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WHAT LAW IS LIKE

George P. Fletcher

“PHILOSOPHY,” Norman Malcolm lectured repeatedly, “is not the history of philosophy.”¹ Philosophy is not a matter of citing great philosophers and explicating their texts. The inquiring mind confronts a philosophical puzzle. The problem demands thought, without authoritative books at one’s side, without great minds leading the way. The model, of course, was Ludwig Wittgenstein. Malcolm had studied with the great iconoclast,² who went through a crises of confidence, rejecting his first great work, the *Tractatus*,³ and then developing a wholly new philosophical position in the *Philosophical Investigations*.⁴ Malcolm insisted that we, his adoring undergraduates, think with the clarity and courage that defined the life of his master.

It is not easy to do philosophy in the tradition of Wittgenstein and Malcolm. The human mind gravitates toward authority—the Bible, great teachers, poets, gurus, even judges. Lawyers, in particular, are captives of authoritative constitutions, statutes, cases, and ruling doctrines. We cannot make a move without citing a source as a backup.

Perhaps this is the way it should be, for as lawyers or legal theorists, we speak in a particular legal culture and tradition. We cultivate that tradition, even as we dissent and subject it to criticism. The tradition is defined by the authorities that have shaped it. Blackstone, the First Amendment, and *Marbury v. Madison*—these sources command a kind of respect with American lawyers that German or Iranian lawyers feel only for the central texts of their traditions. But the habit of deferring to sacred or established texts runs against the grain of philosophical thought. In the tradition exemplified by Wittgenstein, reasoned argument—not authority—is the only basis for assenting to a claim of truth.

It is remarkable, therefore, that we can sustain philosophical inquiry about the law. I greet Dennis Patterson’s book with enthusiasm as an attempt to probe, in a legal context, the classical philosophical conundrum about the nature of truth. Patterson tells us that his book will focus on a single problem: “What does it mean to say that a proposition of law

1. My life was changed by taking Norman Malcolm’s class on the problems of philosophy at Cornell in the year 1959.

2. NORMAN MALCOLM, *LUDWIG WITTGENSTEIN: A MEMOIR* (1958).

3. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (German ed., Suhrkamp 1980) (1921).

4. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1953).

is true?"⁵ We can see already that we are on the verge of coping with a serious puzzle, for if law is based on recognizing authorities, then how can there be any truth in the law at all? The law would seem to be nothing more than the teachings and prescriptions of its leading texts, and these might in fact bear only a contingent connection to truth.

Patterson's book tantalizes us with the conundrum it presents. Whether his own "post-modern" solution works should be of less concern than his having initiated a serious conversation about issues with which we should be concerned. Engaging in a "conversation" with the views of other legal theorists, Patterson concludes that these writers—with one surprising exception⁶—offer us little insight toward understanding the nature of truth in law. In offering his own view in chapter eight, Patterson draws much strength from philosophers, such as Wittgenstein, Quine, and Putnam.⁷ But when he cites these works at length, one has the nagging feeling that Patterson backslides into arguing like a lawyer, though with different sources of authority. He quotes from leading philosophers as though their charismatic authority were sufficient to carry the argument.

It should be obvious that nothing could be true simply because a great philosopher said so. Even my personal philosophical hero, Immanuel Kant, sometimes slipped into errant nonsense.⁸ Philosophers create no precedents. They legislate no binding propositions. Their influence comes not from the authority of power but solely from the clarity of reasoned argument.

I. WHAT IS POST-MODERN JURISPRUDENCE?

If the greats have no particular authority that derives from their status, then surely movements per se have no authority—even if they are the dominant point of view at a particular time. Yet, for some reason, it is very important for Patterson to show his colors as a "post-modern." He locates himself in what he takes to be a movement and offers us a "post-modern jurisprudence"—the title of his final chapter.

