



1997

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Recommended Citation

Charles Altieri, *Some Limits of Postmodernism in Legal Studies: On Dennis Patterson's Law and Truth*, 50 SMU L. Rev. 1663 (1997)
<https://scholar.smu.edu/smulr/vol50/iss5/7>

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SOME LIMITS OF
POSTMODERNISM IN LEGAL STUDIES:
ON DENNIS PATTERSON'S
LAW AND TRUTH

Charles Altieri*

I was flattered and thrilled to be invited to participate in symposium with legal scholars on Dennis Patterson's *Law and Truth*.¹ But when it came to writing my paper for a discipline in which I had no training, those emotions gave way to a vacillation between terror and an even more disturbing sense of my own absurdity. "Why not just remain a literary critic playing at deconstruction in relation to Kafka's *Trial*," I kept telling myself. But then I found an alternative. For while I know little about the law, I do know a fair amount about postmodernism, enough to be convinced that Patterson's allying with it cannot but reveal serious problems with his case.

Of course, there are so many postmodernisms now that sheer variety dulls any sheen the concept may have once had. But all of these postmodernisms seem to me severely limited by two fundamental conditions: (1) their need to separate themselves definitively from what they define as modern, so that they are forced into systematic binaries that their own positive values reject; and (2) their desire to replace all metaphysical and psychological generalizations with a social constructivism that is haunted by reductionism on the one hand and, on the other, by the temptation to slide into equivocal tautology that trades on the slippage between weak and strong ways of using "practice" as an explanatory concept. There is a large, often unacknowledged, difference between needing the mediation of social practices and depending on specific disciplinary aspects of those practices for whatever force an argument might muster.²

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1. DENNIS PATTERSON, *LAW AND TRUTH* (1996).

2. See Charles Altieri, *What is Dead and What is Living in American Postmodernism: Establishing the Contemporaneity of Some American Poetry*, 22 *CRITICAL INQUIRY* 764-89 (1996). I defend my general claim that postmodernism seems to have been around long enough for cracks in the foundations of its anti-foundationalism to become increasingly visible, so that it is difficult to imagine it continuing to do substantial intellectual work. For example, its cult of differences and distrust of regularities has produced, in theory, something close to a radical atomism, "all subjects are singularities," which in turn has made it imperative to rely for any principles of representativeness at all in the political sphere on an identity politics, "all cultural groups are singularities," sharply at odds with its critiques

Patterson's Postmodernism is much leaner and less pretentious than the prevailing models affecting literary studies, and his argumentative skills are far more formidable than one finds in my discipline. Nonetheless, his stance is not entirely free of a self-congratulatory reductiveness towards modernity and a somewhat unseemly confidence in new philosophical dispensations—both of which seem too close to what my discipline embraces to be entirely trustworthy as philosophy. Clarifying this assertion requires going beyond specific legal arguments, so my weakness instantly gets transformed into a strength: I am condemned to having to concentrate on Patterson's readings of philosophy—in part to show how these get him into trouble and in part to show how we might use the problems he encounters as a means of returning to some specifically legal concerns. These problems give us a way to argue for the urgency of Ronald Dworkin's overall case for keeping legal practices subject to more general models for thinking about social values. In particular, I will make three sets of claims. On the most general level, I want to make a case for what Patterson misses when he equates modernism with a set of positions on truth, then develops a postmodernism justified as an alternative to those epistemic claims. Relying on this opposition makes it too easy for him to reject modernism without facing up to its efforts to establish ways of thinking about values and ideals that it saw as necessary to supplement the limits of those epistemological commitments. Were Patterson to engage that work, quintessentially in Kant's moral and aesthetic thinking and in what we might call the issues of framing posited within Wittgenstein's *Tractatus*,³ he might have to admit that shaping jurisprudence around questions of truth forecloses several crucial issues and does not allow sufficient complexity to the notion of practice that Patterson uses to replace those modernist concerns for truth. One might even say that the notion of practice itself becomes impoverished if it is linked simply to normative, argumentative procedures without reflection on what might frame those norms and place disciplinary practices in complex dialogues with more general social discourses.

of identity. And its antifoundationalism must bounce between Rorty's pragmatist reliance on powers of judgment that need no foundational buttressing and Derridean critiques of judgment as the very source of illusions of truth and authority that simply sustain the old empiricism in new, more user-friendly guises. Pragmatism must dismiss deconstruction as mere metaphysics, while deconstruction must dismiss pragmatism as restoring confidence in precisely those powers which prevent individuals from having to confront the constant slippages within both their self-images and their political projections.

