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Truth?

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Dennis Patterson, *Law and Truth* (Oxford University Press, Inc. 1996). 189 pp.; $39.95.

> TRUTH, n. An ingenious compound of desirability and appearance. Discovery of the truth is the sole purpose of philosophy, which is the most ancient occupation of the human mind and has a fair prospect of existing with increasing activity to the end of time.[1]

INTRODUCTION

Great stakes ride on whether an utterance is true or false. If true, I have to deal with its relevancy and import. If false, I can ignore it. If someone utters the truth, I can be impressed. If another person utters a falsity and attempts to pass it off as the truth, I can be morally outraged. Given the ways we use attributions of truth, lawyers and philosophers, among others, have a great stake in when a proposition of law is true.

Lawyers often view questions regarding the truth of a legal proposition as presenting the opportunity to respond positively or negatively, or at least with a tentative conclusion backed with qualifications. A traditional legal opinion serves this purpose; the opinion compares a transaction with the lawyer's view of the law, and then predicts what a court will do with the transaction. A philosopher, however, examines the question by looking at the process by which one arrives at the conclusion. Put another way, the philosopher asks: "What counts as sufficient grounds to say that a particular utterance is true?"

It is this latter, philosophical, analysis that Professor Dennis Patterson brings to law in *Law and Truth*.[2] In this book, he examines many of the common philosophical theories about truth and attempts to apply them to assertions about law. Indeed, the majority of the book is a detailed examination, and in some cases re-examination,[3] of current thought on the nature of law and truth. Only in

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1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 130 (1993).

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

3. The book owes much to Professor Patterson's prior writings in various law reviews. *See, e.g.*, Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993) (reviewing PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991)); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Dennis Patterson, *The Metaphysics of Legal Formalism*, 77 IOWA L. REV. 741 (1992); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1 (1993); Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994) [hereinafter Patterson, *Wittgenstein*]; Dennis Patterson, *You Made Me Do It: My Reply to Stanley Fish*, 72 TEX. L. REV. 67 (1993).

his final two chapters does he set forth his own answer to the deficiencies in other theories.

While one has to admire his analysis of others, I think his own analysis is surprisingly thin and even arguably jejune. His sketchy positive account does not do justice to the deep and abiding relationship between law and philosophy, and thus gives very little to the reader who is swayed by his critiques of others.

After briefly reviewing some basic philosophic positions on truth, and Patterson's own analysis of others, I will concentrate on his answer to the question of what constitutes a true legal assertion.

I. TRUTH AND PHILOSOPHY

For a long while, philosophy was dominated by what has been called a correspondence theory of truth. An assertion was true if it accurately corresponded with the world.[4] The proposition "Snow is white" was said to be true if there was snow in the world and it was the color white. Various versions of this type of theory attempted to bring more precision to the isomorphism between words and reality, but at the base of all such theorizing was the notion that there was a world, and that linguistic assertions were true if they accurately corresponded, or were congruent, with that external reality. In short, truth was a relationship.

This begged the question of the character of the two items truth connected. On the human side, ideas were one half of the relation; on the other was the world. But our knowledge of each side was and is fragile; Cartesian skepticism was born through the use of rational doubt of the external world, and it is deucedly difficult to confirm that one person's ideas have been communicated accurately and fully to others (especially when you can doubt whether other people exist).

Alternate theories thus grew, leading some philosophers to opine that the concept of truth was redundant.[5] They noted that the addition of the words "It is true that" to a simple declarative sentence did not change or alter its meaning. Thus, truth was a label that added nothing which could not be expressed in other terms; it appeared that saying something was true was nothing more than asserting confidence in an assertion being made.

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4. ARISTOTLE, *Metaphysics, in* THE BASIC WORKS OF ARISTOTLE 749 (Richard McKeon ed., 1941) ("To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true . . . ."); PLATO, *Sophist, in* PLATO: THE COLLECTED DIALOGUES 1010 (Edith Hamilton & Huntington Cairns eds. & F.M. Cornford trans., 1961) ("And moreover we agree that any statement must have a certain character. . . . And the true one states . . . the things that are as they are."). *See generally* TRUTH (George Pitcher ed., 1964).

A weak form of the correspondence theory has recently been articulated by John Searle. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 199-226 (1995).

5. The classic statement of this is F.P. Ramsey, *Facts and Propositions,* originally published in 1927 and reprinted in part in TRUTH, *supra* note 4, at 16. Recent scholarship has indicated that Ludwig Wittgenstein likely adopted the redundancy view of truth. HANS-JOHANN GLOCK, A WITTGENSTEIN DICTIONARY 365 (1996).

This leads to an examination of the connection between how we use truth and semantics. These semantical investigations lead to a conception of truth under which a statement is true if it is used correctly under existing rules of usage. Thus, whether it is true that a person is tall turns on whether competent speakers of the language would say that the person was tall. One consequence of this formation is that it jettisons any necessary connection to reality. The only intrusion reality makes is if utterances do not yield satisfactory results, or if the conception of the world changes for the speakers of a language. For example, a statement in the Middle Ages that the world is flat was true then, but not true now.[6] As a consequence, under semantic theories, "truth" is not transcendent.

The establishment and learning of the relevant rules, however, is tricky. Rules in this context are not like the rules of baseball, written down and consulted to resolve disputes. Rather, speakers apply these types of rules unconsciously. The best rough explanation of this view is that if a pattern of behavior exists, then that pattern forms the type of rule referred to.[7] That such rules can slide and slip over time is something that semantic theories embrace; a speaker of present-day English would be hard pressed to understand a phrase spoken in Old English. One just has to have faith in the empirical statement that they won't change so fast as to confuse everyone.

