

FROM POSTMODERNISM TO LAW AND TRUTH

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I. INTRODUCTION

Postmodernism and legal truth both merit serious attention. Properly understood, postmodernism provides an accurate picture of the current state of philosophical thought in the Anglo-American tradition.¹ As the reader will notice, my account of postmodernism² bears little resemblance to what passes for postmodernism in departments of literature and the pages of many American law reviews.³

This article has three parts. I begin by explaining postmodernism as a three-fold departure from modernism. Next, I explain how my account of the transition from modernism to postmodernism leads to a new conception of the relationship between linguistic meaning and

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1. For discussion of postmodernism in the context of Anglo-American analytic philosophy, see NANCEY MURPHY, *ANGLO-AMERICAN POSTMODERNITY* 1-2, 7-8, 60-62 (1997).

2. For a more complete discussion of postmodernism and law, see DENNIS PATTERSON, *LAW AND TRUTH* 151-79 (1996).

3. For a lively, provocative, and compelling critique of some familiar forms of postmodernism, see Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

truth.⁴ Finally, as a corollary to the postmodern account of meaning just described, I present an account of the truth of legal propositions.

II. MAPPING MODERNITY

Modernism is traditionally associated with the Enlightenment, the period from the seventeenth to the eighteenth centuries when the authority of Church and Monarch were displaced by “rationality” as the organizational centerpiece of the social order.⁵ Of all the disciplines, philosophy best provides a complete picture of the modernist worldview. There are three dimensions to this view:

1. Epistemological Foundationalism—Knowledge, this concept posits, can only be justified to the extent that it rests on indubitable foundations. René Descartes comes to mind in connection with this view. His opposite is best represented by the skepticism of David Hume;
2. Theory of Language—Language has two functions: It represents ideas or states of affairs, or expresses the attitudes of the speaker. A representationalist work would be Ludwig Wittgenstein’s *Tractatus*.⁶ The ethical prescriptivism of R.M. Hare⁷ is consistent with Wittgenstein’s account of factual discourse but makes a place for ethics as a discourse of recommendation;
3. Individual and Community—“Society” is best understood as an aggregation of “social atoms.” Society is seen as an aggregation of self-interested social atoms (Adam Smith)⁸ or social atoms driven by the forces of class (Marx).

Taken together, these three axes give us the following picture of modern thought:

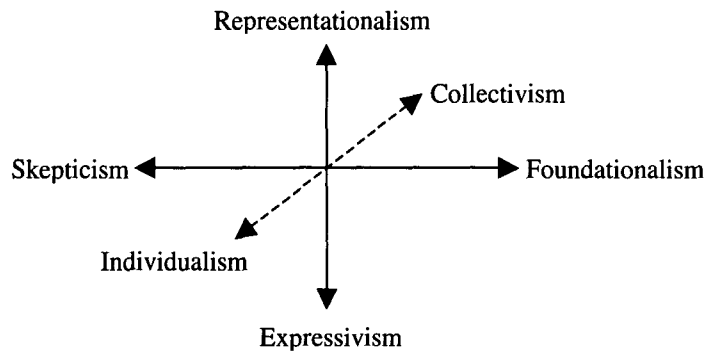
4. Here I side with those in the philosophy of language who believe that truth is best understood from the point of view of meaning.

5. For discussion of this point, see STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 198-201 (1990).

6. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (D.F. Pears & B.F. McGuinness trans., 1961).

7. R.M. HARE, *THE LANGUAGE OF MORALS* 1-16 (1952).

8. See MURPHY, *supra* note 2, at 8.

**FIGURE 1**⁹

III. POSTMODERN THOUGHT

Postmodernism is a matter of transcending the modernist framework without lapsing back into premodern forms of thought.¹⁰ From the point of view of the three axes described above, postmodern thought transcends the framework within which debate occurs over the nature of language, knowledge, and social organization. To be sure, the movement from the modernist picture of knowledge to the postmodern view of the world was a gradual shift in perspective. It is no surprise that the shift begins on modernist terms.

From the seventeenth to the twentieth century, science developed in tandem with fierce philosophical debate over the degree to which “knowledge” is best thought of as empirical knowledge.¹¹ This is due to the empiricist basis of the most influential theory of scientific knowledge—positivism.¹² During the 1950s and 60s, the positivist picture of knowledge began to stress under the pressure of critique.

