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## **On Law and Truth**

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## BOOK REVIEW

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### ON LAW AND TRUTH

*George A. Martinez\**

#### I. INTRODUCTION

The adversarial system often yields a clear result—one side wins and the other side loses. What remains unclear is whether the court has actually arrived at the truth in obtaining its result. Perhaps, given a clear result, one would think that the law does not require a theory of truth. Dennis Patterson, however, recognizes the importance of a theory of truth for the law. In his new book, *Law and Truth*,<sup>1</sup> Patterson argues that the very task of jurisprudence is to provide a philosophical account of what it means to say that propositions of law are true or false.

*Law and Truth* engages a centuries-old philosophical debate over the notion of truth.<sup>2</sup> Patterson links his project to the more general philosophical debate over realism versus antirealism.<sup>3</sup> Following Ronald Dworkin, he connects jurisprudence directly with the philosophy of language.<sup>4</sup> He characterizes Dworkin as advocating a version of re-

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

2 See *id.* at 4; see also TRUTH 1 (George Pitcher ed., 1964). See generally RICHARD L. KIRKHAM, *THEORIES OF TRUTH* (1992).

3 PATTERSON, *supra* note 1, at 5. For more on realism versus antirealism, see MICHAEL DEVITT, *REALISM AND TRUTH* (2d ed. 1991); HILARY PUTNAM, *REALISM AND REASON* (1983); RICHARD RORTY, *OBJECTIVITY, RELATIVISM AND TRUTH* (1991).

4 See PATTERSON, *supra* note 1, at 8; see also Ronald Dworkin, *Introduction to THE PHILOSOPHY OF LAW 1* (Ronald Dworkin ed., 1977). Dworkin writes “[e]ven the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.” *Id.* at 1.

alism,<sup>5</sup> and he understands Dworkin to argue that truth in law requires a truth independent of the belief or agreement that a proposition is true.<sup>6</sup> What motivates realism? Patterson suggests that one motivation is the belief that there is some fact of the matter about legal propositions<sup>7</sup>—we want our discourse on law to be true.<sup>8</sup> Realists are not satisfied with the antirealist account of truth. For antirealists, “true” means the satisfaction of intersubjective criteria,<sup>9</sup> while for the realist, the truth must be something more than the fact that with respect to some proposition of law, everyone believes the proposition to be true.<sup>10</sup> What some realists want—Patterson calls them metaphysical realists—is an account of truth in which the meaning of “is true” is given by the correspondence of some sentences to a state of affairs independent of convention and one’s mind.<sup>11</sup> For the realist, legal discourse must reflect the way things in fact are.<sup>12</sup> Thus, the world makes a contribution to our knowledge.<sup>13</sup> Language is the vehicle for

5 See PATTERSON, *supra* note 1, at 8.

6 *Id.* at 8; see also MICHAEL A.E. DUMMETT, *TRUTH AND OTHER ENIGMAS* (1978). Dummett characterizes “realism” as the belief that statements—for example, statements about the physical world or mental events—possess an objective truth value, independently of our means of knowing it. *Id.* at 146. Such statements are true or false in virtue of a reality existing independently of us. *Id.*

7 See PATTERSON, *supra* note 1, at 8.

8 *Id.*

9 *Id.* In contrast to realism, the antirealist contends that statements are to be understood only by reference to the sort of thing which we count as evidence for such a statement. See DUMMETT, *supra* note 6, at 146. The realist, on the other hand, takes the position that the meaning of statements is not directly tied to the kind of evidence for them that we can have, but consists in the manner of their determination as true or false by states of affairs whose existence is not dependent on our possession of evidence for them. *Id.* The antirealist, however, argues that the meanings of statements are tied directly to what we count as evidence for them such that a statement, if true at all, can be true only in virtue of something of which we could know and which we should count as evidence for its truth. *Id.*; see also RORTY, *supra* note 3. “The term ‘antirealism’ was first put in circulation by Michael Dummett . . .” *Id.* at 3.

10 See PATTERSON, *supra* note 1, at 8.

11 *Id.* at 8-9; see also J.E. MALPAS, *DONALD DAVIDSON AND THE MIRROR OF MEANING* (1992). Malpas suggests that realism comprises three distinct theses:

an independence thesis according to which the existence of the world or the objects which make up the world is independent of anything mental; a uniqueness thesis which states that there is one, and only one, true and complete description of the world; and a thesis about truth, which sees truth as a matter of correspondence between language and the world.

*Id.* at 231.

12 See PATTERSON, *supra* note 1, at 9.

13 *Id.* at 10.

this contribution,<sup>14</sup> and somehow language reflects the way things are in the world.<sup>15</sup> Thus, our use of language will be correct or incorrect depending on the way the world is and not the way we believe it to be.<sup>16</sup>

How does the world guide our linguistic usage? Here Patterson observes a central problem for the realists: they must provide a way for the world to act as a normative check on our linguistic practices.<sup>17</sup> Patterson thinks that this is a problem for every version of realism: to give an account of how the world—or conditions independent of evidence—constrains linguistic behavior.<sup>18</sup>

Patterson would have the law reach beyond realism and antirealism.<sup>19</sup> He contends that “true” does not name a relationship between a state of affairs and a proposition of law.<sup>20</sup> The truth of a proposition of law is not a function of the relationship of the proposition to something that makes the proposition true.<sup>21</sup> Instead, the truth of a proposition of law<sup>22</sup> is shown through the use of forms of legal argument.<sup>23</sup> Independent conditions do not make legal assertions true,<sup>24</sup> and truth, in the law, is neither a property nor a relation.<sup>25</sup> The forms of

14 *Id.*

15 *Id.*; see also TRUTH, *supra* note 2, at 4 (the correspondence theory of truth holds that “truth is a relation—that of correspondence—between what is said or thought and a fact or state of affairs in the world”).

16 See PATTERSON, *supra* note 1, at 10; see also THOMAS NAGEL, *THE VIEW FROM NOWHERE* 91 (1986) (realism is the view that “the world is in a strong sense independent of our possible representations, and may well extend beyond them”).

17 See PATTERSON, *supra* note 1, at 11.

18 *Id.* at 11; see also John McDowell, *Projection and Truth in Ethics*, The Lindley Lecture, University of Kansas, Department of Philosophy (Oct. 21, 1987). McDowell says:

Surely if the history of philosophical reflection on the correspondence theory of truth has taught us anything, it is that there is ground for suspicion of the idea that we have some way of telling what can count as a fact, prior to and independent of asking what form of words might count as expressing truths, so a conception of facts could exert some leverage in the investigation of truth.

*Id.* at 11.