I confess that I find this odd. The Church fathers would never have described themselves as "pre-moderns;" Rousseau and Kant would never have proclaimed themselves as members of the "modernist" movement. Labels are designed for those who observe the actions and thoughts of others and feel the need to classify what they see. Those who think, particularly those who think originally, break the bounds of conventional labels. Why should legal theorists today—feminists, economists, critics, and now post-moderns—classify themselves and think it appropriate to state

5. DENNIS PATTERSON, *LAW AND TRUTH* 3 (1996).

6. Patterson endorses the view of Philip Bobbitt that "the practice of constitutional law is a matter of using six forms of argument . . . to show the truth of propositions of constitutional law." *Id.* at 129.

7. *See id.* at 158-69.

8. For example, Kant defines marriage as a "sexual union . . . the reciprocal use that one human being makes of the sexual organs and capacities of another." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 96 (Mary Gregor trans., 1991).

the camp to which they belong? Perhaps this is just the way lawyers are. We cling to authority—if not always to the authority of statutes and cases then to the seeming validation of numbers. If so many people think this way, there must be something to it!

Perhaps the need to identify oneself has something to do with the perspectivalism that has crept into the American academy. The assumption is that everyone has a perspective, a point of view, and the best thing to do is to own up to one's own rooted vantage point on the world.

Perspectivalism should be foreign to the philosophical mind. For the perspectivalist, argument and conversation are not a common search for truth. Reason, they say, is merely the activity of reporting about how the world looks from one's point of view. The arch-perspectivalist Stanley Fish claims that he sees no difference between reason and rhetoric.⁹ Surely Patterson seeks to persuade us of his account of law not by rhetoric but by reason, whether we are members of the post-modern fraternity or not. He is not merely reporting on his "perspective" to the like-minded but seeking through reasoned argument to reach anyone willing to think anew about the problem of truth in law. Therefore, I regret to say, the entire discussion of post-modernism is irrelevant. Locating oneself as part of a movement is not an argument.

Despite its irrelevance, I confess that I found Patterson's discussion of modernism and post-modernism illuminating.¹⁰ Taking my cue from architecture, I had thought that post-modernism was simply an "anything goes" attitude toward mixing styles and genres. But no, Patterson insists, post-modernism is itself a coherent position, representing a rejection of at least one of three propositions in the modernist point of view. Relying on the "authority" of other writers,¹¹ Patterson offers us three axes of the modernist view. The three axes are all variations on the theme of atoms and wholes. In the modernist view, knowledge builds on the individual atoms called perceived facts about the world. Society consists of individuals, and language is constituted by an accumulation of individual references to the world. The basic idea, then, is that the world is captured in the atoms of facts, individuals and sentences, and then these atoms accumulate and constitute the whole—either of knowledge, of society, or of language.

The post-modern view represents a departure of this way of building wholes out of accumulated atoms. The whole comes to take precedence over the parts. The whole of knowledge becomes the grid for validating the significance of atoms within the whole. The community becomes the window for understanding the rooted individual. And the web of language becomes the matrix for understanding individual propositions. In short the metaphor of the "atom" gives way to the metaphors of the

9. See Stanley Fish, *Rhetoric*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 471-502 (1989).

10. See PATTERSON, *supra* note 5, at 152-63.

11. See *id.* at 153, nn.10-11.

“grid,” “rootedness,” and the “web.” Isolation yields to inter-connectivity. This, I hasten to add, is my own interpretation and simplification of the complicated schema that Patterson draws from the writings of others.

Patterson’s own synthesis of the same material is captured in this sentence: “To put the post-modern alternative in a nut-shell, the modernist picture of sentence-truth-world is replaced with an account of understanding that emphasizes practice, warranted assertability, and pragmatism.”¹²

This dense sentence requires some amplification. The contrast is between an atomistic focus on sentences as they relate to the world and a holistic understanding of the way “competent actors” function within systems of thought. Patterson’s view about truth in law derives from his endorsing the “truth” arrived at by making warranted assertions within a practice. His answer to the question, “What does it mean to say that a proposition of law is true?” is simply put: “The answer is not that it is true if it names a relation between a proposition and some state of affairs but that it is true if a competent legal actor could justify its assertion.”¹³

