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Electricism in Law and Truth

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ECLECTICISM IN LAW AND TRUTH

Jefferson White.

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Eclecticism (Gk., eklegein, to choose) An eclectic position in philosophy or religion is one that seeks to combine the best elements in other views.¹

I. INTRODUCTION

THE doctrine of creation ex nihilo does not apply to cultural reality; this is one truth which lies behind a maxim central to aesthetic understanding: "All art is made out of other art."² What is true of visual and literary art is true of philosophy and jurisprudence as well, and that is why "eclectic" can be a term of aspiration, not a pejorative term.

1. SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 114 (1994).

2. See, e.g., ERNST HANS GOMBRICH, *ART AND ILLUSION* 73 (2d ed. 1961) In drawing a parallel between law and painting, Gombrich notes that:

Just as the lawyer or the statistician could plead that he could never get hold of the individual case without some sort of framework provided by his forms or blanks, so the artist could argue that it makes no sense to look at a motif, unless one has learned how to classify and catch it within the network of a schematic form.

Id. at 73. Cf. Christine Temin, *Grant Wood an American Classic Retrospective Reveals a Master*, BOSTON GLOBE, Nov. 15, 1996, at C1 (reviewing a retrospective exhibition of Grant Wood: "His brush-work was influenced by pointillism, his chiseled figures by European painters—chiefly Flemish and Dutch, but there's a touch of Piero della Francesca, too.").

Richly eclectic philosophical positions, i.e., positions which incorporate varied and extensively developed strains of thought, carry with them a particular set of problems perhaps best described as (1) problems of coordination and (2) imported problems. Coordination problems involve the coherence and consistency among the various elements incorporated in an eclectic position; imported problems reflect pre-existent difficulties inherent in a conceptual scheme—difficulties which “come with the turf,” as they say. It seems fair to characterize Patterson’s³ constructive thought as “richly eclectic” in the above sense of that term, and in Part III and IV of this paper, I explore some coordination problems and some imported difficulties that arise in *Law and Truth*.

It should be made clear from the outset, however, that *Law and Truth* is not primarily concerned with developing a “position” or with constructing a jurisprudential “theory.” Wittgensteinian in spirit, its chief concern is exposure of certain *mistaken* ideas about legal meaning and truth and with *misconceptions* of the nature of law and legal reasoning. Over seventy percent of its pages are devoted to this purpose, and less than fifteen percent to constructive discussion per se.⁴ To pursue the analogy with aesthetics again, reading *Law and Truth* is like reading Expressionist theories of art where it is claimed that in order to understand what art is, we must first understand what it is *not*—it is not craft, it is not entertainment, it is not imitation and so on.⁵

The dominance of Patterson’s critical intention notwithstanding, one thing that gives verve and bite to his criticism is the presence throughout *Law and Truth* of a certain degree of order and system. The significant points of analysis we encounter are consistently informed by the group of ideas about jurisprudence which Patterson labels “Postmodern.” The group is briefly presented as a whole only at the end of the book, but reading the criticism of Weinrib, Dworkin, Bobbitt and the rest, has a sort of osmosis effect—various *parts* of Patterson’s constructive thought are absorbed in the process of understanding his criticism, parts brought together only in a final brief chapter.

The sections in Part II that follow reflect the critical-systemic structure of *Law and Truth*. Here I identify three philosophical objections which I take to be the core of Patterson’s critical program—the objection to realism and antirealism, the objection to interpretive universalism and the

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

4. More exactly, 128 of the 182 pages in the book are devoted to this purpose, 21 to general introduction and only 30, in Chapter 8, deal directly with Patterson’s constructive alternative to the positions he criticizes.

5. Cf. ROBIN GEORGE COLLINGWOOD, *THE PRINCIPLES OF ART* 7-9 (1958) (arguing that “The proper meaning of a word . . . is never something upon which the word sits perched like a gull on a stone; it is something over which the word hovers like a gull over a ship’s stern. . . . The way to discover the proper meaning is to ask not, ‘What do we mean?’ but, ‘What are we trying to mean?’ And this involves the question ‘What is preventing us from meaning what we are trying to mean?’ . . . Applying this to the word ‘art,’ we find its proper meaning hedged about with well-established obsolete . . . meanings. When [these] meaning[s] get tangled up with the proper one, the result is . . . error.”).

"appeals to privacy" objection. After a brief account of each, I explore its connection to the more systematic statement set out in the last part of the book.

Part III is concerned with Patterson's own account of truth, including his understanding of legal interpretation. It is this account which sets him apart from the Wittgensteinianism of Bobbitt as well as from the other forms of contemporary jurisprudence discussed. My argument here is that Patterson's account of the practice of legal argument is marked by equivocation and that this equivocation produces incoherence in his account of truth determination in law. On my analysis, the equivocation is derived from failure to resolve a "coordination problem" between two elements in his conception of legal truth: (1) the claim, derived from Bobbitt, that the forms of legal argument are incommensurable, and (2) the claim, derived from Quine, that choice among competing legal outcomes is governed by the principle of belief conservation.

Part IV deals with "imported" problems, the first of which concerns the scope of legal interpretation. In *Law and Truth*, interpretation is restricted to situations in which the forms of legal argument conflict in some way. I argue that this restriction is much too narrow and that it derives from Patterson's adoption of Wittgenstein's ideas about meaning and use. The second problem concerns the claim in *Law and Truth* that legal argument is autonomous—not completely autonomous, Patterson is clear about that—but autonomous in some sense of that term. Claims of legal autonomy require resolution of what Joseph Raz has called the "limits of law problem," i.e., the problem of defining the difference between what is law and what is not. The treatment of this subject in *Law and Truth* depends on an adaptation of Bobbitt's doctrine of the "forms of legal argument" and I discuss a difficulty inherent in this doctrine: permeability of the forms of argument to extra-legal considerations.

