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LAW AS A SOCIAL FACT: A REPLY TO PROFESSOR MARTINEZ

*Dennis Patterson**

Philosophy's struggle with the concept of truth has been both protracted and vigorous. Since Plato, one picture of truth—perhaps the dominant view—has been that truth is a matter of verisimilitude or convergence of one thing and another. In modernity, truth has attained its most capacious development in the context of scientific inquiry. Before Fleck, Kuhn, and Feyerabend, no philosopher had mounted a serious attack on the idea that scientific truth is a matter of convergence between a proposition and some state of affairs in virtue of which the asserted proposition is made true—Realism. Since the early days of scientific empiricism, the humanistic disciplines have struggled in the shadow of the natural sciences. One need only recall the protracted efforts of Freudian psychoanalysts to claim scientific status for their speculations in order to appreciate the pervasive hold of the scientific aspiration.

The theoretical struggles between scientists and humanists take many forms. One persistent debate has been over the nature of the object of study for each. On the one hand, there are those who, like myself, believe that the object of the natural sciences is of a fundamentally different order than that of art criticism or literature. George Steiner notes well the distinction between the scientific and nonscientific disciplines with the observation that in the nonscientific disciplines, "theories"¹ are never falsified, they just fend off the competition.

Consider Aristotle's theory of rhetoric. It cannot be said to be a "theory" in the sense that, say, Copernicus's account of planetary

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1. See GEORGE STEINER, *REAL PRESENCES* 72-77 (1989).

Two indispensable criteria must be satisfied by theory: verifiability or falsifiability by means of experiment and predictive application. There are in art and poetics no crucial experiments, no litmus-paper tests. There can be no verifiable or falsifiable deductions entailing predictable consequences in the very concrete sense in which a scientific theory carries predictive force.

Id. at 75.

motion is a theory. The essential difference between the two is that scientific theories can be tested in the realm of experiment and their hypotheses confirmed or not. There is no analog in Aristotle's account of rhetoric to the scientific hypothesis. Nothing can show Aristotle's theory of rhetoric to be "false." No evidence can be marshalled "for" or "against" it. The propositions of Aristotle's rhetoric are not apt for confirmation in the ways of science.

Against this background, some philosophers have wanted to say that nonscientific propositions cannot have truth values.² Because scientific propositions assert facts, their truth or falsity depends on states of affairs in which the asserted propositions are true or false. Because there are no nonscientific "facts," no nonscientific proposition can be either true or false. Hence, truth is a concept inappropriate to the nonscientific realm.

This brings us to Professor Martinez's interesting commentary on recent work in legal theory, including my own, regarding the nature of truth.³ The specific philosophical question which I consider is what it means to say that a proposition of law is true. First articulated by Ronald Dworkin,⁴ this question asks us what we mean when we say that a claim about the current state of the law is correct or incorrect, accurate or inaccurate, true or false. Of course, this question is one of general philosophical interest, for it always makes sense to ask what it means to say that someone is doing something correctly or not in any field of endeavor, as in painting, finance, or politics.

Professor Martinez's article is a critical piece: He finds fault with my account of the nature of truth in law.⁵ Professor Martinez correctly states that my work is informed by the approach to the philosophy taken by Wittgenstein after 1929.⁶ Having made the genetic identification, Professor Martinez proceeds to raise questions about this approach to jurisprudence by adverting to questions raised by philosophers about the genetic prototype, Wittgenstein's work. In

2. See ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1946).

3. George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 *LOY. L.A. L. REV.* 545 (1996).

4. *Introduction to THE PHILOSOPHY OF LAW* 1, 5-9 (R.M. Dworkin ed., 1977) (discussing the idea of "truth" with respect to legal propositions).

5. Martinez, *supra* note 3, at 572.

6. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1968) (containing a collection of philosophical concepts Wittgenstein observed over a period of 16 years).

short, Professor Martinez wants to carry over to jurisprudence general criticisms of the work of Wittgenstein. I do not think this a very fruitful way to critique a jurisprudence.

General philosophical objections rarely have a direct and discernible impact on jurisprudential issues. For example, none of the objections raised by Professor Robert Fogelin⁷ to Wittgenstein's later philosophy has any direct bearing on issues in legal theory. For these criticisms to have an impact, one must show how they solve a given problem or answer some question. I do not see Professor Martinez forging the necessary connections. However, Professor Martinez has some quite specific criticisms of my approach to the question of truth in law. It is to these that I wish to respond.

The first of these criticisms concerns the development of what, following Alasdair MacIntyre,⁸ Professor Martinez characterizes as "new conceptual schemes."⁹ The gravamen of Professor Martinez's argument is that jurisprudence must not limit itself to the description of our existing justificatory practices, for those very practices have the effect of marginalizing certain groups and oppressing their members. In short, it is the task of jurisprudence to "develop perspectives of the oppressed to infiltrate dominant legal institution[s]."¹⁰

Well, alright. Who could be against liberation of the oppressed? There is nothing in my work,¹¹ nor the work of any other "New Wittgensteinian," which argues against liberation of the oppressed. It is a mistake to see the Wittgensteinian perspective as somehow at odds with emancipatory projects. In fact, it is perfectly consistent to be a philosophical Wittgensteinian and a political radical. Indeed, it probably helps to have a Wittgensteinian perspective on the jurisprudential issues, because in order to show that one is truly engaged in the work of liberation, one first has to give an account of what from which one is liberated. A jurisprudence which can identify the true state of the law appears to be just the sort of thing one might wish to have.