II. PATTERSON'S ANALYSIS OF EXISTING PHILOSOPHICAL AND JURISPRUDENTIAL POSITIONS

Against this background, and with somewhat different labels, Patterson analyzes various efforts to define truth in law. He starts with formalism,[8] using as his model the type of legal formalism conceived by Ernest Weinreb.[9] For Patterson, this type of "formalism asserts that a proposition of law is true if the stated proposition is consistent with the structure of private law, correctly understood. . . . In short, truth for the formalist is a matter of coherence."[10]

In particular, Patterson takes on formalism, and finds that it is nothing more, at bottom, than hand waving. He believes that Weinreb's dismissal of any other account of truth other than coherence begs the question of how one establishes truth.[11] In short, if you assume that law coheres to external criteria, don't reassert this assumption as a conclusion of your argument.

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6. Indeed, the etymology of the word "true" lies in notions of enduring correctness, in being faithful, steadfast, or firm. JOHN AYTO, DICTIONARY OF WORD ORIGINS 543 (1990). Some believe that the derivation is from "tree." JOHN CIARDI, A SECOND BROWSER'S DICTIONARY AND NATIVE'S GUIDE TO THE UNKNOWN AMERICAN LANGUAGE 275 (1983). The sense of truth as "'in accordance with the facts' is a secondary development." AYTO, *supra*.

7. The prescriptivist view of language, sometimes taken by books on grammar, is thus irrelevant to this point. *See* Patricia T. O'Conner, *Running Afoul of Fowler*, N.Y. TIMES, Feb. 16, 1997, § 7 (Book Review), at 35 (reviewing ROBERT W. BURCHFIELD, THE NEW FOWLER'S MODERN ENGLISH USAGE (1996)).

8. PATTERSON, *supra* note 2, at 22-42.

9. *See, e.g.,* ERNEST WEINREB, THE IDEA OF PRIVATE LAW (1995); Ernest Weinreb, *Legal Formality: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

10. PATTERSON, *supra* note 2, at 23.

11. *Id.* at 34.

Patterson argues that the formalist account, resting as it does on such assertions of what truth as a validator does (in essence, he characterizes the formalist account as normative and not positive), must show the necessity of the first principles upon which it rests.[12] When it cannot do this other than by bald assertion, it cannot be taken seriously.[13]

After thus dismissing the formalists, he takes on, respectively, moral realism as represented by the writings of Michael Moore and David Brink,[14] legal positivists such as H.L.A. Hart,[15] then Ronald Dworkin,[16] and finally Stanley Fish.[17] These critiques have for the most part appeared in print before, and Patterson takes the opportunity to respond to some of the criticisms lodged against his earlier publications.[18] His critiques, however, do not form a substantial or essential part of his positive theory of truth; he is just, so to speak, clearing the field before his entry is presented.

III. PATTERSON'S VERSION OF TRUTH

Patterson opts for a linguistic definition of truth. As he states, "the truth of a proposition of law is shown through the use of forms of legal argument. It is in the use of these forms of argument—the grammar of legal justification—that a proposition of law is shown to be true."[19] By a "proposition of law," in turn, he means "a claim about the content of law or, put differently, a claim about what the law requires, prohibits, or makes possible (e.g., power-conferring rules)."[20] In short, for Patterson, "'[t]rue' does not name a relationship between a state of affairs and a proposition of law. 'True' is best understood disquotationally."[21]

Adoption of this linguistic account of truth commits Patterson to the position that an assertion is true "if a competent legal actor could justify its assertion. . . . '[T]rue' is a term of commendation or endorsement."[22] Patterson arrives at this position via a tour of the rise of what he labels "post-modern thought," which

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12. *Id.* at 35.

13. Patterson's argument that each new act of interpretation must itself be interpreted has recently been criticized as being "modernist" instead of "post-modernist," and thus "radically disjointed." Stephen M. Feldman, *The Politics of Post-Modern Jurisprudence*, 95 MICH. L. REV. 166, 170 (1996).

14. PATTERSON, *supra* note 2, at 43-58.

15. *Id.* at 59-70.

16. *Id.* at 71-98.

17. *Id.* at 99-127.

18. *See* sources cited *supra* note 3.

19. PATTERSON, *supra* note 2, at 19.

20. *Id.* at 3 n.2.

21. *Id.* at 19. The adverb "disquotationally" or any of its roots does not appear in any standard dictionary. It is a term of art in philosophy. As John Searle has explained, "disquotation" refers to theories under which truth conditions are given as follows:

"Snow is white" is true if and only if snow is white.

This criterion of truth is sometimes called "disquotation," because the sentence quoted on the left-hand side occurs on the right with the quotation marks dropped.

SEARLE, *supra* note 4, at 201.

22. PATTERSON, *supra* note 2, at 152.

takes the form of a blend of critique of modernist representational views and short expositions on the insights of philosophers such as Ludwig Wittgenstein and W.V.O. Quine. He then attempts to transfer these insights into the realist/anti-realist debate in law described in his earlier chapters.[23]

Here, Patterson asserts, the two camps dispute under what conditions an assertion is true: realists say that an assertion is true if it corresponds with reality; anti-realists contend that the truth of an assertion is "by reference to the procedures for verifying the presence or absence of truth conditions."[24] The anti-realist position thus converts the search for truth from a search for a corresponding state of the world to a search for the ways in which "truth" is used; that is, a search for the ways in which competent speakers use the word.

Patterson dismisses the realist view because it cannot provide us with a convincing account of why we should believe that, to paraphrase Gertrude Stein's reference to Oakland, there is any there there. What he is left with is the view that "[l]aw is a linguistic practice that provides one of several languages of description."[25] In his "postmodern" view, this is significant. As creatures who use language, "[w]e make sense of the world linguistically."[26] This sense comes from common practice, from repeated similar uses by competent speakers in similar situations. As Patterson says, "[u]nderstanding a linguistic practice, having the ability to say something true, is a learned ability."[27]

At this point, in order to move to his own conception of truth, Patterson switches from analyzing language generally to making specific assertions about how law works: "Law is an activity driven by assertion."[28] Tests of whether these assertions are true consist of asking for the grounds of the claim, and then supplying reasons, or as Patterson calls them, "warrants," for why the proffered grounds are relevant to the resolution of the claim.

