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“Our Real Need”: Not Explanation, But Education

Thomas D. Eisele

The preconceived idea of crystalline purity can only be removed by turning our whole examination around. (One might say: the axis of reference of our examination must be rotated, but about the fixed point of our real need.)¹

Wittgenstein wrote nothing on legal theory or law, so there is no obvious textual basis on which to draw possible connections between Wittgenstein and legal theory. And Wittgenstein abhorred theorizing in philosophy. So the odds are slim that Wittgenstein would have accommodated himself or his work to similar activity in the law. Where does this leave us?

At sea, which is where we normally are in life and, thus, where Wittgenstein wants us to recognize ourselves as being when doing philosophy too. But theory can disguise this fact from us, as it also can make us think that we have unrivalled powers of knowledge and understanding and explanation. Wittgenstein’s criticism of theory, or the activity of theorizing, is meant to get us to see, and to acknowledge, our limits in this respect. But even though his terms and intent are mostly negative in tone and thrust, his criticism of theorizing has positive implications for how we should try to understand what we are doing and what we have done, including what we are doing and have done in the law. So, if understanding the law better is something that legal theory does or tries to do, and Wittgenstein’s later work can help us understand the law better, then Wittgenstein’s later philosophy is connected to the task set legal theory.

The truth of these claims for Wittgenstein’s later philosophy and its relation to legal theory is, of course, a function of what one takes Wittgenstein’s later philosophy to be, and of what one thinks legal theory can or should do. In this article, I offer an extended characterization of Wittgenstein’s later philosophy in sections 1 and 2, and then I conclude with a brief example which may suggest ways in which we might relate Wittgenstein’s later work to theorizing about the common law.

I appreciate Dennis Patterson’s invitation to contribute to this symposium. This article surfaces more material from my unpublished doctoral dissertation, *Wittgenstein’s Normative Naturalism. The Point of His Practice* (Department of Philosophy, University of Michigan, 1984), which I hope to publish in a substantially revised form. I continue to benefit from criticisms made by the members of my dissertation committee—Stephen L. White, Frithjof Bergmann, Ken Walton, and James Boyd White—and from research time and money granted me by the College of Law at Tennessee.

I dedicate this article to my daughter, Carolyn, who daily leads me to explore the necessities, and the rewards, of our shared lives.

1. L. Wittgenstein, *Philosophical Investigations*, G.E.M. Anscombe trans., (New York: Macmillan Co., 1968) 3d ed., §108a. All otherwise unidentified citations in the text are citations to this work. All emphases, oddities of punctuation, and British spellings in the quotations from Wittgenstein are in the original.

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1. His Goal: Understanding What We Are Doing

A. *The Mystery of the Ordinary*

Wittgenstein's later philosophy is essentially concerned with understanding what we are doing when we act, speak, and think. These are topics for him because they are topics for philosophy, and he is interested in how and why philosophy has treated these matters. They are central to human life, and yet much about them remains a mystery to us, as inexplicable today as ever. I might put my first way of understanding Wittgenstein's later philosophy as follows: it attempts both to remove and to preserve the mystery that these matters hold for us. How does it do this?

Let us begin with a traditional philosophical problem, one that has become central to philosophy in the twentieth century, but also one that has been recognized and studied since the very inception of Western philosophy in Athens. John Searle asks, in the opening sentence of his book, *Speech Acts*: "How do words relate to the world?"² It is in the grip of such a question, be it asked for metaphysical or epistemological or ethical reasons, that a philosopher may start constructing various methods or ways of connecting words to the world. Typically, philosophers take one of two familiar routes. One is the causal or pseudo-scientific route, which attempts to account for the relations between words and world on a causal, scientific model, usually based upon some hypothetical explanation of how our minds work (e.g., brain states or processes). The second route is one that appeals to human conventions, attempting to explain the relations between words and the world in terms of conventions that we have posited or set up and that pre-determine, as it were, the agreement between words and world.

Wittgenstein chooses neither of these two traditional routes of explanation. Instead, his later philosophy can be understood as rejecting the desire to give, and the utility of giving, such reductionistic explanations of what we do. Their utility is nil in part because they reduce what we do and say and think to causal processes or to posited conventions, and this reduction falsifies the complicated reality of our lives. Reductionistic explanations based upon causes or conventions suggest that such matters are the foundations of our lives, but Wittgenstein does not think that we are so constituted. These misleading explanations work in effect by *substituting* the claimed causes or conventions for the surface phenomenon sought to be understood, reducing that phenomenon to these other things. This act of reduction assumes that we can best understand the studied phenomenon by learning what is beneath it, underlying it, either in terms of what caused it, or in terms of what conventions it might presuppose or imply, as though these matters were fundamental to the phenomenon, or foundational for it. But Wittgenstein suggests that this type of explanation changes not only the level at which we are considering the phenomenon in question; it in effect changes the phenomenon that we are investigating. However we try to understand these matters, whatever way

2. J. Searle, *Speech Acts* (Cambridge: Cambridge Univ. Press, 1969) at 3.

in which we try to bring ourselves to grips with them, it is with them—and not some reduced or skeletal construction of them—with which we must come to grips.

Even more important, however, than the disutility of reductionistic explanations (which defeat our real need, according to Wittgenstein), is our willingness to invent and entertain them as satisfying answers to our problems. This willingness on our part reveals to Wittgenstein another problem, and it is a problem with us. He asks: Why are we so inclined, so prepared, first to seek, then to fashion, and finally to accept these reductionistic explanations? Wittgenstein intends his later philosophy to fight this human proclivity for theoretical, reductionistic explanations (a proclivity neither stupid nor easy to extirpate), and his later philosophy does so not by denying their attractiveness to us, nor by denying the roles and functions they play in our lives. Rather, his philosophy fights this human proclivity for theory and explanation by making this same human tendency conscious to ourselves, so that we then can see that it is *this* that drives so much of our philosophical claims to know. Wittgenstein brings to consciousness not only the fact that it is we who desire these explanations—and hence that we are the ones for whom they are invented or constructed—but also the fact that we need not construct them. In other words, Wittgenstein brings to consciousness the fact that we desire something that we do not need (if we accept Wittgenstein’s identification of that which is “our real need”). His therapy attempts to dissolve our desire.

Applying this general insight to a particular case, we might say, for example, that we do not need to construct theories of how words relate to the world, for the simple reason that we already have the data and phenomena that we need in order to understand how words relate to the world. Why construct a theory of this relationship (or series of relationships) when we already have the relationship or series present (in some sense) to ourselves? I do not say that this question has no respectable response on behalf of the theorist. Only, it is not obvious what a respectable response might be. So simply by raising this plain question, Wittgenstein begins to force us—if its revelatory power is what he takes it to be—to question responses and inclinations and proclivities we have never before doubted. Then we may begin to wonder, as Wittgenstein wants and encourages us to do, just what exactly our construction of theories and reductive explanations is in service of. As Stanley Cavell puts it, “If there is such a theory [to be had or gained,] it lies in the criteria themselves, or they are what any theory will have to explain.”³

We already know—don’t we?—that our words do normally, and naturally, connect with or relate to the world. If we admit or acknowledge this to ourselves, then we need to undertake two Wittgensteinian projects. First, we must activate our repressed or buried knowledge of *how* our words relate to the world, making it live again to ourselves, bringing it to consciousness again.⁴ This becomes possible as a task or project only upon our recognition

3. S. Cavell, *The Claim of Reason* (Oxford: Clarendon Press, 1979) at 90.

4. I also study this buried or repressed knowledge in the law (and its relation to Wittgenstein’s later philosophy) in my article, “The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities”, (1987) 54 *Tenn. L. Rev.* 345, 350-351. And, in another article, I say more about how

that, up until now, our knowledge of such matters *has* been repressed. Once we reactivate this knowledge, or re-deploy it, then perhaps we shall learn to recognize how in fact words do manage to connect with or relate to the world. This activation entails our learning to see that—and how—we connect and relate our words with and to the world. So this knowledge is a kind of knowledge of human action and activity—practical knowledge of how we act—and, since it is ourselves who are acting and whom we are studying, it is simultaneously a kind of self-knowledge—a knowledge of who we are and what we are doing when we so act.

Second, we must gain some perspective on this plethora of phenomena, allowing our singular investigations to accrete or otherwise to settle and collect into some coherent capacity to respond to the problems bothering us. This capacity may develop out of our growing sense of the whole, the whole way we act and speak and think—from one perspective, we call this whole our “language”, and from another our “culture” (but I do not take these two candidates to exhaust the possibilities).⁵ Such a capacity or sense is not apt to be fully articulate or articulable, but it is something upon which we can call in our moments of doubt or panic—namely, exactly in those moments paradigmatic of philosophy and its questions or problems, which produce our quandaries and perplexities.

Gaining this perspective and cultivating this capacity or sense are what Wittgenstein calls our being able to gain a “perspicuous representation” of the ways in which we use words.

A main source of our failure to understand is that we do not *command a clear view* of the use of our words.—Our grammar is lacking in this sort of perspicuity. A perspicuous representation produces just that understanding which consists in ‘seeing connexions’. Hence the importance of finding and inventing *intermediate cases*.

The concept of a perspicuous representation is of fundamental significance for us. It earmarks the form of account we give, the way we look at things. ...
[§122]

We gain perspective on our use of words (and on our activities generally) not by extracting ourselves from our speech acts and activities, but rather exactly by re-immersing ourselves within them. Wittgenstein’s suggestion

Wittgenstein, through his use of stories, tries to get us to reactivate such knowledge. See Eisele, “Wittgenstein’s Instructive Narratives: Leaving the Lessons Latent”, (March/June, 1990) 40 *J. Legal Educ.* 77.

