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Law and Truth: Replies to Critics

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Articles

LAW AND TRUTH: REPLIES TO CRITICS

*Dennis Patterson**

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The task of philosophy is not to add to the sum of human knowledge, but to enable us to attain a clear understanding of what is already known.¹

I. INTRODUCTION

RONALD Dworkin, the most discussed legal theorist of our day, opens a recent article with the following interrogatory paragraph:

Is there any objective truth? Or must we finally accept that at bottom, in the end, philosophically speaking, there is no "real" or "objective" or "absolute" or "foundational" or "fact of the matter" or "right answer" truth about anything, that even our most confident convictions about what happened in the past or what the universe is made of or who we are or what is beautiful or who is wicked are just our convictions, just conventions, just ideology, just badges of power, just the rules of the language games we choose to play, just the product of our irrepressible disposition to deceive ourselves that we have discovered out there in some external, objective, timeless, mind-independent world what we have actually invented ourselves, out of instinct, imagination and culture?²

One can only be delighted that, of late,³ Ronald Dworkin, and others, have explicitly turned their attention to questions of objectivity and truth in law. For quite some time, analytic legal theorists have seen their subject as a branch of political or moral philosophy; its problems and projects having little to do with the pressing metaphysical and epistemological questions of the day. But to an ever-increasing extent, legal theorists are turning their attention to the connections between questions of legal theory and developments in philosophy of language, metaphysics and epistemology since mid-century.⁴

In *Law and Truth*,⁵ I argue that the later work of Wittgenstein has important implications for contemporary questions in jurisprudence. I follow Wittgenstein to the extent I find most positions in contemporary legal theory grounded in a defective picture of the nature of meaning and truth. This picture, which I see in views as diverse as that of Dworkin and of his arch-rival, Stanley Fish,⁶ seems to lie at the bottom of many of the debates in contemporary legal theory. For these debates to move for-

1. PETER M.S. HACKER, WITTGENSTEIN'S PLACE IN TWENTIETH-CENTURY ANALYTIC PHILOSOPHY 272-73 (1996) [hereinafter WITTGENSTEIN'S PLACE].

2. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

3. As I argue later, in discussion of Professor Aliteri's contribution to this Symposium, Dworkin has had these questions more or less on the table for the last 25 years.

4. Of course, as in so many things, H.L.A. Hart was the first to employ the tools of language philosophy in the context of jurisprudence.

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

6. I first detailed this connection in Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 34-35 (1993).

ward, this picture needs to be abandoned. This is the negative side of the argument in *Law and Truth*.

On the positive side, I make the case for a different approach to issues of meaning and truth in law. In answering the question "What does it mean to say that a proposition of law is true?," I outline an approach to meaning that centers on the forms of argument lawyers and citizens employ to show that what they claim about the current state of the law is the case. Of course, we need some account of what happens when the understanding and agreement that make truth possible in law break down. This requires an account of the nature of legal interpretation, and its connection with understanding and agreement.

The best way to understand jurisprudence in this light is to see jurisprudence as an enterprise devoted to the question of how best to characterize legal practice. Philosophy is not about "explanation," if by that term one means giving an account of the causal forces at work in a practice. Causal explanation has no place in philosophy: we are not interested in why law is as it is, rather, we are interested in how the activity is conducted.

Of course, this view of the philosophical enterprise is contested: that is the point of this Symposium. I want to say at the outset that I am profoundly grateful to my colleagues for coming to Dallas to discuss these issues. In the course of our formal and informal exchanges, I have learned much from them. In addition to showing me how the argument of *Law and Truth* can be improved, I have also seen how to develop the position advanced in *Law and Truth*. Much needs to be done, and my colleagues have helped me define the next step in the argument in ways I had not previously seen. For this and other gifts, I am enormously grateful.

II. GEORGE FLETCHER: MYSTERIOUS REASON

Professor Fletcher makes a strong case for the proposition that law is more like religion than science.⁷ He does this by explicating the role of authority in each practice. Participants in each discipline use texts as authority for appraising assertions about what the respective norms require. And each discipline has its experts, whose task it is to adjudicate disputes over what is and is not the case as a matter of doctrine.

Thus far, there is no disagreement between us. In fact, if one were to look at law and religion from the point of view of Chapter Eight of *Law and Truth*, the only difference between them would be in the warrants and backings used to show the truth of their respective propositions. So if there is disagreement, where is it?

I would put our disagreement this way: George Fletcher believes there is more to legal reasonings than what lawyers do. He believes that there is something more to law—call it "reason"—which is the ground from

7. See George P. Fletcher, *What Law Is Like*, 50 SMU L. REV. 1599 (1997).

which the critic of positive law speaks. He is right to read me as denying a special role for any such thing in the law. I do deny it.⁸

Let me elaborate on this point in the context of Professor Fletcher's discussion of *Bowers*. Here, Professor Fletcher claims that it is not enough to say that "the best argument" is equivalent to saying that the judges "got the law right."⁹ This suggests that there is some measure beyond the forms of argument which makes the results reached by judges through the use of the forms of argument in *Bowers* "right" or "wrong" (true or false). Well, what is that measure?

According to Professor Fletcher, when it comes to the decision in *Bowers v. Hardwick*,¹⁰ the Supreme Court justices "got it wrong But that is not the point. Whether they got it right or wrong depends on the decision itself—not just on whether their opinion was 'justified' under the relevant legal materials."¹¹

I would gloss this paragraph as follows. Judges (and lawyers) use the forms of argument to reach legal conclusions. Whether those conclusions are correct or not, true or false, depends not on the means judges use to appraise legal assertions; it depends "on the decision itself." And this decision itself, it seems, can be shown to be correct or incorrect by resorting to a form of reasoning distinct from, but connected to, legal reasoning.

The problem with Professor Fletcher's position is that the "reason" to which he appeals in telling us that *Bowers* is not good law is never identified. We are not treated to any details of modality, method, or proof. In fact, other than Professor Fletcher's naked assertion, there is no evidence for the reason he champions.

In fact, the situation is worse than this. Professor Fletcher makes the case that law is different from science, in that the reason of science is

8. I would also take issue with Professor Fletcher's attempt to bring Wittgenstein into the camp of "reason." Wittgenstein does not "exemplify a tradition" as Professor Fletcher claims. Wittgenstein never engaged in anything that might be called "reasoned argument." His method, especially so in *PHILOSOPHICAL INVESTIGATIONS*, was not to present arguments, but to assemble what he referred to as "reminders." See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 127 (3d ed. 1958). Wittgenstein scorned philosophical argument with assertions like these: "Philosophy . . . neither explains nor deduces anything" and "If one tried to advance theses in philosophy, it would never be possible to debate them, because everyone would agree to them." *Id.* at §§ 126, 128.

9. Fletcher, *supra* note 7, at 1602.

10. 478 U.S. 1039 (1986).

11. Fletcher, *supra* note 7, at 1602.

universal.¹² By contrast, "law is culture-specific."¹³ But if law is culture-specific, then what is the basis for the claim that *Bowers* is not good law, for the decision is the product of our legal culture? It seems that Professor Fletcher is committed to the view that like science, particular cultures can make mistakes. It is the task of "reason" to correct these mistakes. But if this is true, then what is the point of claiming that law is culture-specific?

In the final section of his article, Professor Fletcher presses his claim that law is like religion. Law and religion are both in a state of tension, a tension between authority and reason. Authority "must yield to the dictates of common sense and reason."¹⁴ Again, mysterious reason is invoked, but we have no glimpse of it. I think that when it comes to the demands of reason, the burden of proof lies with Professor Fletcher. If there is reason beyond the forms of argument, those who assert its existence and role as the arbiter of truth and falsity must do more than invoke its name and assert its role in our practices.

III. DAVID LUBAN: TRUTH, FACTS, AND THE MORALITY OF LAW

It is a truism, of course, that the author of a book enjoys no privileged status when it comes to discerning the meaning of his own words. Of course, the author can speak about what he wanted to say, or thought he said, but those intentional states do not in any way affect the meaning of what he has said. The text, one might say, "speaks for itself."

That said, I must confess that I am puzzled by David Luban's reading of the main argument of *Law and Truth*.¹⁵ What I am most puzzled by is not Professor Luban's claim that I am advancing three theories of truth, but that I am advancing any theory of truth. Yes, it is true that the sentences he quotes from *Law and Truth* are accurate: I do mention "disquotation" and "warranted assertability." And, oh yes, I do mention Pragmatism. But I do not think that the mere mention of these words and phrases—and I do little more than mention them—amount to the advancement of a theory of truth.

12. I am not even sure that, on Professor Fletcher's terms, this claim is sustained. The ground of this worry is the role Kuhn plays in Professor Fletcher's account of rationality in science. Science is governed by universal reason, so Professor Fletcher suggests. It is not clear that Kuhn helps support Professor Fletcher's claim that universal reason is at work. Consistent with Kuhn's views of the role of reason in science, one could explain agreement in science in terms of convergence in criteria of confirmation across cultures and not the result of "reason." In other words, there is a perfectly conventional account of why scientists agree more often than lawyers. Scientific culture enjoys widespread (cross-cultural) agreement on what constitutes confirmation of a hypothesis. Lawyers, by contrast, disagree deeply on what constitutes a successful argument (showing the truth of a proposition of law).

13. *Id.*

14. *Id.* at 1610.

15. See David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 SMU L. REV. 1613 (1997).

In short, I do not see *Law and Truth* as making the case for a particular theory of truth. Rather, my aim is to provide an account of what it means to say that a statement of what the law prohibits, permits, or requires, is true or false. In so doing, I took myself to be rendering clear the meaning of "true" and "false," and their cognates, in the legal context. I did not start, as some think appropriate, with a general account of the nature of truth and then localize that account to the context of law.¹⁶ As I tried to make clear, I think such efforts are dubious, at best.

Professor Luban quotes several lines of *Law and Truth* which, taken together, can be read to run counter to the characterization of *Law and Truth* just given.¹⁷ In responding to his points, I shall say two things. First, I want to explain the motivations for the approach to truth taken by those who favor one or another of the deflationary, disquotational, or redundancy theories of truth.¹⁸ No complete account of this approach to truth can fail to answer Professor Luban's question, which is "is the deflationary theory of truth true?"¹⁹

My answer to this question is the second part of my response on the truth question. But first, a general prefatory remark.

At the heart of Professor Luban's remarks lies a certain conception of the relationship of meaning to truth, a view he attributes to me. That view is that a general account of truth is important to an understanding of the nature of law, specifically the meaning of legal concepts. A brief remark on my view of the relationship of these two important concepts to one another is in order.

A central claim of *Law and Truth* is that the truth of legal propositions is shown and not "demonstrated."²⁰ Some readers read this statement as an endorsement of an "assertability conditions" approach to truth and a rejection of the "correspondence theory of truth."²¹ As I tried to explain in *Law and Truth*, and have elaborated in this *Replies to Critics*, I think neither of these catchy phrases captures the important lessons of Wittgenstein, which I have tried to bring to bear on problems in legal theory.