Patterson is a very sophisticated thinker, so he does not fall into such obvious contradictions. However, I think what follows will show that his reliance on practice as an interpretive concept forces him to a logic of explanation not sufficiently distinct from the logic that leads to identity politics—namely that we can identify specific sets of practices that set off large, substantial social units from more general, shared social modes for reasoning and making value assessments. And while Patterson's theorizing is in no way atomistic, it may have to work so hard to avoid atomism that it fails to account for differences within the normative practices of law.

3. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO—PHILOSOPHICUS* (1921).

My other two claims follow directly from this historical case, but the particular assertions I will make do not depend on it. My second claim is simply that Patterson cannot be adequate to Wittgenstein, despite his intentions, because he is concerned only with how Wittgensteinian semantics deals with the norm of truth, without taking into account the full range of pressures, and of crossing paths, that drives Wittgenstein's investigations. Put bluntly, Patterson prefers the pragmatists' Wittgenstein that emphasizes the concept of practices, while I will argue for a version of Wittgensteinian thinking that stresses not practice but issues of fit, where we can be more fully responsive to shifts in context and to concerns about values that do not respond well to discourses whose normative force is based on modes of analyzing truth claims. "My Wittgenstein" would find Patterson falling into the philosophical vice of wanting to make a single concept, like norms of legal practice, account for a diverse set of interwoven concerns.

My third claim returns to the question of what is at risk if one concentrates one's analysis on issues of how truth claims can be sustained within jurisprudence. I will argue that Patterson's own model of normative practices becomes tautological because it has to equivocate between where arguments get their social force and how they actually take on legitimation in the law. His version of norms treats all arguments proposed for or about the law, arguments about moral value or about ends the law itself might serve, as if their force depended only on the specific ways lawyers operate their normative modes: The forms, not social facts, are the measure by which judges decide cases.⁴ I will challenge this view of measure primarily by showing how Patterson's focus on truth claims makes it impossible for him to deal adequately with Ronald Dworkin. If I am right, these problems within Patterson's arguments actually help make a strong contrastive case for preserving at least the outline of Dworkin's attempts to bind legal norms to more comprehensive value questions.

Let me try now to be more specific about the costs I see involved in Patterson's version of the postmodern. His postmodern depends on establishing three contrasts to these problematic features of "modernism:" (1) "[k]nowledge can only be justified to the extent that it rests on indubitable foundations,"⁵ and hence knowledge must be established in terms sufficient to conquer skeptical analyses; (2) "[l]anguage [either] . . . represents ideas or states of affairs, or expresses the attitudes of the speaker,"⁶ so that expressions and propositions occupy incompatible discursive spaces; and (3) "[s]ociety' is best understood as an aggregation of 'social atoms,'"⁷ so that "[m]ethodological individualism is the explanatory model for understanding."⁸

4. See PATTERSON, *supra* note 1, at 68.

5. *Id.* at 153.

6. *Id.*

7. *Id.*

8. *Id.* at 157.

This sense of what no longer seems adequate is clearly not wrong. But it ignores a great deal, especially in relation to the last two contrasts. For example, Patterson's model makes perfect sense of the Vienna Circle's version of Wittgenstein's *Tractatus*: where we cannot produce truth-functional propositions there philosophy must remain silent. Yet that silence is a far cry from the one that resonates throughout Wittgenstein's text. Silence does positive work there because it leads us to realize how logic itself is something we cannot describe or make the object of propositions but can only display in its power to create the frames by which all propositions are organized. And, analogously, understanding the force of such frames leads us to appreciate the degree to which it cannot suffice to treat value claims as merely personal expressions: values seem not reducible to psychology. Instead, value issues pervade the world mapped by propositions, as if these values provided its overall atmosphere and made it possible to appreciate (but not to argue for) why specific practices are worth pursuing.

