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The Constitution of Conscience

Steven L. Winter*

Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time¹

I. Constitutional Lore and the Preaching of the Parables

Imagine a society, scarcely different than our own, in which people regularly consult specialists before making important life choices. In this society, however, the specialists are neither lawyers nor therapists. For this culture has developed a sophisticated store of folk wisdom—maxims, proverbs, parables, and the like—that serves as its basic ethical and intellectual resource. In times of personal crisis, people turn for the necessary guidance to experts in this folklore. Take, for example, a person contemplating a job assignment that would force her to leave loved ones for an extended period. To help her choose the proper course of action, she would consult one of these professional “counsellors.” After an extended consultation that typically would include an exhaustive case history, the counsellor might say something like this: “I have studied your situation and reviewed the relevant precedents. In my professional opinion, this is a clear case of ‘absence makes the heart grow fonder.’ I recommend that you accept the assignment and not worry about estrangement from your loved ones.”²

As we might well expect, counsellors enjoy a fair degree of authority and prestige in this society. Accordingly, the profession has a stake in

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1. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 44 (2d ed. 1951) [hereinafter LLEWELLYN, *BRAMBLE BUSH*].

2. Devoted readers of the *Texas Law Review* will recognize that this hypothetical is based on Jeremy Paul, *The Politics of Legal Semiotics*, 69 *TEX. L. REV.* 1779, 1815-20 (1991).

assuring that counsellors are well versed in the relevant cultural lore and highly trained in the methods and traditions of their craft. (We might imagine, if we like, that practitioners are licensed by the state or certified by some quasi-public professional board.) Predictably, there are highly selective professional schools for the education and training of future practitioners. Many of these "schools of counselling" are affiliated with major research universities. These university schools of counselling attract the brightest college graduates as students and hire only the most distinguished counsellors as faculty.

The presence of these schools in the university has helped create an intellectual environment conducive to the systematic study and analysis of the art of counselling. Prominent academics publish books on the theory of counselling, treatises on various aspects of counselling lore, and scholarly articles exploring the subtleties of the maxims and proverbs that constitute the substantive material of the discipline. With the escalating sophistication of this scholarship, both lore and the profession gain in intellectual prominence and social power.

Inevitably, however, some brash young scholar at one of the elite university schools makes a startling discovery: Every maxim appears to have a counter-maxim that, in any given case, could be applied with equal plausibility.³ He begins to question the prevailing belief system that credits the traditional lore with the ability to resolve problems. He points out that most counselling lore can be reduced to simple lists of opposing proverbs. He offers the following examples:⁴

too many cooks spoil the broth
 a stitch in time saves nine
 out of sight, out of mind
 he who hesitates is lost
 nothing ventured, nothing gained
 opportunity knocks but once

many hands make light work
 cross your bridges when you come to them
 absence makes the heart grow fonder
 look before you leap
 a bird in the hand is worth two in the bush
 if at first you don't succeed, try, try again

He observes, moreover, that each column describes a distinctive modality or style of thought. The left-hand column represents an "entrepreneurial" approach emphasizing values of self-reliance, decisiveness, and risk taking.

3. The model, as will become obvious in a moment, is Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Of course, the original effort is that of Llewellyn. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931) ("[I]n any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, premises legitimate and impeccable under the traditional legal techniques—are at least two, and . . . the two are mutually contradictory as applied to the case in hand."); see also Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 513-22 (1987) (discussing this version of the indeterminacy argument in law).

4. The matched pairs of proverbs come from James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1051-52 (1985), and Paul, *supra* note 2, at 1815-20.

Conversely, the right-hand column represents a "bourgeois" outlook characterized by such virtues as cooperation, attachment, caution, and perseverance. In any given case, a counsellor can draw a maxim from one or the other of these modalities to support either the more adventurous or the more risk-averse course of action.

On the basis of these observations, the scholar makes three disturbing claims. First, he contends that, in any given case, a competent counsellor will be able to justify opposite recommendations by invoking either proverb from a matched pair. Second, he argues that the practice of counselling is nothing more than the skillful invocation of stylized rhetorical moves that are then used to rationalize outcomes. Third, he concludes that counselling lore should no longer be viewed as a set of substantive precepts, but should instead be studied as a kind of language or semiotic system. He christens this endeavor "counselling lore semiotics." Adherents refer to it simply as "cls."

A ferocious debate ensues. Traditionalist practitioners, for whom the lore is nothing less than the authoritative repository of the objective wisdom of the culture, experience the semiotic thesis as an assault on the foundations of their profession. Prominent traditionalists denounce cls adherents as "nihilists." They maintain, moreover, that counsellors properly trained in their craft are in fact able reliably to resolve problems using the traditional tools. The critics, in turn, accuse the traditionalists of merely exploiting claims of specialized competence to advance their professional and economic self-interest. They maintain that the system of contradictory proverbs cannot itself generate solutions and, accordingly, that there must be "something else" that really determines outcomes. For these critics, the maxims and proverbs are merely mystifications deployed to channel behavior in ways that perpetuate the social and economic status quo. In short, the critics claim that "lore is politics."

These antitheses, however, do not exhaust the debate. For this society, too, has its Wittgensteinians. One of them points out that both sides of the controversy make the same basic error. Both assume that the legitimacy of counselling depends upon establishing adequate truth conditions for the maxims. The traditionalists believe that this promise can, in principle, be redeemed. Because they believe that language mirrors or represents things in the world, they maintain that statements of lore—such as the maxims—attain truth-value by virtue of their correspondence with objective states of affairs such as the facts of the given case or the meaning of a precedent. In contrast, the critics contend that there are no such independent, external referents, either for language or for lore. They regard truth conditions as merely a matter of agreement or convention, and they insist that this is no less true of lore.

For our Wittgensteinian counsellor, however, these contending views ask the wrong question because they subscribe to the same mistaken premise. Adherents of both views assume that counselling lore is *representational*—that is, that the maxims are statements about the world. Consequently, they think that the maxims stand in need of justification. But, the Wittgensteinian explains, the maxims and other components of the culture's folk wisdom are more properly regarded as *constitutional*—that is, as constituting the way in which members of this particular society engage in making decisions concerning important life choices. Thus, the maxims are not statements about the world, but a means of engagement with it. Lore "is something we do, not something we have as a consequence of something we do."⁵

On this view, the legitimacy of counselling is solely a matter of conforming to "that system of logical constraints that the practices of [counselling] activities have developed in our particular culture."⁶ With legitimacy thus detached from the problem of justification, justification can be discarded as a pointless and irrelevant question. One might just as well ask for the foundations that "justify" the English language. Once "we understand the rules of a language-game, we understand all that there is to understand about why moves in that language-game are made."⁷ Legitimacy is simply a function of operating within those practices and conventions that define counselling as a discipline and constitute it as a semiotic system.⁸

Our Wittgensteinian is quite pleased with this intervention. By resolving the lore into its constitutive practices, he has gone a long way toward defanging the debate. Still, he realizes that this stratagem does not resolve the problem of indeterminacy that arises from the matched pairs of proverbs. On this point, too, he adopts a strategy of confession and avoidance. He observes that any fully comprehensive system cannot also be determinate.⁹ Accordingly, he argues that the indeterminacy of counselling lore is more advantage than objection. First, it enables the system to encom-

5. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 24 (1991) [hereinafter BOBBITT, INTERPRETATION].

6. *Id.*; see also PHILIP BOBBITT, CONSTITUTIONAL FATE 236 (1982) [hereinafter BOBBITT, FATE] ("Law consists of resolving questions in the context of the conventions that provide the methods for answering them."). Note that Bobbitt uses "legitimacy" in the more limited sense of "internally valid" rather than "externally justified." I shall conform to that usage throughout this Paper.

7. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 174 (1979) [hereinafter RORTY, MIRROR OF NATURE].

8. For a description of Philip Bobbitt's work as a traditionalist version of legal semiotics, see J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1832 n.7 (1991); *id.* at 1842 n.38.

9. See BOBBITT, INTERPRETATION, *supra* note 5, at 31 ("If it is determinate—does not generate contradictory outcomes—then there will be some cases it cannot decide If the scheme is comprehensive, . . . it will be indeterminate as to which of the conventional modalities is to be applied.")

pass all the varied situations that life presents. Second, it enables the system to operate ethically because it insures a space for moral reflection by the counsellor. "[T]he system is just, not because it produces just outcomes, but because it permits an opportunity for justice consistent with the freedom of the conscience to decide matters."¹⁰

There the debate rests. Or so it seems until some new upstart observes that the resort-to-conscience gambit only seems persuasive because it is already a standardized—indeed, boringly familiar—move in the traditional language-game of counselling.¹¹ Worse yet, the upstart points out that this gambit only manages to resurrect the very problem that the Wittgensteinian had previously purported to resolve. Where he had earlier eluded the infinite regress by discarding the question of justification, the Wittgensteinian has now recreated it in his attempt to sidestep the indeterminacy problem. In embracing the conventional rhetoric of moral theory, he has merely relocated the problem of justification—that is, “what makes the system just?”—from the lore to the individual conscience.¹² But what justifies the choices of the individual conscience?

Here, the Wittgensteinian makes a move that is as predictable as it is telling. Justification comes after decision; it is always a matter of “some external standard”¹³ constituted by the altogether separate practices of moral evaluation.¹⁴ The move is predictable because there is nowhere

10. *Id.* at 163.

11. As Pierre Schlag puts it, “how is it that we, in law, resolve difficult problems, reconcile contradictions and overcome aporias, etc.? The answer of modern American legal thought is clear and unequivocal: ‘We refer them to the good judgment of the pragmatist.’” Pierre Schlag, *Le Hors de Texte, C'est Moi: The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1659-60 (1990). The resort-to-conscience gambit has been a mainstay of conventional legal theory since the heyday of the legal realists. For examples (both hoary and trendy), see LLEWELLYN, BRAMBLE BUSH, *supra* note 1, at 150 (“Of course, from one angle, the two guides are inconsistent. But each, for itself, is true, is sound, is vital—in its place. When to use which? . . . Choice is your own. Your answer for your choice. There are no rules to shoulder *your* responsibility.” (emphasis in original)); Charles E. Clark & David M. Trubeek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 263 (1961) (reviewing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960)) (criticizing Llewellyn because he “has divorced ‘creativity’ from the hard choice of values, and the freedom to choose among them, which is an important part of creativity”); Margaret J. Radin, *After the Final No There Comes a Yes: A Law Teacher’s Report*, 2 YALE J.L. & HUMAN. 253, 262 (1990) (“We can embrace our nature as creatures of the word, and our world as a world of words to the end of it, and yet not rest content . . . Sometimes—and only situated judgment can tell us when—we must be suspicious of what we are hiding.” (emphasis added)). See also James Donato, Note, *Dworkin and Subjectivity in Legal Interpretation*, 40 STAN. L. REV. 1517, 1540 (1988) (“Dworkin manages to turn the idea of subjectivity in interpretation from a simple criticism into a sophisticated form of legal hermeneutics.”).