A succinct statement of the problem is this: "What is the relationship between the truth of a sentence and the meaning of a sentence?" One view that I argue against is the idea that a general theory of truth conditions (one possible element in a theory of truth) can answer all of our

16. For a reading of *LAW AND TRUTH* from this point of view, see Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, MICH. L. REV. (forthcoming 1997).

17. Luban, *supra* note 15, at 1613.

18. Professor Luban uses these terms interchangeably, and I shall not challenge his use. *Id.* at 8. I will, however, note that Wittgenstein "adopted a deflationary (Ramseian) account of truth, while Quine treats 'is true' as a disquotational device." HACKER, WITTGENSTEIN'S PLACE, *supra* note 1, at 191. For a more complete discussion of Ramsey and Wittgenstein on truth, see *id.* at 318 n.13. See also JOHN KOETHE, *THE CONTINUITY OF WITTGENSTEIN'S THOUGHT* 122-139 (1996) (an excellent discussion of Wittgenstein on truth, realism, and related issues).

19. Luban, *supra* note 15, at 1617.

20. This already signals that "truth" will be approached not theoretically, but in some other way.

21. Professor Francis's contribution to this Symposium is a good example.

questions about meaning. The reason I think this view false is not because I deny that sentences have truth conditions. Rather, it is because I do not believe that the truth conditions of sentences regulate the uses to which sentences are put.

In short, use (meaning) is conceptually prior to truth.²² As Wittgenstein says in the *Investigations*, "One learns the game by watching how others play. But we say that it is played by such-and-such rules because an observer can read these rules off from the practice of the game—like a natural law governing the play."²³ The lesson here is that understanding the nature of law requires attendance to the ways in which legal discourse is meaningful. This is an investigation of its normative tools, the forms of argument, for it is through the use of these that legal propositions are meaningful and, thus, capable of being true and false.

That said, let me turn to professor Luban's account of why the deflationary theory of truth fails. He states:

[W]e all recognize a gap between our forms of argument about factual domains and the domains themselves—a gap that corresponds with the gap between providing warrants for assertions and making assertions that are true. If Patterson is right that no such gap exists in the case of law, that will not be because of overarching postmodern insights into language and truth, as he believes, but because the world of law, unlike the world of bacteria, is not a factual domain.²⁴

This quotation crystallizes precisely the view of truth which is the object of the deflationary account. There are two realms: the world (hard facts) and our thought about the world (the domain). To use Professor Luban's example, there are facts about bacteria and there is our talk about bacteria.²⁵ The gap Professor Luban identifies is the gap between what is really the case with respect to bacteria and what we believe to be the case. What we believe to be the case is, I take it, reflected in language.

22. See KOETHE, *supra* note 18, at 143.

The idea that a sentence's truth-conditions are shown or manifested by its use amounts to the idea that attaining a mastery of its use—of its *correct* use—enables us to see or to grasp what its truth-conditions are. But this requires the sentence to *have* a correct use in the first place, one that can be characterized without a knowledge of its truth-conditions. This, recall, was the point Wittgenstein was making in his remarks on truth in *Investigations* at 136: use is conceptually prior to the concept of truth, and we cannot appeal to the notion of truth to determine what a proposition or an assertion is; rather, it must be determined "by the use of the sign in the language-game."

Id.

23. WITTGENSTEIN, *supra* note 8, § 54.

24. Luban, *supra* note 15, at 1620.

25. Bacteria may be an unhappy example with which to make Professor Luban's point. See generally JOHN DUPRÉ, *THE DISORDER OF THINGS: METAPHYSICAL FOUNDATIONS OF THE DISUNITY OF SCIENCE* (1993) (providing a detailed criticism of the notion that anything other than nature itself drives scientific classification).

I do not see the gap Professor Luban sees. In fact, I think the gap he asserts simply does not exist. Let me explore an example to make my point.

Consider the following: A man dressed in colorful garb takes up a sword and cuts off the head of an animal. What can be said about this? I suggest at least four assertions are possible:

1. there has been a killing;
2. this is a religious event;
3. a meal is being prepared; and
4. this act is constitutionally protected under the First Amendment to the United States Constitution.

It seems that all four of these assertions are likely true. But, according to Professor Luban, there is only one "factual domain."

Where is the gap between the factual domain and our beliefs about the factual domain? I simply do not see it. Of course, if the purported "factual domain" is an illusion of some sort, then nothing has taken place. But this is not Professor Luban's point. He maintains that a gap exists between the world of facts and our talk about the world of facts. But I think McDowell,²⁶ Rorty,²⁷ and Putnam²⁸ are right to demur to claims for the efficacy of this picture of truth.

26. See John McDowell, *Projection and Truth in Ethics*, Lindley Lecture, University of Kansas Department of Philosophy 11 (1988).

27. 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 81 (1991).

The pragmatist . . . agrees that there is such a thing as brute physical resistance—the pressure of light waves on Galileo's eyeball, or of the stone on Dr. Johnson's boot. But he sees no way of transferring this nonlinguistic brutality to *facts*, to the truth of sentences. The way in which a blank takes on the form of the die which stamps it has no analogy to the relation between the truth of a sentence and the event which the sentence is about. When the die hits the blank something causal happens, but as many *facts* are brought into the world as there are languages for describing that causal transaction. As Donald Davidson says, causation is not under a description, but explanation is. Facts are hybrid entities; that is, the causes of the assertibility of sentences include both physical stimuli and our antecedent choice of response to such stimuli. To say that we must have respect for facts is just to say that we must, if we are to play a certain language game, play by the rules. To say that we must have respect for unmediated causal forces is pointless. It is like saying that the blank must have respect for the impressed die. The blank has no choice, nor do we.

Id. (emphasis in original).

28. HILARY PUTNAM, REPRESENTATION AND REALITY 114 (Hilary Putnam & Ned Block eds., 1988).

[W]hat is (by commonsense standards) the same situation can be described in many different ways, depending on how we use the words. The situation does not itself legislate how words like "object," "entity," and "exist" must be used. What is wrong with the notion of objects existing "independently" of conceptual schemes is that there are no standards for the use of even the logical notions apart from conceptual choices. What the cookie-cutter metaphor tries to preserve is the naive idea that at least one Category—the ancient category of Object or Substance—has an absolute interpretation.

Id.

Now, Professor Luban is right to criticize any view of truth that reduces truth to what can be asserted. Of course, it is always the case that one could have very good reasons for believing something is the case, when in fact it is not. Happily, I did not advance such a view in *Law and Truth*.

Nevertheless, Professor Luban does have a point: something needs to be said about the fact that while a proposition may appear to be true, in fact, it is not.

In *Science and Metaphysics*,²⁹ Wilfrid Sellars discusses this problem. He starts with the distinction between two senses in which sentences can be assertible without being true. The first is assertability from the point of view of a finite individual and the second from the view of an omniscient user. Richard Rorty fleshes out Sellars's point this way:

Omniscient Jones makes only *correct* assertions, because he has all the additional information which the rules require him to have before opening his mouth. Finite Smith, by contrast, is justified in making incorrect assertions by his lack of world enough and time. So truth has to be defined as S-assertibility, assertibility by Jones, rather than ordinary assertability by you, me, or Smith.³⁰

Whether this way of answering what Rorty refers to as the "anti-pragmatist" point about truth is satisfying depends on whether a pragmatist account of truth can handle epistemic error in a non-representationalist fashion. Sellars's way of handling it is more than satisfactory because he explains error in non-representationalist terms without sacrificing the contingent element in belief. In other words, Sellars provides an explanation of how beliefs can be both grounded in practice and false.

Finally, we come to the question of values. Professor Luban is exactly right when he states that I wish to question efforts to anchor legal practice in "something more universally accessible."³¹ He characterizes this stance as an "overtly moral standpoint"³² and yet, he muses that I am "surprisingly uninterested in what lawyers do or why they do it."³³ In fact, it worries Professor Luban that my view of law and truth leaves the fate of the polity solely in the hands of lawyers.³⁴ As he puts it: "To be told that truth in law *just is* the arcane argumentative practices of lawyers

29. WILFRID SELLARS, *SCIENCE AND METAPHYSICS: VARIATIONS ON KANTIAN THEMES* 101 (1968). This example is discussed in RORTY, *supra* note 27, at 153. The discussion that follows is indebted to Rorty's discussion of Sellars's text.

30. RORTY, *supra* note 27, at 153 (emphasis in original).

31. Luban, *supra* note 15, at 1624. My reasons for criticizing such efforts have nothing to do with the merits of these positions, which I often find to be meritorious. Rather, I see these efforts as metaphysically obscurantist.

32. *Id.*

33. *Id.*

34. I find Professor Luban's closing sentences particularly illuminating on this question. He writes: "Lawyer-talk . . . is a very particular medium, and the standpoint from which we can discuss, criticize, and judge the law—the standpoint for arguing toward legal truth—is not in the least Archimedean. It is the ordinary discourse of morals and politics, every citizen's birthright." *Id.* at 1626. This is a statement any legal positivist could love. Before there can be moral criticism of the law, we have to know what is the case as a matter of law.

is to be told that lawyers rule."³⁵

I think this last claim is mistaken, perhaps profoundly so. In fact, I believe just the opposite to be true. It is because there are forms of argument that ordinary citizens can judge for themselves the legitimacy of legal decisions. For example, virtually every constitutional argument refers to some portion of the constitutional text. True, textual argument is rarely decisive in contested constitutional cases, but the mere fact that constitutional argument takes place against the background of ordinary textual meaning guarantees that the average citizen will have access to and some understanding of the contested issues. If legal discourse were solely the province of lawyers, citizen participation in legal argument would be a fantasy.³⁶

IV. JEFFERSON WHITE: NON-COGNITIVISM AND TRUTH

Jefferson White is the kind of critic for which every author wishes. His explication of the argument in *Law and Truth* springs from a deep and sympathetic understanding of the analytic tradition in philosophy which informs the work. He is correct when he states that *Law and Truth* is committed neither to truth conditions nor instrumentalist Pragmatism.³⁷ He is also correct to note that what is said about truth is best understood non-cognitively³⁸ and "institutionally."³⁹ Further, he correctly identifies normativity in the legal sense as the central focus of the book.

Professor White's understanding of the aspirations of *Law and Truth* leads him directly to the place where the argument needs refinement and development. We start with the forms of argument, which are neither true nor false, but are the means for showing the truth or falsity of legal propositions.⁴⁰ These forms of argument are historically contingent: nothing requires us to use these forms. It is simply a social fact that we do. Here Professor White draws attention to an affinity with H.L.A. Hart's position, specifically the internal point of view.⁴¹ Like the Rule of Recognition,⁴² the appraisive vocabulary of legal argument is a culturally-endorsed tool.

Professor White makes a number of important criticisms of the argument in *Law and Truth*. Moreover, he suggests some further issues, not addressed in *Law and Truth*, which need to be considered. In both his criticisms and his suggestions for further development, Professor White

35. *Id.* at 1625 (emphasis in original).