9. The figure is taken from Nancey Murphy & James Wm. McClendon, Jr., *Distinguishing Modern and Postmodern Theologies*, 5 MOD. THEOLOGY 191, 199 (1989). Each axis represents a debate about a single question. Taken together they form a three-dimensional picture. In this three-dimensional space, it is possible to plot the thought of any modernist thinker along the three dimensions represented by the three different axes.

10. *Id.* at 199. These premodern categories are authority, specifically religious authority, and cosmology—understanding the world on the basis of an explanation for why the universe exists at all, explained by postulating the existence of a deity.

11. The rise of experiment as a central theme in the development of scientific knowledge is discussed in ROBERT JOHN ACKERMANN, *DATA, INSTRUMENTS, AND THEORY: A DIALECTICAL APPROACH TO UNDERSTANDING SCIENCE* (1985). See also PETER GALISON, *HOW EXPERIMENTS END* 13-19 (1987) (reviewing experiments on gyromagnetic effects and the production of scientific knowledge).

12. See DAVID OLDROYD, *THE ARCH OF KNOWLEDGE: AN INTRODUCTORY STUDY OF THE HISTORY OF THE PHILOSOPHY AND METHODOLOGY OF SCIENCE* 168-262 (1986) (tracing the origins of the positivist model of knowledge).

Interesting, the first chink in the positivist armor resulted from a blow that came from within its own ranks, the thought of the philosopher and logician, W.V.O. Quine.¹³ According to Quine, the picture of knowledge as a process of building from the simple to the complex, and the concomitant notion that knowledge is a matter of correspondence between word (concept) and world, had to be discarded. In its place, Quine substituted holism—the view that the truth of any one statement or proposition is a function not of its correspondence to the world, but of the degree to which it coheres with everything else we take to be true. Quine stated his view this way:

The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Reevaluation of some statements entails reevaluation of others, because of their logical interconnections—the logical laws being in turn simply certain further statements of the system, certain further elements of the field. . . . But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to reevaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.

If this view is right, it is misleading to speak of the empirical content of an individual statement—especially if it is a statement at all remote from the experiential periphery of the field. Furthermore it becomes folly to seek a boundary between synthetic statements, which hold contingently on experience, and analytic statements, which hold come what may. Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the

13. See WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20-46 (1953) (arguing against the idea of a “basic” unit of knowledge and urging instead a view of knowledge as embedded in “the whole of science.”); Peter Galison, *History, Philosophy, and the Central Metaphor*, 2 SCI. CONTEXT 197, 203 (1988) (“Quine strongly opposed the total separation of observation from other forms of knowledge; for him, all were up for evaluation.”). For a very quick tour through Quine’s thought, see Hilary Putnam, *Misling*, LONDON REV. BOOKS, Apr. 21, 1988, at 11-13 (reviewing W.V. QUINE, *QUIDDITIES: AN INTERMITTENTLY PHILOSOPHICAL DICTIONARY* (1987)).

system.¹⁴

Quine's picture of knowledge of the external world changed the way people thought about the construction of knowledge. His achievement was to see knowledge not as a matter of foundations—building up from a bedrock (Cartesianism)—but as a function of one's ability to move within a holistic web (be it a web of theory or intersubjective practice). Because Quine changed the picture of knowledge from simplicity, reductionism, and foundations to holism, network, and totality, his epistemology is rightly characterized as "postmodern." Quine's embrace of holism, together with his pragmatism on questions of truth,¹⁵ suggests comparison with the referential theory of language, the second of the three aspects of modernism displaced in postmodernity.¹⁶

When it comes to language, postmodernism¹⁷ does not present arguments *against* the modern, representationalist view.¹⁸

14. QUINE, *supra* note 14, at 42-43.

15. For discussion of this aspect of Quine's thought, see ALEX ORENSTEIN, WILLARD VAN ORMAN QUINE 79-88 (1977) and CHRISTOPHER HOOKWAY, QUINE: LANGUAGE, EXPERIENCE AND REALITY 34-57 (1988).

16. Lest I be misunderstood, I find Quine's empiricism a weak framework for his theory of meaning. While a thorough discussion of Quine's behaviorism and his account of meaning is beyond the scope of this article, I will say that Quine's commitment to behaviorism leads him to dubious conclusions concerning questions of meaning. For an excellent discussion of Quine and Wittgenstein, see MEREDITH WILLIAMS, WITTGENSTEIN, MIND AND MEANING: TOWARD A SOCIAL CONCEPTION OF MIND 216-39 (1999).

