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Some Thoughts on Law and Interpretation

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SOME THOUGHTS ON LAW AND INTERPRETATION

*George A. Martínez**

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I. INTRODUCTION

IN *Law and Truth*,[1] Dennis Patterson critiques the notion of interpretive universalism—the idea that all understanding is a matter of interpretation.[2] Interpretation has become a central focus of jurisprudence.[3] According to this view, understanding a social practice—e.g., law—is a matter of imposing an interpretation on that practice.[4] According to Patterson, the leading advocates of interpretive universalism in law are Ronald Dworkin and Stanley Fish.[5] For them, understanding law

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1. DENNIS PATTERSON, LAW AND TRUTH (1996). For reviews of LAW AND TRUTH, see Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133 (1997); Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, MICH. L. REV. (forthcoming 1997); George A. Martinez, *On Law and Truth*, 72 NOTRE DAME L. REV. 833 (1997).
2. *See* PATTERSON, *supra* note 1, at 72.
3. *See id.* at 73; *see also* Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991); Francis J. Mootz, III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115 (1994).
4. *See* PATTERSON, *supra* note 1, at 73.
5. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

is not a practice; rather, legal truth is a product of a connection between language and a sublime explanatory device.[6] Patterson argues that they are wrong because understanding and interpretation are distinct activities, and thus, legal understanding cannot be identified with interpretation.[7]

For Dworkin and Fish, understanding in law is a matter of interpretation.[8] Patterson's central response to this claim is that all understanding is not interpretation.[9] According to Patterson, understanding is not a matter of the application of an interpretive theory.[10] Understanding is best explained as an ability.[11] The criterion for understanding an utterance is not engagement in a process; rather, it is acting appropriately in response to the utterance.[12] For example, one shows understanding of the request "Please pass the salt" by passing the salt or explaining why it is impossible to do so.[13] Understanding is acting properly in response to the request.[14] If the request is unclear, interpretation of the request may be necessary.[15]

Interpretation cannot be understanding. We engage in interpretation when our understanding of an utterance or sign is in question.[16] Interpretation is an activity of clarification: interpretation begins when our conventional self-understandings break down.[17]

According to Patterson, if all understanding were interpretation, then each interpretation would itself stand in need of interpretation, and so on, infinitely regressing to infinity.[18] Given this, Patterson concludes that it is a mistake to assign interpretation a mediating role between utterances and the understanding of them.[19]

II. THE WITTGENSTEINIAN BACKGROUND

Patterson's argument, of course, is derived from Wittgenstein. Wittgenstein argued that understanding a sign or rule is not interpreting it.[20] Wittgenstein contended that there must be a way of grasping a sign or rule that is not interpretation.[21] To follow a rule without interpretation involves following it as a matter of course, or as Wittgenstein puts it,

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6. *See* PATTERSON, *supra* note 1, at 75.
7. *See id.*
8. *See id.* at 86-87.
9. *See id.*
10. *See id.* at 87.
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*; James Tully, *Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection*, 17 POL. THEORY 172, 195 (1989).
17. *See* PATTERSON, *supra* note 1 at 87; Tully, *supra* note 16, at 195-96.
18. *See* PATTERSON, *supra* note 1, at 88.
19. *See id.*
20. *See* Tully, *supra* note 16, at 193.
21. *See* ROBERT J. FOGELIN, WITTGENSTEIN 171 (1976).

it involves following the rule blindly.[22] If we look at actual cases, we discover that a person who follows a rule uninterpretatively has been trained to react to a sign in a particular way.[23] It seems that Wittgenstein contends that it is simply a fact of human nature that, given similar training, people react in similar ways.[24] To learn to follow a rule is to become the master of a technique that is part of a social practice.[25] Once understanding is seen in the correct way, there is no initial problematic gap between understanding and use that needs to be filled in by a mediator—interpretation.[26]

Conventional understanding, then, does not involve interpretation.[27] It is our acting, which lies at the bottom of the language game.[28] Catching on to and participating in activities—knowing how to act—is the essence of understanding.[29] Our conventional understanding of the world is just the way we are in the world, not an interpretation of it.[30]

III. CRITIQUE

Patterson's critique of law as interpretation is a very interesting and challenging position. There are, however, a number of considerations that may be raised against it.[31] In this section, I argue that Patterson's critique should be rejected because: (1) it is contrary to the view of Donald Davidson; (2) the Wittgenstein-Patterson argument against interpretation is not persuasive; (3) an interpretive approach to law is necessary to generate the ideal of fidelity to law; (4) freedom and rationality require an interpretive view of law; and (5) a non-interpretive approach to law generates the problem of inauthenticity.