II. THE CRITICAL STRUCTURE OF LAW AND TRUTH

A. THE OBJECTION TO REALISM AND ANTIREALISM

In explaining the overarching purpose of *Law and Truth* Patterson says, "I take the task of jurisprudence to be that of providing a philosophical account of what it means to say that propositions of law are true or false."⁶ In common sense and ordinary language, truth is understood as a relation between a proposition and some non-linguistic state of affairs: It is, we normally say, the condition "being green" which makes the sentence "the grass is green" true or false. Among philosophers, this common-sense notion has long been under fire as an adequate understanding of truth, and Patterson sides with its critics. "The heart of the position I advocate . . . is in the denial of the truth-conditional account of propositions of law. 'True' does not name a relationship between a state of af-

6. PATTERSON, *supra* note 3, at 6.

fairs and a proposition of law.”⁷ In what, then, does truth consist? Patterson holds that whether a proposition is true or false depends on its *use*, not on “truth conditions.” But how exactly should “use” be understood? Patterson’s idea is (1) that the “use” of any proposition in a legal context depends on a set of constraints, which, following Bobbitt, he calls “forms or modes of legal argument,” and (2) that reasoning governed by these constraints is the means through which the truth of propositions of law is determined. When he says that the truth of a proposition depends on “use,” he means that it depends on its use *as determined by* “the forms of legal argument.”

For Patterson, then, truth is internal to a *system* of social practice, and in defining legal truth, he places *legal practice* in the place which “truth conditions” occupy in the common-sense understanding of truth—legal practice *functions* in the way that truth conditions function in common sense. He does not say that truth *is* legal practice; he says that legal practice is the *means* of establishing truth.

The notion of practice as a means or instrument of truth determination calls to mind American Pragmatism, where the instrumental conception of truth was developed in some detail. Dewey says, for example:

The adverb “truly” is more fundamental than either the adjective, “true,” or the noun, “truth.” An adverb expresses a way, a mode of acting. Now an idea or conception is a claim or injunction or plan to *act* in a certain way as the way to arrive at the clearing up of a specific situation. When the claim or pretension or plan is acted upon, *it guides us truly or falsely*; it leads us to our end or away from it. Its active, dynamic function is the all-important thing about it, and, in the quality of activity induced by it, lies its truth and falsity.⁸

Patterson would probably agree with Dewey’s claims about truth in the first two sentences of this passage, but I doubt he could agree with the rest. Dewey is a *consequentialist* in his conception of truth: “Confirmation, corroboration, verification lie in works, consequences.”⁹ This is not the way Patterson conceives truth; for him the consequences of a legal decision may play a role in determining whether a proposition of law is true or not—a consideration of this sort is part of what he calls a Prudential form of argument—but Prudential forms of argument are not truth-determining by themselves. They function only in concert with the other forms of argument.

How then should we understand the difference between Patterson’s conception of truth and the conception of Pragmatists like Dewey? This is not an easy question to answer; both conceptions are instrumentalist in nature, but there is a significant difference between the two. In understanding this difference, we need first to note Patterson’s alternative to a truth-conditional account of propositions of law. “‘True’ does not name a

7. *Id.* at 19.

8. JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 156 (1920).

9. *Id.*

relationship between a state of affairs and a proposition of law. 'True' is best understood disquotationally."¹⁰

The basic idea at work in a disquotational understanding of legal truth is that it makes no difference whether people say: "The speed limit in Maine is sixty-five miles per hour" is true; or whether they say the speed limit in Maine is sixty-five miles per hour. To ascribe truth to the latter is to ascribe sixty-five miles per hour to the speed limit in Maine. Such ascription cancels the quotation marks—thus the term "disquotational" understanding of truth. "Disquotational" analysis seems correct as far as it goes. However, if we say that to call a sentence true is simply to affirm it, then how can we tell whether and when to affirm it? Various philosophical theories of truth, including the pragmatist theory, can be understood as attempting to provide an answer to this question, but not the answer that Patterson gives. For his answer—or at least the central part of his answer—it is helpful to note a passage from Hilary Putnam which Patterson cites approvingly. What is important about this passage is Putnam's identification of a feature of truth largely neglected by Pragmatists but given great weight by Patterson: the significance of an "internal point of view" in truth determination.

The suggestion I am making, in short, is that *a statement is true of a situation just in case it would be correct to use the words of which the statement consists in that way in describing the situation. . . . [W]e can explain what "correct to use the words of which the statement consists in that way" means by saying that it means nothing more nor less 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.*¹¹

Two points stand out here: (1) truth is understood as "*warranted* assertion" and (2) "*warranted assertion*" depends on a speaker's being "well-placed." For *Law and Truth*, being well-placed means being placed within a legal system, i.e., having an internal point of view relative to practice within that system. Here, Patterson's point about truth resembles one Arthur Danto makes about art: "To see something as art requires something the eye cannot decry—an atmosphere of artistic theory, a knowledge of the history of art: an artworld."¹² Truth in law is internal to a system of practice, and questions about legal truth can be determined only relative to beliefs, attitudes and procedures presupposed by those who engage in the practice. While this view shares certain features with general accounts of truth found in both pragmatism and coherentism, Patterson's understanding of truth differs from these in the emphasis placed on assumption of an internal point of view.

On this analysis, to say that legal truth can be determined only relative to beliefs, attitudes and procedures *presupposed* by those who engage in

10. PATTERSON, *supra* note 3, at 19.

11. *Id.* at 168.

12. Arthur Danto, *The Artworld*, 477 J. OF PHIL., 571-84 (1964), *reprinted in* ART AND ITS SIGNIFICANCE (Steven Ross ed., 1994).

legal practice, is to say that truth determination in law is *inherently epistemic*. In *Law and Truth*, for example, the properties which confer "warrant" on assertion of a legal proposition are properties to which knowledgeable participants have access—in particular properties connected with use of the forms of argument. For Patterson, the knowledge in question consists of a "web" of *intersubjectively shared* beliefs and attitudes, common property of legal practitioners—a fund of legal knowledge publicly, not privately, held.