36. In fact, those who argue that law is best done by philosophers are the people with whom Professor Luban should take issue, for it is they who are mistaken in their contention that by virtue of being philosophers, they are in the best position to know when and under what circumstances the law has worked itself pure.

37. See Jefferson White, *Eclecticism in Law and Truth*, 50 SMU L. REV. 1629, 1632 (1997).

38. See generally *id.*

39. See generally *id.*

40. See generally *id.*

41. *Id.* at 1644.

42. See H.L.A. HART, *THE CONCEPT OF LAW* 100 (2d ed. 1994).

reaches deeply into the position articulated in *Law and Truth*. He has shown me just how much work remains to be done.

Professor White raises an aspect of the normativity argument that I had not seen. He points out that the disquotational analysis of truth is fine, as far as it goes. The problem is that it simply does not go far enough. White does not mention the disquotational analysis of truth to make the point that *Law and Truth* embraces such a theory. However, he does think that what I do say about truth has to answer a question left unanswered by the disquotational theory, and that is "How can I tell whether to affirm a sentence as true?"

Of course, the disquotational theory of truth does not answer this question. But White believes there is an answer in *Law and Truth*. He sees that answer as part of an overall expansion of what Hart called the "internal point of view."⁴³ As such, White wants to say that the approach to the truth of sentences advanced in *Law and Truth* is "epistemic." By this he means that the answer to the question "How do I know whether to affirm the truth of this sentence?" is answered with knowledge of certain conditions. Following Putnam, these conditions are characterized as conditions of warranted assertability.

While I resist this characterization,⁴⁴ I do not want to contest the point. Let us push on, and consider the next step in the argument. This arises in the context of my objections to interpretive universalism. Relying on Wittgenstein, I make the point that understanding and interpretation are logically distinct. White sees the strength of my discussion of interpretive universalism to be a matter of proving the idea that "all understanding is interpretation" is an implausible account of legal practice. He seems convinced of this argument.

But Professor White thinks the success of this argument is compromised when we get to interpretation. First, in his discussion of Bobbitt's work in constitutional theory, White notes that there is an important distinction between conflict and incommensurability. Bobbitt sees modal conflict as a conflict of incommensurables, the resolution of which requires conscience (itself not a modality). Where do I stand on modal conflict as conflict among incommensurables?

By taking a stand with Quine, at least at the level of the web of belief, White sees my position as fundamentally distinct from Bobbitt's. The reason he sees it as fundamentally different, is that for Quine (and, thus, for me), all conflict is, in principle, resolvable. But if I want to align my-

43. White, *supra* note 37, at 1644.

44. *Id.* at 1645. I am not entirely comfortable with this account of the meaning of "to know." Imagine Bill, of whom we say "He really knows how to play squash." We say this of Bill because when he plays, he always hits great rail and drop shots, and never yields the center. Would we say that Bill "has epistemic access to the properties which make one a good squash player?" We need not. Rather, we would say simply that he exhibits the talents and abilities to play the game. He does not "know" how to play and, thus, plays well. He simply plays well! And this judgment is a normative one, one that is informed by the appropriate appraisive vocabulary.

self with Quine, Professor White argues, I have to overcome certain problems.

First is the seeming fact that I advance two logically distinct forms of truth-determination in law, which White refers to as "Primary and Secondary" legal arguments. Primary arguments, which refer to forms of argument, operate at the level of understanding. Secondary arguments are also truth-determining, but they are actuated in the context of interpretation, where the forms of argument cannot resolve conflict.

What is the problem with two different forms of truth-determination in law? One problem, a problem I acknowledge, is that there is little discussion in *Law and Truth* of the issue of coordination of these two distinct forms of truth-determination. More needs to be said about this. In addition, the varieties of interpretive occasions in law go beyond conflict among the forms of argument. These need to be fleshed out.

A second difficulty is what Professor White terms the "Limits of Law" problem.⁴⁵ The most obvious, and in some ways most difficult, aspect of this problem arises in the context of prudential argument: it is a question about limits. I have an answer to this problem, but I am not at all certain it is satisfactory.

I see the facts of cases as occasions for actuation of the forms of argument. For example, if two merchants used a term common in the trade, and a dispute breaks out over its meaning, there is no doubt that trade usage⁴⁶ resolves the issue. The reason this is so clear is that the text of the Uniform Commercial Code makes it so.⁴⁷ But would it be appropriate to ask what the most efficient reading of the common term might be? And could we not debate the efficacy of candidates for defining the term?

I would not deny the logical possibility of this latter move. But I do not see the "Limits of Law" problem as a great threat to the position I advance in *Law and Truth* because the excesses of each form of argument are kept in check by their need to respond to the other forms actuated by a set of facts. This is the point of my discussion of *Riggs v. Palmer*.⁴⁸ A successful argument is one that shows the most appropriate form of argument for resolution of the issues at hand. Part of the meaning of "appropriate" is found in the degree to which the implicated forms of argument respond to the claims of competing forms. To the degree they do not, their breadth will be diminished.

V. GEORGE MARTINEZ: THE NEED FOR INTERPRETATION

Professor Martinez is a trenchant and perceptive critic of the emerging Wittgensteinian perspective in legal theory.⁴⁹ In his contribution to this

45. White, *supra* note 37, at 1646.

46. See UCC § 1-205 (1989).

47. *Id.*

48. See PATTERSON, *supra* note 5.

49. See George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545 (1996). I respond to Professor Martinez in Dennis Patterson,

Symposium,⁵⁰ he concentrates attention on one aspect of my position—the argument that understanding and interpretation are logically distinct activities (hence, not reducible one to the other). As he explains, the claim that understanding cannot be reduced to interpretation is not original with me—the argument is found in Wittgenstein's *Philosophical Investigations*.⁵¹ Professor Martinez disputes this claim, invoking as authorities the works of Donald Davidson, Ronald Dworkin, and *Critical Legal Studies*.⁵²

Having written about this issue before,⁵³ I thought it helpful at this juncture to respond with two points. First, I think it important to be clear about just what sort of question is involved in this discussion. Second, I shall explain what could count as a refutation of Wittgenstein's argument. As I hope to show, the second of these two points is both more important and less well understood than the first.

First, the question whether understanding and interpretation are distinct activities is a "logical" question.⁵⁴ Let us consider an example.

We often have reasons for action. In the case of judges, a judge may be motivated to rule a certain way but may offer a justification for her decision which has nothing to do with her motivations. For example, the judge may be motivated to rule on a point of evidence against an objecting attorney because she personally dislikes the attorney. Nevertheless, she may have good reasons for making her ruling, and, when called upon to advance those reasons, she does so as a matter of course.

It is important to see that the same act—ruling on a point of evidence—may implicate various explanatory schemes. The motivational scheme is causal in nature: emotions explain action. But quite independent of the emotional/causal explanation, there is a separate ground of explanation: good legal reasons exist which justify the decision. Importantly, we can understand and evaluate the judicial reasons independently of the causal factors.⁵⁵

Now to the second question. Before we can see what would count as a rejection of Wittgenstein's position, we need to consider the details of Wittgenstein's argument that understanding cannot be reduced to interpretation. The most important aspect of Wittgenstein's argument is its negative character. Wittgenstein is arguing against a certain picture of

Law As a Social Fact: A Reply to Professor Martinez, 29 LOY. L.A. L. REV. 579 (1996).

50. George A. Martinez, *Some Thoughts on Law and Interpretation*, 50 SMU L. REV. 1657 (1997).

51. See WITTGENSTEIN, *supra* note 8, at § 201.

52. See generally Martinez, *supra* note 50.

53. See Dennis Patterson, *Against A Theory of Meaning*, 73 WASH. U. L.Q. 1153 (1995); Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994).

54. Now, the adjective "logical" can have many meanings: let me explain what I mean. Activities are logically distinct when one can be engaged in independently of the other. One activity can be reduced to another when all the features of the first activity can be explained by the second.

55. For example, it may be the case that, despite the fact that the judge dislikes the lawyer, and ruled solely on the basis of personal dislike, she was correct to do so.

the nature of human understanding. It is fortunate that Professor Martinez chooses Davidson—arguably the most important figure in contemporary philosophy of language—as a purveyor of this view. Everything Professor Martinez says of Davidson's views is true:

[E]very act of understanding is an act of interpretation. Linguistic understanding is a matter of the application of an interpretive theory. Davidson explains the situation of interpretation in terms of "prior theory" and "passing theory." The prior theory includes everything that one brings to interpretation; including beliefs about the speaker's beliefs and desires, and expectations about what words the speaker will use. When the speaker speaks, the interpreter uses her prior theory to form a passing theory, a theory which actually interprets what the speaker is now saying.⁵⁶

Of course, the view of human understanding as a computational process has a wide following.⁵⁷ The criticism Wittgenstein made of this view of the nature of understanding has been enhanced by other philosophers.⁵⁸ I want to comment briefly on the type of argument that is made against philosophers of the Davidsonian ilk.

The conclusion to the argument is not that the picture of the nature of human thought advanced by Davidson, et al., is wrong; rather, the claim is that it is devoid of sense (philosophically nonsensical). Let us consider Wittgenstein's remarks on this point.

Much of Wittgenstein's *Philosophical Investigations* is an account of normativity (how to understand standards of correctness). Of course, his famous discussion of rule-following is an essential element in this account. The understanding/interpretation dichotomy comes at the end of a long series of paragraphs, wherein Wittgenstein discusses the role of rules in practices. At the end of these reflections, Wittgenstein states the "paradox" of rule-following:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made to conflict with it. And so there can be neither accord nor conflict here.⁵⁹

Notice that in this first of three paragraphs, Wittgenstein has set out a problem to be solved, a riddle to be explained. The question is how rules guide conduct. The problem is that if any action can be made to accord with the rule (that is, an interpretation of the rule) then everything and nothing will accord with the rule. In short, rules by themselves determine

56. Martinez, *supra* note 50, at 1653-54. For some of the original sources for these views, see Donald Davidson, *The Logical Form of Action Sentences*, in *THE LOGIC OF DECISION AND ACTION* (Nicholas Rescher ed. 1967); DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (1980); DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984).

57. It includes Chomsky and many philosophers in cognitive studies.

58. See, e.g., GORDON D. BAKER & PETER M.S. HACKER, *LANGUAGE, SENSE, AND NONSENSE* (1984).

59. WITTGENSTEIN, *supra* note 8, at § 201.

nothing. Something is wrong here. We will come to see that the problem lies in how the question is posed.

The next paragraph in section 201 reads:

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us for at least a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.⁶⁰

This is the heart of Wittgenstein's argument, and the point of Professor Martinez's criticism. Wittgenstein makes the point that if every utterance requires interpretation, then, if interpretations are utterances, they too require interpretation, and so *ad infinitum*. That's the point! If you cannot show that interpretations and the things they interpret are not somehow logically distinct entities, then no reason exists for stopping interpretation at the first interpretation or the ninety-ninth interpretation or the ninety-eighth interpretation.

