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David Luban

LAWYERS RULE: A COMMENT ON PATTERSON'S THEORIES OF TRUTH

*David Luban**

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IN his Afterword, Dennis Patterson accepts one of his reader's descriptions of *Law and Truth* as "a work of demolition."[1] Patterson devotes most of the book to saying what truth in law is not, rather than what it is. "The central claim of a postmodernist account of language" such as his own, he tells us near the end of the book, "is that the truth of our statements is not the result of the relationship between our linguistic acts and some state of affairs."[2] Near the beginning of the book, Patterson likewise informs us that "[t]ruth in law is neither a property nor a relation."[3] The natural question is what Patterson thinks that truth in law *is*. Now there are places where he seems to argue that we should simply stop asking this natural question.[4] There are others where he invokes the authority of Quine, Wittgenstein, and Rorty to back the claim that philosophical investigations of truth are "unintelligible; a project that never gets off the ground;"[5] for that reason, "[p]ostmodern approaches to language do not present arguments *against*" modernist theories of truth.[6]

However, these suggestions are unworthy of the remainder of Patterson's carefully argued book. Call me a hopeless pre-postmodern fuddy-duddy, but I must confess that I have never taken kindly to being told to stop asking questions. I must also confess that deriding a theory as

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1. DENNIS PATTERSON, LAW AND TRUTH 181 (1996).
2. *Id.* at 169.
3. *Id.* at 21.
4. *Id.* at 181.
5. *Id.* at 161.
6. *Id.*

unintelligible, without deigning to argue against it, sounds to me like mere abuse, and the fact (if it is a fact) that Wittgenstein, Quine, and Rorty agree with the abuse does not make it any less abusive.

Fortunately—and perhaps contrary to his own anti-theoretical intentions—Patterson offers an interesting and substantial account of legal truth. Or rather, if I read him right, he offers *three* interesting and substantial accounts of truth, and my first aim is to explore how well they fare, separately and together. The three theories are: the disquotational theory of truth; the analysis of truth in law as whatever a good lawyer is able to justify; and the identification of truth-speaking with mastering the language of law, what Patterson calls the "grammar of legal justification."[7]

Each of these draws its inspiration from more general philosophical ideas about language and truth. This is hardly a coincidence: Patterson chooses as the epigraph to his introduction Ronald Dworkin's claim that "the debate about the nature of law . . . is, at bottom, a debate within the philosophy of language and metaphysics."[8] As we will see, Patterson's generally Wittgensteinian approach to the issue of legal truth takes Dworkin's claim to heart, because Patterson regards law itself as a language or something closely akin to a language. In sections I-VI of my comments, I examine, and in places criticize, some of the more general philosophical ideas Patterson invokes in his discussion.

In the final section of my remarks, I take issue with the basic assumption underlying Patterson's argument—the assumption that law is a language or something akin to a language. I simply do not agree that our practices of legal argumentation share the properties of natural language that compelled Wittgenstein to the conclusion that there is nothing substantial to say about what entitles us to speak as we do. Patterson accepts Wittgenstein's famous caution that philosophy cannot interfere with the actual use of language, and must leave everything as it is—indeed, he takes it as the epigraph of *Law and Truth*,[9] and repeats it in his Afterword, where he says that, "when it comes to law, I wish to leave everything as it is."[10] In my view, Wittgenstein's quietism about our practices derives from his rather mystical appreciation of what is sometimes called the *logocentric predicament*, the fact that we cannot speak about language without using language.[11] To Wittgenstein, this implies that no Archimedean standpoint exists from which we can compare language with an extra-linguistic reality to see whether language is a truth-preserv-

7. *Id.* at 68.

8. *Id.* at 3 (quoting RONALD DWORKIN, INTRODUCTION TO THE PHILOSOPHY OF LAW 1 (1977)).

9. *Id.* at 2.

10. *Id.* at 181.

11. The term "logocentric predicament" originates in HENRY M. SHEFFER, 8 ISIS 226, 227-28 (1926) (reviewing 1 ALFRED NORTH WHITEHEAD & BERTRAND RUSSELL, PRINCIPIA MATHEMATICA (2d ed. 1925)).

ing medium—and this is the central insight driving Patterson's criticisms of theories of truth in law.