As an example of what I mean by Patterson's epistemic approach to truth, consider his discussion of a client who visits his lawyer with an "equipment lease" and tells her:

I am leasing my bulldozer with \$48,000 to Perkins. As you can see, the lease calls for forty-eight equal monthly payments of \$1000. At the end of the lease, Perkins has the option of buying the bulldozer for \$1 or returning it to me. I like this deal. I maintain ownership of the bulldozer and receive a monthly payment to boot. Perkins is happy because he gets to write off the lease payment and can buy the bulldozer at the end of the lease for little money.¹³

In this case, the implications of the agreement are determined by commercial law, more exactly by Article 9 of the Uniform Commercial Code. Addressing what enables the lawyer to perform this function, Patterson says:

What is required is knowledge of the appropriate legal concepts (e.g., "sale," "security interest," "lease," and the like). Knowing the law means, among other things, knowing the legal consequences of what the client has done.

In this situation, one might say the lawyer has certain knowledge. But what sort of knowledge is it? . . . What is it the lawyer knows? The answer is plain to see: she knows the law. But what does it mean to say she knows the law? Is her knowledge reducible to the observation that she can predict how courts will treat the deal her client has struck? Is her knowledge coextensive with the reactions other lawyers will have to this transaction? Or is it simply enough to say that if called upon to justify her claim that the transaction was a sale with the retention of a security interest and not a lease, the lawyer could show the truth of her claim?¹⁴

I shall have more to say on this subject as I move along, but to sum up Patterson's objection to realism we can say that he connects both realism and anti-realism with condition-based conceptions of truth. He rejects such conceptions, and says that, at least in the case of law, truth is determined instrumentally, i.e., through use of the forms of legal argument. These forms of argument function epistemically; that is, they serve as *instruments of knowledge*. Knowledge of what? Knowledge of legally warranted assertion. We discover more about Patterson's brand of

13. PATTERSON, *supra* note 3, at 92-93.

14. *Id.*

instrumentalism in the next section, where we examine the second of his core objections.

B. THE OBJECTION TO INTERPRETIVE UNIVERSALISM

To understand legal truth as "warranted assertion," and to take use of the forms of argument as the *means of knowing* what is warranted and what is not, we need to say more about the distinct *type* or species of knowledge to which modal argument belongs. In the passage above, Patterson observes that to say of a lawyer that she knows the law, is to say that if called upon to justify a legal claim, the lawyer could show the truth of her claim. So far, we have learned that "showing the truth of a legal claim" requires an internal point of view, but what can we say about the *practice* of showing legal truth, i.e., about the activity itself? Patterson's initial approach to this question reflects his strategy in dealing with most subjects in *Law and Truth*: He begins by telling us what the activity of "showing the truth of a legal proposition" is *not*. In particular, he is concerned with establishing that it is *not* interpretation.

In law, the importance of the "interpretive turn" can hardly be overestimated. In addition to a plethora of symposia, books, and articles by leading scholars in all fields of substantive law, the growth of interest in law on the part of academics in the humanistic disciplines confirms that questions of textual meaning are the central, if not the organizing, concern of many sophisticated legal theorists.

There is something fundamentally wrong with the current interpretive orthodoxy. The notion that every act of textual and verbal comprehension is a matter of some act or theory of interpretation is a deeply misconceived idea, one born of a lack of attention to some obvious features of ordinary understanding, coupled with an inordinate emphasis upon, and faith in, the power of theory as the genesis of expressive intelligibility . . . Interpretive universalism, and the manifold claims that issue from it, engender a seriously false and misleading picture of law.¹⁵

The basic structure of this part of Patterson's critical program is informed by two passages from Wittgenstein's *Philosophical Investigations*, which merit careful attention because they provide the basis of Patterson's account of legal truth.

201. . . . 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. . . . 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.

202. . . . "Obeying a rule" is a practice. And to *think* one is obeying a rule is not to obey a rule.¹⁶

15. *Id.* at 72-73.

16. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, §§ 201-02 (G.E.M. Anscombe trans., 3rd ed. 1968).

The point that Wittgenstein makes, and that Patterson emphasizes, is that when we employ rules and standards in reasoning of any sort, the rules can function in one of two very different ways. They can function as *objects* of understanding—for example, when we learn that a rule of tennis is: “a server may not step over the base line when serving,” we experience rules, i.e., we are aware of them, as objects, as “some *thing*” to be learned or observed.

On the other hand, when we engage in the *practice* of playing tennis, the rule about serving functions in quite a different way, namely, as a vehicle through which the activity of playing is carried out. Both Wittgenstein and Patterson stress that, in this respect, some intellectual activities, such as calculating, are like playing tennis. The activity of adding one number to another is a rule-governed *activity* in which our “grasp” or understanding of a rule is *not* an interpretation; in calculation, rules are experienced as vehicles through which calculation proceeds. In mastering addition or subtraction rules, for example, the rules are “internalized,” which means that they have ceased being objects of awareness and have become “ways of going on.”¹⁷

Understanding how to calculate is an activity categorically different from *interpretation*. Interpretation is always *of* some object—of a text, a sign, or a sound. Calculation, like interpretation, is a process, but unlike interpretation, it is non-objective in nature; we do not calculate *of* something but *by means of* something, namely the rules of calculation. In his account of “showing the truth of a legal claim” Patterson sharply distinguishes instrumental awareness from awareness of objects, and he resists what he calls “interpretive universalism” because it fails to recognize the crucial role that non-interpretive knowledge plays in legal practice. One passage in *Law and Truth* compares the kind of knowledge involved in legal decision-making with knowledge of bicycle-riding. The point of the comparison is that in bicycle-riding, the learning involved is learning how to do something, not learning that something is the case.¹⁸ Some coaching may be helpful in acquiring knowledge of this sort, but such skills are acquired largely through experience and practice.¹⁹

17. It is not altogether clear what Wittgenstein's distinction between an *Auffassung* (way of grasping) and a *Deutung* (interpretation) involves, but it can be said that an essential part of the grasp we have of rules when they are employed in an activity which depends upon them is an attitude of “acknowledgement” or “commitment.” Attitudes of this sort depend on our capacity for internalization and sentient self-diremption. Heidegger and others have emphasized the importance of this capacity. Suppose, for example, a set of car keys drops through a grate, down into a large sewer drain, out of sight. The drain is not too deep, so we borrow a coat hanger and “feel around” for the key ring down in the drain where we cannot see a thing. What happens here is that we employ the coat hanger as a probe, and in doing so our awareness of it—our “grasp” of it—becomes non-objective. In carrying out the activity of probing, we are not aware of the coat hanger—it is transparent to awareness. We are aware of objects experienced *through* the coat hanger, as it were—the coat hanger becomes a vehicle of our consciousness.