17. For discussion of the relationship between language and representation in modernism and postmodernism, see SCOTT LASH, SOCIOLOGY OF POSTMODERNISM (1990). Lash states, "Modernism . . . had clearly differentiated and autonomized the roles of signifier, signified, and referent. Post-modernization on the contrary *problematizes* these distinctions, and especially the status and relationship of signifier and referent, or put another way, representation and reality." *Id.* at 12.

18. The postmodern emphasis is on the question of what can be done with language. See 2 RICHARD RORTY, *Wittgenstein, Heidegger, and the Reification of Language*, in ESSAYS ON HEIDEGGER AND OTHERS: PHILOSOPHICAL PAPERS 50 (1991).

[Donald] Davidson's account of human linguistic behavior takes for granted, as the later Wittgenstein also did, that there are no linguistic entities which are intrinsically relationless—none which, like the "simple names" of the *Tractatus*, are by nature *relata* [sic]. But Davidson's holism is more explicit and thoroughgoing than Wittgenstein's, and so its antiphilosophical consequences are more apparent. Whereas in the *Philosophical Investigations* Wittgenstein still toys with the idea of a distinction between the empirical and the grammatical, between nonphilosophical and philosophical inquiry, Davidson generalizes and extends Quine's refusal to countenance either a distinction between necessary and contingent truth or a distinction between philosophy and science. Davidson insists that we not think either of language in general or a particular language (say, English or German) as something which has edges, something which forms a bounded whole and can thus become a distinct object of study or of philosophical theorizing.

Id. at 58.

Importantly, on a postmodern account of language, reference is not rejected.¹⁹ Reference remains an element of the theory of meaning. But reference only enters the picture *as a function of use*.²⁰ To put the postmodern alternative in a nutshell, the modernist picture of Sentence-Truth-World is replaced with an account of understanding that emphasizes practice, warranted assertability, and pragmatism.²¹

IV. MODERNISM AND LANGUAGE

Of the three axes that comprise the modernist framework, the linguistic axis is of paramount importance for law. In this section, I first describe this axis in more detail. I then advance a postmodern conception of the relationship of language to the world. The final section of the article presents an account of legal justification (argument) from the postmodern point of view.

Broadly speaking, philosophy of language in the modernist tradition attempts to disclose the relationship between the word and the world (realism). In the modernist tradition, the principal function of language is representational—it depicts the way things are. States of affairs, which exist independently of mind, can be portrayed or

Rorty's claim that "Davidson's holism is more explicit and thoroughgoing than Wittgenstein's" is a red herring. Davidson's account of understanding is, in the vocabulary here in use, thoroughly modernist and empiricist—a far cry from the holist and pragmatist reading advanced by Rorty. The central reason Rorty's characterization of Davidson's position cannot be sustained is that, for Davidson, understanding is a matter of empirical theory (an empiricist version of the Heideggerian theme "all understanding is interpretation"). See Donald Davidson, *A Nice Derangement of Epitaphs*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 433 (Ernest LePore ed., 1986).

[C]laims about what would constitute a satisfactory theory are not . . . claims about the propositional knowledge of an interpreter, nor are they claims about the details of the inner workings of some part of the brain. They are rather claims about what must be said to give a satisfactory description of the competence of the interpreter. We cannot describe what an interpreter can do except by appeal to a recursive theory of a certain sort.

Id. at 438.

Thus, understanding another person is a matter of having a theory about the sounds that emanate from her mouth. These sounds are interpreted by reference to a grid which is recursively mapped onto the audible output of the interlocutor. This, Rorty claims, is pragmatism! For a Wittgensteinian critique of shortcomings of Davidson's account of understanding, see STEPHEN MULHALL, *ON BEING IN THE WORLD: WITTGENSTEIN AND HEIDEGGER ON SEEING ASPECTS* 91-122 (1990).

19. The rejection of reference *tout court* is the single greatest failing of more familiar forms of postmodernism.

20. Wittgenstein makes this point in *Philosophical Investigations*. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 29-30 (G.E.M. Anscombe trans., 3d ed. 1958) (discussing broomstick and brush).

21. I develop this idea in the context of normativity in Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325, 326-29 (2001).

represented accurately in speech or thought. In modernist terms, the question "What does this sentence mean?" may be translated as "What state-of-affairs does the asserted proposition purport to depict?"

Wittgenstein's picture theory of language²² is a good example of a representationalist theory of language.²³ Wittgenstein believed that sentences were statements of possible states of affairs.²⁴ For example, the sentence "I am sitting at my computer" expresses a proposition, which can or may correlate with a "state-of-affairs."

