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Legal Coherentism

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BEGINNING with Quine's *Two Dogmas of Empiricism* in 1953,[1] and accelerating particularly through the 1970s and 1980s, the philosophy of language and epistemology underwent something of a revolution. Clearly this was a rejection of Logical Positivism,[2] of Emotivism,[3] and of a certain picture of the relation between word and world.

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   1. Willard Van Orman Quine, *Two Dogmas of Empiricism*, in WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW (1953) [hereinafter *Two Dogmas of Empiricism*].
   2. *See, e.g.*, A.J. AYER, LANGUAGE, TRUTH AND LOGIC (Dover ed. 1952).
   3. *See, e.g.*, C.L. STEVENSON, ETHICS AND LANGUAGE (1944).

But beyond that, it is not clear, outside of academic philosophy, of what this revolution consisted. Interestingly, the public, the social sciences, the humanities, and the legal academy seem to be aware of some sort of change—dependent somehow on views of language. But the view of postmodern philosophy of language one most often encounters outside of philosophy is likely to come as a shock to many philosophers.

Outside of analytic philosophy, the story goes as follows. The last thirty years have witnessed a massive movement of reality-busting. Due to continental thinkers from Wittgenstein,[4] Heidegger,[5] and Derrida,[6] to Americans such as Kuhn,[7] Quine,[8] and Rorty,[9] we now realize that the idea that language represents reality is a myth. In fact, the languages of various communities are simply tools we use to get around, to interact, to impose norms on one another, and to carve the world up as we wish at any point in time. Any particular community at any particular time is roughly limited by its language and its conceptual scheme to seeing the world a certain way, but the connection between language and world is ultimately ineffable. Moreover, even with respect to individual speakers, the task of interpretation is daunting, and fundamentally indeterminate. Hence, not only is reality a human construction through language, but the phenomenon of meaning itself is. We are relegated communally to the conventions and paradigms we have established, to the starting points with which we have come. We are relegated individually to whatever interpretations of others we may want. These disappointments also bring freedom. They bring the freedom seen by the deconstructionist to find in meaning what was not plausibly intended and what is not plausibly inherent in text on conventional views; the freedom from rigid paradigms; the freedom from the formalism and the constraints of particular methodologies; and freedom from supposedly privileged modes of discourse and argumentation.[10] They also seem to provide suspicion, suspicion that what goes for true or real or fixed is just the dominant or entrenched ideology. This combination of license and critical suspicion is often used to undergird openly political approaches to legal interpretation.

This, in any case, is the philosophical revolution I am most familiar with as a participant in legal academia, as a reader of the *New York Times*, as a participant in colloquia, and as an occasional attendant at cocktail parties. But as a student of analytic philosophy of the past few decades, this description of the revolution is unrecognizable. It has no connection, or almost no connection, with the revolution I perceive. That

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

5. *See generally* MARTIN HEIDEGGER, BEING AND TIME (1962).

6. *See generally* JACQUES DERRIDA, WRITING AND DIFFERENCE (1978).

7. *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

8. *See generally* WILLARD VAN ORMAN QUINE, WORD AND OBJECT (1960).

9. *See generally* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

10. *See, e.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY (1989); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

"revolution"—and I use the term ironically—was modest, anti-philosophical, and, in some ways that I shall discuss, quite conventionalist. It aimed to stop reformist movements—logical empiricism and epistemological foundationalism—in their tracks. It aimed to send people back to work—away from philosophy and radicalism and profound skepticism—and back to normal science, normal work, and normal life.

It is a profound achievement of Dennis Patterson's *Law and Truth*[11] that it systematically addresses the implications for the legal academy of this powerful, pervasive, but quiet revolution in analytic philosophy.[12] Patterson devotes most of his book to critique of jurisprudential theories that, he argues, presume a theory of truth that philosophers now recognize as misguided. This leads him, in his final chapters, to offer what might be called an anti-philosophical jurisprudence that broadly encourages the legal community to regard legal discourse as autonomous, and not in need of bolstering or legitimizing from areas outside of law, such as philosophy, economics, or politics.

To those familiar, principally, with the explosive and colorful revolution that is more typically labelled "postmodernism," the ultimate conclusions of Patterson's book will seem surprising. But to me they were not. These are quiet, comforting, and somewhat complacent conclusions. Lawyers, judges, and law professors, let us go back to our normal life, our normal work, our normal science. "[W]hen it comes to law," Patterson ultimately concludes, "I wish to leave everything as it is."[13]

This article is, overall, quite sympathetic. I shall suggest that we may derive from Patterson's book a jurisprudential position, which I call "legal coherentism," that is compatible with sophisticated positions in epistemology, semantics, and metaphysics more generally, and remarkably accommodating to many features of legal practice that other jurisprudential views struggle to accommodate or outright reject. While I shall sometimes call this view "legal coherentism," that label is used with some hesitation. Unlike others in jurisprudence who speak of "coherence," the idea I present is not about the role of the idea of coherence in *law*. It is simply an application, to *statements and beliefs about law*, of certain more general *coherentist* views in the philosophy of language and the theory of knowledge. These views, as the article explains, emphasize the importance of the concept of coherence among propositions over a certain conception of correspondence to reality and a certain conception of foundations of knowledge.[14]

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11. DENNIS PATTERSON, LAW AND TRUTH (1996).

12. *See also* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 550-52 (1993) (criticizing use made by Critical Legal Studies movement of philosophical theories of truth and knowledge); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986) (criticizing critical legal studies' use of pragmatism); William G. Weaver, *Richard Rorty and the Radical Left*, 78 VA. L. REV. 729 (1992) (criticizing the radical left's use of Rorty).

13. PATTERSON, *supra* note 11, at 181.

14. There are similarities between the view which I briefly sketch in this paper, and which I am calling "legal coherentism," and other views, particularly that of Ronald Dwor-

On the other hand, my comments are critical in four important respects. First, I am not persuaded that Patterson is addressing the topic he says he is addressing—law and truth; I shall be suggesting that truth is not really the key point in jurisprudence. Second, I shall argue that overcoming the realism/anti-realism distinction is, again, not the principal contribution to be made to legal theory from this analytic revolution. Third, I shall take issue with Patterson's positive view, arguing that it is a form of positivism that suffers from some of the shortcomings that Patterson has rightly pointed out in other theories. These three criticisms are meant, in part, as invitations for Patterson to come over to the view that his work has helped me to construct, and that I believe is implicit in his work—the view I call legal coherentism.

My final complaint against Patterson raises questions about the strength of legal coherentism, and is also, therefore, a piece of self-criticism. I shall suggest that while legal coherentism may permit attractive answers to questions about the nature of law, of legal reasoning, and of truth in law, it offers very little help in answering questions about what sort of respect, allegiance, and power ought to be given to our law and our legal institutions and to the use of reason in law. At a minimum, then, legal coherentism is seriously incomplete.

I. THE ROBUST CORRESPONDENCE THEORY

A. THE ASPIRATIONS OF ANALYTIC PHILOSOPHY AND LOGICAL POSITIVISM

Understanding the coherentist revolution requires an understanding of what was rejected. I must concede at the outset that I will be making a number of serious overgeneralizations, for there were many different views in the first half of the century, which varied not only in detail but also in substance and in conclusions. Wherever possible, I shall try to indicate these differences. But for the purposes of understanding the revolution, it is perhaps most important to understand certain salient points on which there seemed to be significant agreement.

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kin. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986). Although, Kenneth Kress and others have labeled Dworkin a "legal coherentist," *see, e.g.*, Kenneth Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984), Dworkin appears not to adopt the "coherentist" label himself.

Jules Coleman is at pains to argue that the legal postmodernists have mischaracterized the dilemma articulated in analytic philosophy, and Coleman himself arguably entertains a conception of truth and objectivity in law that is consistent with the view I call coherentism. *See* Jules Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33 (1995). *See also* Hilary Putnam, *Are Moral and Legal Values Made or Discovered?*, 1 LEGAL THEORY 5 (1995) (broadly coherentist account of law).

Joseph Raz and Ken Kress have both written important articles principally focusing on the role of coherence in *law* (as opposed to, in the metaphysics, epistemology, or semantics of law and legal propositions). *See* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 2 (1992); Ken Kress, *Coherence, in* COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (D. Patterson ed. 1996). As mentioned in the text, "legal coherentism," as used in this article, is intended to refer to a different sort of view.

The philosophical perspective I am characterizing can be divided into three levels: the theory of truth and reference, the theory of meaning, and the theory of knowledge.[15] In the theory of truth and reference, a major and salient idea was the correspondence theory of truth. As a historical matter, it is arguable that this theory has been with us at least since Plato, and it is easy to attribute an epistemic version of this theory to Descartes, Locke, and Kant, as Richard Rorty has done.[16] But a certain linguistic version of the theory grew out of the work of Bertrand Russell,[17] the early Ludwig Wittgenstein,[18] and Alfred Tarski,[19] and dominated a great deal of thinking in the philosophy of language, logic, and metaphysics in the first half of this century. It continues to hold great sway, in one form or another, but, as I shall argue, the pivotal systematic metaphysical role it once played is more typically rejected than accepted now. I shall then be characterizing the rise and fall of a particular version of the correspondence theory, which I shall sometimes label the "robust correspondence theory of truth."

B. THE ROBUST CORRESPONDENCE THEORY OF TRUTH

Following Wittgenstein's *Tractatus*, many analytic philosophers took the fundamental relation of language and the world to be that of picturing. Two examples may help to explain this idea. The phrase "is located in Toronto" is a predicate that can be placed after a phrase designating some object ("the CN Tower") to create a sentence; whether that sentence is true depends on the location of the thing named. Similarly, the phrase "is true" is a predicate that can be placed after the name of some sentence, to create a new sentence, such as: "'Ben Zipursky has red hair' is true." Whether this new sentence is true depends on something about the sentence named. The sentence named—*Ben Zipursky has red hair*—asserts that a certain state of affairs exists. If that state of affairs exists—if Ben Zipursky does have red hair—then the sentence named does satisfy the predicate, and it is true. Whether the sentence is true therefore turns on whether there is some fact in the world to which the proposition expressed by the sentence corresponds. Truth lies in the correspondence of the sentence to the world. This is the correspondence theory of truth.[20]

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15. *See generally* SIMON BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE (1984) (introduction and overview of various issues within philosophy of language).

16. *See generally* RORTY, *supra* note 9.

17. *See, e.g.*, Bertrand Russell, *On the Nature of Truth and Falsehood* (1906), *in* BERTRAND RUSSELL, PHILOSOPHICAL ESSAYS 170 (1966).

18. *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D.F. Pears & B.F. McGuinness, trans. 1961) (1918) [hereinafter *Tractatus*].

19. *See* Alfred Tarski, *The Semantic Conception of Truth, in* 4 PHIL. AND PHENOM. RES. 341 (1943-44); Alfred Tarski, *The Concept of Truth in Formalized Languages, in* ALFRED TARSKI, LOGIC, SEMANTICS, METAMATHEMATICS: PAPERS FROM 1923 TO 1938 152-278 (1956).

20. It is important to recognize that adherence to the correspondence theory of truth was by no means universal, even among pioneers of analytic philosophy and of logical

All of this seems somewhat airy or platitudinous—a series of truisms, if you will. Its significance lay, of course, in how it was used. On the one hand, it served as a condition of adequacy for a variety of relatively technical projects in semantics, logic, and the theory of reference.[21] However, many philosophers believed the correspondence theory of truth gave us a grip on age-old metaphysical questions about the status of reality.[22] By shifting from the question of whether our beliefs are true, to the question of whether various sentences are true, one acquires the ability to treat the subject of truth as a matter of the semantics of the predicate "is true." And the correspondence theory of truth provides an account of what it means to say that a sentence is true. Finally, in combination with what is sometimes called a compositional theory of meaning, it provides an account of why it is that many of the sentences we take to be true actually do have the property of truth. They have the property of truth because the predicates that occur in the sentence have a certain extension, and the objects to which they refer fall within that extension. We might say, indeed, that the correspondence theory of truth suggested a strategy for explaining the possibility of genuinely true statements about a mind-independent reality. The strategy is to explain how it is that certain terms are genuinely capable of referring to mind-independent objects, and to explain how certain predicates are genuinely capable of ascribing mind-independent properties to those objects. Views of this sort are aptly called "realism," because they are committed to there being mind-independent reality that certain sentences of our language—the true ones—actually represent.[23]

Equally importantly, a focus on truth as correspondence is capable of generating a powerful form of idealism. The early Wittgenstein, the author of the *Tractatus*, was arguably himself a form of idealist (although

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empiricism. Thus, for example, Gottlob Frege, often credited, with Bertrand Russell, with having founded analytic philosophy, has been characterized as a precursor of minimalist theories of truth. *See* PAUL HORWICH, TRUTH 6 n.2 (1990). Frank Ramsey clearly held a redundancy theory of truth as early as 1927. *See* Frank Ramsey, *Facts and Propositions*, PROC. OF THE ARIST. SOC., Supp. Vol. 7 (1927). A.J. Ayer, *supra* note 2, a leading logical positivist, rejected the possibility of a meaningful metaphysical theory of truth. Ayer and other positivists were similarly uneasy about the metaphysical nature of theories of truth. For a useful and remarkably early discussion of the logical positivists' shift from correspondence theories to coherence theories, see Carl G. Hempel, *On the Logical Positivists' Theory of Truth, in* ANALYSIS vol. 2, no. 4, 49 (1935).