However, no corresponding "nomocentric predicament" exists, according to which we cannot speak about law except from within the law. Professional legal argument is highly specialized, but the law affects nonspecialists as well as specialists, and the lay understanding of law is *at least* as important to the shape of law as the forms of professional argument. We are entitled to inspect the credentials of forms of legal argument in a way that we cannot inspect the credentials of language as a whole. So, at any rate, I will argue.

I. DEFLATING TRUTH

The first theory of truth Patterson endorses appears in a quick sentence: "'True' is best understood disquotationally."[12] Legal readers without a background in philosophical logic may well have puzzled over, or simply passed over, this sentence, which refers obliquely to an important twentieth-century literature about truth. I trust, therefore, that it will not be out of place to explicate Patterson's idea.

It goes back to the so-called "redundancy theory" of truth, which was first proposed by Frank Ramsey in 1927.[13] According to Ramsey, saying that a proposition P is true adds nothing over and above asserting P; that is the sense in which talk of truth is mere redundancy. Its force is simply to express endorsement and agreement: "Nice day!" "That's true."

Later, the Polish logician Alfred Tarski developed what he called a "semantic conception of truth," which borrows the central insight of the redundancy theory and uses it to construct a mathematically precise way of defining truth in formal logical languages.[14] According to Tarski, the truth-predicate must obey a law that he called "Convention T":

(Convention T) The sentence P is true if and only if P.

For example, Convention T requires that the sentence "snow is white" is true if and only if snow is white. For convenience, let us call biconditionals of the form "Sentence 'such-and-such' is true if and only if such-and-such" *T-sentences*.[15] Tarski argued that any adequate definition of truth must satisfy Convention T: unless the definition logically implies all the T-sentences, it is not a definition of truth. And the definition of truth he developed for formal logical languages did indeed satisfy Convention T.

In one sense, Convention T seems to restate the so-called correspondence theory of truth, which holds that a sentence is true whenever it corresponds with the facts: "The sentence 'snow is white' is true if and

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

13. Frank P. Ramsey, *Facts and Propositions*, *in* PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (Supp. VII 1927).

14. Alfred Tarski, *The Semantic Conception of Truth*, *in* READINGS IN PHILOSOPHICAL ANALYSIS 52, 54-56 (Herbert Feigl & Wilfrid Sellars eds., 1949).

15. A *biconditional* is a sentence of the form "P if and only if Q," which really means "if P then Q, and if Q then P"—it is called a biconditional because it is the conjunction of two conditionals.

only if snow is white" seems to indicate correspondence between the sentence "snow is white" and the fact that snow is white. But Convention T is actually compatible with any theory of truth, not just the correspondence theory, and for present purposes I want to stress that in important ways it restates the redundancy theory. Convention T says that any time you describe a sentence as true, you are doing something logically equivalent to merely asserting the sentence. The phrase "is true" is redundant—and that observation *is* the redundancy theory of truth.

The redundancy theory seems to suggest that the English language could simply dispense with the words "true" and "false," which are, if the theory is correct, redundant. After all, Convention T asserts that you can always replace "Sentence 'P' is true"—the left side of the biconditional T-sentence—with "P" (the right side of the biconditional). It is not quite correct that the English language can dispense with "true" and "false," however, because we still need to use expressions involving these words for two practical purposes: indirect discourse, that is, discourse about what someone else said, and generalizations about many sentences. Let me explain and illustrate.

Suppose a client comes to you and says, in great agitation, "My lawyer says that I'm legally required to report cash transactions of over $10,000 to the government, and that there's paperwork involved, and that it's a crime not to make the report, and that I could face serious penalties if I don't make the reports. What do you think?" Employing the word "true," you can reply quite simply: "Everything your lawyer told you is true." Without "true," however, you would have to say something along the lines of: "You are required to report cash transactions of over $10,000 to the government, and there is paperwork involved, and it is a crime not to make the report, and you could face serious penalties if you do not make the reports." Obviously, this is cumbersome, weird, and makes you sound like a robot.

Likewise, we sometimes want to generalize about a large class of sentences. Suppose that, in a moment of delight at something you are reading, you are moved to exclaim, "Virtually everything that book says is true!" Take away the word "true" and you are left with the psychotic alternative of repeating, one by one, all the true things that the book says.