19 See PATTERSON, *supra* note 1, at 19.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* Patterson first developed this position in Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993).

24 See PATTERSON, *supra* note 1, at 21.

25 *Id.*; see also WILLIAM P. ALSTON, *A REALIST CONCEPTION OF TRUTH* (1996). Alston discusses deflationary accounts of truth which hold that it is incorrect to believe that there is a property of truth that one attributes to propositions. *Id.* at 41. On a

legal argument are the means for appraising the truth of propositions of law.<sup>26</sup>

This Essay both explains and critiques Patterson's theory of truth. Part II sets out Patterson's alternative account of truth in law, focusing on the example of Philip Bobbitt. Part III explains Patterson's conception of postmodern jurisprudence and describes his typology, which purports to show what it means for a proposition to be true as a matter of law. Part IV evaluates Patterson's account of truth in law and suggests that Patterson ultimately fails to dismantle realism. Part V, in conclusion, offers the recent revival of realism in philosophy as a new influence upon legal thought.

## II. TRUTH IN LAW

Patterson provides an alternative account of truth in law. He uses constitutional argument as an example, and he finds the position of Philip Bobbitt to be instructive.<sup>27</sup> Bobbitt argues that the debate over the legitimacy of judicial review is a pseudodebate.<sup>28</sup> Bobbitt says that the practice of constitutional law involves using six forms of argument—the modalities.<sup>29</sup> The modalities show the truth of propositions of constitutional law.<sup>30</sup> For Bobbitt, a legal decision is legitimate to the extent that it follows the forms of argument recognized within our legal structure—that is, the modalities.<sup>31</sup> The six forms of argument are:

1. Historical (relying on the intentions of the framers and ratifiers of the Constitution);
2. Textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary);
3. Structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up);

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deflationary account, truth discourse that seems to involve property attribution is best understood in some other way. *Id.*

26 See PATTERSON, *supra* note 1, at 21.

27 *Id.* at 128; see also PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). For other discussions of Bobbitt, see George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545 (1996); T.R.S. Allan, *Constitutional Interpretation*, 52 CAMBRIDGE L.J. 157 (1993); Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107 (1993).

28 See PATTERSON, *supra* note 1, at 129.

29 *Id.*

30 *Id.*

31 *Id.* at 129-30; see also Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1902 (1994) (law is a set of practices that are legitimated by following the rules embodied in those practices).

4. Doctrinal (applying rules generated by precedent);
5. Ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and
6. Prudential (seeking to balance the costs and benefits of a particular rule).<sup>32</sup>

The modalities are the ways that propositions of law are shown to be true or false.<sup>33</sup> Contrary to the received view in jurisprudence, they are not true by virtue of something independent of the modalities and external to law as it is generally understood.<sup>34</sup> Thus, jurisprudence should be concerned only with describing internal modalities—describing actual legal practice.<sup>35</sup>

A judicial decision is justified if one of the six modalities is used to reach the decision.<sup>36</sup> Similarly, a legal decision is legitimate to the extent that it remains within the modalities.<sup>37</sup> Appealing to matters external to law to justify legal propositions is rejected not because externalist theory—such as philosophy, literary theory or economics—is wrong, but because it is irrelevant.<sup>38</sup> Legitimacy in law is a function of using the form of argument appropriate to the legal proposition at issue.<sup>39</sup> Thus, illegitimacy in justification results from the use of forms of argument from one discourse to justify a proposition from another discourse.<sup>40</sup> For these reasons, it is a mistake to justify propositions of law with the justificatory tools of disciplines external to law.<sup>41</sup>

### III. POSTMODERN JURISPRUDENCE

Patterson rejects the traditional modernist<sup>42</sup> answer to the question of what it means to say that a proposition of law is true. For the

32 See PATTERSON, *supra* note 1, at 137 (numerals added).

33 *Id.*

34 *Id.*; see also Bobbitt, *supra* note 31, at 1902-03 ("In my view . . . 'legitimacy is not delivered to the law from outside'") (citing Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1838-39 (1994)).

35 See PATTERSON, *supra* note 1, at 137.

36 *Id.*

37 *Id.*

38 *Id.*; cf. Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMAN. 353 (1994). Lind argues that since external legal theorists—those that believe that the truth of a legal proposition depends on something external to law—e.g., philosophy or economics—base constitutional meaning on standards which lie outside the practice of adjudication, they issue judgments of constitutional right and wrong which are fundamentally irrelevant. *Id.* at 390.

39 See PATTERSON, *supra* note 1, at 149.

40 *Id.* at 148.

41 *Id.*

42 Modernism can be represented by three axes:

modernist, truth names a relation between a proposition and some state of affairs that makes the proposition true.<sup>43</sup> The postmodernist rejects the project of discerning the connection between propositions and what makes them true.<sup>44</sup> For a postmodernist such as Patterson, to say that a proposition is true is to say that "a sufficiently well-placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation."<sup>45</sup> Thus, for Patterson a proposition of law is true if a competent legal actor could justify its assertion.<sup>46</sup> To justify the assertion of the proposition, the legal actor would have to employ the forms of legal argument.<sup>47</sup>

Patterson attempts to overcome the realism versus antirealism debate, though these two positions represent the leading perspectives over the question of what determines the truth of a proposition.<sup>48</sup> According to the realist account, a proposition is true in virtue of some aspect of the world that makes it true.<sup>49</sup> On the other hand, the antirealist contends there are no features of the world that make propositions true or false.<sup>50</sup> Instead, truth or falsity is a function of agreement among participants in a practice.<sup>51</sup> Some contend that the realism versus antirealism debate can be side-stepped by viewing questions of truth from an antirepresentationalist standpoint.<sup>52</sup> The thrust

(1) Epistemological Foundationalism: the view that knowledge can be justified to the extent that it rests on indubitable foundations; (2) Theory of Language: language has one of two functions—it represents ideas or states of affairs, or it expresses the attitudes of the speaker; (3) Individual and Community: "society" is best understood as an aggregation of "social atoms."

Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 263 (1992) (citing Nancey Murphy, *Scientific Realism and Postmodern Philosophy*, 41 BRIT. J. PHIL. SCI. 291, 292 (1990)) (hereinafter Patterson, *Postmodernism*).

43 See PATTERSON, *supra* note 1, at 151.

44 *Id.*; see also Patterson, *Postmodernism*, *supra* note 42, at 272 ("postmodernist conceptions of the word-world relation see the modernist picture of propositional, representational truth as unintelligible—as a project that never gets off the ground").

45 See PATTERSON, *supra* note 1, at 151 (quoting HILARY PUTNAM, REPRESENTATION AND REALITY 115 (1988)).

46 *Id.* at 151-52.