21. *See generally* Tarski, *supra* note 19. Indeed, at one point in time the technical aspects of a theory of truth along the lines devised by Tarski was deemed by some logical positivists to be the principal and perhaps the only legitimate aspect of a theory of truth. The hostility of many logical positivists to the metaphysical aspects of the robust correspondence theory of truth points to one of the numerous respects in which it would be a mistake to say that the three aspects of analytic philosophical orthodoxy that I am describing were part of a single program—they were not. As the text points out, there were nevertheless numerous theorists who simultaneously felt theoretical pressures from all three aspects of orthodox analytic philosophy.

22. *See, e.g.*, RUSSELL, *supra* note 17.

23. *See, e.g.*, MICHAEL DUMMETT, TRUTH AND OTHER ENIGMAS (1978); SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); RORTY, *supra* note 9; RUSSELL, *supra* note 17.

this is a hotly contested issue). It is very attractive to use the definition of truth above as a contextual definition of what the facts of the world are. On this view, facts are, by definition, those things that make certain of the sentences of our language have the property of being true. It may thus be argued that the world is something we as a linguistic community are constructing as the set of facts that matches those sentences that we take to be true. "Anti-realism" is often used to denote a family of views that are related to idealism. It takes truth-as-correspondence to articulate our aspirations to be in touch with reality, but lamentably concludes that truth, insofar as we have it, is truth as warranted assertibility. In other words, those sentences which we prephilosophically regard as true, are not ones that we are entitled to say correspond to reality; the most we can say is that these are the sentences that we are warranted in asserting.[24]

I have principally concentrated on global realism versus global anti-realism, but the correspondence theory of truth and the investigations in semantics and metaphysics to which it led also generated what may be called local rejections of realism.[25] As mentioned, the Tractarian view, and the correspondence theory of truth, are associated with the "picture theory of meaning." According to this view, sentences are linguistic pictures of reality. If the aspect of reality the pictures depicts exists—if the purported fact to which the sentence corresponds obtains—then the sentence is true, but if the fact that it pictures does not obtain, then the sentence is false. This view led philosophers to be very concerned about certain classes of sentences, such as moral sentences, that seemed more about expressing judgments or influencing others' conduct, than about picturing reality. The sentence "it is wrong to lie" is a good example of this problem. The natural inference to be drawn is that these sentences were by their very nature incapable of being true or false. Thus, while sentences like "the cat is on the mat" could enjoy the laudable feature of corresponding to reality, sentences like "it is wrong to lie" could not. There is truth and reality about cats and mats and chemistry and physics, but not for ethics, aesthetics, or politics.

Finally, and of at least equal importance, the correspondence theory of truth led to a particular approach to epistemic questions, not simply about the predicate "is true" and not necessarily about the nature of reality, but about what it is for beliefs to get things right—what it is for them to be true. If truth is a matter of matching reality, then, in seeking knowledge, we should be trying to compare our beliefs to reality.

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24. The most prominent contemporary anti-realist is Michael Dummett. *See generally* DUMMETT, *supra* note 23.

25. *See* BLACKBURN, *supra* note 15, at 146 (distinguishing local and global approaches to realism and truth).

C. REDUCTIONISTIC VERIFICATIONISM IN THE THEORY OF MEANING

A second, and quite distinct aspect of philosophical thought in the first part of this century was reductionistic verificationism in the theory of meaning.[26] On this view, the meaning of a sentence is given by the empirical conditions under which the sentence would be verified. Thus, for example, the meaning of the statement "salt is soluble" is given by the fact that if one put salt in water, the salt would no longer be visible.[27]

Reductionistic verificationism combined three views. The first is that meaning is to be given sentence by sentence. The second is that meaning is given by the condition under which some method of investigation would serve to verify the sentence as true. The third is that the relevant sort of investigation or testing was empirical.

Verificationism had a positive side and a negative side. On the positive side, it aspired to explain the meaning of the sentences that were the working units of scientific theorizing. And it tried to attain, for many of the theoretical concepts and statements of science, nearly the same level of confidence and lack of mystery that we attribute to the low-level empirical statements that are verified by observation. It tried to do this through "reductionism"—by showing that these more perplexing-looking theoretical statements were actually just complicated logical constructions out of a variety of individual verifiable sentences. This claim to identity in meaning rested on what is now the notorious analytic-synthetic distinction, which will figure later in our story.

But verificationism was also used by the logical positivists as a bulldozer, trampling eagerly over social sciences and humanistic endeavors in a wide variety of areas.[28] The propositions of psychology and sociology (as ordinarily understood), and of ethics, for example, were deemed "meaningless" because they were not empirically verifiable, and they did not reduce through analytic statements (statements true simply by virtue of the meanings of the terms contained in them) to constructs of empirically verifiable statements.[29] More generally, since these sentences were meaningless, they could not be true or false, and since they could not be true or false, they could not be known.

D. FOUNDATIONALISM

Finally, we come to foundationalism,[30] which is principally an epistemological view (rather than a semantical or metaphysical view). It is widely accepted in epistemology that in order for a belief to count as

26. Rudolf Carnap and A.J. Ayer were prominent exponents of reductive verificationism. *See generally* Rudolf Carnap, *The Rejection of Metaphysics, in* RUDOLF CARNAP, PHILOSOPHY AND LOGICAL SYNTAX (1935); AYER, *supra* note 2.
27. *See* Carl G. Hempel, *Empiricist Criteria of Cognitive Significance, in* CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 101, 109 (1965).
28. *See, e.g.,* Carnap, *supra* note 26.
29. *See, e.g., id.;* AYER, *supra* note 2.
30. *See, e.g.,* RODERICK CHISHOLM, THEORY OF KNOWLEDGE (2d ed. 1977).

genuine knowledge, it is not sufficient that the belief be true. It is also necessary that the believer be justified in believing it. Foundationalism is inspired by a few extensions of these basic statements. It adds that a belief does not count as knowledge merely because it is justified by some other belief, unless the other belief is itself justified. It follows, according to the foundationalist, that either we have no knowledge, because our beliefs are ultimately justified only by unjustified beliefs, or that we have some beliefs that are self-justifying, and can form the foundation for our other beliefs. The foundationalist maintains, in short, that in order for there to be knowledge, there must be beliefs that are justified, but not by reference to other beliefs.

Foundationalism combined rather naturally with verificationism. Certain beliefs, according to the foundationalist, are justified by an observation or experience, not by some other belief. These empirically based beliefs are the foundation of our knowledge. Our more complex beliefs are justified by reference to these empirically based beliefs. The verificationist, using the analytic/synthetic distinction to explain the meaning of more complex statements, can do double duty and explain the epistemic status of these same complex statements.

Just as obviously, however, foundationalism had a nasty underside. Beliefs that are not justifiable by reference to directly empirically justifiable statements are not knowable or justifiable. Thus, again, ethics, psychology, and a variety of other areas were rendered hopeless areas for knowledge. One could, of course, produce arguments and purported justifications in these areas. But, at the end of the day, the arguments either go in circles, or reduce to differences in belief, such that no one is in a position to justify his or her beliefs empirically.

E. THE RESPONSE IN NON-CENTRAL AREAS

It is useful to bring together these three themes. Not all or most philosophers did so.[31] More important for our purposes is the combined negative force of these three views for certain subjects that did not, on their face, appear to be about the physical world. For a subject like morality, this was quite devastating. From the correspondence theorist, one heard the complaint that sentences such as "it is wrong to lie" do not picture facts, but merely express a conviction or exhort others to action. From the verificationists, one heard that moral statements were meaningless because there is no basis for empirically verifying them. And from the foundationalists, one heard that morality has no foundations, in light of the absence of experiential justification. Morality was not alone as a target of these theories. Psychology, sociology, social theory, political science, history, theology, aesthetics, mathematics, and even philosophy itself were often targets. So, of course, was law.

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31. Indeed, there are arguably tensions between these views. *See supra* notes 20-21 (reductive verificationists reject metaphysical notion of truth).

Thinkers in these threatened areas did not just roll over and die. Some did leave and some simply ignored the criticisms. Many fought the underlying theories in metaphysics, philosophy of language, and epistemology that led to this skepticism—a fight that I shall be suggesting they won. Some relished the freedom that comes with the conclusion that their area is not entitled to claim the legitimacy of its normative structure of reasons.

The most important response, however, was to suggest that the meaning of statements in the subject area was, after all, a picture of a sort of fact, was, after all, verifiable, and did, after all, have foundations. Thus, for example, utilitarianism portrayed morality as about pleasure or about preferences;[32] behaviorism portrayed psychology as about behavior, not internal states;[33] and social theory turned sociology, was largely a statistical field about patterns of human conduct. In short, the response to these theories was to come up with an understanding of the content of the subject matter that, although perhaps not immediately fitting the area, nevertheless had a chance of permitting the possibility of truth, reality, meaning, and knowledge.

These historical comments about non-central areas can be summarized with some overgeneralization as follows. The critical questions in central areas—such as propositions about the physical world, and propositions about science—were of the following nature: Is the world that our purportedly true sentences correspond to a mind-independent reality, or is it the case that we can never transcend our own categories? Can all of meaningful scientific and physicalistic language really be analyzed in terms of verification? How much knowledge can be constructed from foundations—how much do we really know?

The central areas enjoyed the luxury of talking about whether to be a realist or an anti-realist. Both realists and anti-realists could talk about truth and reference. And even if the anti-realist concluded that certain aspects of the concepts of truth and reference could not really apply, this was still in a context where it went essentially undoubted that there was a large mass of statements that qualified as true, a large mass of practice that counted as legitimate, some kind of hook for the label of "meaning" and the label of "knowledge." The trappings of legitimacy as an area of discourse, of study, and of justification were present. The question was principally the truly philosophical one, of determining the proper status to give the area, and the proper explanation to give of its status.

By contrast, the philosophical worldview of the first half of this century provoked a crisis for the non-central areas. The response to this crisis was to offer an account of the subject matter of the discourse that enabled

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32. *See, e.g.,* J.J.C. Smart, *An Outline of a System of Utilitarian Ethics, in* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).
    33. *See, e.g.,* GILBERT RYLE, THE CONCEPT OF MIND (1949).

one to continue seeing it as legitimate.[34] The question was not realism versus anti-realism. The issue was, in the first instance, meaningfulness as proper-area of study and discourse, versus meaninglessness and illegitimacy as an area for application of study and reasoned discourse. And in the second instance, the question was the nature of the subject matter under which it could be deemed meaningful, could support discourse, etc. I should add also that there was a somewhat positive side to this worldview even for the non-central areas. For if theorists in these areas were attracted to the idea of recasting the area as having a subject matter different from what its discourse shows on its face, the sophisticated frameworks developed for translating one form of discourse into another would provide a plausible and theoretically impressive manner of executing such a program.

F. THE RESPONSE IN JURISPRUDENCE TO THE
CORRESPONDENCE CLUSTER

It is difficult to gauge the response to this movement in Anglo-American jurisprudence. That is not only because the gap between legal academia and the world of philosophy was much wider then than it is now, or because larger social, political, and economic movements played such a tremendous role in shaping jurisprudential thought. Ironically, it is also because American legal thought was very much in the grip of hard-headed empirical thinking, and pro-science conceptions of law, even before these movements came along. In other words, many of the theoretical pressures brought to bear through verificationism, foundationalism, and the correspondence theory were already dominant in certain

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34. My emphasis on the philosophical concept of subject matter is precipitated by T.M. Scanlon's use of that concept in T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 103, 104 (Amartya Sen and Bernard Williams ed. 1982) ("In moral judgments, as in mathematical ones, we have a set of putatively objective beliefs in which we are inclined to invest a certain degree of confidence and importance. Yet, on reflection, it is not at all obvious what, if anything, these judgments can be about, in virtue of which some can be said to be correct or defensible and others not. This question of subject matter, or the grounds of truth, is the first philosophical question about both morality and mathematics."). Scanlon makes the very plausible and illuminating suggestion that utilitarianism owes its popularity as a first-order moral theory to the attractiveness of what he calls "philosophical utilitarianism"—the second-order view that "the only fundamental moral facts are facts about human well-being." *Id.* at 108. Philosophical utilitarianism is a thesis about the subject matter of moral beliefs and statements. Scanlon himself offers an alternate account of the subject matter of moral beliefs and statements—contractualism—which is not the topic of the present article.