The rules governing the relevancy of warrants, in turn, are supplied by the forms of legal argument, by the ways competent legal actors back or justify the type of warrant employed. Patterson identifies four such types of legal argument: textual, doctrinal, historical, and prudential.[29] In case of conflict between or among types of legal argument (a textual argument seeming to run contrary to a doctrinal argument, for example), "we favor those that clash least with everything else we take to be true."[30] This approach is borrowed from W.V.O. Quine's notion that "'it is misleading to speak of the empirical content of an

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23. *Id.* at 165.
24. *Id.* at 166.
25. *Id.* at 168.
26. *Id.* at 169.
27. *Id.* at 170.
28. *Id.*
29. *Id.* at 171. Or, at least in Chapter 8 he appears to identify four forms. *See infra* Part IV.A.3.
30. PATTERSON, *supra* note 2, at 172.

individual statement.'"[31] Put another way, "[i]n law, we choose the proposition that best hangs together with everything else we take to be true."[32]

Patterson next charts the relationship between warrants and beliefs. Warrants are proffered justifications for choosing one side or another in a legal contest. The warrants employed are backed by one or more of the four forms of legal argument. But if these backings conflict with our beliefs, in, for example, how balances should be struck among competing branches of government, we engage in interpretation of the type employed above. We look to the uncontested beliefs for a resolution that disturbs the least number of settled beliefs.[33]

This form of interpretation is also employed to resolve challenges to the efficacy of any one of the forms of legal argument. In demonstrating this, Patterson tries to justify the use of legislative history in statutory interpretation. Use of legislative history, he asserts, is part of the historical mode of legal argument. It provides us more context related to the creation and construction of the legal language that we are interested in. How we use and construct that argument is a question of interpretation.[34]

To illustrate this, Patterson uses Professor William Eskridge's writing on dynamic statutory interpretation.[35] Eskridge labels his approach one of "evolutive perspective," but it is no more than a version of Patterson's historical legal form of argument.[36] Eskridge's rationale for the use of his form of historical justification is no more than recast versions of interpretation by resort to settled understandings; Eskridge, for example, backs his claims by pointing to the fit of his theory with settled understandings of American democracy and judicial competence.[37]

From this, Patterson asserts that the forms of legal argument perform the "role . . . [of] the grammar of legal justification."[38] In his view, without these forms of legal argument, "there is no law."[39] "The forms of argument are the legal grammar of meaning-making. . . . The forms make it possible to move from ground to claim (i.e., provide the backing for warrants). Because warrants themselves involve matters of belief, these beliefs may be called into question."[40] Patterson then indicates that these matters are resolved by interpretation, which means resolution by resort to deciding which contested view disturbs or clashes least with our settled understandings.

This is where Patterson leaves us. As he sees it, "[t]he essence of law is legal argument: the forms of legal argument are the culturally endorsed modes for showing the truth of propositions of law. It is in the use of these forms that the

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31. *Id.* at 172 (quoting W.V.O. QUINE, *Two Dogmas of Empiricism, in* FROM A LOGICAL POINT OF VIEW 20, 43 (1953)).
  32. *Id.*
  33. *Id.* at 174.
  34. *Id.*
  35. *Id.* at 176-79.
  36. *Id.*
  37. *Id.* at 177-78.
  38. *Id.* at 178.
  39. *Id.*
  40. *Id.* at 178-79.

practice is to be understood. Their use in practice *is* the law."[41] And thus truth in law is what these grammatical practices say truth is. This he sees as an inevitable consequence of twentieth-century philosophy.

IV. TRUTH?

Patterson's examination of truth, although interesting, suffers from significant flaws at critical points. He purports to survey law and isolate aspects of its "grammar." "Grammar," at some level in law, for Patterson means the four forms of legal argumentation, but Patterson seems unable to define or justify his selections; indeed, there is even some confusion on the number of arguments he believes there are.

In addition, from a theoretical level, Patterson's brand of post-modernism raises especially thorny questions for international law, attributable to his adoption of some of the philosophical ideas of Ludwig Wittgenstein. At a more basic level, however, I think Patterson misperceives Wittgenstein's philosophy, as demonstrated by his mixing statements about the form of language with statements about how certain individuals use language, thereby confusing the meaning of truth generally with the truth of specific assertions. I explore each of these criticisms at length below.

A. The Four (Six?) Forms of Argument and Definitional Problems

As detailed and careful as Patterson's analysis is of the philosophy of others, his own account of truth seems somewhat sparse. Further, on examination, it seems prone to many of the same objections he raises against others.

1. Problems with "Justification"

For Patterson, a legal proposition is true "if a competent legal actor could justify its assertion."[42] He goes on to detail the process of justification, and to assert that adherence to that process is an integral part of law. In particular, Patterson asserts that propositions of law are justified by particular types of argumentation; one "justifies" assertions by "employ[ing] the forms of legal argument."[43]

This is both too much and too little. It is unclear exactly what Patterson means by "justify." In normal parlance, this will simply be a matter of giving relevant reasons for concluding that the statement is correct. In short, when a person is asked why she adheres to a particular view of a statute, she will point to the text and to its history, thereby invoking two of the four forms of Patterson's argument. In a weak sense, she will have justified her view, assuming that such arguments are relevant to the point.

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41. *Id.* at 181 (emphasis in original).
42. *Id.* at 152.
43. *Id.*

But Patterson appears to mean more than that; his examples of justification blend into a discourse on interpretation, and that, in turn, focuses on not just putting forth relevant arguments, but relevant arguments which least disturb other beliefs. This last part would be unnecessary if a weak form of justification was intended. Thus, without stating it overtly, Patterson seems to be committed to a strong form of justification; one in which the reasons offered uniquely point to the adoption (or, presumably the rejection) of the proposition in question.