This explains why the words "true" and "false" are indispensable, but redundancy theorists will reply that it does not show that "true" and "false" are philosophically rich concepts rather than merely handy devices to construct abbreviations. Indeed, redundancy theorists will insist that handy devices are all that "true" and "false" are. In practice we cannot do without them, but in principle we can, because any assertion that a sentence is true amounts merely to an assertion of the sentence, and likewise any assertion that a sentence is false amounts to a denial of the sentence. Redundancy theorists claim that Convention T wholly exhausts what there is to say about truth: we need no theory of truth other than a catalogue of all the T-sentences there are.

Terminology changes slowly in philosophy, but it does change. The term "redundancy theory" has more or less disappeared. In 1990, the philosopher Paul Horwich published an influential book entitled *Truth*,[16] which formulated an elegant version of the redundancy theory and defended it against the multitude of objections that have accumulated in the decades since Ramsey. Horwich described his theory as "minimal" and "deflationary" (in that it insisted that a theory of truth consists of a catalogue of T-sentences and nothing more inflated than that),[17] and his descriptions have become the preferred terms for the redundancy theory. Similarly, Convention T is now frequently called *the equivalence schema*—because it says that "Sentence 'P' is true" is *equivalent* to "P"—or *the disquotational schema*, the term Patterson invokes.

What this latter term means is the following. In any T-sentence, for example "The sentence 'snow is white' is true if and only if snow is white," the left side of the biconditional reads "The sentence 'snow is white' is true," with quotation marks around "snow is white" indicating that the latter sentence is being mentioned rather than used. The right side of the biconditional reads *snow is white*, with no quotation marks, because here the sentence is being used rather than mentioned. When we substitute the right side of the T-sentence for the left, thereby eliminating the reference to truth, we have "disquotationalized," or "disquoted," or, I am tempted to say, "dissed" the left side of the T-sentence. By dissing the left sides of T-sentences, deflationists likewise diss the entire idea of a theory of truth. Thus, when Patterson says, "'True' is best understood disquotationally,"[18] I interpret this apercu as an announcement that Patterson adheres to the deflationary theory of truth.

II. REINFLATING TRUTH

Well, is the deflationary theory of truth true? A recent analysis of deflationism by the logician Crispin Wright has persuaded me that it is not.[19] In this section, I will summarize Wright's rather difficult argument.

As I observed earlier, whenever we diss the left side of a T-sentence in order to eliminate its reference to truth, we move from *mentioning* a sentence like "snow is white" to *using* or *asserting* it. Let's take one of Patterson's legal examples.[20] "Insanity is a defense of murder." Someone might want to say "The sentence 'insanity is a defense of murder' is true." Imagine, for example, that there is a true-false section on the bar exam; a bar review instructor, going over a sample examination, might well say "The sentence 'insanity is a defense of murder' is true." According to a deflationist, asserting this is simply a convoluted way of asserting that insanity is a defense of murder. And if you are justified—or, to use philo-

16. PAUL HORWICH, TRUTH (1990).
17. *See id.* at 1-15.
18. PATTERSON, *supra* note 1, at 19.
19. CRISPIN WRIGHT, TRUTH AND OBJECTIVITY 19-24, 31-32 (1992).
20. PATTERSON, *supra* note 1, at 3.

sophical jargon, *warranted*—in asserting "the sentence 'insanity is a defense of murder' is true," then you are warranted in asserting that insanity is a defense of murder.

The converse is true as well, or so Convention T tells us. Whenever we are warranted in asserting a sentence, we are warranted in asserting that it is true. It follows, then, that from the point of view of our linguistic practice, truth and warranted assertability function interchangeably: our aim, when we are speaking sincerely and literally, is to try to make assertions that are warranted, but likewise to try to make assertions that are true. That, at any rate, is what a deflationary account of truth is committed to saying.