Subject matter is superior to meaning as an account of the driving philosophical concept because: (1) it sweeps in both sentences, which are obviously and directly semantic (meaning-bearing) and beliefs, which are not as obviously semantic; (2) it does not obviously bring to the fore questions about what speakers in fact intend to be talking about (which the concept of meaning arguably does); and (3) it more clearly articulates the issue of the grounds of truth—when it is so, what makes it so?

Notably, G.E. Moore, who, with Russell and Frege, is often credited as a founder of analytic philosophy, used "subject-matter" rather than meaning to describe the philosophical project that he believed ethics posed. *See generally* G.E. Moore, *The Subject-Matter of Ethics*, in PRINCIPIA ETHICA Chapter 1 (1903).

ways in the late nineteenth century because of the decline of natural law thinking within late nineteenth century jurisprudential thought.[35] Let me also enter a different ground for diffidence in making the following claims: There are clearly many theoretical but not metaphysical or epistemological reasons for adopting the jurisprudential positions I am about to discuss.[36] Some of these will be mentioned in Part IV.

Nevertheless, I think it is possible to identify at least four different responses for which the pressures of robust correspondence, verificationism, or foundationalism were or are in some sense significant. First, and most obviously, is legal realism. For a certain class of legal utterances—those made by lawyers, citizens, scholars, and judges on lower courts—the realist took legal utterances to be statements about how judges will or do behave.[37] Along logical positivist lines, some realists charted out the possibility of a legal science. The only point of such a science could be to predict, based on prior experience and inductive hypotheses, how legal actors do or will behave.

Realists had a different view when they concentrated on those legal utterances made by judges in the process of identifying the law in an authoritative manner for those below them.[38] In this context, realism is not an attempt to shore up the status of legal statements. On the contrary, it begins with an acceptance of defeat. It revels in the freedom that exists for adjudicators to decide what the law is. Statements about what the law is are ultimately simply part and parcel of the judge's performative utterances of law. Like Emotivists, legal realists believe the judges' utterances are imperatives; they do not state facts, nor are they verified by facts. To say that the law is one way or the other is essentially to declare the law to be that way, which ultimately rests upon choice about what the judge wants or values. In certain respects, Critical Legal Studies is a present-

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35. *See, e.g.*, Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995).

36. Indeed, I do not mean to suggest that metaphysical, semantical, or epistemological considerations have generally been a driving force in jurisprudence, or that questions within these areas have been the central focus of jurisprudence. *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995) (tracing development of numerous movements of American jurisprudence). I am assuming *arguendo*, with Patterson, that these subjects and questions have had a significant role for numerous thinkers and movements, and aiming to give the best account of the nature of that role—not its magnitude.

37. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 840 (1935) ("Washed in cynical acid, every legal problem can thus be interpreted as a question concerning the positive behavior of judges."); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.").

38. *See, e.g.*, Cohen, *supra* note 37, at 840 ("There is a second and radically different meaning which can be given to our type question . . . . When a judge puts this question, in the course of writing his opinion, he is not attempting to predict his own behavior. He is in effect raising the question, in an obscure way, of whether or not liability *should* be attached to certain acts. This is inescapably an ethical question. What a judge ought to do in a given case is quite as much a moral issue as any of the traditional problems of Sunday School morality.") (emphasis in original).

day variant of legal realism,[39] and Patterson's discussion of Singer falls into this camp.[40]

Secondly, there is legal positivism. The positivist takes seriously the need for a demystified account of what makes legal statements true.[41] Whether certain legal relations claimed to obtain really do obtain is a matter of whether valid legal norms imposing those relations do exist. The question is ultimately one of whether legal norms asserted to be members of a set of valid legal norms are in fact members of that set. Unlike the natural lawyer, the positivist does not think this rests on morality; unlike the realist, the positivist does not think this is a matter of prediction, on the one hand, or mere assertion of individual moral judgment, on the other. Nor is the positivist a nihilist who thinks there is no factual answer.

The positivist believes that whether a norm is a valid legal norm is a factual question dependent on whether certain social or historical facts exist.[42] Some positivists—most prominently Hart[43]—answer this question in two steps. First, whether it is valid depends on whether it would be recognized by a rule of recognition in force in the legal community in question.[44] And second, whether a particular rule of recognition is in force in a particular legal community is a question of whether members of the community have a social practice of regarding and applying that rule of recognition in a certain way.[45] Other positivists, following Austin,[46] rely on the notion of a historical pedigree; the validity of a legal norm depends on its having come into being a certain way.[47]

Positivism is consistent with a wide range of views on truth, meaning, and knowledge. Moreover, there are many attractions of positivism that do not broach truth, meaning, or knowledge and many reasons and moti-

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39. *See, e.g.*, Duncan Kennedy, *Freedom and Constraint in Adjudication, a Critical Phenomenology*, 36 J. LEG. ED. 518 (1986).

40. *See* PATTERSON, *supra* note 11; Singer, *supra* note 10.

41. There are at least two (and probably more) quite different ways of thinking about what is essential to being a positivist. According to the view I emphasize in the text, and the view central to Hart, the core of positivism is the view of legal facts as a species of social and historical facts. According to the view of positivism most often paraded by its opponents, the most critical aspect of the view is its separation of law and morality. There is relatively widespread agreement that a view of the first sort creates at least some form of separation between law and morals—if only that it is a contingent matter (rather than a necessary or conceptual one), that law and morality converge. *See* Jules Coleman & Brian Leiter, *Legal Positivism*, *in* BLACKWELL COMPANION TO JURISPRUDENCE (Dennis Patterson ed. 1996).

42. *See* Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, *in* THE AUTONOMY OF LAW 1, 19 (Robert P. George ed. 1996) ("If one had to settle on a central aspect of legal positivism, as a general approach to legal theory that has existed over time, one would focus on the premise that law is in some important sense a social fact or a set of social facts.").

43. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1961).

44. *See id.* at 44.

45. *See id.*

46. *See generally* JOHN AUSTIN, LECTURES ON JURISPRUDENCE (3d ed. 1869).

47. *See id.*

vations for its adoption.[48] Nevertheless, legal positivism, like logical positivism, is attractive to those with a "taste for desert landscapes."[49] Unlike its original adversary, natural law theory, positivism does not add to the world mysterious things—such as natural laws, natural rights, and natural duties. The positivist purports to explain what law is, and, in this sense, what makes legal statements true, by pointing to legal sources and to the conduct and attitudes of those who make the legal sources, interpret them, use them, and treat them as authoritative.[50] To the extent that legal positivism is motivated by the thought that it is metaphysically, semantically, or epistemologically *necessary* to have a view of law that does not go beyond social and historical facts, the attraction of positivism may be attributed to the pressures exerted by analytic philosophy and logical empiricism.

The term "instrumentalism" can be used to denote a view that is to some extent a version of legal realism, or of legal positivism, but also differs from both. The view that I have in mind grew out of one strand of Holmes,[51] and is seen in the work of, for example, William Prosser[52] and, more recently, Richard Posner.[53] The criterion for the truth of a particular statement is whether the legal regime it creates provides an appropriate means for the realization of the policy goals that the law in question is supposed to be realizing. In law, as in ethics, this is an attractive position to take, because it preserves the possibility of truth, knowledge, meaning, and legitimacy, without seeming to have a mysterious account of subject matter. It does this by taking the normative goals of the law in question, and treating the legal statements as statements about what best would realize those goals.[54]

Finally, and not necessarily in direct competition with each of the above views, the pressures I have referred to have had an effect not only on theories of law, but also on theories of interpretation.[55] This is most

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48. Both Joseph Raz and Frederick Schauer, for example, cite conceptual analysis and reasons sounding in normative theory in support of positivism. *See, e.g.,* Josphey Raz, *Authority, Law, and Morality, in* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1994); Frederick Schauer, *Positivism as Pariah, in* THE AUTONOMY OF LAW, *supra* note 42, at 31-55.

49. *See* QUINE, *supra* note 8.

50. *See generally* Coleman & Leiter, *supra* note 12.

51. *See generally* Holmes, *supra* note 39; ROBERT SUMMERS, INSTRUMENTALISM IN AMERICAN LEGAL THOUGHT (1982).

52. *See generally* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS (1941).

53. *See generally* RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW (3d ed. 1994).

54. For a comparison in moral philosophy, see generally Philippa Foot, *Morality as a System of Hypothetical Imperatives, in* PHILIPPA FOOT, VIRTUES AND VICES (1978).

55. I do not wish to pursue here the difference between theories of law and theories of legal interpretation, or to suggest there is a sharp distinction to be drawn. Some of the theories discussed above—for example, instrumentalism—would probably be viewed by many as a methodological thesis about how one ought to interpret apparently open-textured legal norms, rather than as a thesis about what law is or about what makes it true that a norm has the status of law. I raise the point explicitly with regard to originalism because it seems to me that originalism is widely viewed not as a theory of law, but as a theory of the meaning of legal provisions.

striking in the case of originalism.[56] The originalist contends that whether a statement describing the meaning of a particular legal norm is true depends on whether the statement accurately depicts what the legal authorities creating the norm intended it to mean. The predominant philosophical motivation of the originalist[57] is that he believes that something outside of the interpreter's own predilictions must make the statement about what the legal provision means true or false, and he cannot imagine what besides the intent of its utterer could do this. Arguably, this stems from the idea of the "robust correspondence theory" that the possibility of truth demands the existence of particular sorts of facts that can be described and conceived of outside of the language of the embattled area. Similarly, while originalism, because of its heavy reliance on internal mental states, would clearly be suboptimal from an empiricist's point of view, it would be attractive to the verificationist in another way. The verificationist would arguably prefer the originalist's purportedly definite historical methods of verification to the free-floating methods of interpretation asserted by the anti-originalist. In these two ways: (1) demanding an independent and easy-to-grasp description of the sort of fact that makes statements about meaning true, and (2) demanding a method for verifying the truth of each sentences—the pressures that I have described in analytic philosophy lent themselves to originalism.[58]

None of these views, with the exception of one aspect of legal realism, is a view about the existence or nature of truth in law. None of them is a view about the nature of the relationship between legal propositions and the world. To the extent that these views are metaphysical, epistemological, or semantical at all—rather than being first-order views or methodological views or normative views—they are views about the subject matter of legal propositions. And each, in its own way, is a somewhat peculiar view of the subject matter of law, a view about what it is that a legal proposition is saying, and what it is that makes it so.

It is convenient to abbreviate and to say that these are views about truth in law. But to say that some system contains a view about what makes the true sentences in an area of discourse true, is not necessarily to say that it is a view about truth.[59] If the focus is on features of the sentences in that area of discourse, it is natural to call it a view about

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56. *See, e.g.,* Robert Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

57. There are other motivations for originalism, including prudential, historical, and political theoretic ones. Scalia's constitutional originalism does not appear to be motivated by a philosophically based theory of meaning, as his affinity for textualism in statutory interpretation suggests. *See* Antonin Scalia, *Originalism, the Lesser Evil,* 57 U. CINC. L. REV. 849 (1989) (constitutional originalism justified by need for constraint on judicial discretion).

58. Of course, there is an irony in saying this, since if there is any single subject analytic philosophy has been sophisticated about, it is the subject of meaning. Analytic philosophers who have taken the time to address originalism explicitly have typically rejected originalism as an underdeveloped and naive doctrine.

59. *See generally* HORWICH, *supra* note 20; DOROTHY GROVER, ET AL., 27 PHIL. STUD. (1975).

meaning. But if the focus is instead on that in virtue of which the sentences are said to be true, and would just as naturally apply to the issue of what makes our beliefs about law true, it is more naturally put as a view about subject matter.[60] Hence, I think the leading jurisprudential systems outlined above, although they may answer questions as to what it that makes a legal sentence true, are not theories of truth, and do not necessarily even contain theories of truth. They contain theories of the subject matter of legal statements and beliefs.