47 *Id.* at 152.

48 *Id.* at 165; see also MICHAEL DEVITT & KIM STERELNY, LANGUAGE AND REALITY: AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 187-88 (1993) (realism has traditionally been opposed by idealism or antirealism).

49 See PATTERSON, *supra* note 1, at 165; see also DEVITT & STERELNY, *supra* note 48, at 191 ("A notion of truth is realist . . . if it does not make the truth of a statement dependent on the evidence we have or might have for the statement.").

50 See PATTERSON, *supra* note 1, at 165.

51 *Id.*

52 *Id.* at 166; see also RORTY, *supra* note 3, at 2 (antirepresentationalists think that the controversies between realists and idealists are pointless).

of antirepresentationalism is to reject the view of language as set apart from and against reality.<sup>53</sup> The realists say that propositions refer to things in the world, and these things make the proposition true.<sup>54</sup> The antirealist argues that there is nothing out there beyond our conventional determinations of truth and falsity.<sup>55</sup> Both the realist and the antirealist, however, believe that the meaning of propositions comes from somewhere,<sup>56</sup> and they disagree only as to the source of meaning.<sup>57</sup> The realist identifies the world as the source of meaning; the antirealist contends that conventional criteria are the source of meaning.<sup>58</sup>

Patterson contends that the work of the philosopher Hilary Putnam provides a way to avoid the realism versus antirealism debate.<sup>59</sup> According to Patterson, Putnam is an antirepresentationist.<sup>60</sup> Putnam argues that a statement is true if a "sufficiently well-placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation."<sup>61</sup>

Thus, the truth of statements is not the result of linguistic acts and states of affairs.<sup>62</sup> Postmodernism produces a shift from the idea of language as representation to language as practice—that is, meaning as use.<sup>63</sup> In short, the postmodern view of language emphasizes language as a social practice and not as a representational medium.<sup>64</sup>

53 See PATTERSON, *supra* note 1, at 167; see also RORTY, *supra* note 3, at 2 ("antirepresentationalism" refers "to the attempt to eschew discussions of realism by denying the notion of 'representation,' or that of 'fact of the matter,' has any useful role in philosophy").

54 See PATTERSON, *supra* note 1, at 167; see also ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 86 (1992) ("A realist must maintain, with respect to a certain class of statements, that there is a determinant reality rendering the statements in that class either true or not true, independently of whether we can recognize or confirm this.").

55 See PATTERSON, *supra* note 1, at 167.

56 *Id.*

57 *Id.*

58 *Id.*; see also DEVITT & STERELNY, *supra* note 48, at 187 (Realists contend that physical entities are "'independent' of and 'external' to the mind. They say that an entity exists 'objectively' in that its existence does not depend on anyone's opinion; nor does it arise from the imposition of our concepts or theories.").

59 See PATTERSON, *supra* note 1, at 167; see also ALSTON, *supra* note 25, at 132. At one time, Hilary Putnam was one of the leading defenders of realism. *Id.* In the mid-seventies, however, he became one of the leading critics of realism. *Id.*

60 See PATTERSON, *supra* note 1, at 167.

61 *Id.* at 168 (quoting HILARY PUTNAM, REPRESENTATION AND REALITY 115 (1988)).

62 See PATTERSON, *supra* note 1, at 169.

63 *Id.*

64 *Id.* at 170; see also Patterson, *Postmodernism*, *supra* note 42, at 273 ("the postmodern alternative replaces the modernist picture of Sentence-Truth-World with



Knowledge, for the postmodernist, becomes an ability which is shown in linguistic practices.<sup>65</sup>

Applying this antirepresentationalist view to propositions of law, Patterson notes that claims of propositions in law are assertive in nature.<sup>66</sup> For example, the claim that "Statute *S* is unconstitutional" asserts a purported truth. If one asks what it is about *S* which causes one to assert that *S* is unconstitutional, one asks for the *ground* of the claim. Suppose *S* provides the following requirement: "Any assembly of twelve persons or more requires a parade permit." This fact is the ground for the claim that *S* is unconstitutional. The ground is advanced in support of the claim. What connects the ground to the claim? To inquire into how the ground is relevant to the claim is to seek the *warrant*. The warrant is the connection between the ground and the claim. In our example of statute *S*, the warrant is the First Amendment. The First Amendment provides for the right to peaceable assembly. The First Amendment is the warrant which connects the ground and the claim.<sup>67</sup> The warrant, however, must be used in the right way. At this point, the forms of argument—the modalities—are relevant. The forms of argument are the culturally endorsed modes for the use of warrants. The forms of argument are the "backings" for warrants.<sup>68</sup>

How does this work? Suppose we have this claim or proposition of law: "*S* is unconstitutional." The ground of the claim is the fact that the ordinance contains a parade permit requirement. The First Amendment warrants the move from the ground to the claim that "*S* is unconstitutional." The backing for the warrant is the textual modality—that is, looking to the ordinary meaning of the language of the First Amendment.<sup>69</sup>

What if the backings for warrants—or the forms of argument—conflict? One needs a criterion for choosing among forms of argument in cases of conflict.<sup>70</sup> Here Patterson relies on the philosopher W.V.O. Quine's metaphor of science as "a total field of force."<sup>71</sup> Quine suggested that it was incorrect to talk about the empirical con-

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an account of understanding that emphasizes practice, warranted assertability, and pragmatism").

65 See PATTERSON, *supra* note 1, at 171.

66 *Id.* at 170.

67 *Id.*

68 *Id.* at 171.

69 *Id.*

70 *Id.*

71 *Id.* at 172; see also WILLARD V.O. QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (2d ed. 1953). Quine writes:

tent of an individual statement.<sup>72</sup> Similarly, in legal discourse, it is misleading to talk about the truth of a statement of law in isolation from other propositions within the legal web of belief.<sup>73</sup> In selecting among different interpretations, choose those that clash least with everything we take to be true.<sup>74</sup> In law, we are to select the proposition that best meshes with the truth of other legal propositions.<sup>75</sup>

In moving from ground to claim or legal proposition, then, lawyers use the forms of argument, or the modalities, to show the truth of legal propositions.<sup>76</sup> Patterson's typology purports to show what it means for a proposition to be true as a matter of law.<sup>77</sup>

#### IV. AN EVALUATION

Patterson's book is one of the best works in recent years in the philosophy of law. It is a groundbreaking effort to develop the implications of the concept of truth in law. He offers a very important theory as to what it means to say that propositions of law are true or false. Indeed, in my view, he has offered the most sophisticated non-realist account of truth in law that is presently available. Every legal philosopher has much to learn from Patterson. Despite this, I am not persuaded.