Indeed, since deflationism holds that—in Patterson's words—"'true' is a term of commendation and endorsement"[21] *and nothing more*, the theory is committed to the idea that warranted assertability is the *only* alethic norm governing the practice of sincere, literal assertion.[22]

Unfortunately, this latter position is untenable, because it is perfectly possible that a person has fulfilled the norm of warranted assertability but failed at fulfilling the norm of truth.[23] I can be fully justified in saying something and still be wrong—for example, because of information unavailable to me. Potentially, truth can always diverge from warranted assertability; indeed, in one of the most interesting technical portions of his argument, Wright proves that once we accept Convention T, we can reduce truth to warranted assertability only by abandoning the basic laws of logic.[24]

To recapitulate, Wright's "inflationary" argument that I have just been sketching goes like this. *First*, "it is essential to deflationism—its most basic and distinctive contention—that [the word] 'true' is merely a device for endorsing assertions . . . ."[25] We have just observed that this is indeed Patterson's position as well. Thus, *second*, deflationism "can import no norms over assertoric discourse distinct from warranted assertability."[26] But *third*, truth cannot be reduced to warranted assertability. From this, it follows that (*fourth*) "deflationism is an inherently unstable view."[27] It is unstable in the sense that it pushes us toward an identification of truth with warranted assertability that can't be maintained. Truth is more than warranted assertability.

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21. *Id.* at 152.

22. WRIGHT, *supra* note 19, at 21. By "alethic norm," I mean a norm concerned with the dimensions of truth, justification, validity, and so forth. Obviously, there might be other norms—for example, norms of politeness, or norms of relevance, or norms of good taste—that also govern the practice of assertion.

23. In fact, the converse is also true: one can fulfill the norm of truth without fulfilling the norm of warranted assertability, if what I say happens to be true even though I have no reason to believe it.

24. See the appendix of this paper for a simplified version of Wright's proof. I present it here because the identification of truth with warranted assertability seems very close to Patterson's position.

25. WRIGHT, *supra* note 19, at 33.

26. *Id.* at 33-34.

27. *Id.* at 34.

III. THINKING THINGS, NOT WORDS

We can see this latter point even without Wright's argument. Convention T tells us the following about Patterson's legal examples:

- It is true that the First Amendment prohibits prayer in the public schools if and only if the First Amendment prohibits prayer in the public schools.
- It is true that no contract is enforceable without consideration if and only if no contract is enforceable without consideration.
- It is true that manufacturers are strictly liable for injuries caused by their products if and only if manufacturers are strictly liable for injuries caused by their products.
- It is true that insanity is a defense to murder if and only if insanity is a defense to murder.
- It is true that payments to creditors within ninety days of the filing of a petition in bankruptcy are voidable as preferential transfers if and only if payments to creditors within ninety days of the filing of a petition in bankruptcy are voidable as preferential transfers.[28]

According to deflationism, these T-sentences tell us all there is to know about truth in law. Yet surely it must occur to readers that these T-sentences tell us next to nothing. They do not tell us *why* the First Amendment prohibits prayer in the public schools, or *why* no contract is enforceable without consideration. It is completely unilluminating to be told "You are entitled to assert that the sentence 'the First Amendment prohibits prayer in the public schools' is true if and only if the First Amendment prohibits prayer in the public schools." After all, if you do not know whether you are entitled to assert that some sentence P is true, it will not help a bit to be told that P is true if and only if P.

It is this complaint that Patterson means to forestall when he warns us that "Truth is not an explanatorily useful concept."[29] We will not be able to say anything general about what makes all the legal propositions just catalogued true. Instead, we will simply argue for the truth of each one in the familiar ways lawyers argue: by appealing to text, or history, or doctrine, or prudence—the four forms of legal argument the enumeration of which, Patterson tells us, is the sole possible answer to the question "What does it mean for a proposition to be true as a matter of law?"[30] As Patterson puts it elsewhere, "the truth of a proposition of law is shown through the use of forms of legal argument."[31]

He emphasizes this latter point several times, telling us that the forms of argument "are the means for showing that propositions of law are true or false,"[32] that they "constitute the terms for appraising the truth of pro-

28. *See* PATTERSON, *supra* note 1, at 3.
29. *Id.* at 21.
30. *Id.* at 178.
31. *Id.* at 19.
32. *Id.* at 20.

positions of law."[33] I certainly do not disagree with these claims, but I do not find them nearly as significant as Patterson does, because not even the most dyed-in-the-wool correspondence theorist or realist would disagree with them. After all, a realist who believes in a mind-independent subject-matter about which propositions are or are not true also believes that we must use forms of argument for appraising their truth. Indeed, Patterson's claims can be made in any discipline, not just law. The forms of microbiological argument are the means for showing that propositions about bacteria are true or false, and these forms constitute the terms for appraising the truth of propositions about bacteria—but that does not show that apart from the forms of microbiological argument there is no such thing as the truth about bacteria. Nor does it show that the truth about bacteria lies in the practice of microbiology.