5. Michael Oakeshott well-expresses the holistic sense I am after:

[P]olitical education is not merely a matter of coming to understand a tradition, it is learning how to participate in a conversation: it is at once initiation into an inheritance in which we have a life interest, and the exploration of its intimations. There will always remain something of a mystery about how a tradition of political behaviour is learned, and perhaps the only certainty is that there is no point at which learning it can properly be said to begin. The politics of a community are not less individual (and not more so) than its language, and they are learned and practised in the same manner. We do not begin to learn our native language by learning the alphabet, or by learning its grammar; we do not begin by learning words, but words in use; we do not begin (as we begin in reading) with what is easy and go on to what is more difficult; we do not begin at school, but in the cradle; and what we say springs always from our manner of speaking. And this is true also of our political education; ...

M. Oakeshott, “Political Education”, in *Rationalism in Politics and Other Essays* (New York: Basic Books, 1962), at 129.

here takes a metaphorical form, as though in gaining a perspective on language and thought we are learning our way around a web or maze. Language, he says, can be thought of as “an ancient city: a maze of little streets and squares” (§18) through which we find (or lose) our ways; and we also can conceive of it as “a labyrinth of paths” which we can “approach from *one* side and know [our] way about,” but if we “approach the same place from another side ... [we may] no longer know [our] way about” (§203). Then gaining a perspicuous view of our uses of words can be thought of as mapping the ways and means of our *polis* of language, our community of speech and thought.

[T]he very nature of the investigation ... compels us to travel over a wide field of thought criss-cross in every direction.—The philosophical remarks in this book are, as it were, a number of sketches of landscapes which were made in the course of these long and involved journeyings.
[p. v b]

As we journey to and fro in working our way out of the particular philosophical quandaries in which we find ourselves at any specific point in space and time, our goal is not that of some passive view gained from on-high, but rather a heightened sense of our resources and capacities gained by renewing our acquaintance with them—things which as speakers and thinkers and actors we have always possessed in some sense but which require revivifying in our minds. The result of such journeyings is not a theory that explains our linguistic practice, but instead a renewed acquaintance with our linguistic ways, a heightened appreciation of their advantages and disadvantages, their benefits and costs, their values and prejudices, their powers and limitations and conditions. This amounts to a further education in our own practical mastery of words, the world, and ourselves, and it cannot be complete or therapeutic without an acknowledgment of the limits and conditions within which such mastery takes place, finds a home.

B. Locating Our Limits and Conditions By Exploring Our Criteria and Grammar

This may sound good in theory, but how does it work in practice? It is Wittgenstein’s faith that our lives of practice and theory come together in the convening of what he calls our “criteria” and “grammar”, the specific phenomena most often collected for study by his philosophical method (which I call his “normative naturalism”). Look at the following two sections from *Philosophical Investigations*, which pose questions similar to Searle’s and also illustrate Wittgenstein’s normative naturalism.

What is the relation between name and thing named?—Well, what *is* it? Look at language-game (2) or at another one: there you can see the sort of thing this relation consists in. This relation may also consist, among many other things, in the fact that hearing the name calls before our mind the picture of what is named; and it also consists, among other things, in the name’s being written on the thing named or being pronounced when that thing is pointed at.
[§37]

How do words *refer* to sensations?—There doesn't seem to be any problem here; don't we talk about sensations every day, and give them names? But how is the connexion between the name and the thing named set up? This question is the same as: how does a human being learn the meaning of the names of sensations?—of the word "pain" for example. Here is one possibility: words are connected with the primitive, the natural, expressions of the sensation and used in their place. A child has hurt himself and he cries; and then adults talk to him and teach him exclamations and, later, sentences. They teach the child new pain-behaviour. [§244 a]

In both sections, the opening sentence voices a philosophical question akin to Searle's, a question which is meant by the philosopher who raises it to get to the bottom of things, or to the heart of things, for some particular aspect of our way of acting and speaking. Immediately, this philosophical question is responded to by a voice that, while taking seriously this philosophical question, is not captivated by philosophy. This responsive voice is independent of philosophy in the sense that it distances itself from the traditional philosophical mood of wonder; instead, this voice responds by entertaining the question posed by philosophy, but it does so by taking the question in a matter-of-fact mood of ordinary, down-to-earth, clearheaded thinking: "Well, what *is* it [the relation between name and thing named]? Look at language-game (2) or at another one: there you can see the sort of thing this relation consists in" (§37). And: "There doesn't seem to be any problem here; don't we talk about sensations every day, and give them names?" (§244 a) This voice says that naming something or referring to sensations is an ordinary activity that we do "every day" in our lives and language, so there ought to be no mystery about it. We engage in naming, we incorporate it into our everyday lives, making it a part of them and ourselves; we ought to know all about it.

Well, yes and no; we do and we don't. We do talk about sensations daily, refer to them daily, and in this sense they are an ordinary, everyday part of our experience. But, on the other hand, we don't fully understand what we do in our lives. Much of what we do every day is oblivious to itself, as though we sleep-walk through life, unconscious to our actions and activities. We simply do what we do and don't give it a second thought: it is—or has become—second nature to us. So, to *do* these actions daily, even to do them well on a daily basis, is not the same as knowing or understanding that which we do (even if it is done well); the mere doing does not guarantee knowledge or understanding of what is done or how it is accomplished. Knowledge or understanding of the kind desired requires something else, something like reflection on the activity done, giving it the second thought it deserves. We may do this if we realize that what has become second nature to us still is something what we have *acquired*, and hence is something that we might not otherwise have done, or might have done in a different way. So the challenge here is to bring all of this—what we have done and said, our actions and activities, and their imagined alternatives—to consciousness, to conscious inspection and reflection; then, perhaps we shall see what it is that we are doing and how we manage to do it.

Wittgenstein addresses this felt need in the following:

If it is asked: “How do sentences manage to represent?” —the answer might be: “Don’t you know? You certainly see it, when you use them.” For nothing is concealed.

How do sentences do it?—Don’t you know? For nothing is hidden.

But given this answer: “But you know how sentences do it, for nothing is concealed” one would like to retort “Yes, but it all goes by so quick, and I should like to see it as it were laid open to view.”

[§435]

It all goes by so quick ...; we should like to slow it down. Wittgenstein grants us our wish: he slows it down. Not by trying to slow down life, or life’s activities—he knows that that would be impossible; as well, it might falsify the phenomenon under study. Rather, he slows it down by taking it apart piece by piece and examining it at our leisure. That is, he slows it down by slowing *us* down: making us stop and think and look and listen.

Don’t say: “There *must* be something common, or they would not be called ‘games’”—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look! ...

[§66 a]

[W]e must learn to understand what it is that opposes such an examination of details in philosophy.

[§52 b]

One cannot guess how a word functions. One has to *look at* its use and learn from that.

But the difficulty is to remove the prejudice which stands in the way of doing this. It is not a *stupid* prejudice.

[§340]

We know “how sentences manage to represent” (§435 a), and we know “the relation between name and thing named” (§37), and we know “how words refer to sensations” (§244 a)—we know all of these things in the sense that we know *how to do* all of these things with words (i.e., we can do all of them in our language). But we may not know how they work, or what the conditions for their effectiveness may be, and the like, because we have not yet looked and seen what we are doing when and where and as we do these things with words. So Wittgenstein gets us, goads us, to look and see.

We have all of the information we need in front of us, or retrievable to us, in our ordinary experience and actions—“For nothing is concealed. ... For nothing is hidden” (§435 a,b). We all are members of the same community, we all speak the same language. This means that we all are practical masters (to greater or lesser extents) of the same institution or technique.

To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions).

To understand a sentence means to understand a language. To understand a language means to be master of a technique.
[§199 b-c]

And we did not gain admittance to this institution, we did not become initiates of it, we did not master it, by learning anything in relation to the scientific causes or human conventions underlying it. Rather, our practical mastery of the institution and technique of language—of relating words to the world (and the world to words)—consists in knowing our ways around this enormously complicated and intricate form of life, being able to negotiate its terms and passages and conditions, knowing how to call upon and invoke (or how to withhold appropriately) words made available to us by our language in the contexts and circumstances presented us in this world. These anticipated and ensuing norms of our natural language (which Wittgenstein calls our “criteria” and “grammar”) instantiate and inscribe our linguistic practice. They are that which we need to know better, that of which we need to get a more perspicuous view.

Look again at sections 37 and 244,⁶ which deal with “the relation between name and thing named” (§37) and how “words refer to sensations” (§244 a). As an instance of the naming relation, Wittgenstein says: “Look at language-game (2) or at another one: there you can see the sort of thing this relation consists in” (§37). The “sort of thing” a naming relation “consists in”—its grammar or criteria—is now directly in view. The grammar of naming and names consists in the following facts, among other things: that, e.g., when someone is confused about what a particular thing is called, he or she asks its name; that when asked the name of a thing, we respond by giving it (rather than by giving a definition of it, or by drawing a picture of it); that when we want something brought to us, we call for it by name, which we accomplish by calling out its name; and so on and so forth. These are among the grammatical connections and criterial relations in which naming consists. “This relation may also consist, among many other things, in the fact that hearing the name calls before our mind the picture of what is named; and it also consists, among other things, in the name’s being written on the thing named or being pronounced when that thing is pointed at” (§37). No *one* of these relations is necessary or sufficient just anywhere just anytime to *be*, to amount to, a naming relation; but naming consists of these connections and relations, at different times in different situations or circumstances.

