

Reflections on Truth in Law

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PREFACE

I have been a fan of Prof. Susan Haack's work for a very long time.¹ I have especially learned a great deal from her clarification and defense of the pragmatist tradition.² And I have long aspired to emulate the approach to philosophy (and to life) she has perfected: "passionate moderation,"³ exemplified in relation to theoretical topics by a rejection of ungrounded extreme positions and false dichotomies.⁴ Additionally, of course, she has been a central figure in many fields, some far away from my limited areas of expertise: E.g., epistemology, the nature of logic, evidence and proof in science and law, and the use of scientific evidence in the courts. In 2017, I had the good fortune to be part of the same conference with Prof. Haack, commenting on Brian Tamanaha's most recent book on socio-legal theory.⁵ It is great to have this opportunity to be part of a *Festschrift* in her honor.

INTRODUCTION

Throughout her academic career, Susan Haack has been one of the most important scholars on how best to understand claims of truth within and about science, philosophy, and law. She has been the voice of both sophistication and good sense. (In academia these days, those two virtues are only rarely combined—the scholars who purport to be sophisticated are too often peddling post-modern, post-structuralist, post-truth views, views which Prof. Haack has shown to be thoroughly untenable: as often as not, self-contradictory, and, overall, not able to withstand direct scrutiny.) Her work has consistently been the careful and important response to extreme claims and misunderstandings of all kind.

I support and applaud Prof. Haack's work, and, in this article, I will elaborate and clarify, and perhaps amend slightly, her analysis in one small sub-topic within her works on truth: the difficult question of truth within and about law. In what follows, Part I introduces some of the complications of speaking about truth in and about law. Part II takes up and elaborates Prof. Haack's observation regarding the way that legal truth is—and is not—relative. Part III elaborates and clarifies a small but important point in Prof. Haack's discussion of truth in law, relating to a problem of gaps in the law. Part IV discusses problems raised for legal truth by official error and fiat; and is followed by a brief Conclusion.

I. LEGAL TRUTH—INITIAL COMPLEXITIES

When one speaks about legal truth, one could be referring to one of a number of different things. To be more precise, one can make true (or false) propositions of very different kinds and at quite different levels of generality or abstraction, all having some connection to law. There are specific propositions regarding individuals' legal rights and duties at a given time (e.g., "Valerie and I have a valid contract law under American federal and state law⁶ for the purchase and sale of a 2012 Volvo"). There are "doctrinal" (legal science) propositions about a particular legal system at a particular time (e.g., "consideration is required for a valid contract under Minnesota law"). At a higher level of generality, one can make claims about particular legal systems as a whole (e.g., "the Law and England and Wales gives greater priority to form relative to substance, especially compared to the law of many Continental European countries" or "the American legal system in the early 21st century remains pervasively sexist and racist"). At a higher level of generality or abstraction, one can also make claims about law in general⁷ (e.g., "all legal systems make a 'claim to correctness'"⁸). Though all of the above propositions are within or about the law, they differ very much in type, with some claims more internal to the (legal) discourse, and others more in line with other types of discourse, e.g., sociology.

What types of things make these different categories of propositions true or false varies—sometimes significantly—from one to the next. In the present article, I will be focusing primarily on the truth status and truth-making grounds of relatively specific propositions within or relating to law: e.g., "X currently has a legal duty [under Minnesota state law] to pay Y ten dollars" and "capital punishment is an acceptable form of legal punishment under American federal constitutional law in 2020." Questions regarding other levels or types of legal truth—e.g., whether theories of (the nature of) law or of particular doctrinal areas can be said to be true⁹—are of significant interest, but must be left to another time and place.

One additional complication should be noted. Adjudication often involves what appear to be propositions of a non-legal nature: factual or moral claims. In a trial, a judge or a jury may be required to make "findings" regarding what happened in some matter relevant to civil or criminal liability: How fast was A going?, Did B shoot C?, Were the goods delivered by the deadline?, and so on. These are findings that appear to be statements about facts in the world. Additionally, the judge or jury may make findings that are "mixed questions of law and fact": Was A negligent? Did B use "best efforts" in distributing C's product?, Did D act "recklessly"? There are other contexts still where courts are required to make what appear to be purely moral judgments: Does the statute give different groups "equal protection of the laws"? Was A given "due process"? And so on.