18. Cf. PATTERSON, *supra* note 3, at 148.

19. This accounts for a theme often struck in reflections like the following:

The best law school graduates who came into my law firm (Paul, Weiss, Rifkind, Garrison & Wharton of New York City) were not ready to do the

In conclusion, two observations about Patterson's critical program are in order: (1) the case made in *Law and Truth* against all forms of "interpretive universalism" is strong indeed, and his Wittgensteinian analysis of the essential role of non-interpretive rule-following is both significant and convincing; and (2) in 141 of the book's 182 pages, the *only* account of showing the truth of legal propositions is this non-interpretive, instrumental account. It is difficult to avoid the impression that Patterson takes Wittgenstein's insight into calculative rule-following to be adequate *by itself*, as an account of what is involved in showing the truth of a legal proposition. As we shall see, this impression is qualified in the context of his argument against "recursion to conscience," but the qualifications do not amount to denial that truth determination in law is always and only a non-interpretive process.

C. THE RECURSION TO PRIVACY OBJECTION

We come away from Patterson's first two objections with three fairly well established claims: (1) that legal truth should be understood as "warranted assertion," (2) that "warranted assertion" is determined by use of the forms of argument, and (3) that use of the forms of argument is a non-interpretive activity. These ideas about legal truth are expanded in the last part of Chapter 7. To understand the expansion we need to review some of the history connected with Phillip Bobbitt's conception of the forms of argument. I shall not repeat here the clear description of these summarized in *Law and Truth*; it will be sufficient to say, perhaps, that in a 1979 publication, Bobbitt developed the idea that one can translate all the assertions in a well-formed judicial opinion into one of six "modes" or "forms" of argument. Taken together, these were understood as constituting a "system," which functions as the "grammar" of constitutional argument. The modes themselves were regarded as neither true nor false, but as elements of the legal system toward which commitment is required—principles which constitutional practitioners *rely upon* to establish truth or falsity. The attitude of reliance was taken as precluding questions about truth or falsity, and commitment to the forms of argument was understood as part of what constitutes the "internal point of view" upon which a constitutional regime depends, not something we try to support in the way we do when we argue that some legal proposition is true or false.

After publication of *Constitutional Fate*, in which the idea of a "grammar" of constitutional argument was developed, Bobbitt's work was subjected to the kind of scrutiny normal for recognition of a major contribution to jurisprudence. As a result of this scrutiny, he acknowl-

multiple tasks a practicing lawyer must do in trial work or office work. No amount of additional or different academic training in a university setting would have made them ready. The apprenticeship period for the young lawyer will continue because it is the only way trial lawyers are made.

Morris Abram, *quoted in* JAMES B. WHITE, *THE LEGAL IMAGINATION* 941-42 (1973).

edged a serious shortcoming in the original work: failure to address the problem of conflict between and among the modes. In a book published ten years after the original work, Bobbitt concludes not only that such conflict is inevitable, but that modal arguments are not commensurable, meaning that conflicting outcomes derived from them cannot be brought into harmony and/or assessed by any single measure or method of evaluation.

How do we justify the result of a constitutional decision in a particular case? It would appear that the incommensurate nature of the various modalities of argument that enable legitimation makes such an assessment impossible. For if these modes lead to different outcomes, we have no rule that enables us to choose among them This is the "contradiction" so beloved of law professors generally, and especially the theorists of the Critical Legal Studies Group.²⁰

Bobbitt concludes that so far as the "grammar" of constitutional argument is concerned, at least in some cases it will be impossible to say that one outcome is legally better than another. Legal argument, in other words, is modular in nature; each mode of argument develops in a different way with no assurance that its conclusion will be compatible with the outcome of other modes of argument. Where divergence of outcome is extreme, a case cannot be resolved apart from reliance on a judge's personal sensibility.

A judge who never felt the constraints of the various modalities, who felt that any decision could be satisfactorily defended, would be very foolish and very unimaginative. Only a law student or a law professor could say that "everything can be defended" or that "it will always be possible to find" convincing ways to make a set of distinctions look credible. . . . And yet, in difficult cases, these constraints are not determinative. The case must be *decided*.

What justifies the sensibility that makes such a decision, if, as I have claimed, it is not made according to a rule? There are no grounds independent of the sensibility that is judging those grounds. We can say only: these are the sensibilities we have.²¹

What is important about this development in Bobbitt's thought is that, in so-called "hard" cases, resolution of the problem of modal conflict must occur by appeal to conscience and individual decision—*outside* the orbit established by use of the forms of argument.

This system [the system of constitutional adjudication] . . . requires individual decision precisely because the modalities conflict. The result is not any less law because the outcome is not the same for all deciders; indeed it could not really be law, it could not follow the forms of argument and recognize their character as modalities, if it were any other way. The space for moral reflection on our ideologies is created by the conflict among modalities, just as garden walls

20. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 164 (1991).

21. *Id.* at 167-68.

can create a space for a garden.²²

In Chapter 5 of *Law and Truth*, Patterson decisively rejects Ronald Dworkin's "protestant" understanding of interpretation, i.e., the claim that in deciding between legal outcomes, each of which has passed a certain threshold of fit with established law, one must rely on personal judgment, especially judgment about what constitutes political morality.²³ In light of this rejection, Patterson's reaction to Bobbitt's position is predictable: Bobbitt's "recursion to conscience and individual decision" is unacceptable because it involves appeal to knowledge that is essentially private.