I believe that Patterson's project should be rejected because (1) Patterson's rejection of the realist account of truth is not persuasive; (2) Patterson's positive account of truth in law is unacceptable; (3) Patterson's contention that external forms of legal justification are irrelevant has no merit; (4) Patterson's purported descriptive project in jurisprudence is actually a proposal to reform the system and does not differ significantly from externalist approaches<sup>78</sup> in law; and (5) Pat-

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[T]otal science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Reevaluation of some statements entails reevaluation of others, because of their logical interconnections—the logical laws being in turn simply certain further statements of the system, certain further elements of the field.

*Id.* at 42.

<sup>72</sup> See PATTERSON, *supra* note 1, at 172; QUINE, *supra* note 71, at 43 ("it is misleading to speak of the empirical content of an individual statement").

<sup>73</sup> See PATTERSON, *supra* note 1, at 172.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 178.

<sup>77</sup> *Id.*

<sup>78</sup> For more on external versus internal approaches in jurisprudence, see *infra* notes 122-27 and accompanying text.

erson's solution to the problem of conflict among the forms of legal argument is unsatisfactory.

A. *A Critique of Patterson's Rejection of the Realist Account of Truth*

For Patterson, a major problem for any realist account of truth is to illumine the way that the word and world hook up.<sup>79</sup> He uses Michael Moore as an example of a realist.<sup>80</sup> He believes Moore has offered the best defense of a natural law realist theory in law.<sup>81</sup> For Moore, a legal proposition is true when the proposition corresponds to the way the world is—in other words, a state of affairs independent of the mind.<sup>82</sup> Patterson raises a central problem for the realist: how does the world guide our usage?<sup>83</sup> He contends that the realist cannot show how truth is a function of the way the world is.<sup>84</sup> Instead, the realist ends up showing that truth is a function of beliefs—the realist is unable to get outside of beliefs or language to the world.<sup>85</sup> For example, Moore turns out to advocate a coherence epistemology.<sup>86</sup> According to a coherence theory, “justification of any belief is a matter of cohering that belief with everything else we believe.”<sup>87</sup> Patterson contends this coherence approach fails to show how word and

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79 See PATTERSON, *supra* note 1, at 11; see also MALPAS, *supra* note 11. Malpas observes that the philosopher P.F. Strawson argued that one could not elucidate the notion of truth in terms of any correspondence between statements and facts. *Id.* at 240. This is because moving from discourse of truth to discourse of correspondence only shifts the focus for the debate. *Id.* at 241. Instead of “what is truth?” the question becomes “what is correspondence.” *Id.*

80 See PATTERSON, *supra* note 1, at 43.

81 *Id.* at 44.

82 *Id.* at 44-46.

83 *Id.* at 10.

84 *Id.*; see also RORTY, *supra* note 3, at 6 (antirepresentationalists contend that there is “no way of formulating an *independent* test of accuracy of representation—of reference or correspondence to an ‘antecedently determinate’ reality”).

85 See PATTERSON, *supra* note 1, at 10; see also RORTY, *supra* note 3, at 9 (questioning whether there is anything “which might lift us out of our beliefs to a standpoint from which we glimpse the relations of those beliefs to reality”).

86 See PATTERSON, *supra* note 1, at 10.

87 *Id.* (quoting Michael S. Moore, *Precedent, Induction, and Ethical Generalization, in PRECEDENT IN LAW* 183, 198 (Laurence Goldstein ed., 1987)); cf. BARUCH A. BRODY, *BEGINNING PHILOSOPHY* (1977). Brody writes:

For the idealists, one acquired understanding only when one could fit that which is understood into some comprehensive, coherent, and integrated system. In that way, the truth is one indivisible whole. An individual belief would be true only insofar as it would fit into (cohere with) such an ideal system.

*Id.* at 197.

world connect.<sup>88</sup> Instead of showing how the world makes propositions true, the coherence theory directs us to other beliefs and not to the way the world is.<sup>89</sup> We are unable to get outside the circle of beliefs to the world. Thus, Moore has not shown how the world makes what we say true or false.<sup>90</sup>

To evaluate Patterson's argument, it is helpful to locate it within the general philosophical attack on realism. Patterson's argument is a version of probably the most familiar criticism of a realist conception of truth.<sup>91</sup> It is usually directed against correspondence theories of truth.<sup>92</sup> The argument proceeds as follows. On the realist account, in order to determine whether a proposition is true, one would have to determine whether it corresponds to some fact or the world in an appropriate way.<sup>93</sup> The argument contends, however, that this is impossible.<sup>94</sup> One cannot get outside one's beliefs or discourse in order to view reality or the world itself.<sup>95</sup> All of one's cognition of the world is mediated by our beliefs.<sup>96</sup> Thus, one cannot get at the world or reality to see how our beliefs or statements link up to the world.<sup>97</sup> One is unable to get outside the circle of our beliefs.<sup>98</sup>

In my view this is what Patterson means by saying that the central problem for realism is that it cannot show how the word and the world hook up. For Patterson, the realist cannot show how the world can

88 See PATTERSON, *supra* note 1, at 11.

89 *Id.*

90 *Id.*

91 See ALSTON, *supra* note 25, at 85.

92 *Id.*

93 *Id.* at 86.

94 *Id.*; see also Carl G. Hempel, *On the Logical Positivists' Theory of Truth*, 2 ANALYSIS 49 (1935). In formulating a version of this argument, Hempel writes:

Each statement may be combined or compared with each other statement, e.g., in order to draw conclusions from the combined statements, or to see if they are compatible with each other or not. But statements are never compared with a 'reality,' with 'facts.' None of those who support a cleavage between statements and reality is able to give a precise account of how a comparison between statements and facts may possibly be accomplished, and how we may possibly ascertain the structure of facts.

*Id.* at 50-51.

95 See ALSTON, *supra* note 25, at 86.

96 *Id.*

97 *Id.*

98 *Id.*; see also MICHAEL WILLIAMS, *GROUNDLESS BELIEF* 112 (1977) ("[J]ustification is a matter of accommodating beliefs that are being questioned to a body of accepted beliefs. Justification always terminates with other *beliefs* and not with our confronting 'raw chunks of reality,' for that idea is incoherent.").

make propositions true or false because the realist, like Moore, cannot get outside the circle of beliefs.