Prof. Haack resolves—or, perhaps "dissolves"—the complication apparently raised by court findings of seemingly factual truth by noting that "the task of the 'fact-finder' is not to discover whether the crucial factual claims are true, but to give a verdict as to whether or not *they have been established by the evidence presented* (to whatever degree of proof is required, and under whatever procedural rules apply)."¹⁰ One might be tempted to put the same point slightly differently. Under that alternative characterization, the court *is* making a claim about the world, about what really happened, but it is a modified claim: "Given the evidence the court was allowed to consider, and the burdens of proof and standards of evidence imposed by the legal system, *this* is what we think happened." However, in the end, I do not think that this second, alternative characterization is satisfactory, for it does not ultimately make sense to say that one is describing the world while simultaneously admitting that certain otherwise relevant information has been excluded and certain (legally imposed) presumptions and burdens have been inserted.

One might think that a similar re-characterization (that a proposition is not about the world but about the meeting of legally imposed burdens) might work for the moral-sounding claims embedded in some legal judgments; however, the question here is more complicated. Sometimes, courts adjudicating what process is due or which punishments are "cruel and unusual,"¹¹ etc., state that they are merely applying the standard as it has been explicated in relevant precedent—*equality for the purpose of the 14th Amendment, as interpreted*, rather than "equality," full stop. At other times, though, the arguments offered by judges for

their conclusions make it clear that the court is making a claim about “equality” or “cruelty” or “due process” full stop (or at least full stop, subject to relevant precedent—if a higher court had decided that the death penalty is not per se “cruel and unusual,” then it is not open for a lower court to say otherwise, though it might be open to the lower court to conclude that the death penalty is “cruel and unusual” if applied to a minor or to someone with significant mental disabilities¹²). Whether, in cases interpreting moral-sounding terms of the United States Constitution, judges should apply their best understanding of the moral value in question, the country’s conventional understanding of that moral value, the moral views of those who drafted or ratified the provision, or some other standard, is far beyond the scope of the present work.

II. HAACK ON TRUTH (AND LAW)

Prof. Haack has properly insisted that “true” does not change its meaning across different areas of study or areas of discourse: “whatever the subject-matter of a proposition, what it means to say that it is true is the same.”¹³ This is a subtle but important point. Some people might wonder how “truth” could be the same, if the criteria of “truth” vary. If in one area of discourse, truth is grounded on empirical investigation, while in another area truth is a matter of agreement among an elite, it would at first seem like “truth” in those two areas *must* be very different things. If quite different sorts of facts ground truth, it might seem like what they ground could have no more than a family resemblance.

However, as Prof. Haack properly insists, it is not “truth” that changes from one context to another, but only the means by which truth is shown. As she states, “what distinguishes logical from historical truth ... is just what distinguishes logic from history: namely, what the propositions are about—and so, what makes them true.”¹⁴ This is correct also in regards with law: it is not that we mean anything different by “true” when speaking either within or about legal discourse, but the grounds of assertion are, or can be, distinctive.

As Prof. Haack points out, legal truth is, in one important sense, relative to time and place, and relative to a particular legal system.¹⁵ What was allowed by American law in 1860 may be legally prohibited under American law in 2020. Of course, this does not make truth in law “relativist” in the philosophical sense, where relativism is an alternative to objective moral truth.¹⁶ The sort of relativism at work here is not significantly different from statements like “I am in my office” (which is true this morning, while writing this, but will not be true tomorrow afternoon) and “it is below freezing outside” (which is true in some locations on some dates, but false for other locations and other dates). What counts as a true statement of American law changes over time, because the state and federal legislatures (and some other legal officials) have the power to add to the law, as well as, expressly or implicitly, to revoke or alter what had earlier been the law, courts have the power to invalidate statutes on constitutional grounds and executive and agency actions for exceeding delegated powers, federal law can override judicial common law rulings and agency actions, federal laws can preempt state laws, etc. What is true in law changes all the time through the intentional actions of officials delegated the power to do just that: change the law in a particular legal system. However, as discussed, this does not raise any significant philosophical issues.

