practice is woven into the fabric of the particular human activity that gives it its *raison d’être*.<sup>15</sup> It follows that this article conceives of linguistic rules (including methods for applying legal norms) as products of the history and practices of particular forms of life, and not as timeless and pure Ideas that are suspended somewhere “out there” in the Platonic ether.

A third note on method pertains to the relationship between this article and the general intellectual environment that surrounds the aspiration for more clarity in the law. In particular, ever since Bentham wrote diatribes against the common law and paeans in support of clearly written constitutions and statutes, much scholarly ink has been spilt in an effort to prove the many benefits that are supposed to accrue from greater clarity in legal language. Thus, it is alleged that linguistic clarity focuses thought and helps lawmakers and judges refine and achieve their purposes; that it lets people know their rights and allows them to plan their affairs with greater confidence about the legal consequences of their actions; that it is good for popular democracy because it makes law’s contents more visible to the electorate; that it loosens the odious stranglehold that a self-interested legal profession has on the ultimate meaning of the public institutions that affect the lives

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<sup>12</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 5e (G.E.M. Anscombe trans., 3d ed. 1999) (1958).

<sup>13</sup> *Id.* at 8e.

<sup>14</sup> *Id.* at 3e-10e.

<sup>15</sup> *Id.* at 11e.

of the people; and so forth.<sup>16</sup> There even exists an active academic and political movement, calling itself the “International Association Promoting Plain Legal Language,” that stages regular meetings and conferences around the world and that publishes a journal, aptly entitled *Clarity*, which, in addition to advocating the Association’s mission, also trains lawyers and legislative draftsmen in the techniques of clear writing.<sup>17</sup> However noble the Association’s goals may be, my third note on method follows from the first: I am not concerned here with the question of whether the movement for greater clarity in legal language is good or bad, wise or unwise; rather, this article seeks to uncover the movement’s unthought presuppositions about “clarity,” and to show what clarity really *is* as a lived phenomenon.

In the next section I will set forth some important preliminary ideas on the differences between *rules*, *propositions*, and *legal norms*: fundamental logical distinctions that will inform almost all of the article’s subsequent arguments and insights. We will then turn our attention to the concept of the hermeneutic circle and its significance for the difference between the *interpretation* of legal language and the automatic *reception* of that language. This, in turn, will set up an opposition between two modes of thinking about language: the *magical* view (according to which legal norms must always “mean” something) and the *logical* view (which looks at how legal norms are used in accordance with one or more “method of application”). Finally, in the conclusion I will attempt to describe the ultimate political significance, so to speak, of our meditations on legal language by focusing on the internal relationship between legal clarity and Wittgenstein’s concept of forms of life.

### *Six Ideas on the Differences between Rules, Propositions, and Legal Norms*

Having made the foregoing preliminary points as well as I can, permit me to summarize certain distinctions between *rules*, *propositions*, and *legal norms* in the form of six interrelated ideas. In describing these ideas I will generally adhere to the following basic definitions: a “sign” is that part of language that can be perceived by the senses; a “statement” includes both propositions and legal norms, and consists in a sign that has a use in some language game; an “expression” is a statement considered together with the particular human behavior of which it is an element; a “proposition” is the representation of a state of affairs that could be otherwise, and that can be compared with reality according to some method of comparison; and a “legal norm” is a generally accepted legal ought-statement<sup>18</sup> for which there is a method of application.

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<sup>16</sup> To cite but two of the most influential books on the alleged virtues of clarity in legal language, see RUDOLF FRANZ FLESCH, *HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS* (1979) and DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963).

<sup>17</sup> The Association’s website is [www.clarity-international.net](http://www.clarity-international.net).

<sup>18</sup> Since it is not my intention here to develop a theory of what is and is not “law,” the article’s rather loose (and admittedly circular) definition of a legal norm as a generally accepted legal ought-statement should not be read to advocate a position in the debate within legal positivism

Now on to the six ideas:

(1) One of the most important functions of the implicit rules of language pertains to representation. The rules show what can be said, with sense, about the way things are (or are not) in the world — about *logically* possible states of affairs, in other words.

(2) To speak of a “way” that things are implies that there are *other* ways for them to be, for as Wittgenstein says, “there is no sense in talking of a way if there is only one end and a different end is precluded.”<sup>19</sup> For example, while there are many ways to get from Seattle to Cambridge, it makes no sense to talk about a “way” of getting from Seattle to Seattle. Consequently, to say that a state of affairs is logically possible is to say that we can imagine it to be different. The sentences “It is raining” and “Elephants can fly” both depict logically possible states of affairs, but the expression “ $1 + 1 = 2$ ,” at least as a typical Western mathematician might use it, does not. In the first two cases we can imagine an antithesis to what is said (a sunny day or a flightless elephant), whereas in the latter case we cannot: there is no imaginable state of affairs that corresponds to the sentence “ $1 + 1 \neq 2$ ” in this context. Although it may sound shocking (or just plain ridiculous) to say it, a mathematician cannot sensibly say *either* that “ $1 + 1 = 2$ ” is true *or* that “ $1 + 1 \neq 2$ ” is false. If an outraged mathematician were now to rejoin “But ‘ $1 + 1 = 2$ ’ really is true!” (as most undoubtedly would), the best *philosophical* response would be simply to observe that what he asserts is the equivalent of saying that the statement “ $1 + 1 = 2$ ” has been *proven*. In short, the word “true,” as he uses it in this context, is synonymous with the phrase “mathematically proven.” But a “proven” statement in mathematics is not “true” in the very precise sense that we are using the term here: that is, it does not exclude an imaginable antithesis.<sup>20</sup> To put this point in technical terms, a statement makes (or has) sense if it is *bipolar* — if it asserts a state of affairs that could be otherwise. Only bipolar

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about the proper criterion for “law,” or to take a stand in the age-old controversy between positivism and natural law theory. Instead, what is most important about this definition is that it distinguishes legal norms, which no one doubts are statements of what *ought* to be, from propositions, which make assertions about that which *is* (states of affairs). In this respect the distinction between methods of comparison and methods of application is critical: the former compare propositions *with* reality, while the latter apply norms *to* reality.

<sup>19</sup> LUDWIG WITTGENSTEIN, *WITTGENSTEIN’S LECTURES: CAMBRIDGE, 1932-1935* 73 (Alice Ambrose ed., 1979).

<sup>20</sup> For example, an impossibility proof in mathematics does not prove that a thing is impossible *in fact*. Suppose I spend years mucking about with a very precise ruler and compass and manage to divide a sixty degree angle into three parts which, when measured by the finest instruments we humans have available to us, yield measurements of exactly twenty degrees each. Does this mean that I have proven that the trisection of an angle *in the mathematical sense* is possible after all? No, it does not. When Courant and Robbins say (correctly) that it has been proven that “the trisection of the angle by ruler and compass alone is in general impossible,” their use of the word “impossible” is terribly misleading. RICHARD COURANT & HERBERT ROBBINS, *WHAT IS MATHEMATICS?* 137-38 (1996). If trisection in the mathematical sense is impossible it is not impossible in the same sense as my being able to fly to the moon by flapping my arms is impossible. *For the sense of a mathematical sentence is never determined by comparing it with reality.*

statements are propositions, and only propositions have a sense. As Wittgenstein said to Russell, in 1913, “What I mean to say [by the word “bipolar”] is that we *only* then understand a proposition if we know both what would be the case if it was *false and* what if it was *true*.”<sup>21</sup> Non-bipolar statements (such as those contained in mathematical proofs and legal norms) are neither true nor false — they are *nonsense* (*Unsinn*, in German).

The word “nonsense,” it bears noting, is not to be taken in the pejorative sense of being “rubbish,” for nonsensical (non-bipolar) statements can have many different uses. For example, absolute religious and ethical expressions such as “Everything whatsoever happens according to God’s will” do sometimes have their uses despite the fact that they are not bipolar. Although the statements that are the linguistic element of these expressions tell us nothing that could be otherwise, the expressions themselves frequently play the role of demonstrating the speaker’s general attitude towards life.<sup>22</sup> Thus, if someone were to say with conviction that everything whatsoever happens according to God’s will — a statement that admits of no antithesis — we could read his words as essentially the equivalent of the cry “Hallelujah!” That is, although these expressions *say* nothing that could be otherwise, they nonetheless can *show* the religious faith of the speaker to anyone who cares to observe them.<sup>23</sup>

Likewise, it is obvious that legal norms have their uses even though they are not propositions about the world. Although both legal norms and propositions are statements, only propositions are bipolar. Consider the *proposition* “On January 1, 2006, Joe drove a car into the park”: it is bipolar because we can imagine what it would look like if Joe did *not* drive a car into the park on that day. But a statute such as “No vehicles in the park,” although it appears to *state* something, does not purport to *describe*, as a proposition does, any particular state of affairs. Despite the fact that it is not a proposition, however, this statute *qua* legal norm can be the basis of an act of legal enforcement, and this is its primary use. *How* a legal norm can be the “basis” of an act of enforcement will be discussed later. For now, let me say that legal norms are applied according to some *method or methods of application* — and not according to their “contents”; the latter way of conceiving of how legal norms operate is what we will have occasion to call the “magical” (as opposed to the “logical”) point of view on language.

(3) Logical possibility is not the same as empirical possibility, but consists in our ability to imagine and represent a hypothetical or actual state of affairs. For example, the proposition “Unicorns exist” makes sense (even though it is and probably always has been false) because it is possible to imagine the existence of beings that look more or less like this:

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<sup>21</sup> LUDWIG WITTGENSTEIN, CAMBRIDGE LETTERS 47 (Joachim Schulte & Brian McGuinness trans., 1995).

<sup>22</sup> D.Z. Phillips, *Voices in Discussion*, in RELIGION AND WITTGENSTEIN’S LEGACY 89, 91 (D.Z. Phillips & Mario von der Ruhr eds., 2005).

<sup>23</sup> For more on this point, see Louis Wolcher, *A Meditation on Wittgenstein’s Lecture on Ethics*, 9 LAW AND CRITIQUE 3 (1998).