A. DAVIDSON AND PATTERSON

At the outset, Patterson's critique of law as interpretation is at odds with the view of Donald Davidson, a leading philosopher of language. For Davidson, every act of understanding is also an act of interpretation.[32] Linguistic understanding is a matter of the application of an interpretive theory.[33] Davidson explains the situation of interpretation in

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22. *See id.*
23. *See id.* at 154.
24. *See id.* at 143.
25. *See id.* at 144.
26. *See* Tully, *supra* note 16, at 195.
27. *See id.* at 197.
28. *See id.*
29. *See* PATTERSON, *supra* note 1, at 125.
30. *See* Tully, *supra* note 16, at 197.
31. For an approach to Patterson's view on law and interpretation that is different from the analysis set forth in this essay, see Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996).
32. *See* J.E. MALPAS, DONALD DAVIDSON AND THE MIRROR OF MEANING 183 (1992).
33. *See id.*; Donald Davidson, *A Nice Derangement of Epitaphs*, *in* TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 433, 441 (Ernest LePore ed., 1986).

terms of "prior theory" and "passing theory."[34] The prior theory includes everything that one brings to interpretation, including beliefs about the speaker's beliefs and desires, and expectations about what words the speaker will use.[35] When the speaker speaks, the interpreter uses her prior theory to form a passing theory, a theory which actually interprets what the speaker is now saying.[36]

Patterson suggests that this is an implausible view. He relies on an example of the request "Please pass the salt."[37] When one uses this example drawn from our own language, it seems implausible to suppose that understanding is an interpretive process. For Davidson, however, even in this type of situation the problem of interpretation arises. It surfaces for speakers of the same language in the form of the question: how can it be determined that the language is the same?[38] Thus, speakers of our own language represent an interpretive problem to us.[39] Accordingly, contrary to Patterson, interpretation is always present.

B. The Case for Law As Interpretation: A Rejection of the Wittgenstein-Patterson Argument Against Interpretation

Turning to law, Patterson is not the first to think that one could apply a legal rule uninterpretively. For example, H.L.A. Hart discussed the following statute: "A legal rule forbids you to take a vehicle into a public park."[40] Hart concluded that a word like "vehicle" must have some standard instances in which no doubts are felt about its application.[41] For Hart, "vehicle" plainly included automobiles.[42] Apparently, Hart believed no interpretation was necessary to reach that conclusion. Automobile fell within the core of settled meaning and not within a penumbra of debatable cases where interpretation would be required.

Long ago, however, Lon Fuller questioned whether we can include certain cases within a legal rule without the need of interpretation.[43] With respect to Hart's example of the rule excluding vehicles from parks, Fuller argued that it was not possible to apply a word in the rule without interpreting the word in light of the purpose of the statute.[44] If the term "vehicle" clearly included automobiles, it is only because we interpret the

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34. *See* Davidson, *supra* note 33, at 442; SIMON EVNINE, DONALD DAVIDSON 107 (1991).
35. *See* EVNINE, *supra* note 34, at 107.
36. *See id.* at 108.
37. *See* PATTERSON, *supra* note 1, at 87.
38. *See* DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 125 (1984).
39. *See* MALPAS, *supra* note 32, at 182.
40. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, *in* THE PHILOSOPHY OF LAW 56, 62 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).
41. *See id.*
42. *See id.*
43. *See* Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, *in* THE PHILOSOPHY OF LAW 73 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).
44. *See id.* at 86-87.

word in light of the purpose of the statute—e.g., preserve quiet in the park.[45] In other words, interpretation is always present in law because we interpret legal rules in light of their purposes.