In light of this argument, one can perhaps better understand what motivates Patterson's project. Patterson's rejection of a realist account of truth in law may be viewed as an attempt to bring truth down to earth. His approach seeks to link truth to human desires, beliefs and the use of language. He rejects the philosophical tradition that has viewed truth as correspondence between thought and a supposedly inaccessible reality. Other philosophers also have rejected that tradition.<sup>99</sup> They have done so in the belief that the traditional conception of truth was designed to promote the view that philosophers have a special method for ascertaining truth.<sup>100</sup> They sought instead to ensure that the realm of truth could be brought within the scope of human powers.<sup>101</sup>

Under these circumstances, noble motives may underlie Patterson's argument against a realist account of truth. Despite this, his argument is subject to a powerful response. Even if the argument's claims are true, they have no force against a realist conception of truth.<sup>102</sup> This is because a realist account purports to describe what truth is—it does not attempt to provide a way to determine what is true and what is false.<sup>103</sup> Thus, Patterson's central argument against a realist account of truth in law can do no damage because the realist has always maintained that truth is independent of our beliefs or our ability to learn the truth.<sup>104</sup>

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99 See Donald Davidson, *The Structure and Content of Truth*, 87 J. PHIL. 279 (1990).

100 See *id.* at 279; see also JOHN DEWEY, *EXPERIENCE AND NATURE* (Dover Publications 1958). Dewey writes:

[T]he profuseness of attestations to supreme devotion to truth on the part of philosophy is a matter to arouse suspicion. For it has usually been a preliminary to the claim of being a peculiar organ of access to highest and ultimate truth. Such it is not . . . Truth is a collection of truths; and these constituent truths are in the keeping of the best available methods of inquiry and testing as to matters-of-fact; methods which are, when collected under a single name, science. As to truth, then, philosophy has no pre-eminent status.

*Id.* at 410.

101 See Davidson, *supra* note 99, at 280.

102 See ALSTON, *supra* note 25, at 86.

103 *Id.*

104 *Id.* at 86-87; see also Davidson, *supra* note 99. Davidson also rejects the usual complaint against correspondence theories of truth—i.e., that it is impossible to compare one's words or beliefs with the world. He rejects this argument because it depends on assuming that some form of epistemic theory of truth is correct and the realist can simply reply that truth is independent of our beliefs or our ability to learn the truth. *Id.* at 302-03.

B. *A Critique of Patterson's Account of Truth in Law*

As part of his postmodern jurisprudence, Patterson asserts that to say that a proposition is true is to say that "a sufficiently well placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation."<sup>105</sup> Thus, for Patterson a proposition of law is true if a competent legal actor could justify its assertion.<sup>106</sup>

This view seems to identify truth with justification, in that a statement is true if its assertion would be justified. Indeed, Patterson has said that "there is nothing more to be said about the truth of a proposition of law than advancing the reasons for its assertion."<sup>107</sup>

To the extent that Patterson's project identifies truth with justification, significant problems arise. "Truth cannot simply be justification . . ." <sup>108</sup> This is because (1) "truth is supposed to be a property of a statement that cannot be lost, whereas justification can be lost"; and (2) "justification is a matter of degree whereas truth is not."<sup>109</sup> To identify truth with justification would require us "to give up the principle that some of the statements which are now justified may turn out not to be true."<sup>110</sup> This result would be unacceptable.<sup>111</sup>

It may be that Patterson is seeking to offer a notion of truth as idealized justified assertability. The fact that he defines truth by referring to a "sufficiently well placed speaker" may indicate this view. This would be an epistemic<sup>112</sup> conception of truth.<sup>113</sup> For example, Hilary Putnam—the philosopher who seems to have most influenced Patterson in his account of truth in law—at one time argued that a statement is true if it would be justified under epistemically ideal conditions—or in a situation in which all relevant evidence is readily

105 See PATTERSON, *supra* note 1, at 151 (quoting HILARY PUTNAM, REPRESENTATION AND REALITY 115 (1988)).

106 *Id.* at 151-52.

107 Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 56 (1993); see also KIRKHAM, *supra* note 2, at 49 ("Some philosophers . . . have claimed that truth must be defined or analyzed in terms of justification or one of its near synonyms, such as warranted assertibility.").

108 HILARY PUTNAM, *supra* note 3, at 84 (emphasis omitted); see also ALSTON, *supra* note 25, at 192 ("the first thing to notice is the impossibility of supposing that a belief's being justified, as we ordinarily think of this, is sufficient for, much less identical with, its being true").

109 See PUTNAM, *supra* note 3, at 84.

110 *Id.* at 85.

111 *Id.*

112 Epistemic conceptions of truth identify truth with some favorable epistemic status.

113 See ALSTON, *supra* note 25, at 188.

available.<sup>114</sup> If this is the sort of theory that Patterson has in mind, then it is subject to other serious objections. At the outset, there are major problems in attempting to work out a plausible concept of an ideal epistemic situation.<sup>115</sup> Moreover, there are counter examples to the ideal justifiability conception of truth. In this regard, it is plausible to suppose that there are propositions that are true but not ideally justifiable.<sup>116</sup> There may be states of affairs or aspects of reality that are totally inaccessible to human cognition.<sup>117</sup> If so, propositions asserting that such states of affairs obtain will be true even though no statements bearing those propositions as their content would be justifiable in an epistemically ideal situation.<sup>118</sup> Given this, truth cannot be defined as justifiability for human beings in the most ideal situation possible for us.<sup>119</sup>

Epistemic theories of truth have other problems. Theorists, like Putnam, seek to tie truth to the actual ability of human beings to recognize that certain conditions are satisfied.<sup>120</sup> This presents a major difficulty. Such theorists cannot explain how idealized justified assertability can be both a fixed property—or something that cannot be lost—and a property that depends on the actual ability of human speakers to recognize that certain conditions are satisfied. Such a view cannot explain this because actual abilities differ from person to person whereas truth does not. Epistemic theories of truth, then, by limiting truth to what can be ascertained, deprive truth of its role as an intersubjective standard.<sup>121</sup> Thus, Patterson's account of truth in law cannot work even if it is based on the epistemic notion of truth as ideal justified assertability.

### C. *A Critique of Patterson's Rejection of External Approaches in Jurisprudence*

Contemporary legal theorists have identified an external point of view which has dominated approaches to constitutional adjudication.<sup>122</sup> External legal theorists seek to discover principles for legal

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114 *Id.* at 189, 194; *see also* PUTNAM, *supra* note 3, at xvii ("My own view . . . is that truth is to be identified with justification in the sense of *idealized* justification.").

115 *See* ALSTON, *supra* note 25, at 197.

116 *Id.* at 199.

117 *Id.* at 200.

118 *Id.*

119 *Id.* at 201.

120 *See* Davidson, *supra* note 99, at 307.

121 *Id.* at 308-09.