The picture theory provides us with one expression of the dominant, modernist view of language as a representational medium. To the degree an asserted proposition depicts reality, the proposition may then be said to be "true." To the degree it fails accurately to depict reality, it is "false." Wittgenstein put it this way: "[T]his proposition represents such and such a situation. It portrays it logically. Only in this way can *the proposition* be true or false—it can only agree or disagree with reality by being *a picture* of a situation."²⁵

A modernist, representationalist account of language declares any given use of language to be successful—that is, it states a truth—if and only if it accurately describes the facts. But what of linguistic

22. See WITTGENSTEIN, *supra* note 7, at § 3.144 ("Situations can be described but not given names. (Names are like points; propositions like arrows—they have sense.)").

23. For a succinct summary of this aspect of the *Tractatus*, see Ian Hacking, *Wittgenstein the Psychologist*, N.Y. REV. BOOKS, Apr. 1, 1982, at 42 (reviewing LUDWIG WITTGENSTEIN, *REMARKS ON THE PHILOSOPHY OF PSYCHOLOGY* (G.E.M. Anscombe et al. eds., G.E.M. Anscombe et al. trans., 1980)).

The *Tractatus* is written as if language had but one function: representing the world. That creates a problem to which the book addresses itself. How is it possible to represent a nonlinguistic world in words? The opening sentences begin the answer. "The world is the totality of facts, not of things." When the penknife is to the left of the snuffbox, we tend to think of two things, the knife and the box. We think of a world made up of things like penknives that can be arranged in various ways. Not so, says Wittgenstein: the world consists simply of a set of facts, like the fact that the knife is to the left of the box. This is not to deny that there are things, such as penknives. It says only that the totality of facts is all there is to the world. Once that totality is given, you add nothing more by saying, "and there are things too, such as snuffboxes." This idea of the world begins to explain how representative language is possible. Propositions represent the world by picturing the structure of the facts. This idea has been called "the picture of theory of meaning."

Id.

24. For an excellent description of the picture theory, as well as an introduction to the thought of Wittgenstein, see ANTHONY KENNY, WITTGENSTEIN (1973). See also JOACHIM SCHULTE, WITTGENSTEIN: AN INTRODUCTION (William H. Brenner and John F. Holley trans., 1992).

25. LUDWIG WITTGENSTEIN, *NOTEBOOKS: 1914-1916*, at 8 (G.H. von Wright & G.E.M. Anscombe eds., G.E.M. Anscombe trans., 2d ed. 1979).

utterances that are not factual in nature? Consider statements such as “Killing is wrong” and “This painting is beautiful.” As mentioned previously, the modernist tradition characterizes all non-factual discourse as “expressive” in nature. What is expressed are the feelings, recommendations, or preferences of the speaker. Because normative and aesthetic statements cannot depict facts (there being no “facts” to depict), they are non-propositional in nature. The most that can be achieved through their expression is a statement of individual preference.

Postmodernist philosophy of language departs from the modernist picture by rejecting the dichotomy between language as representation and language as expression. Postmodernism supersedes the modernist account of language by illustrating how the choice between representation and expression is false. Of course, much in this description of the postmodernist account of language is controversial. For present purposes, the best way to state the position in a succinct way is to show how postmodernist philosophers have overcome the idea, so prevalent in modernism, that the world fixes a reference point for our concepts.

There is no better way to explore this issue than the recent renewal of the debate between realists and anti-realists. These perspectives represent the two dominant schools of thought in the contemporary debate over the question of what determines the truth of a proposition. For realists, a proposition is true by virtue of some feature of the empirical, conceptual, or normative realm that makes it true. For the realist philosopher of science, for example, a claim with respect to some unobservable aspect of nature is made true because of the way the world is.²⁶ The moral realist similarly asserts that any moral claim

26. Philosophers of science identifying themselves as realists often disagree with one another over the nature of their realism. See generally Roger Jones, *Realism About What?* 58 PHIL. SCI. 185 (1991). As Jones frames it:

While beyond a commitment to a “nature of things itself” advocates of realism are severely divided, they share the general hope that the scientific enterprise has the capacity to provide accounts of this nature-of-things-itself that are true. In what is more or less the “classical” realist position, this hope is elevated to a belief. Indeed, such classical realists are willing to go out on a limb and claim that theories in the “mature” areas of science should already be judged as “approximately true”, and that more recent theories in these areas are closer to the truth than older theories. Classical realists see the more recent theories encompassing the older ones as limiting cases and accounting for such success as they had. These claims are all closely linked to the claim that the language of entities and processes—both “observational” and “theoretical” ones—in terms of which these theories characterize the-nature-of-things-itself genuinely refers. That is, there are entities and processes that are part of the nature-of-things-itself that correspond to the ontologies of these theories.