Now I think this statement is simply false. Did the Supreme Court (a group of competent legal actors, I presume) justify its assertion (i.e., in the written opinion) in *Bowers v. Hardwick*¹⁴ that a state’s prohibition of homosexual sodomy is compatible with the federal constitutional right to privacy? Well, it is hard to know what “justify” means in this context. If it means did they back up their arguments with authority and “warrants” as well as any competent legal actors could, I think the answer is yes. In the conclusion of chapter eight, Patterson focuses precisely on this mode of making warranted assertions in the law as his understanding of the practice of justifying assertions.¹⁵ Yet making the best argument they could for an interpretation of the Constitution does not mean that the judges got it right, that their proposition of law was true.¹⁶ In fact, I think they got it wrong, as do many commentators and lower courts. But that is not the point. Whether they go it right or wrong depends on the decision itself—not just on whether their opinion was “justified” under the relevant legal materials.

And what if I ask today: Is *Bowers* good law? Is it still true that a state’s prohibition of homosexual sodomy is compatible with the federal

12. *Id.* at 161.

13. *Id.* at 152.

14. It is always good to cite a case in a law review article. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

15. PATTERSON, *supra* note 5, at 169-79.

16. Other interpretations of Patterson’s idea that “a competent legal actor justify its assertion” hardly rescue his position:

1) “Justify” could mean that the judges really got it right, in which case Patterson’s proposition would reduce to the truism: “it is true if a competent legal actor would discover it to be true.”

2) Patterson might believe that the Constitution is whatever the Court says it, in which case the very fact that the Court decided *Bowers* in a certain way meant that they were right. But, of course, then they would not have to be competent—just office-holders, and they would not have to “justify” their “assertion” at all.

constitutional right to privacy? You should have trouble answering the question. You could warrant a “yes” answer simply by citing the Court’s decision and stressing that it has never been overruled or disavowed by the Court itself. You could warrant a “no” answer by pointing to the general attitude of scorn in the legal community toward the decision and arguing that, as a matter of principle, the decision is wrong.¹⁷ Both positions strike me as warranted, as a justified assertion by a competent legal actor. But *Bowers* is either good law or it is not. If the notion of truth has any agreed upon content, it is that both A and not-A cannot be true. It cannot be the case that a particular statute violates the constitutional right to privacy and does not violate the constitutional right to privacy. Therefore, the claim that “a proposition of law is true if a competent legal actor could justify its assertion”¹⁸ is false because it leads to the conclusion that *Bowers* is both good and bad law at the same time.

Now, when I make this statement that Patterson’s thesis is false, am I simply making a warranted assertion within a certain practice? Not that I am aware of. I say that Patterson’s account of truth in law is a false description of the form of life known as American law. (It would be interesting to speculate whether there could be a legal system in which Patterson’s thesis was correct). In other words, there is no correspondence between Patterson’s thesis and the world as it is. Thinking and arguing in this way seems to commit me to a tenet of the “modernist” school. If that be the case, I welcome the label—however irrelevant it might be. Yet if I am a modernist, Patterson must be on my side. The only way he can defend his claim about the nature of truth in law is to show that it does indeed provide a good account of American law as we know it. He cannot defend his claim by arguing simply that it is a warranted assertion in a practice¹⁹ called legal philosophy. Who cares whether other people say that Patterson’s assertion is warranted? We want to know whether it is true.²⁰

Patterson’s book is so engaging, not by virtue of his thesis about truth in law (to which he, in fact, devotes very few pages), but because it forces the reader to rethink the question: What is law like? What are the fields that stand in an analogical relationship to law? Patterson draws heavily on the analogies between language and law and between natural science and law. Philosophical reflections about these two fields nourish his rejection of “modernism” in favor of his claims about truth as warranted assertability. After exploring their appeal, I reject both of these analogies

17. For critical commentary, see Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969 (1994); Thomas B. Stoddard, *Bowers v. Hardwick: Accident by Personal Prediction*, 54 U. CHI. L. REV. 648 (1987); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993).

