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FROM HEDONISM TO HUMAN RIGHTS: FELIX COHEN'S ALTERNATIVE TO NIHILISM

*Joel R. Cornwell**

Philosophy lives in words, but truth and fact well up into our lives in ways that exceed verbal formulation. There is in the living act of perception always something that glimmers and twinkles and will not be caught, and for which reflection comes too late. No one knows this as well as the philosopher. He must fire his volley of new vocables out of his conceptual shotgun, for his profession condemns him to this industry, but he secretly knows the hollowness and irrelevancy. His formulas are like stereoscopic kinetoscopic photographs seen outside the instrument; they lack the depth, the motion, the vitality.

—William James¹

INTRODUCTION

The deconstruction of values and principles, of “goodness” and virtue itself, has been at least as problematic for the study of law as it has for the study of literature.² Confronted on most sides with etiologies of circumstance and personal influence (the nominalism of relativity), it has become tragically difficult to assert in a logically consistent manner that any particular legal decision could assert its necessity out of “goodness” or “rightness.”³ Relying essentially on the work of Wittgenstein, and informed by Einstein’s theory of relativity, Felix Cohen suggested a means of supplying such logical consistency. In fact, to understand this effort to ground an indeterminate process in ethical realism is to explain one of the more puzzling and seemingly contradictory changes in Felix Cohen’s intellectual life: namely, his move from classical ethical hedonism to an exploration of the ways in which the adjudication of legal issues could itself be seen as rooted in abiding ethical principles articulated as rights. This essay is an attempt to understand Cohen’s effort as an alternative to contemporary nihilism.

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1. WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 356 (1961).

2. See Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982) (delineating major post-structuralist theories of literary criticism and their relevance to interpretation of legal texts, particularly Federal Constitution and case law engendered by it).

3. See Richard J. Neuhaus, *Nihilism Without the Abyss: Law, Rights, and Transcendent Good*, 5 J. L. & RELIGION 53 (1987) (explicating prejudice that moral legitimacy of law is either self-evident or product of deceptive linguistics, and arguing that democratic government cannot be sustained without appealing to transcendent “good”).

Surprisingly little has been written about the life and work of Felix Cohen.⁴ Among the literature of the so-called "Legal Realists"⁵ who flowered in the fecund disillusionment engendered by the First World War, the moral and intellectual failure of Marxism, the Freudian challenge to human free will, and Einstein's apparent eradication of absolute truth,⁶ the work of Felix Cohen is perhaps the most philosophically sophisticated. His work is equally

4. Felix S. Cohen (1907-1953) spent 15 years on the Solicitor's Staff of the Department of the Interior, where he pursued a keen interest in Native American culture. The son of the eminent philosopher Morris R. Cohen (1880-1947), Felix Cohen was himself a trained philosopher, having taken his Ph.D. from Harvard in 1929, two years before he took his law degree at Columbia. After resigning from the Interior Department in 1949, he practiced law, became general counsel to the Association on American Indian Affairs, and taught in an adjunct capacity at Yale Law School. At the time of his death, he was a partner in the firm of Riegelman, Strasser & Spielberg, and head of the firm's Washington office. A book entitled *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* (Morris R. Cohen et al. eds., 2d ed. 1979) [hereinafter *READINGS IN JURISPRUDENCE*], which Felix Cohen edited with his father, contains selections from critical jurisprudential works of both father and son. Felix Cohen's major articles are anthologized in *FELIX S. COHEN, THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* (Lucy K. Cohen ed., 1970) [hereinafter *THE LEGAL CONSCIENCE*]. A biographical essay and bibliography are part of a memorial symposium issue in the *Rutgers Law Review*. *A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 *RUTGERS L. REV.* 343, 345-53 (1954). To date, there has been no comprehensive biographical study.

5. The term "Legal Realism" is impossible to define with precision. The designation derives from Karl Llewellyn's article, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431 (1930). Although Llewellyn did not offer a comprehensive definition of the term, William Twining considers the following to be consistent with Llewellyn's usage: "A realist is one who, no matter what his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and to try to describe as honestly and clearly as possible what is to be seen." WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 74 (1985). Noting that Llewellyn's own attempts to present Realism as a species of academic "movement" have distorted the image with connotations of a well-defined methodology, Morton Horwitz asserts that "above all, Realism is a continuation of the Progressive attack on the attempt of late-nineteenth-century Classical Legal Thought to create a sharp distinction between law and politics and to portray law as neutral, natural, and apolitical." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960* at 170 (1992). Horwitz provides a more expansive picture of Realism as a response to an intellectual climate. *Id.* at 169-92; see also LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, at 1-44 (1988) (surveying Legal Realism); Joseph W. Singer, *Legal Realism Now*, 76 *CAL. L. REV.* 465, 467 (1988) (reviewing Kalman's survey on Legal Realism). At a minimum, the works of those persons commonly associated with the movement share common themes of cognitive relativism and critical interdisciplinary explication of legal actions. Persons commonly associated with the "movement" include Llewellyn, Charles Clark, Underhill Moore, Herman Oliphant, Hessel Yntema, William O. Douglas, and Walter Wheeler Cook. For an overview of these and other key figures, see HORWITZ, *supra*, at 180-85. For Llewellyn's personal "sample" list of twenty Realists, see TWINING, *supra*, at 76.

6. For an artful explication of this broader intellectual milieu, see PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES* 1-48 (1992). Cf. Bruce Ackerman, *Law and the Modern Mind*, 103 *DAEDALUS* 119, 125 (1974) (noting parallels between the thought of Jerome Frank and other Realists and the works of Stravinsky, Picasso, Joyce, Einstein, and Freud, each of whom "radically challenged the effort to structure objective reality into a single determinate rationalizable order"); HORWITZ, *supra* note 5, at 170 (distinguishing Realism and antecedent pre-World War I movements on the basis of Realism's pronounced "skepticism about reason and morality").

distinguished by a clarity of style rarely attained by philosophers or lawyers. Felix Cohen was peculiarly adept at both the theory and practice of law and, living in the juxtaposition of the two realms, seems to have provided an empowering dimension to each mode of his understanding.

His training in philosophy enabled him to apply to legal rhetoric the insights of the Vienna Circle—notably those of Ludwig Wittgenstein—and others who saw in the analysis of language a remedy to illusory problems of traditional metaphysics.⁷ From his book *Ethical Systems and Legal Ideals*,⁸ through his seminal law review article *Transcendental Nonsense and the Functional Approach*,⁹ his unfinished Platonic *Dialogue on Private Property*,¹⁰ and a prolific array of other writings,¹¹ Felix Cohen waged a razor-sharp attack on the pseudo-problems created by imprecise judicial language, and the consequent judicial impulsion to cast critical value judgments in rhetorical formulations which denied that such judgments could be made.

Every judicial decision, he maintained, was simultaneously an ethical and political decision, and every ethical question must be grounded in verifiable terms which clarify—not obscure—the consequences of the decision.¹² The standard of goodness by which we judge consequences must also be grounded in human experience.¹³ Hedonism—the affirmation that human happiness is the essential determinant of goodness—accordingly provided the posture for measuring the comparative goodness of human acts.¹⁴ Repeatedly, Felix Cohen defended the utilitarian-based hedonic calculus of Jeremy Bentham.¹⁵

7. For a comprehensive account of the linguistic theories of Moritz Schlick, the "early" Ludwig Wittgenstein, Rudolph Carnap, and other contemporaries, see VICTOR KRAFT, *THE VIENNA CIRCLE* (Arthur Pap trans., 1953); see also A.J. Ayer, *Introduction to LOGICAL POSITIVISM* 3-28 (A. J. Ayer ed., 1959).

8. FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1976) [hereinafter *ETHICAL SYSTEMS*]. The book comprises a revised version of Felix Cohen's Harvard doctoral thesis.

9. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) [hereinafter *Transcendental Nonsense*], reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 33.

10. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954).

11. See *THE LEGAL CONSCIENCE*, *supra* note 4 (anthology).

12. *Transcendental Nonsense*, *supra* note 9, at 838-49, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 65-76.

13. See *ETHICAL SYSTEMS*, *supra* note 8, at 121 ("[Ethical systems] must face the scientific test of empirical confirmation. They must fit into our immediate moral observations just as a scientific physics must fit into our immediate physical observations.") (citing BERTRAND RUSSELL, *MYSTICISM AND LOGIC* (1917)).

14. *Id.* at 184-89.

15. *Id.*; see also Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 1, 24-26 (1937) (even if one adopts a separate system, essential concepts of utilitarianism remain), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 92-94; READINGS IN JURISPRUDENCE, *supra* note 4, at 554-56 (utilitarianism can be integrated with values); Felix S. Cohen, Book Review, 42 YALE L.J. 1149 (1933) (reviewing C. K. OGDEN, *BENTHAM'S THEORY OF FICCTIONS* (1932) and JEREMY BENTHAM, *THE THEORY OF LEGISLATION* (C. K. Ogden ed., 1931)), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 179-82.