12. See BOBBITT, *INTERPRETATION*, *supra* note 5, at 177 (“This system, as I have observed, requires *individual* decision precisely because the modalities conflict.” (emphasis added)).

13. *Id.* at 163.

14. Thus, the Wittgensteinian observes:

[A] particular decision will be deemed just according to the prevailing practices of moral theory. These *may* legitimately influence a . . . decider when faced with a modal conflict

else—that is, no more foundational place—for a Wittgensteinian to go except to some other, entirely distinct practice.¹⁵ And it is telling precisely because it can tell us so little about what it means for an individual conscience to decide. If the conscience does not engage in moral theorizing, then in what language-game is it engaged when it does decide? If that language-game is the lore itself, then what is added by the resort to conscience? And if the conscience is engaged in some language-game other than the lore, then what is the form of life that characterizes that activity? What, in short, is the form of life that constitutes conscience?

This predicament is all the more mortifying because it is one of his own making. As every Wittgensteinian knows, the only way to escape the presuppositions of a language-game is “simply . . . to change the subject.”¹⁶ In not fully repudiating the question of justification, our Wittgensteinian counsellor traps himself into offering a pseudo-answer. Instead of evading the infinite regress, he steps right into it.

Faced with such an embarrassing impasse, one is left only with silence—and the sneaking suspicion that it’s still just turtles all the way down.

II. Lore and . . .

Every language-game has a rhetorical economy—that is, a repertoire of moves that, though adaptable to changes in context, remains largely predictable. This is why, notwithstanding the transposition of well-known debates in legal and constitutional theory to the imaginary context of folk-

but such a role is irrelevant to their role as evaluative standards once the decision has been made. . . . Simply because we use such “theories” to map our acts of conscience we should not be led to conclude that they bear any causal relationship to the terrain thereof.

Id. at 168.

15. Later, I shall identify this as the “particularist fallacy.” See *infra* text accompanying notes 26-40. In the meantime, consider Stanley Fish’s claim “that performing an activity—engaging in a practice—is one thing and discoursing on that practice another.” STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 377 (1989), and his explication “that judging or doing judging is one thing and giving accounts or theories of judging is another, and that as practices they are independent,” *id.* at 378. See also RORTY, *MIRROR OF NATURE*, *supra* note 7, at 320 (“[N]ormal discourse is that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it.”).

16. RICHARD RORTY, *Introduction: Pragmatism and Philosophy, Introduction to CONSEQUENCES OF PRAGMATISM* xiv (1982) [hereinafter RORTY, *Pragmatism*] (“This does not mean that they have a new, non-Platonic set of answers to Platonic questions to offer, but rather that they do not think we should ask those questions anymore.”); see also RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 8 (1989) [hereinafter RORTY, *CONTINGENCY*] (“To say that we should drop the idea of truth as out there . . . is to say that our purposes would be served best by ceasing to see truth as a deep inatter . . . or ‘true’ . . . a term which repays ‘analysis.’ . . . But this claim about relative profitability, in turn, is just the recommendation that we in fact say little about [the] topics, and see how we get on.”).

lore counselling, the opening allegory unfolds in such a distressingly familiar progression.

My purpose in resituating these debates as I have is to problematize an entire sequence of conventional jurisprudential arguments. By relocating these arguments in an unfamiliar setting, I hope to deprive them of the taken-for-granted quality or plausibility that normally accrues from encountering them on their familiar intellectual terrain. Moreover, by recasting these debates in the particular context of our own folklore, I hope to expose something very odd—if not, in fact, quite fantastic—about the common underlying assumption of these otherwise disparate jurisprudential positions. Just as we might probe a doctrine by spinning hypotheticals, we can test the cogency of accepted arguments in contemporary legal theory by seeing how well they fare when called upon to account for other social phenomena.

But does the change of setting really problematize these arguments? At first blush, it seems quite plausible to apply the indeterminacy critique to the fanciful field of folklore counselling. We are accustomed to thinking of clichés such as “absence makes the heart grow fonder” and “out of sight, out of mind” as mere platitudes. It is therefore easy to accept the claim that, as bromides without substance, these maxims are susceptible to instrumental manipulation by self-appointed “experts.”

But, as Jeremy Paul has argued in these pages, it is a mistake to think that these maxims are “as empty as mindless clichés.”¹⁷ Banal though they be, such proverbs as “absence makes the heart grow fonder” are part of the common stock of folk wisdom that we accumulate as we come to maturity in this culture.¹⁸ Virtually every one of us has had an experience in which we have either applied or been advised to heed one of these maxims. Most of us have survived separations in which absence did make the heart grow fonder; so, too, we have been a part of weak relationships in which “out of sight” really was “out of mind.” At times, we may even have used these maxims as a means of making up our minds about a relationship. Thus, the contrast between these two emotional responses is one way in which we take a sounding of our feelings when we are uncertain. As a consequence of these experiences, the maxims serve for us “as evocative capsules to trigger memories of how [we have] coped with similar decisions and experiences in the past.”¹⁹

17. Paul, *supra* note 2, at 1816. In a related view, Geoff Miller argues that the maxims of statutory construction—which are also perceived as empty and contradictory—can be understood as corollaries of Grice’s principles of implication. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. REV. 1179.

18. As we will see below, the ordinary, basic-level quality of these proverbs is an integral part of the process of cultural transmission. See *infra* text accompanying notes 63-67 and 77-79.

19. Paul, *supra* note 2, at 1817; cf. JOHN DEWEY, HUMAN NATURE AND CONDUCT: AN

It follows that, in an important sense, the indeterminacy of the maxims is *manufactured*. It is achieved by ignoring all of the history, context, and social experience that make them meaningful. Stripped of significance in this way—like the gestures of a person in a phone booth seen from far away—anything is likely to seem senseless and absurd.²⁰ Little wonder that the proverbs appear vulnerable to manipulation.

Similarly, the claim that for every case there is a mutually contradictory pair of equally applicable proverbs depends upon a deliberate flattening of the maxims. Take the example of the paired maxims “absence makes the heart grow fonder” and “out of sight, out of mind.” The supposed opposition between them is a function of superficial readings that reduce these proverbs to their propositional content. On this rendition, both “absent” and “out of sight” are straightforwardly reducible to “not present”; “fondness” is just a matter of having affectionate thoughts and, thus, the opposite of “out of mind.”

But these simplistic paraphrases ignore the metaphoric content of the maxims that contributes much of their sense.²¹ We know that absence only makes the *heart* grow fonder; relationships that are unimportant emotionally are all too easily forgotten and casually discarded. We know this because, in our culture, the heart is the metaphoric seat of the emotions and the mind is the province of detached observation—the “inirror” of reality—and the realm of “cool reason.”²² Thus, the disparate metaphors signal that the two proverbs identify different phenomenological domains with different psychological dynamics: In the domain of the heart, “absence” signifies the kind of emotional lack or deficiency that so often stimulates an increase in sentimental attachment. In the domain of the mind, “out of sight” indicates not just lack of presence, but irrelevance or insignificance to one’s everyday reality. One need only transpose the metaphors—as in, “out of sight makes the heart grow fonder”—to see how awkward and absurd the maxim becomes.

INTRODUCTION TO SOCIAL PSYCHOLOGY 295 (1922) (“Since morals is [sic] concerned with conduct, it grows out of specific empirical facts.”).

20. Both the image and the substantive point are from Merleau-Ponty. MAURICE MERLEAU-PONTY, *SENSE AND NON-SENSE* 39 (Hubert L. Dreyfus & Patricia A. Dreyfus trans., 1964).

21. For an extended discussion of the role of metaphors in structuring proverbs, see GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 160-216 (1989). See also *infra* text accompanying notes 77-79.

22. Thus, Jeremy Paul is right to focus on the metaphors at work in this proverb. See Paul, *supra* note 2, at 1816 n.108 (noting that “the heart, symbolizing a person’s deepest emotions, gains appreciation for an absent love,” and that, in contrast, “the mind, which sometimes ‘changes’ or ‘plays tricks,’ too easily forgets the absent friend”). In the case of this particular proverb, the connotation that “true” love will survive separation may be overdetermined because the metaphor of *heart* also signifies sincerity—“I mean it with all my heart”—and fortitude—“he has a lot of heart.”

Indeed, one can test the claimed opposition between any pair of proverbs by identifying the operative metaphor and transposing it to its supposed antonym. Thus, “many hands make light broth,” “he who hesitates before he leaps is lost,” and “no birds ventured, no birds gained” are all a bit bizarre at best. In each case, the absurdity arises from what we know about the underlying experience that provides the source domain for the maxim’s operative metaphor.²³ Broth-making is a delicate task that requires subtlety and precision, as opposed to the “heavy” work that benefits from many hands. Leaping can be dangerous if the height is too great; this is why looking is such a good idea.²⁴ A bird’s ability to take flight can make it an elusive quarry; the moral is that, when circumstances are chancy, it may be better to rest content with what one has already attained than to pursue what may prove to be unrealizable.²⁵

The basic point is that trite clichés like “absence makes the heart grow fonder” are neither bearers of intrinsic, objective meanings nor mere floating signifiers. They are, rather, the way in which we understand and communicate an entire infrastructure of experience and social knowledge. It is this (largely social) experience that constitutes meaning and makes it possible. One can always ignore these grounding experiences, strip language of its meaning, and make things seem contradictory or indeterminate. But in doing so, one indulges—even if unwittingly—in the kind of naive linguistic reification which supposes that words do stand apart from the practices and understandings of those who speak them.

Although the Wittgensteinian understanding avoids this obvious linguistic naiveté, it introduces its own, equally serious problems. I will refer to these as the “particularist fallacy” and “practice fetishism,” respectively. Both stem from Wittgenstein’s claim that all language and thought are embedded in action.²⁶ Ultimately, however, each of these difficulties turns out to be the product of a reduction surprisingly comparable to—indeed, the mirror-image of—that which yields the naive linguistic reification.