122 *See, e.g.,* Lind, *supra* note 38, at 356; *see also* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). Weinrib observes that the

decisionmaking that are external to judicial practice and outside of law.<sup>123</sup> Thus, the picture of legal justification that external theorists offer is that the truth of a legal proposition is a function of something that goes beyond law.<sup>124</sup> External theorists, then, have sought to evaluate legal practice on the basis of criteria external to that practice—for example, principles and methods from such disciplines as philosophy, literary criticism or economics.<sup>125</sup>

In contrast to external approaches, some theorists recommend an internalist point of view. From an internalist perspective, adjudication stands independently of externalist theory.<sup>126</sup> According to the internal account, there is no way to evaluate legal decision except by internal investigation of judicial practice.<sup>127</sup> One who takes the internalist approach studies the practice of a craft to ascertain and describe the interpretive methods and linguistic conventions used by the practitioners.<sup>128</sup>

Patterson advocates an internalist approach and rejects appealing to matters external to law to justify legal propositions.<sup>129</sup> He rejects external approaches—appeals to philosophy, literary theory or economics—not because externalist theory is wrong, but because it is irrelevant.<sup>130</sup> According to Patterson, illegitimacy in legal justification results from the use of justificatory tools of disciplines external to law.<sup>131</sup>

What does it mean for Patterson to contend that externalist theory is irrelevant? The roots of this argument, I believe, lie deep in Patterson's Wittgensteinian background. To understand Patterson's point, and to construct an argument against his position, it is helpful to consider the conflict between ideal language philosophers and or-

dominant tendency is to look upon the content of law from the standpoint of some external ideals that the law is to enforce. He contends that implicit in contemporary legal scholarship is the idea that law embodies or should embody some goal that can be specified apart from law and can serve as the standard by which law is to be evaluated. *Id.* at 955.

123 See Lind, *supra* note 38, at 370.

124 See Patterson, *Conscience and the Constitution*, *supra* note 23, at 281.

125 See Lind, *supra* note 38, at 359, 370-71.

126 *Id.* at 357.

127 *Id.*; see also Bobbitt, *supra* note 31, at 1902 (arguing that "the meaning of legal practices inheres in the practices themselves, and accordingly that understanding is a matter of mastering the activities that comprise those practices").

128 See Lind, *supra* note 38, at 359.

129 See PATTERSON, *supra* note 1, at 137.

130 *Id.*

131 *Id.* at 148.



dinary language philosophers—a conflict that evolved under the shadow of Ludwig Wittgenstein.

In the wake of Wittgenstein, philosophers took the Linguistic Turn.<sup>132</sup> According to the linguistic philosophers, philosophical problems could be solved or dissolved either by reforming language or by understanding more about ordinary language.<sup>133</sup> In philosophy, two opposing schools developed: ideal language philosophy and ordinary language philosophy.<sup>134</sup> The ideal language philosophers suggested that it would be possible to eliminate philosophical problems not by describing our ordinary language but by constructing an ideal language.<sup>135</sup> In contrast to the ideal language philosopher, ordinary language philosophers—under the strong influence of the later Wittgenstein—took the linguistic turn but refused to construct an ideal language.<sup>136</sup> They argued that philosophical problems arise because philosophers have not used ordinary English.<sup>137</sup> Accordingly, ordinary language philosophers adopted as their method the description of the logical behavior of the linguistic expressions of ordinary language.<sup>138</sup> In so doing, philosophical problems could be dissolved.

The dispute between the ordinary language philosophers and the ideal language philosophers is analogous to the dispute between internalist versus externalist theorists in law. Ordinary language philosophers may be viewed as internalists; ideal language philosophers as externalists. The ordinary language philosophers argued that since philosophical questions arise in ordinary language, one ought to be able to resolve philosophical problems in ordinary language without

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132 See generally THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty ed., 1967) [hereinafter LINGUISTIC TURN] (explaining movement away from Wittgensteinian scientific evaluation of philosophical theories to more language oriented approach).

133 See *id.* at 3; see also THE PHILOSOPHY OF RUDOLF CARNAP (Paul A. Schilpp ed., 1963) (observing that the aim of both naturalists and constructivists was to solve philosophical problems); Gustav Bergmann, *Logical Positivism, Language and the Reconstruction of Metaphysics*, in LINGUISTIC TURN, *supra* note 132, at 63 (discussing group of philosophers who have taken the linguistic turn initiated by Wittgenstein).

134 See Bergmann, *supra* note 133, at 64 (discussing division between ideal linguists and analysts of ordinary usage); LINGUISTIC TURN, *supra* note 132, at 4.

135 See Bergmann, *supra* note 133, at 65-66.

136 See J.O. Urmson, *The History of Philosophical Analysis*, in LINGUISTIC TURN, *supra* note 132, at 294. Urmson observes that the ordinary language philosophers were inspired by the thought of the later Wittgenstein. *Id.* at 297. He states that Wittgenstein did not believe that the use of an ideal language would be helpful in philosophical analysis. *Id.*; LINGUISTIC TURN, *supra* note 132, at 12.

137 See James W. Cornman, *Uses of Language and Philosophical Problems*, in LINGUISTIC TURN, *supra* note 132, at 227.

138 See LINGUISTIC TURN, *supra* note 132, at 19.

having to appeal to some external discourse—namely, some ideal language. Thus a key argument in favor of the ordinary language approach went as follows:<sup>139</sup> “[T]he roots of philosophical problems lie in ordinary language . . . [therefore,] the difficulties must be eliminated by the analysis of ordinary language.”<sup>140</sup> To seek to resolve these difficulties by appealing to some external discourse—such as an ideal or constructed language—would be to do something totally irrelevant.<sup>141</sup> It would direct our attention from the original problems to different concepts.<sup>142</sup>

This argument explains what Patterson and other theorists mean when they say that external theory is irrelevant. It is analogous to arguments offered against externalist approaches in law. Douglas Lind, for example, offers such an argument against externalist views in law. Lind argues that external legal theorists allow for determination of legal meaning to take place wholly independent of the practice of adjudication.<sup>143</sup> According to an internalist approach to law, however, the practice of adjudication provides the only authoritative standard of constitutional meaning.<sup>144</sup> Lind, therefore, contends that since external theorists base constitutional meaning on standards which lie outside the practice of adjudication, they issue judgments of constitutional right and wrong which are fundamentally irrelevant.<sup>145</sup> Thus, just as the proposals of ideal language philosophers to reconstruct language were said to be fundamentally irrelevant, in that they direct our attention away from the original concerns, so too are externalist proposals to reconstruct the practice of law.