Such a view, however, is vulnerable to the same types of arguments Patterson employs against the formalists.[44] If there is but one interpretation, then there must be some standard against which we are comparing all competing interpretations. That such a standard is psychological (the concept of unsettling the fewest beliefs) does not save it; we still have to rank the views according to some external scale or rule that measure the level of variance from accepted beliefs.

Patterson's view of justification thus leads to an antimony: if weak justification is accepted, then his scheme bestows the label of truth on inconsistent, but internally plausible, propositions.[45] If the strong and hegemonic form is intended, then he falls prey to his own arguments on the false use of external standards to select correct statements. Neither of these outcomes would seem to be acceptable for any account which seeks to define truth in a useful fashion.

2. Problems with the Concept of a "Competent Legal Actor"

This turns the focus of Patterson's analysis to who decides which view is uniquely justified. For Patterson, the entity making this decision is a "competent legal actor."[46] This concept, however, is fuzzy. Under one view of who counts as such competent legal actors, the propositions of law set forth in *The Restatement* series are by definition "true"; one could hardly imagine a greater collection of competent legal actors than the assembled membership of the American Law Institute, who sponsor and approve the text of *The Restatements*. And their collective intent is to produce something that accurately states (or restates) what the law is. But I take it that such a conclusion is not what Patterson has in mind.[47]

Instead, Patterson uses this concept to refer to a hypothetical person who has been trained in law, and knows how "to play the game." She can make arguments in forms recognized by courts, even if they are not ultimately adopted. She understands the tools lawyers have to fashion results for clients. For most cases, this notion is unobjectionable; Patterson has invoked something akin to the law's

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44. *See supra* text accompanying notes 10-13.
45. This is, I take it, another view of the criticism made by Professor Martinez in George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOYOLA (L.A.) L. REV. 545, 570-71 (1996).
46. PATTERSON, *supra* note 2, at 152.
47. *Id.* at 12 n.32. This view was also rejected by Wittgenstein. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241 (G.E.M. Anscombe trans., 3d ed. 1958) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS].

jury of one's peers. But such a view is problematic for innovative practices or anything which could tend to disturb the status quo.[48] A "Brandeis Brief" would never succeed; and more recently, law and economics would seem to have no sway. The modes of argument utilized by these innovations—empirical research and market theory—would not have been part of the jargon or training of "competent legal actors." Thus, assertions backed by arguments employing these techniques would not have been assessed as "true," at least not for the reasons asserted.[49]

The scope of competency of the legal actor is also unclear. For example, the proposition "Parole evidence applies to transactions in goods" is true in the United States[50] sometimes, unless the Convention for the International Sale of Goods applies.[51] The common lawyerly practice of qualifying statements before committing to their truth (legal opinions) seems not to have a place in Patterson's scheme; either that, or Patterson is committed to labeling false all but the narrowest of propositions—and those are not his examples.

3. How Many Forms?

Finally, his selection of the forms of argument is particularly ad hoc. He seems to choose four—textual, historical, doctrinal, and prudential—but nowhere discusses why he selected these and no others,[52] and nowhere defines what he means by them.[53] In particular, it is unclear what differences exist between

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48. Patterson would presumably handle innovation under interpretation, and would accept new forms of argument only if their acceptance would disturb fewer beliefs held by the hypothetical person than would their rejection. But this seems a cumbersome way to analyze argumentation; rather than examining the effect on held beliefs, it might be easier to say that legal forms of argumentation presumptively mirror acceptable forms of persuasive argument in general. This was certainly the way law was viewed in the *trivium* in Latin training, where rhetoric, grammar, and logic were illustrated by legal argumentation, not the other way around. *See, e.g.,* 1-2 THE ELDER SENECA, CONTROVERSIAE (M. Winterbottom trans., Loeb Classical Library 1964) (n.d.).

49. There do need to be some limits. At some point in history, under Patterson's analysis, wager of law and trial by combat were presumably forms of legal argumentation. Due to our reduced faith in God's intervention always to achieve the correct result, they have fallen out of favor. A theory that excluded such forms of argumentation would be desirable.

50. *See* U.C.C. § 2-202 (1989).

51. U.N. CONVENTION ON CONTRACTS FOR THE INT'L SALE OF GOODS, art. 8(3), U.N. Sales No. E.95.V.12 (1995). The United States and Canada have signed this convention, and thus it would apply to contracts between Americans and Canadians, such as sales of cars from one country to the other.

52. It is unclear on first read that there are four. Patterson chooses not to mention them initially in the text. Instead, he shows them in illustrations accompanying his argument. PATTERSON, *supra* note 2, at 175. He does state later in the text, however, that "[w]e have identified four forms of argument as central to law." *Id.* at 174. He does not give a cross reference, however, to where in his book that identification took place.

53. In Patterson's discussion of legal positivism in Chapter 4, we are given these brief summaries: "The nub of textual argument is the meaning a legal text has to the common, professional reader. Historical argument proceeds by appeal to the then-present legislative context. What was Congress trying to do with this statute? What was its point or purpose?" *Id.*

historical and doctrinal forms—both could easily relate to discussions or reference to decided cases. And the inclusion of "prudential" is similarly odd. After spending most of the book denying that truth is a relation between words and the world, he then introduces a concept—prudence—which requires assessment of the relation between acts and an "ideal" way of acting, without so much as a code of conduct (such as the Chancellor's foot) to measure with.