23. To be clear, I am employing a theory of metaphor understood as a matter of semantic content rather than mere expression, a matter of thought rather than mere language. Thus, “metaphor” refers to a tightly structured set of conceptual mappings in which a target domain is understood in terms of a source domain of more readily comprehended, embodied or social experience. See George Lakoff, *The Contemporary Theory of Metaphor*, in *METAPHOR AND THOUGHT* 202, 206-09 (Andrew Ortony ed., 2d ed. 1992).

24. Though “he who hesitates before he leaps is lost” might still be good advice to the last paratrooper in the squad.

25. Though “no birds ventured, no birds gained” could apply to some exotic wager.

26. As he explains, “the term ‘language-game’ is meant to bring into prominence the fact that the speaking of language is part of an activity, or of a form of life.” LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 23 (G.E.M. Anscombe trans., 2d ed. 1958) (emphasis in original); cf. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 798 (1989) (“[T]he distinctive feature of recent reinterpretations of pragmatism is . . . the idea that thought is essentially embedded in a context of social practice.”).

The fundamental Wittgensteinian move might be characterized as a naturalized behaviorism: Language is seen not as a matter of representation “in which we try to form pictures of reality, but as part of the behavior of human beings. On this view, the activity of uttering sentences is one of the things people do in order to cope with their environment.”²⁷ For the Wittgensteinian, meaning does not derive *from* something (like a practice); rather, meaning *inheres in* practice.²⁸ As Stanley Fish explains, understanding is a matter of “tacit knowledge that tells [one] not so much what to do, but already has [one] doing it as a condition of perception and even of thought.”²⁹ Fish illustrates this point with an anecdote in which a *New York Times* reporter asked the pitcher Dennis Martinez what advice his manager, Earl Weaver, had offered before the game. Martinez replied: “He [Weaver] said, ‘Throw strikes and keep ’em off the bases,’ . . . and I said ‘O.K.’ . . . What else could I say? What else could he say?”³⁰

Although it is actually quite different, the Wittgensteinian view is frequently mistaken for conventionalism. One can see how this misunderstanding occurs. In resolving a line of thought into its constitutive practices, it is easy to think of those practices as a set of rules or conventions that are followed or obeyed by self-directing practitioners.³¹ Thus, when our Wittgensteinian counsellor argued that legitimacy is a function of operating within the practices and conventions of the counselling profession,³² one might have read this reductively as a claim that legitimacy is a matter of *conforming with* the agreed-upon professional conventions. But this is precisely the mistake that Wittgenstein warned against.³³ To op-

27. RORTY, *Pragmatism*, *supra* note 16, at xvii; *see also* RORTY, *CONTINGENCY*, *supra* note 16, at 15 (“This Wittgensteinian attitude . . . naturalizes mind and language by making all questions about the relation of either to the rest of [the] universe *causal* questions, as opposed to questions about adequacy of representation or expression.” (emphasis in original)).

28. *See* BOBBITT, *INTERPRETATION*, *supra* note 5, at 24 (“Law is something we do, not something we have as a consequence of something we do.”); *see also* Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 *TEX. L. REV.* 1, 55 (1993) [hereinafter Patterson, *Interpretive Universalism*] (“Catching on to and participating in these activities—knowing *how* to act—is the essence of understanding.” (emphasis in original)).

29. FISH, *supra* note 15, at 127.

30. *Id.* at 372.

31. For example, consider Steve Burton’s very analytic take on the elements that comprise a language-game: “Different intellectual discourses, or ‘language-games,’ can be distinguished in five respects: They proceed from different standpoints, in different vocabularies, with reference to different entities, *guided by different ground rules*, and under different criteria for success.” STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 117 (1992) (emphasis added).

32. *See supra* text accompanying notes 6-8.

33. As Wittgenstein puts it, “[s]o are you saying that human agreement decides what is true and what is false?”—It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life.” WITTGENSTEIN, *supra* note 26, § 241 (emphasis in original). Perhaps because the master himself warned against this misunderstanding, it is the one that his devotees most like to attribute to one another when they are engaged in the language-game of academic one-upmanship. Thus, in a truly egregious misreading, Dennis Patterson argues that

erate "within" the conventions of a practice is not a matter of following or complying with its rules; it is, rather, to *take part in* those activities that constitute the practice as a practice.³⁴

This emphasis on practice as an ongoing activity is a salutary corrective to the reductive and reified view of practice as merely a matter of following conventions. Still, it has its own characteristic costs. The Wittgensteinian, it will be recalled, abjures the common representational view in favor of an essentially *performative* view of meaning—that is, that the meaning of a word is a matter of how it is used.³⁵ Consider the example of a traffic sign that says, "No Right Turn on Red" posted at that point of a "T" shaped intersection where no right turn is possible.³⁶ The sign is absurd, but not because it fails accurately to represent a state of affairs in the world. Indeed, in some "literalist" sense the sign is correct: There is no turning there when the light is red, or at any other time. Rather, the sign is unintelligible because it has no meaning as part of the activity of driving; it is pointless because it has no social consequences.

Too narrow a focus on the performative dimension of meaning, however, can lead to the kind of parochialism that I identified earlier as the "particularist fallacy." A practice, after all, is an activity directed at some pragmatic end. Folklore counselling, to return to the opening allegory, is about resolving personal crises and making important life choices. The proverbs are the tools or instruments of this activity. It follows, or so the argument goes, that one cannot understand the maxims except as elements of this particular practice. It is but a short step to the conclusion that every

Stanley Fish is a conventionalist who thinks that all understanding is merely a matter of interpretation. See Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 283-84 (1993) [hereinafter Patterson, *Conscience and Constitution*] ("Fish is the arch-conventionalist; he is unwilling to consider the possibility that meaning could arise other than by tacit or explicit interpretive assumption."); Patterson, *Interpretive Universalism*, *supra* note 28, at 40 ("For Fish, it is not enough to say that a word has meaning by virtue of the ways in which it is used (action); Fish's claim is much stronger than that The meanings of our words rest on 'tacit assumptions' that give the signs the meaning they have."). The magnitude of this misreading is striking when one considers Fish's celebratory use of the Dennis Martinez anecdote. See FISH, *supra* note 15, at 372, 372-74 (characterizing Martinez's "deadpan rebuke" as having "a precision that Wittgenstein might envy"). For his own response, see Stanley Fish, *How Come You Do Me Like You Do? A Response to Dennis Patterson*, 72 TEX. L. REV. 57, 65 (1993) ("Patterson wants to be like Ludwig, or to be Ludwig's best explicator or the enforcer of Ludwig's insights. I'm not saying it's a bad game[, but] . . . as the immortal Sam Goldwyn once put it, 'Include me out.'). For an extended analysis of how and why Patterson keeps repeating this mistake, see Steven L. Winter, *One Size Fits All*, 72 TEX. L. REV. 1857 (1994).

34. See FISH, *supra* note 15, at 386-87 ("To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue 'naturally'—without further reflection—from one's position as a deeply situated agent." (emphasis in original)).

35. See WITTGENSTEIN, *supra* note 26, § 43 ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language." (emphasis in original)).

36. It may seem like I'm making this up, but I'm not—at least, not quite. See Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 963-64 (1991).

practice obtains its defining character from the objectives, methods, values, and underlying rationales that constitute that particular endeavor as an endeavor.³⁷ In this sense, all practices are "local" practices.

The "particularist fallacy," then, is the assumption that every practice or discourse is a matter of understandings and conventions specific to that activity—for example, that judging is judging and folklore counselling is folklore counselling and never the twain shall meet. One lesson of the opening allegory, however, is that putatively unrelated practices can be entirely similar in shape notwithstanding radical differences in content. This congruence, I hasten to add, is not just something built into the allegory: For one thing, the allegory had to be believable on its own terms or it would not have succeeded as an allegory; for another, much the same congruity can be seen whether the subjects of comparison are law and music,³⁸ law and poetry,³⁹ or Euripides's *Medea* and the *Restatement (Second) of Contracts*.⁴⁰

The second distortion is what I referred to earlier as "practice fetishism." The allusion here is not to the psycho-neurotic phenomenon of obsession and arousal, but to the primitive belief system in which an article is regarded as having or being the embodiment of a magical potency. Thus, practice fetishism is the tendency to regard a practice as an irreducible, elemental quality that is the virtual embodiment of the understanding that it makes possible.

To appreciate the problem, it will help to reconsider why a practice cannot be reified and treated as merely a set of rules or conventions. A practice is a dynamic pattern of performance under varying circumstances. Consequently, it cannot be reduced to a set of rules because no such set could be both explicit enough to give adequate guidance and comprehensive

37. See BOBBITT, INTERPRETATION, *supra* note 5, at 185 (noting that "the validity of all such answers depends on the particular discipline within which the question makes sense"); FISH, *supra* note 15, at 125 (observing that practice is "at every moment . . . ordered by an understanding of what it is practice of (the law, basketball)" (emphasis in original)); RORTY, MIRROR OF NATURE, *supra* note 7, at 320 (describing "normal discourse" as "the practice of solving problems against the background of a consensus about what counts as a good explanation of the phenomena and about what it would take for a problem to be solved").

38. See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1654-58 (1991) (demonstrating the remarkable parallels with respect to debates over interpretation in music and law).

39. See Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 748 (1992) [hereinafter Winter, *Mother of Metaphor*] (reviewing THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991)) ("[D]espite even obvious differences in their appearance, law and poetry are surprisingly comparable products of a common human cognition.").