To his untimely death, Felix Cohen did not repudiate the Benthamite calculus. This reticence, inconsequential on its face, is a source of curiosity in light of some of his final writings, which appear to adopt—or at least to speak approvingly of—notions of human rights.¹⁶ Traditional interpretations of rights-based jurisprudence appear incompatible with traditional interpretations of utilitarian-based hedonism,¹⁷ and so Felix Cohen's "last words" about human rights,¹⁸ or, from a different aspect, his silence about the he-

Bentham's calculus is set out in chapter IV, §§ 1-8 of his treatise, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789), reprinted in *READINGS IN JURISPRUDENCE*, *supra* note 4, at 500-02. Because pleasure and avoidance of pain are the appropriate ends of legislation, the value of any action is appropriately judged in terms of the quality and extent of pleasure and pain it produces. The social value of pleasures and pains is to be calculated according to seven factors: (1) intensity; (2) duration; (3) certainty or uncertainty; (4) propinquity or remoteness; (5) fecundity (i.e., the degree to which a sensation is likely to be followed by the same kind of sensation); (6) purity (i.e., the degree to which a sensation is not likely to be followed by sensations of the opposite kind); and (7) extent (i.e., the number of persons to whom the sensation extends). *Id.* For a modern evaluation of the problem of calculating interpersonal utilities, see BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 45-53 (1980) (criticizing "conventional wisdom" of contemporary economists that impartial comparisons of utility are meaningless).

16. See Felix S. Cohen, *Human Rights: An Appeal to Philosophers*, 6 *REV. OF METAPHYSICS* 617, 617-22 (1953), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 171-76 (originally presented as an address before the American Philosophical Association) (human rights and law). See *infra* note 112 and accompanying text for discussion of this article. Felix S. Cohen, *Law for the Immigrant*, *THE NEW REPUBLIC*, Jan. 4, 1954, at 12-13 (reviewing MILTON R. KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* (1953); written on the last day of Felix Cohen's life), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 481-82. In this final work, Felix Cohen quoted the Kantian philosopher Herman Cohen regarding the Mosaic ideal of loving the stranger, expressed in *Leviticus* 19:33-34 and 24:22: "The alien was to be protected not because he was a member of one's family, clan, religious community; but because he was a human being. In the alien, therefore, man discovered the idea of humanity." *THE LEGAL CONSCIENCE*, *supra* note 4, at 482; see also *infra* note 133. Cohen subsequently observed that "techniques of tyranny and oppression are generally tried out and perfected in application to some small and friendless group before they are extended to the rest of society," *THE LEGAL CONSCIENCE*, *supra* note 4, at 482, implicitly adopting a concern frequently employed by natural law theorists against Benthamite utilitarianism, i.e., the utilitarian failure to account for minority rights adequately.

17. Cohen ordinarily employed a concept of rights coextensive with that of traditional legal positivism:

The concept of a legal right wins admission to the category of reality when it is defined as a function of judicial behavior, as "a disposition on the part of those by whom the powers of government are exercised, to cause him to possess, and so far as depends upon them to have the faculty of enjoying, the benefit to which he has a right." One thinks of the origin of "realistic jurisprudence" in the phrase of Holmes, "A right is but the hypostasis of a prophecy," and remembers that Holmes is the child of Austin, and Austin the child of Bentham.

Cohen, *Book Review*, *supra* note 15, at 1151-52.

The incompatibility of positivist and natural law conceptions of rights would not, however, preclude a natural law concept with its own linguistic integrity. See *infra* note 85 for a discussion of Cohen's concept of "systematic relativism." See also *infra* note 127 and accompanying text.

18. This is not of course a literal reference to the last words spoken by Cohen on his deathbed, but rather a characterization of the philosophical tenor of his last written product, i.e., the book review written on the last day of his life. See generally Cohen, *Law for the Immigrant*, *supra* note 16. Cohen's reference in this book review to *Leviticus* 19:33-34, which he had previ-

donic calculus, presents something of a *Rosebud*-like mystery¹⁹ to the philosophical obituarist.

One solution is to posit a fundamental shift of teleological principles which Felix Cohen would have articulated had he lived longer. Professor Golding has suggested this possibility in one of the few substantial pieces written on Cohen.²⁰ The present essay suggests that what might appear as a shift of teleology is more accurately characterized as a shift of epistemology, from the verificationist mode of the Vienna Circle and the "early" Wittgenstein to the contextualist posture of the "later" Wittgenstein. This is the subject of part I. Although Cohen was decidedly influenced by Wittgenstein's early work, the direct influence of Wittgenstein's change of aspect upon Cohen is a matter of conjecture. Nevertheless, this posture of the "later" Cohen (paralleling the "later" Wittgenstein) is impelled independently by an analogy of philosophy and physics, more accurately aligning ethical and judicial theory with Einstein's principle of relativity, which clearly did act as a direct influence.²¹ Both of these influences diminish the utility of Bentham's hedonic calculus, which attempts to measure the effects of human actions without adequately integrating a contextual dimension against which the measurements are fixed. This is the subject of part II. Ironically, this added dimension is more easily integrated into a revised formulation of rights language, which has a greater capacity for variable terms signifying the relation of fact and value across a social field. This is discussed in part III.

I. THE PARALLEL TO WITTGENSTEIN

There is of course no *correct* way of characterizing what in Cohen's thought changed. From one perspective, Felix Cohen's appeal to human rights might be seen as a change of emphasis focusing on the task of *living* ethically,²² as opposed to *demonstrating the logical possibilities* of ethical de-

ously quoted in his address before the American Philosophical Association, together with his reference to *Leviticus* 24:22, provides a poignant summation of his jurisprudential "form of life" in the Wittgensteinian sense. See *supra* note 16; see *infra* notes 33, 37, and 128. The *literal* last words Cohen wrote in the book review are as follows:

Cold [economic] analysis of the high cost of prejudice may not carry the high emotional flavor of prophetic utterance, but in the long run may enlist the attention of many practical Americans, in and out of Congress, who are accustomed to hate at sight any political precept that seems to be based on considerations of ethics or humanity.

Cohen, *Law for the Immigrant*, *supra* note 16, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 484.

19. The allusion, of course, is to Orson Welles' classic film, *Citizen Kane* (RKO 1942). In *Citizen Kane*, an investigative reporter attempts to uncover the significance of the word "Rosebud," the last utterance of Charles Foster Kane, a celebrated publishing tycoon. In Kierkegaardian fashion, the meaning of Kane's life is revealed more in the search than in the result.

20. Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032, 1057 (1981).

21. See *infra* notes 76-115 for discussion of the influence of Einstein's work on Cohen.

22. This shift of focus would parallel Ludwig Wittgenstein's emphasis upon "showing" that about which language cannot speak. The emphasis upon "showing" reflected a shift in perspective on the propositional calculus which verified language against reality. Initially viewing the

cision-making.²³ From another standpoint, the change of discourse might be characterized as a proximate result of a shift in Cohen's perception of the distinction between truth and value,²⁴ or, in more practical terms, a more compelling perception of the *psychological* difficulty of comparing pleasures and pains quantitatively,²⁵ a difficulty which gnaws at the intellect even after the *logical* possibility of the comparison is acknowledged. Yet again, the shift from the hedonic discourse to the human rights discourse might be seen as running parallel to a larger contextual shift of philosophic discourse generally. By the middle of the twentieth century, philosophers were not speaking of their discipline as a means of verifying assertions through pure logic, but as a means of imparting wisdom by understanding human modes of experience in fundamentally human terms.²⁶ Felix Cohen's rhetorical recalibration

propositions as the mirror of reality, Wittgenstein later saw the propositional calculus as a kind of metaphorical scaffolding for scientific knowledge. Propositions were useful in delimiting what was scientifically verifiable, but useless for designating a "higher" ethical knowledge. Ethics could not be demonstrated in propositions. It could only be shown in a form of life which is itself a precondition of language. See ALLAN JANIK & STEPHEN TOULMIN, *WITTGENSTEIN'S VIENNA* 188-91 (1973) (delineating the relation of logic and ethics in Wittgenstein's critique of language, concluding that the purpose of the *Tractatus* was "as much ethical as logical"); PHILIP R. SHIELDS, *LOGIC AND SIN IN THE WRITINGS OF LUDWIG WITTGENSTEIN* 86 (1993) (explicating the "ethical and religious significance" of the say/show distinction).

23. The "logical explication of possible ethical systems" is Cohen's essential focus in *ETHICAL SYSTEMS*, *supra* note 8, at 125, 145-227. The analysis is in accord with the propositional calculus of the "early" Wittgenstein, seeking to test the concepts (e.g., good, bad, better, worse) of *ethical propositions* against empirical referents. *Id.* at 127-45. "A science," Cohen asserts, "may be usefully defined as a set of propositions whose truth or falsity is to be established." *Id.* at 127 (citing BERTRAND RUSSELL, *PRINCIPLES OF MATHEMATICS* 3 (1903)).

24. See *ETHICAL SYSTEMS*, *supra* note 8, at 192-93 (viewing the distinction between truth and value as virtually absolute). The elementary failure to distinguish between truth and value, Cohen contended, was the mistake made by F. H. Bradley when he rejected hedonism (the identification of intrinsic goodness with a surplus of pleasure) on the ground that it made every person "a law unto himself," since any person can interpret valuations of pleasure with as much authority as any other person. *Id.* Cohen insisted that the *fact* that hedonic measurements will bear different interpretations has no bearing on the *truth or falsity* of hedonism's essential premise. *Id.*

25. See *ETHICAL SYSTEMS*, *supra* note 8, at 196 (deeming this "psychological difficulty" inconsequential). Any argument against hedonism could only be meaningful by being directed against hedonism's logical structure. *Id.* Cohen recognized that a hedonic calculus could not be precise in a quantitative sense because there were no divisible units to multiply according to intensity and duration. But this did not matter because "*the qualitative comparison of any two events or set of events with respect to the contained pleasantness is always theoretically possible.*" *Id.* at 196-97 (emphasis in original). If quantitative divisibility were a prerequisite, Cohen noted, we could not measure relations (e.g., distances) or entities with an infinitely divisible number of parts (e.g., spaces and temporal durations). *Id.* at 199-200.