What is to be done? Here is Wittgenstein's answer: "Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another."⁶¹

Wittgenstein recommends that the paradox be avoided by seeing understanding as logically distinct from interpretation. This is not to deny the need for interpretation; rather, it is to deflate interpretation from a pervasive to a sometime activity (as I say in *Law and Truth*, a "second-order" activity).

This is the precise point where one needs to meet Wittgenstein's argument, if one is to defeat it. The response to Wittgenstein must be that he somehow misstates or misunderstands the Davidsonian argument. The claim Wittgenstein makes is a logical one: if all understanding is interpretation, then why is it not the case that all interpretation is not infinite interpretation? Unless one shows that the infinite regress of interpretation can somehow stop, Wittgenstein's argument has not been met with successful challenge.

None of this is to deny any of the points Professor Martinez makes with respect to Fuller or CLS. Here we agree more than we disagree. Despite this overlap in perspective, I believe we still part company over the question whether there is something between us and the world. Professor Martinez stands with the majority on this one; many philosophers agree that something (politics, emotions, morality) acts as a medium between us and the world. But my sympathies are with Wittgenstein (and not Heidegger). Language is not between us and the world—it is because of language that we have the world we do.

60. *Id.*

61. *Id.*

VI. CHARLES ALTIERI: ON READING DWORKIN

Charles Altieri takes issue with my reading of Dworkin.⁶² In particular, he thinks I overplay the importance of truth in Dworkin's account of the nature of law. He sees this misreading as caused, in the main, by my account of postmodernism, which also comes in for criticism.⁶³

I disagree with Professor Altieri on both counts. The account of postmodernism in *Law and Truth* is not as narrow as Altieri suggests; his central claim is that, in my hands, modernism is reduced to empiricism. But with respect to Dworkin, Professor Altieri understates the claim he seeks to dispute. My argument is not that truth is central in *Law's Empire*.⁶⁴ The claim is much broader and stronger: that without truth, Dworkin has no distinct jurisprudential position. Before considering Dworkin's position, let me say something about postmodernism.

In *Law and Truth*, I explain how postmodernism can help us understand changes in philosophical thought over the course of the twentieth-century.⁶⁵ The sea change I perceive is a movement beyond certain perennial philosophical questions. These include questions like "What is the nature of mind?," "What is a number?" and "Can we know the content of another person's thoughts?" Following Murphy and McClendon, I take the position that any modernist thinker could be located in the three-dimensional space set out in *Law and Truth*.⁶⁶

One of the three axes, epistemology, has been a principal subject of debate for analytic philosophers since Descartes. With respect to the question of truth in Dworkin's jurisprudence, Professor Altieri correctly states that I have three basic objections to Dworkin's account of the nature of law.⁶⁷ Of these objections, Professor Altieri maintains that all three objections would hold if it were Dworkin's primary ambition to describe legal practice.⁶⁸ Dworkin, Professor Altieri asserts, is under no illusion that his account of law as integrity is in fact how law is practiced.⁶⁹

But Dworkin sees his own position as very closely tied to the actual practice of law. He states: "This book [*Law's Empire*] takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face."⁷⁰ I fail to see how an author desirous of participating with the members of a practice can fail to

62. See Charles Altieri, *Some Limits of Postmodernism in Legal Studies: On Dennis Patterson's Law and Truth*, 50 SMU L. REV. 1663 (1997).

63. *Id.*

64. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

65. Here I rely on the work of Nancey Murphy and James McClendon. See Nancey Murphy, *Scientific Realism and Postmodern Philosophy*, 41 BRIT. J. PHIL. SCI. 291 (1990); Nancey Murphy & James McClendon, *Distinguishing Modern and Postmodern Theologies*, 5 MOD. THEOLOGY 191 (1989).

66. See PATTERSON, *supra* note 5, at 157.

67. *Id.* ("Patterson offers three basic criticisms of Dworkin . . .").

68. See Altieri, *supra* note 62.

69. *Id.*

70. DWORKIN, *supra* note 64, at 14.

do anything short of what Dworkin describes, that is, join the practice and carry on with its members in the mutual struggle over issues of soundness and truth. Yes, truth.

Professor Altieri thinks that I overplay Dworkin's concern with truth. This focus, he maintains, causes me to miss the force of the "value issues" so central to Dworkin's project.⁷¹ In fact, Professor Altieri goes so far as to suggest that "what is most important for Dworkin can be preserved while jettisoning every claim about truth (in fact the word "truth" hardly does any conceptual work after the first chapter of *Law's Empire* or in *Freedom's Law*)."⁷²

It seems to me that there are two claims here. The first claim, to use Professor Altieri's words, is that "what is most important for Dworkin can be preserved while jettisoning every claim about truth"⁷³ The second claim is that Dworkin himself does not see truth as an important concept in his account of the nature of law.

The second of these questions is easier to deal with than the first. One need only marshal the texts to make the case.⁷⁴ But the first question is a bit tricky. Who decides what is important in Dworkin's position? How is this decided? Let me try to answer both questions simultaneously, showing both that truth is important to Dworkin and, moreover, why the concern with truth is an essential element in his account of the nature of law.

Law's Empire is composed of eleven chapters. The first bears the title "The Nature of Law." This title is no accident. From the start, Dworkin's project has been to provide an account of the nature of law. He began with deep criticism of the legal positivism of H.L.A. Hart. He then showed that there is more to the practice of law than the primary and secondary rules identified by Hart. Finally, he argued that there are right answers to almost all legal questions, and he argued that law and morality are logically connected.⁷⁵

How does Dworkin open *Law's Empire*? On the fourth page of the book he identifies the central element in legal argument, the proposition. He states: "Let us call 'propositions of law' all the various statements and claims people make about what the law allows or prohibits or entitles them to have."⁷⁶ In the same paragraph we are told that propositions of law "can be true or false."⁷⁷ Now comes the argument. Characteristi-

71. See Altieri, *supra* note 62 ("So I come to my second general critical claim—that Patterson does not see the force of these value issues because so much of his reasoning depends on making questions of truth the focus of his historical and analytical enterprise.").

72. *Id.* at 1672.

73. *Id.*

74. I think I did that in *LAW AND TRUTH*. In fact, I made the point of showing that the question of the truth of propositions of law has preoccupied Dworkin for over twenty-five years. And truth remains a central topic of concern for Dworkin. See generally Dworkin, *supra* note 2.

75. This last point is known as the "relational thesis"—the idea that the truth of propositions of law turns, at least in part, on the truth of certain moral propositions.

76. DWORKIN, *supra* note 64, at 4.

77. *Id.*

cally, it is framed as an attack: "Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic."⁷⁸

What is Dworkin's aspiration? He tells us a few pages later: "[T]o construct and defend a particular theory about the proper grounds of law."⁷⁹ In short, Dworkin wants to identify the true grounds of law because those grounds will be the truth maker for legal propositions (the thing in virtue of which propositions of law are true and false).⁸⁰ Dworkin argues that the way to get to those grounds is through interpretation.

I do not see how to characterize Dworkin's project of legal justification as materially different in form from the classic truth-conditional account of propositions applied to legal propositions.⁸¹ Interestingly, Dworkin not only embraces this characterization, he trumpets it!

In a short article,⁸² which appeared five years after the publication of *Law's Empire*, Dworkin summarizes—almost paraphrasing—the account of his position given in *Law and Truth*. The article is very short—only seven pages. But it exhibits the great virtue of compression: in the small space provided, Dworkin sums up the position which he has evolved over the course of the last twenty-five years. He describes his immediate question as "the ancient, dusty subject 'gaps in the law.'"⁸³ Here is the argument:

I say roughly: "Gaps in the law are very rare; there is almost always a right answer to a legal question."⁸⁴

I think we have to start with the notion of a concrete proposition of law. For example . . . : "I am permitted by law to drive my bicycle into the Bois de Boulogne today."⁸⁵

I use the phrase "realist" and "anti-realist," which, as you know, are taken from contemporary debates in ontology, to suggest that

78. *Id.* Of course, the target, already coming into view, is Hart's positivism: the idea that the truth of legal propositions turns on social facts.

79. *Id.* at 11.

80. Halfway through *LAW'S EMPIRE*, Dworkin summarizes all of this in the following paragraph: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." *DWORKIN, supra* note 64, at 225.

81. Nevertheless, in support of his claim of my misreading, Professor Altieri maintains that propositional versions of truth claims are impossible to sustain in the philosophy of law and that imposing the grid of truth conditions can have very bad effects because it reinforces the binary oppositions between truth and skepticism. *See generally* Altieri, *supra* note 62. If this is so, then these are problems for Professor Dworkin and, as such, affirm rather than undermine the strength of my critique of his position.

82. Ronald Dworkin, *On Gaps in The Law*, in *CONTROVERSIES ABOUT LAW'S ONTOLOGY* 84-90 (P. Amselik & D.N. MacCormick eds., 1991). In reading the summary of the argument in this short article, notice how it tracks the outline just given of the argument of *LAW'S EMPIRE*. I think the same preoccupation with truth is illustrated in Dworkin, *supra* note 2.

83. Dworkin, *supra* note 82, at 84.

84. *Id.*

85. *Id.*

our decisions about the gaps-in-the-law question are going to depend upon the answer we give to the following question of ontology: "what kind of facts are legal facts?" If it can be true that (for example) the law permits me to take a bicycle into the Bois, in virtue of what is it true?⁸⁶

"In virtue of what can propositions of law be true?" I will call the first answer . . . that law could be a matter of institutional fact. The second possibility I want to consider is that law is a matter of interpretive fact.⁸⁷

On the second "interpretive" view, any proposition of law which is true, is true because it figures in, or is the consequence of, the best interpretation of a community's political history.⁸⁸

[I]nterpretation aims to make of the object of interpretation the best it can be of the genre to which it is taken to belong.⁸⁹

So I want to ask, "Shall we accept the view that when a proposition of law is true, it is true in virtue of an institutional fact?"⁹⁰

I am drawn to the interpretive answer to the question: what makes a proposition of law true? Even in easy cases, that is, even when it goes without saying what the law is, even when . . . everyone knows what the law is . . . we do better to explain that phenomenon by speaking of a convergence on a single interpretation, or, at least, on interpretations that have the same results in most cases, because of a shared political culture and assumptions.⁹¹

Let me return to my two questions. First, does Dworkin think truth is important? The answer seems clear. His question—one that he has had on the table for twenty-five years—is "What does it mean to say that a proposition of law is true?" Dworkin rejects the "institutional" answer to this question, and argues for his "interpretive" answer.

Could Dworkin's position be preserved, as Professor Altieri suggests, if he dropped the word "truth" from his argument? Go through the quotes above and try to make sense of his position without the word. It can not be done.

There are larger, more important reasons why it cannot be done. As I argued in *Law and Truth*, Dworkin—like H.L.A. Hart—is wedded to a truth-conditional picture of law.⁹² Dworkin is in fundamental agreement

86. *Id.* at 84-85.