Yet in law it is this latter proposition that seems to be Patterson's leading insight: "[L]aw is a practice of argument . . . . It is in the use of [the] forms [of legal argument] that the practice is to be understood. Their use in practice *is* the law."[34] Think how odd it would be to enumerate the forms of microbiological argument and then assert that bacteria *are* the use of these forms of argument in practice.

It would be odd precisely because we 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.

This latter point should be congenial to Patterson. It is, I take it, the import of his chapters on Moore and Hart. In the former, he argues that there is no ontological realm of meanings for propositions of law to correspond to, while in the latter he argues that law is not a social fact. I find both arguments persuasive, and as a result I am inclined to agree with Patterson that there may be no better explanation of why a given legal proposition is true than an argument on its behalf. But that is a distinctive fact about law, and in no way shows that we ought to embrace a "postmodern alternative . . . that emphasizes practice, warranted assertability, and pragmatism."[35] As Sidney Morgenbesser has quipped, pragmatism may be useful, but it is not true.[36]

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33. *Id.* at 21.

34. *Id.* at 181.

35. *Id.* at 161.

36. Like most of the great Morgenbesserisms, this one belongs to the oral tradition and has not appeared in print. I have explained my objections to pragmatism in three essays: David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43 (1996) (also in THE REVIVAL OF PRAGMATISM (Morris Dickstein ed., forthcoming)); David Luban, *The Posner Variations: Twenty-Seven Variations on a Theme By Holmes*, 48 STAN. L. REV. 1001, 1006-20 (1996); David Luban, *Doubts About the New Pragmatism*, *in* LEGAL MODERNISM 125 (1994).

IV. LEGAL TRUTH AS A PRACTICE OF ARGUMENT

Patterson himself seems dissatisfied with a purely deflationary account of legal truth, because in the final chapter of *Law and Truth*, he offers a more general account: he tells us that a proposition of law "is true if a competent legal actor could justify its assertion."[37] This claim is a special case of a more general one, which he calls "postmodern."[38] "[T]o say that some proposition is true is to say that a sufficiently well placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation."[39] As a first approximation, the phrase "competent legal actor" seems to be a euphemism for *lawyer*: Patterson tells us that "[t]he investigation of truth in law turns out to be the effort to describe what lawyers *do* with language,"[40] and jurisprudence is likewise "an account of what lawyers do;"[41] similarly, Patterson asserts that "lawyers have no difficulty in reaching for the forms of argument to show the truth of propositions of law."[42] Presumably, Patterson uses the more cumbersome phrase "competent legal actor" to stress that none of these assertions holds unless we're talking about a competent lawyer, and also to allow that non-lawyers who have mastered the way that lawyers argue—what Patterson repeatedly calls "the grammar of legal justification"[43]—may also be able to justify a legal proposition and thus show that it is true. But the way these non-lawyers argue is parasitic on the way that lawyers argue: they are "competent legal actors" only because they are able to talk lawyer-talk. For this reason, I think it does not misrepresent Patterson to restate his position thus:

(P): A proposition of law is true if a good lawyer could justify its assertion.

In this formula, the word "justify" is ambiguous. It may be used either as an attempt-verb or as a success-verb—either as "argue skillfully for" or "argue successfully for." As I now argue, neither alternative is satisfactory.

V. TRUTH AS SKILLFUL ARGUMENT

Consider the first:

(P_1) A proposition of law is true if a good lawyer could argue skillfully for its assertion.