40. See Steven L. Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595, 1616-18 (1991) (showing that, in rebuking the husband who abandoned her, *Medea* employs ostensibly "modern" legal arguments premised on doctrines such as performance as consideration, quantum meruit, detrimental reliance, and rescission for impossibility of performance).

enough to cover all the possible permutations of events.⁴¹ To be able to participate in a practice is not a matter of having knowledge *of*, but a matter of situated, tacit knowledge *how*. As Stanley Fish explains:

To be a judge or a basketball player is not to be able to consult the rules (or, alternatively, to be able to disregard them) but to have become an extension of the know-how that gives the rules (if there happen to be any) the meaning they will immediately and obviously have.⁴²

On this view, there is little or nothing one can say about the content or structure of a practice, except perhaps to describe the step-by-step process of rote initiation.⁴³ Practice thus becomes fetishized in two senses. First, it is treated as a kind of conceptual primitive; a practice is seen simply to embody the knowledge that it enables. In the revealing words of one self-professed Wittgensteinian, "understanding is primordial."⁴⁴ Second, practice is fetishized in the sense that it tends increasingly to be represented as an autonomous, active agency. Stanley Fish, for example, argues that an initiate "is not only possessed *of* but possessed *by* a knowledge of the ropes" and, therefore, "is not free to choose or originate his own meanings because a set of meanings has, in a sense, already chosen him."⁴⁵

In an important sense, this fixation on practice should be understood as a needed corrective to—though a decided overcompensation for—the tendency to reify practice and treat it as merely a matter of following conventions.⁴⁶ Still, to conceive of a practice as an irreducible quality—let alone, as an animate being—is to go to the opposite extreme. This is more

41. Cf. FISH, *supra* note 15, at 123-25 ("Practices are not fixed and finite The moral of the story, then, is . . . that what you learn cannot finally be reduced to a set of rules. Or, . . . insofar as the requisite knowledge *can* be reduced to a set of rules ('Take only good shots,' 'Consult history'), it will be to rules whose very intelligibility depends on the practices they supposedly govern." (emphasis in original)).

42. *Id.* at 128.

43. See WITTGENSTEIN, *supra* note 26, § 208 ("[I]f a person has not yet got the *concepts*, I shall teach him to use the words by means of *examples* and by *practice*.—And when I do this I do not communicate less to him than I know myself." (emphasis in original)); see also RORTY, *MIRROR OF NATURE*, *supra* note 7, at 174 ("[I]f we understand the rules of a language-game, we understand all that there is . . . save for the extra understanding obtained from inquiries nobody would call epistemological—into, for example, the history of the language, the structure of the brain, the evolution of the species, and the political or cultural ambiance of the players.").

44. Patterson, *Interpretive Universalism*, *supra* note 28, at 55.

45. FISH, *supra* note 15, at 127-28 (emphasis in original).

46. Thus, to be completely fair, Fish's "in a sense" signals that the active voice is not intended "literally" and that its use should be understood as a strategic bit of rhetoric intended to overcome the more conventional picture of a practice in terms of rule-following by self-directing agents. Nor does Fish eliminate entirely the agency of the initiate or other participant; the sentence continues with the observation that a practice "is working itself out in the actions of perception, interpretation, judgment, etc., [the initiate] is even now performing." *Id.* at 128.

than a pedantic criticism, for this fetishization obscures some of the indispensable processes that make it possible for a practice to maintain its continuity as a practice.⁴⁷ First, it eclipses the process of objectification and reproduction of experience that makes possible the institutionalization of social meaning. Second, and concomitantly, it effaces the role of reflection by situated practitioners in the performance and perpetuation of a practice.

Both of these points can be illuminated by contrasting the Wittgensteinian view with Berger and Luckmann's account of institutionalization.⁴⁸ In some respects, their account seems very much like the Wittgensteinian understanding of social meaning. Berger and Luckmann stress the ineradicably performative nature of social institutions: An institution exists only to the extent that the actors who compose it successfully reproduce the roles, routines, and patterns of behavior that constitute it as an institution.⁴⁹ Similarly, they emphasize the practical and situated nature of most knowledge—what they refer to as “recipe knowledge, that is, knowledge limited to pragmatic competence in routine performances.”⁵⁰ Accordingly, Berger and Luckmann stress the nontheoretical, prosaic, and everyday quality of social knowledge and the degree to which “theory” is something that comes afterward—and, even then, only with “heroic”

47. Similarly, Stephen Turner argues that “practices cannot be both causal and shared.” STEPHEN TURNER, *THE SOCIAL THEORY OF PRACTICES: TRADITION, TACIT KNOWLEDGE, AND PRESUPPOSITION* 123 (1994). Although there are similarities between Turner's argument and mine, our arguments are fundamentally at odds in two crucial respects. Turner, too, points out the anthropomorphism in Stanley Fish's notion of an interpretive community. *Id.* at 54-55. And as in the account that follows, he maintains that “[m]uch of the work done by ‘shared practices’ . . . can be done by habit.” *Id.* at 13. But, following Saul Kripke's interpretation of Wittgenstein, *id.* at 68-77, and Donald Davidson's account of language, *id.* at 135 n.8, Turner produces an account of habituation that is genuinely individualistic. *See, e.g., id.* at 98-99 (“The same kind of persistence can occur entirely through individual (and possibly literally different) habits that arise in the individual as a *consequence* of the emulative performance of particular activities, observances and the like.”). Turner is led to this position, in my view, because he lacks a sophisticated understanding of cognition as both socially contingent and irreducibly imaginative. *See generally* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1122-36 (1989) [hereinafter Winter, *Transcendental Nonsense*]; *see also* Winter, *supra* note 36, at 987-95.

48. *See* PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 47-92 (2d ed. 1967).

49. As Berger and Luckmann explain, “The institution, with its assemblage of ‘programmed’ actions, is like the unwritten libretto of a drama. The realization of the drama depends upon the reiterated performance of its prescribed roles by living actors Neither drama nor institution exist empirically apart from this recurrent realization.” *Id.* at 75; *see also id.* at 52 (“[S]ocial order exists only and insofar as human activity continues to reproduce it.”).

50. *Id.* at 42. As they elaborate, “a large part of the social stock of knowledge consists of recipes for the mastery of routine problems. Typically, I have little interest in going beyond this pragmatically necessary knowledge as long as the problems can indeed be mastered thereby.” *Id.* at 43. Along similar lines, they recognize the “local” nature of institutional practices. *See id.* at 65 (“On the pre-theoretical level, . . . every institution has a body of transmitted recipe knowledge, that is, knowledge that supplies the institutionally appropriate rules of conduct.”).

effort.⁵¹ Finally, they emphasize that this practical knowledge is learned through a process of instruction, initiation, and internalization such that social knowledge becomes constitutive of the individual.⁵²

Unlike the Wittgensteinian, however, Berger and Luckmann recognize that a certain amount of reification is integral to the process of institutionalization.⁵³ They use habitualization as a model⁵⁴ with which to explain this process: "Any action that is repeated frequently becomes cast into a pattern, which can then be reproduced with an economy of effort and which, *ipso facto*, is apprehended by its performer *as* that pattern."⁵⁵ Consequently, the phenomenological experience of habituation has a "There I go again" feel to it.⁵⁶ Social institutions are constituted by the buildup of reciprocal or complementary habitualizations.⁵⁷ "There he goes again" becomes "There *we* go again."⁵⁸

At this hypothetical stage, however, reification is only "incipient."⁵⁹ Although some measure of objectification has already occurred, it "remains tenuous, easily changeable, almost playful" because it is still "fairly accessible to deliberate intervention" by the relevant actors.⁶⁰ As Berger and Luckmann observe, however:

All this changes in the process of transmission to the new generation. The objectivity of the institutional world "thickens" and "hardens," not only for the children, but (by a mirror effect) for the parents as well. The "There we go again" now becomes "This is how these

51. See *id.* at 65 ("[T]heoretical knowledge is only a small and by no means the most important part of what passes for knowledge in a society The primary knowledge about the institutional order is knowledge on the pretheoretical level.")

52. See *id.* at 67 ("[What is] learned as objective truth . . . and thus internalized as subjective reality . . . has power to shape the individual. It will produce a specific type of person . . . whose identity and biography . . . have meaning only in a universe constituted by [that] body of knowledge.")

53. Cover makes much the same point with respect to law: "Objectification is crucial to the language games that can be played with the law and to the meanings that can be created out of it. . . . Creation of legal meaning entails, then, subjective commitment to an objectified understanding of a demand." Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 45 (1983); see also Winter, *Transcendental Nonsense*, *supra* note 47, at 1208 ("Cover makes a distinctly linguistic assertion about the indispensability of this process of metaphoric reasoning to the creation of LAW No law exists without reification." (emphasis in original)).

54. It is clear, however, that this is only a model and not a claim of methodological individualism. See BERGER & LUCKMANN, *supra* note 48, at 54 ("[E]ven the solitary individual . . . will habitualize his activity in accordance with biographical experience of a world of social institutions preceding his solitude Empirically, the more important part of the habitualization of human activity is co-extensive with the latter's institutionalization.")

55. *Id.* at 53 (emphasis in original).

56. *Id.*

57. See *id.* at 54 ("Institutionalization occurs whenever there is a reciprocal typification of habitualized actions by types of actors.")

58. *Id.* at 57 (emphasis in original).

59. *Id.* at 58.

60. *Id.*

things are done." A world so regarded . . . becomes real in an ever more massive way⁶¹

Institutions "have now been crystallized" and "are experienced as existing over and beyond the individuals who 'happen to' embody them."⁶²

An important part of this process of institutionalization involves the phenomenon of "sedimentation" which, among other things, includes objectification in language.⁶³ Intersubjective meaning becomes "truly social only when it has been objectivated in a sign system of one kind or another, that is, when the possibility of reiterated objectification of the shared experiences arises."⁶⁴ Consider, for example, the development and perpetuation of an institution. If it is to endure, it must be reproduced successfully in the performance of actual actors. To assure such continuity, there must be an educational process through which the relevant recipe knowledge can be transmitted systematically to those whose actions will constitute the institution in the future. Thus, the process of transmission itself creates pressure to reduce this recipe knowledge to canonical, easily memorizable forms⁶⁵—"maxims, morals, proverbial nuggets of wisdom, values and beliefs, myths, and so forth," the familiar "'what everybody knows' about a social world."⁶⁶ In this way, "[l]anguage becomes the depository of a large aggregate of collective sedimentations, which can be acquired . . . as cohesive wholes and without reconstructing their original process of formation."⁶⁷

61. *Id.* at 59.

62. *Id.* at 58.

63. *See id.* at 67 ("The experiences that are so retained [in consciousness] become sedimented, that is, they congeal in recollection as recognizable and memorable entities."); *see also id.* at 37 (noting that the "common objectifications of everyday life are maintained primarily by linguistic signification"). For further discussion of the concept of sedimentation, its cognitive underpinnings, and its jurisprudential implications, see Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1883-88 (1991) [hereinafter Winter, *An Upside/Down View*], and Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1487-91 (1990) [hereinafter Winter, *Indeterminacy and Incommensurability*].

64. BERGER & LUCKMANN, *supra* note 48, at 67.

65. As Berger and Luckmann explain:

[S]ince human beings are frequently stupid, institutional meanings tend to become simplified in the process of transmission, so that the given collection of institutional "formulae" can be readily learned and memorized by successive generations. . . . We have here on the level of sedimented meanings the same processes of routinization and trivialization that we have already noted in the discussion of institutionalization.