Such a catalog of four also is at odds with his introduction of the subject, in Chapter 7, in which he discusses Phillip Bobbett's unique analysis of constitutional doctrine as being the product of *six* forms of argument, called by Bobbett "modalities." These modalities or forms of argument include Patterson's four—textual, historical, doctrinal, and prudential—and add two more: ethical and structural. In Chapter 7 at least, Patterson seems to agree with this index. He states categorically that "[t]here is nothing more to constitutional law (*or any other body of doctrine*) than the use of the six modalities of argument."[54] He goes on to assert that "the essential task of jurisprudence is the accurate description of our legal practices of argument."[55]

Patterson's Chapter 8, his own positive account of truth in law, fails this test. After asserting that the forms of legal argument are of the utmost importance, he fails to develop or distinguish the four he seems to choose. He simply gives us two judicial opinions in which he contends that opposing forms of argument were used.[56] He fails utterly to explain dropping Bobbitt's ethical and structural arguments. The reader is left to wonder if they were superfluous, irrelevant, or ill-conceived. This failure is especially striking after Patterson's earlier dismissal of Weinreb's arguments on legal formalism as argument by assertion.[57]

Finally, his failure to categorize leaves the status of many types of argumentation unclear; in short, many forms of legal argument seem not to be unambiguously in any of the four finally chosen. What of logical argument? The syllogism, and reactions to it, form a respectable body of legal literature;[58] arguments employing the *reductio ad absurdum* also appear frequently. Are these thus "historical" arguments? "Doctrinal"? Moreover, the whole of equity jurisprudence, with its appeal to the conscience, seems missing, unless that is what he means by "prudential" forms of argument.

Patterson might respond that such arguments miss the point of reconceptualizing truth from a relation to a "term of commendation or endorsement."[59] But any explanation of truth that resorts to empirical assertions about the way law is practiced and the way lawyers practice it ought to get the practices correct, and it ought to offer some explanation of why some, and not others, were chosen. In short, if truth is an endorsement, we ought to know exactly what methods may be used to endorse. Patterson's response is that the

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at 66.

54. *Id.* at 137 (emphasis added).

55. *Id.*

56. *Id.* at 172-79. The two cases are Riggs v. Palmer, 22 N.E. 188 (1889) and United Steelworkers v. Weber, 443 U.S. 193 (1979).

57. *See supra* text accompanying notes 10-13.

58. *See, e.g.*, Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

59. PATTERSON, *supra* note 2, at 152.

forms of argument, when appropriately used, serve this function. But if the forms are not defined, and fuzzy in number, we have no rational basis to assess or adopt the view put forward. This is especially the case when two of the original six "modalities" discussed disappear from one chapter to the next.

In short, while Patterson may have argued cogently against formalistic and positivistic views of truth in law, his own positive account of truth using post-modern principles is thin and largely unpersuasive.

B. *Wittgenstein and Patterson*

It is no coincidence that Patterson's account of language bears strong similarities to the philosophical work of Ludwig Wittgenstein. He has spent much of his career writing about Wittgenstein.[60] In *Law and Truth*, many of Patterson's locutions echo Wittgenstein: his invocation of meaning as use;[61] his use of the term "grammar" to describe the glue that imbues proper use;[62] and his view that the practices of communities, over time, constitute rules for the appropriate and proper employment of language,[63] are all Wittgensteinian in form.[64]

If this initial internal evidence indicates that Patterson's arguments follow Wittgenstein, then critiques which have been employed against Wittgenstein should also create some concern for Patterson. In addition, if Patterson's form of argument resorts to his view of Wittgenstein as authority, its persuasiveness is undercut if plausible alternate readings of Wittgenstein produce contrary results. In this Part I try to show both; that is, I review briefly one objection to Wittgenstein that applies to Patterson's incorporation of his philosophy, and I offer an alternative account of Wittgenstein's philosophy that casts doubt on Patterson's construction of truth.

1. Cross-Cultural Arguments Against Wittgenstein

Wittgenstein's view of language has been questioned for some of its cross-cultural consequences.[65] If, as Patterson asserts, "[w]e make sense of the world linguistically,"[66] how do we breach differences between us and a foreign culture, which may "see" the world differently if our own conception is locked up in our

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60. *See, e.g.*, Patterson, *Wittgenstein, supra* note 3; *see also* DENNIS M. PATTERSON, GOOD FAITH AND LENDER LIABILITY: TOWARD A UNIFIED THEORY (1990); Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

61. PATTERSON, *supra* note 2, at 151 & n.1.

62. *Id.* at 178.

63. *Id.* at 169-70.

64. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 43; *see also infra* text accompanying notes 79-83.

65. *See* A.C. GRAYLING, WITTGENSTEIN 104-09 (1988).

66. PATTERSON, *supra* note 2, at 169.

own language? This notion finds expression in Eskimos' better perception of snow because they have more words for it, and in the sense that ancient Greek was particularly good for development of logic.

Such differences across cultures, and the impact on perception, have significant consequences for law: how do we make *any* true statements of international law when the international community encompasses regimes that have so many different ideological bases? Can there be true statements of international law that cross boundaries when one state is a democratic republic, another is a totalitarian regime, another a constitutional monarchy, and yet another a tribal community? Or are our different cognitive viewpoints sufficiently remote from one another that we cannot perceive the concepts and referents of the different languages?[67]

Since we do seem committed at one level to "international law," how are assertions about what international law provides or requires viewed from each of the different states? Put in the context of an example, what do "fundamental human rights" mean to tribal communities? And are they the same as in other states? But this comparison assumes that the viewpoints can be compared. If their languages and "forms of life" are significantly different, so as to have significantly altered their cognitive abilities so as to make communication of some concepts impossible, then maybe postmodernism, at least as interpreted in *Law and Truth*, means that there can be no true statements of international law. I think that such a view would be rejected by most legal actors, and thus take it as grounds for doubting the nature of Patterson's enterprise.