III. GAPS, PREDICTION, AND REASONING

At one point, Prof. Haack states the following regarding judicial interpretation and legal truth:

To say ... that legal truths are in part constructed by judicial interpretations is not to say, *simpliciter*, that legal truths are made, and not, like natural-scientific truths, discovered. ... The point is ... that unlike natural-scientific truths, legal truths become true only when some person or body made them so; but of course, once they have been made true, that they are true is something to be discovered.¹⁷

In speaking of “some person of body” making legal truths, it is clear from context that Prof. Haack here means a judicial decision.¹⁸

The implications of this comment is that where a particular issue is not covered by the clear language of a statute (or other authoritative legal text) or a court decision applying that legal text, then there is no legally true propositions regarding that issue, and this will continue until a judge or other officer makes an official pronouncement as part of a court or agency decision. However, this understanding, at least if read narrowly, is in tension with our normal practice within the American legal system, and also the other legal systems with which I am aware. It is conventional to argue that legal truth applies to a wider range of disputes than those on which there is some direct authoritative pronouncement. It is both common and perfectly sensible to say: “The courts have not given a decision directly on point, but it is clear that activity X is [not] allowed under the statute.” Lawyers and legal scholars use standard tools of legal interpretation and doctrinal analysis to fill in some of the “gaps” not expressly covered by the clear language of statute or court decision. This is what we take three years learning in law school (and, for some of us, many years *trying to teach* in law school). And this is what lawyers are (highly) paid by clients to do: to state whether a certain action is legal or illegal, *where the answer is not immediately obvious under the relevant legal texts*.

Consider the alternative: if ever a factual situation varied in a small way from a binding precedent (in a Common Law country) or if the application of a statute to facts involving any sort of judgment, then one would be forced to say that there was no law. (Hans Kelsen, at one point, seemed to be making just such a claim: that each act of law application, however apparently straightforward, was also an act of law creation.¹⁹) This seems untenable, or at least insufficiently grounded either in our practices or in our normal understanding of practical reasoning.

Of course, there are well-known dangers at the other extreme, in being too loose in equating “what the law is” with “what conclusions might be argued from the premises of authoritative texts.” There are ongoing disputes regarding how far the process of extrapolation can go and still be considered a declaration of existing law (rather than the creation of new law). Ronald Dworkin famously argued that there was a right answer to all, or nearly all, legal disputes, asserting there were sufficient legal materials (taking into account legal rules, legal principles, and other legal standards) from which to construct possible theories of what the law requires in each case, with the right answer being the theory which best combined fit and moral value.²⁰ I do not mean to be sidetracked here into the extensive debate about Dworkin and his right-answer thesis.²¹ Suffice it to say for present purposes that there is ample room for a middle position, believing that there are right answers to legal disputes in *many* situations where the statutory language and court decisions have not yet given a clear response, without necessarily believing that this is the case for *all* (or nearly all) such situations. In other words, one can still believe that there are right answers for most legal disputes, but for a significant number of legal questions (in this, or any other, legal system) there may be no right answer, no legal truth.

Let us return for a moment to the possible skeptical view, that there is no truth of the matter regarding a legal dispute unless there is clear language in a statute or prior court decision directly on point. The argument would be that law depends on social sources,²² and where no social source—no statutory text, judicial decision, or agency declaration—can be found, then there is no law (yet). As already noted, it is part of our current practices (in the American legal system and in many other legal systems) to speak *as if there is* a truth of the matter, at least some of the time, even prior to a court decision expressly on the topic. (As Dworkin points out, if one goes by the rhetoric used by advocates and judges in discussing legal disputes, the parties seem *always* to imply that there is an existing legal answer available to be found, even if reasonable lawyers and judges might disagree on what that answer is²³). The question still remains: how are we to understand a truth claim here?