What is the insight at work in Fuller's example? The idea that interpretation is always required in order to determine what acts are in accord with a rule seems to be based on the idea that rules are indeterminate.[46] There is a gap between a rule or a sign and its application.[47] This gap can only be bridged by interpretation.[48]

Andrei Marmor recently has constructed a Wittgensteinian response to Fuller's argument. He contends that Fuller's position violates the distinction between following a rule and interpreting it.[49] According to Wittgenstein, interpretation is the substitution of one expression of the rule for another.[50] Action according to a rule cannot be mediated by interpretation because the gap between a rule and its application cannot be bridged by another formulation of the rule.[51] Applying this argument to Fuller, Marmor argues that assumptions about the purpose or policy of a rule are interpretive assumptions that do not mediate between a rule and its application but rather between one formulation of the rule and another.[52] Thus, Fuller's contention that one always needs to determine the purpose of the rule in order to be able to specify what actions are in accord with it, amounts to contending that the application of a rule always requires its translation into another rule, which is an absurdity.[53]

Marmor's argument is not persuasive. It ignores the distinction between "rules" and "policies." For example, Ronald Dworkin defines "policy" as a standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community.[54] Legal rules differ from policies in that, unlike policies, rules are applicable in an all or nothing fashion—i.e., if the facts a rule stipulates are given, then the answer it supplies must be accepted.[55] Policies state a reason that argues in one direction but do not necessitate a particular decision.[56] Given this, the policy or purpose of a rule is not simply a reformulation of a rule. Thus, contrary to Marmor, interpretive assumptions about the policy of a rule can mediate between a rule and its application.

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45. *See id.*
46. *See* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 147 (1992).
47. *See id.*
48. *See id.*
49. *See id.* at 153.
50. *See id.* at 151.
51. *See id.*
52. *See id.* at 153.
53. *See id.*
54. *See* Ronald M. Dworkin, *The Model of Rules*, *in* THE PHILOSOPHY OF LAW 139 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).
55. *See id.* at 140.
56. *See id.*

Marmor's characterization of Wittgenstein's argument against interpretivism is consistent with the reading of G.P. Baker and P.M.S. Hacker, perhaps the leading interpreters of Wittgenstein.[57] It is worth examining their account of Wittgenstein's case against interpretivism in order to put us in a position to make a general critique of the Wittgenstein/Patterson thesis. They describe how the critique of interpretivism develops. Wittgenstein's interlocutor is tempted to interpose mediating entities between the formulation of a rule and the acts that accord with it.[58] The interlocutor considers whether it is an interpretation that builds the bridge between the expression of the rule and one's actions.[59] In response, Wittgenstein says that: "any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning."[60] Baker and Hacker view the metaphor of an interpretation hanging in the air together with what it interprets as the centerpiece of Wittgenstein's critique.[61] They explicate this metaphor as follows.

The interlocutor is concerned about the philosophical problem of how one makes the transition from a symbol or rule to doing something.[62] Wittgenstein is addressing the suggestion that an interpretation must bridge the gap between the rule and one's action.[63] Wittgenstein's metaphor expresses the thought that interpretations accomplish nothing toward resolving this puzzle.[64] One's interpretation of a rule is a mental symbolization of the rule.[65] It can have no powers that an ordinary rule formulation cannot have.[66] Given this, an interpretation is powerless to bridge the gap between a rule and one's action.[67] It is just another formulation of the rule, and therefore, is no closer to one's action than the original rule formulation was.[68] If the original rule formulation hangs in the air, so will another formulation of the rule.[69] Thus, interpretations of rules do not determine meanings.[70]

This examination of Fuller, Marmor, Baker and Hacker suggests a more general response to Patterson and Wittgenstein. It seems that the Wittgensteinian critique of understanding a rule as interpretation amounts to the following. Understanding a rule is not interpretation be-

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57. *See generally* G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY (1985).

58. *See id.* at 90.

59. *See id.* at 91.

60. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 198 (G.E.M. Anscombe trans., 3d ed. 1958).