UNICORN

In the *Wiener Ausgabe*, Wittgenstein sums up his entire philosophical method as a transition from the question of truth to the question of sense.<sup>24</sup> This means that nonsensical statements have not earned the right, as it were, to be called “true” because they are not understood to represent anything of which it could be said, “This is what it would be like if the sentence were false; but that’s not what it is like, and therefore the sentence is true.” The best way to understand what someone who asserts a statement of the form “X is true” is getting at is to ask him to give a representation of *what* is true. In the case of the assertion “It is true that unicorns do not exist,” for example, the speaker can give a description or draw a picture of the thing that he would call a “unicorn” if it *did* exist. His representation could then in principle be compared with reality as a means of deciding the *question* “Do unicorns exist?” and hence of determining whether the *answer* “Unicorns do not exist” is true or false. This example shows what it means to assert, as I did in the previous section, that absolute statements are never true, for as Wittgenstein says, “in order for a proposition to be capable of being true it must also be capable of being false.”<sup>25</sup> Someone who says that the law of non-contradiction is “necessarily true,” for example, is not claiming that there is some imaginable state of affairs that is described by the statement “*p* and not-*p*,” such that just *this* state of affairs is not the case. What would it look like, for example, for a ball simultaneously to be colored red all over and blue (not-red) all over? Of course, this does not imply that the statement “The law of non-contradiction is necessarily true” has no use at all. The speaker may be expressing, by means of this nonsensical statement, that the law of non-contradiction — “not (*p* and not-*p*)” — is a grammatical rule that she has decided to follow in constructing her sentences, and *this* possibil-

<sup>24</sup> LUDWIG WITTGENSTEIN, *WIENER AUSGABE* 177 (1994).

<sup>25</sup> LUDWIG WITTGENSTEIN, *NOTEBOOKS 1914-1916* 55c (G.E.M. Anscombe trans., 2d ed. 1984).

ity would give her statement a use.<sup>26</sup> Wittgenstein makes the same point this way: “all propositions which seem to be statements about the essences of things are grammatical propositions.”<sup>27</sup>

(4) The propositions that we utter and write according to the implicit rules of the language-game in which we are participating, having a sense, can be compared with reality according to some *method of comparison* that allows us to ascertain whether they are true or false. A legal norm, although it does not represent something in the way that a proposition does, also requires a method in order to be of use: a *method of application*. A *method of comparison* is to a proposition what a *method of application* is to a legal norm. The first compares a proposition *with* reality; the second applies a norm *to* reality. For instance, the proposition “There are unicorns in Seattle” might be *compared* with reality by holding a picture of a unicorn, such as the one shown above, next to every living being in the city, and then looking to see whether any of them exhibits the salient characteristics of the creature that is shown in the picture: this would be one possible method for comparing the proposition with reality. On the other hand, the hypothetical legal norm “No unicorns are allowed in Seattle” might be *applied* according to a legal fiction<sup>28</sup> that takes horses to be unicorns, and requires the testimony of two witnesses to prove that a “unicorn” (horse) is in the city: this would be one possible method for applying the legal norm to reality.<sup>29</sup> As these examples suggest, propositions can be compared (in theory if not in fact) with something that they are understood to be about, whereas legal norms are not “compared” with anything.

To be sure, legal norms can become the basis for forming *propositions* such as “Louis illegally brought a unicorn into Seattle on April 14, 2006,” but the legal norm “No unicorns are allowed in Seattle,” is not itself “about” this (or any) particular event. Its role in the legal language game is non-propositional: the legal norm can be *applied* to Louis in the sense that it can be the basis of a proposition that, if true, would make him into a lawbreaker who is worthy of legal sanction; but standing alone the norm *as such* does not refer to anything concrete. This example suggests that concept-words like “unicorn” that are used in legal propositions *also* have one or more methods of application, and this is true. The method of application that is used to apply a legal norm to reality will be the same method of application that is used to formulate a legal proposition that enforces that norm. Since a legal proposition is the linguistic product of the event of applying a legal

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<sup>26</sup> “The laws of logic, e.g., excluded middle and contradiction, are arbitrary. This statement is a bit repulsive but nevertheless true.” WITTGENSTEIN, *supra* note 19, at 71.

<sup>27</sup> LUDWIG WITTGENSTEIN, PUBLIC AND PRIVATE OCCASIONS (James Klagge & Alfred Nordmann eds., 2003).

<sup>28</sup> For an excellent analysis of the role of legal fictions in the development of the law, see LON FULLER, LEGAL FICTIONS (1967).

<sup>29</sup> As this example shows, the method of application of a legal rule is seldom *exclusively* a function of the implicit rules that inform a purely legal language game. Very often legal terms are applied according to implicit rules that are drawn from ordinary life. In other words, the legal and non-legal forms of life in any given society are never wholly autonomous from one another.

norm, this is hardly surprising. Nevertheless, once such a legal proposition is expressed and understood as bipolar, it brings with it a method of comparison that the legal norm as such lacks — one that allows us to decide whether the proposition is “true” or “false.” For example, although the proposition “Louis illegally brought a unicorn into Seattle on April 14, 2006” might be judged false if credible eyewitnesses testify that Louis was lying comatose in a hospital bed on that day, no amount of testimony can prove (*or* disprove) the “truth” of the legal norm “No unicorns are allowed in Seattle.”

The meaning of a statement — whether it is a proposition or a legal norm — cannot be determined by just staring at the signs of which it is comprised; instead, a philosophical description (in the sense of observing and reporting linguistic regularities within a form of life) of the methods of comparison or application that are associated with the statement *shows* what it means to the people involved. To illustrate this point, consider the apparently contradictory statement “1 = .9.” The Pirahã people, a group of hunter-gatherers who live along the banks of the Maici River in Brazil, use a system of counting called “one-two-many,” in which the word for “one” translates to “roughly one,” the word for “two” means “a slightly larger amount than one,” and the word “many” means “a much larger amount.”<sup>30</sup> It is obvious that their mathematics will not take them to the moon or allow them to produce computers and automobiles. But so what? They simply do not care that their mathematics produces what *we* would call contradictions, for they are perfectly content to count one apple as the equivalent of what we would call nine-tenths of an apple. They get along fine with this method of applying the numerals of their language, and it is not the job of a philosopher to deny that this just happens to be their form of life. Indeed, it ought to be a philosopher’s job to notice this fact.

(5) It is senseless to say that the implicit rules of language *themselves* are true or false, for although the rules could be different, they themselves are not statements “about” anything. As Hannah Arendt puts it, when people judge things “only the individual case is judged, not the standard [of judgment] itself or whether it is an appropriate measure of what it is used to measure.”<sup>31</sup> For example, most of the time our statements implicitly follow the laws of logic, such as excluded middle and non-contradiction. These logical rules themselves do not mean something that is capable of being true or false — they are not bipolar — but rather constitute grammatical rules that “determine a meaning and are not answerable to any meaning they could contradict.”<sup>32</sup> Whatever meaning there is in a

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<sup>30</sup> *Language Barriers; Linguistics*, THE ECONOMIST, August 21, 2004, at 66-67.

<sup>31</sup> HANNAH ARENDT, THE PROMISE OF POLITICS 102 (Jerome Kohn trans., 2005).

<sup>32</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR 29 (Rush Rhees & Anthony Kenny trans., 1978). Grammatical rules in this sense are like stipulations concerning units of length: we can use a stipulated length (a bar we call “one meter,” for example) to measure with, but it is hard to see what the point would be of saying that the bar we have chosen as our standard of measurement is *itself* one standard unit long. Consider Wittgenstein’s remark about what was then the standard meter-bar in Paris: “There is *one* thing of which one can say neither that it is one metre long, nor that it is not one metre long, and that is the standard metre in Paris. But this is, of course,

law of logic is already included in specific statements that follow its form, and does not pop out as something “extra” that the naked signs that make up the law itself “represent.”

As I have already mentioned, this same principle applies to legal norms, for they, too, are not bipolar statements about the world. One can imagine the provisions of the European Convention on Human Rights being replaced by another set of legal norms, but what *else* would it mean to say that one could imagine the ECHR “being otherwise?” Compare this example: although one can imagine a game just like chess, but with one of the official rules changed to permit the bishop to move as the knight does from the tenth move on, only a fool would say “I can imagine a game just like chess, having all the same rules, but with those rules being otherwise.” A legal norm can *exist*; it can *be in force*; but it does not have *being true* as one of its properties. On the contrary, a legal norm, as earlier remarks have implied, plays the role of a grammatical rule for the construction of propositions according to some method of application. The norm plus its method of application comprise a kind of measuring device (quite literally a “rule”) that allows lawyers and judges to say of this or that *particular* action “*This* is an instance of ‘X’ within the meaning of the legal norm that says ‘Do not do X.’”

(6) A legal norm does not have to take any particular form, at least in a common law system like ours. This fact sometimes can make the distinction between norms and propositions difficult to draw. By way of illustration, consider the following series of mathematical statements:

$$\begin{aligned} E_1: & 4 = 2 + 2. \\ E_2: & 2 = 1 + 1. \\ E_3: & 4 = (1 + 1) + (1 + 1). \end{aligned}$$

Is the transformation from  $E_1$  to  $E_3$  accomplished by means of  $E_2$ , seen as a *norm* (of substitution)? Or does  $E_3$  follow as merely the next step from the first two equations seen as co-equal *configurations* in the game? That is, do I go, step by step, from  $E_1$  to  $E_2$  to  $E_3$  by means of an inference according to *other* norms, or does  $E_2$  amount to the norm that I apply to  $E_1$  in order to produce  $E_3$ ? One might argue (erroneously) that  $E_2$  is insufficiently general in its form as a matter of logical necessity, and that logic (as opposed to mere convention) requires us to have a substitution-norm of the appropriate “generality of expression” in order to get  $E_3$  from  $E_1$  and  $E_2$ .<sup>33</sup> However, the statement of any such norm would consist in signs, just as  $E_2$  does, and there is nothing to prevent us from reading (or failing to read) the appropriate level of generality in either of them.

The appropriate level of generality that is required of a norm is usually decided on the basis of regularity of usage, and sometimes on the basis of the idiosyncratic choices of individuals. In either case an induction is what *people* do, and *no* additional norm can save them this inductive step. As Wittgenstein puts it:

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not to ascribe any extraordinary property to it, but only to mark its peculiar role in the language-game of measuring with a metre-rule.” WITTGENSTEIN, *supra* note 12, at 25e.