87. *Id.* at 85. Dworkin also adds: "Neither view, of course, supposes that law is a matter of brute fact." *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 86.

91. *Id.* at 88. Of course, this last sentence, which characterizes understanding as a function of shared assumptions, is exactly the same argument made by Stanley Fish. In fact, not only could Fish write this sentence, he did. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 301 (1989) (the meaning of the sign "\$100" is "the product of interpretive assumptions . . . [which] . . . will always be a function of something prior to it").

92. Again, as Professor Altieri himself argues: propositional versions of truth claims are impossible to sustain in the philosophy of law. See generally Altieri, *supra* note 62. I agree. In fact, that is precisely the argument of much of *LAW AND TRUTH* (Jefferson White's contribution brings this aspect into relief).

with Hart that the project of finding the "true grounds of law" (that in virtue of which propositions of law are true) is the name of the game.⁹³ In short, were Dworkin to drop his concern with truth, he would be abandoning all that is unique in his position.

VII. BEN ZIPURSKY: MUST WE SPEAK OF TRUTH?

Ben Zipursky is a sympathetic and intelligent critic of *Law and Truth*. While sympathetic to my account of the postmodern turn in analytic philosophy⁹⁴ however, he has reservations about the questions I think are central to contemporary analytic jurisprudence. His unease with my position grows out of his own reading of the history of analytic jurisprudence in this century and, more particularly, his own reading of the struggles in jurisprudence to come to the right questions about law.

I want to agree immediately with Professor Zipursky's characterization of the central message of *Law and Truth*, that its conclusions are "quiet, comforting, and somewhat complacent."⁹⁵ I find it astonishing that so many in contemporary political and legal philosophy have yet to appreciate what Professor Zipursky characterizes as the "reality busting" developments in recent analytic philosophy.⁹⁶

In writing *Law and Truth*, I have tried to take the first steps in opening up the discussion in jurisprudence to these important and, in my view, irreversible developments. While Professor Zipursky praises this aspiration, he has some specific objections to my account of the importance of these developments. Let me turn now to his criticisms.

Professor Zipursky divides philosophy into two areas, which he denominates "central" and "non-central." The central areas are the ones where one could find "real" discourse, talk about the facts. Obviously the philosophy of science was the biggest winner here, dominated as it was by discussions in metaphysics and epistemology. Non-central areas, like aesthetics and morality, took a beating. They were either dismissed as "meaningless" (e.g., by Logical Positivists) or developed by non-factual modes for understanding their object languages (this was the strategy of ethical emotivists).

How does a non-central discipline such as jurisprudence fit into this scheme of things? Professor Zipursky moves through legal realism, positivism, formalism, and instrumentalism, to the conclusion that, with the exception of realism, none of those views is a view about the existence or nature of truth in law.⁹⁷ If they are not about truth, then what are they

93. The person who first noticed this, and showed its significance for understanding Dworkin's position, is Gerald Postema. See Gerald J. Postema, "Protestant" Interpretation and Social Practices, 6 *LAW & PHIL.* 283 (1987).

94. Benjamin C. Zipursky, *Legal Coherentism*, 50 *SMU L. REV.* 1721 (1997). Zipursky, though, neither endorses nor criticizes the label "postmodern."

95. *Id.* at 1681.

96. Witness, for example, the shock and horror of Kantians everywhere when Rawls backed away from a metaphysical reading of *A THEORY OF JUSTICE*.

97. See generally Zipursky, *supra* note 94.

about? Professor Zipursky says

[T]hese are all views about the subject matter of law. They are all views of what is being said when one asserts some proposition of law. They are all views of what one is accepting when one accepts or believes a proposition of law, or of what it is for things to be as the proposition of law says they are. These are views purporting to tell us what legal propositions are, at bottom, about. They are not then really theories of truth. They are theories of what law is.⁹⁸

No sooner is Professor Zipursky finished with his criticism of my focus on truth, then he begins to explain why I take the tack I do in *Law and Truth*. He says that "it is difficult to find any other way to formulate the question [I] say jurisprudes have been asking. . . ."⁹⁹ Not only is this emphasis understandable, it is, to use Professor Zipursky's words, "doubly understandable"¹⁰⁰ because "a certain approach to truth, meaning, and knowledge[] was highly influential in motivating legal theorists to work hard on the question of subject matter."¹⁰¹ Well, if this is criticism, let me have more!

I do not believe that I say anywhere in *Law and Truth* that anyone in jurisprudence ever advanced a theory of truth (although some have, more or less explicitly, relied on one). Nevertheless, some of the authors I discuss in *Law and Truth* do not explicitly discuss the truth of propositions of law.¹⁰² But I do think each of the jurisprudential theorists discussed in *Law and Truth* does have a view of what it means to say that a proposition of law is true. And I agree with and appreciate Professor Zipursky's point that the question "what does it mean to say that a proposition of law is true?" is the most felicitous way of posing this question.

Over what, then, do we disagree? As I read Professor Zipursky, we seem to disagree less about substance than a certain *façon de parler*. What I think he regrets is the fact that certain questions have a way of narrowing the field of inquiry. I suspect Professor Zipursky finds my question a bit too narrowing. And in a certain sense, it is. By way of explanation, and not defense, I can say that I had two reasons for asking the question I did. The first is that this question "What does it mean to say that a proposition of law is true?" reverberates with much contemporary analytic philosophy. I regret these reverberations are, in law circles, often heard only as a snarl and not as a source—indeed, a considerable one—of intellectual sustenance.

The second reason I ask such a question is the pervasive influence of the thought of Ronald Dworkin. The question I have posed is Dworkin's question. I think there is no better way to put the matter than to say that

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. I note that Professor Zipursky does not discuss Dworkin's views of truth in connection with his discussion of the intellectual history of contemporary jurisprudence. Nor is Michael Moore mentioned.

his thought represents the leading jurisprudential position. If you want to say something new, his thought is the standard against which new positions are measured.

Now to Professor Zipursky's second objection. He begins with a discussion of how "The Correspondence Cluster" came to be rejected in analytic philosophy.¹⁰³ His account is both accurate and interesting. Professor Zipursky explains how Wittgenstein erected the picture theory, only to destroy it upon his return to philosophy. Quine's seminal essay, "Two Dogmas of Empiricism," is identified as a central text in the dismantling of positivist empiricist epistemology. Finally, Professor Zipursky details how the rejection of foundationalism and correspondence do not entail relativism. Most importantly, he notes that going beyond the realism/anti-realism debate requires one to articulate a position that rejects the Tractarian account of truth without embracing idealism.

Regrettably, Professor Zipursky does not see a place for *Law and Truth* in this story. Why not? Jurisprudence, it seems, was responding to pressures which were different than those of other non-central disciplines. While the latter were preoccupied with questions of the legitimacy of truth-talk, jurisprudence was worrying itself about "a novel account of [its] subject matter."¹⁰⁴ He details this observation this way:

We need not answer the question of what law is from outside of law—at least we need not do so in order to render legal discourse capable of the sort of truth, meaning, and possibility of knowledge available in other areas of discourse. For all that really permits truth and knowledge in those areas is the possibility of coherence, and all that really permits meaning is the existence of a rule-governed practice of using the language.¹⁰⁵

There is nothing here with which I disagree. I think that what Professor Zipursky is saying is that meaning is more important than truth. That, of course, is precisely what Wittgenstein said when he moved from the *Tractatus* to the *Investigations*. But I believe that is precisely what I said in *Law and Truth*. I did not advocate theories of truth; what I did was to provide an account of the meaning of the word "true" in law. That is not a theory; rather, it is a description of the manifold ways in which the word is used (in law). Professor Zipursky is correct: meaning is more important than truth. We do not disagree.

Professor Zipursky suggests that my view of law is positivist. Worse, he faults me for this! The reason for his characterization of my view as "positivist" is that he reads my argument as embracing a central tenet of positivism as articulated by H.L.A. Hart. This is the idea of "a pedigreed set of legal norms."¹⁰⁶ This leads Professor Zipursky to characterize my position as "reductive."¹⁰⁷

103. Zipursky, *supra* note 94, at 1695-99.

104. *Id.* at 1705.

105. *Id.* at 1706.

106. *Id.*

107. *Id.*

How can I defend the claim that the argument of *Law and Truth* is neither positivist in the sense just mentioned nor reductivist? Let me take each issue separately.¹⁰⁸

As I have explained, both in *Law and Truth* and elsewhere in these *Replies to Critics*, my goal in writing *Law and Truth* was to defeat one picture of normativity in law and replace it with another. I believe the account of normativity in law set forth in *Law and Truth* is more perspicuous and illuminating than the views I criticize. But even if that were not the case, that still does not warrant the criticism that the view is reductive. To see this more clearly, let us turn our attention to the normative aspects of another discipline.

Consider art criticism. We would regard as defective any account of the merits of a painting that discussed only the neighborhood where the artist lived, the stores in which he purchased his supplies, and the galleries in which his work was shown. Imagine a review of a Rothko exhibition which discussed only these three aspects of the painter's life and work. Is it reductive to say that this account of Rothko is "defective" because it invokes the norms of art criticism to reject a certain "review" of the artist's work? I do not see how. It is one thing to say that the appraisive norms of a given discipline are sometimes contested. I certainly do not dispute that. But what I cannot understand is why the identification of those norms attracts the sorts of labels Professor Zipursky employs. This is puzzling.

Professor Zipursky suggests that the four forms of argument I identify as "central" to law may not be enough. I do not dispute this.¹⁰⁹ It may well be the case that certain areas of the law have unique forms of argument.¹¹⁰ I agree with Professor Zipursky that there is more to be done both in identifying the complete range of argumentative forms in law and saying more about how they are employed to show the truth of legal propositions.

Finally we come to the suggestion that *Law and Truth* is, in some sense, a "foundational" account of law.¹¹¹ None of the forms of argument is "essential" to law. The forms could have been different, and they may yet be different. We use the forms we have because they are our collective inheritance. There is nothing special about them. Why we have them and whether they could have been different are not philosophical questions. That does not mean those questions are not interesting.

108. I do not believe that the idea of normativity expressed in terms of forms of argument is reductive in the least. Or, if it is reductive, then it is no more reductive than any other normative enterprise.

109. In the case of constitutional law, Bobbitt argues that, in addition to the four forms of argument I identify, there is ethical and a structural argument. I think he is correct, but I do not see these two forms at work in other areas of law.

110. Craig Nard, for example, identifies a form of argument unique to patent law. See Craig A. Nard, *Deference Defiance and the Useful Arts*, 56 OHIO ST. L.J. 1415 (1995).

111. Zipursky, *supra* note 94, at 1716.

We come, then, to a question that bothers Professor Zipursky far more than it does me. He puts the question this way: Can legal coherentism be too easy? Professor Zipursky worries that legal coherentism, a view he sees as compatible with the position in *Law and Truth*, "takes away many of the primary concepts used by the philosopher to engage in thoroughgoing challenges to the legitimacy of our practices . . ." ¹¹² It will come as no surprise that I dissent from this bleak account of the upshot of the deflation of philosophy's second-order status. But this is not to say that Professor Zipursky does not have a point. There is a real question to be answered. I would put the question this way: "What is the task of a postmodern jurisprudence?"