26. This was true even of some mainstream logical positivists. See, e.g., Friedrich Waismann, *How I See Philosophy*, in *LOGICAL POSITIVISM*, *supra* note 7, at 345:

Philosophic arguments are, none of them, logically *compelling*: they really screen what actually happens—the quiet and patient undermining of categories over the whole field of thought. . . . Their purpose is to open our eyes, to bring us to see things in a new way—from a wider standpoint unobstructed by misunderstandings.

Id. at 364.

could thus represent the difference between philosophy conceived as science and philosophy conceived as edification.²⁷

Bertrand Russell, emphasizing the scientific character of philosophy, asserted logical form as the essence of philosophical thought,²⁸ just as Kant had asserted a priori truths.²⁹ The language of philosophy was accordingly the language of signified relationships³⁰—essentially, experience translated into mathematical form—and the authority of philosophical criticism lay in its indubitability.³¹ This attitude prevailed until Ludwig Wittgenstein, in his later writings, undermined the assertion that truth could be measured by a correspondence of internal representations to external states of affairs,³² and so called into question the possibility of, and the need for, a *logical* basis of epistemological certainty.³³ Felix Cohen's attempt to articulate an ethical standard of legal criticism by uncovering the operative basis of "intrinsic

27. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 10-11 (1979) (critically outlining post-Cartesian notions of "mind" and "knowledge").

28. See, e.g., Bertrand Russell, *Logical Atomism*, in *LOGICAL POSITIVISM*, *supra* note 7, at 31 ("I hold that logic is what is fundamental in philosophy, and that schools should be characterized rather by their logic than by their metaphysic[s].").

29. A. J. Ayer has observed that Russell's earliest philosophical works were written from a heavily Kantian perspective. A. J. AYER, *PHILOSOPHY IN THE TWENTIETH CENTURY* 24 (1982); see also RAY MONK, *LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS* 286 (1990) (Moritz Schlick similarly interpreted Wittgenstein's writings regarding syntax of systems of propositions as evincing a Kantian attempt to describe a necessary "structure of appearances").

30. See Russell, *Logical Atomism*, *supra* note 28 (asserting a philosophy characterized by logic, not metaphysics); KRAFT, *supra* note 7, at 16-83 (explicating the essence of philosophy as a mathematically inspired language).

31. See KRAFT, *supra* note 7, at 114-60 (logical empiricists' account of truth).

32. That is, Wittgenstein abandoned his "picture theory" explicated in the *Tractatus*. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* propositions 4.01-4.012, 4.03, 4.032, 4.06 (D. F. Pears & B. F. McGuinness trans., 1971).

33. Wittgenstein perceived the structure of language as misleading us into a paradigm according to which the "indubitable" or "inexorable" quality of mathematics lay in a mental capturing of phenomena, i.e., in a *having* of knowledge. Thus, Wittgenstein responded to G. E. Moore's assertion that we have fundamental perceptions of external phenomena (e.g., our body parts) which we *know* are real by stating that Moore was misusing the term "knowledge." The certainty—the indubitable, inexorable confidence with which Moore speaks—is not the result of *knowing* the *things* he asserts. Rather, Moore is certain about these phenomena because doubting their existence would be nonsensical. "Certain propositions belong to my 'frame of reference,'" Wittgenstein concluded. "If I had to give *them* up, I shouldn't be able to judge *anything*." MONK, *supra* note 29, at 557. All human understanding, and all human language, becomes meaningful by "what stands fast around it," by a "form of life" against which the speaker's very sense of self is given definition. SHIELDS, *supra* note 22, at 16-19. Neither language nor mathematics requires a theory to verify its origins. The attempt to construct such a theory is misguided. MONK, *supra* note 29, at 326-27. Monk explains:

A proof in mathematics does not establish the truth of a conclusion; it fixes, rather, the *meaning* of certain signs. The "inexorability" of mathematics, therefore, does not consist in *certain knowledge* of mathematical truths, but in the fact that mathematical propositions are *grammatical*. To deny, for example, that two plus two equals four is not to disagree with a widely held view about a matter of fact; it is to show ignorance of the meanings of the terms involved.

Id. at 418.

goodness"³⁴ took place within the interstices. Accordingly, his language in *Ethical Systems and Legal Ideals* resembles that of Russell's *Principles of Mathematics*,³⁵ while his later works, for example, *Field Theory and Judicial Logic*,³⁶ appear to anticipate positions taken by Wittgenstein in his *Philosophical Investigations*.³⁷

The classic form of analytical philosophy practiced by the Vienna Circle, and given its most eloquent expression in Wittgenstein's *Tractatus*, supposed that knowledge about the world could be verified by a correspondence to logical form.³⁸ Elementary propositions composed the structure of language—and hence, thought—just as atomic particles composed the structure of matter.³⁹ These "atomic" propositions provided the basis of all inference, and so all inferences were verifiable.⁴⁰ *Tautologies* (statements of logic or mathematics) appropriately were judged as "true" or "false" according to the correspondence of the statement to the structure of elementary propositions.⁴¹ *Factual propositions* (statements which could be empirically tested) appropriately were judged as "true" or "false" according to the correspondence of the statement with the apprehensions of sense experience.⁴² Any other type of statement was nonsense. "[T]he meaning of a statement lies in its method of verification," declared Rudolph Carnap.⁴³ "A statement asserts only so much as is verifiable with respect to it."⁴⁴

The principle of verification dictated a circumscribed role for ethics. *Goodness* and similar concepts, being impossible to verify, were inherently

34. See *ETHICAL SYSTEMS*, *supra* note 8, at 145-227 (positing an empirically verifiable good).

35. See *supra* notes 13 and 23-24.

36. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238 (1950), *reprinted in* *THE LEGAL CONSCIENCE*, *supra* note 4, at 121 [hereinafter *Field Theory and Judicial Logic*.]

37. Compare Felix Cohen's comments on the meaning of the Twenty-third Psalm, *infra* text accompanying note 69, with Wittgenstein's comparison of language to music, *MONK*, *supra* note 29, at 538 ("Understanding a sentence is much more akin to understanding a theme in music than one may think.") (quoting *Philosophical Investigations* II, xi). Monk comments: "The example of understanding music was important to [Wittgenstein] . . . because it is clear that the meaning of a piece of music cannot be described by naming anything that the music 'stands for.'" *MONK*, *supra* note 29, at 538. For excellent technical studies of Wittgenstein's concept of meaning, particularly his use of the term "language games," see Norman Malcolm, *Wittgenstein's Philosophical Investigations*, in *LUDWIG WITTGENSTEIN: THE MAN AND HIS PHILOSOPHY* 181 (K. T. Fann ed., 1978) and Paul Feyerabend, *Wittgenstein's Philosophical Investigations*, in *LUDWIG WITTGENSTEIN: THE MAN AND HIS PHILOSOPHY*, *supra*, at 214.

38. See *WITTGENSTEIN*, *supra* note 32 (language describes facts entirely); see also H. O. MOUNCE, *WITTGENSTEIN'S TRACTATUS: AN INTRODUCTION* 22-48 (1989) (same).

39. See *WITTGENSTEIN*, *supra* note 32, at propositions 4.2-4.25; MOUNCE, *supra* note 38, at 39-48; see also Russell, *supra* note 28, at 44-45 (philosophical language built of simplified symbols).

40. *WITTGENSTEIN*, *supra* note 32, at propositions 4.2-4.25.

41. MOUNCE, *supra* note 38, at 39-48.

42. *Id.*

43. Rudolph Carnap, *The Elimination of Metaphysics Through Logical Analysis of Language*, in *LOGICAL POSITIVISM*, *supra* note 7, at 60, 76.

44. *Id.*

misleading. "Whatever scientifically knowable properties a thing may have," wrote C. L. Stevenson, "it is always open to question whether a thing having these (enumerated) qualities is good. For to ask whether it is good is to ask for *influence*."⁴⁵ Insofar as traditional ethical questions might be reformulated in terms which are empirically verifiable, the questions are meaningful as factual inquiries of psychological motivation.⁴⁶ Otherwise, the questions are at best meaningless, and at worst diabolical. The best that the philosopher can accomplish is to clarify in a precise manner the emotive drives masquerading as factual propositions.⁴⁷

If the principle of verification were not operative, however, the task of ethics, and that of philosophy generally, would generate out of a very different perspective.⁴⁸ In what initially was an attempt to delineate the syntactical structure connecting elementary propositions, Wittgenstein in fact attained a very different perspective—one that lead him to abandon the principle of verification.⁴⁹ The "later" Wittgenstein did not look for the meanings of words in the syntax of propositions, but in the *forms of life* of the persons using the words.⁵⁰ Language was, of course, subject to rules, but the logic which impelled meaning was not a priori.⁵¹ Rules acquired their power as a matter of context.⁵²

The implications of this new theory of meaning were grave. "Knowledge" itself became a problematic concept. For if the meaning of a proposition does not lie in its correspondence to a logical structure determining the possibilities of language (thought) in the same manner as the logical structure of mathematics determines the possibilities of physics (the world), it is difficult to state precisely the meaning of knowledge.⁵³ Knowledge cannot be

45. C. L. Stevenson, *The Emotive Meaning of Ethical Terms*, in LOGICAL POSITIVISM, *supra* note 7, at 264, 280.

46. Moritz Schlick, *What Is the Aim of Ethics?* (David Rynan trans.), in LOGICAL POSITIVISM, *supra* note 7, at 247, 260-61.