The force of Patterson's criticism of "private knowledge" merits attention here. Most people would agree that a person's intention to make a phone call immediately after a meeting is private, in the sense that the person is the only authority for knowledge of that intention. We are our own authority for the truth of first-person avowals of intention and feeling, including moral feeling or conscience. *Descriptions* of personal experiences, however, involve subsumption of the experience under a concept, e.g., the experience of "an intention," or of "excitement" or of "moral outrage." Wittgenstein stressed that all concepts must have criteria and that those criteria must be matters of intersubjective agreement, even when the *experience* described by a concept is essentially personal and private.²⁴ Patterson stresses this point about the public nature of criteria in the application of legal concepts.

The use of the modalities is a practice—they (and the ways they are used) are public, cultural property. This means that the truth of a constitutional proposition is not a function of what anyone thinks or believes about the proposition; rather, one uses the modalities of argument to show the truth of the proposition. Because the modalities of constitutional argument are public coin, no private meanings are possible. . . . Conflicts among the modalities are resolved not by what individuals decide, but by what they ultimately accept as an adequate resolution of modal conflict. No particular resolution of modal conflict springs forth from conscience as a fully formed resolution, as persuasion—not conscience—ultimately drives choice²⁵

Reference to "persuasion—not conscience" in this passage signals development of an alternative to Bobbitt's conception of conflict resolution among forms of legal argument. To the questions, "When modal conflict occurs, where does the discussion or argument go at this point?" and "What is the next step in the process?" Patterson responds with his own account of interpretation.²⁶

22. *Id.* at 177.

23. See PATTERSON, *supra* note 3, at 85.

24. See *supra* note 16 and accompanying text.

25. PATTERSON, *supra* note 3, at 144-45.

26. See *id.* at 145 n.78.

III. MODAL INCOMMENSURABILITY: A "COORDINATION PROBLEM"

In the last section I noted that a linear reader of *Law and Truth* will have finished more than two-thirds of the text before reaching Patterson's discussion of modal conflict. I also noted that the only conception of modal argument presented in this portion of the book is the conception derived directly from Wittgenstein's discussion of the non-interpretive nature of calculation. Only after rejecting Bobbitt's recursion to conscience does Patterson, for the first time in *Law and Truth*, directly confront the issues inherent in modal conflict and incommensurability. This confrontation sets in motion an important modification of his non-interpretive model of legal argument.

What is missing in Bobbitt's otherwise compelling account of the practice of constitutional law is some description of the practice of persuasion that is so much a part of constitutional law and law generally. How is it that lawyers convince one another of a particular reading of the law when the meaning of law is put in question? Why is one rendering of modal conflict followed by some courts or judges and not others? It is an obvious and important feature of law that the merits of a single judicial decision play no role in the wider discourse of law unless and until another judge finds the reasoning persuasive. The cultural methods and resources for persuasion simply cannot be ignored.²⁷

But of what does the "practice of persuasion" consist? Patterson addresses this question directly:

How, in law, do we move from contradiction to truth? I have suggested that Quine's metaphor of science as a "total field of force" is the best way to think of legal interpretation. . . . [I]n law, it is misleading to speak of the truth of a proposition of law in isolation from other propositions within the legal "web of belief."

In choosing between different interpretations, we favor those that clash least with everything else we take to be true. . . . In law, we choose the proposition that best hangs together with everything else we take to be true.²⁸

The language in this passage is a telling example of Patterson's eclecticism. First, he appears to affirm Bobbitt's incommensurability claim about modal argument: He speaks of moving from "contradiction," not merely from conflict, among the forms of argument.²⁹ He cites with approval Fallon's claim that constitutional law has a "commensurability problem."³⁰ His objection is to Bobbitt's claim about the necessity of recourse to privacy, not to his incommensurability claim.

27. *Id.* at 145-46.

28. *Id.* at 172.

29. "Contradiction" is the term Bobbitt uses to describe the condition connected with his own claim of incommensurability and with the understanding of legal argument affirmed by the Critical Legal Studies Group. *Cf.* BOBBITT, *supra* note 20, at 164.

30. *Cf.* PATTERSON, *supra* note 3, at 143.

Second, Patterson introduces a new element into the “use of legal argument” picture, a distinct form of argumentative practice designed to determine choice among conflicting outcomes flowing from the use of the forms of argument. Two features of the practice are significant: (1) it is *interpretive* in nature, categorically distinct from the non-objective, non-inferential legal understanding emphasized in his objection to interpretive universalism; and (2) it is not governed by the forms of legal argument, but by a measure described as “fit with what is not in question.”³¹

Legal argument [in interpretation] is “horizontal” in nature. When a problem in some aspect of the argumentative field arises, solutions are measured not against a practice-transcendent ideal but by the degree to which the proposed solution fits with everything not then in question.³²

In situations where, *a lá* Bobbitt, modal arguments are incommensurable, Patterson proposes to graft a “Quine-like” account of belief confirmation onto his non-interpretive, essentially “Wittgensteinian,” account of legal understanding and argument. The account of “showing the truth of a legal proposition” which emerges can be described roughly as follows: Ordinarily the truth of a legal proposition is shown through reliance on what we shall call “primary legal argument.” This kind of activity is emphasized throughout most of the book and illustrated in his discussion of the “lease” case.³³ Speaking of the activity involved in showing legal propositions to be true in that case, Patterson says: “This way of accounting for legal knowledge provides no opportunity for interpretation to take hold. The reason interpretation never takes hold . . . is that there is no occasion for it—the need for interpretation simply does not arise.”³⁴ The lawyer here acts “under the aspect of normativity,” i.e., in a way determined by the content of the Uniform Commercial Code; no reflection, no interpretation, no inference is called for.

In addition to “primary legal argument,” there is, for Patterson, a second type of activity involved in truth determination, which we shall call “secondary argument.” It is “secondary” in the sense that it always stands as a *successor* to the use of the forms of legal argument—more exactly it is a successor to *conflict* among or about the forms of argument.³⁵ It may also be “secondary” in its significance for truth determination, which will be discussed further below.