2. The Confusion of the Concept of Truth with the Truth of Individual Assertions—An Alternate View of Wittgenstein's Philosophy

Patterson also confuses the general concept of truth with the process by which we determine whether individual utterances are true. Even if one accepts his thesis that truth is a term of commendation and not a relation, it is one thing to say how generally truth is understood, another to say whether a particular utterance is true. The critical difference lies in the fact that humans can and do temporarily agree to vary language conventions.

One way to illustrate the issue is to imagine two robbers who, in order to avoid detection, create a code in which they agree to change the names of the prospective victims when in public. Do we wish to say that when the two robbers utter statements using the pseudonyms they are uttering false statements because no one else (by design) can understand them? I do not think so, at least not in the elemental sense suggested by Patterson's view of Wittgenstein. But, on the other

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67. *Cf.* LUDWIG WITTGENSTEIN, ON CERTAINTY § 229 (G.E.M. Anscombe & G.H. von Wright eds. & Denis Paul & G.E.M. Anscombe trans., 1974) [hereinafter WITTGENSTEIN, ON CERTAINTY] ("Our talk gets its meaning from the rest of our proceedings."); WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, part II, § xi, at 223 ("If a lion could talk, we could not understand him."); LUDWIG WITTGENSTEIN, ZETTEL § 219 (G.E.M. Anscombe & G.H. von Wright eds. & G.E.M. Anscombe trans., 1967) [hereinafter WITTGENSTEIN, ZETTEL] ("We don't understand Chinese gestures any more than Chinese sentences.").

hand, their discourse is not meaningless simply because they do not obey the convention of only calling people by their given names.[68] By consent, these individuals have created a special language game in which real names are switched for aliases. Those who do not know the game may be confused by their conversations, but that is insufficient to deny their utterances meaning. In short, the participants have created a special way to use the language, a special way that I think is similar, if not identical, to what Wittgenstein called "language games." In short, I think the concept of language games can permit comparisons between the intent of a particular utterance and an accepted interpretation.

To get to language games, one must first review Wittgenstein's later general approach.[69] In the *Philosophical Investigations*, Wittgenstein argues for the proposition that communication exists on the basis of agreed patterns of word and sentence usage. In his words: "For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."[70]

Part of the basis of this assertion lies in Wittgenstein's appeal to our observations on how we actually communicate. As he saw it, we communicate through a web of interconnected customs and conventions, which Wittgenstein called "language games."[71] It is central to Wittgenstein's thought that what knits these games together is not expressible by a general, abstract theory of language—something he had tried in the *Tractatus*. He admits as much:

> Instead of producing something common to all that we call language, I am saying that these phenomena have no one thing in common which makes us use the same word for all,—but that they are *related* to one another in many different ways. And it is because of this relationship, or these relationships, that we call them all "language."[72]

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68. *Cf.* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, part II, § xi, at 214.

69. Wittgenstein only published one book on philosophy in his lifetime. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 4.05 (D.F. Pears & B.F. McGuinness trans., 1974) [hereinafter WITTGENSTEIN, TLP]. Patterson, and others, focus not on the *Tractatus Logico-Philosophicus*, but on his later posthumous writings, of which there are many.

70. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, at § 43 (emphasis in original).

71. LUDWIG WITTGENSTEIN, *The Blue Book*, *in* PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS" GENERALLY KNOWN AS THE BLUE AND BROWN BOOKS 17 (Rush Rhees ed., 2d ed. 1969) [hereinafter PRELIMINARY STUDIES]; LUDWIG WITTGENSTEIN, *The Brown Book*, *in* PRELIMINARY STUDIES, *supra*, at 81; WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 7, at 130; *see* 1 G.H. BAKER & P.M.S. HACKER, WITTGENSTEIN: UNDERSTANDING AND MEANING 89-98 (1980). Although the scope of any language game is unclear, all are linked in one language through connections which may fade with replication, but which still can provide a trackable print. Wittgenstein called these connections "family resemblances"; he drew analogies between cousins who appear differently, but still share common features with their parents and with their grandparents. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 67; *see also* ROBERT J. ACKERMANN, WITTGENSTEIN'S CITY 82-83 (1988).

72. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 65 (emphasis in original).

Language games can take many forms. They include primitive languages,[73] as well as the whole of language taken together with the physical actions made in concert with its use.[74] Indeed, language is sufficiently rich to include countless types of games.[75] For Wittgenstein, language games include "[f]orming and testing a hypothesis," "[t]ranslating from one language into another," and "[a]sking, thanking, cursing, greeting, praying."[76] Wittgenstein also admits the possibility of "technical" languages which describe a limited range of reality with intended precision and logic.[77]

Speakers use language games, as well as words, phrases, and gestures, according to sets of conventions, or customs. These conventions and customs regulate the contexts in which certain words or word groupings can be used and not be nonsense. In short, these conventions and customs—what Wittgenstein called "grammar"—weave words, phrases, and language games into the whole fabric of language.

Grammar in this sense is not a set of verb declensions and conjugations; rather, it is more like an accounting of acceptable and accepted uses of language.[78] It governs the accepted syntax of sense. Thus, Wittgenstein often refers to grammar to dissolve philosophical questions that are incapable of being answered because they lack a proper sense.[79] In short, he resorts to accepted usage and the internal relationships between and among words to analyze a particular utterance. The effect is not unlike the process by which an architect determines whether a particular bolt should be used to fasten two beams. Some bolts—like some words—can be used in many different situations; others are specially made for only a few. A trained architect—like a mature and competent speaker of a language—can select which bolt, or word, is appropriate because it has been designed to apply to the particular case at hand.[80]

The relationship between the design and the use of the bolt and the particular situation is analogous to what Wittgenstein means by philosophical grammar.[81]

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73. *Id.* § 7.

74. *Id.*

75. *Id.* § 23.