47. See Stevenson, *supra* note 45, at 281: "What I should like to do is to *account* for the confusion [that prompts one to use "good" in an *a priori* sense]—to examine the psychological needs which have given rise to it, and to show how these needs may be satisfied in another way."

48. See RORTY, *supra* note 27.

49. See *supra* note 33.

50. See *supra* note 33; see also Malcolm, *supra* note 37, at 202-04 (explaining Wittgenstein's notion of "form of life").

51. Malcolm, *supra* note 37, at 202-04; see also Feyerabend, *supra* note 37, at 228-40 (explaining Wittgenstein's "instrumentalist" theory of language).

52. Malcolm, *supra* note 37, at 202-04.

53. Cf. RORTY, *supra* note 27, at 12:

The picture which holds traditional philosophy captive is that of the mind as a great mirror, containing various representations—some accurate, some not—and capable of being studied by pure, nonempirical methods. Without the notion of the mind as mirror, the notion of accuracy as representation would not have suggested itself. Without this latter notion, the strategy common to Descartes and Kant—getting more accurate representations by inspecting, repairing, and polishing the mirror, so to speak—would not have made sense. Without this strategy in mind, recent claims that philosophy could consist of "conceptual analysis" or "phenomenological analysis" or "explication of meanings" or examination of "the logic of our language" or of "the structure of the

conceived as the accurate representation of reality in a world where propositions are anchored in different realities.⁵⁴ Without the verification principle, the concept of "ethics" is equally problematic. If one cannot define knowledge, one can hardly define ethics, which is necessarily a form of knowledge. No less a logician than Moritz Schlick had asserted that "ethics is a system of knowledge, and nothing else; its only goal is the truth."⁵⁵

Felix Cohen's primary concern in *Ethical Systems* was to ground the concept of goodness in empirically verifiable criteria—insofar as this was possible.⁵⁶ He knew that, logically, goodness could not be defined.⁵⁷ *Good*, he said, like the mathematical *x*, takes a value only when it is assigned.⁵⁸ If someone makes the ethical judgment, "*A* is intrinsically good," and means, Cohen says, "*A* pleases me,"⁵⁹ the judgment is *logically* valid because *x* is given a definite reference in the speaker.⁶⁰ Of course, if a second speaker were to assert, "*A* does not please me," his judgment also would be logically valid. And so with a third speaker.⁶¹ Therefore, it cannot be asserted that what pleases many people has more intrinsic value than what pleases a few.⁶² Nevertheless, intuition dictates that what is pleasing to people is good and what is painful to people is not good, and so pleasure (a verifiable sensation) becomes the meaning of goodness.⁶³ Ethical assertions are in this sense verifiable, though the integrity of the measurement must appeal to something as unverifiable as intuition.⁶⁴

By the time he wrote *Field Theory and Judicial Logic*, Cohen's perspective had changed. His focus was no longer upon establishing an operative principle for the verification of goodness, but upon understanding the linguistic infelicities which obscure radically different meanings of words. "Are law-

constituting activity of consciousness" would not have made sense. It was such claims as these which Wittgenstein mocked in the *Philosophical Investigations*, and it is by following Wittgenstein's lead that analytic philosophy has progressed toward the "post-positivistic" stance it presently occupies.

Id.

54. Cf. *id.* at 10: "[T]he notion of 'accurate representation' is simply an automatic and empty compliment which we pay to those beliefs which are successful in helping us do what we want to do."

55. Schlick, *supra* note 46, in *LOGICAL POSITIVISM*, *supra* note 7, at 247 (emphasis in original). Even the "early" Wittgenstein was critical of Schlick's approach to philosophical ethics. See JANIK & TOULMIN, *supra* note 22, at 192-96 (correspondence regarding *Tractatus*).

56. *ETHICAL SYSTEMS*, *supra* note 8, at 116 ("Values are facts The possibility of a science of ethics rests upon the applicability of scientific method to those facts, whether 'natural' or non-natural, whether discovered by introspection or by external observation, which form the substance of ethical knowledge.").

57. *Id.* at 227.

58. *Id.* at 153.

59. *Id.* at 154.

60. *Id.*

61. *Id.* at 154-55.

62. *Id.* at 155.

63. *Id.* at 188.

64. "Hedonism, as its more able exponents have recognized, cannot be proved. The only evidence for its truth can be the obviousness of the value judgments to which it leads" *Id.*

yers liars?" he asked,⁶⁵ noting the inevitable discrepancies between recitations of facts provided by opposing lawyers and sworn to by opposing litigants. Logically, it would seem that at least half of the lawyers and litigants in any controversy are lying about one or more critical facts. But this characterization of "lying" in judicial proceedings is illusory insofar as the very concept "truth" has different meanings to the lawyer and the logician.⁶⁶

To the logician, a proposition *must* be either true or false.⁶⁷ Ambiguity is not possible. Even so empirically grounded a statement as "It is raining," strictly speaking, cannot be a proposition, since it is true at one time and in one place but not in another.⁶⁸ But in the course of living, we make such statements, and they mean something:

One of the great modern logicians, Alfred North Whitehead, used to say: "We shall meet propositions in heaven." By this he meant that the symbolism of terrestrial life is too fuzzy ever to reach absolute precision, so that unambiguousness is an ideal rather than an attainable fact. Every actual humanly constructed sentence has different shades of meaning to different readers. This is most likely to be the case in fields of controversy where different readers bring different examples, contexts, and values to bear on any given word. In any such situation, a sentence will embody not a single proposition but several propositions which are ideally distinguishable. Some of these propositions may be true. Some may be false. The relation of true meanings to false meanings that flow from a single sentence generally involves a complicated quantitative distribution pattern. The simple, traditional true-false dichotomy is often quite useless.

Take, for instance, a typical humanly constructed sentence, one which has been uttered, down through some 3000 years, by hundreds of millions of human beings of many races, many tongues, and many religions:

The Lord is my Shepherd; I shall not want.

What sense does it make to ask whether this sentence is true or false?⁶⁹

The statement is not devoid of meaning, Cohen concluded.⁷⁰ Indeed, it would seem to mean many things to many people. But the meaning is always dependent upon a personal frame of reference.⁷¹ We commonly acknowledge the fact of radically different frames of reference with respect to religious assertions. Why, Cohen asked, should frames of reference be univocal with respect to other modes of speech?⁷² When we ask for the *real* or *true*

65. *Field Theory and Judicial Logic*, *supra* note 36, at 238, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 121.

66. *Id.* at 239, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 122.

67. *Id.*

68. *Id.*

69. *Id.*, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 122-23.

70. *Id.* at 240-41, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 123-24.

71. *Id.*

72. *Id.*

meaning of the Twenty-third Psalm—or, by implication, the real meaning of a contract or of the First Amendment—we are asking an illusory question, having misconstrued the character of the reality we are seeking.⁷³ Like the “later” Wittgenstein, the later Cohen had developed a keen awareness of the multivarious functions served by human words and, like Wittgenstein, had concluded that *meanings* of words arise from the different contexts in which they are formed and apprehended.

From the Wittgensteinian perspective, human knowledge is not the result of a correspondence between an external object and an internal cognitive perception, but of *living* in a particular manner.⁷⁴ All language, and all human understanding, becomes meaningful by “what stands fast around it,” by a “form of life” against which a speaker’s very sense of self is given definition.⁷⁵ Neither language nor mathematics requires a theory to verify its origins. The attempt to concoct such a theory evinces that the meanings sought have already been overlooked.

II. THE INFLUENCE OF EINSTEIN

In a universe divested of absolute motion,⁷⁶ space and time are functions of one another,⁷⁷ and the meaning of any concept can be grasped only in terms of its relationships.⁷⁸ The legal realists had grasped this significant feature of Einstein’s theory of relativity. Just as there could be no motion apart from space and time, so there could be no law apart from emotions, instincts, and the entire range of economic, social, and political forces which compose a culture.⁷⁹ Every legal decision was at bottom an ethical decision, not a

73. *Id.*

74. See *supra* note 33.

75. See *supra* note 33 for a discussion of sources analyzing this idea.

76. The denial of absolute motion is the essential characteristic of Einstein’s theory of relativity. ALBERT EINSTEIN, *OUT OF MY LATER YEARS* 41 (1991).

77. *Id.* at 58 (“In the generalized theory of relativity, the doctrine of space and time, kinematics, is no longer one of the absolute foundations of general physics. The geometrical states of bodies and the rates of clocks depend in the first place on their gravitational fields, which again are produced by [matter].”).

78. Cf. MICHAEL WHITE & JOHN GRIBBEN, *EINSTEIN: A LIFE IN SCIENCE* 132-33 (1994):

The new picture of the universe casts aside the everyday notion of space [and time] and replaces it by an almost tangible continuum in four dimensions (three of space and one of time) . . . something that can be bent and distorted by the presence of material objects.