The general moral that Wittgenstein draws from these specific instances is that, although their characteristic criteria and grammatical connections can and do vary, they still vary with the circumstances. So that an appreciation of the circumstances can help us to see which criteria may fit where, and what grammatical connections may become relevant when. And, despite this apparent indeterminacy, the control and guidance afforded us and our words

6. See text at 9-10, *supra*.

by these criterial and grammatical means suggest that not just anything can be said anywhere and still be meaningful or intelligible. There are limits. (They include our criteria and our grammar.)

For all their variety or variation, in the proper contexts or circumstances, our criteria provide us with our ordinary means of describing phenomena and objects and experiences and relations (etc.) as and where and when we find or have or possess them. In this respect, criteria relate us to these things, and they do so in virtue of their being “characteristic” of the things for which they are criteria. This is true in two senses. They are characteristic in that they are our normal or normative signs for identifying these things; and they are characteristic in that they serve to characterize—they function by describing—these things.⁷

For Wittgenstein, criteria provide the natural or normal or necessary means by which, and terms in which, we relate ourselves to the objects and phenomena and institutions and activities and experiences (etc.) of our world. We identify things as they are within certain contexts or specific circumstances on the basis of, or by means of, our criteria. The identity of a thing is what it “consists in,” and what it consists in is a matter of the criterial relations and grammatical connections that it has with other things (including people). My understanding of this central aspect of Wittgenstein’s later philosophy is that criteria are those means that we have of relating ourselves to things in the world, whereas grammar (as he calls it) or grammatical connections relate these things amongst themselves (constituting a grammatical system, something that we call a “language”). Or, perhaps a better way to put this distinction is as follows. Criteria illustrate that aspect of language that speaks to how we use language to relate it (and ourselves) to the world. Grammar, on the other hand, traces the internal connections between or among things (terms) within the language itself, or within the world itself (as a coherent system, or a system of coherencies), without making explicit reference to ourselves (although implicitly we—and our uses of language—are always there, embedded within the system, just as it is embedded within us, our community, and our world).

C. Grammar as the Network Our Lives Form

While our real need is to gain an understanding of what we do and say and think, such a need cannot be fulfilled by offering causal or conventional explanations. Here we must appreciate, among other things, the kind of problems posed in philosophy. These problems put into question matters that we rarely if ever otherwise doubt, things that we ordinarily take for granted. The subject-matter of philosophy is not in this respect esoteric or exotic; philosophy simply means to examine and explore, relentlessly but not uncharitably, the ordinary matters that our lives comprise, the mundane bases of our mundane lives. The surprise is that philosophy finds the results of its examination and exploration surprising, and we find them puzzling, even

7. See also Eisele, “The Activity of Being a Lawyer”, *supra* n. 4, at 352.

unsettling. It is this ability of philosophy to find our ordinary lives interesting, exciting, and surprising, which Wittgenstein captures and cultivates in his later philosophy:

Don't take it as a matter of course, but as a remarkable fact, that pictures and fictitious narratives give us pleasure, occupy our minds.

("Don't take it as a matter of course" means: find it surprising, as you do some things which disturb you. Then the puzzling aspect of the latter will disappear, by your accepting this fact as you do the other.)

[§524 a-b]

It is Wittgenstein's ability to comprehend the paradoxical ordinariness and extraordinariness (or romance) of our lives—a capacity analogous to Keats' "negative capability"⁸—that makes me say that Wittgenstein's later philosophy attempts both to remove and to preserve the mystery that these matters hold for us.⁹

Wittgenstein recognizes that philosophy makes that which is ordinary, a matter of course, seem foreign to us, or suddenly distant from us. It dislocates or disorients us, making us feel as though our ordinary lives are strange, as though they were not ours but rather someone else's, about which we know little or nothing. (In a sense, this can be true.) And then, in the grip of such doubt, we are apt to feel the overwhelming need to know, which we interpret as the need to explain (to ourselves as well as anyone else).

He does not deny the reality of our confusion here; our confusion is genuine, not spurious. Unlike the Logical Positivists in this regard, Wittgenstein recognizes philosophical problems as real, not pseudo-problems. They evidence a real need, which is a need for clarity, or clarification. But we gain clarification not by constructing a scientific theory of causes or by offering an explanation based upon conventions, but rather by describing and imagining and otherwise investigating the facts and phenomena and categories and criteria that constitute our experience and practice, our way of living, seeing, speaking, thinking and acting. So we address our real need (as Wittgenstein puts it in the motto to my article) by turning our whole examination around, transforming it from one of theoretical explanation to one of descriptive and imaginative education. We rotate our work "about the fixed point of our real need" (§108 a)—which is clarification, leading to understanding.

Since a philosophical question arises in terms of (and is posed in) our everyday language, we ought to be able to answer or solve it in the same language, without having to appeal to some other discourse (e.g., a scientific one). Another way of putting this point is as follows: If the problem arises within the medium of ordinary language, then it is (in part at least) a problem of (or with) this same medium. We do not solve *this* problem if we change our method to that of another medium or language; instead, such a shift only serves to convert or transform the problem into something cognizable in the substituted medium.

8. J. Keats, *The Selected Letters of John Keats*, L. Trilling ed., (Garden City, N.Y.: Doubleday & Co., 1956), at 103. See also Eisele, "Review Essay/Dworkin's 'Full Political Theory of Law'", (Summer/Fall, 1988), 7 *Crim. Just. Ethics* 49, at 64-65.

9. See text at 6, *supra*.

When I talk about language (words, sentences, etc.) I must speak the language of every day. Is this language somehow too coarse and material for what we want to say? *Then how is another one to be constructed?*—And how strange that we should be able to do anything at all with the one we have!

In giving explanations I already have to use language full-blown (not some sort of preparatory, provisional one); this by itself shews that I can adduce only exterior facts about language.

Yes, but then how can these explanations satisfy us?—Well, your very questions were framed in this language; they had to be expressed in this language, if there was anything to ask!
[§120 a-c]

Our practical mastery of our language enables us to ask these questions; it also should enable us to answer them (if they are answerable). But then how are we to gain the perspective or purchase we need, on the things we do and say, in order to understand them?

For the phenomena and experiences and activities and media and institutions that bother us (at least, that bother us philosophically, or while we are doing philosophy), Wittgenstein indicates that “our real need” is to understand them as they are in life. Their living identity for him is bound up not with their underlying causal or conventional aspect (if such they have), but rather in their interrelatedness with all of the other phenomena and experiences and activities and media and institutions that constitute our lives and our world. Bishop Butler said, “Everything is what it is, and not another thing.”¹⁰ This rings true as well for Wittgenstein, but I think that he would wish to amplify it by saying that everything is what it is only in view of everything else with which it relates and to which it is connected. I take this to be the moral of his obscure remarks about grammar and essence and identity: “*Essence* is expressed by grammar” (§371); “Grammar tells what kind of object anything is. ...” (§373). Identity of this sort is based upon the criterial relations and grammatical connections each thing has or may have in our lives and language; the vision is frankly holistic.

In pursuing the linked notions of criterial relations and grammatical connections through his later philosophy, Wittgenstein enacts a reversal of philosophical direction. We must turn “our whole examination around,” from one pitched on the false hope of transforming philosophy into either a natural or a social science, to one pitched on the true belief that philosophy transforms itself as it renews itself, in its continued faithfulness of response to the ever-present, ever-changing, gnawing questions put to humans in philosophy as it is, one of the humanities and no kind of science. This humanity studies humanity as and where and when it finds it in this world. Then where and how does Wittgenstein’s later philosophy find humanity in this world? In the network or fabric of relations and connections (he sometimes calls it a “maze” or a “labyrinth” [see §18; §203]) formed by the lives and world we have woven and continue to weave through our activities, linguistic and otherwise.

10. Quoted in G. E. Moore, *Principia Ethica* (Cambridge: Cambridge Univ. Press, 1902), at 11.

D. The Allure of Theory

Looking for some underlying causal connection or some hidden human convention is not necessary in order to understand our linguistic activities. Rather, we need to look at, perhaps to rearrange or otherwise to organize, the materials and actions and experience and information we already have at hand. “The problems are solved, not by giving new information, but by arranging what we have always known” (§109). We need somehow to gain a synoptic view of what we do and say and think.

What is problematic for Wittgenstein—and that to which he tries in his later philosophy to make us sensitive as well—is the fact that usually we do not proceed in the way he suggests (which he sees as one natural way for us to behave). Much more often, we proceed in another way, which may be even more natural to us: we resort or retreat to theory, concocting theoretical explanations. Yet in these very situations, resorting to theory is not helpful, is not an aid to understanding; rather, it is the abnegation of understanding. We are substituting theory for understanding. Why?

Wittgenstein never says, to my knowledge, that all theories are wrong, or that all theorizing is a misleading activity. How could he (or anyone else) say such a thing? Saying such would only amount to more theoretical babbling—illustrating his true meaning, which is that theorizing allows us to speak in unserious or inauthentic ways, ignoring or forgetting the inconvenient facts of our linguistic practices and of our circumstances at large. This is one way of saying that theorizing can take place (and too often does take place) in the absence of any acquaintance with or recollection of the data and phenomena which the theorizing is intended to explain. This amounts to a kind of arrogance in our thought and speech, which vanity Wittgenstein is committed to opposing in all its forms.¹¹ Not in the false hope of ridding ourselves of the urge or temptation to theorize—that would be like hoping to rid ourselves of original sin. But, instead, in the sure and certain hope that we may inoculate ourselves against the allure of theory by acknowledging, again and again, its attraction for us, and yet bringing home to ourselves, our consciousness, the bitter knowledge that it often seduces and abandons our minds without advancing them to any insight. Theory can be empty. And theoretical speech can consist of pictures that we uncritically accept or follow. Then what Wittgenstein wants us to do is to subject these pictures, our theories, to criticism and scrutiny; he doesn’t ask us to abandon them.