<sup>33</sup> For example: “For the sign ‘2’, wherever it occurs, ‘1 + 1’ may be substituted.”

The essential thing about [a rule], its generality, is inexpressible. Generality shows itself in application. I have to *read* this generality *into* the configuration. . . . A rule is not like the mortar between two bricks. We cannot lay down a rule for the application of another rule. We cannot apply one rule by means of another rule.<sup>34</sup>

In this passage Wittgenstein does not mean to deny that one can construct canons for construing norms; rather, he means that there is no such thing as a norm (including a canon) that can read itself *as* a norm. Thus, for example, we would not say of the interpretive legal norm of applying the “plain meaning” of a statute that it itself has a plain meaning, for it is this very norm (together with its method of application) that establishes the possibility of saying that this or that statute has a “plain meaning” in the first place. In short, the norm-like quality of a statement does not depend on its having the “right” level of generality of expression. This is a point that was well-known to the legal realists, who delighted in showing that the “holding” (the statement of a legal norm) of a common law precedent is always a function of the level of generality at which subsequent courts decide to characterize the precedent court’s decision.<sup>35</sup> What one judge thinks of as the holding of a precedent case another judge might think of as a mere description of the facts of that case; the difference is that the second judge would read the sentences that make up the previous decision as standing for a legal norm which he expresses at a higher level of generality than the level expressed by the first judge: “a gasoline-powered vehicle in the park” versus “an automobile in the park,” for example. The main point is that *any* set of signs can show itself as a norm — it all depends on how the signs are actually used by people.

Although an explicit norm dealing with signs is a stipulation about the use of signs, people constantly confuse statements of this type with a proposition because “at first blush a rule dealing with signs looks just like a proposition.”<sup>36</sup> The statement “Red is a color,” for example, looks similar to the proposition “My sweater is red.” However, the latter tells us something about a state of affairs that could be otherwise (my sweater could be colored blue, for instance), whereas the former tells us nothing of the sort; it is at best a reminder that the word “red” belongs to the linguistic practice of describing things by their color. To overlook this distinction is to confuse the grammatical with the factual. Thus, to say that the concept “law” is itself lawful is like saying that the concept “red” is colored red. Both ways of thinking and talking are confused. More generally, a great deal of philosophical confusion — especially confusion about the problem of clarity and obscurity in legal language — stems from a failure to understand and appreciate the differences between rules, propositions, and norms.

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<sup>34</sup> FRIEDRICH WAISMANN, WITTGENSTEIN AND THE VIENNA CIRCLE: CONVERSATIONS RECORDED BY FRIEDRICH WAISMANN 154-55 (Joachim Schulte & Brian McGuinness trans., 1979).

<sup>35</sup> *See, e.g.*, JULIUS STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS 268-74 (1964); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 72-76 (1927).

<sup>36</sup> WAISMANN, *supra* note 34, at 241.

*The Hermeneutic Circle*

Now trying to get clear, in a philosophical sense, about the problem of clarity in the use of legal language is a bit like trying to sing a song about how to sing. Despite our best intentions to investigate the theme of clarity (or singing, for that matter) thoroughly and critically — from the ground up, as it were — we always begin the investigation by bringing certain pre-critical and un-thought understandings of the theme to that very theme. Wittgenstein pithily summarizes one aspect of this insight in remarking that “to understand a question is to know what kind of proposition the answer will be.”<sup>37</sup> To generalize Wittgenstein’s point, *any* project of investigation needs to have *some* idea of its object, however vague and un-thematic that idea may be, in order to care about the object in the first place, and to isolate it for subsequent investigation within its “proper” field. And what holds true for the philosophical project that this article is attempting to advance is no less true for the everyday project of interpreting and clarifying the meaning of legal norms and propositions.

Heidegger famously calls the reciprocal relation between our implicit pre-understandings of a thing and our subsequent explicit understandings of that thing *the hermeneutic circle*, which can be described in general terms as a kind of circuit of intelligibility that runs from what is taken for granted about X (including its very identity *as* X) to X itself, and back again.<sup>38</sup> The world helps us to understand it only on the basis of how the world is already understood. Notice that the implicit grammatical rules that allow the production of understanding to proceed are not representational. They do not correspond to some nameable or describable pre-hermeneutical reality that cannot be understood apart from these rules. In other words, it would be misleading to think that “X” and its method of application *refer* to some otherwise ineffable X, for to say that “X is the ineffable thing itself” (the *noumenal*, to use Kant’s terminology) already directs and shapes our intentions in advance in accordance with the sign “X” and its method of application. Thus, we do not grasp existing entities as the appearance of some pre-linguistic *thing* (X); rather, in the event of grasping X *as* “X” there transpires an uncovering of what is already pre-connected to us by virtue of our cares and concerns. No matter how far you run, you will never succeed in catching your shadow by chasing it: understanding X *as* “X” is all there is to understand.

It is important to comprehend that the hermeneutic circle is not a process that people can choose to enter into or leave. Rather, this concept expresses what has become almost a truism, at least in postmodern thought, concerning the manner of being of the human being: namely, that “we are *permanently* set in motion and caught in the hermeneutic circle,” from the cradle to the grave.<sup>39</sup> Heidegger’s own discussion of the hermeneutic circle

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<sup>37</sup> *Id.* at 227.

<sup>38</sup> I should indicate that as far as I know Wittgenstein knew nothing of the hermeneutic circle, although it is obvious that I find this concept to be a helpful complement to his philosophy.

<sup>39</sup> MARTIN HEIDEGGER & EUGEN FINK, HERACLITUS SEMINAR 16-17 (Charles Seibert trans., 1993) (emphasis added).

indicates both the limits that it puts on human understanding and the interpretive possibilities that it creates:

It is not to be reduced to the level of a vicious circle, or even a circle that is merely tolerated. In the circle is hidden a positive possibility of the most primordial kind of knowing. To be sure, we genuinely take hold of this possibility only when, in our interpretation, we have understood that our first, last, and constant task is never to allow our fore-having, fore-sight, and fore-conception to be presented to us by fancies and popular conceptions, but rather to make the scientific theme secure by working out these fore-structures in terms of the things themselves.<sup>40</sup>

As this passage suggests, far from being something negative, the concept of the hermeneutic circle is actually good news for philosophy and science, because without some sort of “idealizing presuppositions,” as Habermas puts it, we would not know where or how to look for phenomena such as “clarity in legal language” in the first place.<sup>41</sup> Kant famously expresses this same point in terms of the necessary interdependence of intuition and understanding: “Thoughts without content are empty, intuitions without concepts are blind.”<sup>42</sup> As the theologian I.U. Dalferth recently said, the postmodern version of Kant’s insight radicalizes the latter’s critique of reason by resituating philosophy from a “subject-centered to a language-centered approach.”<sup>43</sup> A language-centered approach lets go of attachment to the transcendental subject — roughly, Kant’s view that mankind possesses a universal mental architecture comprised of “faculties” that precede and enable all experience — in favor of the idea that human beings speak and think by means of heterogeneous conventions that are founded in history, culture, experience and, well, *forms of life*.

There is no need to accept any of this on faith. *Just look*. There are, to be sure, many times in our lives when we feel unsure about what a given statement means or requires of us, and hence we have to perform work on it to make it yield meaning. We have a name for this work — “interpretation” — and we manifest it in statements that take the form “‘X’ means Y.” But interpretation is not our only relationship to language. For example, it is obvious that the definition or interpretation “‘X’ means Y” would do us no good unless we already understood, in a pre-interpretive sort of way, how to use the sign “Y.” To put the facts of the matter bluntly, there are many, many cases in which we just understand, in an intuitive and pre-reflective sort of way, what to do with and how to react to certain expressions. H.L.A. Hart calls this the “automatic” understanding of language,<sup>44</sup> but to distinguish this mode of relating to words from interpretation, I will call it

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<sup>40</sup> MARTIN HEIDEGGER, BEING AND TIME 195 (John Macquarrie & Edward Robinson trans., 1962) (1927).

<sup>41</sup> JÜRGEN HABERMAS, TRUTH AND JUSTIFICATION 85 (Barbara Fultner trans., 2003).

<sup>42</sup> IMMANUEL KANT, CRITIQUE OF PURE REASON 193-194 (Paul Guyer & Allen Wood trans., 1998) (1787).

<sup>43</sup> I.U. Dalferth, *Wittgenstein: The Theological Reception, in* RELIGION AND WITTGENSTEIN’S LEGACY 273, 277 (D.Z. Phillips & Mario von der Ruhr eds., 2005).

<sup>44</sup> H.L.A. HART, THE CONCEPT OF LAW 123 (2d ed. 1994).

*reception*. What I mean by “reception” is that in a very large part of our daily lives no question arises about whether certain “obvious” expressions are either clear *or* obscure. But this does not mean that we “know” what it is that we do not doubt in this way, or even that we frequently and easily “interpret” language in standard ways. Interpretation is an act of will, and it may or may not accompany our reactions to language (indeed, usually it does not).

The thought experiment that Wittgenstein proposes in the following passage on following orders from the *Blue Book* demonstrates why this is so:

If I give someone the order “fetch me a red flower from that meadow,” how is he to know what sort of flower to bring, as I have only given him a word? Now the answer one might suggest first is that he went to look for a red flower carrying a red image in his mind, and comparing it with the flowers to see which of them had the color of the image. Now there is such a way of searching, and it is not at all essential that the image we use be a mental one. In fact the process may be this: I carry a chart coordinating names and colored squares. When I hear the order “fetch me etc.” I draw my finger across the chart from the word “red” to a certain square, and I go and look for a flower that has the same color as the square. But this is not the only way of searching and it isn’t the usual way. We go, look about us, walk up to a flower and pick it, without comparing it to anything. To see that the process of obeying the order can be of this kind, consider the order “imagine a red patch.” You are not tempted in this case to think that before obeying you must have imagined a red patch to serve you as a pattern for the red patch which you were ordered to imagine. Now you might ask: do we interpret the words before we obey the order? And in some cases you will find that you do something which might be called interpreting before obeying, in some cases not.<sup>45</sup>

Everyday life is full of cases in which we do not explicitly interpret linguistic signs such as “fetch me a red flower” but nonetheless manage to react to them in pretty much the same way as everyone else does. It would be a grievous mistake, however, to assume that all similarities in people’s reactions to signs are caused by or grounded in the clarity of the signs themselves. This is because linguistic clarity cannot become what is called “clarity” unless it is recognized *as* such; whereas in the kind of case that Wittgenstein discusses, although we certainly notice the signs themselves, we do not *take notice* of anything explicit *about* them, such as whether or not they are “clear.” We simply react to the signs without question or hesitation, almost as if we were Pavlov’s dogs salivating at the sound of a bell. To put the matter less pejoratively, regularities in the use of language do not prove that the language itself is “clear” — they merely show that there is a consensus of reception and behavior within a form of life.