is true or false by virtue of certain features of the world, to which we refer when we employ moral concepts.²⁷

The anti-realist opposes the realist picture of truth with a variety of alternative pictures. For example, conventionalists assert that there are no features of the world that make propositions true or false. Rather, truth and falsity are a function of agreement among participants in a given practice. For the anti-realist philosopher of science, the only measure of the truth of a scientific proposition is the fact of group assent. On this account, a scientific proposition is "true" if everyone agrees it is true. Likewise, in ethics, the anti-realist explains morality as the product of a tacit or hypothetical bargain reached by citizens of a polity. The bargain generates principles of justice that, among other things, provide a basis for the evaluation and criticism of conduct.

Having stated the realist and anti-realist positions on the issue of truth generally, I now examine the question of the relationship between truth and meaning. Michael Dummett, who first employed the term "anti-realism," elucidates the connection by considering a class of propositions, the truth-value of which is in dispute. With respect to that class, Dummett says:

[T]he realist holds that the meanings of statements of the disputed class are not directly tied to the kind of evidence for them that we can have, but consist in the manner of their determination as true or false by states of affairs whose existence is not dependent on our possession of evidence for them. The anti-realist insists, on the contrary, that the meanings of these statements are tied directly to what we count as evidence for them, in such a way that a statement of the disputed class, if true at all, can be true only in virtue of something of which we could know and which we should count as evidence for its truth. The dispute thus concerns the notion of truth appropriate for statements of the disputed class; and this means that it is a dispute²⁸ concerning the kind of *meaning* which these statements have.

For both the realist and the anti-realist, knowing the meaning of a sentence means knowing its truth conditions (when, and under what conditions, the sentence would be true). Here, the anti-realist (Dummett) seems to have the upper hand; the only way to make sense of meaning and understanding is by reference to the procedures for verifying the presence or absence of truth conditions. If all the realist

Id. at 186.

27. See, e.g., ALAN H. GOLDMAN, MORAL KNOWLEDGE 8-12 (1988) (contrasting coherence theory of law with realism and anti-realism in ethics); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1143-49 (1982).

28. MICHAEL DUMMETT, *Realism, in TRUTH AND OTHER ENIGMAS* 145, 146 (1978).

can do is assert, *but not adduce* (due to some epistemic failure, for example), the presence of those truth conditions, then the realist has not met her burden of proof. But, the realist will counter, failure to meet the burden of proof on any one occasion does not preclude meeting it on another, nor does it prove that a right answer could not or does not exist.²⁹

Some philosophers argue that the realism/anti-realism debate is mistaken, and believe it can be avoided by looking at questions of knowledge, truth, and meaning from an “antirepresentationalist” point of view.³⁰ The basic viewpoint against which antirepresentationalism is deployed is that of language set apart from and “over and against” reality. The realist asserts that something in the world is referred to or implicated by a proposition, and it is this that *makes* the proposition true. The anti-realist counters that there is nothing out there beyond our conventional assessments of truth and falsity. Despite their differences, both the realist and the anti-realist claim that the meaning of our propositions *comes from somewhere*; the disagreement is not over the question of how there is meaning, only of its *source*: the world (realism)³¹ or conventional criteria (anti-realism).

One philosopher whose recent work points a way out of the realism/anti-realism debate is Hilary Putnam. For a long time Putnam

29. Ronald Dworkin has consistently made this argument in connection with his thesis that there is a right answer to every legal question. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

30. Here I follow Richard Rorty's usage. See 1 RICHARD RORTY, *Introduction: Antirepresentationalism, Ethnocentrism, and Liberalism*, in *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS I* (1991).

[Anti-realism] is standardly used to mean the claim, about some particular true statements, that there is no “matter of fact” which they represent. But, more recently, it has been used to mean the claim that *no* linguistic items represent *any* nonlinguistic items. In the former sense it refers to an issue within the community of representationalists—those philosophers who find it fruitful to think of mind or language as containing representations of reality. In the latter sense, it refers to antirepresentationalism—to the attempt to eschew discussion of realism by denying that the notion of “representation,” or that of “fact of the matter,” has any useful role in philosophy. Representationalists typically think that controversies between idealists and realists were, and controversies between skeptics and antiskeptics are, fruitful and interesting. Antirepresentationalists typically think both sets of controversies pointless. They diagnose both as the results of being held captive by a picture, a picture from which we should by now have wriggled free.