G. TRUTH AND LAW

This brings me to my first disagreement with Patterson. Patterson asserts that a great deal of Twentieth Century jurisprudence has focused on the question of "what it means to say that a proposition of law is true"[61] and that his book is intended to bring this focus to the surface, and to provide a fresh answer to the question. I think this misdescribes both the positions that Patterson criticizes, and what his own view really has to offer. The positions Patterson addresses are not about the meaning of the term "true" or the concept of truth. Nor are they about one side or the other of the realism/anti-realism debate. Rather, these are all views of the subject matter of law. They are all views of what is being said when one asserts some proposition of law, of what one is accepting when one accepts or believes a proposition of law, and of what it is for things to be as the proposition of law says they are. These are views purporting to tell us what legal propositions are, at bottom, about. They are not really theories of truth; they are theories of what law is. They are all, in fact, entirely compatible with many different theories of the predicate "true" and of truth more generally. A positivist can just as easily be a coherentist as a correspondence theorist or a redundancy theorist. The same goes for instrumentalism and formalism. The key lies not in what is said about the nature of truth or the predicate "true," but in what is said about law.

Patterson's undue emphasis on the concept of truth and the term "true" in jurisprudence suggests several other comments. First, I note that Patterson has understandably been drawn to focusing on the term "truth" because it is difficult to find any other way to formulate the question he says jurisprudes have been asking, which is roughly, "what kind of thing is one saying is so when one asserts a legal proposition?" Patterson uses a more convenient locution: "What does it mean to say that a legal proposition is true?" To take the word "truth" or the concept of truth to be the issue here is like taking the word "so" or so-hood to be the issue in the first question. It is to confuse a term merely thrown in to help us quantify over the whole domain of legal propositions, with a term of independent substance.[62] Second, his overemphasis on the concept of truth in jurisprudence is doubly understandable because, as I have suggested, a

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60. *See* Foot, *supra* note 57; Scanlon, *supra* note 36.
61. *Id.* at 21.
62. *See, e.g.,* HORWICH, *supra* note 20.

certain approach to truth, meaning, and knowledge, was highly influential in motivating legal theorists to work hard on the question of subject matter. Third, I will later in this article explain my agreement with Patterson's view that changes in the theory of truth provide a reason to reevaluate all of the jurisprudential positions he has described, and to consider a rather new jurisprudential position, modeled on the metaphysics of contemporary theorists of truth. But the nature of truth is an indirectly relevant issue: subject matter and meaning are really the fundamental questions.

II. THE RISE OF COHERENTISM

I want to reemphasize that my account of the "pressures" of correspondence, verificationism, and foundationalism is a synthetic amalgam, not accurate as a description of any particular person's view, or to anyone else's historical account. It is not too bad, I hope, as a description of a set of pressures that focused central-area theorists on one set of questions, and non-central area theorists on another. I repeat these points as I launch into a description of the next phase of intellectual history here. The developments I will describe are not intended as an account of any single person's thought (although in this case, I believe my description will probably be accurate to many actual philosophers' views, most notably Richard Rorty[63] and Donald Davidson[64]), but as a description of developments that have, to a significant extent, undermined the pressures that went along with the correspondence picture.

A. THE REJECTION OF THE ROBUST CORRESPONDENCE THEORY

It may not be accurate to say that the correspondence theory of truth has gone out of favor; it is perhaps more accurate to say that a certain version of the correspondence theory has gone out of favor.[65] This robust correspondence theory is the version associated with Wittgenstein's *Tractatus*, a version that has given rise to decades of extensive work in the theory of reference and the philosophy of language more generally. I described the Tractarian view as a picture view, and I also mentioned the possibility of developing a theory of reference such that the referents of the naming expressions and the referents of the predicates were understandable, and the state of affairs described by a sentence could be understood as a function of the referents of the sentential components.

While the early Wittgenstein may have done the most to bring a robust version of the correspondence theory of truth to the foreground of the

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63. *See* Richard Rorty, *Davidson, Truth and Pragmatism, in* TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 333 (Ernest Lepore ed. 1986) [hereinafter TRUTH AND INTERPRETATION].

64. *See* Donald Davidson, *A Coherence Theory of Truth and Knowledge, in* TRUTH AND INTERPRETATION, *supra* note 63, at 307.

65. *But see, e.g.,* WILLIAM ALSTON, A REALIST CONCEPTION OF TRUTH (1996) (embracing robust correspondence theory of truth); CRISPIN WRIGHT, TRUTH AND OBJECTIVITY (1992).

world of Anglo-American philosophy in the early twentieth century, arguably the late Wittgenstein did the most to destroy it.[66] At the broadest level, Wittgenstein's later work relentlessly emphasized that sentences are socially developed tools used in social activities, and that it was misguided to conceptualize sentences as pictures of reality. The project of analyzing truth and correspondence through accounts of reference in naming and predicate-meaning was severely attacked by Wittgenstein's practice-based critiques of ostensive definition[67] and rule-following,[68] respectively. Wittgenstein's skepticism about the ability to extract from linguistic practice identifiable "pictures of reality" was arguably developed in Quine's *Word and Object*,[69] where the notion of reference was also devastatingly attacked[70] and his critique of the rule-based notion of predicate meaning has been powerfully developed by Saul Kripke.[71]

On a more affirmative note, formal theorists and ordinary language philosophers alike began to find more interesting things to say about the predicate "is true."[72] Formal theorists and logicians found that in logic and formal semantics, it was useful and possible to stretch the notion of truth-value beyond truth and falsity, and that the particular notion we associate with "true" may best be characterized by its logical features.

Perhaps the most important thinking that kept some form of correspondence theory, but criticized a robust version of the correspondence theory, was that of Donald Davidson.[73] Building upon the work of Tarski, Davidson focused upon truth sentences of the sort I mentioned "'Ben Zipursky has red hair' is true, if and only if, Ben Zipursky has red hair." He argued persuasively that these sentences are not part of a theory that *explains* the predicate "is true" in English, but conversely, that the entire set of sentences is part of a theory of meaning that explains what each of the sentences means in English. Insofar as "truth" has a role to play in these correspondence sentences, it is really just a disquotational device. The point is much clearer if we consider a series of sentences explaining the meaning of terms in a foreign language. Consider, "'Ben Zipursky a les cheveux blondes' is true, if and only if, Ben Zipursky has blond hair." What this does is to say what the sentence means. More generally (and

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66. *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1958, G.E.M. Anscombe trans.) (1945); LUDWIG WITTGENSTEIN, ON CERTAINTY (G.E.M. Anscombe & G.H. von Wright eds. Denis Paul and G.E.M. Anscombe, trans. 1969); LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS (G.H. von Wright, et al., eds. G.E.M. Anscombe, trans. rev. ed. 1978); LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS (2d ed. 1960).

67. *See* WITTGENSTEIN, *supra* note 4, at 29.

68. *See id.*

69. WILLARD VAN ORMAN QUINE, WORD AND OBJECT (1960) [hereinafter WORD AND OBJECT].

70. *See id.*

71. *See generally* SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982).

72. For an extremely useful collection on theories of truth, see THEORIES OF TRUTH (P. Horwich ed. 1985).

73. *See generally* DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION (1983).

more accurately, for Davidson is a holist), to have a correct theory of meaning for a language is to have a theory that will generate a correct truth sentence for every well-formed sentence in the language. The purportedly impressive truth sentences of the correspondence theorist are just English-English. Davidson's theory was important because it wound up giving some significance in semantics and philosophical theory to the truth sentences so dear to the correspondence theorist, and it certainly wound up accepting those sentences as correct and as relevant to the semantics of the predicate "is true." On the other hand, by arguing persuasively that truth-sentences are critical parts of a theory of meaning, he completely undermined the pretensions of metaphysical theories to turn truth into predicate linking sentences to facts-in-reality. Davidson's theory is, in this sense, not so much a rejection as a deflation of the notion of truth as correspondence.

Similarly, numerous thoughtful and creative theorists have suggested that the correspondence theory of truth results from the mistaken view that the phrase "is true" really functions as a predicate, like "is blue." This has led philosophers to think that one who says a sentence is true must be saying that the sentence has some attribute, and that for a sentence to be true is for it to have that attribute. And hence, there has been a wild goose chase to figure out what that attribute is—*correspondence to the facts in the world* being the answer.

This is all a mistake according to these theorists, who variously label their view a "redundancy" theory,[74] a "prosentential theory,"[75] and more recently a "minimalist" theory.[76] On their view, when we say that something is true, as in, "[i]t is true that the CN Tower is in Toronto" or "[t]he sentence 'The CN Tower is in Toronto' is true," this is really just a device for asserting or agreeing with the underlying sentence. Consider a true/false test. Question: Is the following statement true or false? "The CN Tower is in Toronto." Answer: true. Giving the answer "true" is not making a statement about the correspondence between the sentence and reality. It is merely saying that the CN Tower *is* in Toronto—i.e., it is merely registering agreement with what has been said. Like Davidson's disquotational theory, it accepts our vocabulary of truth but undermines its pretensions to metaphysical significance, and in this sense, is deflationary. Paul Horwich's minimalist view is the best-developed theory along these lines.[77]

Finally, many philosophers have ceased to consider the notion of correspondence as a criterion of truth. I believe that this is largely asserted as a point about knowledge, not about truth, and that it was largely a concomitant of the downfall of reductive empiricism, for reasons that will

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74. *See generally* Frank Ramsey, *Facts and Propositions*, PROC. OF THE ARIST. SOC., Supp. Vol. 7 (1927).

75. *See generally* GROVER ET AL., *supra* note 59.

76. *See generally* HORWICH, *supra* note 20.

77. *Id.*

become clearer in the subsequent discussion of verificationism and foundationalism. For the moment, the point is simply this: In the first half of this century, many philosophers endorsed the claim that the measure of a sentence's truth was whether it could be said to match up to a fact in the world. After Wittgenstein, Quine, Sellars, and Davidson, many thinkers are no longer comfortable with that position; instead, it is thought, the measure of the truth of a sentence is how well it coheres with the other sentences we accept.

The first reaction to the downfall of a robust version of the correspondence theory of truth was that it warranted or constituted a form of anti-realism. If realism was understood as the conjunction of the robust correspondence theory, and a theory according to which reference as a relation between language and mind-independent reality could be established, then the loss of either conjunct, and certainly of both, seemed to leave one with an anti-realistic, and perhaps even a relativistic, position. If coherence is all we can have, and we cannot assure ourselves of a point of contact or correspondence with reality, then we seem to be stuck with idealism, or anti-realism at best. Many philosophers have accepted these conclusions, while many find them so repulsive that they prefer to continue as realists, defending the traditional view against the onslaught of criticisms I have mentioned.

But there is a third family of views, which numerous eminent philosophers including Donald Davidson,[78] John McDowell,[79] and Hilary Putnam[80] have developed. Versions of this type of view are called, variously: "anti-anti-realism," "quietism," or "internal realism."[81] On this type of view, the late Wittgensteinian critique of the picture theory of meaning and the correspondence theory of truth, and its Quinean and Davidsonian amplifications, undermine anti-realism every bit as much as they undermine traditional metaphysical realism. The ground of anti-realism, on this view, is really a robust conception of sentences as pictures of reality, combined with an argument of the impossibility of establishing a relation of correspondence to reality. While the second premise of this argument is correct, it does not lead to anti-realism without the first, and the first premise is false for the reasons suggested by the Wittgensteinian critique. The anti-realist sees us stuck in a world of our own because we have no way to establish that our picture book of reality matches the way the world really is; hence the idealism. But if one rejects the view that sentences about the world are anything like a picture book, then the inability to get outside of our own language does not imply anti-realism or

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78. *See* Davidson, *supra* note 64, at 307.

79. *See generally* John McDowell, *Non-Cognitivism and Rule-Following, in* WITTGENSTEIN: TO FOLLOW A RULE (Stephen Holtzman and Christopher Leich eds. 1983).

80. *See generally* HILARY PUTNAM, REASON, TRUTH AND HISTORY (1981).

81. I do not mean to suggest that all of these terms refer to the same view, or even roughly the same view. They are usefully said to belong to the same family or class of views for the reasons stated in the text.

idealism.[82]   This view typically then points out that we are entitled to help ourselves to whatever use of the predicate "true" we normally use in the language. Notably, Professor Dworkin has recently endorsed such a view with regard to ethics, and confidently labelled it simply "realism."[83]

B.   The Rejection of Reductionistic Verificationism

It is easy to pinpoint the work in the canon of analytic philosophy that counts as most seriously damaging reductionistic verificationism: it is Quine's *Two Dogmas of Empiricism*, published in 1953,[84] and followed up with Quine's brilliant indeterminacy of translation argument against verificationist theories of meaning (and perhaps more) in *Word and Object* in 1960.[85] *Two Dogmas* was not aimed at all forms of empiricism—indeed Quine himself remains an empiricist. It is the program of logical empiricism or logical positivism that Quine was aiming at in *Two Dogmas*. He addressed two dogmas of the reductionistic form of empiricism. The first is the proposition that each sentence has a meaning, which is its conditions of verification. The second dogma is the proposition that certain sentences are analytic, in that their truth is a matter of pure logic and semantics, immune from empirical disconfirmation. The two dogmas were connected, in that it was through analytic sentences that complex sentences that appeared theoretical could be reduced to simple sentences about direct experience. In this manner, it was hoped, one could demonstrate that the meaning of all (non-analytic) statements about the physical world could be reduced to the capacity to be verified by certain direct experiences.