If a statement’s meaning and clarity are not endogenous to linguistic signs as such, neither should a statement’s meaning or clarity be conflated with the state of mind of its author. The phenomenological experiment that Wittgenstein performs with the order “fetch me a red flower” decisively refutes the so-called “private object” thesis, according

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<sup>45</sup> LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 3 (1960).



to which the meaning of language is taken to be the state of mind or mental idea that accompanies its production.<sup>46</sup> The experiment shows that in many, if not most, cases of speaking and hearing there is no fact “in” the world (including mental facts “inside” the subject) that constitutes the *meaning* of the expression. Please understand that this is not a denial that people *think* as they produce language, or that they *believe* things about the language they have produced, or that a wide variety of mental phenomena accompany the production, understanding, and learning of texts. It is merely an observation that whatever role is played by these psychological phenomena in connection with the use of language, that role does *not* consist in the psychological phenomena being the same as what the language “means.” If you still have any doubt about this, perform the following experiment: (1) consider the fact that the statement “I have one apple” means exactly the same as the statement “I have the same number of apples as the root of the equation  $x^2 + 2x - 3 = 0$ ”; (2) observe the different states of mind that correspond to the uses of these two sentences; and (3) then ask yourself whether you still want to believe, against the evidence of your own senses, that the meaning of a statement is the state of mind that accompanies its production.

Wittgenstein once remarked that “what the eye doesn’t see the heart doesn’t grieve over.”<sup>47</sup> Given that the absence of any questioning in “easy” cases such as the order “fetch me a red flower” also implies the absence of any answers, it is possible to construe Wittgenstein’s poignant aphorism as a kind of philosophical warning. It warns us that it is dangerous to import our pre-critical interpretations of our everyday understandings of linguistic signs into our philosophizing by adhering unreflectively to the belief that the so-called “easy case” is *ipso facto* always an example of clarity in legal language. Following this path would prevent us from surveying the complexity of the facts, including especially the fact that language can and often does play the role of a trigger for an automatic response — an event that I earlier called reception — that is unmediated by any “interpretation” on the part of those who encounter and apply it.

Take, for example, just about the best illustration of legal clarity that I can think of: a traffic detour sign on which an arrow like this is painted:  $\rightarrow$ . As I mentioned earlier, in the philosophy of language a “sign” is defined as that element of the events of speaking and writing that can be perceived by the senses: the sound waves that we generate when we speak and the ink characters that appear on this page, for example. A *sign* in this sense is not yet a *statement*. Thus, the gibberish “X\$%\$#QQW” is just as much a linguistic sign as the word “Stop” — something *more* than their sheer materiality alone is required to make them into statements. That being so, we are entitled to ask what it means to say that just *this* sign,  $\rightarrow$ , “clearly” indicates (or symbolizes) that drivers should go to the right. Couldn’t someone receive or interpret the sign as mandating a left turn? After all, the so-called “head” of the arrow-sign  $\rightarrow$  *can* be seen as a tail or base from which a left-pointing

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<sup>46</sup> See William Alston, *Meaning*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 233, 235 (Paul Edwards ed., 1967).

<sup>47</sup> WITTGENSTEIN, *supra* note 4, at 205.

straight line emerges. Please notice that to imagine such a non-standard (albeit not obviously irrational) interpretation of an allegedly “clear” sign is also to prove its logical possibility, for even a child can see that there is nothing “inside” the material sign  $\rightarrow$  as such that contradicts this interpretation. Saul Kripke expresses what he calls the “Wittgensteinian paradox” this way, with reference to the analogous problem of how to add numbers in accordance with the mathematical sign “+”:

The infinitely many cases of the table [of numbers] are not in my mind for my future self to consult. To say that there is a general rule in my mind that tells me how to add in the future is only to throw the problem back on to other rules that also seem to be given only in terms of finitely many cases. What can there be in my mind that I make use of when I act in the future? It seems that the entire idea of meaning vanishes into thin air.<sup>48</sup>

The key phrase in this quotation is “it seems.” For signs such as “meaning,” “+” and “ $\rightarrow$ ” as we actually *use* them do not vanish into thin air despite the fact that we do not always hold something called their “meaning” inside our heads. And this is the real point that Kripke is making by taking radical rule-skepticism to its limit. Among other things, this example tends to confirm S.G. Shanker’s observation that “it is not the rule which compels me, but rather, I who compel myself to use the rule in a certain way.”<sup>49</sup>

The philosophical puzzlement that can arise in connection with allegedly “clear” legal rule-signs like  $\rightarrow$  is similar to the kind of problem that can bedevil us in thinking about certain mathematical expressions. I am referring to a feeling that one can sometimes get in the context of trying to answer questions such as “What is the meaning of the expression ‘ $\exists x . 3 + n = 7$ ?’”<sup>50</sup> Just as *go to the right* seems to be “there already” as the meaning of the legal sign  $\rightarrow$ , it seems that *the number 4* is “there already” in the infinite set of numbers  $x$  as the only correct solution to the equation  $3 + n = 7$ . In both cases it seems that it requires no further interpretation or calculation to recognize that the signs in question always already mean their right applications, before and apart from all human recognition. But on the other hand (and here comes the perplexity) how can we be sure of this, given that we have not run through *all* the possible interpretations of  $\rightarrow$  or values of  $x$ ?

Wittgenstein observes that the root cause of the perplexity that philosophers feel in response to questions like this is a confusion between *physical* impossibility and *logical* impossibility.<sup>51</sup> It is physically impossible to count all the grains of sand on a beach inside of two hours because we do not have sufficient time to do so; nevertheless, we have some idea of what *trying* to count them would look like. But logical impossibility is altogether different: since it is logically impossible to “check” an infinite number of propositions (infinity is not a quantity) it is also impossible to *try* to do so. The feeling that our solution or

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<sup>48</sup> SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 22 (1982).

<sup>49</sup> S.G. SHANKER, WITTGENSTEIN AND THE TURNING-POINT IN THE PHILOSOPHY OF MATHEMATICS 17 (1987).

<sup>50</sup> Or “There exists a class of numbers,  $x$ , such that  $3 + n = 7$ .”

<sup>51</sup> WITTGENSTEIN, *supra* note 32, at 451.

interpretation is somehow insecure because we have not yet tried to ascertain and consider every possible value of  $x$  or interpretation of  $\rightarrow$  therefore rests on our inability to distinguish these two forms of impossibility. But we *can* check (and “prove”) our intuition that only the number 4 solves the equation  $3 + n = 7$ , and this method of applying the signs that comprise the problem is perfectly sufficient for our purposes. By the same token, a judge can check whether someone has driven to the left in violation of his widely shared automatic reception of the meaning of the legal norm-sign  $\rightarrow$ , and that too would be sufficient both for his purposes and the purposes of the legal system as a whole. In this context the word “sufficient” is merely sociological: it means that people in general do not doubt the correctness of the judge’s decision.

The facts of the matter are really quite simple: linguistic signs *qua* perceivable entities do not in fact “contain” anything. The bare sign  $\rightarrow$ , for instance, is not comprised of the property of clearly-pointing-to-the-right amongst all of its other material properties, such as its dimensions, its blackness and its linearity. At best the sign simply displays its sense to those who perceive it in a certain way. As Wittgenstein says in the *Tractatus*, “no proposition can make a statement about itself, because a propositional sign cannot be contained in itself.”<sup>52</sup> To put Wittgenstein’s point a bit more prosaically, there is no room “in”  $\rightarrow$  for anything other than  $\rightarrow$ , and if this sign is taken to symbolize something in a clear (or even very clear) manner, this is only because we happen to receive it in a way that we call “clear” because we do not doubt the correctness of our reception. To quote S.G. Shanker again: “The impression of necessity is an illusion; the apparent inexorability of a rule reflects our inexorability in applying it.”<sup>53</sup> In other words, clarity is something we bestow upon statements within the context of a form of life, and not something that statements bestow upon us.

This should not be received as bad news, for our inexorability in applying certain rules is no small thing: *in fact it forms a large part of the legal form of life*. Indeed, the phenomenon of reception shows that every judge and lawyer *eventually* becomes a kind of strict textualist: for no matter how much interpretive work one puts into a case, at the end of the process of interpreting one will harbor no doubt about the meaning of the very statements that make up one’s *own* interpretation of a legal norm. One might even say that a description of how people actually receive and apply legal signs like  $\rightarrow$  is *pro tanto* a description of the rule of law. For such a description would tell us what *really happens* when we allow ourselves to be governed by legal norms. And the point of giving such a description would not be to advance the skeptical thesis that all language is radically indeterminate and therefore that there can be no such thing as the rule of law. No, the point would be to show, by means of the description, what is *called* the “rule of law” in our form of life. In other words, the term “rule of law” can be (and is) applied in different ways in the context

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<sup>52</sup> WITTGENSTEIN, *supra* note 6, at 16.

<sup>53</sup> S.G. SHANKER, *supra* note 49, at 17.

of different forms of life,<sup>54</sup> and the job of a philosopher is (or ought to be) simply to take notice of these differences without decreeing from on high which form of life constitutes the “real” meaning of the rule of law.