Id. at 2-3.

31. Metaphysical realism—the strongest expression of the realist viewpoint—may be defined thus: “[T]he world consists of some fixed totality of mind-independent objects. There is exactly one true and complete description of ‘the way the world is’”. Truth involves some sort of correspondence relation between words or thought-signs and external things and sets of things.” HILARY PUTNAM, *REASON, TRUTH AND HISTORY* 49 (1981).

championed the superiority of realism as the best account of the nature of truth. Not long ago, Putnam radically changed course and recast his view of the relationship between meaning and truth in ways germane to the present discussion. The position, described as “antirepresentationalist,” is directed at the view of language as something set “over and against reality” and against the idea that reality is something that can be captured by language, much as a cookie-cutter captures dough. Putnam argues that the cookie-cutter metaphor is undermined by the fact that:

the same situation can be described in many different ways, depending on how we use the words. The situation does not itself legislate how words like “object,” “entity,” and “exist” must be used. What is wrong with the notion of objects existing “independently” of conceptual schemes is that there are no standards for the use of even the logical notions apart from conceptual choices. What the cookie-cutter metaphor tries to preserve is the naive idea that at least one Category—the ancient category of Object or Substance—has an absolute interpretation.³²

What Putnam describes here is the realist position on the relationship between meaning and truth: a proposition is true if the words used to express the proposition (the cookie cutter) capture some feature of reality (in the dough) that subsists independently of all conceptual schemes. The anti-realist counters with “the view that it’s all *just* language.”³³ Is there any escape from the anti-realist’s claim that “the world” is merely a function of our categories? Putnam answers thus:

We can and should insist that some facts are there to be discovered

32. HILARY PUTNAM, REPRESENTATION AND REALITY 114 (1988). To the same effect:

Surely if the history of philosophical reflection on the correspondence theory of truth has taught us anything, it is that there is ground for suspicion of the idea that we have some way of telling what can count as a fact, prior to and independent of asking what forms of words might count as expressing truths, so that a conception of facts could exert some leverage in the investigation of truth.

JOHN McDOWELL, PROJECTION AND TRUTH IN ETHICS 11 (Lindley Lecture, Univ. Kan., 1987).

Naturalism looks only to natural science, however fallible, for an account of what there is and what what there is does. Science ventures its tentative answers in man-made concepts, perforce, couched in man-made language, but we can ask no better. The very notion of object, or of one and many, is indeed as parochially human as the parts of speech; to ask what reality is *really* like, however, apart from human categories, is self-stultifying. It is like asking how long the Nile really is, apart from parochial matters of miles or meters. Positivists were right in branding such metaphysics as meaningless.

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

33. PUTNAM, *supra* note 33, at 114.

and not legislated by us. But this is something to be said when one has adopted a way of speaking, a language, a "conceptual scheme." To talk of "facts" without specifying the language to be used is to talk of nothing; the word "fact" no more has its use fixed by the world itself than does the word "exist" or the word "object."³⁴

But if the world does not fix the reference of our words, what does? It is at this point that Putnam makes a very interesting move.

"Is the tree identical with the space-time region it occupies?" or "Is the chair identical with the mereological sum of the elementary particles that make it up?" [or] "Is a space-time point a concrete individual, or is it a mere limit, and hence an abstract entity of some kind?" [These questions] can all be handled in much the same way. "Identical," "individual," and "abstract" are notions with a variety of different uses. The difference between, say, describing space-time in a language that takes points as individuals and describing space-time in a language that takes points as mere limits is a difference in the choice of a language, and neither language is the "one true description."³⁵

But this seems to confirm the anti-realist claim that "the world" is relative to a given conceptual scheme and that there are different worlds to the extent that there exist different languages of description—in short, that truth is simply relative to a conceptual scheme. Putnam responds in this way:

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 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.³⁶

What are the implications of Putnam's analysis for law? Law is a linguistic practice that provides one of several languages of description. In light of what Putnam refers to as "common sense standards," are legal materials "in the world"? If so, *how* are they in the world? What does this mean? Rorty has a wonderful image for this question. He writes:

The pragmatist meets this point by differentiating himself from the idealist. He agrees that there is such a thing as brute physical

34. *Id.*

35. *Id.* at 114-15.