18. PATTERSON, *supra* note 5, at 152.

19. *Id.* at 170.

20. On the idea that “truth” is a primitive that resists definition or reduction to other terms, see Donald Davidson, *On the Folly of Trying to Define Truth*, 93 J. OF PHIL. 263 (1996).

and defend a third. The thesis that emerges at the end of this article might startle: To understand truth claims in law, you should think of law as analogous to religion.

II. IS LAW LIKE LANGUAGE?

The theory of language provides many seductive metaphors and analogies for other fields. Inspired by Chomsky's theory of universal grammar,²¹ many legal theorists draw on the notion of "deep structure"²² to explain the way in which principles are embedded in the law. The notion of "grammar" appeals to many conceptualists who defend their abstract schemes as the "grammar" of legal discourse.²³ But above all, it is the theory of meaning that spins its influence in neighboring webs of thought.

To explore the impact of theories of meaning, we need to review some different positions that can be taken in this debate.

One way that language that relates to the world, arguably, is to reproduce in it grammatical structure the way in which actions and objects related to each other in the world. Therefore, if I say that "A hits B," I conceive of a world in which A and B exists independently of "hitting" and in which the action flows in real time, as it does in the simple noun-action-object syntax from A to B. This, I think, is something like the view that Wittgenstein presents in the *Tractatus*.²⁴ He reportedly gave up this position during the First World War when an Italian acquaintance made an obscene Florentine sign at him. Wittgenstein realized immediately that this gesture carried meaning, but that it no way pictured the world. This realization led to his abandoning the picture theory of language and challenging, as well, the reference theory of meaning. The latter view requires a short detour.

A. THE REFERENCE THEORY OF MEANING

The test of whether language communicates is whether the recipient—the listener or reader—can make sense of the sounds, gestures, or markings transmitted from the "speaker" to the recipient "listener." Making sense implies that there is *meaning* in the transmission. Now, exactly what "meaning" is a great philosophical puzzle. Many are those who think that meaning consists in referring to something in the world—a view called the "reference" theory of meaning.²⁵

21. See NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1975). For a popular account, see STEVEN PINKER, *THE LANGUAGE INSTINCT* (1957).

22. A LEXIS check in March 1997 revealed 247 usages of the phrase "deep structure," some in unexpected contexts. See, e.g., William D. Popkin, *The Deep Structure of Capital Gains*, 33 CASE W. RES. L. REV. 153 (1983).

23. See, e.g., Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929, 930 (1986); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 185 (1990).

24. For a more precise exposition of Wittgenstein's views on the "picture theory" of propositions, see ANTHONY KENNY, *WITTGENSTEIN* 54-71 (1973).

25. See William P. Alston, *Meaning*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 233, 234 (1967).

One should not underestimate the appeal of this theory of meaning. One of the ways we teach language to children is by pointing to objects and telling them what the object is called, i.e., by ostensive definition. It is sensible to think, therefore, that a language, when fluently spoken, is tied somehow to the method by which it was learned.

If I am standing in a museum and I say, "I like that painting," my friend might ask, "Which one do you mean?" "I mean that one, the Van Gogh over there," I might answer, pointing at the same time to a painting across the room. When I say "that painting," I am undoubtedly referring to a specific painting.

The reference theory of meaning works for demonstrative pronouns and proper nouns, but it cannot account for all the words and functions of even very simple languages. Think, for example, about the names of colors. It would be implausible to think that every time I said "red," I had a patch of red in my mind to which I was referring. How children grasp that a single feature unites red cars, red roses, red dresses, and red sunsets strikes me as one of the mysteries of language learning. But grasp it they do. And when they talk about red things thereafter, they could not be simply referring to a specific instance of red—as though they carried around in their heads a video of the moment in which they grasped the difference between a thing and its color.