It is easier to visualise what is going on in terms of a two-dimensional elastic surface. That is a “model” of Einstein’s version of empty spacetime. Now imagine dumping a heavy bowling ball in the middle of the sheet. The sheet bends. That is Einstein’s model of the way space distorts near a large lump of matter.

When you roll a marble across the original flat sheet, it makes only a tiny indentation, and rolls in a straight line. But when you roll the marble near the bowling ball, the distortion in the rubber sheet caused by the bowling ball makes it follow a curved path. That is Einstein’s model for the force of gravity. Objects are simply following a path of least resistance, a geodesic—the equivalent of a straight line through a curved portion of spacetime.

79. See *supra* notes 5 and 6.

neutral deduction from precedential mandates "discovered" in the nature of things. Felix Cohen's *Field Theory and Judicial Logic* is largely an attempt to clarify this correlation between the new physics and ethical-judicial theory by emphasizing the different contexts or fields in which an action is perceived as morally significant, and the possibility of translating the significance into other fields. Judicial decisions, like other events, could be predicted by formulating "the successive 'distortions' that any observed social fact will undergo as it passes through different value-charged fields in the 'world-line' of its history."⁸⁰ Opinions, like light, bend as the realignment of matter warps the "life space" through which they must travel.⁸¹

Of course, the predictability of a judicial decision does not ensure its goodness. For the meaning of goodness, like the meaning of "The Lord is my Shepherd," is discernible only by the forms of life which stand around it, acting as matter to shape the gravitational path of emotive energy.⁸² From the beginning, in *Ethical Systems and Legal Ideals*, Cohen acknowledged that the accuracy of the hedonic calculus which measured goodness was not certified by mathematical theory.⁸³ From the perspective which views even mathematical truth as context-dependent,⁸⁴ the hedonic calculus appears even more dubious a tool by which to measure the truth of ethical assertions.⁸⁵ The new dubiety was not the result of mathematical relativity exposing the

80. *Field Theory and Judicial Logic*, *supra* note 36, at 243, reprinted in THE LEGAL CONSCIENCE, *supra* note 4, at 127 (citation omitted).

81. According to Einstein's model, it is spacetime which curves. Light travels in a geodesic of least resistance through the curvature. WHITE & GRIBBEN, *supra* note 78, at 140. "Life space" is Cohen's term for the social field equivalent of spacetime. See *infra* note 89 for Cohen's analysis of this point.

82. See *supra* note 78 for analogy of spacetime.

83. ETHICAL SYSTEMS, *supra* note 8, at 195.

84. "We realize that Euclidean and non-Euclidean geometries can both be true. What is a straight line in one system may be an ellipse in another system . . ." *Field Theory and Judicial Logic*, *supra* note 36, at 241.

85. The difference in dimension between Euclidean and non-Euclidean geometry essentially parallels the difference between classic utilitarianism and field theory. Euclidean geometry is "flat," and so the Newtonian calculus integrating it proved inadequate to express the theory of relativity, which required a mathematical description of the curvature of four-dimensional spacetime. WHITE & GRIBBEN, *supra* note 78, at 129-30; EINSTEIN, *supra* note 76, at 58. Einstein formulated the precise equations only after becoming familiar with the work of Bernhard Riemann, whose calculations with respect to the geometry of curved surfaces provided a multi-dimensional model enabling the development of tensor theory calculus. WHITE & GRIBBEN, *supra* note 78, at 129-30. Bentham's calculus appropriately measures effects in straight lines, so to speak, irrespective of the curvatures in the life space upon which the pleasure/pain lines are drawn. The lack of dimension necessarily distorts the measurement of ethical assertions, whose truth, like the truth of "The Lord is my Shepherd," has meaning only in relation to such curvatures. Cohen used geometric systems to illustrate the concept of "systematic relativism" among different philosophical methods. Felix S. Cohen, *The Relativity of Philosophical Systems and the Method of Systematic Relativism*, 36 J. PHIL. 57, 59-61 (1939), reprinted in THE LEGAL CONSCIENCE, *supra* note 4, at 95, 97-98.

[S]ystematic relativism . . . suggests that the differences between philosophic systems are not differences to which the categories of truth and falsity are relevant, that we are dealing here rather with differences of logical structure or perspective, and that philoso-

emotive basis of hedonic measurement—this basis was *always* known⁸⁶—but rather the product of the new perspective on the character of knowledge. The perspective exemplified in *Ethical Systems and Legal Ideals* is one focused upon the problem of verifying ethical propositions.⁸⁷ The perspective exemplified in *Field Theory and Judicial Logic* is one in which the question of verification has become secondary, for verification follows as a matter of context. To say that something is a *fact* is simply to say that it is true in a given context.⁸⁸ The logic of verification, then, is not nearly so much a matter of interest to the ethicist as is the context in which the logic operates.⁸⁹ The goodness of a human act, like the sense of a mathematical calculation⁹⁰ or the correctness of a judicial application of precedent,⁹¹ is not verifiable by logic; it simply *is*. The context of the act, that which “stands fast around it,” the “observation post”⁹² from which the phenomenon is reported and from which its “world-line”⁹³ of effects is determined, that is, its “field,”⁹⁴ will determine the comparative goodness of the act, not as a matter of neutral calculation, but as a matter of participation.⁹⁵ The point can be apprehended

phies which have been regarded as contradictory may turn out on analysis to be compatible—or even identical—in content, though differing as to form.

Id. at 59.

86. See *supra* note 25 for Cohen's defense of utilitarianism.

87. See *supra* notes 23-25 for a discussion of ethics and logical positivism.

88. This is made explicit, in Cohen's view, by Einstein's theory of relativity. See *Field Theory and Judicial Logic*, *supra* note 36, at 242-43 (judicial opinions can only be understood in context), *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 126.

89. Analogizing field theory in physics to jurisprudence, Cohen commented that The absolute space of unchanging rules and unmoving precedents that characterized traditional jurisprudence is gone. In its place we have a “life space” with many “value regions.” Whatever passes from one region to another—a rule, a precedent, or a statement of facts—changes its weight, its shape, and its direction in accordance with “the lay of the geodesics” of that region.

Field Theory and Judicial Logic, *supra* note 36, at 250 (citation omitted), *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 134.

90. See *supra* notes 22 and 33 for a discussion of the idea that language and concepts are products of a dialectic between reality and our perceptions.

91. *Field Theory and Judicial Logic*, *supra* note 36, at 245, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 129.

92. *Id.* at 243, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 126.

93. *Id.*, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 126-27.

94. *Id.* at 265, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 142-43.

95. “The egocentric distortion [of value judgments, analogous to distortion in physics] we all recognize, at least in others. . . . The facts that we dislike we call theories; the theories that we cherish we call facts.” *Field Theory and Judicial Logic*, *supra* note 36, at 250, *reprinted in* THE LEGAL CONSCIENCE, *supra* note 4, at 134.

Quantum theory revealed that an observer can never be separate from the phenomena being observed. Although Cohen did not explicitly appeal to the Heisenberg Uncertainty Principle, his observations in *Field Theory and Judicial Logic* imply it. The Uncertainty Principle states that the more precisely one measures the position of a subatomic particle, the less precisely one can predict its subsequent movement. Professor Tribe has illustrated the phenomenon concretely by imagining an attempt to fix the coordinates of a basketball on a gymnasium floor:

The problem is that, for the ball to be visible, at least a little light must shine on it, and reflect off it. True, the light particles individually seem ephemeral. But when they

more practically in the insightful epithet of a contemporary heir of the Legal Realist movement: "What protects us against Nazism is not the belief that reason can prove that it is wrong. What protects us is outrage."⁹⁶

Indeed, the Nazis might account in part for this change of perspective and for the new language of human rights which followed in the wake of *Field Theory and Judicial Logic*. Cohen was particularly sensitive to the power of totalitarian rhetoric, and he analyzed the legislative means of combatting propaganda in a series of articles undertaken for the Institute of Living Law.⁹⁷ In these articles, he displayed a confidence in the power of rational argument to expose factual inaccuracies upon which totalitarian arguments are predicated, but realized that the life force necessary to win the Second World War had little to do with logic or verification. He made this

bounce off the ball they still move it a little—although the movement is usually too small to detect with the naked eye. Of course, if light particles had the momentum of moving marbles, the movement would be obvious. And if you could tell where the basketball was located only by hitting it with light particles that had the momentum of moving basketballs, the process of finding its location would inevitably cause quite a change in velocity.

That is precisely the situation at the subatomic level, the province of quantum theory. Because light particles, which physicists call photons, can easily act on the tiny electrons, using a light beam to figure out the precise location of an electron at an instant in time would significantly disturb its velocity. This tradeoff is the result of the Uncertainty Principle at work. For this reason, the principle is sometimes put in terms of a relationship between the observer and the observed: the more you try to learn about an object's position, the less you can know about its velocity, and vice versa. In any case, the act of observing always affects what is observed.

Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 18 (1989) (footnote omitted); cf. WERNER HEISENBERG, *PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE* 47-48 (1958) (all observations require interpretation). See generally A. E. E. MACKENZIE, *THE MAJOR ACHIEVEMENTS OF SCIENCE* 323-26 (1960) (discussing uncertainty principle and quantum theory).