The great difficulty here is not to represent the matter as if there were something one *couldn't* do. As if there really were an object, from which I derive its description, but I were unable to shew it to anyone.—And the best that I can propose is that we should yield to the temptation to use this picture, but then investigate how the *application* of the picture goes.
[§374]

11. I say more about Wittgenstein’s later philosophy and its negative application to legal theorizing, in my commentary, “Hegelian Vanity, Common Law Humility: On Legal Theory, Its Expression and Its Criticism”, (1989) 10 *Cardozo L. Rev.* 915, 925-947. It is equally important to me, however, to indicate the positive work that can be done from a Wittgensteinian perspective in trying to gain some overview of the law and our activities within it. I intend my remarks in the second section of this article to begin to meet this need.

This is the only way to wean ourselves from this narcotic, and it requires some strong medicine (which Wittgenstein offers us as therapy), as well as some abstemiousness on our part. “And we may not advance any kind of theory. There must not be anything hypothetical in our considerations. We must do away with all *explanation*, and description alone must take its place. And this description gets its light, that is to say its purpose—from the philosophical problems” (§109).

This does not mean that theory and explanation have no place in our lives or our world, or in our philosophies. Instead, it means that we must ensure against theory and explanation being given or ceded more of a place in our lives or our philosophies than they rightfully (i.e., ordinarily, normally) have. The threat is that theory and explanation (as philosophical techniques or tools, as ways of understanding) may take over our lives and our minds, capturing our imaginations to the detriment of the rest of our capacities and techniques, our routes to understanding. It is in this sense that I take Wittgenstein’s closing remark in section 109 to be expressing a cautionary tale for philosophy and philosophers: “Philosophy is a battle against the bewitchment of our intelligence by means of language”; in particular, I take it, by means of theoretical language, or language used in theorizing.

For Wittgenstein, the battle is joined at the level of description, and not that of explanation, because we do not yet understand where we are or what we do; these are matters to be investigated, not issues on which we can hold forth dispositively and definitively. And our offering of explanations *at this point* in our investigations is worthless. Worse than worthless, really, because the offer itself is misleading; it holds out false hope of clarity when in fact we live in confusion. To speak in terms of theories or explanations allows us to imagine that we know when in fact we do not know. It allows us to imagine, as Stanley Cavell puts it, that “we have explanations where in fact we lack them.”¹² We do not know what we think we know. And yet, it also is true for Wittgenstein that, in a certain respect, we know more than we think we know.

Take, for example, causal reductionism and conventional reductionism. These explanations proceed on a theoretical level, one that presupposes a certain structural or underlying “crystalline purity” (§108 a) to our lives which those lives simply do not have. In the context of these two theoretical and reductionistic explanations, such a pure structure would be either a structure of causes or one of conventions. But what do we know of any such structure of causes or conventions? I believe that they are invented for the purpose of trying to explain the problems bothering us, trying to answer our need to know, to understand these matters. But they only have the form or structure of explanations because of the apparent vacuum in our ordinary lives, by which I mean our apparent ignorance or lack of any ordinary explanations for these matters that puzzle and perplex us. In our ordinary lives and world, while causes and conventions may certainly be a part of our experience, I doubt very much that their theoretical structure or explanatory nature is. Instead, the

12. S. Cavell, “Knowing and Acknowledging”, in *Must We Mean What We Say?* (New York: Charles Scribner’s Sons, 1969), at 258. See also Eisele, “Hegelian Vanity, Common Law Humility”, *id.*, at 928 & n. 47.

causes and conventions we experience are a part of our phenomenological lives only in the sense that anything is a part of those lives: they help to compose the fabric or weave of our experience, which Henry James calls “an immense sensibility”. Our experience, he says, comprises “a kind of huge spider-web of the finest silken threads suspended in the chamber of consciousness, and catching every airborne particle in its tissue”.¹³

Our lives and our world (by which I mean, the phenomena and experiences and activities and media and institutions that constitute them) *do* have a structure, *do* have a pattern—without a doubt. And Wittgenstein never denies this. In fact, he insists upon nothing less. But, if we want to understand the phenomena bothering us, then we need to look at and investigate *these* phenomena. For Wittgenstein, to see them in and for themselves is never to see them isolated or divorced from ordinary life; it is rather always to see the phenomena *in practice*, as they take place in our daily lives (i.e., as a part of our practices). In Wittgenstein’s later philosophy, we continually proceed on the practical level of our ordinary language and everyday understanding; for him, it is quite sufficient (because ordinary language is the medium, the living system, within which our understanding takes its bearings and its terms of understanding).

The structure of our lives and language is not one of “crystalline purity”; rather, it is all the kind of tangled, complicated, intertwined affair meant to be illuminated and elicited by Wittgenstein’s constant harping on and appealing to the “criteria” and “grammar” and “language-games” and “forms of life” that we have and possess and enact (and reject ...). The structure and coherence of our lives and language consist, *there*, in these interrelations and connections of phenomena. *There* is where and when and why and how our words relate to the world. And these emphatic demonstratives do not point to a structure of theory (“crystalline purity”); instead, they suggest that these are eminently practical matters, and hence that their structure (such as it is) is that of a practice, constituted by that which we in fact and in life do (and say and think ...). And despite its complexity, its terribly knotted and nested density, this practical structure of our lives and language is knowable and traceable by us. To make it known to us, and to trace it intelligibly (without falsifying or simplifying it), are the goal of Wittgenstein’s later philosophy.

2. His Method: Philosophy as Educative Ethnography

A. *Is Wittgenstein an Anthropologist?*

Some commentators have said that Wittgenstein’s later philosophy, in its concern for describing and assessing how we think and act and speak, is anthropological, even anthropocentric. One instance of this occurs in a very good introduction to Wittgenstein’s work, David Pears’ book in the Modern

13. H. James, “The Art of Fiction”, in *Partial Portraits* (Ann Arbor: Univ. of Michigan Press, 1970), at 388. See also Eisele, “The Activity of Being a Lawyer”, *supra* n. 4, at 358-359; and J. White, *The Legal Imagination* (Boston: Little, Brown & Co., 1973), at 48-49.

Masters series.¹⁴ There Pears describes the transition in Western philosophical practice since Kant as a “shift toward anthropocentrism,”¹⁵ and he claims that Wittgenstein’s work, both early and late, contributes to this shift. Pears goes on to say that the later philosophy of Wittgenstein has a “positivistic” tenor, in that its method for understanding the world and our place within it “take[s] a psychological or anthropological form [often expressed by the proposition]: ‘That is how people are.’”¹⁶ Such philosophical anthropocentrism suggests, he claims, that “human nature provides a sufficiently firm basis”¹⁷ for our philosophical needs.

This description usefully highlights a definite aspect of Wittgenstein’s philosophical method worth emphasizing, but it also conflates this aspect with another aspect that needs to be kept distinct. The aspect of Wittgenstein’s philosophical practice that I find to be truly anthropological is voiced in his frequent injunction to imagine strange people or “tribes” who do things quite differently from the way we do things. Here are several examples of this anthropological bent:

Let us imagine a language for which the description given by Augustine is right. The language is meant to serve for communication between a builder A and an assistant B. A is building with building-stones: there are blocks, pillars, slabs and beams. B has to pass the stones, and in the order in which A needs them. For this purpose they use a language consisting of the words “block”, “pillar”, “slab”, “beam”. A calls them out;—B brings the stone which he has learnt to bring at such-and-such a call.—Conceive this as a complete primitive language.

[§2 b]

We could imagine that the language of §2 [above] was the *whole* language of A and B; even the whole language of a tribe. The children are brought up to perform *these* actions, to use *these* words as they do so, and to react in *this* way to the words of others.

[§6 a]

Suppose you came as an explorer into an unknown country with a language quite strange to you. In what circumstances would you say that the people there gave orders, understood them, obeyed them, rebelled against them, and so on?

[§206 b]

Let us imagine that the people in that country carried on the usual human activities and in the course of them employed, apparently, an articulate language. If we watch their behaviour we find it intelligible, it seems ‘logical’. But when we try to learn their language we find it impossible to do so. For there is no regular connexion between what they say, the sounds they make, and their actions; but still these sounds are not superfluous, for if we gag one of the people, it has the same consequences as with us; without the sounds their actions fall into confusion—as I feel like putting it.

Are we to say that these people have a language: orders, reports, and the rest?

14. D. Pears, *Ludwig Wittgenstein* (New York: Viking Press, 1970) (reissued with a new preface and identical pagination 1986). See also S. Cavell, *supra* n. 3, at 118-119.

15. *Id.* at 25.

16. *Id.* at 28.

17. *Id.*

There is not enough regularity for us to call it “language”.
[§207 a-c]

Imagine people who could only think aloud. (As there are people who can only read aloud.)
[§331]

All of these sections ask us to imagine other people, some quite different from ourselves, who act in very different ways than we do. Then Wittgenstein often (but not invariably) follows these descriptions by asking us to think what we would say about such people, or such behavior, usually along some particular dimension or criterion of assessment. Is it a language? Is it a rule? Could we learn it or follow it? Do they calculate? Are they thinking?