Ultimately, it is Kant who offers the greatest modernist effort not to succumb entirely to purely epistemic values while recognizing its hegemony when we deal with propositions.⁹ Here, I will rely on two features of his thought that seem to me especially useful in specifying what is problematic in Patterson's binaries. First, we have to recall Kant's use of the concept of aesthetic judgment as a means of finessing the binary between individual and collective. For he thought it was possible to show how individuals' desires to affirm certain aspects of their subjective states would lead them to submit themselves to something like universal judgments; only projected possibilities of agreement make it possible to move from immediate sensibility to the social forms secured in discourse about taste and to the rationality that establishes ethical identity. In so far as how we will seems an important dimension of how we see, we must shift from straight empiricist inquiry into something more speculative and intersubjective. Even more important, Kant insisted that the better our grasp of how propositions work, the more intense our awareness that there is a complementary structure of thinking based on the ideas we form of ends appropriate for various objects and practices. These ideas are not reducible to the terms of the understanding but instead require that philosophy admit complex processes of idealization, despite their many dangers. Ideas are not just about the world but about who we can become by virtue of how we go about making judgments responsive to value questions.

9. Nietzsche also deserves mention here because he went even further than Kant by turning Enlightenment epistemic ideals against themselves, at least in his claims that the limitations of empiricism required a more general suspicion of the will to truth and a corresponding emphasis on the workings of a will to power suppressed by that emphasis on truth. So with Nietzsche too, modernist epistemic emphases require not simply reducing value questions to expressions or illusions but also using the knives analysis to articulate what impinges on propositions without being reducible to them.

Kant's own processes of idealization culminate in his rationalist morality, where the ultimate value is preserving one's identity as a rational person. But I have tried to keep the case on so general a level that we can use Kant's strategies without being bound to his specific claims. Here, what matter are those features of Kantian thinking that clearly do not fit epistemic modernism and that do construct a path for idealization reworked by Rawls and by Dworkin. Patterson does not admit such speculations. Once one can cast the philosophy of law as a matter of characterizing the truth of legal propositions, then value questions remain caught within modernist epistemic criteria, even if one ultimately rejects the modernist framework. Patterson sees that the philosophy of law has not managed a feasible account of how an empiricist or foundational model of truth can apply to the law. Therefore, he feels entirely justified in making a "postmodern" assertion that "true" is only "a term of commendation or endorsement"¹⁰ grounded simply in properly following the forms of argument established by the grammatical practices governing legal institutions.

But now there is nothing but this domain of truth claims. So Patterson feels entirely justified in also reducing all value questions in law to the domain of internal norms, without having to address questions about what epistemic models cannot handle. Consequently, his reversal of modernism ironically remains bound to the most reductionist modernist positions on how we make determinations about value. It is true that Patterson does not embrace the reductionist distinction between expression and assertion or subjective states and truth-functional and hence testable propositions. But that is only because in effect all assertions are treated as if they were part of social expression; only now, expression is a matter of how practices work rather than of how subjects do. Patterson still embraces a conceptual world in which there is no basis for objectivity in value claims (beyond the objectivity provided by disciplinary norms) and in which there are not even terms for discussing why it may matter to honor principles of truthfulness and perspicuousness in relation to how individuals represent themselves.

I think attention to the work modern philosophers like Kant do in supplementing or resisting the demands of their epistemological models provides a much richer context for thinking about values. Minimally, it helps us see the limitations of the alternative. If philosophy can offer the law only models for deciding on truth claims, then as soon as those models seem inadequate, the only arbiter for the law becomes social practice. On the other hand, if the philosophy of law is attentive to those aspects of modern philosophy that were uneasy about the scope of their epistemic commitments and that explored alternative paths for dealing with values, then these speculations can guide and challenge theory even when the truth model does not seem to suffice. One might even argue that Kantian work on the limits of understanding helps show why the truth model does

10. PATTERSON, *supra* note 1, at 152.

not suffice. And in showing that, such work also makes it clear that when truth functional analysis seems no longer able to sustain large philosophical claims, one need not immediately leap into bed with the postmodernists who seem to have overthrown the prevailing accounts of truth.

These generalizations about preserving an alternative version of modernism will only be persuasive here if they lead us to identify specific problems in what Patterson develops as postmodernism, so that we can then propose alternatives to the lines of thinking that generate these problems. Therefore, I now turn to two specific aspects of his case that I think prove self-defeating, largely because they run counter to the Wittgensteinian framework he invokes. Then I will show how these problems help us appreciate by contrast the work thinkers like Dworkin are trying to do.

There are many ways of challenging what I will call the immanentist holism of Patterson's claim that the law makes determinations entirely in terms of internal norms, yet ought not be considered autonomous or separate from society. On the most general level, I worry that he confutes what counts as pressure from arguments whose normative structures are not shaped by legal practice—for example, moral and economic ones—with what counts as processes of legal legitimation, where normativity must ultimately be established within legal practices (although even conditions for legitimation can be affected by changes in expectations about law generated by arguments responding to more general normative criteria).