According to Cohen, the distortion of value-intensive fields is the proximate result not of light particles, but of language. For example,

while a white man "travels" or "commutes," an Indian (like a buffalo) "roams." A white man may be of "mixed ancestry," an Indian (or a cow) is a "mixed breed." Land held by a group of white men in accordance with an intricate apportionment of individual rights is called "corporate" or "partnership" or "family" property; land held by a group of Indians under arrangements of equal or greater intricacy is dubbed "communally occupied."

Field Theory and Judicial Logic, *supra* note 36, at 264, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 149-50.

96. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 55 (1984).

97. Felix S. Cohen & Edith Lowenstein, *Combatting Totalitarian Propaganda: The Method of Suppression*, 37 U. ILL. L. REV. 193, 210-13 (1942) (dual-edged sword of suppressive legislation); James E. Curry et al., *Combatting Totalitarian Propaganda: The Method of Exposure*, 10 U. CHI. L. REV. 107 (1943) (congressional acts combatting subversive propaganda); Lucy M. Kramer & Felix S. Cohen, *Combatting Totalitarian Propaganda: The Method of Enlightenment*, 27 MINN. L. REV. 545, 573 (1943) (arguing against protection of civil liberty in face of totalitarian threat). The articles were reprinted in a pamphlet published by the Institute of Living Law. *COMBATTING TOTALITARIAN PROPAGANDA: A LEGAL APPRAISAL* (Felix Cohen ed., 1944).

point plainly and eloquently in an address delivered the week following the attack on Pearl Harbor:

If we persuade the Germans and the Italians and the Japanese that our objective in this war is their extermination, they will not surrender and, I think, in that event we cannot win the war.

If we ourselves are firmly persuaded that submission to the principle of Fascism is worse than death, then we will not surrender and we cannot lose.

So I think in the long run our chances of victory depend upon the strength of our feeling that our way of life is superior to the Axis' way, superior to the way of totalitarianism. I say that our chances of victory depend upon the *strength* of this feeling rather than the *fact* of this feeling. It is the intensity of this feeling, its durability, its capacity to take heavy blows and to retain its integrity that will determine our chances of winning this war and not the fact that perhaps 99 percent of all Americans believe that the American way of life is superior to the Axis' way. The question is not how many believe in that superiority but how we value that superiority.⁹⁸

The perspective from which we observe the "world-line" of events is not a physical space, but an emotive disposition, a place of feeling.⁹⁹ It is, then, the quality of feeling that in the end shall determine the moral significance of what we apprehend.¹⁰⁰ The *strength* of the particular feeling to which Cohen refers would of course be measurable in the Benthamite hedonic calculus¹⁰¹ and verifiable according to the actual sacrifices offered by individuals and

98. Felix S. Cohen, Address (Dec. 1941) (transcript available in Beinecke Rare Book and Manuscript Library, Western Americana Collection, Yale University). The emphasis in the quotation is Mr. Cohen's. The audience is not precisely identified, though references indicate a predominately Jewish attendance.

99. In a model taken from physics, fact and value approximate motion and velocity. According to Einstein's principle of equivalence, motion and velocity cancel each other out. This is illustrated by Einstein's picture of a man freely falling through space, experiencing no gravitational field during the fall. WHITE & GRIBBIN, *supra* note 78, at 127-28. In the context of falling, the subject does not feel his own weight, and so does not perceive himself as falling. In a perpetually free-falling elevator, the occupants would float in zero gravity; they would become grounded on the elevator floor, so to speak, only if the velocity could be slowed by the influence of matter, such as a safety cable or the ground. *Id.* So, too, in a social context, value (like motion) will be indiscernible until facts (like velocity) are no longer aligned in equivalence and an emotive force (like gravity) intervenes. From the perspective within the "elevator" of Nazi Germany (or any other society), fact and value are indistinguishable until emotion generates a second-level account, a "standing back" from one's social fabric. The separation of fact and value is in this sense artificial—a psychological invention which allows us to cope, not a categorical distinction of nature which the mind simply mirrors. *Cf.* RORTY, *supra* note 27.

100. Again, modelling ethical theory upon physics, one can view emotions, passions, and feelings as the equivalent of matter acting to bend the dimensions of spacetime across which perceptive light travels in a path of least resistance. See WHITE & GRIBBIN, *supra* note 78 for an analogy of spacetime curvature.

101. The Benthamite measurement would lack the contextual dimension, focusing solely upon the subject. The social field, or "life space," see *supra* note 89, which the feeling necessarily shapes (as matter shapes spacetime) is not integrated into the hedonic calculus. See *supra* note 85 in which utilitarianism is analogized to Newtonian physics.

groups. But there is no practical reason for such a measurement apart from predicting an outcome, and the prediction of an outcome is not at issue to the degree that one possesses the feeling—the qualitative point of the feeling being that life is unimaginable on terms dictated by Nazis. The hedonic calculus is, in this context, useless because anyone making the calculation is missing the point by abrogating the meaning of the feeling.¹⁰² Again, acknowledging the *fact* that a moral act rests upon an unverifiable feeling has not disproved the hedonic calculus; rather, experiencing the *strength* of the feeling has rendered the hedonic calculus less useful. The difference is one of perspective. The perspective is a matter of disposition. Disposition cannot be adjudged “true” or “false.”

A reference to Jerome Frank in the same address illustrates this fundamental difference of dispositions, that is, that which perceives the raw empirical separation of fact and value,¹⁰³ in contradistinction to that which perceives an integration of fact and value in a grammar delineating the human qualities of life. Criticizing Judge Frank’s appraisal of American Jewish attitudes toward the possibility of American intervention in the war against Germany, Cohen perceived a fundamental misperception of the *fact* of a distinct Jewish culture, both in America and Europe. “Much as I admire the brilliance of Jerome Frank’s intellect,” Cohen declared, “I cannot help feeling that it is a misuse of that intellect to think up astute reasons for denying obvious facts.”¹⁰⁴ He continued:

Mr. Frank first achieved fame as an authority on law by writing a book designed to prove that there is no law, that there are merely isolated decisions by individual judges which depend upon psycho-analytic and behavioristic psychological factors and not upon any general principles. Having disposed of law, Mr. Frank became an expert on America’s foreign relations, by writing a book designed to show that we have no essential foreign relations, and if we only pay attention to our own problems at home we will not have to worry about events and ideas outside the Western hemisphere. Having disposed of law and international relations, Mr. Frank now becomes an expert on the Jews by writing an article in the Saturday Evening Post designed to prove that there are not any Jews, merely Jewish Americans in the statistical sense in which there are Americans whose names include the letter “V”. Since there are no Jews, Mr. Frank thinks Anti-Semitism is all a mistake, and the Anti-Semites,

102. That is, according to the model of physics, the meaning of feeling (corresponding to matter) is its influence upon the social field or “life space” (corresponding to spacetime). See *supra* note 89. Following the metaphor of the elastic surface, WHITE & GRIBBEN, *supra* note 78, the meaning of the bowling ball is its effect upon the marble and all subsequent traversing objects.

103. Llewellyn also asserted a strict separation of fact and value, in contrast to the positions of Felix Cohen, Morris Cohen, and John Dewey, whom Llewellyn viewed as an inspiration for his own work in jurisprudence. HORWITZ, *supra* note 5, at 183; TWINING, *supra* note 5, at 422-23 & n.130.

104. Cohen, Address, *supra* note 98.

upon being convinced of the error of their ways, will probably disappear.¹⁰⁵

Regardless of the accuracy of Cohen's interpretation of Frank's belief in the existence of Jews, there is no inaccuracy, or, more precisely, no unfairness, in the assertion that Frank did not believe in the existence of law. Frank himself expressed regret at having utilized the term "law" in his book, *Law and the Modern Mind*.¹⁰⁶ In Frank's understanding, the term "law" properly designated only specific decisions of judges, decisions which were predictable or unpredictable only to the degree that a judge's apperception of factual data were calculable or invaluable.¹⁰⁷ He regretted using the term in his book because readers invariably connoted "law" with rules and principles, regardless of the author's technical definition.¹⁰⁸ Frank's perspective exemplifies the attitude of the philosophers of the Vienna Circle, to whom fact and value were inherently and apodictically separate.

For Jerome Frank, there is no law. There are only facts. For Felix Cohen, there is law, not as the popular mind might conceive it—as certitude logically impelled from rule and principle—but as a kind of psychological consonance against which all that is (properly) designated as human attains its form.¹⁰⁹ Law is, so to speak, a kind of grammar of the human heart.¹¹⁰

105. Cohen, Address, *supra* note 98. The sources to which Cohen referred may be: JEROME FRANK, *LAW AND THE MODERN MIND* (1930); JEROME FRANK, *SAVE AMERICA FIRST* (1938); Jerome Frank, *Red, White and Blue Herring*, SATURDAY EVENING POST, Dec. 6, 1941, at 9. Cohen reviewed *Law and the Modern Mind*: Felix S. Cohen, Book Review, 17 A.B.A. J. 111, 112 (1931), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 117. Cohen evidenced ambivalence about the book in the review.

106. Letter from Jerome Frank to Felix Cohen, (Jan. 9, 1946) (available in Beinecke Rare Book and Manuscript Library, Western Americana Collection, Yale University).