The point applies as well to abstract nouns used in the law: rights, corporations, culpability, justification, rules, principles—the list barely has limits. No one learns how to use these words by ostensive definition. There is no entity out there called "rights" to which we refer when we talk about the right to life or the right to have an abortion. H.L.A. Hart persuasively made this point in one of his early articles about the nature of language in law.²⁶ The notion of speech acts, as developed by the philosopher John Austin, helped philosophers appreciate that we do many things with language other than describe and refer to things.²⁷ When we speak about rights and excuses and property and justifications, we are making moves in the language game called legal discourse. As Hart put it, we are, among other things, "ascribing rights and responsibility."²⁸

B. MEANING AS USE

The use of the term "language game" in the preceding paragraph is a bit premature. I have yet to explain the breathtaking alternative Wittgenstein developed to the picture theory of language. Having abandoned the effort to explain all of language as a replication of the world, Wittgenstein shifted in the *Philosophical Investigations* to inquiries based on localized,

26. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, in 49 PROCEEDING OF THE ARISTOTELIAN SOCIETY 171 (1949).

27. JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1955). See also JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 176 (1969) (discussing Austin's theory).

28. See Hart, *supra* note 26.

very basic, interactive uses of language. He imagines what happens when someone gives elementary orders and another person follows: Lift that bale, tow that barge. What occurs, as he imagines it, is a very simple interaction between two people. One speaks and the other does something.²⁹

Thus was born the notion of the language game. People use language to accomplish certain tasks. For example, take the notion of fairness. Enter any kindergarten classroom and watch children playing with a single ball or Lego set. Sooner or later, one of them will complain that another is not sharing, that he or she is "not fair." The charge of unfairness is a tool that children quickly learn to protect their interests. Not sharing is paradigmatic unfairness. The children learned the language game of protecting oneself and criticizing others.

As Hart argues, the abstract language of the law should generally be understood in this way.³⁰ We develop modes of interaction in legal discourse in order to transfer property ("This is yours"), get married ("I do"), make contracts ("It's a deal"), criticize the actions of others ("It was his fault"), and justify our actions ("She hit me first"). The abstract language of the law serves these kinds of purposes. Their use between people confers meaning on abstract terms. We know what "corporations" and "rights" are when we learn how to use the terms.

I do not think we have to represent Wittgenstein as saying that we never refer to things when we speak. Sometimes we do; sometimes we do not. We could imagine a language game of referring. Rather than infer some grand systematic truth from the *Philosophical Investigation* (which would be contrary to the spirit of the enterprise), I wish to concentrate on two important methodological lessons that I have learned from working with Wittgenstein's ideas:

Lesson One. Do not suppose the existence of any abstract entity unless you can prove it. The method of the *Philosophical Investigations* is to ridicule arguments of the forms: "You must be referring to a patch of red in your head when you say red; otherwise you could not be using the word correctly."³¹ The test for whether I use the word correctly—whether I understand the meaning of the term—depends on whether I use it correctly. I need not make up entities that somehow *must* be there in order to make sense of using language.

Lesson Two. Language is an irreducibly social phenomenon. This is a critical point, sometimes expressed as Wittgenstein's rejection of private language. The conception of language conveyed in the *Tractatus* resembles the image of Adam, standing alone in the world, without Eve, naming the animals that pass before him.³² Somehow as the lion passed by, he knows that the appropriate word for the lion is "lion." The amazing

29. WITTGENSTEIN, *supra* note 4, at 9.

30. See Hart, *supra* note 26.

31. WITTGENSTEIN, *supra* note 4, at 25.

32. *Genesis* 2:19-20.

assumptions are first that without language he could even perceive the difference between the tiger and the lion and further that he could remember the word "lion" the next time he encountered the same animal.

If you indulge in these assumptions, you could be easily led to something like the reference theory of meaning. Adam must have registered a photograph of the first lion in his mind and each time he sees the same animal he compares it with the photograph and concludes, "Yup, that's the lion." What happens, however, when he encounters another lion—perhaps a female, a little smaller, with a slightly different mane? Or the lion is crippled and can not walk. How is he supposed to know that the divergence from the photograph is not so great that it must be a different animal? The reference theory of meaning has no answer to these puzzles.