Of course, there is a tautological sense that everyone licensed in law participates in one structure, just as everyone who is a citizen participates in one nation. But I doubt there is a way of encompassing the range of arguments lawyers use and the values that frame their arguments within any systematic case for what makes them specific to the legal profession. Both the arguments and the values participate, in part at least, in practices shaped by other groups within the society at large, ranging from those with political agendas to those relying on disciplinary orientations extending from sociology and economics to different branches of philosophy. Ironically, developing a more persuasive case for the law as unified practice may require relying on the idealizing processes basic to Dworkin's view of constructive interpretation. What makes law or practice may be more a matter of identification than of purely disciplinary considerations.

I cannot quarrel with the purely semantic and historical force of the claim that “[i]t is in the use of these forms of argument—the grammar of legal justification—that a proposition of law is shown to be true.”¹¹ From that, it is reasonable to conclude that “[w]e cannot say that the legislature has done anything (and, thus, we cannot say anything about what the law

11. *Id.* at 19.

is) apart from our practice of statutory interpretation."¹² But there remain two crucial difficulties. First, Patterson does not take up the substantial gulf between what may be necessary conditions for laws to be established and interpreted and what are sufficient conditions for law taking hold as part of a social consensus. Does not a philosophy of law have to address questions about how legal arguments and legal decisions have force, achieve social acceptance, and suggest directions for future testing or modifications of a heritage, none of which can be handled by relying solely on law's normative practices? Second, Patterson's own use of Wittgenstein on grammar seems to sanction his stress on identifiable stable practices, within which questions about "fit" can be handled along Quinean lines. But in my view, this imposes on Wittgenstein a rigidity not sufficiently sympathetic to his concern for how paths cross in constantly shifting ways. Wittgenstein rarely resolves issues simply by showing that the appropriate ways of going are available so long as we simply indicate what discipline is governing the discourse. Rather, we have to acknowledge the thorny sense of particulars and multiple paths that makes Wittgenstein difficult to subsume under any general pragmatism.

Let me bring out these differences by concentrating on one passage from Patterson's concluding remarks describing how debates over the law are resolved: "[S]olutions are measured not against a practice transcendent ideal but by the degree to which the proposed solution fits with everything not then in question."¹³ When it comes time to flesh out this "everything," Patterson has to make normativity do yeoman labors: "In my view, normativity in law arises from linguistic practices. Unlike the anti-realist, I do not believe that communal agreement can explain normativity. The relation goes the other way: normativity—intersubjective linguistic practice—makes agreement possible."¹⁴ And normativity has that power because "[t]he essence of law is legal argument," and the use of the forms of argument in practice simply "is the law."¹⁵

Notice how reified the concept of grammar becomes here. The concept of "essence of the law" stands out as the most egregious instance, but the way the argument moves is even more disturbing. Patterson's initial Quinean notion of everything not in question forming a backdrop for deciding cases quickly resolves into a narrow and specific principle of normativity defined only by the linguistic practices shaping what legal professionals do. Therefore, the possible roles of shared cultural backgrounds and assumptions all get funnelled into legal semantic norms, as if all it takes to share a world is to agree on what different expressions mean within normative practices. And there is no worry about differing interests, and wills, and visions of legal practice itself. There is no possible way to represent those pressures on the law that might produce those

12. *Id.*

13. *Id.* at 179.

14. *Id.*

15. *Id.* at 181 (emphasis in original).

differences and which might demand principles of resolution not locatable within legal practice *per se*, or at least not within any specific interpretation of the claim that there is only one shared legal practice.

In other words, Patterson's efforts at an immanentist holism leave him no effective way to explain the force of disagreement, except perhaps as a matter of normativity not quite holding or of understanding being somehow faulty. He seems never to consider the possibility that disagreement is also fundamental to our legal institutions, so that in practice there never is only one legal practice. And because he cannot explain disagreement, he cannot indicate where flexibility might lie for at least negotiating such disagreement, since such negotiations are likely to depend on the grammars that enable us to talk in non-legal ways about value questions and political projects.

One could try to show what has gone wrong here by insisting (on Patterson's own Wittgensteinian terms) that there need not be any *one* essence of the law. It may well be that seeking such an essence eliminates the sense of pressure and possibility that stems from realizing how much the basic issues of law remain essentially contested, even issues involving how we map the contours of legal practice. But I want to get at the temptations that lead Patterson to this claim, so I have to take the more indirect route of asking how Wittgenstein might deal with Patterson's version of "grammatical understanding."