What I want to highlight about this account is the inherent difficulty of coordinating Bobbitt’s claims about incommensurability with Quine’s claims about belief conservation.

Three points emerge from this strain of analysis:

31. *Id.* at 179.

32. *Id.*

33. See Section IIA, *supra*.

34. PATTERSON, *supra* note 3, at 179.

35. This form of argumentative practice is discussed by Patterson in connection with Warrants 1 and 2—where he is concerned with choice among plausible legal outcomes. *Id.* at 171-72.

(1) For Patterson, use of the forms of legal argument is the sole and only instrument of truth determination.

(2) These forms are incommensurable, i.e., in some cases the use of modal arguments produces divergent outcomes and no single measure is available for deciding between such outcomes.

(3) On the other hand, Patterson says that in cases where the outcome of modal arguments conflict, (notice the predicate "conflict" here, not "are incommensurable") the practice of persuasion comes into play. A practice which is governed by the principle of belief conservation, i.e., the principle that, when faced with a choice among plausible outcomes, one chooses the outcome which "best fits with what is not in question."³⁶

The consequence of combining (1) and (2) with (3) is an equivocal account of truth; that is, Patterson takes from Bobbitt the claim that the forms of argument—the sole and only instruments of truth determination—are incommensurable. He also takes from Quine the claim that choice among plausible outcomes is governed by the principle of belief conservation. The latter claim, which is essential to Patterson's account of interpretation, provides a single measure, (belief conservation) in terms of which conflict among forms of argument can be assessed and choice among them can be determined. The availability of such a measure is just what incommensurability precludes.³⁷

An important question raised in *Law and Truth* is: How is *each* of the two types of legal argument—non-interpretive and interpretive—related to *truth determination*? The answer to this question will determine whether interpretative argument in law is "secondary" to non-interpretive argument in legal significance. Are propositions established by each of these types of argument on the same footing, i.e., do they have the same status as truth or warranted assertion? Or is interpretive truth somehow diminished in being mediated by interpretive activity? Is it less certain and/or less reliable, for example, than truth established by "primary legal argument?" How certain must interpretive truth be in order to be "persuasive?" And how can we know when such a threshold of certainty is reached?

Questions also arise about the measure or measures of confirmation at work in legal interpretation. As we have seen, the most prominent measure mentioned in *Law and Truth* is "fit with what is not in question."³⁸ This seems to be very close to one of the "virtues" discussed by Quine when he describes the criteria at work in choosing among various plausible hypotheses, viz. the virtue of belief conservation.³⁹ In *The Web of Belief*,⁴⁰ which Patterson cites with approval, Quine lists other virtues as

36. *Id.* at 179.

37. Cf. BLACKBURN, *supra* note 1, at 69 ("Two things are commensurable if they can be ordered by some single measure.").

38. PATTERSON, *supra* note 3, at 179.

39. *See id.*

40. W.V.O. QUINE & J. S. ULLIAN, *THE WEB OF BELIEF* 66-68 (1970).

well, e.g., "modesty," "simplicity," "generality," and "refutability."⁴¹ Do these figure in legal conflict resolution in addition to belief conservation?

Along these lines it is worth noting that, in connection with arguments of Eskridge and Posner, Patterson refers approvingly to "rule of law virtues."⁴² What are these? Do they function as criteria in legal interpretation? If so, how are they related to the criterion of "fit with what is not in question?"

Law and Truth provides little to go on in attempting to answer questions like these. They are nonetheless important. Patterson says that when the forms of argument conflict, one chooses in light of "what is not in question" plus, on some occasions at least, certain "rule of law virtues." Part of the unfinished business of *Law and Truth* is an explanation of how interpretation works and how it is related to "primary legal argument."

We should, perhaps, repeat in closing that the "equivocal" account of "showing the truth of a legal proposition" is not entirely a matter of Patterson's own doing but is a condition imposed by an attempt to combine two approaches to truth determination which are essentially incompatible—that of Bobbitt and that of Quine. Patterson clearly distinguishes his understanding from Bobbitt's claim to the necessity of recursion to privacy. However, absent a similar distinction between this understanding and Bobbitt's incommensurability claim, coordination with Quineian belief conservation does not seem possible.

IV. IMPORTED PROBLEMS

A. THE SCOPE OF INTERPRETATION

As we have seen, for Patterson, interpretation enters the jurisprudential arena *only* when (1) the forms of argument conflict, *or* (2) one or another of the forms is called into question. "Interpretive endeavor," he says, is *confined* to problems inherent in use of the forms of argument.⁴³ In my view, this understanding of legal interpretation is much too narrow. In this section, I explore the ideas that the undue restriction can be understood as a problem "imported" into *Law and Truth*, and that, in fact, the scope of interpretation extends beyond the forms of argument to "interpretive endeavor[s]" of several different kinds.⁴⁴

Patterson is surely correct when he points out that either modal conflict or calling a form of argument into question can cause the kind of breakdown in non-interpretive argumentative practice to which interpretation is a response. The pattern at work in a development of this sort—break-

41. *See id.* at 68-82.

42. On the subject of "rule of law virtues" one passage which I find particularly confusing is the following: "Notice that the ground of Posner's criticism is the rule of law virtues. The *form* of Posner's criticism is that Calabresi's proposal is too inconsistent with our fundamental beliefs, specifically separation of powers." PATTERSON, *supra* note 3, at 176. Is separation of powers regarded here as a "rule of law virtue?"

43. *See id.* at 174.

44. *See id.* (where the term "interpretive endeavor" occurs).

down of meaning, followed by breakdown of non-interpretive legal argument, followed by a reflective effort to repair meaning—seems applicable over a very wide spectrum of legal thought and conduct. Legal practice is essentially adversarial, and, as such, it regularly entails the sort of “calling into question” which causes “breakdown” in (non-interpretive) attitudes and activities. Doubt, the friend of legal adversaries, is the enemy of un-critical, non-interpretive attitudes, and doubt-raising is among the most valuable of legal skills.