Id. at 70. For a different and more charitable explanation of why proverbs take the form they do—though one also rooted in the idea of memorability—*see infra* note 79.

66. BERGER & LUCKMANN, *supra* note 48, at 64.

67. *Id.* at 69; *see also id.* at 41 ("Within the semantic fields thus built up it is possible for both biographical and historical experience to be objectified, retained, and accumulated. . . . By virtue of this accumulation a social stock of knowledge is constituted, which is transmitted from generation to generation and which is available to the individual in everyday life."). On the gestalt nature of cognitive processes, see Winter, *Transcendental Nonsense*, *supra* note 47, at 1152, 1151-56 ("[A]n

To summarize, Berger and Luckmann see the social world as constituted by an ongoing, three-way dialectic in which externalization—that is, ongoing human activity⁶⁸—objectification, and internalization are each necessary moments.⁶⁹ Though they insist that this “objectivity” is socially constructed and, therefore, has no independent ontological status,⁷⁰ they emphasize that it is nevertheless real as a phenomenological matter and essential to the construction of a social world.⁷¹ Accordingly, they maintain that any “analysis of the social world that leaves out any one of these three moments will be distortive.”⁷²

We are now in a position to see exactly why the Wittgensteinian approach is prone to the problems and distortions identified earlier. In effect, it goes straight from externalization—that is, ongoing human activity—to internalization without any mediations whatsoever. Thus, even in the hands of its most subtle proponents, the Wittgensteinian account is necessarily impoverished by its elimination of the middle term of the dialectic. Without a moment of objectification or other cognitive consolidation, it has no alternative except to reduce meaning to a “primordial” and inexplicable dimension of practice. Correlatively, we can also see why, for the Wittgensteinian, reflection necessarily drops out. Simply put, the Wittgensteinian account has nothing—that is, no “thing”—for practitioners to reflect upon. There is only the purely performative dance of an ongoing practice and its practitioners’ inexpressible tacit knowledge: “What they know is either inside of them or (at least on this day) beyond them.”⁷³

idealized cognitive model (‘ICM’) . . . is a ‘folk’ theory or cultural model that we create and use to organize our knowledge. It relates many concepts that are inferentially connected by means of a single conceptual structure that is experientially meaningful as a whole.” (footnote omitted)). See also Winter, *Indeterminacy and Incommensurability*, *supra* note 63, at 1487-88 (identifying phenomenology’s concept of sedimentation with cognitive theory’s construct of an ICM).

68. See, e.g., BERGER & LUCKMANN, *supra* note 48, at 52 (“Social order is a human product, or, more precisely, an ongoing human production. It is produced by man in the course of his ongoing externalization.”).

69. *Id.* at 61. Following Hegel and Marx, they use the term “objectivation.” See *id.* at 60 (“The process by which the externalized products of human activity attain the character of objectivity is objectivation.” (footnote omitted)).

70. See *id.* (“The institutional world is objectivated human activity. . . . In other words, despite the objectivity that marks the social world in human experience, it does not thereby acquire an ontological status apart from the human activity that produced it.”).

71. See *id.* (“[Each of these three dialectical moments in social reality] corresponds to an essential characterization of the social world. *Society is a human product. Society is an objective reality. Man is a social product.*” (emphasis in original)).

72. *Id.* (footnote omitted).

73. FISH, *supra* note 15, at 373. The extended argument for the possibility and importance of reflection by situated practitioners, what I call “situated self-consciousness,” requires a full-fledged account of the role of imagination. For such an argument, see Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 *STAN. L. REV.* 639, 664, 686 (1990). I touch on this account below. See *infra* text accompanying notes 76-79.

In its own way, then, the Wittgensteinian account turns out to be surprisingly reductive. Where the naive linguistic reification supposes that words stand apart from the practices and understandings of those who speak them, the Wittgensteinian approach goes to the opposite extreme. Objectification—linguistic or otherwise—and reflection are vaporized as everything is reduced to “practice.” Ironically, this reduction revolves on the same mistaken premise that the Wittgensteinian attributed to everyone else: the assumption that representation could only be a matter of a one-to-one correspondence with objective states of affairs in the world. Like the conventionalist, the Wittgensteinian does not believe that such correspondence is possible. But the Wittgensteinian goes one step further and gives up on representation altogether.⁷⁴

This view ignores two things, however. The first is the ordinary capacity of humans to use language to encapsulate, communicate, and conserve shared social experience. As our examination of the folklore maxims reveals, there is a sense in which the maxims and proverbs do have a “representational” character. They are not merely the way in which members of this society engage in making decisions concerning important life choices—though that they certainly are. Simple though they be, the maxims are objectified nuggets of social wisdom that re-present the social knowledge acquired in historical or biographical experience. And that knowledge, in turn, shapes subsequent perception and behavior. We saw this earlier with respect to a maxim such as “absence makes the heart grow fonder,” which serves both to evoke memories of how one has managed emotional deprivations in the past and to provide a means of assessing one’s feelings about an ambivalent relationship in the present.⁷⁵ Thus, in an important sense, the Wittgensteinian has it wrong: Folklore is *both* something we do *and* something we have as a consequence of something we do.

The second, closely related thing this view ignores is the ineradicably imaginative nature of human rationality. Thus, to say that folklore is some “thing” we “have” is not to say either that it is an object or that it is an objective reality. *That* would be the fallacy of reification—that is, to conflate metaphor with reality and, as a consequence, to treat abstract ideas as if they were concrete and real.⁷⁶ By the same token, the proverbs are not point-for-point representations of objective states of affairs in the world. Our hypothetical Wittgensteinian counsellor is correct in saying that the maxims do not acquire legitimacy by correspondence with some

74. Thus, following Rorty, Bobbitt identifies his position as neither realist nor anti-realist but “anti-representationalist.” BOBBITT, *INTERPRETATION*, *supra* note 5, at xx (citing 1 RICHARD RORTY, *OBJECTIVITY, RELATIVISM AND TRUTH: PHILOSOPHICAL PAPERS 3-4* (1991)).

75. See *supra* text accompanying notes 17-19.

76. Winter, *Mother of Metaphor*, *supra* note 39, at 759, 766-69.

truth-conferring, mind-independent reality. The proverbs are, after all, social constructions. (Which is to say both that they are *social* constructions and that they are social *constructions*.⁷⁷) They do not derive from experience in any direct or linear way, but are mediated by metaphor and other imaginative processes.

To put the point in a somewhat different way, one can recharacterize Berger and Luckmann's three-way dialectic of externalization, objectification, and internalization as a reflexive relation between experience, imagination, and meaning. The proverbs provide a particularly good illustration. Our earlier examination showed that the folklore maxims do not obtain their meaning solely or even primarily from their use in the practice of counselling. For the most part, they draw on the information-rich imagery of concrete, everyday experiences from which we abstract general lessons about life.⁷⁸ For example, the maxim "a stitch in time saves nine" maps our concrete knowledge about fabric—that, once torn, it will progressively unravel unless mended—to an indeterminate number of other specific situations. From one set of concrete experiences we extract the general lesson that a small, but potentially worsening problem should be dealt with before it turns into a major crisis.⁷⁹

The importance and ubiquity of imaginative processes such as metaphor undermine the Wittgensteinian claim that there is no more to mean-

77. The operative metaphors here are IDEAS ARE OBJECTS and THEORIES ARE BUILDINGS. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 46-48, 52-53 (1980).

78. See *supra* text accompanying notes 21-25. As we saw, some proverbs such as "absence makes the heart grow fonder" draw on general cultural metaphors and other forms of folk knowledge. See *supra* text accompanying note 22.

79. This is a complex, imaginative process involving the conceptual metaphor GENERIC IS SPECIFIC, which "maps a single specific-level schema onto an indefinitely large number of parallel specific-level schemas that all have the same generic-level structure as the source-domain schema." LAKOFF & TURNER, *supra* note 21, at 162. Consider the Asian proverb, "Blind/blames the ditch." We readily understand it as a statement about a broader class of people who have some incapacity but who nevertheless attribute their misfortunes to external circumstances rather than to their own shortcomings. *Id.* As Lakoff and Turner explain, "[t]his extracted generic-level information constitutes a generic-level schema, which can be instantiated by many other specific-level schemas." *Id.* at 163-64. They continue with the following:

Generic-level schemas have the power of generality, that is, the power to make sense of a wide range of cases. But they lack the power of specificity. Specific-level schemas are both concrete and information-rich: they have rich imagery associated with them, they are memorable, they are connected to our everyday experiences, and they contain a relatively large amount of information about those concrete everyday experiences. Proverbs use both kinds of power: they lead us to general characterizations, which nevertheless are grounded in the richness of the special case.

Such specific-level schemas tend to be evoked by short, common words, like "blind," "blame," and "ditch." As a result short proverbs tend to be packed with information and imagery. Consequently, the knowledge they call up includes a great deal of generic-level information as well as specific-level information.

Id. at 165.

ing than its performative significance within a social practice. This strong claim for practice—and the fetishism that it entails—cannot survive the recognition that meaning is mediated by imaginative operations that include objectification, transfiguration, and subsequent reflection. So too, the particularism characteristic of the Wittgensteinian understanding of a practice becomes untenable once we appreciate that we regularly use knowledge from one experiential domain to structure our understanding of another. Consequently, many of the constituent facets of a practice will themselves be comprehensible only by reference to things and experiences outside that practice.

Indeed, this last point betrays a quite remarkable congruity between the semiotic claim and the Wittgensteinian understanding. On one axis, of course, the two views are polar opposites. One sees meaning as indeterminate and, therefore, subject to manipulation by a self-interested—or, at least, co-opted—professional caste. The other claims that meaning inheres in practices that cannot be transcended by agents who are themselves constituted by those practices. Oddly enough, these contending visions of interpretive autonomy and inherence nevertheless converge on one surprising point: the practical and conceptual independence of a specialized discipline such as law (or folklore counselling). But this shared assumption of professional independence is quite fantastic once one appreciates the many ways, though complex and nonlinear, in which meaning is dependent on social experience.