107. *Id.*; see also, Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 45 (1931); *Part Two: As Through a Glass Darkly*, 80 U. PA. L. REV. 233, 240-42 (1931) (non-legal factors influence judicial decisions); Jerome Frank, *What Courts Do in Fact*, 26 U. ILL. L. REV. 645, 662 (1931) (formalism conceals reality of decision-making); Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 580-84 (1931) (human element is irrepressible). Frank cites all three articles in his letter to Cohen. See *supra* note 106.

108. Letter from Jerome Frank to Felix Cohen, *supra* note 106.

109. Cf. Cohen, Book Review, *supra* note 105, at 112, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 179.

The questions which Mr. Frank has put to us are not as simple as the answers he has offered. Granted that much nonsense has been uttered in the name of legal logic, eternal principles, and "law apart from decisions," there is, as our author frequently recognizes in the cool retrospection of a footnote, *something* beyond decisions, in terms of which we can criticize decisions. There is something to which the judicial "hunch" should conform; there are some patterns to which it does conform.

Id.

110. Cf. Felix S. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 216-17 (1931). Cohen wrote:

If the doctrine of *stare decisis* means anything, and one can hardly maintain the contrary despite the infelicitous formulations which have been given to the doctrine, the consistency which it demands cannot be a logical consistency. The consistency in question is more akin to that quality of dough which is necessary for the fixing of a

Without grammar, the brute facts of human perception can make no more sense than brute utterances can constitute communication.

For Felix Cohen, the isolation of fact and value generates distortion, mistaking value as a higher level of abstraction when it is in fact a constituent element of perception,¹¹¹ that which stands fast around the perspective according to which moral significance is revealed. This distortion is exemplified by Judge Frank's inability to grasp the significance of the *fact* of Jewish culture. Without an adequate appreciation of the forms of life against which the components of culture are defined (language, art, spirituality, suffering), one simply cannot apprehend the more abstract composite, just as without an appreciation of grammatical form, one cannot perceive complete sentences.

The challenge of jurisprudence is to delineate the structures of human thought in a manner that reveals the implications of thinking and speaking about phenomena in a particular way.¹¹² In this mode of study, the language of "human rights" can be edifying even to those who believe that the concept is nonsense.¹¹³ The study of discourse *about* human rights becomes something like an exercise in philosophical psychology, and better enables us to understand who we are by understanding who others have thought themselves to be.¹¹⁴ The practical benefits of such a study entail, at the very least,

enduring shape. Decisions are fluid until they are given "morals." It is often important to conserve with new obeisance the morals which lawyers and laymen have read into past decisions and in reliance upon which they have acted. We do not deny that importance when we recognize that with equal logical justification lawyers and laymen might have attached other morals to the old cases had their habits of legal classification or their general social premises been different. But we do shift the focus of vision from a stage where social and professional prejudices wear the terrible armor of Pure Reason to an arena where human hopes and expectations wrestle naked for supremacy.

Id.

111. See *supra* note 99 for an analogy of ethics to physics. The *articulation* of values requires abstraction, but the phenomenon is not a proximate result of abstraction. Values are a constituent of forms of life, whether or not an emotive jolt spawns their recognition in discourse. Like the passengers in the hypothetical elevator, see *supra* note 99, we perceive only that which our form of life (motion correlating with velocity) makes possible.

112. This is the essential point of Cohen's *Human Rights: An Appeal to Philosophers*, *supra* note 16, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 171. Cohen identifies seven questions as being "at the heart of the world's great darkness today." They are: (1) When people discourse on human rights, what light does such discussion throw upon the character and motivations of the discussants?; (2) How do people in fact reach agreement on basic objectives?; (3) How do people use language to conceal disagreements on basic objectives?; (4) How do the social arrangements that we call rules of law come into being?; (5) What ethical implications follow logically from the assertion or denial of any given right?; (6) What sort of evidence can establish a human right?; and (7) Are there any human rights, and if so, what are they? *Human Rights: An Appeal to Philosophers*, *supra* note 16, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 171-75.

113. *Human Rights: An Appeal to Philosophers*, *supra* note 16, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 171-72 (discussion of question 1 *supra* note 112).

114. *Id.* at 172-74 (discussion of questions 2, 3 and 4 *supra* note 112).

a broader understanding of possible means by which to resolve emotive conflicts.¹¹⁵

But discourse *about* human rights is not enough in a relativistic world. In order to translate the moral significance observed from one perspective into the language of another, one needs a standpoint from which to translate, that is, something like a "mother tongue" against which different moral syntaxes can be determined. In other words, translation is a value-laden activity, and translators, if they are honest, must appeal to something. There must be not only discourse *about* human rights but discourse *of* human rights. The question becomes one of how to speak of that which has no formal verification.

III. THE UTILITY OF NATURAL LAW LANGUAGE

The scientific study of law, like the scientific study of religion, speaks in a descriptive mode about objectively verifiable phenomena, irrespective of any nonverifiable assertions or presuppositions comprising the object of study. It is possible to describe what judges and lawyers do, what beliefs they profess, and how their actions appear to affirm or disavow what they talk about doing, just as it is possible to describe rituals, dogmas, and attitudes of those who profess religious faith. In either example, the discourse is *about* the subject matter, not *of* it.¹¹⁶ As soon as the scientific student of religion enters church, synagogue, mosque, or fetich shrine *as a believer*, discourse in the *about* mode loses its utility. Only a language *of* faith—whether in the form of hymn, petition, profession, or silence—enables the speaker to *participate* in the divine mystery. The philosopher of law also must utilize a language in the *of* mode as soon as she enters the courtroom, the legislative chamber, or any place that justice is to be done. But what precisely is this a language *of*? A language that empowers persons to do justice must also be a language of faith.

115. Principled linguistic formulations are secondary to something like an emotive-intuitive grasp of common ground. *Id.* at 175-76 (discussion of question 7 *supra* note 112) (Utilitarians, Thomists, Hegelians, Communists, and Yogis all are likely to affirm on disparate bases the proposition of the "Universal Declaration of Human Rights" that "all human beings . . . should act towards one another in a spirit of brotherhood."); cf. ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 1-20, 304-43 (1988) (rejecting "tyranny" of an ethics deduced from immovable principles in favor of fact-specific application of general paradigms in light of specific desirable outcomes). The authors noted a personal experience of participating in a congressionally mandated commission to study and issue guidelines on biomedical and behavioral research. Commission members of widely disparate backgrounds and ideologies often agreed in their practical conclusions, becoming argumentative only when attempting to formulate express rationales. *Id.* at 16-19; cf. John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 397 (1986) (observing similar phenomenon with respect to liberal and critical legal theorists).

116. For an insightful account of the "of" and "about" modes of speech, particularly with regard to religious discourse, see PAUL L. HOLMER, *THE GRAMMAR OF FAITH* 56-80 (1978) (scientific language and language of religion).

Moral truth does not consist of verified propositions, but of confidence in the perspective from which one views human acts—a perspective which, according to the theory of relativity, actively determines the scope and significance of the act. Moral knowledge, then, is possible not because external data or a metatheory verifies conceptions of who human beings ought to be, but rather because the living of a human life implies certain habits and sensibilities without which one could not imagine the designation *human* making any sense. Humanity has, so to speak, its own grammatical form. Like mathematics, morality is a matter of fixing certain signs. This is essentially a function of language in the *of* mode. A language of human rights fixes signs.

Following Wittgenstein, Cohen would have acknowledged the impossibility of saying anything meaningful *about* morality once a verificationist mode of speech were abandoned. Language can do no more than “point” to that which it is incapable of explicating in the manner of a proof. Goodness cannot be verified by logic; it can only be experienced.¹¹⁷ The philosopher’s dilemma is that people must nevertheless speak about goodness, rooting the language in the world of measurable consequences while drawing its vitality from something beyond measure because it is beyond language.

Thomas Aquinas also faced this dilemma, resolving it, so far as possible, by allowing flexibility in the universal component to which moral language referred.¹¹⁸ Like Cohen, Aquinas believed that the ultimate goal toward which all human actions were directed was nothing more or less than human happiness.¹¹⁹ But since happiness could only be accomplished through communion with God,¹²⁰ a phenomenon beyond the descriptive powers of language,¹²¹ the measurement of happiness in any interstitial phase was necessarily imprecise and, in certain contexts, virtually impossible.¹²² Accordingly, the “natural law” maintained a capacity for variables in order to measure highly context-specific actions against an ultimate (and so imprecise) standard. The importance of the universal law lay not in its precise

117. The impossibility of verifying “goodness” by logical rules is a consistent theme in Cohen’s works throughout his career. See, e.g., Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 43 (1934), reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 17. Cohen wrote:

The study of logic may show that certain supposed proofs of the need for certain rules or judgments are not valid, but the fact that certain proofs advanced to support a given cause are not valid does not show that the cause is bad. Logic offers its powers on equal terms to good men and bad men, to good rules of law and bad rules of law.

Id. at 26; cf. *supra* notes 55-56.

118. See THOMAS AQUINAS, *SUMMA THEOLOGICA*, q. 94, art. 4. (general principles of natural law discerned by speculative reason fail to provide guidance to degree that practical applications become dependent upon circumstances); see also ANTHONY BATTAGLIA, *TOWARD A REFORMULATION OF NATURAL LAW* 96-102 (1981) (Aquinas’ distinction between general precepts of natural law and secondary precepts provides wide latitude for cultural diversity underestimated by some traditional Thomists).

119. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, bk. 3, ch. 17.

120. *Id.* at chs. 17, 25.