While it is true, I think, that the forms of legal argument are vehicles of legal meaning, which, under the condition of doubt, can become objects of interpretation, they are not the *only* vehicles. Consider the following example: A federal appellate court had to decide whether the Federal Drug Agency’s criticisms of quality-control methods used in certain tests, relied on by the manufacturer of a diet pill, were “reasonable” or “arbitrary.” In explaining his conclusion that the criticisms were “reasonable” and “non-arbitrary,” a judge in the case said that he arrived at that conclusion because the facts referred to in the criticism had “some basis in the record,”⁴⁵ and because these facts in addition to policy concerns “could lead a reasonable person to make the decision the agency had made.”⁴⁶ There is nothing strictly legal about the “warranting conditions” for this conclusion, nor is employment of the forms of legal argument required for decision on this particular issue. Of course, in the end, the judge’s decision will depend on legal considerations; but on the point in question—the issue of “reasonableness”—don’t we want to acknowledge that interpretation occurs? And don’t we want to say that the interpretation counts toward, and contributes to, the final legal outcome in an important way?

I think Patterson’s conception of interpretation should extend beyond examples of this sort, to use in legal reasoning of what Hart calls “open-textured” legal terms.⁴⁷ Surely interpretation is required if one is to “go on”—in Wittgenstein’s sense of progressing in thought—in situations of the sort Hart describes in his famous “vehicle in the park” case.⁴⁸ As obvious as this seems, *Law and Truth* appears committed to restriction of interpretation to just two types of “interpretive endeavors:” (1) situations where use of the forms of argument conflict, and (2) situations when one of the forms of argument is called into question.

The only reason I can think of for this restriction is a constraint supplied by commitment to a conception of legal meaning, in which (1) meaning is determined only by use, and (2) “use” is *always and only* understood as modal argument. It seems especially difficult to understand how this conception of meaning can apply to cases in which variable-stan-

45. FRANK M. COFFIN, *THE WAYS OF A JUDGE* 150 (1980).

46. *Id.*

47. See H.L.A. HART, *THE CONCEPT OF LAW* 124-25 (1975).

48. See *id.* at 125-26.

dard legal terms, like "reasonable person" and "good faith," are employed.

A more philosophical way of putting this problem is that, while it is helpful to think of legal argument as engaging in a kind of language game (a distinct way of using language), we should not be misled by this. Language games are *language* games, and truth in the legal language game cannot be reduced to legal use. The idea that meaning is determined by use has gained wide acceptance, but the claim that meaning of any particular kind can be reduced to use is difficult, if not impossible, to support. One reason for this is that specialized uses of language, as we find in science and law, are parasitic upon ordinary uses of natural languages; ordinary usage is *incorporated* in specialized uses of language. Criteria for truth derived from such usage—whatever those are—enter into specialized uses of language.

One problem with an over-reliance on the notion of "meaning as use" has been identified by Putnam.⁴⁹ He has observed that, in their zeal to give "meaning as use" its proper due, Wittgensteinians often miss the fact—or at least fail to emphasize the fact—that a simple lexical definition is often all we need to know, i.e., to have learned, in order to understand *how a word is used*.⁵⁰ There is a great deal of what he calls "stage-setting" involved in such knowledge; however, he says,

it is rarely stage-setting specifically designed to enable one to learn the use of *this* word. The fact that one *can* acquire the use of an indefinite number of new words, and on the basis of simple "statements of what they mean," is an amazing fact: it is *the* fact . . . on which semantic theory rests.⁵¹

What is important for present purposes is this: We *rely on* established lexical meanings in legal argument in exactly the same way that we rely on, accept, and are committed to forms of legal argument. When, for whatever reasons, lexical meaning is called into question in the course of legal argument, the same kind of hiatus-in-thought occurs as when the forms of argument conflict, i.e., the non-interpretive attitude breaks down, calling for what Patterson calls "interpretation."

One can surely avoid the pitfalls of "interpretive universalism" and at the same time recognize that legal interpretation is quite extensive in scope, stretching considerably beyond the limits assigned to it in *Law and Truth*. It is difficult to see how the scope of interpretation can be extended much beyond the limits thus set, however, so long as Patterson's commitment to the doctrine of "meaning as use" is as unyielding as it sometimes seems.⁵²

49. See HILARY PUTNAM, *MIND, LANGUAGE AND REALITY* (1975).

50. See *id.* at 149.

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

52. Cf. PATTERSON, *supra* note 3, at 181.

I have argued that law is a practice of argument. As such, propositions of law do not have "grounds." The nerve of law is legal argument: the forms of legal argument are the culturally-endorsed modes for showing the truth of

B. THE LIMITS OF LAW PROBLEM

1. Introduction

This section discusses a difficulty in *Law and Truth* which can be called the "limits of law" problem. Joseph Raz states the problem in this way:

Most people tend unreflectively to assume that laws belong to legal systems This includes for most people the assumption that laws differ from non-legal rules and principles. There are, for example, moral rules and principles, social customs, constitutions and regulations of voluntary associations, and so on, which are not laws. Many legal philosophers have tried to justify this common assumption. Various criteria have been offered for demarcating the limits of law, for testing whether or not a particular standard belongs to a particular legal system. Various suggestions have been made concerning the importance of the distinction between what is legal and what is not, and the ways in which, by preserving it, we promote our understanding of law and society. For it has often been acknowledged that the distinction is not an easy one to draw in precise terms, and that any reasonable test would admit the presence of borderline cases.⁵³

Raz observes that making a distinction between what is legal and what is not—or in Patterson's terms between legal propositions which are true and those which are false—has, so far, proved to be less than a complete success. This section will examine that problem as it arises in *Law and Truth*, in order to show that, like the problem of the scope of interpretation, that difficulty is an "imported" problem—in this case one derived from difficulties which attend Bobbitt's notion of the grammar of legal argument.