III. Legal Ethnocentrism

If these comments seem abstruse, we can powerfully concentrate the focus by inquiring into Bobbitt's ambivalent relation to Llewellyn's under-recognized classic, *The Constitution as an Institution*.⁸⁰ The evidence is as revealing as it is terse. Bobbitt makes just two references to the Llewellyn piece—one laudatory, the other critical. In *Constitutional Interpretation*, Bobbitt draws a quite favorable comparison between Fish's argument that debates over the meaning of the Constitution are the product of different modalities of reading—that is, constituting—the text and Llewellyn's earlier, "brilliant" analysis of the relations between constitutional practice and constitutional text.⁸¹ In *Constitutional Fate*,

80. Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934) [hereinafter Llewellyn, *Constitution as Institution*].

81. BOBBITT, INTERPRETATION, *supra* note 5, at 39. Interestingly, Bobbitt refers to Llewellyn's article as "The Constitution as Construction/Creation." *Id.* at 203 n.18. That this is a paraphrasis, and not a mere mistake, is clear when one considers that Bobbitt's reformulation of the title recapitulates the fundamental theoretical difference between him and Llewellyn: Bobbitt approaches constitutional law as a matter of lawyers' argumentative *practices*; Llewellyn, in contrast, sees it as an *institution*. See *infra* text accompanying notes 85-94.

however, Bobbitt chides Llewellyn for failing to “see the operation of the conventions there were, because he was captivated by the old pictures [of textualism] to whose discrediting he was devoted.”⁸²

It is not difficult to understand this conflicted reaction once one realizes that, from Bobbitt’s perspective, Llewellyn’s thesis cuts uncomfortably close to the bone. Like the Wittgensteinian, Llewellyn understood that an institution such as a constitution lives only insofar as it is realized in its actual performance.⁸³ So, too, he understood that these practices are constitutive of the people who take part in them.⁸⁴ Accordingly, Llewellyn denied that constitutional legitimacy is a matter of conformity with a reified text or hypostatized Framers’ intent. Rather, like Bobbitt, he maintained that legitimacy is a function of practices: “Wherever there are today established practices ‘under’ or ‘in accordance with’ the Document, *it is only the practice which can legitimize the words as being still part of our going Constitution*. It is *not* the words which legitimize the practice.”⁸⁵

82. BOBBITT, *FATE*, *supra* note 6, at 228-29. Here, Bobbitt is responding to a passage in which Llewellyn argued:

A “written constitution” is a system of unwritten practices in which the Document in question, by virtue of men’s attitudes, has *a little influence*. *Where it makes no important difference which way the decision goes*, the Text—in the absence of countervailing practice—is an excellent traffic-light. Aside from such cases, any Text of fifty years of age is an Old Man of the Sea.

Llewellyn, *Constitution as Institution*, *supra* note 80, at 39 (emphasis in original). Elsewhere in *Constitutional Fate*, Bobbitt makes the related observation that Llewellyn was still a captive of the representational picture in which legal statements obtain truth-value by correspondence with states of affairs in the world. Bobbitt suggests that Llewellyn’s work on the UCC shows that he was a constructivist “trying to create a structure, admittedly imposed, within which a statement is either correct or incorrect.” BOBBITT, *FATE*, *supra* note 6, at 235. There is some truth to this characterization. Llewellyn’s preference for merchant practice as a basis for contractual rules, for example, can be seen as evidence of an inclination toward empirical naturalism. See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 224-25, 306-07 (2d ed. 1985). But it can also be understood as an example of Llewellyn’s view that—both as a descriptive and normative matter—“realism” about law consists in legal rules that reflect social practice. See *id.* at 319 (“In commercial law the ‘realism’ that is needed is that of a balanced and reasonably accurate picture of the whole scene in terms of patterns of practice, of recurrent problems and of projected future trends.”).

83. Thus, Llewellyn observes:

An institution is in first instance a set of ways of living and doing. It is not, *in first instance*, a matter of words or rules. The existence of an institution lies first of all and last of all in the fact that people do behave in certain patterns *a*, *b*, and *c*, and do not behave in other conceivable patterns *d* to *w*.

Llewellyn, *Constitution as Institution*, *supra* note 80, at 17 (emphasis in original) (footnote omitted). Note, however, the phrase “in first instance.” Unlike the Wittgensteinian, Llewellyn does not believe that meaning is *only* a matter of practice.

84. See *id.* at 18 (“If, like ours, it is a firmly established constitution, it involves ways of behavior deeply set and settled in the make-up of these people—and it involves not patterns of doing (or of inhibition) merely, but also accompanying patterns of thinking and of emotion . . .”).

85. *Id.* at 12 (emphasis in original).

At this point, however, Llewellyn's thesis starts to rankle. Although both Bobbitt and Llewellyn claim that the legitimacy of constitutional law is a matter of "practices," they have strikingly different things in mind. (There is no lack of irony here; notwithstanding their different views on representation, Bobbitt and Llewellyn simply do not intend the same real-world referents.) For Bobbitt, the relevant practices are those of constitutional law as practiced by constitutional lawyers.⁸⁶ These are the six modalities of constitutional argument—what he identifies as the historical, textual, structural, doctrinal, ethical, and prudential forms of argument—that maintain the legitimacy of judicial review.⁸⁷ Bobbitt views these as constituting the "grammar" of the language-game called constitutional law.⁸⁸ He refers to them as "modalities" because they are "the ways in which legal propositions are characterized as true from a constitutional point of view."⁸⁹

Llewellyn, in contrast, was not interested in the forms of justificatory argument practiced by constitutional lawyers and judges; that kind of parochialism was his principal target. Rather, Llewellyn was interested in the Constitution as an institution in just the sense that Berger and Luckmann explain. The practices that Llewellyn thought relevant were those of the people who participate in the ongoing processes of government—that is, the specialists in governance (including the officials), the interest groups that vie to influence those specialists, and, at a remove, the general public.⁹⁰ For Llewellyn, judges—and, derivatively, constitutional lawyers—are

86. See BOBBITT, INTERPRETATION, *supra* note 5, at 9 ("The use of the six forms of constitutional argument is the way we decide constitutional questions in the American legal culture.")

87. *Id.* at 12-13.

88. *See id.* at 23 (arguing that the study of these modalities "permits the critical reader to describe the ideological and political manipulations of the various grammars of constitutional law"); BOBBITT, FATE, *supra* note 6, at 6 ("There is a legal grammar that we all share and that we have all mastered prior to our being able to ask what the reasons are for a court having power to review legislation.")

89. BOBBITT, INTERPRETATION, *supra* note 5, at 12. To be precise, Bobbitt should have said "from a constitutional lawyer's point of view." Otherwise, he might seem to be making a truth claim about what the Constitution "really" is.

90. Thus, Llewellyn explained:

[A] working Constitution is an institution, and so consists of the ways and attitudes of varied people; which last may be summed up more or less adequately as the going scheme of government under which those who do it, do it; and those who get something out of it proceed about getting something out of it; and those who take it, take it—sometimes hard.

Llewellyn, *Constitution as Institution*, *supra* note 80, at 26. For Llewellyn, the general public serves largely as a background constraint on the practices of the specialists. *See id.* at 20 ("In all but odd cases this power of the general public operates not as a veto of action taken, but as a deterrent from taking action—for fear of what *might* happen." (emphasis in original)). He described the role of the general public as shaped both by unthinking reverence to the Constitution as a symbol and by indifference—and, therefore, de facto deference to the specialists—with respect to its contents (*i.e.*, practices). *See id.* at 23-25.

nothing more than a "small group of specialists" who occasionally exercise a veto.⁹¹

It is easy to see why Llewellyn's version of "legitimacy conferred by practice" has such sting. Bobbitt is ensnared by the particularist fallacy. The comparison with Llewellyn is uncomfortable because it exposes Bobbitt's view as narrow, parochial, unrealistic. For Bobbitt, law consists in the practices of its specialists; it is first and foremost a matter of legal conventions. Llewellyn's view, on the other hand, opens up a broader frame of reference: "A national constitution . . . involves in one phase or another the ways of a huge number of people—well-nigh the whole population."⁹²

Llewellyn was dedicated to discrediting textualism precisely because he saw it as narrow and unrealistic. "An inch from the eye is a portion of the Text; the whole living world behind is 'covered' by it."⁹³ But Bobbitt's parochial focus on the practice of constitutional argument has almost exactly the same vice. It obscures an entire world of social experience that, as I have argued both here and elsewhere, is essential to any competent understanding of the law.⁹⁴ Paradoxical as it may now seem, one would have thought that this point should be especially congenial to a Wittgensteinian.

To illustrate, consider Roberto Unger's critique of formalism. Unger starts from the premise "that every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals."⁹⁵ Some such vision is necessary, he explains, if legal reasoning is to avoid degenerating into a too-easy game of ad hoc analogies and distinctions.⁹⁶ He contends—credibly, in my view—that this "picture" does not take its form from a "coherent, richly developed normative theory" because there is none that can account for all the conflicting legal doctrines it is offered

91. *Id.* at 20, 22-23.

92. *Id.* at 18.

93. *Id.* at 17.

94. *See supra* note 63.

95. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8 (1986). Both Bobbitt and Fish read this passage as saying that law is indeterminate without a transcendent normative theory. *See* BOBBITT, *INTERPRETATION*, *supra* note 5, at 164-66; FISH, *supra* note 15, at 379-80. In context, however, this sentence makes only the smaller claim that the coherence of every area of the law depends on a prescriptive telos. This observation serves as the premise for a two-step argument against formalism: (1) for any given area of doctrine, there is no transcendent normative theory that can supply that telos and still be consistent with all the cases; and (2) this failure reveals that, contrary to its formalist pretensions, law is political and ideological. UNGER, *supra*, at 8-11. This is not a claim either for "Grand Theory" or "indeterminacy," but a critique of neutrality. It rests on the premise that law is dependent on a prescriptive social vision; this dependence means that law is caught between the Scylla and Charybdis of incoherence and ideology.

96. UNGER, *supra* note 95, at 8.

to explain.⁹⁷ For Unger, it follows that law can only be the product of a myriad of political and ideological conflicts.

For our purposes, Unger's premise will prove to be much more important than his conclusion. To see why, consider how a Wittgensteinian such as Bobbitt might respond to Unger's argument. First, he would exhort us to abandon the question of justification precisely because it precipitates this kind of all-or-nothing conclusion. Second, and relatedly, he would deny that there are any such "pictures." He would argue that law does not consist of representations of social life. On his view, law is the activity of decisionmaking within the existing modalities.