Here Wittgenstein is testing and prodding the limits of our understanding of others, looking at the limits of our concepts and criteria in terms of how we would apply them to others who differ from us in certain ways. What he wants to know (and what he wants to get us to ask ourselves) is, How can we relate ourselves to these others? *Can* we relate ourselves to them; or, instead, do we not have that capacity? This becomes a question of how we are to *take* these people—or what we are to take them to be (and to be doing). This is not primarily a matter of our imaginative ability to empathize with them, to project ourselves into another’s shoes or skin and to see what it looks and feels like from that position (although this capacity for empathetic identification or projection seems to play a part in this conceptual investigation). More to the point, Wittgenstein wants to know whether we can subsume these others under our concepts and criteria as they stand, or as they stand stretched or complicated by his anthropological cases. Thus, he is asking us to question what *our* position is with respect to these people. Can we understand them *as* people, as significant others *to us*. Can we understand them from *this* distance (our distance, our vantage point)? Can we feel at home with them? How are they strange or foreign to us, how familiar or intelligible? He asks us, in other words, to assess their position in terms of—and from the perspective of—our own, and to gauge the distance, or proximity, between the two. This taking-the-measure-of-the-distance-between ourselves and others (as a group or society or “tribe”) seems to me to be a genuinely anthropological aspect of Wittgenstein’s later philosophy.

But in a number of other sections of the *Investigations*, Wittgenstein’s emphasis is importantly different from the one described above. He does not ask us to imagine others at all, but rather *ourselves*, acting either as we normally do or else differently than we normally do. Here he is asking us to investigate (from the inside) the actualities and possibilities of our own lives and language *as applied to us*, either as we currently live our lives and speak our language, or as we may wish or imagine ourselves living and speaking. What he wants us to discover here are the possibilities and necessities of our own concepts and criteria, which are revealed when we turn these concepts and criteria on ourselves. Wittgenstein’s idea is to see what capacity for projection and room for play, what flexibility and tension and rigidity, our con-

cepts and criteria have in characterizing ourselves at home, in familiar surroundings (if not always in the presence of familiar behavior).

As I read this second set of sections, there is no distance between *self and other* being anthropologically measured or tested. Rather, what is taking place is a measure or test of the actual distance that we travel, or the potential distance that we may travel, under our own gaze or gauge, in applying our concepts and criteria to actions and thoughts and words that, if not ours presently, are candidates for becoming ours. This investigation traces a trajectory *from a present self to a future self* (possibly a better self, certainly a different self). Here are some samples of this second kind of investigation:

Suppose someone points to a vase and says “Look at that marvelous blue—the shape isn’t the point.”—Or: “Look at the marvelous shape—the colour doesn’t matter.” Without doubt you will do something *different* when you act upon these two invitations. But do you always do the *same* thing when you direct your attention to the colour? Imagine various different cases. To indicate a few: ...
[§33 b]

... Imagine that you were supposed to paint a particular colour “C”, which was the colour that appeared when the chemical substances X and Y combined.—Suppose that the colour struck you as brighter on one day than on another; would you not sometimes say: “I must be wrong, the colour is certainly the same as yesterday”? This shews that we do not always resort to what memory tells us as the verdict of the highest court of appeal.
[§56]

I say “There is a chair”. What if I go up to it, meaning to fetch it, and it suddenly disappears from sight?—“So it wasn’t a chair, but some kind of illusion”.—But in a few moments we see it again and are able to touch it and so on.—“So the chair was there after all and its disappearance was some kind of illusion”.—But suppose that after a time it disappears again—or seems to disappear. What are we to say now? Have you rules ready for such cases—rules saying whether one may use the word “chair” to include this kind of thing? But do we miss them when we use the word “chair”; and are we to say that we do not really attach any meaning to this word, because we are not equipped with rules for every possible application of it?
[§80]

Would it not be possible for us, however, to calculate as we actually do (all agreeing, and so on), and still at every step to have a feeling of being guided by the rules as by a spell, feeling astonishment at the fact that we agreed? (We might give thanks to the Deity for our agreement.)
[§234]

Look at a stone and imagine it having sensations.—One says to oneself: How could one so much as get the idea of ascribing a *sensation* to a *thing*? One might as well ascribe it to a number!—And now look at a wriggling fly and at once these difficulties vanish and pain seems able to get a foothold here, where before everything was, so to speak, too smooth for it.
[§284 a]

These two sets of sections from the *Investigations* which illustrate what I am calling two “aspects” of Wittgenstein’s later philosophical method—an anthropological and a self-scrutiny aspect—are importantly similar and also

importantly different. Their similarities include these two: First, both aspects proceed by way of asking what we would say in these given (described) circumstances. Thus, both proceed by eliciting the criteria we have for calling things as we do (or would) call them. In this way, both seek to get us to elicit, and then to explore, what we are willing to say about things, including ourselves and others, and the bases or reasons we have (or may have, or may think of) for so speaking, for so wording the world.

Second, both the anthropological and the self-scrutiny aspects test not only our capacity for applying and analyzing our criteria, but also our capacity for accepting people as people. We are asked, that is, to consider *as people* either others or ourselves acting in certain ways, taking these actions or thoughts or expressions as exemplifying recognizably human attributes, exemplifying or instantiating at least a part of what it is to be a human being. So both aspects are lessons in how we take people, and what we take them to be. And in both instances, Wittgenstein is asking us to test the extent of our capacity for accepting or rejecting people as people, embracing or avoiding them, denying or recognizing their behavior and characteristics. In short, both aspects of Wittgenstein's philosophical practice test our ability to "read" people, ourselves as well as others.

Two human capacities are being examined in these anthropological and self-scrutiny phases of Wittgenstein's work, and they can be examined together because they are intertwined. The former capacity—our capacity for applying our concepts and criteria to people—is dependent upon the latter—our capacity for accepting or taking people as human beings. If we do not, or cannot, take others or ourselves as people, then our criteria cannot so much as come into use. Our criteria in this case have nothing to which to be applied, no host or subject to whom they apply, or whose existence or activity they characterize.

... What is disappointing about criteria?

There is something they do not do; it can seem the essential. I have to know what they are for; I have to accept them, use them. This itself makes my use of them seem arbitrary, or private—as though they were never shared, or as if our sharing of them is either a fantastic accident or a kind of mass folly. ... To withhold, or hedge, our concepts of psychological states from a given creature, on the ground that our criteria cannot reach to the inner life of the creature, is specifically to withhold the source of my idea that living beings are things that feel; it is to withhold myself, to reject my response to anything as a living being; ...¹⁸

There are important differences as well, however, between these two aspects of Wittgenstein's later philosophy, one of which is the following. The first set of sections asks us to imagine ourselves viewing someone else, different people; it invites us to try to imagine what sense these people might make to us. The second set of sections asks us to imagine ourselves here and now ("at home," I put it above¹⁹), acting or developing in a different way

18. S. Cavell, *supra* n. 3, at 83.

19. See text at 21, *supra*.

than we do act at the present time, or expect to act; it asks us to think about what sense we can make of ourselves if we were so to act. So the first set of sections asks us to conceive of other people as acting differently, and is concerned with whether we could understand them, or share their way of doing things, or recognize what they were doing as something that we also do (albeit somewhat differently). And the second set of sections asks us, What can we make of our present situation if it develops or evolves in a certain (imaginable, but unpredictable, or unlikely) way? In other words, What can we make from our present resources? What can we do from here (where we are, where we find ourselves) with these tools and materials and capacities?

I think that, by vacillating between an anthropological and a self-scrutiny perspective, Wittgenstein intends to surprise us: he demonstrates that what initially strikes us as being foreign to us (e.g., those tribes of strangers or primitive people) may suddenly seem not so strange, so foreign, to us. And, correspondingly, we also may be surprised to learn that what we have all along taken to be familiar or obvious is replete with unappreciated or neglected foreignness. (For example, look at section 524.²⁰) It turns out that everything Wittgenstein cajoles us into investigating *can* be familiar or foreign to us—and that the alternation between these two possibilities is definitive for the kinds of subject he sets himself in his later studies.

Just such an alternation between foreign and familiar also is characteristic of self-knowledge; our knowledge of ourselves can alternate between appearing familiar or obvious—commonplace—and foreign or fantastic. And this alternation is something that we cannot control or predict. Then Wittgenstein's method can be thought of as trying to create situations in which the alternation or vacillation between foreignness and familiarity can be studied. (See, e.g., §§524-525, 595-596, 628.) If I am right about this strategy in Wittgenstein's later work, then the conception of Wittgenstein's later philosophy as ethnography, as anthropology, is misleading (unless we add an educative element to it).

Anthropology assumes a certain distance between ourselves and the world we are studying (and others in it), because the common model of anthropology is one of an observer observing and describing a foreign culture (the observed). This distance rests upon a notion that the perceiver is not a participant in the culture or activity being observed. It is foreign to him or her both because he or she is not an initiate, and because he or she cannot both participate in it while at the same time observing it. But in Wittgenstein's later philosophy we are studying ourselves and our own culture's resources. We are studying not only the distances between ourselves and others, but also those within ourselves, between our current self and any number of future selves.

An emphasis on the anthropological or anthropocentric aspect leaves out of account Wittgenstein's genius for simultaneously studying and including himself (and us) in the figures of his writing. It falsifies or slights his ability to find or place himself (and us) within the topics and subjects he discusses and investigates. Thus, the topic of self-knowledge is essential to the text of the

20. See text at 14, *supra*.

Philosophical Investigations, as it is central in his other late writings. But even this way of expressing the point puts it badly, because self-knowledge (as also the knowledge of others) is more than a topic for Wittgenstein in his later philosophy; it is his very method, the way he proceeds from topic to topic and subject to object. And proceeding by way of self-knowledge is not usually thought to be a defining characteristic of anthropological writing or procedure.