36. *Id.* at 115.

resistance—the pressure of light waves on Galileo’s eyeball, or of the stone on Dr. Johnson’s boot. But he sees no way of transferring this nonlinguistic brutality to *facts*, to the truth of sentences. The way in which a blank takes on the form of the die which stamps it has no analogy to the relation between the truth of a sentence and the event which the sentence is about. When the die hits the blank something causal happens, but as many *facts* are brought into the world as there are languages for describing that causal transaction. As Donald Davidson says, causation is not under a description, but explanation is. Facts are hybrid entities; that is, the causes of the assertability of sentences include both physical stimuli and our antecedent choice of response to such stimuli. To say that we must have respect for facts is just to say that we must, if we are to play a certain language game, play by the rules. To say that we must have respect for unmediated causal forces is pointless. It is like saying that the blank must have³⁷ respect for the impressed die. The blank has no choice, nor do we.

The investigation of truth in law turns out to be the effort to describe what lawyers *do* with language. The modernist, referential approach preoccupies itself with the ways in which legal language represents, depicts, and captures the world. Those who deny such a referring relation have left themselves little in the way of alternatives to relativism. We need not embrace this false dichotomy. If jurisprudence is to be an account of what lawyers do, however, what is to be said of truth? Let us now turn to that question.

V. LAW AND TRUTH

The central claim of a postmodernist account of language is that the truth of our statements is not a function of the relationship between our linguistic acts and some mind-independent state-of-affairs. Putnam’s point is that “reality” does not come pre-packaged. We make sense of the world linguistically. Owing to the fact that language does not “cut[] things at the joints,”³⁸ “knowledge” will not be the grasp of a relation (truth-condition) between word and object; rather, knowledge will be unpacked in terms of linguistic competence or facility in a language.

What postmodernism achieves is a shift from a concept of language as representation to language as practice (meaning as use). It is a move from picturing to competence, with competence being a manifested ability with and facility in a language. Of course, our

37. RORTY, *supra* note 31, at 81.

38. *Id.* at 80.

immediate concern is with the special language of law. If it makes little sense to theorize whether legal propositions are true in virtue of mind-independent truth-conditions (realism) or depend solely upon conventions (positivism), then what can we say about law and truth?

In the previous section, I cast the postmodern view of language as emphasizing language as a social practice rather than a representational medium. A shift from language as a medium of representation to a social practice also marks a fundamental change in the nature of epistemology. For the modernist, knowledge is the knowledge of referring relations (the grasp of truth conditions). For the postmodernist, knowledge is an ability, manifested in linguistic practices.³⁹ Understanding a linguistic practice, having the ability to say something true, is a learned ability.⁴⁰ What is it that is learned?

Law is an activity driven by assertion. As Ronald Dworkin rightly points out, our interest lies in propositions of law—"statements and claims people make about what the law allows or prohibits or entitles them to have."⁴¹ Propositions of law may range from "The Fourteenth Amendment prohibits the denial of equal protection" to "Jones has violated the motor vehicle code by exceeding the speed limit." In law, how do we go from assertion to truth? To answer this question, we need to know something about the nature of legal argument.

Legal argument begins in assertion. The Claim "Ordinance 'S' is unconstitutional," asserts a purported truth. To ask what it is about *S* that prompts an assertion of unconstitutionality is to ask for the *Ground* of the Claim "*S* is unconstitutional." Suppose *S* states the following requirement: "Any assembly of twelve persons or more requires a parade permit." This fact is the Ground for the Claim that *S* is unconstitutional. The Ground is advanced in support of the Claim. This relation may be represented thus:

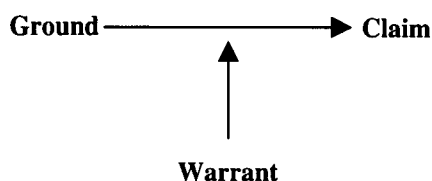
Ground —————> Claim

39. See WITTGENSTEIN, *supra* note 21, at 80-81 ("To understand a sentence means to understand a language. To understand a language means to be master of a technique."); see also PETER WINCH, TRYING TO MAKE SENSE 75 (1987) ("The notion of a 'technique' of using the picture replaces that of a 'rule of projection' on which the *Tractatus* had relied.").

40. For an excellent discussion of Wittgenstein's emphasis on technique and its relationship to linguistic meaning, see DAVID CHARLES, *Wittgenstein's Builders and Aristotle's Craftsmen*, in WITTGENSTEINIAN THEMES: ESSAYS IN HONOUR OF DAVID PEARS 49 (David Charles & William Child eds., 2001).