There are two aspects to this question: critical and programmatic. By "critical," I mean to identify all those enterprises which purport to show normative shortcomings in the law. I have in mind the full range of critical perspectives, from feminism and critical theory to law and economics and theories of justice. Postmodern jurisprudence of the sort found in *Law and Truth* does not argue for the elimination of any of these enterprises. Rather, it argues for a different understanding of their status. The law can certainly be made better through critique: it was never the purpose of *Law and Truth* to argue otherwise. But I think it goes too far to say that law and justice are co-extensive, and that one finds justice through law from the point of view of philosophy.

Now to the second, positive answer to the question. For as long as I have been a lawyer, and much longer than that, American legal academia has been turning its back on the law. The last thirty years have seen the demise of treatise writing, the denigration of "doctrinal analysis," and the elevation of all manner of theory. We now face a situation where, at least in the elite law schools, the traditional subjects are often taught largely from a non-legal point of view. Imagine a medical school where a class in surgery is taught from the point of view of efficiency!

I would welcome more of what Professor Zipursky refers to as "normal science." Moreover, I would like to see more respect for the practitioners of normal science. The law is an infinitely complex, sophisticated, and intrinsically interesting discipline. If postmodern jurisprudence does anything, I hope it serves to remind us of these truths.

VIII. LESLIE FRANCIS: THE LONGING FOR REALISM

Leslie Francis asks good questions. In her contribution to this Symposium,¹¹³ she uses two recent Federal Appellate Court decisions¹¹⁴ as a context for posing the following questions:

112. *Id.* at 1714.

113. Leslie P. Francis, *Legal Truth and Moral Realism*, 50 SMU L. REV. 1721 (1997).

114. See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksburg*, No. 96-110, 1997 WL 348094 (U.S. June 26, 1997); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd sub nom.* *Washington v. Glucksburg*, No. 96-110, 1997 WL 348094 (U.S. June 26, 1997).

1. What does it mean to say that either of these decisions rests on true propositions of law?;

2. Could either of these decisions be overruled, yet the proposition asserted in the overruled decision still be true?; and

3. Might it not be the case that these decisions are not about truth at all, but, as she puts it, “about something quite different—say, politics?”¹¹⁵

While praising *Law and Truth* for opening up the issue of truth in law, Professor Francis states that I have “misunderstood what some modern defenders of legal ideas of truth assert”¹¹⁶ and that my position “relinquishes much that is significant about truth claims in law.”¹¹⁷

Before raising distinctly philosophical questions about truth in law, Professor Francis summarizes the argument in *Law and Truth*. The manner of her summary prefigures her reservations about the position. In *Law and Truth*, I state that an account of truth in law must make clear how, in law, “we go from assertion to truth.”¹¹⁸ This is immediately characterized by Professor Francis as “a theory of truth [which] gives us a mechanism for sorting preferred legal assertions (the true ones), from ones to be left aside (the false ones).”¹¹⁹ With such a theory of truth, Professor Francis states, we might have “a way of distinguishing the true legal assertions in the assisted suicide cases from the false ones.”¹²⁰ Professor Francis notes that one possible truth mechanism, correspondence, is rejected, and that what she characterizes as “an account of legal truth rooted in the workings of legal practice”¹²¹ is the preferred position. It is this position Professor Francis wishes to explore. What does that exploration reveal?

In the final chapter of *Law and Truth*, I identify the discipline or practice of law as distinct in that it has its own warrants and backings for showing how legal propositions are true and false. I use this account both to explain how a proposition of law can be shown to be true or false and, in addition, what it means to say that the law requires interpretation.

Professor Francis’s first object of criticism is the account of interpretation just mentioned. She says that the theory is a coherence theory, one that has two major difficulties.¹²² The first difficulty is that “there may be more than one plausible reconstruction of the direction in which the law is moving.”¹²³ And why might this be a problem? Professor Francis mentions the ongoing constitutional debate about liberty,¹²⁴ discussing prece-

115. Francis, *supra* note 113, at 1721.

116. *Id.* at 1722.

117. *Id.*

118. PATTERSON, *supra* note 5, at 170.

119. Francis, *supra* note 113, at 1727.

120. *Id.*

121. *Id.*

122. *Id.* at 1729.

123. *Id.*

124. *Id.* at 1722.

dents from *Roe*¹²⁵ to *Bowers*¹²⁶ and *Cruzan*.¹²⁷ The problem, it seems, is that there is disagreement about how best to characterize these precedents. Because there is disagreement, coherence theory cannot tell us how to resolve the disagreement, because more than one reading of precedent is possible.

The second problem is a more general statement of the first. Professor Francis says that my "view just does not allow a theory of legal truth to contribute significantly to these debates."¹²⁸ We want a theory, she says, that at least tells us we are moving "in the [right]—or at least *a*—right direction."¹²⁹

It seems to me that these criticisms, which are the same point put two different ways, misfire. *Law and Truth* presents an argument against a certain picture of what it means to say that a proposition of law is true, as well as an account of the nature of legal argument. It is simply not a criticism of a position to say that the position does not deliver what one might want from it. On the negative side, the argument in *Law and Truth* is one of limitations: I argue that a certain philosophical account of the nature of law is false and misleading. This is an argument about what cannot be said. On the positive side, I provide a detailed account of the nature of legal understanding and an account of how interpretation in law proceeds. With respect to this argument, the appropriate criticism is at the level of accuracy. If interpretation, for example, does not occur as I have described it, then the argument is faulty. But the argument cannot be faulted for refraining from taking a position the critic thinks is appropriate. For that, the critic needs to supply her own argument. And Professor Francis does just this. Let us now consider the argument.

Professor Francis wants to defend a certain picture of the nature of legal truth, which she describes in this way: "a theory of legal truth should provide an account of what it is to get things more or less right, legally."¹³⁰ Her preferred theory gives us something she finds lacking in the position advanced in *Law and Truth*, that of "objective corrigibility."¹³¹ The view she endorses is the juridical equivalent of moral realism, the idea that, among other things, "there is a reality in some sense independent of the believer's beliefs about it."¹³²

Professor Francis presents not so much an argument for realism in law as an account of what, if successful, such an account might mean for our understanding of law. She avers that "the legal analogy to moral realism has tended to be presented in its least plausible versions, and that my

125. *Roe v. Wade*, 410 U.S. 113 (1973).

126. *Bowers v. Hardwick*, 478 U.S. 186 (1983).

127. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).

128. Francis, *supra* note 113, at 1730.

129. *Id.* (emphasis in original).

130. *Id.*

131. *Id.* at 1730.

132. *Id.* at 1731.

presentation is no exception to this.”¹³³ But I am puzzled by this claim, as an entire chapter of *Law and Truth* discusses the most sophisticated account of moral realism in law, that of Michael Moore. Professor Francis objects not at all to my discussion of his position.

What I suspect lies behind Professor Francis’s brief for realism is the desire for a certain sort of objectivity. It would be a great comfort to know that beyond the play of practice there lies a realm where the claims of lawyers may be adjudicated with the precision of laboratory instruments. But desire is no substitute for argument. I do not believe there is anything more to be said about “getting things right” than what I have already said. I share Professor Francis’s wish that it were otherwise, but we have no reason to think so.

IX. BRIAN LEITER: QUINE, NORMATIVITY, AND TRUTH

Brian Leiter sets out to show that Quine is not a postmodernist.¹³⁴ As a criticism of the discussion of Quine in *Law and Truth*, this arrow misses its intended target. I never said Quine was a postmodernist. What I did say was that analytic philosophy has moved into a new paradigm, which I identify as postmodern, and that Quine’s thought represents a significant contribution to the development of this new mode of philosophizing.

That said, it is still fair to say that Professor Leiter faults my reading of Quine on several points. Much of what Professor Leiter has to say about my discussion of Quine’s thought is grounded in his reading of the main argument in *Law and Truth*. This reading sets up the framework for his subsequent remarks on the role of Quine’s thought in my argument and Quine’s place in twentieth-century analytic philosophy. Thus, before I consider the topic of Quine, I will of necessity consider Professor Leiter’s reading of the main argument in *Law and Truth*, what he characterizes as my “core jurisprudential position.”¹³⁵

Leiter correctly identifies Philip Bobbitt’s work in constitutional theory as one source for the main argument in *Law and Truth*. In this connection, it is important to recognize a pervasive influence on both Bobbitt’s work and my own, that of the later work of Wittgenstein. Without some appreciation of Wittgenstein’s approach to questions of meaning, no clear understanding of my work, or Bobbitt’s, is possible.

The central element in Wittgenstein’s later account of the nature of linguistic meaning is his approach to normativity. By normativity, I mean standards or criteria of correctness. The normative character of language has been a central focus in philosophy of language since the late nineteenth century. For Frege, the normativity of language lay in the distinction between “sense” and “reference,” with “sense” ultimately being understood in terms of reference to the world. For Russell, the normative

133. *Id.* at 1733.

134. Brian Leiter, *Why Quine is Not a Postmodernist*, 50 SMU L. REV. 1739 (1997).

135. *Id.* at 1740.

character of language was a matter of correlation between words and things. The young Wittgenstein disagreed with Frege and Russell over the nature of propositions.¹³⁶ But what he shared with Frege and Russell was far more important than their disagreements. Like them, Wittgenstein believed that the key to meaning was to be found in "the relation between thought and language and between language and reality . . ."¹³⁷

As I point out in *Law and Truth*, Wittgenstein later repudiated this conception of meaning. *Philosophical Investigations* presents a completely new account of the nature of meaning. In addition, like *Philosophical Investigations*, *Law and Truth* has a strong critical emphasis. Just as Wittgenstein criticizes the Augustinian picture of language throughout *Philosophical Investigations*, I criticize much of contemporary jurisprudence. Of course, the object of my criticism is different; I am not arguing that the theories that I consider are all exemplars of the Augustinian approach to language. Would that it were so easy! I argue that contemporary jurisprudence reflects an approach to normativity that I find implausible. After criticizing that view, I offer an alternative, one grounded in the later work of Wittgenstein. It is this account of meaning which informs the work of Philip Bobbitt and my own. Let me now say a few things about this conception of meaning, and its role in normativity and in law.¹³⁸

Activities involve normative capacities. For example, when I ask at the market for a bunch of bananas, the person to whom the request is made has to know how to weigh the fruit. The ability to weigh the fruit, and properly to generate the amount due at the check-out counter, are normative capacities. If, in the course of weighing the fruit, the grocer puts her hand on the scale, we would be correct in saying she was making a mistake, or worse. It would be the case—true—that the fruit was not weighed correctly.