The contrary point of view — that legal norms like  $\rightarrow$  clearly do or can mean only one thing, and that this single meaning is somehow currently present in the world as a kind of shadow that is cast by the sign itself, independently of any particular or general human reception of it — is what D.Z. Phillips, following Wittgenstein, calls *the magical view of signs*.<sup>55</sup>

### *The Magical View of Signs*

The previous example of the arrow-sign  $\rightarrow$  provides a clue about why our philosophical prejudices concerning the nature of linguistic clarity and obscurity are so hard to shake. We observe and recall that in everyday experience everyone we have ever known and seen always reacts to the sign  $\rightarrow$  in the same way: *they just all go to the right*. But it must also be noted that if everyone does in fact go to the right in response to the arrow-sign, they also manifest a kind of indifference with regard to the *manner* of their experiencing the sign’s command. As Heidegger puts it, “the peculiarity of factual life experience consists in the fact that ‘how I stand with regard to things,’ the manner of experiencing, is not co-experienced.”<sup>56</sup> To be sure, when we are driving we undoubtedly do experience the event of our going-to-the-right upon encountering and receiving the sign  $\rightarrow$ , but as I tried to make clear in the previous section, this does not mean that we also necessarily experience some sort of mental act or state that could reasonably be called “the meaning of  $\rightarrow$ ” or even “knowing what  $\rightarrow$  means.”

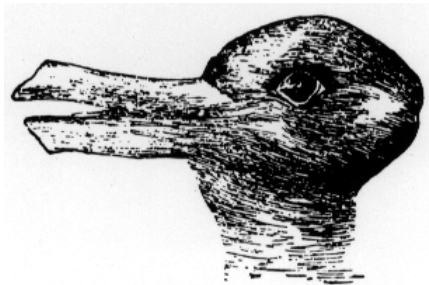
Our everyday unawareness of, and indifference to, the underlying nature of our responses to language can be profitably compared to the phenomenon of seeing only one aspect of an ambiguous figure. In the context of a well-known gestalt drawing called the duck-rabbit, for example, it is possible to see what the picture represents in at least two different aspects. If you look at it one way, it appears to be a rabbit; but if you look at it another way, it appears to be a duck:

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<sup>54</sup> See, e.g., Louis Wolcher, *What is the Rule of Law? Perspectives from Central Europe and the American Academy*, 78 WASH. L. REV. 515 (2003).

<sup>55</sup> D.Z. Phillips, *Just Say the Word: Magical and Logical Conceptions in Religion*, in RELIGION AND WITTGENSTEIN’S LEGACY 171, 173 (D.Z. Phillips & Mario von der Ruhr eds., 2005).

<sup>56</sup> MARTIN HEIDEGGER, THE PHENOMENOLOGY OF RELIGIOUS LIFE 9 (Matthias Fritsch & Jennifer Gosetti-Ferencei trans., 2004) (1995).



In the *Philosophical Investigations*, Wittgenstein notes that there may be certain people who have always seen this figure as, say, a rabbit, and have never seen it in any other way.<sup>57</sup> For them the figure would “clearly” represent a rabbit and only a rabbit. Indeed, Wittgenstein also observes that there could even be people who are ‘blind’ to the possibility of seeing the figure as a duck despite having had the figure’s ambiguity pointed out to them in no uncertain terms. The twin phenomena of “seeing-as” and “aspect blindness” are perfect metaphors for why the problem of clarity and obscurity in legal language is so difficult to think about.

Consider, for example, Stanley Fish’s penetrating description of legal formalism:

Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one — no matter what his or her situation or point of view — can ignore.<sup>58</sup>

A dogmatic legal formalist of the type that Fish describes is like someone who is capable of seeing the figure of the duck-rabbit in only one of its aspects, and who goes on to insist that it “clearly means” just this one thing. Such a formalist would suffer from an almost congenital failure of imagination that is analogous to aspect blindness. He would tend to judge non-standard interpretations of what he calls “clear” signs such as duck-rabbits and traffic arrows as metaphysically wrong and irrational rather than as just plain different. In doing so, however, the formalist would render himself incapable of thinking perspicuously about the problem of how language is *received* as being “clear.”

Reception, it will be recalled, is not the same as interpretation or even meaning-recognition, both of which are conscious processes. The phenomenology of reception concerns what does *not* happen and what is *not* doubted in the event of noticing language and then reacting to it without reflection. Thus, the legal formalist accepts *as* clear what he immediately receives to be the sign’s meaning, and he does not pause to consider or think about what makes this very phenomenon of receiving-as-clear possible. To borrow Cath-

<sup>57</sup> WITTGENSTEIN, *supra* note 12, at 194e.

<sup>58</sup> Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *ANALYTIC JURISPRUDENCE ANTHOLOGY* 133, 134 (Anthony D’Amato ed., 1996).

erine MacKinnon's wonderful phraseology, formalists of this type unthinkingly transform their own point of view into the standard for point-of-viewlessness.<sup>59</sup>

This way of putting the matter underscores an aspect of legal formalism that we have not yet mentioned: it is intimately connected to the phenomenon of political power. Formalists think literally in a very precise sense of the word "literally": they take signs such as  $\rightarrow$  to "literally mean" what they unquestioningly *receive* them to mean. Indeed, that is how the words "literal meaning" are used in law: they elevate to the level of dogma a particular reception of a legal sign that the receiver and others who are like-minded do not doubt. As for the fact that other people *do* doubt the way they receive the legal sign, well, what the formalist's eye doesn't see his heart doesn't grieve over. Strict formalists prefer not to think metaphorically, for as the poet Wallace Stevens says, "metaphor creates a new reality from which the original appears to be unreal,"<sup>60</sup> and there is nothing more threatening to the instinct of power than the feeling that the expressions of one's most cherished certainties are in fact ambiguous. "Language is a part of our organism, and no less complicated than it," wrote Wittgenstein during the First World War, adding later that "words are like the film on deep water."<sup>61</sup> For the dogmatic formalist, however, words are but simple tools, and legal texts are never deeper than a wading pool.

Do our previous observations, including the examples of the arrow-sign and the duck-rabbit, suggest that philosophy ought to declare that there is no such thing as clarity in legal language, and therefore that everything is up for grabs? Should we say that the very possibility of non-standard interpretations of signs like  $\rightarrow$  and the duck-rabbit prove that legal clarity is a chimera? We should not. To understand why we should not, consider the following passage from the *Blue Book*, in which Wittgenstein reflects on the philosophical importance of just the kind of case that we have been considering:

[Suppose] we give someone an order to walk in a certain direction by pointing or by drawing an arrow which points in the direction. Suppose drawing arrows is the language in which generally we give such an order. Couldn't such an order be interpreted to mean that the man who gets it is to walk in the direction opposite to that of the arrow? This could obviously be done by adding to our arrow some symbols which we might call "an interpretation."... The symbol which adds the interpretation to our original arrow could, for instance, be another arrow. Whenever we interpret a symbol in one way or another, interpretation is a new symbol added to the old one. Now we might say that whenever we give someone an order by showing him an arrow, and don't do it "mechanically" (without thinking), we mean the arrow one way or another. ...

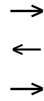
Is it then correct to say that no arrow could be the meaning, as every arrow could be meant the opposite way? Suppose we write down the scheme of saying and meaning by a column of arrows one below the other.

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<sup>59</sup> Catherine MacKinnon, *Feminism, Marxism, Method and State*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 635, 635 (1983).

<sup>60</sup> WALLACE STEVENS, THE COLLECTED POEMS OF WALLACE STEVENS 908 (1997).

<sup>61</sup> WITTGENSTEIN, *supra* note 25, at 48e-52e.



Then if this scheme is to serve our purpose at all, it must show us which of the three levels is the level of meaning. I can, e.g., make a scheme with three levels, the bottom level always being the level of meaning. But adopt whatever model or scheme you may, it will have a bottom level, and there will be no such thing as an interpretation of that. To say in this case that every arrow can still be interpreted would only mean that I could always make a different model of saying and meaning which had one more level than the one I am using.<sup>62</sup>

Surprisingly enough, the most important aspect of this passage is what Wittgenstein does *not* say in it. For it would be very easy to read this passage in a casual and careless sort of way as asserting a skeptical thesis about language, one that subscribes to the nihilistic point of view that “there can be no such thing as meaning anything by any word.”<sup>63</sup> But in truth Wittgenstein does not employ the example of the arrow-sign to prove that there is no such thing as meaning or clarity in language, or even no such thing as an “easy case.” *Rather, his example simply shows that whatever else linguistic clarity may be, it is not a “property” or entailment of linguistic signs as such.*

As I mentioned at the end of the previous section, to believe otherwise is to subscribe to the “magical view” of language. This view insists that the meaning of a linguistic sign is somehow magically conveyed or conjured up all at once, so to speak, by the sign itself.<sup>64</sup> The source of the magical view is the mistaken belief that if people generally react in the same way to a sign such as →, this implies that the sign must contain or otherwise “have” something *else* called its “meaning” that explains why people react to it as they do. Wittgenstein aptly summarizes the nature of this kind of superstition as follows: “Some words refer to things, so we create ghosts for other words to refer to.”<sup>65</sup> In other words, we notice that some words refer to material things that have the power to move people (for example, “my automobile”); so therefore we think that *every* word must refer to something thing-like with the power to instigate human action.

A good example of this way of thinking is H.L.A Hart’s theory that legal norms do (and must!) have a “core of settled meanings” without which the rule of law would be impossible. Because this view on legal language is so common amongst lawyers and judges, not to mention mainstream law professors, it is important to take the trouble of demonstrating the nature and sources of the metaphysical confusion from which it stems. By way of analogy, Hart’s belief that most legal norms have a “core meaning” is like a Platonic mathematician’s belief that a norm for generating natural numbers, say “ $x + 1$ ,” contains or refers to all the natural numbers right now, prior to its application. However, the *picture* that the mathematician associates with this belief does not itself contain “all”

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<sup>62</sup> WITTGENSTEIN, *supra* note 45, at 33-34.

<sup>63</sup> SAUL KRIPKE, *supra* note 48, at 55.

<sup>64</sup> D.Z. Phillips, *supra* note 55, at 174.