76. *Id.*

77. Wittgenstein included "the use of charts and diagrams, descriptive geometry, [and] chemical symbolism" in the class of such technical languages. WITTGENSTEIN, *The Brown Book, in* PRELIMINARY STUDIES, *supra* note 71, at 81.

78. LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR 87 (Rush Rhees ed. & Anthony Kenny trans., 1974) [hereinafter WITTGENSTEIN, PHILOSOPHICAL GRAMMAR] ("Grammar is the account books of language. They must show the actual transactions of language, everything that is not a matter of accompanying sensations.").

79. *E.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, part II, § xi, at 222 ("A whole cloud of philosophy condensed into a drop of grammar."); WITTGENSTEIN, ON CERTAINTY, *supra* note 67, §§ 57-58, at 313.

80. For a short description of Wittgenstein's grammar, see Norman Malcom, *The Mystery of Thought, in* A WITTGENSTEIN SYMPOSIUM: GIRONA, 1989, at 53, 63-64 (Josep-Maria Terricabras ed., 1993). A longer exegesis is 2 G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 34-64, 263-347 (1985).

81. *See* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 373 ("Grammar tells what kind of object anything is.").

One would not use a screw where a bolt should go—even though it seems to fit the hole—because that is simply not what the screw was designed for. These limitations can be perceived as usage rules. Thus, for Wittgenstein, "[g]rammar is a free-floating array of rules for the use of language."[82]

For Wittgenstein, grammar mediates our utterances with the world around us.[83] The conventions and rules of grammar ensure that what we speak of is understood by those who listen—for their training, if similar to ours, has inculcated in them the same rules. As Wittgenstein says: "Like everything metaphysical the harmony between thought and reality is to be found in the grammar of the language."[84] If this line of argument seems to lead to the conclusion that no one way of expression is superior to others, Wittgenstein is prepared to accept that. "The rules of grammar are arbitrary in the sense that the rules of a game are arbitrary. We can make them differently. But then it is a different game."[85]

To return to our small language game, if two people can agree on varying conventions, so can three, four, and more. Once enough people systematically agree, then the words have the consciously-agreed meaning. To take this to a grander scale, one can see this in the Uniform Commercial Code ("U.C.C." or "the Code"). Many of the definitions there are at odds with normal parlance; in normal conversation, 11 p.m. is not the "afternoon";[86] a purchase will rarely

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82. 2 BAKER & HACKER, *supra* note 80, at 40; *see also id.* at 56; *cf.* Ludwig Wittgenstein, *Philosophy, in* PHILOSOPHICAL OCCASIONS 1912-1951, at 161, 169 (James C. Klagge & Alfred Nordmann eds., 1993) ("I could ask: why do I sense a grammatical joke as being in a certain sense deep? (And that of course is what the depth of philosophy is.)").

83. WITTGENSTEIN, PHILOSOPHICAL GRAMMAR, *supra* note 78, at 97 ("The connection between 'language and reality' is made by definitions of words, and these belong to grammar, so that language remains self-contained and autonomous."); ACKERMANN, *supra* note 71, at 80; WITTGENSTEIN, PHILOSOPHICAL GRAMMAR, *supra* note 78, at 190; MERRILL B. HINTIKKA & JAAKKO HINTIKKA, INVESTIGATING WITTGENSTEIN 221-24 (1986); Robert L. Arrington, *The Autonomy of Language, in* WITTGENSTEIN'S INTENTIONS, at 51 (John V. Canfield & Stuart G. Shanker eds., 1993); P.M.S. Hacker, *The Agreement of Thought and Reality, in* WITTGENSTEIN'S INTENTIONS, *supra*, at 38; *cf.* WITTGENSTEIN, TLP, *supra* note 69, § 4.05 ("Reality is compared with propositions.").

84. WITTGENSTEIN, ZETTEL, *supra* note 67, at § 55; *see* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 445 ("It is in language that an expectation and its fulfillment make contact."); *see also* ACKERMANN, *supra* note 71, at 48 ("Over a long period of time, successful action is the strongest evidence we could have that our language has some relationship with reality."). Professor Robert Arrington has a good exegesis of section 445. Robert L. Arrington, *Making Contact in Language: The Harmony Between Thought and Language, in* WITTGENSTEIN'S PHILOSOPHICAL INVESTIGATIONS: TEXT AND CONTEXT 175 (Robert L. Arrington & Hans-Johann Glock eds., 1991); *cf.* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, § 206 ("The common behavior of mankind is the system of reference by means of which we interpret an unknown language.").

85. WITTGENSTEIN'S LECTURES, CAMBRIDGE, 1930-32, FROM THE NOTES OF JOHN KING AND DESMOND LEE 57 (Desmond Lee ed., 1980); *see also* ACKERMANN, *supra* note 71, at 83-84; *cf.* WITTGENSTEIN, ON CERTAINTY, *supra* note 67, § 229 ("Our talk gets its meaning from the rest of our proceedings."); WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 47, part II, § xi, at 223 ("If a lion could talk, we could not understand him.").

86. U.C.C. § 4-104(a)(2).

mean "taking by lien";[87] and good faith is usually more than "honesty in fact."[88] Yet we have common agreement on the usage, and can assess propositions against that conscious agreement. If it doesn't match, then what is said is false, but not nonsense.

In brief, I believe that the U.C.C. is an example of a purposeful construct which can best be described as a language game unto itself.[89] While it imports most of its rules and practices from the English language, it also modifies some of those rules. In particular, in order to promote certainty and stability, the Code employs different rules about usage. The parties may fix the meaning of their terms by excluding other interpretations by affirmatively adopting their own standards.[90] Although the U.C.C is a good example of a common effort to restrict meaning, it is by no means the only one. In varying degrees, in statutes and through judicial decision, words are construed to have a common meaning so that future actors may rely on that interpretation.