Quine argued that, from a logical point of view, experience could count as verification or falsification of a particular sentence only against a background of other sentences that are assumed to be true. It is always possible to treat a certain piece of data as not a disconfirmation, if one is willing to alter the background set of assumptions. We alter the sentences, we accept in response to experience (and it is epistemically rational for us to do so), but it is not logically or epistemically accurate to say that we test sentence by sentence. The test, at bottom, is always a test of our total theory against the totality of experience. We wisely keep most sentences fixed most of the time, but this is a choice; as a logical matter, it is a set of experiences that verifies a set of sentences, not an experience that verifies a sentence. Hence, there is really no such thing as a "verification condition" corresponding to the meaning of a sentence.

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82. In addition to the works cited at *supra* notes 78-81, the argument recited in this paragraph draws from themes in Donald Davidson, *On the Very Idea of a Conceptual Scheme, in* DAVIDSON, *supra* note 73, and John McDowell, *Values and Secondary Qualities, in* MORALITY AND OBJECTIVITY (Ted Honderich ed. 1985).

83. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It!*, PHIL. AND PUB. AFF. vol. 25, no. 2, 87-139 (Spring 1996).

84. *See* QUINE, *supra* note 1.

85. *See* WORD AND OBJECT, *supra* note 69, at 26-79.

A similar fate follows for the analytic/synthetic distinction, Quine argued. For purported analytic statements are simply parts of our overall theory too. They are parts of the theory that we generally decide to keep fixed. But there is nothing to guarantee that an experience would not come along under which the most convenient and practical change to make in our theory was simply to deny or to qualify the analytic statement. Quine enthusiastically embraced what has been called pragmatism and sometimes called holism. The most captivating metaphor offered for this theory is that in our theory building, we are like sailors on a boat that we know will not last long enough to keep us at sea, unless we rebuild it.[86] We must replace the faulty planks one at a time, while at sea, keeping afloat on those that do not yet need replacement. So in the endeavor to build adequate theories. We do not have the luxury of coming to land, where we some things are solid, fixed and reliable. We must replace from within a theory, every single plank of which is individually vulnerable, and we must hang onto the whole as we change the most vulnerable planks.

C. THE REJECTION OF FOUNDATIONALISM

Of the theories that we have considered, foundationalism is the most obviously relevant to non-central areas, because it directly set forth normative conditions for the possibility of knowledge, which many non-central areas were understandably said to fail. In this sense, the death of foundationalism is the most obviously liberating. But the death of foundationalism is not so easy to document. The late Wilfrid Sellars, upon whom Rorty's writings rely, was arguably the most important figure in undermining foundationalism, as Rorty's explicit indebtedness to Sellars suggests. I would also suggest that Wittgenstein and Quine played a significant role in undercutting this view.[87]

The most impressive form of foundationalism argued that individual observational experiences were the foundation of our knowledge. The advantage of using these as foundations is that people are exceptionally reliable reporters of what perceptual experience they believe themselves to be having. Indeed, as Descartes argued, one is arguably an incorrigible reporter of the perceptual experience that is before one's own mind. Foundationalists used sophisticated semantical frameworks to build up a system of meanings for sentences that were about the external world, and argued that these were sentences we are capable of knowing about insofar as they were justified by a series of steps that led down to the foundations of our knowledge—perceptual experience of reality.

In his brilliant work, *Empiricism and The Philosophy of Mind*,[88] Sellars

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86. *Id.* at 3 (describing the philosopher Otto Neurath's metaphor of science as a boat that must be rebuilt at sea).

87. *See generally* MICHAEL WILLIAMS, GROUNDLESS BELIEF (1977).

88. Wilfrid Sellars, *Empiricism and the Philosophy of Mind, in* WILFRID SELLARS, SCIENCE, PERCEPTION AND REALITY (1963).

argued that the concept of a perceptual experience was perniciously am-
biguous. Insofar as perceptual experiences are raw physical sensations, it
makes no sense to think that an experience is false, but that is simply
because the experience is not a representation of anything, and has no
propositional content. It is therefore not capable, from a logical point of
view, of serving as a justification of anything. On the other hand, the
thought that I am having a perception of a red thing does have proposi-
tional content, and could serve as a justification of something. Yet this is
a complex psychological statement, heavily dependent on a whole theory
of human perceivers, and involving the intersubjectively utilized category
of redness. While the former can be immune from criticism, it cannot
justify; while the latter can justify, it does, itself, require justification.
There is no solid foundation after all.

Quine, Sellars, Wittgenstein, and Rorty all believe that the lack of un-
justified justifiers in itself defeats foundationalism. Here again we get
Neurath's boat. We must start from where we are. The crucial thinking
is to make the planks stick together—to find coherence in our theory, and
to find a way of constructing the theory so that it covers as much as we
can.

D. THE RISE OF COHERENTISM

The critique of foundationalism dovetails with the critique of robust
correspondence theory and of reductive verificationism to yield a coher-
ence theory of truth and knowledge.[89] Justification and knowledge are
relational, and are piecemeal. We cannot say anything, but do not need
to say anything, about the relation between language and reality. Using
language, we simply seek to find the best justified set of statements. That
is what theory building and knowledge seeking are all about.

It is worth pausing for a moment to compare this critical movement
with what I think is often assumed outside of analytic philosophy.
Outside of analytic philosophy, it is often assumed, that philosophy con-
sists of the hangers-on—those who have clung to foundationalism, verifi-
cationism, and, particularly, to a robust version of the correspondence
theory based on a rigorous analysis of reference and correspondence, or
those who are still struggling to reduce problematic areas of discourse to
some kind of physicalistic or instrumentalist basis. If you are not a
hanger-on, then you are one who has seen the light and recognized the
futility of all of these projects. In this case, you recognize that reality is a
mere social construction in every area, that all is dependent on our con-
ceptual scheme, and that meaning is illegitimate as a general tool of the-
ory and evanescent in any particular case.

I do not think this is correct as a generalization about philosophers, and
more importantly, of course, I do not think it follows from range of avail-
able philosophical options. In particular, I think rejecting the correspon-

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89. *See, e.g.,* DAVIDSON, *supra* note 73.

dence cluster more naturally leads to complacency and comfort than to radicalism; to thin theories of correspondence rather than to idealism or the rejection of truth altogether; to a coherentism in epistemology that eschews foundations but is confident without foundations, and to a conception of meaning that is constrained by what is reasonable in practice to treat as meaningful. To believe that the fall of the three pillars entails the absence of knowledge, the evanescence of meaning, or the pure social construction of truth is to embrace wholeheartedly the robust correspondence theory's setting of the terms of the debate, and then to argue that one side has failed. Following Patterson, I have tried to suggest why the Wittgensteinian critique leads to rejection of the entire terms of the debate.

Overcoming a certain reading of the correspondence theory of truth, overcoming verificationism, and overcoming foundationalism have indeed been important for both the central and the non-central areas. In the central areas, philosophers have become more persuaded of the possibility of knowledge without foundations, of the possibility of meaning without verification, and of the idea of reality without reference. While the fantasy of metaphysical realism has perhaps been dashed, the nightmare of idealism has also been removed.

The non-central areas—such as ethics and the social sciences—have also been liberated to a great extent. First, they do not need to spend their time doing philosophy or methodology or metaphysics; they can keep to first-order work, make progress there, and not fear the barrage of illegitimacy arguments.[90] Second, they do not need to operate within a subject matter that does not really match the target area. Ethicists are not blocked at the level of language or metaphysics or epistemology from being deontologists; if they reject deontology, it will be for moral reasons, not metaphysical ones. Similarly, cognitive psychologists may weigh their theories as psychologists against the behaviorists' theories; they need not feel that the very vocabulary of their theories, if resistant to the behavioristic account of subject matter, precludes their views. The non-central areas were liberated by the rejection of the correspondence cluster because they were not forced to distort their first-order views by philosophically defensive accounts of their subject matter.

It may be useful to explain what I mean by "distorting discourse and practice," within one sort of coherentist epistemological framework.[91] A first-order philosophical theory of some area—such as ethics—needs to

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90. Again, while this view is forcefully asserted by Rorty, Davidson, McDowell, Putnam, Dworkin, and numerous others (*see* SABINA LOVIBOND, REALISM AND IMAGINATION IN ETHICS (1983)), there are many important thinkers who remain focused on metaethics and the epistemology of morals. *See, e.g.*, WALTER SINNOTT-ARMSTRONG & MARK TIMMONS, MORAL KNOWLEDGE? NEW READINGS IN MORAL EPISTEMOLOGY (1996).

91. The framework I am using will be recognizable as Rawls's theory of reflective equilibrium. *See* JOHN RAWLS, A THEORY OF JUSTICE 48-51 (1971) [hereinafter A THEORY OF JUSTICE]. Although this framework is useful for illustration, the point is a broader one that could be articulated outside of the framework.

explain simultaneously both the particular judgments in that area, and more general principles and methodological norms in that area. It needs to be able to give a coherent explanation of each in terms of the other. This is the attempt to attain reflective equilibrium. A certain number of particular judgments and a certain number of principled judgments may need to be eliminated or modified in order to achieve this coherence— the fewer the better, all else equal. One strives to bring as much into equilibrium as possible.

Now imagine adding to this set of statements (not yet in equilibrium) an orthodox set of metaphysical, epistemological, and semantic conditions in order for the judgments in this area to count as true, objective, possible bases for knowledge, and possible bearers of meaning. The result may be that the form of discourse will have to be reduced and reinterpreted. Possible reflective equilibria will now have to be abandoned, because many (or all) of the statements within them are unacceptable from the second-order point of view. The set of statements one is able to retain may be a much smaller subset of one's beginning first-order judgments than would have been obtained without the second-order constraints.

Now the reduction or reinterpretation to another area transforms the discourse, and might also transform the meaning of the principled judgments. If it turns out to be the case that the metaphysically based-constraints were unjustifiable, then it will be preferable to have a theory that retains much more of the initial first-order particularistic, principled, and methodological judgments. Indeed, it will be rational to regard those as the best set of statements available—as true—and to regard the set of statements generated within the philosophically constrained version as false insofar as it deviates from the former. Its deviations from the metaphysically based set of statements will be somewhat systematic; it will, for example, reject sentences that were not reducible to discourse that better conformed to the metaphysical biases (e.g., ethical statements not coherent or not plausibly true when ethics is reduced to pleasure, will be rejected). These sentences will have been rejected as false or meaningless, yet they might have survived the philosophically-unbiased reflective equilibrium. In this case, it will be plausible to say that the metaphysical agenda "distorts" the practice and the discourse and the set of true particularistic judgments, but that is really an understatement. It really makes false statements (and fails to include true statements) about the discourse, the practice, and the substantive area. Because they are systematically misrepresented, it is suggestive to say that they "distort" discourse and practice. Moreover, for some statements, the reduction to another discourse will alter the meaning of the statement, and so if it accepts the original statement as true only insofar as it is captured in the translated statement, it again distorts the discourse, the facts in that area, and the practice.

Returning to our historical framework, the point is this. The project of theory in various areas—such as ethics or psychology—was to bring together particular judgments and particular data, and more general principles and hypotheses. Theoretical concepts and principles are introduced to help produce a coherent and broad account that does all of this. But theories in these areas were seriously handicapped because they were told that their first task was to reinterpret the discourse in a way that satisfied the metaphysical, epistemological, and meaning-based constraints that I have described. Their reinterpretations or reductions omitted or greatly altered many of the important judgments that we sought to explain, and to put into reflective equilibrium. The theories at which they have arrived, while satisfying the second-order constraints, were rather poor at the first-order level, both in accommodating particular judgments and in accommodating principles and methodologies. But "poor" is relative, and if one takes it as a given that second-order constraints must be met, then a poor theory at the first-order level may be the best one can do. However, once the correspondence theory, the logical empiricist, and the foundationalist constraints were lifted, it became possible to entertain first-order theories that were not based on reductions or reinterpretations. This did not mean that reductionistic or correspondence-theory driven accounts were therefore wrong; it meant that: (1) one of their principle sources of motivation was removed, and, more importantly; (2) their merit was now to be measured against non-reductive theories, and theories that were not driven by correspondence-based pressures; and (3) theoreticians felt free to work with much less constraint on first-order theories.