This leads me to think that Wittgenstein's later philosophy is centrally concerned with education, especially self-education, and that his vacillation between an anthropological and a self-scrutiny aspect is meant to cultivate this central concern. Wittgenstein wants us to learn from these studies of our criteria and grammar not only what we are and where we live, but also the possibilities of who we may become and how we may grow. What impresses him most, I think, is not how settled or unsettled our lives are, but rather how they habitually require *resettlement*, not only establishing but also re-establishing the terms and conditions upon which we can and do and should live. We and the lives we lead are open to change from birth, even including reversal or transformation. But once we have achieved our initial maturity, adulthood, with some significant formation of the self and the self's world, change and education entail not just growth but conversion, self-transformation.²¹

Our human capacities are such that they invite new experience which we assimilate with the old; and they function by way of our continuing ability to make suitable projections of old words into new contexts, new habitations, even if such habitations only afford us momentary stays against confusion.²² So, while we live at sea, as I said in the opening paragraphs of this article, we yet have the tools and means of navigating, in particular because we have the capacity to learn, to educate ourselves.

Pears' comment, then, about the "positivistic" aspect of Wittgenstein's later work, ascribing to it a claim that "human nature provides a sufficiently firm basis" for our philosophical needs,²³ is misleading. It suggests a settled human nature, as though it were some solid, unchanging foundation, but this is not quite the way in which Wittgenstein appeals to human nature—the natural and normal—in his later writings. He does appeal to natural and normal human responses, ways of taking things, ways of seeing things, and so forth, but he appeals to them not in terms of their being fully realized or finally settled. These core capacities of human beings are never fully realized or settled in the sense that they might be achieved once for all or exercised in some exhaustive way, in full and final settlement of our nature. Rather, we share them, and hence share their potential, just as we can share the forms of

21. As Stanley Cavell says:

The anxiety in teaching, in serious communication, is that I myself require education. And for grownups this is not natural growth, but *change*. Conversion is a turning of our natural reactions; so it is symbolized as rebirth.

S. Cavell, *supra* n. 3, at 125. See also Eisele, "The Legal Imagination and Language: A Philosophical Criticism", (1976) 47 *U. Colo. L. Rev.* 363, 412-413.

22. See R. Frost, "The Figure a Poem Makes", in *Selected Prose of Robert Frost*, H. Cox & E. Lathem eds., (New York: Holt, Rinehart and Winston, 1968), at 18.

23. See text at notes 16-17, *supra*.

life and the media within which these human capacities can be formed and exercised. In this respect, they do provide a basis of our lives (and a basis for philosophy, if it chooses to consider them) because they afford us fruitful, bountiful, regenerative ways of projecting ourselves and our concepts into new contexts and thereby making sense of them (and of us as we are there and then situated).

Wittgenstein appeals to these capacities and norms in terms of their nearly perpetual, inexhaustible capacity for feeding and supporting human learning and education. Yet they have this potential in part only because they (these capacities and norms) exist within the limits and conditions laid down by our inherited criteria, grammar, language-games, and forms of life. This Wittgensteinian view implies neither that “everything is settled” nor that “everything is possible”. It simply encourages us not to give up hope, and not to forget what we have to work with. In particular, it urges us to test and measure and learn both the criterial and grammatical bases of ourselves and our lives as we and they are currently constituted, and to consider the possibilities of these matters as they may either foretell or forestall change (in terms of us or in terms of the world changing). Thus, as Cavell puts it, “the writer of the *Investigations* declares that philosophy does not speak first. Philosophy’s virtue is[, rather, its] responsiveness.”²⁴

B. Learning about the Common Law: Simpson v. Sugarman

How does this view of Wittgenstein’s later work relate to our study and understanding of law? I said earlier that for Wittgenstein the “practical structure of our lives and language is knowable and traceable by us,” and that its true tracing in intelligible terms was the goal of his later work.²⁵ The practical structure of our legal lives and language largely consists in what we in the Anglo-American world call “the common law”, and there is perhaps no better test of Wittgenstein’s utility for legal theory than examining the extent to which Wittgenstein’s insights might help us better to understand the common law. The need is great, if for no other reason than the fact that in this increasingly legislated legal world of ours, we are losing our natural affinity for common law habits of mind and styles of argument and analysis. And this need has not been addressed by contemporary legal theorists.

To my mind, the single best piece criticizing our impoverished theories of the common law is A.W.B. Simpson’s article, “The Common Law and Legal Theory,” first published in 1973 and now republished in revised form in a

24. Given in full, Cavell’s words are these:

... [I]n beginning with the words of someone else—in choosing to stop there, in hearing philosophy called upon in these unstriking words—the writer of the *Investigations* declares that philosophy does not speak first. Philosophy’s virtue is responsiveness. What makes it philosophy is not that its response will be total, but that it will be tireless, awake when others have all fallen asleep. Its commitment is to hear itself called on, and when called on—but only then, and only so far as it has an interest—to speak.

S. Cavell, *This New Yet Unapproachable America: Lectures After Emerson After Wittgenstein* (Albuquerque, New Mexico: Living Batch Press, 1989), at 74.

25. See text at 18, *supra*.

recent collection edited by William Twining.²⁶ Simpson's essay begins with the remark that "no very satisfactory analysis of the nature of the common law has been provided by legal theory. Indeed the matter has received remarkably little sustained attention by theoretical writers."²⁷ Ironically, the very next piece in the Twining collection (by David Sugarman) seems to confirm Simpson's view. There we find the following characterization of the common law mind: "Stated baldly, it assumes that although law may appear to be irrational, chaotic and particularistic, if one digs deep enough and knows what one is looking for, then it will soon become evident that the law is an internally coherent and unified body of rules."²⁸ With due respect for the scholarship displayed in the remainder of Mr. Sugarman's article, and taking account of his footnote disclaimer acknowledging that he is speaking here in terms of an "ideal-type" or "model", I still do not see that this characterization of the common law mind can be accepted.

Sugarman is claiming that this purported assumption of the common law mind aptly describes the essence of the common law tradition and process. But I do not find in the materials of the common law (most especially, not in its judicial opinions) any such assumption or attitude. Can it truly be said that the common law attitude is one of assurance in its internal coherence and unity? I don't think so. It seems to me, instead, that the common law is only too conscious of the fact that its development may be haphazard, that its fecundity for problem-solving purposes may carry with it the vice of promoting some incoherence and disunity among the rules and principles that it engenders and invokes.²⁹ Indeed, Dworkin, among others, might say that such a recognized tension within the common law is one of its positive aspects, not a negative concern. However this may be, it seems to me that the common law rests secure in the thought that, although its work may not yield an internally coherent or unified body of rules, it still plays a valuable role in our lives and culture. This sense of security stems not from some perversity inhering in the common law, nor from any insensitivity to the desirability of internal coherence and unity as virtues of a legal system. But the common law seems to me to appreciate that the danger of its slighting these two values (and others like them) is a risk that it must run if it is to respond to the facts and equities of a particular party or specific case presented to it for decision. This amounts to a refusal to sacrifice overriding needs and values for some vaunted ideal of coherence or unity. The common law system is too empirical and opportunistic to be attracted to such an ideal—yet it continues to be a

26. Simpson, "The Common Law and Legal Theory", in *Oxford Essays in Jurisprudence*, 2d Series, A.W.B. Simpson ed., (Oxford: Clarendon Press, 1973), at 77; Simpson, "The Common Law and Legal Theory" (rev.), in *Legal Theory and Common Law*, W. Twining ed., (New York: Basil Blackwell, 1986) at 8. Since Simpson has republished his claim, I take it that he believes (and I agree) that nothing in the theoretical writing of the past fifteen years has disproved him.

27. Simpson, *id.* at 77 (Twining republication, at 8).

28. Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition", in *Legal Theory and Common Law*, *supra* n. 26, at 26 (footnote omitted).

29. The following represents at least one attitude typical of the common law mind.

"The old fashioned English lawyer's idea of a satisfactory body of law was a chaos with a full index." T. Holland, *Essays* 171 (1870). Holmes' review of Holland's book made this remark famous, or notorious. See Holmes, "Book Review", (1870) 5 *Am. L. Rev.* 114. (I owe this quotation and the references to J. Dukeminier & J. Krier, *Teacher's Manual for Property, Second Edition*, (Boston: Little, Brown & Co., 1988), at 299.)

principled system as well. But its pursuit of principles seems always to be undertaken in terms of what Oakeshott calls (in the context of politics) the pursuit of “intimations” of existing traditions of thought and action.

[Our] activity, then, springs neither from instant desires, nor from general principles, but from the existing traditions of behaviour themselves. And the form it takes, because it can take no other, is the amendment of existing arrangements by exploring and pursuing what is intimated in them. The arrangements which constitute a society capable of political activity, whether they are customs or institutions or laws or diplomatic decisions, are at once coherent and incoherent; they compose a pattern and at the same time they intimate a sympathy for what does not fully appear. Political activity is the exploration of that sympathy; and consequently, relevant political reasoning will be the convincing exposure of a sympathy, present but not yet followed up, and the convincing demonstration that now is the appropriate moment for recognizing it.³⁰

It cannot be said that the values and norms of the common law support the view that common law rules are either internally coherent or unified. This may be a goal for the common law (as it may be a goal for any legal system), but we should not confuse a hope or aspiration for an achievement. The rules we find or create within the common law tradition may or may not cohere with one another, just as they may or may not cohere with the form of life out of which they are generated and to which they are meant to apply. At various stages in its growth and development, the common law has generated and applied rules that were not coherent, either internally with one another or externally with the world to which they were being applied. The faith of the common law is, however, that such matters can be worked out to a satisfactory resolution, because we have the tools and the means with which to work with the law and to render it something good—but still only provisionally. Yet even this prudent possibility remains mostly a Fullerian aspiration,³¹ not an accomplished fact.