<sup>65</sup> WITTGENSTEIN, *supra* note 27, at 384.

the natural numbers, for they are infinite. At best he might imagine (in the literal sense of having a mental image of) a whole lot of natural numbers standing in an ordered row that *seems* to be infinite because it stretches to the horizon and disappears beyond it, like this:

**0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23.....**

Despite what the mathematician may fervently believe in his heart of hearts, however, the norm “ $x + 1$ ” does not and cannot presently “mean” that the irrational number  $\pi$  is not in the set of numbers that the norm constructs. Only the *application* of the rule proves (and thus *shows* to those who read the proof) that  $\pi$  is not in the set. Likewise, a legal norm such as “No vehicles in the park” — the hypothetical example that Hart uses — does not presently “mean” (by listing VIN numbers, for example) all of the particular vehicles-in-context to which it will and can be applied in the future; rather, the norm’s ongoing application will *show* the cases (and “vehicles”) to which it applies. To paraphrase Wittgenstein, the symbol for the class of cases to which a legal norm applies is a list. And seen from the point of view that we are trying to achieve in this article, what lawyers and judges call “following the law” is simply an extension of the list of cases to which the law is applied according to one or more methods of application.<sup>66</sup>

And why, pray tell, does Hart think otherwise? Why does he think that legal words *must* have core meanings? Hart’s answer to these questions, though correct as far as it goes, yields a *non sequitur*: “If we are to communicate with each other at all,” he says, “and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use — like ‘vehicle’ [in the statute ‘No vehicles in the park’] — *must have some standard instance in which no doubts are felt about its application.*”<sup>67</sup> Hart’s answer is a *non sequitur* in this context because the *absence* of doubt about how to apply a legal norm has absolutely no necessary connection to the *presence* of something called the norm’s “meaning.” In other words, although Hart is right that people regularly experience an absence of doubt about how to use legal signs such as  $\rightarrow$ , this no more *has* to be explained by an entity called their “meaning” than the passage of light waves from the sun to the earth must be explained by the hypothesis that space is filled with invisible ether.

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<sup>66</sup> “The mistake in the set-theoretical approach consists time and again in treating laws [like  $x + 1$ ] and enumerations [like 0,1,2,3,4,5] as essentially the same kind of thing and arranging them in parallel series so that the one fills in gaps left by the other. The symbol for a class is a list.” WITTGENSTEIN, *supra* note 32, at 461.

<sup>67</sup> H.L.A. Hart, *On Core and Penumbra*, in ANALYTIC JURISPRUDENCE ANTHOLOGY 57, 57 (Anthony D’Amato ed., 1996) (emphasis added).



Among other things, both of the hypotheses just mentioned violate Ockham's razor, which wisely stipulates that philosophers should not multiply entities beyond necessity. The fact that people have been trained, or have otherwise just picked up, how to use certain words in this or that particular language-game is sufficient to explain why they experience no doubt about the usage of the words. Moreover, in cases where a judge simply understands how to use a sign like  $\rightarrow$  without reflecting on it, it is a distortion of language to say, as Hart does, that the judge is using the legal norm as his "guide."<sup>68</sup> Hart's motive for saying this is to distinguish the internal from the external points of view on law: in the former case judges who act in good faith rely on a legal norm as the *ground* of their decision, whereas in the latter case an observer of the judge counts the existence of the norm as but one of the many *causes* of a judicial outcome that he would like to predict or explain. In particular, Hart is eager to discredit the so-called "prediction" theory of law, according to which law is taken to be nothing more than a prediction of how judges will actually apply it.<sup>69</sup>

But while the distinction between grounds and causes, as well as the one between the internal and external points of view, are both helpful as far as they go, they are irrelevant to the simple phenomenon of automatic reception that we have been discussing in this article. That Justice Scalia and Justice Stevens tend to *receive* constitutional norms differently is obvious, and it would undoubtedly be possible to give an interesting sociological, psychological, and political account of that difference. But in this article I have a more modest goal: merely to bringing out reception as a *phenomenal fact* — one that pertains to *any* concrete event in which legal norms are applied, regardless of its causes. To paraphrase the great French phenomenologist Gaston Bachelard, people who hastily abandon ontological investigation into *how* legal norms are applied in order to dig into the *causes* of case results are like botanists who always want to explain the flower by the fertilizer.<sup>70</sup> So let us slow down our thinking to a snail's pace. If we do that, it is possible to notice that people ordinarily seek guidance from norms only when they are in doubt. But since all doubt *eventually* ceases at what Wittgenstein calls the "bottom level" of signs,<sup>71</sup> so too does the guiding function of legal norms. To be sure, language and the interpretive process can "guide" us through an unclear legal norm to a new statement that we now understand without any more ado; but that final understanding itself does not "guide" anything — *it is simply how we receive and apply the norm*. Hart's invention of "core meanings" to explain linguistic clarity and regularities in the use of legal language is therefore ultimately unnecessary. For as Wittgenstein remarks, "symbols that are dispensable have no meaning — superfluous symbols signify nothing."<sup>72</sup>

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<sup>68</sup> HART, *supra* note 44, at 10.

<sup>69</sup> *See, e.g.*, OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 173 (1920) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.").

<sup>70</sup> GASTON BACHELARD, THE POETICS OF SPACE xxvi (Maria Jolas trans., 1969).

<sup>71</sup> WITTGENSTEIN, *supra* note 45, at 34.

<sup>72</sup> WAISMANN, *supra* note 34, at 90.

Lon Fuller's famous example of a fully operational army truck that veterans want to put on a pedestal in the park as a war memorial cleverly shows how Hart's dogma of core meanings can lead to absurdities in the interpretation and enforcement of legal norms like "No vehicles in the park."<sup>73</sup> But Fuller's example merely shows how the belief that words must always have "core meanings" can produce baleful practical and political consequences. In contrast, my concern here is to show that views like Hart's unduly narrow philosophical investigation into clarity in the context of legal language. Although judges frequently ground their decisions in statements about what legal norms mean, this does not imply that the norms "have" metaphysically determinate meanings that cause judges to decide as they do. Hart commits something akin to the genetic fallacy by assuming that regularities of behavior within a historically similar group of people (judges unanimously agreeing in "easy" cases, for instance) must be based on something more important or real (the "meaning" of legal norm-signs) than the plain fact that these people belong to a group all of whose members simply *receive* the signs the same way in deciding the cases in question.

If a group of people were all to look at the sky and exclaim in unison, "There's a bird," we would have public criteria for deciding both what their proposition refers to (a small winged creature with feathers and a beak, etc.) and where to look for it (the sky). But Hart's *only* criterion for a legal norm's meaning-the-same to many judges is that they behave the same way in response to it. He thus provides no criterion and no evidence that there is such a thing as the "core meaning" of a norm which exists independently of its use. It takes but a moment's reflection to observe that if someone claims that a consensus of use is "explained" by a core meaning that is itself demonstrated *only* by the fact that there is a consensus of use, then such a claim is the equivalent of saying, rather unhelpfully, that what is to be explained is explained by what is to be explained. If the words "core meaning" have a use in legal practice (as they undoubtedly do) this is not because there is some *thing* — some *object*, whether mental or otherwise — to which they refer. They just have a use — period.

The picture of the way language works in which linguistic signs like  $\rightarrow$  are always attached to what Wittgenstein calls a *Bedeutungskörper* (meaning-body) is a familiar and remarkably enduring one in philosophy.<sup>74</sup> In the *Blue Book*, Wittgenstein identifies our inclination to look for some thing corresponding to the noun in sentences like "What is length?", "What is meaning?", and "What is the number one?" (to which list I will add the questions "What is the meaning of a legal norm?" and "What is clarity in legal language?") as being "one of the great sources of philosophical bewilderment."<sup>75</sup> Later, in the first paragraph of his *Philosophical Investigations*, Wittgenstein elaborates on this picture of language by quoting from Augustine's description of how he learned to speak as a young child. In the *Confessions*, Augustine recounts that his elders used words to name objects, and that "by hearing words arranged in various phrases and constantly repeated,

<sup>73</sup> Hart, *supra* note 67, at 62.

<sup>74</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHISCHE GRAMMATIK* 54 (1969).

<sup>75</sup> WITTGENSTEIN, *supra* note 45, at 1.

I gradually pieced together what they stood for.”<sup>76</sup> For Wittgenstein, Augustine’s description offers “a particular picture of the essence of human language,” which he characterizes this way:

[T]he individual words in language name objects — sentences are combinations of such names — In this picture of language we find roots of the following idea: Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands.<sup>77</sup>

It is important to see that this passage locates in Augustine’s primitive idea that a word’s meaning is its bearer (the physical object that it may or may not name) the roots of a somewhat more sophisticated idea: namely, that the object for which a word stands is not (or at least not necessarily) its bearer, but rather another entity called its “meaning.” In other words, Wittgenstein is telling us that the more sophisticated idea of the way language works is not different in kind from Augustine’s, but is at bottom merely a variation of the primitive picture that Augustine draws.

The meaning-body picture of language that Wittgenstein describes tends to have a curious effect on our philosophizing. If we insist on thinking of linguistic signs as disembodied things that do or do not have meaning in the same way that a wooden box does or does not have marbles in it, then certain puzzles can (and do) arise while we are philosophizing, and we can (and do) run around in circles trying to solve them. Thus we ask questions like “What is clarity in legal language?”, and think that the answer *must* be a proposition asserting the existence of a relation between the signs “clarity in legal language” and something else for which these signs stand. The question presupposes, in other words, something like the following picture of the kind of answer that will satisfy it: “Answer: the meaning of ‘clarity in legal language’ is . . . such and such.” For convenience, we will shorten the form of the meaning-body picture of language to “**X**” **R**  $\square$ . This expression has the advantage of depicting visually the essence of the belief that a legal statement, “X,” must always stand in a relation, R, with something else, namely  $\square$ . The sign  $\square$  pictures an entity that is not the *same* as “X,” but rather an altogether different thing that is called “X’s” meaning. In the grip of this picture we ask (and think) things like this:

Ask → “What is truth?”; think → “truth” must mean  $\square$ .  
Ask → “What is justice?”; think → “justice” must mean  $\square$ .  
Ask → “What is law?”; think → “law” must mean  $\square$ .