At the close of his book, Patterson tries to make it clear that he is not a strict formalist and does not intend to read "everything not then in question"¹⁶ in terms that isolate law "from the social and discursive spaces around it."¹⁷ "However, law is an identifiable practice, one with its own argumentative grammar. The mistake of so much of contemporary jurisprudence is to think that this grammar is reducible to the forms of argument of another discipline."¹⁸

But what in fact makes law an identifiable practice? Is it specific argumentative norms, or is it the fact that various norms all have to be submitted to the same set of public institutions? And several institutions, like universities, are characterizable not by the prevalence of any one grammar but by their commitment to working through the differences created by the multiple grammars that over time find sponsorship within the institution. In this regard, it is not insignificant that Patterson bases his case for the purity of legal practice on metaphors like grammar borrowed from philosophy, which in turn borrows them from philology. Thus, he falls afoul of the one principle that Wittgenstein and Derrida obviously share—that one is doomed to fail if one tries to establish rigid distinctions separating what is inherently within some value-laden public practice from other related phenomena that one intends to keep outside what one is defining.

16. *Id.* at 179.

17. *Id.* at 182.

18. *Id.*

If we turn to Wittgenstein, we will see that he rarely links grammar to some master practice. Grammar is woven into our sense of context, and context is far more fluid than one can capture by relying on disciplinary boundaries for the practices involved, in part because grammatical understanding is continually negotiating bridges among practices. It is perspicuous representations, not forms of argument, that shape and deploy complex grammatical understandings. Indeed, we best recognize how grammar works when we are confronted by situations where we are either lost or tempted to impose one framework on another without appreciating the differences involved. Analogously, Wittgenstein is not as suspicious of interpretation as Patterson is. Wittgenstein does distinguish between ordinary understanding and those circumstances when we have to hypothesize what might be the appropriate framework. But he treats interpretation and understanding as parts of a continuum: the very possibility of getting lost that elicits interpretation also opens awareness of the grammar that ordinarily remains simply an effective background.

For a dramatic center to the contrast I am developing, we can focus on the ways that Patterson tries to appropriate the Wittgensteinian ideal of "fit." Patterson is right to insist on the importance of "fit" in Wittgenstein's thinking about how grammar facilitates a sense that one has found the appropriate meaning because one now knows how to go on. But in the *Philosophical Investigations*,¹⁹ "fit" is situation-specific, a matter of attuning to specific contexts and not a matter of adapting to determinate practices analogous to Quinean empirical method. "Fit" depends less on how arguments come together than on how argument itself comes to seem irrelevant because the agents find a concrete path enabling some ongoing behavior to appear no longer blocked by the doubt and hesitation leading people to attempt interpretive hypotheses. Where Patterson wants an immanent understanding located in how we learn to use the forms of argument, Wittgenstein sees "fit" as something both more elemental and more capacious than argument.

Were Wittgenstein to deal with law, he would probably attribute "fit" to those moments when one sees that certain connections are feasible—at times within arguments, at times as the basis for new arguments, and at times as ways of seeing beyond the strictly legal case to some other level on which the conjunction of details makes the kind of sense that allows confident subsequent moves. If "fit" were a matter of disciplinary normativity, it would be predictable from within the discipline and would not require Wittgenstein's intermediate cases. More importantly, "fit" is not a simple, single-levelled register of appropriateness. As Dworkin illustrates, we have to talk about varying thresholds of "fit" responsive to the interplay of contexts that law is always negotiating.²⁰ Then, one can be responsive to the different expectations that stem from taking any one of the three overall approaches to law Dworkin identifies. And insisting

19. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1958).

20. RONALD DWORKIN, *LAW'S EMPIRE* 255-59 (1986).

on thresholds of fit prevents naturalizing “fit” as some kind of immanence. What seems an easy, unchallenged “fit” that is simply recognized and not developed by interpretive hypotheses might, with shifts in context, become problematic and disturbing.

Now we can look back to recognize how much Patterson has had to modify Wittgenstein in order to invoke his authority. For Patterson has the difficult job of simultaneously admitting the force of context while not allowing that force to diminish the normative essence he insists upon. Hence, for Patterson, “grammar” is not simply education in the culture but the internalizing of specific forms of argument as the only arbiters for legal work (even if in the more general grammar these forms are woven into other non-legal considerations); coherence itself must become something grounded in a notion of single normative structures determinable as such from some generalized point of view that Wittgenstein would insist entails a perspective we could never occupy. For Wittgenstein, law as a practice would always be comprehensible only incompletely and in relation to the many analogical bridges that tie legal practice to the semantic and the evaluative frameworks that pervade social life. Rather than identifying a grammar of law, he would try to show how the orientation of a grammatical understanding might help us accept and negotiate what must remain fuzzy or contested when law has to engage complex social issues.