121. AQUINAS, *SUMMA THEOLOGICA*, q. 13, art. 10.

122. AQUINAS, *SUMMA CONTRA GENTILES*, bk. 3, ch. 43.

representation of human psychology; rather, human psychology was perceptible by means of analogical imagery demonstrating the place of the human will and intellect in the divine order of creation.¹²³ Natural law was, in this sense, metaphorical. Like the analogy of physics to jurisprudence, the analogy of law to nature served a highly useful purpose, promoting understanding of the human relation to God by a grasp of essential similarity in the relations of particular objects in the world. For Aquinas, this was the best that language had to offer. To speak of natural law is to engage in language in the "of" mode of God's creation, grasping by participation, living truth through metaphor.

Given the fact that language is incapable of integrating the "life space"¹²⁴ of ethical decisions in a mode analogous to tensor theory calculus,¹²⁵ it is only by grasping similarities in the essential relations of "natural" phenomena that one can perceive the appropriate relation of human beings to one another. In *Ethical Systems and Legal Ideals*, Cohen had acknowledged the possibility of employing natural law language in a manner consistent with his own analysis of the good life, provided that the signification of the universal component of human nature were sufficiently variable to allow for peculiarities of social contexts.¹²⁶ The impractical character of natural law language was seen as a result of its cultural baggage, not of contradictions inherent in the language:

It is only because of the unfortunate connotations and ambiguities of the phrase "natural law" that we have sought to present our own position in a different terminology. For in addition to the alternative interpretations of the doctrine already criticized, there is in the natural law terminology a confusing reminiscence of noble savages,

123. A particularly lucid explication of the Thomistic grasp of truth through analogy is offered by SAMUEL BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 51 (1993):

To argue by analogy is to reason from particular to particular. It has two phases. Its initial phase is the perception of similarity between two things, for example, that the pope is Godlike. In this respect reasoning by analogy is like poetry. For a nominalist, such a figure of speech would exemplify not rational demonstration but literary adornment. When, for instance, Hobbes said that factions in the body politic are like worms in the entrails of natural man, he meant this not as a similitude but as a simile to make more vivid his statement of what he thought was a general law of political behavior. For Aquinas, however, to perceive such an identity in difference is to grasp an important fact. To see that the pope is Godlike is to grasp a truth about the relation between the pope and the deity. The perception is poetic. It is a metaphor, not a concept. But for the essentialist, poetry is truth because the structure of reality is metaphorical. The essence that makes the two things similar is really present in both, making possible their existence.

Id.

124. See *supra* notes 81 and 89.

125. See *supra* note 85.

126. That is, one must not make the mistake of (1) identifying universal acceptance as a criterion of a law's validity, or (2) identifying universal aspects of human behavior as the basis from which law is to be derived. *ETHICAL SYSTEMS*, *supra* note 8, at 103-04. It would seem to be the second mistake to which natural law language is particularly vulnerable.

a suggestion of the untutored conscience to deal with all jural problems, a vague implication of the law-giver in the sky who is more powerful than terrestrial legislators, and a confusing double use of *law* in its normative and positive meanings. . . . It is therefore simply for reasons of methodological convenience that we prefer to substitute a formula in terms of positive law and the good life for one in terms of natural law or natural rights. In substance the two standards are equivalent natural law is taken to mean ideal law; and the alternative interpretations of the natural law theory are all to be rejected as unjustified in their claims to a supreme place in legal valuation.¹²⁷

But a change of aspect, focused upon the role of the observer in defining and delimiting phenomena, would have revealed a highly useful quality of natural law language which could outweigh even the ancient connotative infelicities.¹²⁸ If it is our perspective which determines what we perceive as good, and if language serves multivarious functions, not merely mirroring states of affairs but actively participating in them,¹²⁹ then *speaking* about the good is itself a moral act, just as speaking the words "I love you" is itself an essential instance of loving.¹³⁰

To speak of a right, then, is to participate in it. To speak of a human right is to create it in the sense of delimiting that which stands fast around our relationships and without the recognition of which we are not properly designated as human. Natural law language appears to engender a confusion of the normative and positive senses of law only because we are prejudiced in the belief that fact and value are inherently distinct. It is not natural law language that is bent; it is social spacetime. In the attempt to live human lives, natural law language might indeed serve as our best light. A language of natural morality, in some form, is the determiner of an emotive force which is *all* that can stand fast against the Nazis or their equivalents, who in every generation wait as predators upon the precipice of anomie. This insight, or something like it, is probably why Felix Cohen died speaking the language of human rights.

127. *Id.* at 110-11.

128. The term "infelicity" was used by J. L. Austin to describe the ill effects of utterances which cannot technically be designated as false. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 14 (1975). A particular type of infelicity operates by means of elements entailed, presupposed or implied in a statement. *Id.* at 47-52; see also, G. J. WARNOCK, J. L. AUSTIN 110-13 (1991). For example, the assertion that the King of Italy has gray hair cannot be designated as false without suggesting that there is in fact a King of Italy and he does not in fact have gray hair. WARNOCK, *supra*, at 112-13. Cohen's work predated Austin's, and Cohen did not use the term "infelicity." The concept nevertheless captures the difficulty Cohen perceived in the implied conditions, rather than the express assertions, of traditional natural law language.

129. See *supra* notes 78, 99-102. Language participates in states of affairs as matter participates in spacetime.

130. The insight that language actually performs functions while simultaneously describing them has been given its classic explication by J. L. Austin, who introduced the concept of "performatives." AUSTIN, *supra* note 128, at 1-11. See generally WARNOCK, *supra* note 128, at 105-51 (surveying Austin's linguistics).

CONCLUSION

The puzzle of Felix Cohen's apparent teleological shift from hedonic measurements of positive law to assertions of universal human rights can be resolved by viewing the shift essentially in terms of epistemology. Cohen's epistemological posture would seem to have evolved in a manner largely paralleling that of Ludwig Wittgenstein. The "early" Cohen, unquestionably influenced by Wittgenstein's *Tractatus*, focused upon verification of propositions, and so attempted to formulate propositions about goodness in such a way that the propositions could be tested in a manner analogous to that employed to test propositions of natural science.¹³¹ Although Cohen's later works do not refer to writings of the "later" Wittgenstein, Cohen's emphasis upon discovering the meaning of words within a contextual "field" is reminiscent of Wittgenstein's emphasis upon the "forms of life" against which words attain meaning.

Einstein's principle of relativity directly influenced Cohen and impelled him to model judicial-ethical theory on the new physics. According to the model, value judgments are not verified by facts; rather, fact and value approximate motion and velocity, integral to a dimension of spacetime which bends according to the influence of matter. Propositions are analogous to geodesics, traversing a given social field or "life space" in the path of least resistance, appearing to bend only because the life space bends. Verification must accordingly take on a "dimensional" aspect, measuring life space, not the words which traverse it. When this model is employed, the Benthamite hedonic calculus is of limited utility, as Newton's calculus was inadequate to Einstein's model. In order to measure goodness, one must develop a new calculus capable of integrating the new dimension, just as mathematicians had to develop tensor theory calculus (integrating a non-Euclidean geometry of curved spaces) in order to express relativity theory.¹³²

Because human language cannot precisely attain a level of abstraction commensurate with mathematics, the analogy of physics and ethical theory would seem to end in frustration, since nothing like tensor theory calculus can be employed. Nevertheless, human language can account in some manner for the dimensional variations of life space, and in fact does so, although such accounting (e.g., the holiness code of Leviticus¹³³) is essentially analogical, and bears no necessary resemblance to mathematics or modes of speech (e.g., Bentham's hedonic calculus) which connote scientific methodology.

131. See *supra* notes 22-75 and accompanying text for discussion of the relation of Cohen's work to Wittgenstein's philosophy.

132. See *supra* notes 76-117 and accompanying text for discussion of the relation of Cohen's works to the physical sciences.

133. In both his works appealing to the concept of human rights, Cohen referred to *Leviticus* 19:34: "The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself; for you were strangers in the land of Egypt." *Human Rights: An Appeal to Philosophers*, *supra* note 16, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 173; *Law for the Immigrant*, *supra* note 16, reprinted in *THE LEGAL CONSCIENCE*, *supra* note 4, at 481.

Ironically, natural law language is peculiarly suited to the task. As utilized by Thomas Aquinas, natural law language appropriately employs broad precepts against which human *meaning* (or the *meaning* of being human) makes sense. Like mathematics, language fixes signs. Aquinas' natural law language appropriately allows a wide range of variance in secondary precepts, allowing for differences in cultural and psychological life spaces. Most importantly, natural law language itself influences the life space dimensions as matter influences spacetime, creating through analogy an emotive-gravitational force pointing beyond human dimensions.¹³⁴ This was probably Felix Cohen's impetus for utilizing in his last writings a concept of human rights in apparent disregard of Bentham's hedonic calculus, which had previously provided Cohen with a baseline for judging the good. This same realization provides a fertile ground of hope to those contemporary heirs of Legal Realism who seek an alternative to nihilism.

134. See *supra* notes 18, 95, and 99. Cf. ALBERT EINSTEIN, THE WORLD AS I SEE IT 1 (1993):

What is the meaning of human life, or of organic life altogether? To answer this question at all implies a religion. Is there any sense then, you ask, in putting it? I answer, the man who regards his own life and that of his fellow-creatures as meaningless is not merely unfortunate, but almost disqualified for life.

Id.