The problem, of course, is that Bobbitt admits that the modalities often will conflict and, therefore, that decision is indeterminate.⁹⁸ He maintains, moreover, that insisting on the exclusive claim of a particular modality—which would eliminate some of this indeterminacy—turns that modality into an ideology.⁹⁹ In effect, then, Bobbitt concedes that law faces the very predicament that Unger identifies: it *is* either ideology or indeterminacy. Indeed, without foundations, what other alternatives could there be? Bobbitt believes that he has solved this problem with the resort-to-conscience gambit. But, as we have seen, this is like pasting a rhetorical Band-Aid over a very real aporia.

We have both reason to refuse this invitation to re-enter the infinite regress and the means to do so. The way is already suggested by our earlier discussion of the defects of practice fetishism.¹⁰⁰ Thus, we could accept the Wittgensteinian's first response without buying into the second; we could abandon the notion of justification without relinquishing entirely the concept of representation.

In that event, our reaction to Unger's challenge would change. We would no longer seek a "coherent, richly developed normative theory"¹⁰¹ to justify a branch of doctrine and, accordingly, would not be disappointed when we could not find one. But it would remain true that we need something to keep the doctrine from lapsing into the endless play of analogies and distinctions. Bobbitt candidly concedes that the conventions cannot fulfill this role because the modalities themselves are not determinate. So what serves this function?

Surprisingly, the Wittgensteinian's answer is not very different from Unger's; to say that meaning inheres in a practice is, as we have seen, to say that meaning is given by a "vision" or set of understandings about goals, methods, values, and underlying rationales that constitute that prac-

97. *Id.* at 9.

98. See text accompanying notes 9-10.

99. BOBBITT, INTERPRETATION, *supra* note 5, at 24-25, 164.

100. See *supra* text accompanying notes 41-47.

101. UNGER, *supra* note 95, at 9.

tice as a practice. As Stanley Fish explains with respect to literary interpretation, "the rule-of-thumb reader begins with a knowledge of the outcome he desires, and it is within such knowledge that the rule assumes a shape, becomes readable."¹⁰² Thus, all that really changes on the Wittgensteinian account is that, having eschewed justification, we are left with a purely causal question.¹⁰³ So where does this "picture" of social relations come from? Necessarily, it arises from the social practices and conditions that already exist in the relevant culture. The answer to the question "What warrants the law?" is "A prior picture of social relations." At the same time, the answer to the question "Where does that picture come from?" is "From those very social relations."

The alternative, in short, is to recognize the reflexive relation between practice and meaning. This is the view taken by Charles Taylor, for example.¹⁰⁴ This alternative is, of course, conceivable only if one recognizes the possibility of objectification, institutionalization, and retention of legal meaning. But it has the distinct advantage of avoiding the infinite regress while neither treating practice reductively nor claiming any objective or privileged status for those practices.¹⁰⁵

A principal point of Wittgenstein's concept of a language-game is to emphasize that a language or rhetorical system like law is always "part of an activity, or of a form of life."¹⁰⁶ Bobbitt reads this claim narrowly to apply to the particular activity of constitutional argument. But, as Bobbitt himself recognizes, constitutional law is not an abstract forensic exercise; it also must connect with our day-to-day affairs.¹⁰⁷ It follows that a practice like constitutional law cannot be understood apart from the larger social practices—the form of life—in which it participates. Thus, Bobbitt concedes that "[t]he concepts which occur in Constitutional law must also occur and have a meaning in everyday life. . . . It is the use of

102. FISH, *supra* note 15, at 317; *see also id.* at 295 ("Words are intelligible only within the assumption of some context of intentional production, some already-in-place predecision as to what kind of person, with what kind of purposes, in relation to what specific goals in a particular situation, is speaking or writing." (emphasis omitted)).

103. *See* RORTY, *CONTINGENCY*, *supra* note 16, at 15 (explaining that the "Wittgensteinian attitude" makes "all questions about the relation of [mind and language] to the rest of [the] universe causal questions, as opposed to questions about adequacy of representation or expression" (emphasis in original)).

104. *See* CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 204 (1989) ("The basic relation is that ideas articulate practices. . . . That is, the ideas frequently arise from attempts to formulate and bring to some conscious expression the underlying rationale of . . . [existing patterns of behavior].").

105. *See* Steven L. Winter, *Human Values in a Postmodern World*, 6 *YALE J.L. & HUMAN.* 233, 235 (1994) [hereinafter Winter, *Human Values*] (arguing that social contingency should be viewed as "foundational" in this nonobjectivist sense).

106. WITTGENSTEIN, *supra* note 26, § 23; *see supra* note 26.

107. *See* BOBBITT, *INTERPRETATION*, *supra* note 5, at 40.

these concepts outside law . . . that makes their use within constitutional law meaningful."¹⁰⁸ He even acknowledges that there is some reflexivity in the relation between law and culture.¹⁰⁹ He insists nevertheless that law is both separate and primary.¹¹⁰ As he puts it, "[t]he rules of constitutional law are not *derived* from these everyday uses, however, but result from the operations of the various conventions."¹¹¹

Bobbitt's version of the relation between law and culture is one that firmly places law and lawyers at the center of the social universe. It is a kind of legal ethnocentrism, and it is indefensible as a theoretical or empirical matter. As Robert Cover points out, "[p]recepts must 'have meaning,' but they necessarily borrow it from materials created by social activity."¹¹² So, too, Llewellyn at his best recognized the degree to which law is dependent on culture: "As to tools, law has borrowed copiously from the rest of culture: language, logic, writing; and for the subject matter of its thinking it borrows the whole stock of practices, standards, ethics that make up the social, economic and religious phases of society."¹¹³

108. BOBBITT, FATE, *supra* note 6, at 237.

109. *Id.* at 184 ("[T]here is a reflexivity, a kinaesthetic, mutually affecting reaction between a society and its law.").

110. *Id.* at 185 ("Because I do not believe we are born with a taste for jury trials or the Australian ballot, I must assume that our institutions play some role in establishing our aesthetic principles in these matters. The Constitution is first among such institutions."). The logic of this inference is something less than inescapable; there are some intermediate possibilities between the alternatives of innate instinct and the primacy of formal legal institutions. For example, Arthur Leff argues quite credibly that our trial practices mirror our characteristic cultural values. See Arthur A. Leff, *Law and*, 87 YALE L.J. 989, 1003-05 (1978).

111. BOBBITT, FATE, *supra* note 6, at 237 (emphasis in original).

112. Cover, *supra* note 53, at 18.

113. LLEWELLYN, BRAMBLE BUSH, *supra* note 1, at 117. Llewellyn's famous, but little understood concept of situation-sense is best comprehended in this way. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 261 (1960) (describing how one exercises situation-sense by "visualizing the hands-and-feet operations in the picture, seen as a going scheme, a working setup"); see also Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2263-64 (1989) (noting the experiential and image-based nature of this description and concluding that "Llewellyn's notion of situation-sense incorporates virtually all of the essential attributes of the idealized cognitive model identified by experientialist theory; it lacks only an account of internal configuration").

Llewellyn, however, was not always consistent in maintaining this insight; he was, perhaps, sometimes too exuberant to extol the virtues of craft. In *Bramble Bush*, for example, Llewellyn indicated that he was "strongly inclined to believe that one of the earliest and most persistent stimuli to the growth of generalization, classification, and so of rational thought . . . is attributable more to law than to any other phase of civilization except perhaps language." LLEWELLYN, BRAMBLE BUSH, *supra* note 1, at 118. The false bravado of this claim, which mistakes cause and effect, is revealed by the final proviso: The human capacity to generalize is the indispensable prerequisite for having a linguistic capacity. See generally GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987). Law is just one social by-product. Thus, earlier in *Bramble Bush*, Llewellyn observed that the concept of precedent is the legal correlate of habit and social institutions. LLEWELLYN, BRAMBLE BUSH, *supra* note 1, at 70; see *infra* note 126.

Let me sketch two examples that I have developed at greater length elsewhere.¹¹⁴ It is easy enough to imagine the historical, textual, structural, doctrinal, ethical, and prudential arguments in support of the constitutional right to travel. Not surprisingly, it is “fundamental,” “firmly established and repeatedly recognized.”¹¹⁵ Still, the Supreme Court has been remarkably casual about the nature of this right—noting, for example, that “[w]e have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”¹¹⁶ It may be that the legitimacy of the constitutional right to travel is maintained by the availability of the modal arguments that the Court neglects to make. But it seems at least equally likely—and more consistent with the (absent) forensic evidence—that the legitimacy of the right to travel arises from the fact that it’s deeply implicated in the cultural and historical life of a nation forged in the experience of immigration and westward expansion—not to mention one so currently dominated by the automobile. What could be more quintessentially American?

If the right to travel reveals the relevance of the living world behind the modalities of argument, the First Amendment demonstrates how that world penetrates the modalities themselves.¹¹⁷ The familiar “marketplace of ideas” metaphor that so invigorates our modern thinking about free speech is itself contingent on social practices entirely unrelated to freedom of expression. Thus, Milton’s seventeenth-century polemic against censorship, the *Areopagitica*, used the “market” metaphor to *deride* the notion of licensed printing.¹¹⁸ Milton, of course, wrote in an era of imperial mercantilism. It is only after the rise of *laissez faire* capitalism that the “marketplace of ideas” even makes sense as a metaphor for the First Amendment ideal of open debate. If, today, we can trace a doctrinal line that runs from Holmes’s dissent in *Abrams v. United States*¹¹⁹ to Brennan’s opinion in *New York Times v. Sullivan*,¹²⁰ we can do so in part

114. What follows is a condensation of a more detailed argument that is elaborated in Winter, *Indeterminacy and Incommensurability*, *supra* note 63, at 1485-92, 1511-13.

115. *United States v. Guest*, 383 U.S. 745, 757 (1966).

116. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

117. Here, I am recapitulating part of an argument elaborated previously in Winter, *Transcendental Nonsense*, *supra* note 47, at 1183-95, 1224-32. For a more complete summary, see Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993).

118. See John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc’d Printing, To the Parliament of England, in THE PROSE OF JOHN MILTON* 265, 303-04 (J. Max Patrick ed., 1968) (“Truth and understanding are not such wares as to be monopoliz’d and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all knowledge in the Land, to mark and license it like our broad cloth, and our wooll packs.” (citations omitted)).

119. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

120. 376 U.S. 254, 270 (1964) (Brennan, J.) (invoking the “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open”).

because of entirely unrelated social changes with respect to our economic practices and institutions.