With respect to the argument that externalist accounts are irrelevant in law, one can construct a response analogous to the ideal language philosophers’ response to the ordinary language argument described above. Rudolf Carnap, one of the major ideal language philosophers,<sup>146</sup> argued against the ordinary language approach and emphasized the importance of the introduction of new linguistic

139 See THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 133, at 937.

140 *Id.* at 937-38.

141 *Id.*

142 *Id.*

143 See Lind, *supra* note 38, at 390.

144 *Id.*

145 See *id.*

146 See THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 133, at xv. For recent reappraisals of Carnap’s philosophy, see Guy S. Axtell, *In the Tracks of the Historicist Movement: Reassessing the Carnap-Kuhn Connection*, 24 *STUD. HIST. PHIL. SCI.* 119 (1993); Michael Friedman, *Carnap’s Aufbau Reconsidered*, 21 *NOUS* 521 (1987); Michael Friedman, *The Re-evaluation of Logical Positivism*, 88 *J. PHIL.* 505 (1991); George A. Reisch, *Did Kuhn Kill Logical Empiricism?*, 58 *PHIL. SCI.* 264 (1991).

frameworks or conceptual schemes in order to resolve philosophical problems.<sup>147</sup> Carnap said that the ordinary language argument is based on the view that ordinary language is something that cannot be changed or replaced.<sup>148</sup> Contrary to the ordinary language philosophers, however, Carnap argued that a language is an instrument that may be replaced or modified according to our needs, like any other instrument.<sup>149</sup> Language is something we have learned. Therefore we can replace it with another language.<sup>150</sup> Carnap said that ordinary language is like a crude pocket knife. It may be useful for certain purposes. For some purposes, however, special tools are more efficient.<sup>151</sup> Thus, if the pocket knife is too crude, we should replace it with a more suitable tool.<sup>152</sup> According to Carnap, the ordinary language philosophers were in essence arguing that we should not use a special tool—ideal language—because by doing so we evade the problem of the correct use of the cruder tool—ordinary language.<sup>153</sup> In Carnap's view, however, that argument is not persuasive—we should not criticize someone for using a more sophisticated tool—ideal language—to solve problems that a more primitive tool—ordinary language—could not resolve.<sup>154</sup> Thus, Carnap concluded that the choice of a method for the solution of philosophical problems—an ideal language approach versus ordinary language approach—should be decided by practical considerations.<sup>155</sup>

We are now in a position to construct an argument against Patterson's claim that externalist accounts in law are irrelevant. The argument is analogous to Carnap's argument against the ordinary language philosophers. Our current forms of legal argumentation

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147 See Rudolf Carnap, *Empiricism, Semantics and Ontology*, in LINGUISTIC TURN, *supra* note 132, at 72.

148 See THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 133, at 938.

149 *Id.* at 938-39; see also Reisch, *supra* note 146, at 275 (value of linguistic frameworks resides in their utility with respect to practical purposes).

150 THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 133, at 938.

151 *Id.* at 938-39.

152 *Id.* at 939; see also Reisch, *supra* note 146, at 275 (noting that Carnap argued that philosophical instruments may prove useless and become extinct).

153 See THE PHILOSOPHY OF RUDOLF CARNAP, *supra* note 133, at 939.

154 *Id.*

155 *Id.*; Reisch, *supra* note 146, at 274. Carnap's principle of tolerance—that is, the freedom to adopt linguistic forms according to one's purposes—ensures that there is no one ideal philosophical model of scientific theory. Instead, various philosophical goals will generate species of philosophical instruments. *Id.* at 274. These instruments will each be intended to clarify and reconstruct scientific reasoning for a particular set of purposes. *Id.* at 274-75. Just as organic species may become more fit in their respective niches, these philosophical instruments may become more fruitful in fulfilling their purposes. *Id.* at 275.

may be too crude a tool. If externalist forms of legal justification—or appeals to philosophy, literary theory or economics—would be a more helpful instrument, then we should attempt to construct such schemes to resolve practical problems in society. We should not set up dogmatic prohibitions against externalist accounts in law. The choice of a method for the solution of jurisprudential problems—internal versus external approaches—should be decided by practical considerations.

Consider an example. In 1963 Martin Luther King, Jr. appealed to external theory—natural law<sup>156</sup>—in an effort to justify his disobedience to the segregationist statutes then existing in the southern portion of the United States.<sup>157</sup> In his famous “Letter from Birmingham Jail,” King argued that the segregation statutes could not be law because they were unjust and contrary to natural law.<sup>158</sup> This example shows how external forms of justification in law might be useful—they might help bring about racial justice. In view of their success it seems that one should not take the position that external forms of justification in law are irrelevant.

*D. A Critique of Patterson on Jurisprudence and Description:  
Internalist Approaches Collapse into Externalist Approaches*

Patterson suggests that the task of jurisprudence is simply to describe the internal forms of legal argument.<sup>159</sup> This is consistent with the opening page of *Law and Truth*, which cites Ludwig Wittgenstein’s famous dictum that philosophy can only describe the actual use of language, and philosophy leaves everything as it is.<sup>160</sup> Wittgenstein took the position that philosophy was purely descriptive.<sup>161</sup> Patter-

156 Internalist legal theorists have uniformly taken the position that natural law is an illegitimate externalist approach. For example, Bobbitt rejects the view that natural law is enshrined in the Constitution. See BOBBITT, *supra* note 27, at 168 (arguing that the United States Constitution “refus[es] to enshrine any particular comprehensive morality”). Similarly, Lind states that the Supreme Court does not engage in externalist inquiry into abstract principles of higher law. See Lind, *supra* note 38, at 386.

157 See PHILOSOPHICAL PROBLEMS IN THE LAW 24 (David M. Adams ed., 1992).

158 See Martin Luther King, Jr., *Letter from Birmingham Jail*, in PHILOSOPHICAL PROBLEMS IN THE LAW 58-62 (David M. Adams ed., 1992). For a recent discussion of natural law, see LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987).

159 See PATTERSON, *supra* note 1, at 137; see also Patterson, *supra* note 107, at 56 (“The task of jurisprudence is the accurate description of the forms of argument used by lawyers to show the truth of propositions of law.”).

160 See PATTERSON, *supra* note 1, at 2 (quoting Ludwig Wittgenstein).

161 See P.M.S. HACKER, INSIGHT AND ILLUSION 117 (1972); see also PAUL JOHNSTON, WITTGENSTEIN AND MORAL PHILOSOPHY (1989). Johnston observes that the fundamen-

son's descriptive project cannot succeed, however, because any neo-Wittgensteinian purported descriptions of our ordinary methods of legal argument are actually disguised reformations of our legal practices. Accordingly, Patterson's purported internalist descriptive project differs only in degree from externalist approaches.