41. RONALD DWORKIN, LAW'S EMPIRE 4 (1986).

What connects the Ground to the Claim? The *Warrant* explains the relevance of the Ground to the Claim. The Warrant is the connection between the Ground and the Claim for which the Ground is marshaled. In the case of *S*, the Warrant is the First Amendment. The First Amendment, which provides for the right to peaceable assembly, is the Warrant that connects the Ground and the Claim. This connection may be represented in the following way:



Of course, the text of the First Amendment is not self-executing. There is more to the move from Ground to Claim than resort to a Warrant. In addition to invoking a Warrant, the Warrant must be used in the right way—it has to be construed (used meaningfully). This is where the forms of argument⁴² come into play. The forms of argument are culturally endorsed modes for the use of Warrants. The forms of argument are the *Backings* for Warrants.

These considerations yield the following picture of legal argument:

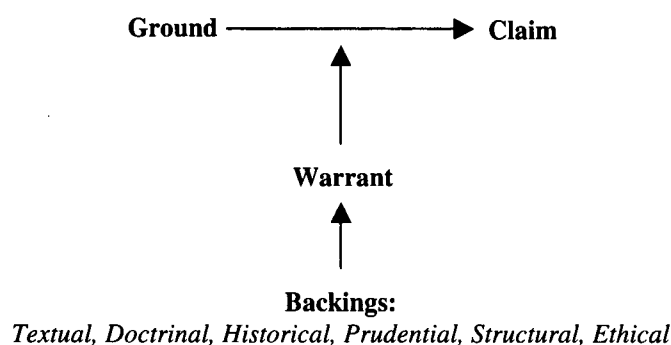


FIGURE 2⁴³

42. The idea of forms of argument was developed in the American context by Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-119 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11-22 (1991). Bobbitt identifies six forms of argument (he refers to them as “modalities”). For discussion of interpretation in the context of German law, see KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 312-65 (6th ed. 1991).

⁴³ This figure is adapted from STEPHEN TOULMIN ET AL., *AN INTRODUCTION TO REASONING* 62, fig. 6-1 (2d ed. 1984).

In the case of the proposition "S is unconstitutional," S is an assertion having the status of a Claim of law. The Ground of the Claim is the fact that the ordinance contains a parade permit requirement. The First Amendment warrants the move from the Ground to the Claim that S is unconstitutional. The Backing for the Warrant is the ordinary meaning of the language of the First Amendment (textual argument), perhaps backed with appeal to precedent (doctrinal argument).

There is no legal argument outside the forms of argument. The forms of argument surely could have been different and may one day be different.⁴⁴ History, not necessity, explains the present structure of legal justification. The forms of argument are an inheritance, not a dictate.

VI. CONCLUSION

Postmodernism is doubly controversial. First, because postmodernism suffers from its association with deconstruction,⁴⁵ any mention of the term in analytically minded circles is met with ridicule. This is unfortunate. If those who dismiss postmodernism actually examined the arguments, they would find that it is a perspicuous account of the current state of analytic philosophy, and more.

Second, the current balkanization of academic culture seems to be centered on a paradigm that has lost its explanatory power. I refer to the old feuds between objectivism and relativism.⁴⁶ Many dismiss postmodernism as just another form of relativism. A moment's reflection on the argument demonstrates the emptiness of this charge.

44. See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 43, at 5 ("The ways in which Americans interpret the Constitution could have been different. . . . For Americans, however, these ways have taken the forms of common law argument, those forms prevailing at the time of the drafting and ratification of the US Constitution."); NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 373 (1997) ("The common law today is what it has been since it crystallized in the fourteenth century."); H. Jefferson Powell, *Constitutional Investigations*, 72 TEX. L. REV. 1731, 1737 (1994) ("There is nothing sacred or philosophically fundamental about those modes; they derive historically from the professional discourse of early-modern English common lawyers, and over time they may change." (citations omitted)).

45. As I said in another context: "In the end, Derrida is just a skeptic—Hume in the cafe." Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 313 n.276 (1992).

46. See Dennis M. Patterson, *Interpretation in Law—Toward A Reconstruction of the Current Debate*, 29 VILL. L. REV. 671, 671-82 (1984).

It is difficult to see how the label “relativist” describes a position that argues for objectivity, truth, and reference in the theory of meaning. One only hopes that, in time, truth will prevail.

PANEL II:
ORIGINALISM AND HISTORICAL TRUTH

PANELISTS:

REBECCA BROWN
JOHN HARRISON
LARRY KRAMER