In addition, it is not at all clear that the common law has existed or continues to exist as a body of rules. Simpson claims, to the contrary, that the common law exists in terms of its customs, or that its existence is based upon its source in our customs and customary ways of doing things.³² And, in this sense, the common law can be said to be a way of approaching certain issues or problems, a congeries of attitudes and techniques applied to certain controversies and disputes in certain areas that are subject to the jurisdiction and competence of certain institutions and officials.³³ Although it is true that

30. M. Oakeshott, *supra* n. 5, at 123-124.

31. I am appealing here to Lon Fuller’s notion that an internal morality of law exists for all legal systems, that this morality consists in several principles of legality, and that this morality states aspirations more so than duties. One such aspiration is that the rules within the system not contradict one another; yet another aspiration is that the announced rules be congruent with official actions in reading and applying those rules. See L. Fuller, *The Morality of Law* (New Haven: Yale Univ. Press, 1964), at 65-70, 81-91.

32. Simpson, *supra* n. 26, at 80, 91-94 (Twining republication, at 10, 18-21).

33. I use Simpson’s article to emphasize the extent to which rules of law are generated by the common law process, and thus depend upon that process for their existence and intelligibility, in “The Activity of Being a Lawyer”, *supra* n. 4, at 372-374, 377-385. I also discuss the common law as a way of acting, speaking, and thinking, in “Hegelian Vanity, Common Law Humility”, *supra* n. 11, at 942-947. In this later article, I make use of Harry Jones’ fine essay on the common law. See Jones, “Our Uncommon Common Law”, (1975) 42 *Tenn. L. Rev.* 443.

a part of what we inherit from our forebearers and bequeath to our successors may be certain rules of law, we also inherit and bequeath ways of dealing with those rules—ways of reading, interpreting, understanding, applying, revising, revoking, and otherwise using them. And their uses are at least as important—although much more difficult to locate and express—as the rules themselves.

So it seems to me that Sugarman's description of the common law mind mistakes its normal attributes and condition. Also, Sugarman's description flies in the face of Simpson's contrary suggestion, namely, that the common law is nothing like a system of rules. In this regard, Sugarman's characterization implicitly accepts a positivistic portrait of the common law, which it is the purpose of Simpson's piece to reject:

The predominant conception today is that the common law consists of a system of rules; in terms of this legal propositions (if correct) state what is contained in these rules. ... I wish to consider the utility of this conception, and to contrast it with an alternative idea—the idea that the common law is best understood as a system of customary law, that is, as a body of traditional ideas received within a caste of experts. ... Indeed in an important sense it is in general the case that one cannot say what the common law is, if its existence is conceived of as consisting of a set of rules, and if saying what the law is means reporting what rules are to be found in the catalogue. ... [I]t is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it is inherently impossible to state so much as a single rule in what Pollock called 'any authentic form of words'. How can it be said that the common law exists as a system of general rules, when it is impossible to say what they are? ... It is as if the system placed particular value upon dissension, obscurity, and the tentative character of judicial utterances. As a system of legal thought the common law then is inherently vague; it is a feature of the system that uniquely authentic statements of the rules which, so positivists tell us, comprise the common law, cannot be made.³⁴

C. Milsom on the Multifarious Contexts of the Common Law

I agree with Simpson's complaint that traditional legal theories have failed to give us a satisfactory portrait or account of the common law.³⁵ In so far as the common law tradition and process are to be seen and understood as constituting not only a legal institution but also a legal technique, a kind of activity (one that essentially builds upon our linguistic capacities and sensibilities nurtured by our acquisition of a native language), then it is my sense that the need identified by Simpson has been filled not by theorists of law but rather, to some extent, by historians of law. (If I am right about this claim, then one of the bases for the excellence of Simpson's own essay on the common law may be the fact that he is, among other things, a historian of law.)

In this regard, I find the writing of S.F.C. Milsom, one historian of the common law, to suggest how Wittgenstein's later philosophy may be relevant to educating our own primitive conception of the common law. This does not mean that I find Milsom's account wholly satisfactory or that I think that

34. Simpson, *supra* n. 26, at 79-80, 88, 89, 90 (Twining republication, at 10, 16, 17 [with some modifications]).

35. See text at n. 27, *supra*.

Milsom has presented us with a full description of the common law. (But he doesn't think that his account is fully satisfactory or complete either.) Rather, when I read Milsom's work, I gain a better sense of how far we still are from achieving a satisfactory view of the common law in its many guises.

And perhaps this is the central message of Milsom's work, for he says again and again that the common law is not one thing, not a univocal system of human thought and activity existing from human epoch to human epoch, but instead is (and has been) many things. Its existence is multifarious, in part because its contexts are (and have been) multifarious.

It is in the nature of law that what is done in the present must be congruous with the immediate past; and it is therefore in the nature of legal history that the evidence is systematically deceptive. The largest changes cannot be obvious to historians because they could not be obvious at the time. In the thirteenth century, for example, the changes most obvious on the surface of the law are legislative provisions dealing with scattered and seemingly unrelated points of irritation. These were small symptoms of a structural change too large to be knowingly borne, but too piecemeal to be seen; and in the legal records it is hidden behind the changed meaning of some words, the changed operation of some rules. What has really changed is not so much 'the law' as the context; and it is the earlier context that may be lost to historians, overlaid by the later. Perhaps more than in any other kind of history, the historian of law is enticed into carrying concepts and even social frameworks back into periods to which they do not belong.³⁶

Here, in the preface to his book, *Historical Foundations of the Common Law*, S.F.C. Milsom tells us that the largest changes in our legal system and our conception of law are both “too large to be knowingly borne, but too piecemeal to be seen.” Normally, we do not knowingly change our concept of law, although it certainly may change or evolve. Similarly, we do not usually change the structure of our entire legal system through any sort of conscious or calculated decision, although it is equally true that in fact the structures of legal systems can and do change. These things seem to happen as a result of the interaction of many things, including not only our conscious decisions but also accidents or happenstances, coincidences, gradual accretions that go unnoticed but not unfelt, and a variety of other factors. And we do not combine these factors consciously, as though we possessed a kind of alchemical formula for changing legal concepts or structures; we simply live through them. Living through them, we may not be fully conscious of them, and they are apt not to be obvious or noticeable to us. So, as Milsom says, the records we leave behind are “systematically deceptive” as evidence of our legal concepts and structure, because we are not aware of them fully. Hence, we shall fail to speak to that which those who come after us will most want to know, and our silence allows them to make the same mistakes we make—“carrying concepts and even social frameworks back into periods to which they do not belong.”

Milsom's criticism is reminiscent of Wittgenstein in this respect: both appreciate the fact that we normally are not cognizant or conscious of the

36. S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed., (London: Butterworths, 1981), at vi.

larger contexts in which we think, speak, and act. But then, analogous to the way in which Wittgenstein seeks to make explicit the implicit structure and contours of the criterial and grammatical contexts of our lives, the challenge for a historian or theorist of the law is to make the social and legal contexts of our legal lives and language appear, to elicit them. If these contexts are implicit (as Milsom claims), either we learn how to elicit them or we shall lose them, shall lose their significance for us and our lives. How does Milsom go about trying to elicit them?

He uses what I would call a Wittgensteinian procedure. He asks himself, How can I learn what the law was to those people back then? And he responds by looking for evidence of how they used the law, how they taught the law, how they learned the law—in other words, he looks at all of the kinds of things that I think Wittgenstein would call the “criteria” of their concept of law.³⁷ For example, Milsom describes the creation and use of the “year books,” which are reports of early English cases and which provide us with much of what we know about the early common law.

They seem to begin as the common-place books of students. ... But in the course of the fourteenth century some organisation seems to take hold: instead of many reports being made of each case there is generally one, and that a more earnest affair less often noting the happy phrase or the anecdote. ... [This reporting by year books then evolved into] an educational routine ... [by which apprentice lawyers] formalised a method of learning about the core of their art.³⁸

What do the year books tell us about the law and legal process of those times? About some of their aspects, the year books tell us much; about others, little or nothing. Milsom says that, in the earliest of the year books, “the count itself is often set out in whole or in part, and this ... still engages some of the learner’s attention. But usually it is the next step that interests the reporter, and he gives only such summary of the count as is necessary to understand what happens next, which is argument about the defendant’s answer, about the plea.”³⁹ Under the ancient mode of trial, the only denial that a defendant could make to the plaintiff’s count was a general one, and then both would proceed to the formal decision mechanism (such as wager of law by ordeal or battle). Initially, then, a “general denial” was the only response open to a defendant who wished to contest a plaintiff’s cause of action.