61. *See* BAKER & HACKER, *supra* note 57, at 133.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

cause interpretation is just a reformulation of the rule.[71] Interpretation is substituting one rule for another.[72] Thus, it is not plausible to suppose that interpretation can bridge the gap between a rule and action.[73] If a rule could not determine what actions were in accord with it, then no interpretation—which is only a reformulation of the rule—could do this either.[74]

It is now possible to construct a general response to this central argument. It ignores the distinction between rules and interpretive assumptions—e.g., policies and principles. Fuller argues that policies are used to interpret law. I have already shown how they differ from rules. Dworkin argues that principles are the interpretive lens.[75] Principles are also different from rules in that, unlike rules, principles do not apply in an all or nothing fashion.[76] Like policies, principles state a reason that argues in one direction but does not require a particular decision.[77] Given the distinction between rules and interpretive assumptions—policies and principles—it is plausible to suppose that interpretation can fill the gap between rule and action.

More recently, scholars writing in the area of critical legal studies (CLS) have provided additional reasons to believe that interpretation is always present in law. In this regard, Patterson admits that interpretation is required in the context of legal indeterminacy—i.e., where the modalities or the forms of legal argument conflict.[78] He thinks this is permissible because he apparently assumes that indeterminacy occupies only a peripheral zone in the legal system. Like the positivist H.L.A. Hart, he seems to assume that a wide range of acting with words is not in doubt and that the legal rules in force dictate the result in many plain cases, without the need for interpretation. Critical legal scholars, however, see indeterminacy as far more extensive than Patterson seems to think. Indeterminacy cannot be confined to a peripheral region of law.[79] According to the CLS account, they have demonstrated that legal reasoning is inde-

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71. *See* MARMOR, *supra* note 46, at 149.
72. *See id.*
73. *See id.*
74. *See id.*
75. *See* Dworkin, *supra* note 54, at 142-43.
76. *See id.* at 140.
77. *See id.*
78. *See* PATTERSON, *supra* note 1, at 171.
79. *See* Andrew Altman, *Legal Realism, Critical Legal Studies and Dworkin*, *in* THE PHILOSOPHY OF LAW 176, 177 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995); *see also* Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493 (1997) (discussing the problem of judicial discretion); Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realties*, 25 RUTGERS L.J. 269, 321 (1994) (discussing how the preconceptions of judges influence judicial decision-making); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error*, 69 TEX. L. REV. 1929, 1958 (1991) (discussing false necessity in judicial decision-making); Kevin R. Johnson, *The Truth and Consequences of the Common Law as Social Propositions*, 23 U.C. DAVIS L. REV. 903, 912-14 (1990) (discussing the "vast discretion available to a judge").

terminate and contradictory.[80] For example, CLS theorists argue that all cases implicate a cluster of rules and that in any cluster there are competing rules leading to opposing outcomes.[81] This type of indeterminacy is the deepest and the most pervasive in the legal system.[82] If these claims are correct, this is an additional reason to embrace a law as interpretation approach.

What about Patterson's infinite regress argument? Patterson says that if all understanding were interpretation, then each interpretation would itself stand in need of interpretation, and so on infinitely regressing to infinity.

The infinite regression argument is related to Wittgenstein's idea that explanation must come to an end somewhere.[83] Thus, at some point reasons give out. For this reason, interpretations cannot forever be backed by other interpretations.

Wittgenstein writes: "If I have exhausted the justification I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'"[84]

Similarly, in *On Certainty*, Wittgenstein says: "Giving grounds, however, justifying the evidence, comes to an end;—but the end is not certain propositions' striking us immediately as true, i.e., it is not a kind of *seeing* on our part; it is our *acting*, which lies at the bottom of the language-game."[85] Given this relationship between the infinite regress argument and Wittgenstein's claim that explanation must come to an end, the following may be said to suggest that the infinite regress argument is not persuasive.

Patterson's infinite regress argument is not compelling because it does not leave us with a satisfactory analysis of understanding a sign or rule. In an effort to bring explanation to an end, Wittgenstein and Patterson stop their investigation into the notion of grasping a rule or sign at the point where the problems have only been stated.[86] In the end, we are simply told by Wittgenstein and Patterson that "this is how we act."[87] Knowing how to act is the essence of understanding a sign. Developing the command of a concept through training, however, seems to be some-

80. *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984).

81. *See* Altman, *supra* note 79, at 178; *see generally* Christopher Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving Speak English Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. (forthcoming 1997); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994).