At the outset of *Law and Truth*, Patterson rightly says that "In addition to detailing truth, some account must be given of disagreement and the resolution of disputed cases."[44] Very well; how does (P_1) account for disa-

37. PATTERSON, *supra* note 1, at 152.
38. *Id.* at 151.
39. *Id.* (quoting HILARY PUTNAM, REPRESENTATION AND REALITY 115 (1988)).
40. *Id.* at 169.
41. *Id.*
42. *Id.* at 178.
43. *See, e.g., id.* at 68, 70, 80, 178. *Cf. id.* at 21, 181.
44. *Id.* at 4.

greement and the resolution of disputed cases?

Not well, I think. In lucrative cases, and sometimes even in important cases, good lawyers write excellent briefs on both sides. Skilled judges disagree; circuits split; the Supreme Court divides 5-4; first-rate legal scholars, with more time to think the issues through than the Supreme Court has available, argue in vast law review articles that cases have been wrongly decided; other first-rate scholars disagree.

By the terms of (P_1), one of the following alternative explanations of legal disagreement must hold: either one of the lawyers, judges, or scholars is incompetent; or else one of the lawyers, judges, or scholars has failed to argue skillfully; or else both the legal proposition and its denial are true. The first two alternatives are question-begging and abusive, while the third is logically impossible. I conclude that (P_1) must be abandoned.

An analogous difficulty also besets another of Patterson's formulations of his theory of legal truth, namely the idea that truthfulness in law consists in mastering the language of the law. As Patterson frames the idea, "knowledge will be unpacked in terms of linguistic competence, facility in the languages of man,"[45] and "truth [is] a matter of the grammar of legal justification."[46]

The problem with this formulation, which Patterson reiterates several times in the course of his argument, is that it is one thing to speak grammatically and quite another to speak truthfully. Linguistic competence allows us to speak intelligibly; it is the precondition of speaking truthfully *or falsely*. And, if lawyers can speak grammatically on *both* sides of a legal issue, identifying truth with the mastery of legal grammar implies that a proposition of law can be both true and false. Mastering of the forms of legal argument, like learning to argue skillfully, may well be a necessary condition for enunciating legal truth, but it cannot be a sufficient condition.

VI. TRUTH AS VICTORIOUS ARGUMENT

Now consider the other reading of (P), in which we treat "justify" as a success-verb rather than an attempt-verb:

(P_2) A proposition of law is true if a good lawyer could argue successfully for its assertion.

The analysis of (P_2) turns on what the word "successfully" means in its context. On one reading, to argue successfully for an assertion is to establish its truth. But that cannot be the right reading, because then (P_2) would be transformed into a near-tautology:

(P_2) A proposition of law is true if a good lawyer could establish its truth.

45. *Id.* at 169.
46. *Id.* at 70.

At best, (P_2) would launch us on the unenticing enterprise of searching, like some latter-day Diogenes, for a good lawyer (a "competent legal actor"). At worst, it would lead us into a vicious circle, once we realized that the criterion of being a good lawyer is adeptness at establishing the truth of those propositions of law that are true. Then we are left with:

(P_2) A proposition of law is true if someone adept at establishing the truth of true propositions of law establishes its truth.

We should not ascribe these readings to Patterson, because he does not mean to be arguing in circles—although it is worth pointing out that the "postmodern" claim I quoted earlier, which he endorses on page 151, is circular in just the way (P_2) and (P_2) are: "[T]o say that some proposition is true is to say that 'a sufficiently well placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation.'"[47] Notice that this formula defines a proposition's truth in terms of a "sufficiently well placed speaker" calling the proposition true.

The non-circular alternative reading of (P_2) would construe "successfully" along Legal Realist lines. A lawyer has argued a point of law successfully if she has won:

(P_3) A proposition of law is true if a good lawyer could win an adjudication of the point.