Language is learned in interaction with other people who typically correct you when you call a tiger a "lion." Imitation and correction are intrinsic to acquiring language. The striking fact is that all native speakers learn to speak correctly, even sometimes develop their own languages without overtly correcting each other at all. The important point of Wittgenstein's theory of language, however, is that Robinson living alone on an island could not have had a language. He could draw pictures of things, but there would be no way, without interacting with others, to remain consistent in his use of sounds.

The great shift in the theory of language, then, is from thinking of an individual standing alone against the world, as does Adam in Genesis, to thinking of language as embedded in social interactions with others.

Law, like language, is an irreducibly social phenomenon. We develop a legal culture in order to live with others in harmony. But this, I believe is where the analogy between language and law ends. The theory of meaning cannot help us understand the nature of truth in law, for meaning and truth have little to do with each other. The inquiry about truth presupposes that we understand the meaning of the proposition; otherwise we would hardly know how to decide whether it is true or not.

There is a tempting and seductive analogy, however, between the reference theory of meaning and the correspondence theory of truth. Patterson identifies both as aspects of the modernism he rejects under the label "sentence-truth-world." Both theories—meaning as reference and truth as correspondence—connect individual sentences (or words) to the world. But as I will show in the next section, it makes perfectly good sense to follow Wittgenstein on the theory of meaning as use and yet insist on a correspondence theory of truth.

III. IS LAW LIKE NATURAL SCIENCE?

Let us apply the Wittgensteinian method and inquire, in what sort of language games does the question of truth arise? Suppose I look outside and see that it is raining and I reply, "No, it's not, the weather is lousy." Though the word "truth" is not used, this kind of exchange is typically taken to be about the question of truth. It would be easy to continue or

rewrite the dialogue so that the word "true" came into play. A third party could come on the scene and say, "What he said is true. It was raining a few minutes ago, but now the sun is shining."

The important point of this little story is that we resolve a dispute about the truth of a simple proposition ("The sun is shining") by taking a glance out the window or if necessary going outside and looking at the sky. That is, we measure the proposition against the world and determine whether the two jibe or not. If they jibe, the proposition is true; if they are at odds, the sentence is false. This is called the "correspondence" theory of truth.

It is tempting to think that natural science is simply the story of rain-or-shine writ large. A complicated theory of the solar system might look simply like the accumulation of a large number of atomistic facts. The theory is tested against these facts and if the facts line properly, the theory is validated as true. When more facts are discovered, they invalidate the old theory and generate a better one.

The problem with this view is that scientific theories shape the way we perceive the facts that support it. As Thomas Kuhn convinced many in my generation, fact-finding proceeds by reference to a theory that enables us to perceive, conceptualize or order what we see.³³ The leading example is the scientific shift from the Ptolemaic earth-centered to the Copernican heliocentric conceptions of the solar system. Both theories account for the available data, and indeed the Ptolemaic system comports well with the way we observe the movements of the stars and the planets—even with the most sophisticated equipment. The only problem is explaining away certain anomalies, such as the movements of Jupiter's moons, which sometimes appear in front, sometimes behind Jupiter's orbit. You have to imagine these moons doing somersaults—called epicycles—in order to conceive of orbits that match our observations. The sole advantage of the Copernican system, it is said, is that it accounts for the available data in a simpler, more elegant way.