If Bobbitt overlooks these more complex relations between culture and law, there is still much that is valuable in his approach. It seems clear to me that he is right in saying that the validity of judicial review is not a matter of some transcendent justification; its legitimacy is given by our practices.¹²¹ So, too, his taxonomy of the forms of constitutional argument is exceedingly useful for sorting out the issues and debates in conventional constitutional life. Bobbitt goes astray only when he tries to claim more for the forms of argument than they can plausibly bear on their own.

Bobbitt stumbles because he wants to maintain that his taxonomy is more than a taxonomy, that there is something special—even holy¹²²—about the forms of argument that he has identified. But is it really plausible to say that historical, textual, structural, doctrinal, ethical, and prudential arguments are the unique province or invention of law? Arguments premised on intent (“What did she *mean* when she said that . . . ?”), text (“But that isn’t what you *said!*”), institutional function or design (“Just let me do my job.”), and instrumentalism (“It’s not the way we were taught at school, but it gets the job done.”) are all familiar aspects of everyday life.¹²³ Ethical argument, in Bobbitt’s distinctive definition, is explicitly rooted in a wider cultural ethos.¹²⁴ Only doctrinal argument would seem to have any claim to professional distinctiveness. Yet, even here, one finds ample evidence to the contrary. One need only recall Medea’s contract-based arguments¹²⁵ or Llewellyn’s description of the or-

121. But, then, Alexander Bickel, Robert Dahl, Jan Deustch, Karl Llewellyn, Laurence Tribe, and—no doubt—others all agree. See Winter, *An Upside/Down View*, *supra* note 63, at 1924 n.220 (collecting sources).

122. Bobbitt closes his book with the piety: “Decision according to law is an ideal, but it is also an art and finally it is our piety, our ‘service to God.’” BOBBITT, *INTERPRETATION*, *supra* note 5, at 186. Consider, too, his heavy-handed rebuke to critical legal studies, which is so reminiscent of Carrington’s tirade:

It is not enough, therefore, for the critic to describe a possible world in which there is less injustice than in the present. He must also show that it is possible to actualize such a world in which the system of interpretation is legitimate or acknowledge that he is simply proposing the destruction of our fundamental civil institution.

Id. at 170; cf. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (“[T]here is dread in disbelief. A lawyer who succumbs to legal nihilism . . . must contemplate the dreadful reality of government by cunning and a society in which the only right is might.”).

123. See Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915, 928-34 (1988) (using a quite ordinary argument between a child and her babysitter to demonstrate the common forms of legal argument); see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 71-100 (1990) (arguing that there is little distinction between legal reasoning and practical reasoning generally).

124. BOBBITT, *INTERPRETATION*, *supra* note 5, at 20 (“This form of argument denotes an appeal to those elements of the American cultural ethos that are reflected in the Constitution.”).

125. See *supra* note 40.

dinary social roots of the doctrine of precedent¹²⁶ to see that law differs surprisingly little either in content or form.

Llewellyn recommended that we make of law an anthropology.¹²⁷ The advice is cogent beyond the obvious sense of recommending systematic inquiry into the institutional and social practices that constitute the law. Culture, as we have seen, is both anterior and interior to the language and thought of law. Approaches to law that proceed on the assumption of its separability from or superiority to life are little more than a form of professional self-flattery.

IV. Forms of Justice? Forms of *Life*

Perhaps the most disquieting aspect of Bobbitt's approach is the way in which he deploys "conscience" as the mystery ingredient that vindicates the system: "I conclude that the system is just, not because it produces just outcomes, but because it permits an opportunity for justice consistent with the freedom of the conscience to decide matters."¹²⁸ As to the makeup of this conscience we are told little, except the cryptic line that "there is no conscience without faith for without faith there is only expediency."¹²⁹

If this suggestion works at all, it is only because it is reassuring in tone and familiar in content. Like a contemporary Chauncey Gardiner,¹³⁰ Bobbitt effectively invokes the soothing metaphor of the garden: "The space for moral reflection on our ideologies is created by the conflict among the modalities, just as garden walls can create a space for a garden."¹³¹ But, as even his most ardent admirer points out, this metaphor is as weak as the point it is offered to illustrate: "The problem with the metaphor of the garden . . . is that without a public practice of gardening,

126. As Llewellyn explains:

The foundation, then, of precedent is the official analogue of what, in society at large, we know as folkways, or as institutions, and of what, in the individual, we know as habit. . . . It takes time and effort to solve problems. . . . Both inertia and convenience speak for building further on what you have already built; for incorporating the decision once made, *the solution once worked out*, into your operating technique *without reexamination* of what *earlier went into* reaching your solution.

LLEWELLYN, BRAMBLE BUSH, *supra* note 1, at 64-65 (emphasis in original).

127. *Id.* at 144-45.

128. BOBBITT, INTERPRETATION, *supra* note 5, at 163.

129. *Id.* at xvii. The sentiment is also unpersuasive, for it appears to ignore commitment or, more precisely, committed action. See Cover, *supra* note 53, at 45 ("The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken." (footnote omitted)); see also Winter, *Human Values*, *supra* note 105, at 248 ("[T]he problem of values is one of learning to rediscover their locus in our practices and commitments. There is no other basis for our values than our own committed actions.").

130. See JERZY KOSINSKI, BEING THERE (1970).

131. BOBBITT, INTERPRETATION, *supra* note 5, at 177.

it is impossible to tell whether someone is gardening or merely moving plants around."¹³² Indeed, without a shared social practice of gardening, it is not even possible to tell whether they are garden walls and not, say, the walls of a prison—or a dead-end.

Bobbitt's resort to conscience is, as has been noted, decidedly un-Wittgensteinian.¹³³ Nowhere in his account is there a practice or language-game of conscience. The most likely candidate, the practice of moral evaluation, is said to be something separate and later.¹³⁴ Bobbitt presents conscience as elemental, inexplicable, and *individualistic*: "The United States Constitution formalizes a role for the conscience of the individual sensibility by requiring decisions that rely on the individual moral sensibility when the modalities of argument clash."¹³⁵ For Bobbitt, then, it is as if conscience were some "private language."¹³⁶

This is not a mere lapse of consistency in an "otherwise compelling account,"¹³⁷ but a consequence of a fundamental flaw in Bobbitt's argument. His particularist view of practice restricts his gaze to the narrow horizon constituted by the argumentative practices of constitutional lawyers and judges. The entire world of social activity that lies beyond is obscured, ignored, and forgotten. This omission is fatal. Lawyers argue; judges decide; people act and are acted upon. Bobbitt sees only the first two moments. For him, law is reduced to an empty space of argumentative practices and inexplicable decisions based on individual conscience. The archetype here is less the naturalized behaviorism of a Wittgenstein than the transcendental idealism of a Kant. Thus, Bobbitt's single most revealing statement is that "values come into being" through "the exercise of moral choice."¹³⁸ Entirely absent from his analysis is any conception of social action.¹³⁹

132. Patterson, *Conscience and Constitution*, *supra* note 33, at 302 n.100.

133. *Id.* at 303-04.

134. *See supra* notes 13-15 and accompanying text.

135. BOBBITT, *INTERPRETATION*, *supra* note 5, at 168.

136. *Cf.* Patterson, *Conscience and Constitution*, *supra* note 33, at 303 ("The philosophical inspiration for Bobbitt's position, Wittgenstein, himself inveighed against the possibility of a private language.").

137. *Id.* at 306.

138. BOBBITT, *INTERPRETATION*, *supra* note 5, at 179.

139. In contrast, John Dewey maintained that "moral judgment and moral responsibility are the work wrought in us by the social environment." DEWEY, *supra* note 19, at 316. Accordingly, he argued that the failure to attend to the social dimension of conscience is morally retrogressive:

Of what avail is it to presch unassuming simplicity and contentment of life when communal admiration goes to the man who "succeeds"—who makes himself conspicuous and envied because of command of money and other forms of power? . . . The notion that an abstract ready-made conscience exists in individuals and that it is only necessary to make an occasional appeal to it . . . is associated with the causes of the lack of definitive and orderly moral advance. For it is associated with lack of attention to social forces.

Id. at 319.

Worse yet, this analysis conduces to a strangely abstract conception of justice. As Cover points out, judicial interpretations “are not only ‘practical,’ they are, themselves, practices” precisely because the “judicial word is a mandate for the deeds of others.”¹⁴⁰ Following Cover, Bobbitt remarks: “Cases do not arise because the litigants want to test what a particular judge thinks the Constitution is for. Litigants want justice.”¹⁴¹ Just so. But the only justice that Bobbitt has to offer is a purely formal justice.¹⁴² Like its cousin “formal equality,” this formal justice is rendered via the key words “opportunity,” “freedom,” and “individual.”¹⁴³ And like its cousin, it is rendered in empty promises.

Conscience, like the law, is constituted in the forms of life that give meaning to our categories, concepts, and values.¹⁴⁴ Thus, in an earlier encounter with Bobbitt, I argued both that the practice of a truly “constitutional” politics must struggle with the much more difficult task of making constitutional meaning and that this task *requires* social action.¹⁴⁵ Fortunately, that quite lengthy argument can be summed up by a simple “syllogism”:

- (1) The justice we can achieve is constrained by the forms of life in which we find ourselves.
- (2) It follows, therefore, that the justice we can imagine is attained only in the construction of new forms of life.
- (3) If we think otherwise, we are just fooling ourselves.

140. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1611 (1986). Cover explains: “[I]t is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes *legal* interpretation. . . . Legal interpretation is either played out on the field of pain and death or it is something less (or more) than law.” *Id.* at 1606-07 (emphasis in original).

141. BOBBITT, INTERPRETATION, *supra* note 5, at 40.

142. *See id.* at 168 (“The United States Constitution *formalizes* a role for the conscience of the individual sensibility” (emphasis added)).

143. *See id.* at 163 (“[T]he system is just, not because it produces just outcomes, but because it permits an *opportunity* for justice consistent with the *freedom* of the conscience to decide” (emphasis added)); *id.* at 168 (“The United States Constitution formalizes a role for the conscience of the *individual* sensibility” (emphasis added)).

144. *See* DEWEY, *supra* note 19, at 323 (“[T]he formation of habits of belief, desire and judgment is going on at every instant under the influence of the conditions set by men’s contact, intercourse and associations with one another.”). For a detailed example, see Winter, *An Upside/Down View*, *supra* note 63, at 1905-25 (discussing the Court’s culturally-based myopia in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988)).

145. Winter, *Indeterminacy and Incommensurability*, *supra* note 63, at 1473-1505.