82. *See* Altman, *supra* note 79, at 178.

83. *Cf.* FOGELIN, *supra* note 21, at 147.

84. *See* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 60, at ¶217; FOGELIN, *supra* note 21, at 148.

85. LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 204 (G.E.M. Anscombe & G.H. von Wright eds. & Denis Paul & G.E.M. Anscombe trans., 1972).

86. *Cf.* FOGELIN, *supra* note 21, at 148.

87. *Cf. id.*

thing that demands more explanation than simply "this is how we act."[88] Such phenomena do not seem to be brute and inexplicable.[89] Thus, Patterson's argument does not leave us in a better position than the interpretive approach.

C. Fidelity to Law

An interpretative approach to law is necessary to generate the ideal of fidelity to law. Here, again, it is instructive to consider the work of Lon Fuller. One of the main contentions of legal positivism is that there is a conceptual separation between law as it is and law as it ought to be.[90] This separation thesis assumes that judges can identify the law and apply it without reference to considerations about what the law ought to be in the circumstances.[91] In attacking positivism, Fuller argued that it could not account for the ideal of fidelity to law.[92] In order to deserve loyalty, law must be right and good.[93] Since positivism insists on the separation of law from morality, it cannot account for the ideal of fidelity to law.

Patterson's rejection of an interpretive approach to law creates a similar problem. Through interpretation, one imposes a point or a value on a normative based practice.[94] Through interpretation, one engages in creative activity that helps make the law what it ought to be in the circumstances.[95] Thus, in rejecting the view that law is always subject to interpretation, Patterson deprives law of value. In so doing, he is unable to account for the ideal of fidelity to law.

D. Freedom and Rationality

There are other reasons to retain an interpretive approach to law. One potential reason is that our political life or legal practices are free and rational only if based on some form of critical reflection like interpretation.[96] Critical reflection frees us from blind adherence to convention.[97] For example, for Jurgen Habermas, our customary agreements are rational only if the participants could give reasons that justify them.[98]

James Tully, in the spirit of Wittgenstein, has argued that it is a mistake to conclude that we are rational only insofar as we could give reasons for

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88. *Cf. id.* at 149.
89. *See id.*
90. *See* Marmor, *supra* note 46, at 124; *see also* Johnson, *supra* note 79, at 904 ("The positivist school of thought views the common law as a rational system of positive rules . . . separate and apart from morality.").
91. *See* Marmor, *supra* note 46, at 124.
92. *See* Fuller, *supra* note 43, at 83.
93. *See id.* at 77.
94. *See* Marmor, *supra* note 46, at 42.
95. *See id.* at 124.
96. *See* Tully, *supra* note 16, at 172.
97. *See id.* at 173.
98. *See* Jurgen Habermas, The Theory of Communicative Action, Volume One, Reason and the Rationalization of Society 17, 317 (T. McCarthy trans., 1984); Tully, *supra* note 16, at 177.

what we take for granted. He argues, following Wittgenstein, that it is reasonable in some circumstances to take something as a matter of course without justification.[99] Wittgenstein argued that "reasons will soon give out. And then I shall act, without reasons."[100] For Wittgenstein, the exhaustion of reasons is not irrational.[101] "To use a word without a justification . . . does not mean to use it without right."[102] Thus, using signs rationally cannot be equated with the giving of validational reasons.[103]

It seems to me that Tully's position is not persuasive. We sacrifice freedom and rationality by giving up critical reflection or interpretation. The full clarity of rational understanding is the essence of self-determining freedom.[104] To act without reasons—without critical reflection—seems to abandon reason. To act without reasons "is to lose oneself in the great current of life" and is to "give up autonomy."[105]

E. The Problem of Inauthenticity

Martin Heidegger's discussion of inauthentic human beings also seems relevant to the question of whether one should retain an interpretive approach to law. Heidegger's overall project in *Being and Time*[106] was to discover the meaning of being.[107] Human beings can understand what it is to be in two different ways, authentically and inauthentically.[108] The authentic way gives us the best access to the meaning of being.[109] Heidegger first provides an analysis of inauthentic human being.