Now sometimes it comes to pass that we exhaust a very long list of meaning-bodies that we think might correspond to words like “truth,” “justice,” and “law” without finding any of them to be satisfying. After all, the expression of a meaning is made up of mere linguistic signs, too: as we have seen, its general form is “‘X’ means Y”. This implies that

<sup>76</sup> AUGUSTINE, CONFESSIONS 29 (R.S. Pine-Coffin, trans., 1961).

<sup>77</sup> WITTGENSTEIN, *supra* note 12, at 2e.

we must be able to receive the sign “Y” in a certain way in order to be sure of the meaning of “X”: a process that seems to lead to an infinite regress that can be frustrating to those who want to get to the bottom of the way language means what it means. To counteract the puzzlement that continues to nag us after we grow dissatisfied with all of the answers that we give to the questions that our own picture of language (“X” R □) leads us to ask, it does not occur to us to change the picture itself on the ground that it is misleading. Rather, we continue to think of language as a disembodied thing, only now we imagine that it is a thing from which all clear meaning has been removed, in much the same way that marbles can be removed from a box.<sup>78</sup> In short, we are tempted to become linguistic nihilists in the precise sense of believing that there is no such thing as meaning anything by any legal statement.

For example, we might think that the legal norm “No vehicles in the park” is absolutely indeterminate and therefore has no meaning. But rule-skepticism of this sort is nonsensical, in the exact Wittgensteinian sense that it is not bipolar. What could a rule skeptic even *try* to exclude if he said that the legal rule “No vehicles in the park” has no meaning? *No meaning as opposed to what?* The sense of a negation (“not-p”) depends on our ability to imagine or depict what is negated (p): “It is not raining”, for example, asserts that water-falling-from-the-sky is not present. But what kind of meaning-body could (or does) the statement “No vehicles in the park” have, such that just *this* imaginable meaning-body (□) can be pictured in the manner I earlier pictured the imaginary being called a “unicorn”? What does the “meaning” of this legal norm look like, such that just *this* entity (the meaning) does *not* exist? (Be careful! A list of examples is not the same as a legal norm’s meaning — it contains mere instances of the norm’s actual or imagined applications.) Since one cannot look for anything *ad infinitum*, one must, in order to look, have a *method of looking*. But since there is no method of looking infinitely at *all* the possible

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<sup>78</sup> The best example in American legal theory of this kind of person is Stanley Fish. When Fish asserts that “formalist or literalist or four corners interpretation is not inadvisable ... it is impossible,” for example, he is not saying that there is a kind of four-corners interpretation that is imaginable and representable, but that is empirically impossible. Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, in PRAGMATISM IN LAW AND SOCIETY 47, 56 (Michael Brint & William Weaver eds., 1991). His sentence does not play the same kind of role as the following sentence does, for example: “It is impossible for Stanley Fish to lift a thousand pound boulder over his head.” We can imagine, and represent in words or pictures, what it would look like for Stanley Fish to lift a thousand pound boulder over his head, and it is *this* state of affairs that such a sentence would exclude as impossible in fact. But anyone who is reasonably familiar with Fish’s work knows that he is not saying that there is some describable practice that “four-corners interpretation” stands for, and that engaging in this practice is so very difficult for human beings to do that it comes down to being impossible in fact. No, the expression of radical rule-skepticism of this sort is the kind of nonsense that plays the role of a grammatical stipulation: it stipulates in advance (perhaps for political reasons) that the speaker has decided not to call *any* interpretation of a legal text the “literal” meaning of that text.

meaning-bodies of a norm, there is no sense in saying *either* that the correct meaning is there *or* that it is not.<sup>79</sup>

### *The Logical View of Signs*

The magical picture “X” R □ operates as a grammatical rule that is analogous to the syntactical norm “Never end a sentence with a proposition.” In the latter case those who obey the norm are always checking their prose to see whether there are any sentences that end with prepositions such as “with.”<sup>80</sup> Likewise, the picture “X” R □ compels those who accept it to assert that every word or sentence must have one or more meaning-bodies. Those who find themselves in the grip of the magical view of language let the mysterious object □ that the picture “X” R □ tells them the legal norm “X” *must* represent specify their act of describing the meaning of “X,” instead of investigating how to describe its meaning by unpacking the methods of application that a form of life has laid down for people well in advance of any particular event of application. An investigation into the *meaning-bodies* of a legal norm orients thought outward, towards some ethereal extra-linguistic realm; an investigation of *methods of application* brings thought down to earth, to what people actually do with legal norms. Wittgenstein calls the latter method of investigation “logical” as opposed to “magical,” and he describes its essence in the form of an injunction: “don’t try to specify the act of description by means of the object that is described; but by the technique of description.”<sup>81</sup> Here it is exceedingly important to distinguish *being the meaning of* from *determining the meaning of*. The different ways (techniques) of describing the meaning of a statement are not identical to the statement’s meaning. Rather, investigating the techniques helps us clearly understand that there just *are* fundamental differences between different claims of meaning. As D.Z. Phillips recently put it, “Wittgenstein shows that it is not the sign or rule which determines their application (the magical view), but our practice which shows how in fact the sign or rule are used.”<sup>82</sup>

That said, what does it mean to say that one can and should pay attention to methods of application rather than chasing after ephemeral meaning-bodies? The magical view asks whether the legal norm “X” really means what someone says it means (“Y”); the logical view asks what *method of application* the speaker has followed in deriving “Y” from “X,” and whether he has followed it in a standard way within the context of the language-game that he is playing. Those in the grip of the magical view are obsessed with whether language is determinate or indeterminate (one battleground of the culture war in legal theory between formalism and critical legal studies). Those who use the logical view of language are inclined to examine how words like “determinate” and “indeterminate” are actually applied — they want to know what speakers *do* when they say that a given

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<sup>79</sup> “Scepticism is *not* irrefutable, but obviously nonsensical, when it tries to raise doubts where no questions can be asked.” WITTGENSTEIN, *supra* note 6, at 73.

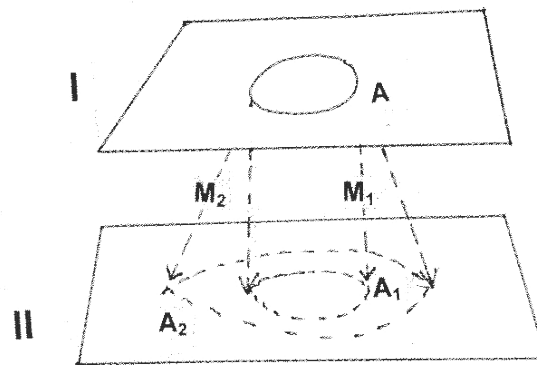
<sup>80</sup> Among other things, there is a not-so-subtle joke that this sentence ends with.

<sup>81</sup> WITTGENSTEIN, *supra* note 5, at 48.

<sup>82</sup> D.Z. Phillips, *supra* note 55, at 173.

text is determinate or indeterminate. For example, from the logical point of view on language it is possible to notice that the generality of a concept's expression is in tension (if not at war) with its determinacy. A logically bounded concept exhausts its meaning in a list of instances. Its extension *is* its meaning. For instance, if the logically bounded function  $f(x)$  contains only four instances it is exactly the equivalent of  $f(a \vee b \vee c \vee d)$ . Nothing could be more determinate than the sign " $f(x)$ " in this context: indeed, this example can probably serve as the paradigm of what most philosophers and law professors would call a "completely determinate" concept. On the other hand, the statement of a general concept is not the equivalent of a list of instances; its generality (and hence its indeterminacy, at least relative to a logically bounded concept) can be indicated by the ellipsis in the following statement:  $f(y) = f(a \vee b \vee \dots)$ . But observe: the sign " $\dots$ " does not itself *complete* the list of cases to which the concept applies. Rather, " $\dots$ " acts as a kind of signpost that points in the direction of a *method for continuing the series of instances to which the concept can be applied*. In short, you need to know the method of application in order to know what the concept "means", and what it "means" can only be shown by the application of the method.

Permit me to illustrate this last point by means of a favorite metaphor of Wittgenstein's, drawn from a field of mathematics known as projective geometry. Think of the signs that make up a legal norm — one that has not yet undergone interpretation in a particular case before a judge or a lawyer — as if it were a two-dimensional shape lying on a plane. Imagine, for example, that the text of the statutory rule "No vehicles in the park" is like figure A in plane I in the following illustration:



The point of the metaphor is just this: understanding how a judge or lawyer has interpreted (or will interpret) the meaning of the legal norm "No vehicles in the park" is analogous to the task of understanding a geometer's projection of figure A onto plane II. Just as there is, in principle, an infinity of mathematically accepted methods of projection in projective geometry (both orthogonal and non-orthogonal), so too there is at least a

plenitude of legally accepted methods for interpreting the meaning of “No vehicles in the park”: original intent, the plain meaning of the language, the underlying purpose of the words, following precedent, and so forth. In the case of geometry, it is easy to see that the shape of the figure that is projected onto plane II from plane I depends on which method is used: as the drawing shows, hypothetical method  $M_1$  (which is orthogonal) produces figure  $A_1$ , whereas hypothetical method  $M_2$  (which is non-orthogonal) yields the different figure  $A_2$ . The same kind of thing holds true in the case of interpreting a legal norm. A statute like “No vehicles in the park” will receive one kind of interpretation if a judge adheres to the method of ascertaining and following the legislature’s “original intent,” and a different kind of interpretation if she decides to follow well-established precedent without regard to whether past cases are consistent with what the first interpreter would call the statute’s original intent. And even if the ultimate legal result of a particular case happens to be the same whichever theory of interpretation is used, the process of getting there and the judge’s explanation of the result will depend on the method she uses. In other words, it is an observable fact that judges who agree in the outcome of a case (e.g., “reversed” or “affirmed”) but who follow different methods of application in getting there have simply *behaved* differently. And this difference in behavior is an extremely important aspect of the legal system as a whole as well as one of the many interesting ways in which legal “clarity” manifests itself.