Now, I come to my second line of argument against Patterson, this time returning to his affiliation with the postmodern. Because Patterson treats the basic questions of jurisprudence as ways of specifying how one can describe the truth of legal propositions, and because he links modernism entirely to such questions about truth, he concludes that by refuting modernism’s ways of talking about truth he can turn to social practice to establish what counts as truth. But even if one were to grant Patterson’s ways of using truth, there would remain good reason to think that he asks this concept to do too much work. We get a postmodern view of law that cannot address what, for me, remain basic concerns for both modern and contemporary jurisprudence—namely how we are to imagine society valuing law and law justifying its powers of constraint. To make this case concrete I will concentrate on the ways that Patterson’s commitments make it impossible for him to state Ronald Dworkin’s fundamentally neo-Kantian position with any sympathy or to engage accurately its fundamental vision. Instead, Patterson concentrates on the role that the epistemic plays in Dworkin’s work, without ever noticing that what is most important for Dworkin can be preserved while jettisoning almost every claim about truth (in fact the word hardly does any conceptual work after the first chapter of *Law’s Empire* or in *Freedom’s Law*).²¹

21. See *id.* See generally RONALD DWORKIN, *FREEDOM’S LAW* (1996). Let me be clear that I am not arguing that Dworkin’s entire case is correct. I want only to defend his overall enterprise as one worth building upon. Once we accept that, we can begin to develop different versions of his claims. In particular, I think Dworkin is wrong to locate a demand for idealization within and about law simply through a specific theory of interpretation and a very problematic notion of community. He would do much better to locate

My arguments here can be brief because for the most part they simply extend my critique of Patterson on Wittgenstein. Patterson asserts “the task of jurisprudence to be that of providing a philosophical account of what it means to say that propositions of law are true and false.”²² But if we look at the list of examples that he gives on page three we might be struck by how weak the operant notion of “truth” is.²³ The truth of propositions like “Insanity is a defense to murder” is certainly necessary within the normative structure of legal reasoning. But such truth is not in question in any specific case where the crucial question would be how well a case shows a person was insane or, in more theoretical terms, how well certain lines of defense and accusation are perspicuous in relation to the charges being engaged. So, while it matters that such claims are true, the issue of their truth is not what is central in specific legal debates.

Even in cases like *Riggs v. Palmer*,²⁴ truth conditional claims about the rights of heirs and the conditions under which inheritance becomes appropriate cannot be adjudicated in the ways that truth claims are in science, since the fact of the matter is rarely what is under dispute. Rather, in hard cases, we might say that there is too much truth—both sides have it if we accept their premises—so the important questions are how we deal with concerns about what aspects of true claims about the law seem most appropriate in the given circumstances. At one pole, the crucial considerations involve relevance and perspicuousness; at the other pole, the key terms all circulate around ideas of justice—to legislative intent, to the parties involved, and to the populace affected by the overall roles that law is envisioned serving in the society.

One could always say that we are then concerned with the truth of justice claims. But since courts do not resolve those claims by empirical analysis, adding the layer of “truth” to the specific demands on judgment seems only to obfuscate the pressing issues. And imposing the grid of truth can have problematic consequences because it reinforces the binary oppositions between truth and skepticism on which movements like critical realism thrive, without indicating the kind of considerations that might evade such binaries (except for the tautology of resolving all questions by noticing whether they conform to the normativity of legal argument). Dworkin, on the other hand, can evade those binaries by placing at the center of theory the questions of how constraint can be justified, and, correspondingly, how agents best make the structure of law they live under part of their identification as citizens. Then we have a framework for explaining why we might bring value questions to bear on the law even if we are skeptical of any specific epistemic authority: “we take an interest in law not only because we use it for our own purposes, selfish or

that demand in an agent’s desires to achieve certain kinds of identity before the law, for example, when citizens express their willingness to affirm their bonds to a specific social structure.