The impetus behind scientific revolutions, Kuhn argued, is not simply the accumulation of data, but rather, it is the disposition of the scientific community to accept a new way of looking at things. The new theory may be better in-line with the "spirit" of the age, and it may respond to the psychological needs of those who advocate it. The "disposition" to change is a subtle phenomenon. The critical point is that paradigmatic change occurs for reasons that go beyond the discovery of new data. New research even suggests that the birth order of scientists contributes to their willingness to accept new theories. For example, biologists who were late in their family birth order proved much more willing to accept Darwin's theory of natural selection than were their colleagues who were

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

first born.³⁴

Kuhn's view of paradigmatic change provides some support for Patterson's view that truth always obtains within the prevailing system, or paradigm of thought. A true proposition is one that a competent player in the paradigm can assert, and that will find acceptance by other participants in the paradigm. Of course, the assertion must be made on the basis of data. The "competent player" must also assert that the proposition is true—not just for the particular paradigm, but for all paradigms. No self-respecting thinker would accept an argument simply on ground of loyalty to other devotees of the paradigm. A "competent actor" within the actor must present his or her claims not as it is interpreted within a particular theory, but as an accurate representation of the world as it is.

If we carry this way of thinking to the extreme, we arrive at an alternative way of thinking about truth. Propositions are true if they cohere within a system of thought, or paradigm, generally accepted in a community. This, I take it, is what it means for a competent actor to justify an assertion, namely, to show how it fits snugly within the generally accepted paradigm of the moment. In this sense, one could say with Patterson that an assertion is true if a competent actor could justify it, in particular, to other adherents of the same paradigm.

There are, of course, limits to the view that all science proceeds within paradigms that shape and structure particular factual claims. The claim that the earth is flat remains fairly clear regardless of the paradigm. To those who think that any proposition can be true—given a suitable theory in which it is coherent—I say I am sorry. The Flat Earth Society will not win many serious adherents even from those willing to jump through all the necessary theoretical hoops.

In the end, however, Kuhn's theory of scientific revolutions provides little comfort for those who think that truth is no more than "warranted assertability." For example, take Copernicus's thesis that the orbits of the planets around the sun must be round because that view made the most sense within the theory. Initially, the scientific community felt compelled to reject Kepler's counter-evidence that the orbits are in fact elliptical, but eventually the factual evidence won out. Kepler's victory has nothing to do with coherence or warranted assertability. His view triumphed for the old fashioned reason that it was better supported by the evidence.

Kuhn's theory of paradigmatic change provides the best analogy between natural science and the law. One might even think that something like a paradigmatic change has occurred in the application of economic analysis to legal problems, particularly with torts. Today, at least in academic writing, it is difficult to ignore the impact of Coase, Calabrese, and Posner. The legal economists might think their success is due to the intrinsic power of their theories, but then they would misunderstand the rise and fall of intellectual fads. The popularity of economic theories of

34. FRANK J. SULOWAY, *BORN TO REBEL: BIRTH ORDER, FAMILY DYNAMICS AND CREATIVITY* 31-33 (1996).

law may tell us much more about the people with whom these theories resonate than about the law itself. Many thinkers, craving the seeming exactitude of economics, may delight in the new and different for its own sake.

In modest ways, Kuhn's views are suggestive in thinking about the impact of new theories in academic legal thinking. Does it follow that natural science is the correct model for understanding the truth of propositions in the law? I do not think so. Note the following very basic limitations on the analogy:

1. Science is universal. If there is a revolution in science, it is accepted everywhere, by everyone who calls himself or herself a scientist. You cannot hold a different view simply because your scientific tradition differs. It is inconceivable that France would follow Ptolemy and Italy would adopt Copernicus. But law is culture-specific. The legal economists or the natural lawyers can have a great effect upon one legal culture and absolutely no influence on another. Truth in science is universal. Truth in law need not extend beyond a particular culture.

2. Scientific revolutions are complete and irreversible. If Copernicus prevails over Ptolemy, Darwin over Lamarck, Einstein over Newton, the triumph is definitive. There are no dissenting opinions. But the law respects its dissenters. The economists could never totally displace the tort theorists who believe in corrective justice. No matter what the field, a seemingly rejected view may return and re-establish itself. Science proceeds by rejecting the old and adopting the new. For the law, however, there is no old and no new. Ideas and paradigms replace each other in cyclical fashion. No serious thinker will ever claim again that the earth is the center of the universe, but the legal ideas of the ancients can always return to fashion.