For present purposes, the most important thing to notice about the metaphor of projection is that one cannot infer or judge the nature of figure A just by looking at its projections ( $A_1$  and  $A_2$ ) alone. Instead, one also needs to know the *method of projection*, and only with this information in hand can one infer the nature of figure A from figures  $A_1$  or  $A_2$ . Just as it would be mathematically naive to ask whether figures  $A_1$  and  $A_2$  are “accurate projections” of figure A without knowing the techniques according to which they were produced, so too it is philosophically naive to ask whether a given statement about the meaning of a legal norm is “correct” without knowing the technique according to which it was produced and applied. In the *Philosophical Grammar*, Wittgenstein makes use of the projection analogy to say that “the same thing happens when we depict reality in our language in accordance with the subject-predicate form.”<sup>83</sup> That is, just as you will get nowhere by investigating what figures  $A_1$  and  $A_2$  “mean” without knowing the techniques according to which they were produced, so too you will spin your wheels hopelessly if you ask what a given statement (legal or otherwise) means without paying close attention to the method according to which it is produced and applied. If conservative Justice Scalia and liberal Justice Stevens of the United States Supreme Court were both to say “Due process of law is an important value in our constitutional scheme,” this does not imply that their methods of getting to these words or their methods of applying them are the same. On the contrary, just about every American lawyer knows that their ways of dealing with cases involving the legal norm “due process of law” are radically different. One might say that the two justices always project “due process of law” according to dif-

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<sup>83</sup> WITTGENSTEIN, *supra* note 32, at 205.

ferent methods of projection despite the fact that there are occasional congruencies in the shape of the resulting figures.

I must emphasize that an investigation of common *methods* of applying legal norms is not the same as an investigation of the common *opinions* of those who apply them. The “truths” of law are not determined by a consensus of opinion, for the opinion that “X” means Y, however widespread, does not tell us how the sign “Y” itself is applied. As Wittgenstein puts it, an answer to the question “How is that meant?” merely “exhibits the relationship between two linguistic expressions.”<sup>84</sup> No, what is called a “technique” or “method” of applying words is not determined by a consensus of opinion, but by a consensus of *action*:

There is no opinion at all; it is not a question of opinion. They [here, the truths of logic] are determined by a consensus of action: a consensus of doing the same thing, reacting the same way. There is a consensus but it is not a consensus of opinion. We all act the same way, walk the same way, count the same way.<sup>85</sup>

Thus, if we notice that there are two methods of applying the same statement (a legal norm, for instance), we should not take this to imply that the statement *has* “two meanings.” We should take it to mean that people just happen to proceed according to different methods of application, and that frequently (although not always) a difference in methods produces a difference in outcome. Notice that this observation does not assert some sort of grand claim (or theory) about meaning; rather, it simply draws attention to what people are actually doing with language in the context of their various forms of life.<sup>86</sup>

Let us consolidate our gains by putting them in the form of a thesis. *The clarity (or obscurity) of legal language is always a function of the method used to apply it: a consensus (or lack thereof) of doing-things-with-signs in a particular context.* As Wittgenstein put it in 1930, “it is only the method of answering the question that tells you what the question was really about.”<sup>87</sup>

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<sup>84</sup> *Id.* at 45.

<sup>85</sup> LUDWIG WITTGENSTEIN, LECTURES ON THE FOUNDATIONS OF MATHEMATICS: CAMBRIDGE 1939 183-184 (Cora Diamond ed., 1976).

<sup>86</sup> WAISMANN, *supra* note 34, at 186.

<sup>87</sup> *Id.* at 79. Compare the following remarks by Wittgenstein: “the verification is not *one* token of the truth; it is *the* sense of the proposition. (Einstein: How a magnitude is measured is what it is.)” LUDWIG WITTGENSTEIN, PHILOSOPHICAL REMARKS 200 (Raymond Hargreaves & Roger White, trans., 1975), and “Where there are different verifications there are different meanings.” WAISMANN, *supra* note 34, at 53. Wittgenstein later came to reject this, his most dogmatic form, of verificationism, which seemed to offer a theory of meaning in which “the meaning of *p*” = “the methods used to verify that *p* is the case.” For example, if we take the case *p* = “Ouch!,” what method do we use to verify what the speaker is talking about? Wittgenstein’s answer: he is not talking *about* anything that could be the case (that’s not the role “Ouch!” plays here), and so it makes no sense to say that the meaning of “Ouch!” is the method we would use to verify that “Ouch!” is the case. Nevertheless, paying close attention to the method of application of words in different contexts, including words like “true” and “false,” continued to be an important element



The clarity of a text has no necessary relationship to the number or the arrangement of the linguistic signs that comprise it. Even a text that is as convoluted as the Internal Revenue Code of the United States can show itself as clear to a tax lawyer. And as Stanley Fish reminds us, a simple statement that seems as vague and unclear on its face as “throw strikes and keep ‘em off the bases” can convey a crystal clear message about what is to be done when spoken by a coach to a pitcher in the context of a major league baseball game.<sup>88</sup> “How good a description is must be judged by how well it achieves its end”, says Wittgenstein, adding that “if a description makes people do the things you want them to do, it is a successful description.”<sup>89</sup>

People who are embedded in a particular form of life will receive, interpret, and apply statements in accordance with the linguistic practices that are typical of that form of life. Thus, the clarity or obscurity of a statement depends on the form of life in which it is expressed. As we have said from the beginning, considered from a logical (as opposed to magical) point of view legal norms themselves are not “about” anything. Rather, they are signposts pointing at possible uses in a community, or different communities, of law-speakers. Investigation of the method or methods of application that are employed in a particular language-game is the key that solves the puzzle of how legal language means or fails to mean *in that context*. As for the norm’s meaning in other contexts, well, an understanding of that will have to await further investigation. To understand the substance of a statement of law you must understand all of the implicit rules of legal norms — i.e., the set of regular linguistic practices that have been developed, inherited, and maintained by law-speakers. Equipped with such an understanding, it is possible to recognize at long last that the much-vaunted value of the rule of law ultimately rests on the historically delivered laws of implicit rules.

### *Conclusion: The Relation between Clarity and Forms of Life*

Lawyers and laypersons occupy different planes, so to speak, when they are trying to understand a legal text. Wittgenstein used to say to his classes that “a blunder is always a blunder in a given speech community.”<sup>90</sup> I would add to this that the clarity or obscurity of a legal text is always clarity or obscurity within a given speech community. When a lawyer reads a statute or contract, the text is always received within the context of a form of life that has trained the lawyer to be attentive to certain interpretive possibilities, certain remedial consequences, and certain juridical risks and benefits of which the layperson that reads the same text has little if any idea. This means that what is clear to the layperson about a plain-language statute such as “No vehicles in the park” is clear in a *different way* to a lawyer. Likewise, what is obscure to a lawyer about a given provision of, say, the

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of Wittgenstein’s philosophy to the very end.

<sup>88</sup> STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 372 (1989).

<sup>89</sup> WITTGENSTEIN, *supra* note 27, at 394-95.

<sup>90</sup> PETER MUNZ, *BEYOND WITTGENSTEIN’S POKER* 89 (2004).

tax code may also be obscure to a layperson in a totally different way, for the lawyer knows where and how to look for an answer and the layperson does not. Making legal language more accessible to the public by making its expression simpler for laypersons to read will never efface this fundamental distinction between the legal and non-legal forms of life.

As we have seen, in Wittgenstein's later philosophy the word "meaning" hangs closely together with the concept "form of life." For participants in a linguistic practice to understand one another, Ronald Dworkin writes, "means not just using the same dictionary, but sharing what Wittgenstein called a form of life."<sup>91</sup> If this is true, then we ought to read the claims made by the international movement for more clarity in legal language under the concept of "forms of life." It will be recalled that one of this movement's major arguments is that the meaning of legal language ought to be made pellucid to laypersons. Considered from the point of view that this article has attempted to sketch, this argument comes down to being a call for laypersons to begin participating with lawyers in the same form of life. But notice: such a call would not be the same as just asking laypersons to talk *to* lawyers or to talk *like* lawyers talk. Rather, it would essentially ask them to *become* lawyers. For lawyers are the only kind of people who can use and understand legal language in the same way that lawyers use and understand it. This tautology is meant to draw attention to the fact that in Wittgenstein's philosophy the concept "use of language" is internally related to the concept "form of life."<sup>92</sup> The most important sense of this internal relation comes through plainly in the following passage from the *Philosophical Investigations*:

"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.<sup>93</sup>

As this passage suggests, to use and understand a statement in the same way that a given group of people do has nothing to do with plucking something called the "clear meaning" of that statement out of one's observation and description of the people's use of it, and then talking *about* it (the meaning). Although the sign "meaning" has many uses, meanings are not things. To use and understand legal language the same way that law-

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<sup>91</sup> RONALD DWORKIN, *LAW'S EMPIRE* 63 (1986).

<sup>92</sup> Glock defines Wittgenstein's concept of "internal relations" as "relations which could not fail to obtain, since they are given with or (partly) constitutive of the terms (objects or relata), such as white's being lighter than black." HANS-JOHANN GLOCK, *A WITTGENSTEIN DICTIONARY* 189 (1996). He continues:

[T]here is no such thing as justifying or doubting an internal relation. Since the relation is (partly) constitutive of the relata, one cannot coherently deny that it obtains without ceasing to talk about those relata. Consequently, a sceptic cannot meaningfully deny that the relation obtains. At most, he could reject the practice which treats the two as internally related.

*Id.* at 191.

<sup>93</sup> WITTGENSTEIN, *supra* note 12, at 88e.

yers do is to use it *as* they do, all the way down. It is to agree in one's behavior and speech with their form of life, and not just to take notice of something called a "meaning." If those in the "Clarity" and "Plain Language" movements really want legal language to be as clear to laypersons as it is to lawyers, then laypersons would have to begin using legal language *as* lawyers use it — they would have to begin writing legal briefs and opinion letters instead of emails and poetry. In short, they would have to *become* lawyers — and in doing so they would undoubtedly begin to share in the enormous political and economic power that lawyers exercise by virtue of their privileged form of life. The demand for clarity in legal language thus seems to be a demand for admission into the form of life inhabited by lawyers, judges, and legislators; it seems to entail a demand for a share of their power. But sometimes one cannot acquire power without entering into a kind of Faustian bargain, and this may be one of those times. "Complete clarity in legal language" = "Every person a lawyer": now *there's* a linguistic equation that gives food for thought.