Patterson's view essentially seeks to incorporate shifting perceptions of human activity into the process by which we ascribe truth to a particular statement. But this view was clearly rejected by Wittgenstein:

> Is a statute book a work of anthropology telling how the people of this nation deal with a thief, etc.—Could it be said: "The judge looks up a book about anthropology and thereupon sentences the thief to a term of imprisonment"? Well, the judge does not USE the statute book as a manual of anthropology.[91]

But Patterson seems to want to import "anthropology" into statutory construction.[92] To him, evidence of how traders act (or put another way, the reports of anthropologists consigned to study commercial practices) will be in many cases

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87. U.C.C. §§ 1-201(32).

88. U.C.C. § 1-201(19); *cf. id.* §§ 2-103(1)(b), 3-103(a)(4).

89. *Cf.* WITTGENSTEIN, *The Brown Book, in* PRELIMINARY STUDIES, *supra* note 71, at 81; WITTGENSTEIN, ZETTEL, *supra* note 67, § 644.

90. There are potentially long-lasting implications even in a contract. Many long term leases entered into before abrogation of the gold standard in 1933 contained clauses requiring the consideration to be paid in gold or with reference to the market value of gold; the purpose was a hedge against inflation. After Congress repealed the abrogation in 1973 and 1974, landlords have attempted to revive these clauses, with mixed success. Fay Corp. v. Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990) (Lease containing gold clause was invalid until incorporated into novated contract, then enforceable.); Rudolph v. Steinhardt, 721 F.2d 1324 (11th Cir. 1983) (Gold devaluation clause entered into in 1970 was not affected by 1973 and 1974 abrogation.); Schickler v. Santa Fe S. Pac. Corp., 593 N.E.2d 961 (Ill. App. 1992) (1973 and 1974 acts did not revive gold clause in bonds.); Equitable Life Assurance Soc'y v. Grosvenor, 426 F. Supp. 67 (W.D. Tenn. 1976) (Lessee was not obligated to pay in gold.); Henderson v. Mann Theaters Corp., 135 Cal. Rptr. 266 (Ct. App. 1977) (Lessee was not obligated to pay in gold.).

91. LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS, part III, § 65 (G. H. von Wright et al. eds. & G.E.M. Anscombe trans., rev. ed. 1978) (emphasis in original); *see also id.*, part I, § 118.

92. "[I]n law the determination of what a rule requires (what it means to claim) that 'X' is following [or not following] a rule" is made by disclosing the *point* of the rule. This 'disclosure' is essentially a matter of social anthropology." Dennis M. Patterson, *Toward a Narrative Conception of Legal Discourse,* 5 SOC. EPISTEMOLOGY 62 (1991) (alterations and emphasis in original).

determinative of the issue. Statutes can admit such evidence, but they usually do it explicitly, such as in section 1-205 of the Code. But it is a feature of language games as conceived by Wittgenstein that they can exclude such references as well.

Here we return to the nature of truth in law. Is it true, with respect to the processing of checks, that 11 p.m. is in the afternoon? The answer is yes, not because of the form of argument that I use to justify it, but because I have detected and applied a consciously-agreed convention applicable to check processing. In short, the statement is true by virtue of adherence to the convention, not by virtue of how I justify it.

The addition of the intentions of both the drafters and the consumers of statutes imports a form of the correspondence version of truth—that of correspondence with the intentionally derived convention. But this type of structure is what Wittgenstein called a language game, in much the same way that translation and curing could be language games under his view.[93] As a language game, the rules for application of the text of the U.C.C., or any other body of law, can be explicit, and the meaning of, and truth of statements about, the U.C.C. can be derived by reference to the conventions.

At most, however, this shows that Patterson's schema is incomplete, not that it is wrongheaded. Indeed, it is plausible that Patterson could say that all I have done is created an elaborate application of one of the forms of legal argumentation, or that I have identified a fifth form. This response rings hollow, in the sense that what I have proposed is more than just description; it is setting forth a standard, derived from what Wittgenstein would call a language game, and stating that in matters in which the standard or convention applies, it determines whether a statement about a proposition within the scope of the convention is true. We return to truth as correspondence, not truth as a form of argument. The tension here is against jurisprudence as description only, and as rejecting theorizing because of a lack of anything "real" that can be the subject of discussion.[94] This debate, however, is ongoing, and is a debate that, as Ambrose Bierce might have noted, "has a fair prospect of existing with increasing activity to the end of time."[95]

CONCLUSION

So what is truth? After reading *Law and Truth*, I don't know, but that is not all bad. Because of it, I am closer to sorting out the use and usages of the word "truth" in legal contexts, and I do have new insights into various jurisprudential debates. If one views *Law and Truth* as a way station on the journey of understanding, the time invested reading it is time well spent.

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93. *See supra* text accompanying notes 74-78.

94. Patterson writes early in his work that "[g]etting a clear surview of [the] grammar [of legal argument] is the task of jurisprudence." PATTERSON, *supra* note 2, at 21. He has been criticized recently on this point. Feldman, *supra* note 13, at 184; Martinez *supra* note 45, at 558-65.

95. BIERCE, *supra* note 1.

If, however, we look at the book under Patterson's own terms—that is, has the work provided "an accurate description of our legal practices of argument"[96]—then the time is better spent elsewhere. Patterson has imported post-modern arguments into the jurisprudence of truth without really working to get the fit right. Even if his view is correct, he owed his readers an accurate account (and count) of his central construct—the forms of legal argument. Without such an account, the book is no more than bald assertions of the type he decries when used by legal formalists.[97] And as Patterson does with the formalists, we should just discount what he says and resume our own search for the truth.

Finally, if Patterson is to rely on the philosophy of Ludwig Wittgenstein, he needs to acknowledge its potential weaknesses and alternative explanations. Until that task is undertaken, the debate on what is truth will continue.

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96. PATTERSON, *supra* note 2, at 137.
97. *See supra* text accompanying notes 10-13.