22. PATTERSON, *supra* note 1, at 4.

23. See *id.* at 3.

24. 22 N.E. 188 (N.Y. 1889).

noble, but because law is our most structured and revealing social institution. If we understand the nature of our legal argument better, we know better what kind of people we are.”²⁵

Claims like these require a substantial shift in interpretive attitude. The best way to justify that shift, I think, is to recognize what one cannot do from within Patterson’s perspective—in particular, how one cannot even properly address Dworkin’s concerns because the focus on truth imposes the wrong interpretive theater. Patterson offers three basic criticisms of Dworkin: (1) that he treats all law as a matter of interpretation, which is “an implausible description of the activity of legal justification;”²⁶ (2) that interpretation only pertains when “real doubt exists about how to apply a rule;”²⁷ and (3) that “legal interpretation simply does not proceed in the way that Dworkin describes it.”²⁸ All three objections would hold if it were Dworkin’s primary ambition to describe legal practice. But while it is crucial for Dworkin that his vision of the law can be adapted by those practicing it, he is under no illusion that his account of law as integrity is in fact how law is usually practiced.²⁹ Theory for Dworkin is a matter of bringing together disparate features of a practice within a single view that defines how the practice might be best understood in relation to society’s value concerns:

We accept integrity as a distinct political ideal, and we accept the adjudicative principle of integrity as sovereign over law, because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in the right relation.³⁰

Semantic debate then resolves nothing because each semantic position is framed by certain idealizable interests. It is there—in how we idealize—that we best represent the philosophical values shaping our work. And it is there that theory best interprets the law because it must then handle the fact of real and deep disagreement (which no positivist-leaning theory can do). Analyzing the normative force of a practice will not help us here because the relevant questions involve how we can attribute value to an agent’s participation in the practice itself. Nor will truth-conditional arguments prove useful because what is at stake is not describing what is the case, but rather characterizing, in plausible terms, who persons become by virtue of how they decide to stop with certain versions of what the case is.

Let me try to bring out the differences involved by addressing each of Patterson’s criticisms, since that should also help clarify the limitations of identifying with a postmodernism defined in primarily epistemological terms. First, it is crucial to see, contra Patterson, that Dworkin’s view of

25. DWORKIN, *supra* note 21, at 11.

26. PATTERSON, *supra* note 1, at 86.

27. *Id.*

28. *Id.*

29. *Cf.* DWORKIN, *supra* note 21, at 46-55.

30. *Id.* at 404.

interpretation is very different from the one held by Stanley Fish. For Fish, interpretation is semantic: all understanding is interpretation, so that where we stand or where a community makes us stand determines what we can see. Patterson handles this position deftly by showing that one cannot speak meaningfully about interpretation in semantic matters without granting an underlying level of understandings that is not dependent on the process of doubt and hypothesis characterizing interpretation. But the same arguments simply do not work in relation to Dworkin. Dworkin need not deny that much of law can be dealt with by understanding rather than by interpretation, that is by what Patterson calls "an activity of clarification" generated by doubt and confusion about how to go on in particular cases.³¹ Dworkin does, nonetheless, deny that understanding without interpretation can suffice for an adequate theoretical account of law because law must always be open to second-order evaluations, and hence to doubts about the values at stake in our understandings. Interpretation is not a matter of specific construals but of providing overall accounts of how these construals accord with three basic values—justice, fairness, and due process as these unfold in our history.

This difference in focus means that theory cannot concentrate only on the primary contrast between what allows understanding within normative constraints and what creates doubt and uncertainty in particular cases. Rather, philosophy of law needs also to attend to contrasts between the pre-reflective and the reflective with regard to needs for making a practice integral and articulate about its underlying principles. Even where practical understanding is entirely clear, there remain questions of how we justify what we do. We have to be able to say who we are.

One might say that Fish is protestant in the sense that he is suspicious of authority and insists on the capacity of individual communities to foster differing interpretive standards. But he has no recourse beyond those communities. Dworkin is protestant on another level³² where what matters is not simply what the text means but what one can make out of one's interpretation in relation to the one question everyone must worry about—can I be saved and how might I best align my will with what the quest for salvation demands? Dworkin sees interpretation as inseparable from justification, in the full sense of a term that in legal practice is only a metonymy. Interpretation is not horizontal, not a matter of specific application, but vertical because it involves what contexts one can use to address questions of choice, and hence of identity, where they arise.