At this point, Patterson's postmodern theory of truth has been transformed into a more familiar modernist paradigm, the Legal Realists' so-called "predictive theory" of law. As Oliver Wendell Holmes stated it, the law is simply "prophecies of what the courts will do in fact."[48]

However, as writers have pointed out for at least sixty years, the predictive theory is unacceptable.[49] The reason is simple: the predictive theory leads to thoroughgoing indeterminacy when we ask the question of truth from the standpoint of a judge. A judge, wondering how to adjudicate a question of law, cannot very well decide the question by predicting how she will decide the question! How she will decide the question turns on her judgment of whether some proposition of law is true or false; and if she accepts (P_3) as her working notion of what it is for a proposition of law to be true, she will find herself in an infinite regress of predicting how she will predict how she will predict how she will predict, etc. Since this is impossible, the judge must decide the truth of propositions of law according to criteria other than (P_3); and the good lawyer, aiming to persuade the judge, must take those criteria, not (P_3), as the norms governing her practice of argument. Metaphorically, we might say that (P_3) points be-

47. *Id.* at 151.

48. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

49. *See, e.g.*, LON L. FULLER, THE LAW IN QUEST OF ITSELF 94-95 (1940); H.L.A. HART, THE CONCEPT OF LAW 10 (1964); ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 101-15 (1982); Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MODERN L. REV. 5, 17 (1937); Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 248-49 (1964).

yond itself to those other criteria; but, more literally, we must simply say that (P_3) is wrong.

To summarize: Patterson's second theory of legal truth is the proposition I have labeled "(P)," which states that a proposition of law is true if a good lawyer (a competent legal actor) could justify its assertion. If "justify" means "argue skillfully for"—the reading that I labeled "(P_1)"—the theory yields the contradiction that a proposition of law and its denial can both be true, because opposing lawyers can both argue skillfully. If "justify" means "argue successfully for," then the theory fails because it either turns into the vicious circle that I have labeled "(P_2)," "a proposition of law is true if a good lawyer could establish its truth," or else turns into the unsatisfactory predictive theory of law. And Patterson's third formulation of his theory of legal truth—truth is a matter of the grammar of legal justification, so that speaking truthfully in law means arguing competently—fails because it is simply a variant of (P_1).

VII. WHOSE LAW IS IT?

I now want to examine Patterson's theories from a less logic-centered and more overtly moral standpoint. What seems central to his enterprise is the grounding of legal truth in the argumentative practices of lawyers. His critical chapters are all efforts to block jurisprudential attempts at breaking out of the legal language-games to anchor them in something more universally accessible: law's immanent rationality (Weinrib), moral or natural facts (Moore and Brink), social facts (Hart and Fish), extra-legal morality (Dworkin and Bobbitt).

But why lawyers? Patterson is interested in the practice of legal argument, or at least the forms of legal argument, but he is surprisingly uninterested in what lawyers do or why they do it. Let me put the point tendentiously: it will come as an enormous surprise to most people that lawyers' argumentative practices are the necessary and sufficient conditions of *truth*. The standard lawyer joke, after all, asks "How do you tell when a lawyer is lying?" and answers "His lips move." It does not ask "How do you tell when a lawyer is *telling the truth*?" and answer "His lips move." Now I am certainly *not* one of those who identifies lawyers with liars, but I do think that the joke recognizes an important fact, namely that the practice of law has no necessary connection with truth.

Patterson thinks otherwise because he abstracts legal argument from the reasons people engage in it. These have to do with such familiar phenomena as influencing the agencies and instrumentalities of government; influencing other people by invoking the power and authority of government; sidestepping the efforts of other people to influence us or to influence government to intervene against us; learning what our obligations are and how to comply with them in the least disruptive way we can. These are active, not contemplative, ends, and arguments made in the course of executing them are only obliquely connected with truth-seeking.

The connection is attenuated even further by the requirements of the adversary system. A lawyer's obligations within the adversary system are to present arguments favorable to the client. The standard for introducing legal arguments is non-frivolity, not plausibility, and lawyers are not only not required to believe their arguments, they are forbidden from expressing their personal opinion of the justness of their cause.[50]

One way to put my point is that legal arguments are practices of persuasion, not of conversation. I think that this distinction goes very deep into the difference between Patterson's views and my own. He is inclined to treat legal argument as a kind of language, which he understands in the same way as Wittgenstein: a set of practices combining verbal and nonverbal actions, a set of language-games. For Patterson, "Language is the universal medium within which we think, act, and understand."[51] Since it is a universal medium, "The moves we make in everyday language are neither negotiated nor interpreted at every turn."[52]

But law is not like that. It is not a universal medium within which we think, act, and understand; rather, it is a specialized medium for distributing the burdens of obligation; ultimately, law is concerned with mobilizing, demobilizing, or threatening to mobilize or demobilize the instruments of state violence. Unlike everyday language, the moves lawyers make in legal language *are* negotiated and interpreted at every turn. A single careless word in a Supreme Court opinion, a statute, or a contract can generate a cascade of litigation, confusion, and misery.