7. See ROBERT J. FOGELIN, *WITTGENSTEIN* (Ted Honderich ed., 2d ed. 1987) (cited by Martinez, *supra* note 3, at 548).

8. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

9. Martinez, *supra* note 3, at 567.

10. *Id.* at 570.

11. In fact, I argue that feminism can be reconstructive and critical, even from a postmodern point of view on truth. Dennis Patterson, *Postmodernism/Feminism/Law*, 77 *CORNELL L. REV.* 254, 256-58 (1992).

We now come to the area of greatest disagreement, that of truth. In the section of his essay devoted to "Truth," Professor Martinez quotes me for the proposition that "a proposition of law is true if one can show that one is correctly using the words in question."¹² He further states that, in my view, "there is nothing more to be said about the truth of a proposition of law than advancing the reasons for its assertion."¹³ From these quotations, Professor Martinez draws the conclusion that for me, truth equals justification.¹⁴ It is the identification of truth with justification that Professor Martinez contests.

The relationship of truth to justification is a complicated affair. In traditional terms, truth is a metaphysical relationship and justification an epistemic one. For example, I may be justified—in other words, have good reasons—in believing that my child is at school, although that belief is false, because, for example, she has skipped classes to be with her friends. Justification of belief is a matter of evidence. Truth is a matter of what is the case. Because I do not employ the concept of justification in the epistemic sense just described, I do not believe Professor Martinez's critique undermines any aspect of my position. I hold that the truth of a proposition of law is shown by the use of forms of argument. Forms of argument are the culturally-endorsed modes of appraisal for propositions of law. True, I labeled "justification" the activity of showing the truth of a proposition of law, but nothing in my work suggests that believing—an epistemic state—a proposition of law to be true makes it so. Saying something true requires that, on any given occasion, the speaker uses the words in question in appropriate ways.¹⁵

12. Martinez, *supra* note 3, at 572 (citing Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 289 (1993) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991))).

13. *Id.* (quoting Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 56 (1993)).

14. *Id.*

15. This view is expressed by Hilary Putnam, thus:

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 than 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.

HILARY PUTNAM, *REPRESENTATION AND REALITY* 115 (1988).

Having distinguished between epistemic and metaphysical senses of justification, and having shown that the sense of justification relevant for the present discussion is not epistemic but metaphysical, let me now address the metaphysics of legal justification. This returns us to a theme broached earlier, that of the distinction between the natural and the social.

There are two types of facts: natural and social. Natural facts concern the realm of nature, and are the province of the physical sciences. Scientific activity seeks understanding of the naturalistic realm through the twin processes of observation and experiment. Because law is not a natural fact, observation and experiment have no role in discerning the state of the law at any given time.

Legal facts are institutional in nature.¹⁶ Owing to the institutional nature of legal affairs, understanding law means understanding the social practices we identify as legal. Without social practices, there would be no law. The same is true for all other cultural products, such as money, art, or beauty.¹⁷

Professor Martinez takes issue with my account of the nature of law by contrasting it with a certain picture of the development of law. He states:

The justification conditions for sentences change as our total body of knowledge changes. Thus, not only may we discover that statements we now regard as justified are false, but we may even discover that procedures we now regard as justificatory are not, and that different justification procedures are better.¹⁸

For the reasons given, I think this view of the nature of law is false. Legal facts—what is the case as a matter of law—are not “discovered.” Cures for diseases are discovered through the intervention of the creative scientist. But there are no contracts in the world in the same way there is cancer. The fact that there is cancer in the world depends not at all on us. By contrast, there would be no contracts in the world without the social practice we identify as contract law.

16. For a development of this claim in the context of commercial law, see Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

17. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995) (providing a recent treatment of this topic).

18. Martinez, *supra* note 3, at 572 (citing PUTNAM, *supra* note 14, at 85).

Nothing in this account of the nature of law undermines the possibility of legal facts or the objectivity of law. Rather, it seeks to show that the nature of law is of an order fundamentally different from that of the physical world. For that reason, any account of it must itself be of a different order.

It is always difficult in the space of a short reply to be as complete as one might like in responding to criticism. I believe that one obstacle to fruitful debate over the issues that divide Professor Martinez and myself is the lack of a clear consensus as to what the disagreement is about. In my theoretical work,¹⁹ I have pressed the case against a certain conception of truth in law, one imported from the natural sciences. I believe Professor Martinez relies on this conception in criticizing my position. I hope I have shown why this criticism misses its intended target.

19. A complete statement of my views is found in my forthcoming book *Law and Truth* (Oxford University Press, 1996).