A dramatic example of my point may be particularly interesting to legal audiences. Undoubtedly two of the great figures of American philosophy in this century have been Rawls and Quine. Both were at Harvard, both with their most important work in the third quarter of this century, Quine's most important works in 1953[92] and 1960,[93] and Rawls in 1955[94] and 1971.[95] There is very little made in the philosophical world, of the connection between this giant of political philosophy and the giant of philosophy of language. Perhaps that is because we still have little historical distance on this period of philosophical thought. Although there is no substantive or doctrinal connection between them, there is a connection at a very broad level. What is remarkable about Rawls, relative to the 100 years of philosophical thought preceding him in the Anglo-American world, was his confidence to engage in first-order political philosophizing without feeling the methodological pressure to conform to a utilitarian framework. One might well say that what was remarkable about Quine was that he dealt a lethal blow to the ever growing aspira-

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92. *Two Dogmas of Empiricism, supra* note 1.
93. WORD AND OBJECT, *supra* note 69.
94. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).
95. A THEORY OF JUSTICE, *supra* note 91.

tions of philosophers to make empirical verifiability a criterion for notions of meaning, reference, and truth. Quine—a lover of empirical methodology in science—shattered logical positivism and logical empiricism as an ideology dictating terms of legitimacy to every field of inquiry. Rawls produced the first important work of first-order political philosophy in the Anglo-American world in several decades that did not presuppose the necessity of a utilitarian methodology. My comments are meant to suggest that the connection between the two is this: Quine's refutation of reductive verificationism had the effect of undercutting the philosophical pressure which reductive verificationism indirectly exerted on political and moral philosophers to think of their subject matter as the domain of utility, and paving the way for major first-order theorizing in political philosophy that was non-utilitarian, and paving the way for a warm and enthusiastic reception of such theorizing.

Note, then, that the liberation of these non-central areas is rather different than the liberation of the central areas. This is not surprising because the sorts of pressures faced by each were rather different. The central areas faced the very great pressures associated with the metaphors that go along with a robust conception of the correspondence theory of truth and foundationalism. The task was to make good on the metaphor, or risk giving up the possibility of genuine reality and knowledge.

In the non-central areas, the problem was not one of making good on the details of the metaphor of correspondence. The problem was that the metaphor, in its robust form, simply did not fit. Hence there was tremendous pressure to reconceptualize the subject matter of these areas so the metaphor at least had a chance of fitting. With the elimination of the sentence-as-picture metaphor as the lodestar for philosophical legitimacy, the pressures eased, and it was possible to return to those disciplines, undisturbed by nightmares of meaninglessness and illegitimacy, and uninvaded by those who would distort the discourse to satisfy the very idea of correspondence.

E.   COHERENTISM IN JURISPRUDENCE

This brings me to my second criticism of Patterson, and it flows quite naturally from the first. The dethroning of the robust correspondence theory of truth has essentially liberated jurisprudence, as Patterson contends, but not for the reasons Patterson states. It is not because it was deemed crucial to defeat anti-realism in law. Nor was it crucial to find out what it meant for a statement of law to be true. These were not the goals or pressures, and therefore relief from these was no great source of liberation. Law, as one of the non-central areas, experienced pressure to provide a novel account of the subject matter of legal statements. This pressure produced accounts that distorted legal practice, and also discouraged the possibility of first-order legal theorizing that was not amenable to reduction into other discourse.

The reasons for rejecting the robust correspondence theory of truth, verificationism, and foundationalism, are reasons for rejecting the presumption that jurisprudes must give an account of the subject matter of law that is distinct from the discourse of law itself. We need not answer the question of what law is from outside of law—at least we need not do so in order to render legal discourse capable of the sort of truth, meaning, and possibility of knowledge available to other areas of discourse.[96] For all that really permits truth and knowledge in those areas is the possibility of coherence, and all that really permits meaning is the existence of a rule-governed practice of using the language.

The view I have just described might be called, following Donald Davidson, a "coherentist theory of truth and knowledge" in law, or "legal coherentism;"[97] with equal aptness, it might also be called, following Paul Horwich, a minimalist view of truth in law.[98] It is not so much a metaphysical, semantic, or epistemological view about law as it is, as a philosophical view about why one should reject certain kinds of reasons for thinking one needs a metaphysical, semantic, or epistemological account of law. Its central virtue is that it does not require us to distort legal practice or legal discourse in order for us to find legal discourse intelligible as an area for justification, truth, or knowledge.

Unlike the formalist, we need not abjure pragmatic or instrumental arguments in the law. For such argumentation is part of our legal discourse, and part of our most coherent construction of what our actual law is. Unlike the instrumentalist, however, we need not take the opposite tack and reduce all possibility of legal truth to means-ends statements. There is nothing intrinsically suspicious about the idea that some law embodies certain non-instrumental ends, and there is no reason to assume that legal reasoning could not be, at least some of the time, a species of practical reasoning distinct from means-end reasoning. To be locked into a view that rejects such a possibility is to distort discourse and practice dogmatically and erroneously.

The positivist is also guilty of distorting legal practice, most notably—as Dworkin has forcefully argued—by cutting short the possibility of moral argumentation within the law.[99] And the legal realist—in rejecting the possibility of a subject matter (other than what ought to be done)—

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96. Part IV of this article leaves open the question of whether an account of law from outside of law is necessary for answering questions of authority and political legitimacy. Professor Luban's article in this Symposium mounts an impressive argument that we do. *See* David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 SMU L. REV. 1613 (1997).

97. *See supra* note 14 and accompanying text.

98. I do not mean to suggest that Davidson's and Horwich's views are identical, or that mine is identical with either of theirs. I mean to follow Davidson's embrace of the coherence theory of knowledge (which Horwich does not discuss), and the rejection by both Davidson and Horwich of a robust correspondence theory of truth in law. I am more sympathetic with Horwich's minimalism in truth, because it does not require commitment to a Davidsonian theory of meaning.

99. *See* DWORKIN, *supra* note 14; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

rejects the possibility of coherent discretion-binding, power channeling practices, and also distorts practice, by claiming to have a philosophical basis that licenses judges to engage in levels of discretion that are alien from our practice. Coherentism leaves open the possibility of retaining our practices and methodologies and still keeping a grip on the ideas of truth, meaning, and knowledge. For these are provided by coherence, by our overall set of propositions about law, which is really the most we can say about any other area, and all we really need to say about any area.

Legal Coherentism is not itself a theory of law.[100] It is, in a sense, a metajurisprudential view. It tells us that it is not necessary to satisfy some of the constraints once thought essential. It does not actually tell us what the best theory of law is. But it does tell us that our goal ought to be to accommodate in a coherent and illuminating theoretical framework, as much as we can of what pre-theoretically appear to be the most acceptable judgments and principles and methodologies, without a metaphysically driven reduction or reinterpretation as a necessary preliminary step. It is possible that positivism, or realism, or instrumentalism, really is the most impressive theoretical synthesis. However, each begins with a serious shortcoming in that it undercuts our sense of the breadth of appropriate methodology, and, concomitantly, undercuts a number of more particular statements about what the law is that would be accepted, and would stem from one of those methodologies.[101]

III. PATTERSON: COHERENTIST OR POSITIVIST?

At one level, the view I have articulated seems to match Patterson's quite closely. He too wants to return to legal practice. He rejects the need for correspondence, although if I am right, the point would be better put by saying that he rejects the need for an account of subject matter in non-legal discourse that will provide more comfort given the picture theory of truth. In any case, Patterson, like the form of legal coherentist I have outlined, rejects the need for a non-legal description of the subject

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As Jules Coleman has argued, it is possible that positivism can accommodate more of a "moral" component than Dworkin often admits. Arguably, positivism is consistent with the contention that some legal systems permit the immorality of a norm to count as a reason against the claim that the norm is law. *See, e.g.*, Jules Coleman, *Negative and Positive Positivism, in* JULES COLEMAN, MARKETS, MORALS, AND THE LAW (1988). Whether inclusive positivism is indeed a defensible form of positivism is a broad question that goes beyond the scope of this article. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW (1979) (defensible form of positivism must insist upon separation of law and morality); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); *cf.* W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994) (defending inclusive positivism against Raz); Jules Coleman, *Authority and Reason, in* THE AUTONOMY OF LAW, *supra* note 42, at 287.

100. *But see supra* note 14 and works discussed therein.

101. It is an interesting question whether Dworkin is a coherentist in the sense that I have described. It is arguable that Dworkin is a coherentist who has turned to substantive, non-metaphysical first-order (but philosophical) theories of what law is. Note, however, that Dworkinian coherentism would be one out of many different forms of coherentism. For example, nothing I say in this article commits coherentism to as broad a role for morality in general or rights theory in particular, as that maintained by Dworkin.

matter of law. And like the legal coherentist, Patterson relies on coherence as the touchstone of whether a legal proposition is to be accepted. Finally, his substantive affirmative commitment to the set of modalities he derives from Bobbitt[102] seems to reflect a commitment to diversity of legal arguementation and discourse, and the need to refrain from distorting such argumentation with false constraints from the robust correspondence theory, verificationism, or foundationalism.

However, I would suggest that, insofar as he has tried to answer his own question of truth in law with a modality theory, Patterson has given us yet another view of the subject matter of law. His view is similar to that of the Positivist, and quite similar to that of H.L.A. Hart. Assertible statements of law, both for Hart and for Patterson, are ones that bear a certain relationship to valid legal norms. The assertion that a particular legal norm is valid is itself among the statements whose assertibility will need to be established, for both Hart and Patterson.

Patterson criticizes Hart for believing that the ability to make correct judgments about which norms are law is based on the awareness of a "rule of recognition for the legal system."[103] Rather, Patterson argues, it is our appreciation of forms of argument that enables us to grasp this. There are deep Wittgensteinian reasons, and also more quotidian observations of legal practice, to doubt that the grasp of these forms of argument is rule-like in the Hartian sense.[104] It is fair to say, however, that for Patterson as for Hart, the essence of law is: (1) the existence of valid legal norms; (2) the existence of a certain set of shared practices, which competent members of the legal community participate in appropriately, and which enables them to grasp which are the valid legal norms, and what follows from those legal norms. The difference between them lies in whether the nature of these shared practices is rule-like in the Hartian sense, and whether the nature of participation and understanding is as Hart describes.[105]

For both Patterson and Hart, law is ultimately a matter of certain forms of social practice. According to Patterson, what these forms of practice are, is not, for Wittgensteinian reasons, reducible in terms amenable to a methodological individualist.[106]   But the work of Wittgenstein and Kripke on Wittgenstein[107] suggests that if one is stuck to the correspon-

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102. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTI-TUTION (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

103. PATTERSON, *supra* note 11, at 68-70.

104. *Id.*

105. *See* PATTERSON, *supra* note 11; *see also* Dennis Patterson, *Law's Pragmatism: Law as Practice and Narrative, in* WITTGENSTEIN AND LEGAL THEORY (D. Patterson ed. 1992) (Wittgensteinian account of legal practice).

106. *See* PATTERSON, *supra* note 11, at 67-69, especially 68, where Patterson writes "The mistake legal positivists make is to believe that the meaning of the law lies in the acts of certain institutional players in the legal system," but then notes that the truth of legal propositions consists in "[p]ractice." By "methodological individualism" I mean to denote the view, in the philosophy of social science, that sound explanations of social phenomena must be reducible to statements about individual conduct and thought (broadly construed).

107. *See* KRIPKE, *supra* note 71.

dence cluster, one will be stuck with a methodologically individualistic conception of positivistic rules of recognition. One of the purposes of Patterson's undercutting the correspondence theory is to make room for a more subtle conception of the social practices that constitute our law. But now look where we have arrived; legal statements *are* about social practice, it is just that social practice is not as simple as the correspondence cluster insisted it must be.[108]

Patterson, then, appears to be a positivist with a non-individualistic and anti-intensionalistic Wittgensteinian account of social practice, which the elimination of the correspondence cluster seems to license. He has selected an important jurisprudential theory—the dominant one—and shown that a weak spot in the theory can be repaired. The weak spot was that the account of rules of recognition was itself an account within, broadly speaking, social science, and it was an account that presupposed correspondence-theory constraints on the type of social science analysis available—i.e., it was problematically dependent on methodological individualism in social science (and intensionalism in semantic theory). Hence, the problem with positivism was not that it reduced law to social practice; that is the right move. It is that the conception of the subject matter of social science seriously distorted the subject area, and was incapable of plausibly capturing the social practice. The defeat of the robust correspondence theory is relevant because it frees up non-central areas to be non-reductive. With a non-reductive account of the social practice associated with engaging in legal discourse, a plausible reductive account of law in terms of social practice is available. To overstate my case slightly, I am even inclined to say that, once Patterson's anti-reductive account of forms of argument in terms of practice has been established, and once the word "rule" has been reinterpreted in a post-Kripkenstein manner, it may even be possible to convert Patterson's "forms of argument" into a series of rules of recognition.