But, as trial by jury began to supersede trial by wager of law, or at least became available as an alternative, it would make sense to allow the defendant to plead more specifically the facts in his or her defense. Milsom says, however, that this is not quite how the common law in fact developed. “The

37. Michael Oakshott also illustrates the kind of inquiry that I regard as being essentially Wittgensteinian and criterial:

... [I]f political activity is impossible without a certain kind of knowledge and a certain sort of education, then this knowledge and education are not mere appendages to the activity but are part of the activity itself and must be incorporated in our understanding of it. We should not, therefore, seek a definition of politics in order to deduce from it the character of political knowledge and education, but rather observe the kind of knowledge and education which is inherent in any understanding of political activity, and use this observation as a means of improving our understanding of politics.

M. Oakshott, *supra* n. 5, at 113. See also Eisele, “The Activity of Being a Lawyer”, *supra* n. 4, at 352.

38. S.F.C. Milsom, *supra* n. 36, at 44-45.

39. *Id.* at 45.

natural reaction to the introduction of the rational jury would be to let him [the defendant] plead whatever facts seemed to tell in his favour,... . In fact[, however,] his freedom was confined by [procedural or pleading] rules which at first sight seem artificial.”⁴⁰ It appears from the year books that, even with the advent of trial by jury, defendants’ lawyers continued to resort to the general denial as a matter of course, either without pleading any special or specific facts in defense, or else pleading them but only as a preamble or a rider to the general denial. The common law at that time, according to Milsom, “was dominated by the ancient pattern of law-suit. For [common law lawyers] the ancient [general] denial, now called the general issue, was paramount; and it must always be made unless there was good reason for departing from it.”⁴¹ And apparently to their minds—although not to ours—the rise of trial by jury, the availability of rational argument before a fact-finding body of peers, did not present a reason sufficiently good for departing from this ancient pattern of pleading.

As Milsom puts it, then, the year books frequently do not report or discuss the actual pleading at all; rather, they often discuss what the defendant *might* have pled and how the defense *might* have been stated or formulated. “It follows that year book discussions are not generally about the legal sufficiency of the defendant’s facts. They are about the propriety of allowing him to plead them at all, and about the form in which he may do it: is he to add a preamble or rider to the general issue, or to depart from it altogether?”⁴² This seems strange to our minds, but it was not unusual behavior from their point of view. Why? Milsom suggests the following possibility:

The year books, then, and the legal process which they record, lie in the shadow of that ancient unvarying [general] denial. The modern reader can hear real arguments by lawyers who would shine in any age; but often he finds the point of the argument elusive. The difficulty is in his own mind. The terms into which he is trying to translate the argument, the terms of substantive law, were not much in the minds of those arguing. For them the essence of a law-suit was still the formulation of a question to be put to some deciding mechanism, whether wager of law or jury. Practical considerations compelled departures from the old general question. To hindsight [i.e. to our eyes], the important result of these departures was the creation of substantive law. But this was not a focus of attention at the time. The year books astonishingly preserve the true infancy of a modern legal system; but they will not often answer legal questions asked in modern terms.⁴³

I have not done justice to the rich detail and liveliness of Milsom’s argument here, but perhaps my use of it will suffice to suggest the following connections between Wittgenstein’s work in philosophy and Milsom’s work in legal history. The changes in context or structure Milsom describes tend to be invisible, both to those who live through them and to those of us who live with their consequences and study them. They seem to be invisible, paradoxically, because they are so large, so all-encompassing, that those living

40. *Id.*

41. *Id.* at 47.

42. *Id.*

43. *Id.* at 48.

during that time simply do not notice them or appreciate them, and hence do not note them in their records, which we who come later use as our evidence of their world. But then, reflecting on this possibility, is it truly so strange that we might be oblivious to the largest changes in the context or framework of our lives? For, we might ask, from what perspective, from what Archimedean point, could we view them? Milsom clearly has no such privileged position from which to view (or review) these changes, and in this he again is akin to Wittgenstein, who performs his feats of bringing us to a consciousness of our implicit circumstances and assumptions from within the criterial and grammatical weave of our lives.

Also, these changes in the concept and structure of the common law were not due, by and large, to conscious decisions or social adjustments made by calculated acts. Rather, they grew out of a variety of actions, omissions, accretions, accidents, and coincidences. The structure or context of the common law is not something altered by adjusting it or tinkering with it to our rational delight; rather, it is the result of societal and communal forces and interactions of which we only know the half of it, if that. (And Wittgenstein knew this too about language and our lives; we try to over-intellectualize both.) Milsom's point is that we shall be surprised by what we find in investigating the transformations of the common law, because those same changes also surprised those who lived within the common law at the time it was transformed.

It is a simple starting-point; but the English law did not move from it by a process of evolution. A structural change had magical effects. Largely meaning only to enforce regularisation of these [local court] customs, the king's court brought to an end the feudal jurisdictions that had applied them, and [thus the king's court] had to apply the customs itself. But the change of habitat changed their nature. The king's court looking from outside the [local feudal] unit could not think in terms of [customary feudal] management, only of rules and some abstract right. ... And the entire change was in a sense invisible. The canons of inheritance, for example, could be stated in the same words after as before. It is just that they did quite different things.

The change of jurisdiction [from local lord to king] therefore produced instant law, a system of substantive rules and abstract concepts.⁴⁴

Or, as Milsom says later, "The system could not be altered, only transformed."⁴⁵

Milsom warns us that "the historian of law"—and not just the historian—"is enticed into carrying concepts and even social frameworks back into periods to which they do not belong."⁴⁶ With respect to the common law, he thinks that this is exactly what has happened: "One of the main things that we have carried back is our vision of the law as a system of substantive rules having some existence separate from society and requiring separate adjustment."⁴⁷ Our vision of law, our concept of law, which sees substantive legal

44. *Id.* at 3.

45. *Id.* at 61.

46. *Id.* at vi.

47. *Id.*

rules being applied to facts in the world, is different from (yet related to) the concept of law that we find expressed or implied in the year book descriptions of the early common law. We take law to be a human artifact—something subject to social engineering, or to conscious calculations of utility and cost/benefit analysis, or to rational arguments about justice and equity. Whatever the substantive constraints we see as imposed on law, we see it as something consciously calculated and rationally designed and molded. The early English seemed to see law as being much more dependent upon their customs; they also placed more faith in procedure; and they relied upon a different kind of decision-making mechanism.

The demurrer to the evidence is one of the clearest examples of the common law having to go back and deal with a matter once deliberately shut out from consideration. The process of pleading made the common law; but it was not a happy juristic invention designed to that end. It was an uncomfortable necessity imposed by the jury, whose fallibility had broken up the comfortable old pattern of a general question to be put to an infallible test. ...

But this in turn is only an illustration, though a striking one, of the need to consider these institutions of the early common law in their own terms, and not in ours. When it is said, for example, that the writ of error was defective because questions could not be raised about the propriety of evidence given to the jury, we must remember that the excluded questions might be more serious than what we think of as matters of evidence. [Matters of faith or trust, perhaps, not to be put into question lightly or ill-advisedly?] And when it is said, as it too often is, that the year books were inferior to modern law reports because they often did not give the facts or the judgment, it must be remembered that neither was generally important [to students or apprentice lawyers of that time]. The facts and the law are both reflected [at early common law] in the pleading; and the equivalent of today’s lawyer seeking a *ratio decidendi* was a year book reader trying to make out whether a particular plea would or would not be upheld on demurrer, or why it should be in this form rather than in that. There was no substantive law to which pleading was adjective. These were the terms in which the law existed and in which lawyers thought [at early common law].⁴⁸

Neither the ancient nor the modern concept of law is better than the other; they are different yet related, just as are the legal processes and issues and activities that are subsumed by each concept. Milsom puts it boldly: “However unsatisfactory to modern eyes looking at it out of its context, the ancient pattern of law-suit in local courts probably did as much justice between the parties to individual disputes as anything we know today.”⁴⁹

D. To Imagine a Legal System is to Imagine a Form of Life

It is a property of legal sources, especially from the middle ages, that they will tell the investigator nearly everything except what he wants to know. Business documents are made for those who know the business; and the records of litigation, whether plea rolls which were the courts’ minutes, or Year Books which were reports made for the professional or educational purposes of lawyers, are brusque in

48. *Id.* at 59.

49. *Id.* at 67.

their unhelpfulness to outsiders. Charters and the like use words which we may not even recognize as terms of art, let alone guess at the volumes of meaning which it is the function of terms of art to import. Even legislative acts, even legal treatises, were addressed to an audience which knew something about the law and which lived in the society which the law regulated. We have to conjure up both. It is what was assumed that we need to know, not what was said. ... The law court is miraculously clear in our spotlight. The world around it, largely the world of facts and wholly the world of ideas, is in the dark.⁵⁰

Among Wittgenstein's many remarks about how we are to accomplish the tasks set us by his later philosophy, there is the following: "[T]o imagine a language means to imagine a form of life" (§19 a). I take him here to be urging us to remember that, in investigating any means of expression, any symbol system, any medium for making meaning—which for me includes the law, and emphatically the common law—we must see implicit in every nook and cranny of the medium or system the lives of its users and inhabitants. Their various activities and practices and institutions are formed in part by means of the language they use; in turn, those matters partially form and reform that language. These two fields of phenomena—language and forms of life—are symbiotically related, and we ought not forget it, says Wittgenstein. So, too, with respect to the common law, says Milsom: we need to describe and imagine the forms of life from which the law springs. His work goes a long way toward accomplishing that task. It seems to me to be a task worthy of anything we should wish to call "legal theory".

50. F. Pollock & F. Maitland, *The History of English Law Before the Time of Edward I*, vol. I, (2d ed. 1898), reissued with a new introduction by S.F.C. Milsom, (Cambridge: Cambridge Univ. Press, 1968), at xxv-xxvi, xxvii.