The most significant features of legal culture are that law is both culture-specific and concerned about truth. This peculiar combination represents a blend of respect for authority and pursuit of truth based on reason. The law demands a sensibility that is simultaneously obedient and philosophically rebellious. Only one other field unites these apparently contradictory ways of thinking: religion.

IV. LAW IS LIKE RELIGION

The great religions of the West are all based on holy texts, precisely as law is based on the authority of constitutions, statutes, and cases. Priests, ministers, and rabbis argue about the origin of the universe and the human condition on the basis of their texts, precisely as lawyers rely upon their authoritative sources to defend their positions.

Yet divine revelation in the Bible and other texts stands in constant tension with reason. Authority must yield to the dictates of common sense and reasoned argument. Maimonides absorbed the reasoned theo-

ries of Aristotle into the Jewish tradition,³⁵ and Thomas Aquinas assayed the same synthesis for medieval Christians.³⁶ As in legal argument, theologians must interpret their authoritative sources, and interpretation invariably adapts the ancient materials to the visions of reason and common sense.

As lawyers seek justice and the right in interpreting their sources, religious thinkers seek to fathom their own ultimate issues by applying the wisdom of their traditions. Both ways of life admit of the possibility of truth, but in both the truth is so difficult to capture that most people simply embrace their authorities in a gesture of piety.

Interestingly, legal cultures also have their believers, their agnostics, and their atheists. Advocates are usually believers—or at least they argue as though they were believers in achieving justice in particular cases. Atheists make less convincing lawyers, for the most they can do is cite the sources as the dead residue of history. To understand the inner dynamic of an authoritative source—of a constitution or of the Bible—the reader must have a mind open to the ultimate issue that the text seeks to address.

The law is more like religion than the practitioners of either are likely to recognize. Lawyers think of themselves as engaged in a purely secular activity, so how can it have anything to do with a God-oriented system of thought? And the religious are unlikely to see their mirror image in the arguments of lawyers about whether homosexual sodomy should be protected under the constitutional right to privacy. But lawyers and theologians share a pursuit of ultimate truth in the context of culture-specific traditions. They must mediate between the demands of universal reason and their localized respect for particular sources.

Both law and religion stand in a close but uneasy relationship to morality. The practitioners of both would like to think their disciplines incorporate and, indeed, teach morality. Because of the role of potentially arbitrary authority, however, lawyers must respect anomalies like the Fugitive Slave Law and religious believers must accept the reality of God's command to Abraham to sacrifice his son Isaac. Because their authorities are not always moral, both law and religion end up endorsing views that sensitive free-thinkers find abhorrent.

The structural similarities of law and religion extend into the details. German criminal lawyers describe their theories of responsibilities as "dogmas," thus using the same word that the Catholic Church uses to describe its articles of faith. We are not typically aware of it, but our term "doctrine" has the same origin as the idea of wise teachings.

The similarity between religion and law emerges as well in perceptions of the "other." Religions, of course, are notorious for delegitimizing those of other faiths and treating them as less than worthy outsiders.

35. See MOSES MAIMONIDES, *THE GUIDE OF THE PERPLEXED* (Shlomo Pines trans., 1963).

36. See generally ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* (1916).

Lawyers do the same. Law for the common lawyer is law written in English. For the German lawyer, the only relevant sources are written in German. The French are equally xenophobic. For the lawyer in each tradition, the only relevant sources are those close to home. The German Civil Code is as foreign to an American lawyer as is the Talmud to a Buddhist, or the Koran to a Protestant. I know of no disciplines as intellectually parochial as both law and religion.

Yet both law and religion share a yearning to break out of the parochial confines and to find the truth about ultimate issues—of justice, in one case, and the meaning of human existence, in the other. This is just the beginning of a longer project. If we recognize, as lawyers, how much we are like those schooled in a religious faith, we will come closer to understanding the problem of truth in law.