This brings me to my third criticism of Patterson, which largely focuses on the fact that many of the concerns associated with reductive accounts generally, and positivism, in particular, would appear to apply to Patterson. First, Patterson's account is more reductive than it needs to be. If the attack on robust correspondence is correct, we do not need to be positivists in order to retain truth, knowledge, and meaning. We are entitled to keep all of our discourse without changing, and without treating law as about something else—in this case, about practices of using certain methodologies.

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108. The picture is somewhat more complicated. Patterson is also following Wittenstein's rejection of intensionalism in spelling out what it is for an individual to understand a rule, and using this to undercut Hart's picture of the content of a rule of recognition. This seems to me an instance of using the same tool as was used to undercut the robust correspondence theory, as a tool to undercut a particular understanding of the nature of rules of recognition. But it does not seem to me a case of using the rejection of the correspondence theory to undercut the Hartian understanding of the nature of rules of recognition.

Second, Patterson's account does not do particularly well in accounting for the meaning of statements about truth in law. Often, Patterson is careful not to offer a positive account of the predicate "is true," and it is possible that he intended to be a minimalist theorist on truth. For example, in previewing what he will say about the question "What does it mean to say that a proposition of law is true?," Patterson says "'true' is a term of commendation or endorsement."[109] And throughout he is quite careful not to bring truth back in as a term of relation.

On the other hand,[110] Patterson's ultimate answer to the question of what it means to say that a legal proposition is true is that his typology of argumentation has answered the question.[111] This suggests that, on Patterson's account, to say that a legal claim is true is to say that it is the answer that would be reached appropriately using the four methods of legal argumentation to back a warrant, which, taken in conjunction with a ground, will lead to the claim. To say, "'The First Amendment protects advertising of nicotine on television' is true," is, for Patterson, to say that the methods of argumentation properly applied to the First Amendment and to the precedents decided under it would yield that claim. But I do not think that captures what it is to say that that sentence is true, for one could easily doubt that any particular method or combination of methods led to that consequence, and still believe that the sentence was true.[112] Rather, I think to say that the sentence "The First Amendment protects advertising of nicotine on television" is true, is simply to say that the First Amendment protects advertising of nicotine on television. Patterson, in discussing metaphysics and semantics generally, properly sticks to the minimalist theory, but in advancing his own jurisprudence, sometimes appears to fall into an account according to which to say something is true is to make a claim about the status of that proposition within our legal practices. The latter is not particularly tenable, as an account of the meaning of those sentences; a minimalist theory is more plausible.

In the third place, and most importantly, I have grave concerns about the adequacy of the typology Patterson establishes. One problem is that Patterson does not tell us why the only sorts of claims he is accounting for are particular applied legal claims. Statements about law are often statements about what the warrants of law are. Which norms are warrants and which are not is a question that Patterson does not address, and it is not

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109. PATTERSON, *supra* note 11, at 152.

110. Professor Luban details, at greater length, equivocations by Patterson on his analysis of what it is to say that a legal proposition is true. *See generally* Luban, *supra* note 96, at 1613.

111. PATTERSON, *supra* note 11, at 178 ("What does it mean for a proposition to be true as a matter of law? The typology just advanced is the answer to this question.").

112. This is a version of G.E. Moore's open question argument. *See* MOORE, *supra* note 35. As Rorty and numerous others have pointed out, this is generally an impressive form of argument against anti-realist accounts, warranted assertibility, or conventionalist accounts of truth. *See* Rorty, *supra* note 63. An acute problem for Patterson is that he has already declared himself an anti-anti-realist, presumably, in part, because of the force of arguments like this one.

obvious that his typology will yield a comfortable account of where this question fits in. This means that it may be that we cannot say why it is that certain assertions (about which norms are warrants) are acceptable in our legal-linguistic community, and other such assertions are not; or, for example, we cannot describe what is occurring when people engage one another in argument over which norms are warrants.

A more striking aspect of Patterson's view, from the vantage point of coherentism, is his insistence that there are four forms of argument. Why are these forms the only forms? Why is there a definite number of forms? How do we know that these forms are forms? Do the same forms exist for every area of law and in every jurisdiction? Little is said about what each form of argument is, and that is a problem; the embracement of a flexible approach to characterizing forms of argument does not relieve Patterson from the obligation of giving content. Very little is said about how conflicts between them—or even how positive synergies between them—are to be handled. Again, Patterson's philosophical approach may preclude the possibility of an algorithm, and therefore relieve him of the obligation to provide one (although I do not believe this has been shown), but this does not mean that there is no obligation to explain the phenomenon of conflicting or overlapping input from argumentative norms.

Moreover, because of all the forms of argument neglected—for example, arguments of morality, or political justice or administrability, or economic efficiency—Patterson will be forced into a dilemma for large numbers of important parts of contemporary legal argument. He will have to say that they are either not part of our practice as a matter of fact, or are not part of our practice insofar as the practice has the possibility of tracking the truth. The former view is not credible, factually, while the latter, I think, turns jurisprudence into an outside second-guesser of the discipline of law—the very result I thought Patterson was at pains to avoid. In short, I am arguing that the particular set of forms of argument chosen by Patterson is so narrow that it will certainly distort practice in a way that he has rightly complained about himself, and I am concerned that any number of argument-forms—and even the very category of argument-forms—is likely to put pressure on us to alter our practices and web of belief in law in order to accommodate what is essentially a second-order philosophical position. I suspect (although this is only a hunch that will have to be elaborated at a later date) that the inadequacy of Patterson's typology is not simply a matter of the fact that his account is not yet fully developed, but that it is a manifestation of a more general shortcoming of both positivism and conventionalism; the very attempt to provide an analysis of the sort of social practice that is constitutive of law is in tension with the pragmatist/coherentist commitment to leave any aspect of one's theoretical commitments—even one's methodologies—open to revision.

My critique of Patterson can very easily be put in a more constructive light. Patterson should not be offering a theory, from outside of the discourse of law, articulating the standards that any claim inside the discourse must satisfy. That strategy runs into many of the problems of positivism, in particular, and of philosophical legal theories, generally. Rather, Patterson's comments should be understood as general, broad, remarks from within first-order legal discourse. His comments are not answers to the question "What is truth in law?" They are answers to questions like, "What, in broad outline, is the nature of our practice and discourse in law?" Bobbitt can be seen as offering an answer to this question in constitutional law, and Patterson can be viewed as offering a generalized version of the answer. Although I find Patterson's answer limited, for the reasons I mentioned, this is now a disagreement about the adequacy of his typology of legal argumentation, and not a disagreement about truth in law, or about the subject matter of law. The view I have just sketched is entirely consistent with legal coherentism as a jurisprudence, and need not be a form of positivism. Form of argumentation is not serving as a criterion for being law, or for whether statements about law are true. Whether a legal statement is true is a matter of what statement it is, and the assessment of the statement is to be conducted by approaching it critically from within our discourse.[113] It may be very illuminating to try to systematize which forms are, in fact, acceptable in our system.

I will tentatively summarize. I do not quite agree with Patterson's claim that a principal question in jurisprudence has been what it means to say that a proposition of law is "true." On the other hand, Patterson is correct that, like many areas of human discourse, philosophers in law have felt pressure to provide an account of the meaning and subject matter of legal statements that is itself non-legal. To this extent, the question is: what is the subject matter of a legal proposition, such that things are as it says they are when a legal proposition is true?

Again, I do not agree precisely with Patterson's claim that transcending the realism/anti-realism debate was particularly significant for jurisprudence. On the other hand, the rejection of the forceful versions of correspondence theory, verificationism, and foundationalism was important, because it removed the pressure to articulate in non-legal discourse the subject matter of law.

Third, I have taken issue with what appears to be Patterson's claim that the rejection of the correspondence theory leads to a focus on the typology and forms of argument. Patterson has used the rejection of representationalism to defeat methodological individualism in social theory, and

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113. I take non-conventionalism to be central to the version of legal coherentism I am sketching. Hence, the phrase "from within our discourse" must be understood narrowly, as connoting, principally, a rejection of the attempt to analyze questions of truth in law as dependent on replacements or reductions of legal discourse, and not as an attempt to relativize truth to the relation between the sentence in question and certain allegedly essential features of "our discourse" as it now exists in our legal community.

has therefore used a Wittengensteinian view of practice in social theory to complement what might be called a form of legal positivism. But Patterson's view, like those he complains about, suffers from a tendency to distort and underestimate the variety of possible legal moves in legal argument that have a claim to legitimacy. And it faces a dilemma that I have suggested all positivistic theories face: it cannot make its characterization of the social practices that constitute law sufficiently essential to provide a satisfactory analysis of law, unless it abandons the flexibility and pragmatism that are essential to a defensible, coherentist approach to the justification of legal arguments.

Rather than positivism, I think that coherentism in metaphysics, semantics, and philosophy of language most easily leads to what I have called legal coherentism. On this view, we say as little as we can about metaphysics, epistemology, and semantics in law. We do not really need to say anything about it. There is no need for an independent description of the subject matter of legal discourse. The possibility of justification in the discourse depends on the need to arrive at coherence among our legal statements, just as it does in any other area of human discourse and thought.

Patterson's book displays at many points an affinity for what I have called legal coherentism, although, as I have argued, it also displays an affinity for legal positivism. It is possible to read Patterson as endorsing legal coherentism as a second-order philosophical view, and engaging in argumentation over the typology and forms of legal argument, only from within a broad form of descriptive first-order legal theory. Although I have serious reservations about the substance of Patterson's discussion of typology, this account diminishes the gap between Patterson and myself at second-order level, for I think coherentism preferable to what I called Patterson's form of positivism. For the remainder of this article, I will assume *arguendo* that Patterson is really what I call a legal coherentist.

IV. COHERENTISM AND QUESTIONS OF LEGITIMACY

My central concern with coherentism, both in philosophy in general, and in legal philosophy in particular, is simply this: I fear that coherentism may be too easy. It seems to me that while the attacks on the robust correspondence theory and its cohorts are warranted, it is not necessarily correct to conclude that all broad concerns about the legitimacy of the concepts of knowledge, truth, objectivity, and meaning, are fundamentally misconceived. I will grant that not all coherentists make such broad remarks, and I have not intended to suggest those broad remarks here. But it is the explicit strategy of the position I am considering, at least with regard to truth, and it is clearly the drift of the theory more generally, as is prominently exemplified in the work of Richard Rorty.[114]

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114. *See* RORTY, *supra* note 9.

To overstate somewhat, my view could be phrased as a *reductio ad absurdum* of coherentism. It seems to me that we have failed to make sense of philosophical discourse if we can no longer get a coherent description of what it is that can be worried about when one worries about the possibility of truth and knowledge in general or even with regard to a particular subject area.[115] For it is evidently a part of philosophical thought to be challenging the legitimacy of certain ways of talking and thinking. Philosophers—both in normative disciplines like ethics, politics, and law—and in non-normative disciplines like science and mathematics—are, in part, social critics. The coherentist fails to account for (and therefore eliminates) many of the primary concepts used by the philosopher to engage in thoroughgoing challenges to the legitimacy of our practices—challenges to our practices through challenging the capacity of our discourse and our modes of justification to achieve the sort of "legitimacy" they often appear to claim for themselves.

This is as clear in jurisprudence, of course, as it is anywhere. I have criticized formalism, realism, instrumentalism, and positivism, because they *distort* legal practice, but the point could obviously be put differently; they make implicit claims to guide, and at times to reform, legal practice, on what are, at bottom, normative grounds. At bottom, the demand for robust correspondence, verification, and foundations, was a demand that disciplines which use the power-loaded concepts of truth, knowledge, and discursive justification were only entitled to do so if they fit into a methodological mold that seemed right for empirical science. As that mold turned out not to fit even empirical science, the demand that other areas fit into it was neutralized. But while this episode in intellectual history counsels a presumption of suspicion to those, in the future, who attempt to mount deep challenges to subject areas in terms of the concepts of truth, knowledge, objectivity, or justification, it does not follow that no such challenges could coherently be phrased, and of course many movements in jurisprudence, including those listed, may be describable in terms of challenges different from the analytic and logical empiricist ones I have outlined here.