How is law like this? Like the measurement of weight, law involves normative capacities. One of these capacities is discerning the state of the law on a given question. In *Law and Truth*, I argued that the modalities Bobbitt identifies are the normative ether of law. The forms of argument are the ways in which assertions of what is the case as a matter of law are appraised. Just like weight on the grocer's scale, the forms of argument are elements of a practice. Like the use of the scale, one succeeds at using it only after one has been properly trained. The mastery of law is in principle no different from the mastery of the scale, for each is the mastery of techniques.¹³⁹

In *Law and Truth*, I argue that Bobbitt is right to claim that the academic debate over the legitimacy of judicial review contributes nothing to

136. For a discussion, see HACKER, WITTGENSTEIN'S PLACE, *supra* note 1, at 28.

137. *Id.* at 29.

138. This is done in various places in LAW AND TRUTH.

139. This account of normativity is, of course, quite reductive. For a longer account, one that I found quite perspicuous, see HACKER, WITTGENSTEIN'S PLACE, *supra* note 1, at 97-136.

our understanding of the normative character of constitutional argument. I agree with Bobbitt that more often than not, efforts at legitimation turn out to be little more than an argument for the supremacy of one form of argument over all others.¹⁴⁰ I agree with Bobbitt that if a lawyer wants to show that a proposition of law is true, she has to employ the forms of argument to do so, for they are the culturally-endorsed modes of constitutional appraisal.

Professor Leiter is unhappy with this account of the normativity of constitutional argument. He says:

This whole line of thought seems to trade on an ambiguity in the meaning of the word "legitimate." Legitimacy in the *philosophical* sense has to do with whether a particular practice is *justified*. "Legitimacy in the *sociological* sense has to do with whether a particular practice is 'accepted' or 'viewed as legitimate' by participants in the practice."¹⁴¹

First, I do not see how the argument trades on an ambiguity. Bobbitt employs the distinction between legitimacy and justification. He argues that a constitutional argument is legitimate if it is made in the language of constitutional law, the modalities. Whether a decision is "just" is a matter of justification, the province of moral, economic, or philosophical argument. Professor Leiter's distinction between two senses of legitimacy, the "sociological" and the "philosophical," is nothing more than a translation of Bobbitt's own distinction between legitimacy and justification. Professor Leiter provides a translation of Bobbitt's terms, but Bobbitt's distinction remains intact, with no ambiguity having been shown.¹⁴²

Second, if we accept Professor Leiter's distinction between two senses of legitimacy, his point is trivial. Professor Leiter does not want to talk about legitimacy in what he refers to as its "sociological" sense; he prefers to talk about legitimacy the way philosophers do, that is, in the "philosophical" sense. But why is this a weakness in Bobbitt's position? It seems as if Professor Leiter wants to talk about a different topic. This is not a criticism.

Professor Leiter then turns to the more important topic of truth. Regrettably, labels appear again, which obscure the discussion. My account of truth is characterized as "internal"¹⁴³ to the practice of law. Worse, it is internal "in some sense that remains vague."¹⁴⁴ I have no idea what this means. What would it mean to say that the weight shown on the grocer's scale is "internal?" Internal to what? To say that the forms of argument are "internal" is just to say that they are the means for deciding what is the case as a matter of law, just as to say that units of measurement are the way the grocer determines weight and price. There is no

140. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 126-40 (1991).

141. Leiter, *supra* note 134, at 1741 (emphasis in original).

142. Indeed, if there were ambiguity, it would be equally present in Professor Leiter's own translation.

143. Leiter, *supra* note 134, at 1742.

144. *Id.*

mystery here.¹⁴⁵

Professor Leiter's introduction of the adjective "internal" sets the stage for his argument for the primacy of philosophy over legal practice. He begins by stating that my account of truth in law "relies on an attractive intuition, one widely shared . . . by lawyers."¹⁴⁶ He then recasts the intuition this way:

[W]hen Dworkin gives a belabored argument of moral philosophy for the constitutionality of affirmative action or Posner gives a complex efficiency argument for the law of negligence, whatever it is they are doing it doesn't look much like law.¹⁴⁷

Further,

In their quest to "reduce" legal categories and legal arguments to economic or philosophical ones, legal academics actually miss the distinctive "internal" logic and integrity of the actual practice of legal argument as we find it in countless oral arguments and lawyer's briefs every day throughout the country.¹⁴⁸

This characterization of my position is offered by Professor Leiter as "a sympathetic re-statement of the intuition that animates [my] position (and perhaps also Bobbitt's)."¹⁴⁹ But the sympathy ends there, as the claims are dismissed as "inadequate as an objection to the theories of scholars like Dworkin and Posner"¹⁵⁰ and, worse, "false"¹⁵¹ and "question-begging."¹⁵²

Well, are they? Consider two quotes, the first of which is from Posner and the second from Dworkin:

[I] think that economic principles are encoded in the ethical vocabulary that is the staple of legal language, and that the language of justice and equity that dominates judicial opinions is to a large extent the translation of ethical principles into legal language.¹⁵³

Even in easy cases, that is, even when it goes without saying what the law is, even when . . . everyone knows what the law is . . . we do better to explain that phenomenon by speaking of a convergence on a single interpretation, or, at least, on interpretations that have the same results in most cases, because of a shared political culture and assumptions.¹⁵⁴

145. One is reminded in this connection of the first paragraph of *PHILOSOPHICAL INVESTIGATIONS*, where Wittgenstein's interlocutor asks "But what is the meaning of the word 'five?'" and Wittgenstein replies "No such thing was in question here, only how the word 'five' is used." WITTGENSTEIN, *supra* note 8, § 1.

146. Leiter, *supra* note 134, at 1742.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1752-53.

153. See WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 23 (1987).

154. Dworkin, *supra* note 82, at 88.

It is only owing to his initial misunderstanding of the arguments about normativity that Professor Leiter could come to the conclusions he does about my arguments against Dworkin (and, by Leiter's implication, Posner). This leads Professor Leiter, again mistakenly, to characterize my error as one of "description." He states, correctly, that Dworkin claims to be describing the actual practice of law.¹⁵⁵ I certainly do not dispute that.¹⁵⁶ What I dispute is the characterization given by Dworkin (and Posner) of the practice of law. This is the distinction, Wittgenstein's distinction, between understanding and interpretation, which lies at the heart of *Law and Truth*. But Professor Leiter has missed it, and with it the point of my criticism.¹⁵⁷

For clarity's sake, let me repeat the main points of my argument. When a lawyer—or anyone else—says that the law permits, prohibits, or requires a given thing, that conduct is best explained normatively. Explanation of a normative act "consists in rendering the act intelligible by clarifying its *meaning*, elucidating its *goal* and the *reasons* for performing it."¹⁵⁸ If we want to know the meaning of what someone has done, we can ask participants in the practice. Further, we invoke rules to criticize the behavior of others: rules provide reasons and justifications for action. In short, normativity in law is all the activities connected with legal rules, such as guidance, justification, criticism, and explanation.¹⁵⁹

I deny what Posner and Dworkin maintain, that understanding law requires excavation below the surface. As Professor Leiter correctly points out, Dworkin says that there is something hidden, that it is the job of the philosopher to ferret it out.¹⁶⁰ This is the precise point of disagreement between Professor Dworkin and myself.

As I said in *Law and Truth*, Professor Dworkin reduces all understanding to interpretation.¹⁶¹ I criticized this central aspect of his position because I think Wittgenstein's argument against this philosophical stance is decisive.¹⁶² His argument has direct and vast implications for the ongoing

155. Professor Leiter mistakenly claims that I provide no argument "against Dworkin's descriptive claim." Leiter, *supra* note 134, at 1743. But I do. See PATTERSON, *supra* note 5, at 92-94.

156. But Professor Altieri does. See Altieri, *supra* note 62, at 1665 n.5.

157. It is important, in fact critical, to understand the nature of the disagreement between myself and Professor Leiter. We are not disagreeing about legal practice in a descriptive sense. We each would agree that what lawyers do is the practice of law. Our disagreement is a philosophical disagreement. And what sort of disagreement is that? Let me use Professor Leiter's own words, as they are a precise statement of the nature of philosophy: "Criticisms of philosophical theses are not normally intended to call into doubt the underlying practice; rather, they are offered to raise doubts about a certain picture or way of understanding the practice." Brian Leiter & Jules L. Coleman, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 572 (1995). It is the explanatory picture of law offered by Dworkin and Posner that comes in for criticism.

158. BAKER & HACKER, *supra* note 58, at 257 (emphasis in original).

159. See generally *id.* at 256-66.

160. See DWORKIN, *supra* note 64, at 265.

161. Consider the quote above. Notice also that Professor Dworkin draws no distinction between easy and hard cases: it is interpretation all the way down.

162. See PATTERSON, *supra* note 5, at 86-94.

debate over the nature of law. We view legal assertion in the same way we typically view all of our conduct, that is

under the aspect of normativity. We do not *interpret* it thus, we see it so. Our application of normative predicates to the behavior we view thus does not typically rest on any *inference*. When a chess player makes an appropriate move, I do not *interpret* it as a move (as if it might have been just a muscular “tic” causing him to move his queen two squares), I take it as one. When someone says “What is the time?”, I take him as having asked me the time, not as having made a noise which now needs interpreting (viz. maybe it was Chinese, or just a meaningless sound). Yet though our use of normative language in identifying typical human conduct does not generally rest on an inference from non-normative behaviour and the existence of a rule under which it is subsumed, nevertheless our *explanations* of the meanings of the normative terminology we thus use (e.g., “promise”, “check”, “buy”, “sell”, “vote”, “elect”, “marry”, “will”, “property”) will typically involve reference to rules.¹⁶³

My argument is not only that “nothing is hidden” in the law. I also dispute the claim that understanding law is always and everywhere a matter of interpretation.¹⁶⁴ Interpretation is a defective way of characterizing much of the normative activities of lawyers. The forms of argument are not, as Judge Posner might characterize them, the mere epiphenomenal expression of hidden meanings. All of these efforts to understand law from a “point of view” (i.e., an interpretive point of view) come to nought, for they are based on a philosophically defective account of the nature of meaning.

The only reason Professor Leiter could dismiss as question-begging¹⁶⁵ my claim that theorists such as Dworkin and Posner seek to explain law by virtue of something “outside” law, is that he has failed to come to terms with the argument just given. He claims that my position constitutes “not an argument but the conclusion of an argument that still needs to be made.”¹⁶⁶ But I think I have shown that the argument was made in *Law and Truth*.

In his discussion of the role of realism and anti-realism in jurisprudence, Professor Leiter ignores what I say in *Law and Truth* about the realism/anti-realism debate in jurisprudence in favor of a discussion of the debate in philosophy generally. This is fine as it goes, but it fails to engage the argument in *Law and Truth*.