Unfortunately, the better my theological analogues fit Dworkin, it seems that the stronger Patterson's claim becomes that Dworkin's is an implausible description of legal practice. There are very few examples of Herculean judges in the real world, and hence very little room for the second-order modes of interpretation that Dworkin calls for. And yet,

31. PATTERSON, *supra* note 1, at 87.

32. *Contra id.* at 85.

this very complaint may well count less against Dworkin's efforts to formulate possibilities of idealization than it does against Patterson's efforts to make legal practice itself an immanent normative container whose validations of truth seem also to determine values. Dworkin knows that his view of interpretation is not an accurate picture of legal practice.³³ But that is precisely why he is so intent on clarifying the limitations of positivist theories. His question is not whether law in fact proceeds by principles of integrity or even whether interpretation of values is central to practice. He wants to show that the practice of law is impoverished without a philosophy of law that does try to interpret the values at stake in particular decisions and does try to rationalize them into the best overall systematic model of purposes and principles. Such philosophizing is not simply a matter of how practical issues are in fact resolved. Just as truth claims are grounded by warrants and backings shaped by the forms of a practice, idealizations must be grounded in the models of identity that they sustain for and beyond that practice.³⁴

Patterson seems to me most blind to Dworkin on the issue of the relation between hard and easy cases, which becomes the basis of his third criticism. Dworkin insists that any easy case can become a hard case because convictions about justice and fairness change, and hence generalizing theory can become necessary to frame what had once seemed immanent to law's regular normative practices.³⁵ But for Patterson, this imposes worries that blind us to the paradigmatic force of easy cases, since they exemplify the kind of normative fit that practice makes possible. Thus, in Patterson's view, it is simply not the case that we see the theory in hard cases but "it is apparently out of sight in easy cases."³⁶

Other than the need to discredit conventionalist accounts of legal justification, there is no need to introduce the idea of a "theory" (recognized or unrecognized) to explain the truth of legal propositions. We do not need a theory to understand legal rules any more than we need a theory to understand the rules of baseball, violin performance, or addition. The standards for correct and incorrect assertions are not "hidden from view," nor does one need a theory to know whether the speed limit is fifty-five miles per hour or not.³⁷

For Patterson, theory merely adds a problematic supplement obscuring the force of normativity in legal judgment and seducing us into quests for mysterious hidden grounds that might justify going beyond such practices. Patterson would be entirely right if Dworkin were talking about hidden grounds or if Dworkin thought what made a case difficult were

33. See DWORKIN, *supra* note 21, at 407.

34. My SUBJECTIVE AGENCY tries to show how such idealization might be grounded in a possible model of subjective agency. See generally CHARLES ALTIERI, SUBJECTIVE AGENCY (1994). This book also clarifies what I mean below when I speak of law as a constructivist version of expressivist thinking. Put simply, law renders visible constructed values that make it possible for us to express the terms of our fealty to a state.

35. DWORKIN, *supra* note 21, at 359.

36. PATTERSON, *supra* note 1, at 91.

37. *Id.*

questions of understanding the truth of law. But Dworkin's theory of law as integrity is not directed primarily at understanding rules, nor does his notion of grounds involve discovering anything hidden. Quite the contrary: Dworkin's position is a constructivist version of expressivist thinking in which what grounds the law only emerges as we seek terms with which we can identify. Such terms are not hidden, although they are latent, depending on theory not to reveal them but to demonstrate their continuity with the overt structure of law that seeking integrity allows one to bring forward. Ironically, the more pressing problem with the hidden occurs when agents ignore the larger public and rely only on the norms sustaining particular sets of rules. Baseball, for example, does not depend on theory in order to be played, but it could certainly benefit from more theorizing about the modes of identification it cultivates.

Because he confuses Fish's version of protestant subjectivity with Dworkin's, Patterson thinks he can replace that protestant concern for idealization codified in Kant by a postmodernism oriented towards the dynamics of social normativity. I think that is a bad trade. The following statement by Patterson summarizes what this postmodernism can promise: "I hope that this work will inspire others to abandon the effort to identify the 'true grounds of law' and pursue a different course. In short, when it comes to law, I wish to leave everything as it is."³⁸ If that is the best legal theory can do, the profession of law may need some help even from literary critics, if only in the form of a reminder of the expression Dante saw etched into the gates of Hell: "*lasciate ogni speranza, voi ch'entrate.*"³⁹ On this the old Catholic and new Protestant theorists of law as integrity can agree, despite their different disciplinary practices.

38. *Id.* at 181.

39. DANTE ALIGHIERI, *INFERNO* Canto 3, 1.9 ("[A]bandon every hope, you who enter here.").