My general point is that high level philosophical discourse about "truth," "meaning," "knowledge," and "objectivity" is a vocabulary that we utilize to scrutinize, often obliquely, certain normative questions about our actual practices.[116] Perhaps it will illuminate what is at issue here to focus on the context of adjudication. Our system tries to answer questions about how certain people are to be treated—who is to be forced to pay whom, for example—by answering certain questions phrased in legal discourse. The adjudicator answers these questions by making a variety of moves, or engaging in a variety of arguments, in the

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115. *See* Dworkin, *supra* note 83, at 87-88.
116. *See* Benjamin Zipursky, Objectivity and Linguistic Practice (unpublished Ph.D. Dissertation, University of Pittsburgh, Dep't of Philosophy) (1987) (on file with author) (concept of objectivity is tool for evaluating linguistic practices that guide communities to converge in belief).

legal discourse. In doing so, she takes up a certain attitude. Dworkin has argued forcefully that in our legal community, legal adjudicators take up the attitude of right answer seeking, of seeking to find the best interpretation, or, at a minimum, of attempting to decide which side has the better argument for the legal holding it advocates.

Now, a legal theorist can ask at least three levels of questions. At the first level, one may ask whether the law is as it ought to be; a second question to ask is whether the structure of legal discourse is as it ought to be. A third question is whether the attitude that the decisionmakers approach the question with: what is the best answer? (constrained by legal discourse)—is as it ought to be. It is this third question that I shall focus on.

It is part of the excitement and the radicalism of legal realism and its descendant, critical legal studies, that they offer a negative answer here— to the extent that judges believe that they are to decide policy and individual fate on the basis of what the justificatory system yields as the correct legal answer, they are not doing as they ought to be doing. The practice of deciding through legal discourse, with an internal best-argument seeking attitude, is merely a device for stopping those who hold the reigns of power from implementing substantive justice and change. Insofar as adherence to this "attitude" and practice is dependent upon on the acceptability of the idea of truth in law, these thinkers deny the existence of truth in law, and were delighted to have this as an argument to bolster their critique.

Boldly defending the opposite view is Dworkin. The attitude of seeking the best argument through legal discourse is part of a practice that Dworkin affirmatively supports. A system of legal decisionmaking staffed by competent and sincere "best argument" seekers, given Dworkin's account of what "best argument" seeking involves in our legal discourse, is a system that fosters a certain kind of fairness and principledness in the disposition of the practical decisions, involving the fate of individuals and society, that come before it. This point may be summarized by saying that a community based on a legal system that enjoys a practice of this sort, enjoys the political and social virtue of integrity.[117] Commendably, to my mind, Dworkin presents these arguments without recourse to general theories of truth or objectivity. But insofar as arguments against truth or objectivity threaten to undermine Dworkin's position, he is understandably a friend of the Davidsonian critique of overblown metaphysical realism.[118]

Finally, part of the tremendous appeal of Hartian positivism is that it takes a plausible middle road between the realist and the Dworkinian, on the status of the attitude of seeking best-argument through legal discourse. For the positivist, this attitude is sometimes appropriate and sometimes not. For certain questions, the rule of recognition yields no

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117. *See* DWORKIN, *supra* note 14, at 95-96.
118. *See* Dworkin, *supra* note 83.

answer, and the adjudicator ought to recognize that the decision to be made is one of discretion. The Hartian tells also us what determines whether the question at issue is one the "best-argument" seeking attitude is appropriate. The positivist's account of the subject matter of legal statements therefore yields a partial and qualified defense of truth in law: some legal statements are true or false, others are neither.

I am suggesting that a critical question in jurisprudence is the legitimacy and appropriateness of a "best-argument" seeking practice that I, like Dworkin, believe adjudicators engage in. Another way to describe this practice is a practice of "right answer" seeking, or, perhaps, a practice of truth-seeking. The practice seems to be accompanied by a presumption that there is some answer to which adjudicators ought to converge, a presumption that justificatory forms of argument that can be analyzed as truth-preserving will lead us to the argument, an idea that the right answer is independent of the will of the answer-seeker, and conviction that the answer will be a sound basis for action. The suggestion is that a critical question in jurisprudence is the legitimacy and appropriateness of what might be called truth-seeking (or best interpretation-seeking) practices and attitudes in adjudication.

It is tempting to say that the question of whether legal statements are really capable of truth is the question of whether the truth-seeking practices are legitimate. I shall not indulge that temptation. It seems to me that minimalist or deflationary accounts of "truth" (at least semantically) are more promising, for the reasons I have stated. But I venture that legal theorists' attempts to develop an account of subject matter in response to logical empiricism can be understood, in part, in connection with the evaluation of truth-seeking practices more generally. There are certain subject areas—medium-sized physical object talk, for example— where there is no dispute as to the legitimacy of truth-seeking practices. In other areas, taste in food and clothes, for example, only a narrow fragment of discourse involves truth-seeking practices, and common sense challenges even the legitimacy of that. On one level, the fear engendered by logical positivism is that areas like ethics and psychology and law were more like fashion than like science. At this level, the goal was to gain an account of what these areas were about such that we became comfortable with treating the truth-seeking practices as legitimate.

It seems to me that the destruction of the robust correspondence theory, verificationism, and foundationalism can be understood as a refutation of the idea that certain causal accounts of perception, language use, and reference relations would be able to persuade us that our truth-seeking practices were, in a sense we idealize, possibly truth-finding. In this respect, and only relative to a rather bloated sense of epistemological aspirations, the critique can lead to a sort of skepticism. It should also be recognized, however, that insofar as the account was intended to bolster the legitimacy of the truth-seeking practice, it could no longer do so.

The coherentist has three responses. The first is to say that the skeptical terms in which the challenge to the legitimacy were phrased were themselves unfounded. The second is to doubt whether any global critique of our linguistic practices, even if it is limited to our truth-seeking practices, can coherently get off of the ground. The third is to say, in response to the legitimacy question, that our linguistic practices are simply how we get around; their legitimacy lies in their utility. This third, rather pragmatic sounding statement points to one of the reasons that coherentists are often pragmatists.

Most of my recounting of the coherentist revolution has been, in some sense, an explanation of the first coherentist response: a sympathetic account of what was wrong with the framework within which the attack was made. I am much less persuaded that the coherentist has demonstrated the impossibility of any global critique of truth-seeking practices. I shall leave that for another time. As for the third claim—that the truth-seeking practices and our mode of discourse is useful—this seems to me true but remarkably bland and uninformative; it is not clear that we could not get around without very different sorts of practices. It is also not clear what values are at play.

But in any case, the question at hand is not global challenges to truth-seeking practices, but the challenge to truth-seeking practices in legal discourse, and particularly in the context of adjudication. Here, I agree with Patterson that correspondence-based challenges fail, because the framework cannot get off the ground. But the second and third responses above are particularly unpersuasive in the case of law. First, I think that realists, feminists, critical legal studies scholars, and to a significant extent positivists, have challenged the legitimacy of truth-seeking practices in law. This is done explicitly from an ethical and a political point of view, although it is sometimes also done from epistemological, metaphysical, or linguistic points of view. And it is often done, most interestingly, with regard to particular parts of legal discourse on particular occasions.

Finally, note how bland and unhelpful pragmatism is as an answer to the local question about the legitimacy of truth-seeking practices in law. Certainly, legal discourse, and even truth-seeking practices in adjudication have utility and pragmatic value. But there are other ways of making decisions that may have greater utility or pragmatic value. And more importantly, it is far from clear that the "utility and pragmatic value" argument is sufficient as a normative and political matter, to bear the weight that the practice of adjudication bears in our system.

Pragmatism about discourse globally, or about the physical world, is a rather sensible view. It makes little sense to doubt all of linguistic and knowledge gathering practices; there is something unrealistic about this level of skepticism, if it is meant practically. Once the best-formed theoretical bases for articulating forms of skepticism or metaphysical realism have been put to rest, all that is left to be said is that there is no obstacle

simply to going on with our practices, including our truth-seeking practices. At a minimum, it helps us get around.

But this form of pragmatism in legal discourse gets things backwards, because in legal discourse, we start with what is a realistic normative question about our practices, and not with a metaphysical problem. Removing the metaphysical problem does not remove the legitimacy question. Indeed, it tends to show that the metaphysical question did a poor job of articulating what it was we were really interested in the first place. The legitimacy question remains.

The legal coherentist has an answer to the legitimacy question insofar as it is driven by the robust correspondence theory, but has no answer to the legitimacy question *tout court.* I have suggested that a loose kind of pragmatism, with which coherentism is more generally associated, is completely unsatisfactory. It is also tempting to add to legal coherentism the pat statement that there is no reason to lose confidence in the legitimacy of truth-seeking practices in law or to depart from our legal discourse, but I think this is inaccurate; rather, a certain kind of metaphysical challenge is not a good reason to alter the practice or lose confidence in truth. Hence, I favor admitting that legal coherentism itself is an incomplete view.

I think it likely that there are many views that can be conjoined with legal coherentism to remedy this incompleteness on the legitimacy question. I shall close by pointing in the two directions that interest me most, recognizing that there may be others. The first is Dworkin's, for I believe Dworkin is ultimately a legal coherentist with a twist. The twist is to give a sufficiently rich and attractive account of the detailed nature of the truth-seeking practices in adjudication that the institutions of the law, and communities governed through those institutions, turn out to possess a certain sort of social virtue; in Dworkin's case, it is the virtue of integrity. A second and entirely different approach is seen in some positivists,[119] but is also compatible with the form of coherentism I have offered. This approach does not focus on the truth-seeking practice as a locus of legitimacy. Instead, it says that we should pour our energy into assessment of the laws and the methods of argumentation. We must also question the proper scope and occasions of the exercise of adjudicative power, on the other, given that the adjudicative practices work as they do, and given that the law and its methods are what they are. Both of these approaches are consistent with saying that legal statements are about the law; there is nothing problematic with saying that legal statements are true; that no extra-legal discourse is needed to describe the subject matter of law; and that coherence among our legal statements is the measure of whether to accept legal statements.

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119. *See, e.g.,* Schauer, *supra* note 48.

V. CONCLUSION

I want to close by returning to Patterson, and by saying a few words about what motivates his view, which I think in large parts motivates legal coherentism. Legal coherentism may be a particularly important view in this, the era of "Law and . . ." in the courts and in the legal academy, as this "Law and Truth" symposium itself reveals. Law and economics, law and philosophy, law and politics, law and literature—these "law ands" have a dual status that must be closely watched. Non-legal disciplines may be used either critically, or foundationally. Law and economics, for example, could be used critically to explain the content of a legal norm or legal form of argument, that itself contains concepts which call for economic analysis; thus, economic analysis is very likely called for in interpreting what constitutes an unreasonable restraint of trade under the Sherman Act.[120] On the other hand, it could be used foundationally, as an attractive way of understanding what an entire body of law is really about. Here, Landes and Posner's positive theory of tort law is a prime example.[121] Similarly, it is one thing to delve into a philosophical analysis of equality to assist in interpreting the meaning of "equality" in the Equal Protection Clause;[122] it is another to suppose that constitutional law is simply the embodiment of a Lockean or Rawlsian political philosophy.

Patterson—at least as legal coherentist—is open-minded about the kinds of discourse that can appropriately be integrated into our legal discourse, and is thus a supporter of the critical use of non-legal discourse. But where a foundational approach to an area of law would have the effect of distorting the content of the law in that area, and replacing the legal discourse already in that area with a discourse that is more comfortable for its expert exponent, legal coherentism counsels suspicion. This is for four reasons. First, we should be suspicious about the perceived need for an independent subject-matter; the perceived need likely comes from a philosophically ill-founded view of the impossibility of truth or knowledge without foundations. Second, we should be suspicious of the possibility of meaning reduction, in light of the Quinean and Wittgensteinian critiques. Third, we should recognize that, because the ultimate criterion for acceptability of the system is its ability to correlate with what we already accept within the law; coherence, not correspondence to independently comfortable subject matter, is the touchstone of the possibility of truth. Finally, we have no reason to attempt to limit our legal discourse to one form of justificatory methodology (e.g, economic, rights-based), and, in fact, doing so would seriously distort the law and the discourse.

In an effort to preserve the autonomy of the law against incursions from these other enterprises, however, Patterson goes beyond these arguments and veers dangerously close to a form of positivism, and indeed a

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120. 15 U.S.C. § 1 (1994).

121. *See, e.g.*, WILLIAM LANDES AND RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

122. *See* RONALD DWORKIN, FREEDOM'S LAW (1996).

form of conventionalism. For reasons I have pointed out, I do not think he should adopt these views. Ultimately, legal coherentism can keep non-legal reductive enterprises at bay so long as it can argue, on the merits, that nonreductionistic accounts give better interpretations of the law. And if it cannot do this, then conventional legal discourse does not deserve to win. This, in any case, is the essence of the moderate anti-dogmatism that lies at the core of the coherentist revolution.