2. Permeability of the Forms of Argument and the Limits of Law Problem

In order to understand the "limits of law problem" in *Law and Truth* we need to consider, in some detail, the nature of modal argument. Bobbitt distinguishes between arguments that:

- (1) *rely on* the framers' intent in producing an established legal text
— this is the Historical form of argument;
- (2) *look to* the common sense meaning of a text
— this is the Textual form of argument;
- (3) *infer rules* from the structure of a text
— this is the Structural form of argument;
- (4) *apply rules* generated by precedent
— this is the Doctrinal form of argument;
- (5) *derive rules* from the moral commitments of the American ethos
— this is the Ethical form of argument;
- (6) and *seek to balance* costs and benefits of applying a rule

propositions of law. It is in the use of these forms that the practice is to be understood. Their use in practice is the law.

Id. (emphasis in original).

53. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

— this is the Prudential form of argument.⁵⁴

Notice that (1) through (4) are legal-specific in nature; that is, they are derived from institutionally established legal texts and/or legal decisions. Ethical and Prudential forms of legal argument, on the other hand, are not derived in this way. There is nothing specifically legal about the moral commitments of a community, nor is there anything particularly legal about prudence in balancing the costs and benefits of applying a legal rule. It is true that, in order to have legal relevance or to count as a form of legal argument, commitment to a moral rule or principle must somehow have found legal expression. However, the *source* of such a commitment is not to be found in legal institutions per se—that is the point of Bobbitt's reference to the "American ethos." Similarly, assessing the consequences of applying a legal rule is largely an empirical, not a legal, consideration. To be sure, consequences for the legal system count in such assessment, but social consequences of many different sorts count as well.

Viewed from a strictly philosophical point of view, one can say, perhaps, that moral standards derived from a variety of sources—utilitarian and natural law analysis, for example, can be incorporated into the "grammar of legal argument" without difficulty. The forms of argument, in other words, are pervious to extra-legal considerations. Since nothing within the grammar prevents one or another of the forms from taking on *overriding* significance, either a committed utilitarian or a natural law theorist could be a fairly happy camper in Patterson's "field of legal force" created by the modalities of legal argument. That the forms are penetrable in this way may account, at least in part, for modal conflict.

Viewed from a strictly grammatical point of view—the point of view taken by someone attempting to describe the "limits of law"—recognition that a set of limits is pervious to extra-legal considerations is unsettling, because it threatens the success of the grammatical project itself—finding a way to distinguish clearly between propositions that are true as a matter of law, and those that are not.

In Part II, we saw that Patterson regards truth as internal to, and determined by, a system of practice. Internalist conceptions of truth—whether scientific, aesthetic or legal—depend in a crucial way on identification of the practice in question *as a system*, i.e., on defining its limits. Successful resolution of the "limits of law problem" is thus an essential part of any jurisprudence which relies on the idea that law is autonomous—formalism, positivism and Wittgensteinian jurisprudence of the Bobbitt-Patterson type, for example. I take affirmation of the autonomy of law—in some sense of that term—to be a central claim in *Law and Truth*. However, given the permeability of the forms of argument as described above, I am unsure how this claim can be sustained within the framework laid out in *Law and Truth*.

54. BOBBITT, *supra* note 20, at 12-13.

V. CONCLUSION

This paper began with the observation that works of jurisprudence are characteristically constructed out of elements derived from other works, and that eclectic projects can turn out to be achievements of notable value. This observation needs to be supplemented by noting that the eclectic achievements of worth are those which perform a constructive function, which unify and solidify, rather than dissipate, the energies of exposition, analysis and argument.

The bulk of discussion in Parts III and IV, above, had to do with difficulties and tensions which arise in *Law and Truth*—features of the work which, left as they stand, seem to threaten the unity and coherence of the work. One task of participants in a symposium like this is to identify features of this sort, but it would be a mistake to end discussion of *Law and Truth* on this note. A fact of overriding importance is that, while Patterson's hold on the problem of legal truth is derived from multiple and diverse sources, it is, nonetheless, an original hold. This theme was lightly struck in Part II, where I commented that the "verve" and "bite" one experiences in reading Patterson's critical analysis of various forms of recent jurisprudence is due to the presence of a certain order and system of ideas; and, in closing, I want to echo this remark as a way of registering my sense of the eclectic accomplishment in the book.

In the course of discussions above, I remarked several times on the preponderance of criticism in this work, but it is important to notice that Patterson studiously avoids criticism which is merely *ad hoc* or occasional. He accomplishes this adroitly by tying together critique of various positions in ways which suggest a coherent and distinct alternative. This "tying together" sometimes consists of repeating the same critical point in discussion of different positions. For example, the "recursion to privacy objection" is repeated in criticism of both Dworkin and Bobbitt. The net effect is to suggest that certain difficulties, mistakes, and misconceptions are *shared* across very different lines of jurisprudential thought—mistakes and misconceptions, however, to which an alternative is readily available—in this case, a proper understanding of the role of inter-subjectivity in truth determination.

To this comment about the unifying way in which criticism is carried out, I would add that the range of positions covered in *Law and Truth* is quite large. If a jurisprudentially uninformed reader should need a single source of information about recent philosophy of law, one could hardly do better than to recommend the descriptive sections of Chapters 2 through 7. Brief as they are, these sections are well-illustrated renditions of often complex and difficult philosophical positions, renditions which, without exception, are hooked together in the way described above. Where else, for example, is one likely to find a clear and reasonably brief account of Weinrib's formalism connected by way of critique to Ronald

Dworkin?⁵⁵

In short, it is Patterson's scheme of critical and constructive ideas that gives *Law and Truth* its particular purchase on the problems of legal truth. While the scheme is derivative in nature—that has been my primary theme—it is original as well, and represents a distinct concatenation of ideas. In the end, it is this originality of critical program and constructive vision that carries the work, giving unity and direction to a very wide range of jurisprudential positions and arguments. Whether the program hangs together with sufficient coherence to form the basis of a strong, constructive alternative to other forms of jurisprudence may be an open question; but that it does hang together is surely clear in a close reading of the text. That is the main reason why it is a work to be reckoned with, no matter how our disagreements and agreements turn out.

55. See PATTERSON, *supra* note 3, at 78, n.51.