Small wonder that most citizens view the arguments of lawyers—which are invariably *partisan* arguments—with a great deal of suspicion. Patterson argues that the argumentative practices of lawyers are arcane, for the grammar of legal justification must be learned through immersion in practice rather than deduced from extra-legal facts or principles. To be told that truth in law *just is* the arcane argumentative practices of lawyers is to be told that lawyers rule. It is to be told that the sole criterion of legitimacy in legal arguments is that lawyers use them, and that the only way to contest their legitimacy is locally, by employing them,[53] because arguments are not "measured . . . against a practice-transcendent ideal."[54] It is to be told that to search for legal values underlying the practices of textual, doctrinal, historical, and prudential argument—values such as openness, certainty, stability, practical responsiveness, fidelity, fairness, or even decency—is just a modernist mistake, because *nothing* underlies these practices except that lawyers engage in them. It is to be told, therefore, that our lives, fortunes, and sacred honor are trothed to professionals who are pledged to argue on behalf of someone else's life, fortune, and sacred honor.

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50. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(e) (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4) (1983).
51. PATTERSON, *supra* note 1, at 162.
52. *Id.* at 105.
53. *Id.* at 178-79.
54. *Id.* at 179.

I do not mean to suggest that Patterson offers his arguments in order to defend a set of institutional arrangements in which lawyers rule. I do not think that he offers his arguments to defend or attack *any* particular set of institutional arrangements, but rather to demarcate the logical and linguistic conditions under which arguments about those arrangements can take place. But that is because he thinks of law as a language, or at least something like a language, whereas I am suggesting that it is not. Language is a universal medium, and Patterson rightly insists that there is no Archimedean standpoint outside of language available for discussing it. Lawyer-talk, on the other hand, 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.

VIII. APPENDIX: CRISPIN WRIGHT'S ARGUMENT[55]

Consider a sentence about whose truth or falsehood we have no information. Consider, for example:

(1) Joan of Arc had an even number of hairs on her head when she was condemned.

This sentence is not warrantedly assertable, since there is no evidence that makes it more likely than its denial. If truth is the same as warranted assertability, sentence (1) is therefore not true, and so we have:

(2) Joan of Arc did not have an even number of hairs on her head when she was condemned.

Evidently Joan of Arc was either bald or had an odd number of hairs on her head when she was condemned. But neither of these assertions, nor indeed sentence (2), is warrantedly assertable any more than (1) is, so (2), like (1), is untrue. The theory that truth equals warranted assertability is trapped in contradiction: it requires us to assert sentence (2) while simultaneously asserting that (2) is untrue.

A defender of the pragmatic theory might object that just because (1) is untrue, it doesn't follow that (2) is true. But to abandon this inference is to abandon Tarski's Convention T:

(Convention T) For any sentence P, "P" is true if and only if P.

In the example we have been discussing, Convention T implies:

(3) "Joan of Arc had an even number of hairs on her head when she was condemned" is true if and only if Joan of Arc had an even number of hairs on her head when she was condemned.

Notice that sentence (3) is logically equivalent to:

(4) "Joan of Arc had an even number of hairs on her head when she was condemned" is not true if and only if Joan of Arc did not have an even number of hairs on her head when she was condemned.

55. *See* WRIGHT, *supra* note 19, at 19-24, 31-32.

That is because of the logical principle that "P if and only if Q" is logically equivalent to "not-P if and only if not-Q." This principle holds in both classical and intuitionist logic. If, as we are supposing, (1) is not true, (2) follows directly from (4). To deny the inference is to deny Convention T.

The conclusion of this argument is the following: Of the triad consisting of the theory of truth as warranted assertability, Convention T, and the logical equivalence of "P if and only if Q" and "not-P if and only if not-Q," at most two can be salvaged. My vote is to save Convention T and propositional logic; in that case, truth-as-warranted-assertability must go.