In *Law and Truth* I said that “our understanding of the current debates in jurisprudence over the truth status of legal propositions can be enhanced by considering equally contemporary debates in philosophy over the nature of meaning. These are a cluster of controversies to which the

163. BAKER & HACKER, *supra* note 58, at 261 (emphasis in original).

164. Interpretation is an activity, understanding is not.

165. Leiter, *supra* note 134, at 1753.

166. *Id.*

label 'realism' and 'anti-realism' attach."¹⁶⁷ I then went on to discuss anti-realist arguments in jurisprudence, specifically mentioning the varieties of anti-realist arguments and the persons who advance them.¹⁶⁸ My central point was that, like the realists, the anti-realists think the way to answer the question about the truth of legal propositions is to identify the truth-maker—that in virtue of which propositions of law are true and false. For the anti-realist of the weak variety (e.g., Stanley Fish), "truth is defined as consensus among the members of an interpretive community"¹⁶⁹

For the anti-realist, the consensus of the community is the thing in virtue of which propositions of law are true and false.¹⁷⁰ This contrasts with the realist, like Dworkin, who thinks that something lies "hidden" behind the law, and that it is this hidden item which makes true propositions of law true.

Professor Leiter does not discuss any of this in his treatment of realism and anti-realism. This would be perfectly fine, were it not for the fact that his comments purport to be about the discussion of realism and anti-realism in *Law and Truth*.

This leads Professor Leiter, once again, to miss the point of my remarks about Putnam and postmodernism. I described the linguistic axis of postmodernism as the idea that the modernist distinction between reference and expression was no longer viable. I invoked Putnam's discussion of this point in his *Representation and Reality*¹⁷¹ to make the (postmodern) point that reference (and, hence truth) only enters the picture once meaning is established.¹⁷² In other words, the world is multiply-realizable: the same underlying "brute fact" can be realized in a multiplicity of ways, owing to the language-games then available. Some—including Professor Leiter—belittle this as "relativism,"¹⁷³ but that is just name-calling. The debate about realism and anti-realism will continue to be a pseudo-debate for as long as the belief endures that meaning is a matter of truth-conditions and not linguistic practices.¹⁷⁴

167. PATTERSON, *supra* note 5, at 5.

168. *See id.* at 11-18.

169. *Id.* at 14-15.

170. Of course, Chapter 6 of *LAW AND TRUTH*, devoted to the thought of Stanley Fish, argues that this view is philosophically defective.

171. PUTNAM, *supra* note 28, at 61 (1988).

172. I also make this point in response to Professor Luban.

173. Professor Leiter thus concludes as much. Leiter, *supra* note 134, at 106-07.

174. Professor Leiter identifies the core of relativism as the notion that conflicting views can be equally "valid" (where valid means "true" or "warranted" or "competent")." *Id.* (emphasis in original). Notice the ambiguity here. If a language game is a "view," then Leiter has to be read as saying that for every "brute fact" there is only one correct construal. He makes no argument for this. If his claim is that conflicting views within a practice cannot all be correct, then he is making a point no one would disagree with. The question is not whether there are conflicting views; the question is how to characterize the fact of conflict in view. Recall in this connection the discussion of multiple truths in my reply to Professor Luban. *See supra* notes 15-36 and accompanying text.

We come, finally, to the announced subject of Professor Leiter's essay, the thought of W.V.O. Quine. I agree with much in Professor Leiter's discussion of Quine. Many of Professor Leiter's discussion points cover matters not addressed in *Law and Truth*, and so it is not clear why they are mentioned. I understand Professor Leiter is eager to preserve his own picture of Quine's thought.¹⁷⁵ But there is little in what I say about Quine (save the use of the label "postmodernism") that should be cause for alarm.

Nevertheless, I think it instructive to review two points. First, what, exactly, do I say in *Law and Truth* about Quine's thought? On this point, we need to see whether Professor Leiter disputes any aspect of this characterization. I think he does not.

The second point concerns the trajectory of Professor Leiter's own account of Quine. It seems to me that Professor Leiter's argument undoes itself as, in the end, he attributes a "philosophical" position to Quine after having told us—correctly—that Quine himself (but more importantly, Quine's argument) repudiates philosophy in favor of science.

In *Law and Truth*, I outlined three axes which, taken together, provide a three-dimensional picture of Modern thought.¹⁷⁶ Those three axes are language, knowledge, and metaphysics. The knowledge axis, where Quine is discussed, has Cartesian Foundationalism at one end and Humean skepticism at the other. Every position in Modernist epistemology can be located along this axis. The repudiation of this axis—the repudiation of the debates that are the province of the philosophical subject "epistemology"—is a repudiation of the Modernist approach to knowledge.

Quine's role in the history of analytic philosophy is pivotal for, among other reasons, the fact that he repudiates the positivist, empiricist approach to questions of knowledge. As Professor Leiter himself states, the Duhem-Quine thesis destroys the positivists' reductivist program for the philosophy of science and, with it, any hope of providing an indubitable foundation for scientific knowledge.¹⁷⁷ So states Professor Leiter: "With the failure of epistemological foundationalism, Quine thinks we must 'repudiate the Cartesian dream of a foundation for scientific certainty firmer than scientific method itself.'"¹⁷⁸

But Quine does not stop at deflating epistemology: he wants to recast the role of philosophy as well.¹⁷⁹ The "justification" for our scientific beliefs will come from science. Once philosophy is naturalized, there are no

175. See Leiter, *supra* note 134, at 1746 (rereading jurisprudence from the point of view of naturalized epistemology).

176. This account of postmodernism is not original to me. See generally Murphy & McClendon, *supra* note 65; Murphy, *supra* note 65.

177. Peter Hacker disputes Duhem's contribution to the Duhem-Quine thesis. See HACKER, WITTGENSTEIN'S PLACE, *supra* note 1, at 195.

178. Leiter, *supra* note 134, at 1747-48 (quoting W.V.O. QUINE, PURSUIT OF TRUTH 19 (1990)).

179. For an interesting argument for the proposition that Quinean "philosophy" is the end of philosophy, see HACKER, WITTGENSTEIN'S PLACE, *supra* note 1, at 193-95.

longer any distinctly philosophical questions. Professor Leiter hedges this when he states: "This does not mean we can no longer talk of epistemic norms; it just means that these norms will themselves be the deliverances of science."¹⁸⁰

But this shuffle comes to nothing. Quine has already told us that philosophy has been removed from the equation: its status as a second-order policeman of first-order scientific discourse has been deflated. Philosophy is now continuous with science. In other words, the only norms are scientific ones.¹⁸¹ Thus, if we want to know what the norms for scientific knowledge are, we must seek an account of how scientists conduct their activities.¹⁸² This is precisely what I argue is the case in law as well.

Professor Leiter attempts to limit the effects of his own, largely correct, account of Quine's thought. He does this by introducing Quine's remarks on truth and "realism." Let me quote the relevant paragraph:

In my naturalistic stance I see the question of truth as one to be settled within science, there being no higher tribunal. This makes me a scientific realist. I keep to the correspondence theory of truth, but only holophrastically: it resolves into Tarski's disquotational version of truth rather than a correspondence of words to objects.¹⁸³

Quine has already told us that when it comes to norms, science is the only game in town. Of course the question of truth will be settled within science. But this sounds like Quine is a Pattersonian "internalist" since the only norms for science are internal, scientific ones.¹⁸⁴ Can Quine's remarks on truth save the day? After all, Quine does say he is a "realist" and that he believes in truth.

Alas, even this is insufficient, for Quine himself tells us that "truth" is to be understood disquotationally and holophrastically. "True" is just a compliment we pay to sentences that pay their way in the scientific realm. "Truth" does all of its work within the practice of science. In fact, Quine provides a wonderful example to make just this point:

Naturalism looks only to natural science, however fallible, for an account of what there is and what there is does. Science ventures its

180. Leiter, *supra* note 134, at 1748 (emphasis in original).

181. *See id.* ("Philosophy cannot justify science . . .").

182. This means that, philosophically speaking, Quine's thought is compatible with that of many in the sociology of science movement. *See e.g.*, BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* (1986).

183. *See* Leiter, *supra* note 134, at 1750 (quoting W.V.O. Quine, *Comments on Lavener*, in *PERSPECTIVES ON QUINE* 229 (Robert B. Barnett & Roger F. Gibson eds., 1990)).

184. The following quote, representative of Quine's thought, would justify a characterization far stronger than what I have advanced here:

What makes the sentence count as an observation sentence, then, is that all members of the community, nearly enough, will say "Yes" to it under the same stimulations. What counts as an observation sentence will be relative to the community chosen, but this is as it should be; "Deer track" and "Condenser" will qualify as observation sentences for communities of experts and not for wider communities. . . . Observation sentences for the arbitrating community are the sentences on which that community can reach immediate agreement under appropriate stimulation.

W.V.O. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (1970).

tentative answers in man-made concepts, perforce, couched in man-made language, but we can ask no better. The very notion of object, or of one and many, is indeed as parochially human as the parts of speech; to ask what reality is really like, however, apart from human categories, is self-stultifying. It is like asking how long the Nile really is, apart from parochial matters of miles or meters. Positivists were right in branding such metaphysics as meaningless.¹⁸⁵

Professor Leiter tries to hold on to a stronger version of truth with the claim that "Quine retains the correspondence theory of truth . . . but at the level of *justification*."¹⁸⁶ But this means only that "true" will be understood, as Professor Leiter says, from "within" the practice of science. Professor Leiter's gloss on Quine—"truth is a matter of correspondence, knowledge is fixed by the epistemic standards of science"¹⁸⁷—adds nothing to what Quine has said. For Quine, "correspondence" is cashed out in pragmatic terms, that is, in the accomplishments of scientific practice. This is a form of correspondence any Pragmatist could love.¹⁸⁸

We come, then, full circle, to the question of normativity.¹⁸⁹ Quine is important precisely for the reasons given in *Law and Truth*. No beliefs are foundational, and "true" is to be understood "disquotationally," a compliment we pay to sentences that pay their way (meaning is prior to truth). Philosophy is deflated as a second-order activity and the perspicuous description of the norms of practice takes its place. What is of interest to Quine are the norms of scientific appraisal—how the uses of the word "true" are parsed in scientific practice. Quine opened the way for the same approach to understanding law. Professor Leiter has advanced no convincing arguments for thinking otherwise.

X. CONCLUSION

No work is fully understood by its author. And no author can hope for more than sympathetic and insightful critics. On this score, I have been blessed by this assemblage of critics. In the course of the days leading up to and beyond our days in Dallas, I have learned much from the participants in this Symposium. They have given generously of their time and considerable talents. They have forced me to rethink my work and, most importantly, have shown me what is left to be done. For this, I thank them, one and all.

185. W.V.O. Quine, *Structure and Nature*, 89 J. PHIL. 5, 9 (1992).

186. Leiter, *supra* note 134, at 1750.

187. *Id.* at 1751.

188. And Rorty does. See generally RORTY, *supra* note 27.

189. For the reasons given earlier, Professor Leiter's discussion of normativity in connection with Quine completely misses its intended target. The point is not the justification of practice, rather, the point is to identify the normativity of legal practice, how it is that lawyers appraise uses of the word "true" in legal practice. Because he wants to reduce normativity to his sense of justification, Professor Leiter cannot see the point of the argument.