To see this, consider the view of Douglas Lind, a neo-Wittgensteinian who has offered a view similar to Patterson and Bobbitt.<sup>162</sup> Lind argues that there is no way to evaluate legal decisionmaking except by internal investigation of judicial practice.<sup>163</sup> Thus, Lind seeks to ascertain and describe the conventions actually employed by the practitioners of adjudication.<sup>164</sup> According to Lind, his internal investigation of constitutional adjudicative practice reveals that judicial decisions are justified to the extent that they satisfy the internal conditions of adjudicative excellence—impartiality, reasoned explanation, articulative boundaries, coherence and workability.<sup>165</sup> Like Bobbitt and Patterson, Lind purports to describe adjudicative practice. Yet Lind has identified different modalities from those described by Bobbitt<sup>166</sup> and adopted by Patterson. So it seems that Patterson and his allies are not able to simply describe modalities which would then be used to justify legal propositions. Contrary to Wittgenstein's dictum, they cannot leave everything as it is. Patterson and his allies are actually proposing that our legal practice could be reconstructed along the lines of their suggested modalities. Such modalities would then be used to justify legal propositions. Under these circumstances, Patterson's descriptive project seems to differ only in degree from the externalist approaches to jurisprudence—approaches that appeal to philosophy, economics or literary theory—which may also be viewed as attempts to reconstruct our legal practice by offering external ways of justifying legal propositions.

*E. A Critique of Patterson's Solution to the Problem  
of Conflict Among Modalities*

What happens when the modalities or the forms of legal argument conflict? Patterson recognizes that the modalities can be used

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tal premise underlying Wittgenstein's method is the claim that philosophy should be descriptive, and that it should advance no theses. *Id.* at 2.

162 See Lind, *supra* note 38, at 353-71.

163 *Id.* at 357.

164 *Id.* at 359.

165 *Id.* at 378.

166 For a description of Bobbitt's modalities, see *supra* notes 27-32 and accompanying text.

to generate different outcomes.<sup>167</sup> He resolves this problem by suggesting that one ought to select the modality that best coheres with other beliefs—in other words, select the proposition that best hangs together with everything else we take to be true.<sup>168</sup> This coherence theory is not a satisfactory solution to the problem of conflict among the forms of argument. It generates the problem of bad coherence in our legal institutions.<sup>169</sup> Coherence theories give rise to a difficulty: it is possible to have a coherent system of belief and have that system be coherently bad.<sup>170</sup> For example, racist or sexist systems can be coherently bad.<sup>171</sup> Thus, in selecting a form of legal argument that best coheres with everything else we take to be true, it is possible to select one that would support a legal proposition that could be bad—racist or sexist, for example. *Plessy v. Ferguson*<sup>172</sup> is instructive on this point. At the time that *Plessy* was decided, the racist proposition expressed by that decision—the idea that segregation of racial minorities was permissible—cohered well with its contemporary legal and political context.<sup>173</sup> Given the possibility of bad coherence, Patterson's Quinean solution to the problem of conflicting modalities is simply unacceptable.

## V. THE MOVE TOWARD REALISM

If antirealist or antirepresentationalist accounts of truth are not acceptable, what is the alternative? It seems to me that the realist alternative has not yet been defeated. Patterson's book may end up performing a very valuable service by spurring legal philosophers to produce better realist accounts of truth in law. Such work is needed and would be consistent with the recent revival of realism in other

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167 See PATTERSON, *supra* note 1, at 172. Recently, pragmatists, critical legal scholars and others have argued that law is indeterminate in the sense that legal materials often permit a judge to justify multiple outcomes to lawsuits. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 23 (1990) ("Moreover, the American legal tradition is now so rich, variegated, conflicted and ambivalent that a strand of it can easily be found to support either side in difficult cases."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing how law is infused with irreconcilably opposed principles and ideals); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11-12 (1984) (stating traditional legal theory incorporates indeterminacy).

168 See PATTERSON, *supra* note 1, at 172.

169 See Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710 (1990).

170 *Id.*

171 *Id.*

172 163 U.S. 537 (1896).

173 See Radin, *supra* note 169, at 1723.

areas of philosophy such as in the philosophy of science and ethics.<sup>174</sup> For example, philosophers have recently published some major defenses of moral realism.<sup>175</sup> This work on moral realism is highly significant since moral realism is closely linked to realism in law. For instance, Michael Moore's realist account of truth in law contends that the truth of a legal proposition in law depends on a true moral proposition.<sup>176</sup> Thus, for Moore, the legal realist is a moral realist.<sup>177</sup>

Given the importance of moral realism for law, it is worth briefly sketching the general philosophical trend toward realism, including moral realism. Recent developments in realist philosophy of science and related naturalistic developments in epistemology and philosophy of language can be used to defend moral realism.<sup>178</sup> Philosophers' increasing inclination to view science from a realist perspective<sup>179</sup> has brought about advances in epistemology, metaphysics, and the philosophy of language that suggest a realist conception of the main issues in the philosophy of science.<sup>180</sup> These developments represent an effort to explore the philosophical implications of the realist position that reality is prior to thought.<sup>181</sup> These results establish realism as a plausible philosophical position and make possible a serious defense of moral realism.<sup>182</sup> Given these recent developments in philosophy, there is reason to believe that a realist account of truth in law will prove to be persuasive.

## VI. CONCLUSION

*Law and Truth* is one of the most significant books on jurisprudence to be published in recent years. It constitutes a pioneering effort to carefully explore the importance of an account of truth for law. In so doing Patterson has produced the most sophisticated non-realist theory of truth in law that is presently available. In spite of his masterful effort, I believe Patterson's rejection of realism must ultimately fail.

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174 See Richard N. Boyd, *How to Be a Moral Realist*, in *ESSAYS ON MORAL REALISM* 181 (Geoffrey Sayre-McCord ed., 1988).

175 See, e.g., *id.*; David Brink, *Moral Realism and the Skeptical Arguments from Disagreement and Queerness*, 62 *AUSTRALASIAN J. OF PHIL.* 111 (1984); Peter Railton, *Moral Realism*, 95 *PHIL. REV.* 163 (1986).

176 See PATTERSON, *supra* note 1, at 44.

177 See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse*, 41 *STAN. L. REV.* 871, 882 (1989).

178 See Boyd, *supra* note 174, at 182.

179 *Id.* at 188.

180 *Id.*

181 *Id.* at 189.

182 *Id.*

Instead, the recent revival of realism in philosophy may offer important direction for jurisprudence in years to come.