In taking up particular practical projects and human purposes, we also take up a variant of our cultural understanding of being.[110] According to Heidegger, we usually do so in an inauthentic manner.[111] The cultural understanding of being includes a sense of the appropriateness of human purposes and projects and of the manners in which we engage them.[112] Much of this sense resides in public or social norms of comportment.[113]

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99. *See* Tully, *supra* note 16, at 180.
100. *See id.* at 181.
101. *See id.*
102. *See id.*
103. *See id.*
104. *See* Taylor, Hegel and Modern Society 12 (1979).
105. *See id.* at 12-13. There is another problem that acting without reasons presents. Such behavior should not properly be called action. Actions are events performed by people for reasons. *See* Evnine, *supra* note 34, at 41. Actions are done intentionally. *See id.* For anything to be an action—something we do rather than something that merely happens—it must have some description under which it is intentional. *See id.* For an event to be an action, there must be some description of it under which an agent has a reason for doing it, and that reason is the reason why one performs an action. *See id.* at 44.
106. Martin Heidegger, Being and Time (John Macquarrie & Edward Robinson trans., 1962).
107. *See* Harrison Hall, *Intentionality and World: Division I of Being and Time*, *in* The Cambridge Companion to Heidegger (Charles Guignon ed., 1993).
108. *See id.* at 135.
109. *See id.*
110. *See id.* at 136.
111. *See id.*
112. *See id.*
113. *See id.*

These are norms captured by such expressions as "One just doesn't do that," "One doesn't do that here, in that manner," or "One always . . .," and so on.[114] For Heidegger, these norms are everywhere, at least implicitly, as the potential expressions of the cultural sense of what it is appropriate to do.[115]

By "understanding" Heidegger means taking a stand on.[116] We take a stand on our being whenever we choose a particular possibility or project.[117] Every purposive, future-directed choice from among the culturally determined alternative possibilities expresses an understanding of what it is to be a human being.[118]

According to Heidegger, we are always choosing from among the cultural possibilities.[119] We choose, often without realizing we are choosing, to do "what one does."[120] When we choose to interpret our being in the public way—living in the world of the one, doing "what one does" we "fall" into the inauthentic way of being.[121]

It seems to me that Wittgenstein's and Patterson's notion that one applies rules uninterpretively—i.e., as a matter of course or blindly—implicates the problem of inauthenticity. For Patterson and Wittgenstein, to understand a sign or a rule is knowing how to act properly in response to the sign or rule. To follow a rule uninterpretively is to act appropriately as one has been trained to act. At this point, however, knowing how to act appropriately in response to a sign seems to be as Heidegger would put it—knowing how to act as one acts. To follow a rule without interpretation, then, is just to act as one acts. Given this, following a rule uninterpretively or blindly can bring about a fall into an inauthentic way of being.

Falling into inauthenticity—acting as one would act—could have disastrous consequences in the legal context. For example, in *Plessy v. Ferguson*,[122] the Supreme Court upheld the racist proposition that it was permissible to segregate racial minorities. At the time of the decision—1896—such a proposition cohered well with and merely reflected the general racist practices of the era.[123] In upholding segregation, then, the justices on the Court were merely acting as one would act. Thus,

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114. *See id.* For example, "[in] the West *one* eats with a knife and fork; in [Asia] *one* eats with chopsticks." HUBERT L. DREYFUS, BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S *Being and Time*, DIVISION I 153 (1992).

115. *See* Hall, *supra* note 107, at 136; *see also* DREYFUS, *supra* note 114, at 153 ("in each culture there are equipmental norms and thus an average way to do things").

116. *See* Hall, *supra* note 107, at 137.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*; *see also* DREYFUS, *supra* note 114, at 241 ("Dasein can become either inauthentic or authentic. Dasein can 'choose the one for its hero,' in which case it is inauthentic.").

122. 163 U.S. 537 (1896).

123. *See* Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1723 (1990).

inauthenticity in legal decision-making can have extremely bad consequences.

IV. CONCLUSION

In *Law and Truth*, Dennis Patterson has offered a vigorous critique of the notion that understanding in law is a matter of interpretation. In so doing, he is swimming against the tide of "the interpretive turn" in jurisprudence. In these comments, I have sought to offer some reasons to question whether Patterson's critique is dispositive.