There are, broadly, two different directions one could take in filling in the gaps in the legal materials. One approach would be an argument about objective right answers using the doctrinal reasoning and other acceptable forms of reasoning within the legal system in question. The second approach would be a prediction of how the courts will resolve the matter, even if that prediction varies from what one considers the

objectively best answer based on the legal materials and acceptable forms of legal inference. Obviously, the two approaches should converge for most cases (we predict that courts will reach the decision that is best under current rules and standards of legal reasoning), but might diverge in cases involving high-profile political or moral issues, where judges might be more guided by outcomes than by what doctrinal reasoning would require.²⁴

As Prof. Haack points out, the prediction approach is associated with Oliver Wendell Holmes²⁵ and later with the American legal realists²⁶ (like Prof. Haack, I do not make the mistake of believing that Holmes' talk of predicting court action was meant as a general or conceptual theory of law²⁷). The prediction approach and purely doctrinal approach are in obvious tension,²⁸ and this is not the occasion to attempt to choose between them.

One should note that the claim that there might be a right answer to an open interpretive question within a legal system is entirely consistent with Prof. Haack's interesting and important point that the law in general, and legal texts (including constitutional provisions) in particular, can change and grow in meaning over time.²⁹ Just as the fluidity of meaning of language over time does not foreclose the possibility that a term may have a clear meaning at a particular time, so the fluidity of legal meanings over time is consistent with there being a right answer to a legal question at a certain moment. At the same time, the possibility of (e.g.) a "living constitution"³⁰ (Canadian legal scholars speak of a "living tree constitution"³¹), or other changing legal meanings, does open the possibility that any given moment *might* be a moment of transition, where the old meaning is starting to give way to the new. As standards change regarding, for example, what is meant by "freedom of speech," "freedom of religion," "privacy," or "cruel and unusual punishment"³²—perhaps in response to changing technology or changing social practices, or perhaps reflecting changing social norms—then at the period when the change is under way but not yet complete, there may be uncertainty as to the application of the legal standard.

As Connie Rosati points out, in trying to work out the intricacies of legal truth (and its objectivity), one might choose between two standard philosophical analytical moves, which parallel the idea about responses to legal gaps mentioned earlier.³³ First, one might argue—broadly in line with a prediction approach—that law is simply what a majority of judges say it is; second, one might argue that the law is what an judge in an ideal epistemic situation would decide (basically a sophisticated restatement of the doctrinal argument approach).³⁴ Each approach has distinct advantages and disadvantages. If law is just what a majority of judges (on the highest court) says that it is, it is hard to make sense of judicial dissenting opinions or courts reversing themselves in later cases (on such occasions, the courts do not say that they are simply "making new law"; they say that the original decision was "mistaken").³⁵ However, if the law is what a judge would decide under ideal conditions, then one must be able to articulate what "ideal conditions" might be, as this has been shown to be surprisingly difficult.³⁶

IV. ERROR AND FIAT

However we respond to the problem of "gaps" (where a legal official has not spoken but one can make claims based on past decisions, justified either on doctrinal reasoning or prediction grounded in part on non-doctrinal reasons), the complexity is that courts can end up deciding cases that are contrary to how we think they should have come out, as a matter of doctrinal reasoning, and/or contrary to how we predicted that they would decide. Especially for outcomes contrary to what we believe that the legal materials and legal reasoning require, commentators might describe the decision as a "mistake," as "wrongly decided." And this possibility adds layers and intricacies to the analysis of legal truth.

To me, the questions about legal truth after an apparently (allegedly) wrong judicial decision are both more difficult and more central than the questions when the courts have not yet spoken. When the court makes the mistaken decision—say, the "separate but equal" race equality decision of *Plessy v. Ferguson*³⁷—at the time of the decision, there is a sense in which that court's decision both *is* and *is not* a correct statement

of the law.³⁸ There are, it seems, two inconsistent legal truths, each with grounding in the authoritative legal materials.

Of course, *Plessy* was eventually overturned,³⁹ and this may simplify the analysis. Many lower court decisions that are generally considered mistaken are reversed on appeal, and occasionally, decisions are rejected by a later decision by the same court (the only option for “correction” if the original decision was by the highest court). One should, however, here also note that this same fate—“correction” by a higher or later court—could also occur when the original decision was considered to have been correct.

If the mistaken decision is quickly reversed or overruled, then there may not appear to be a philosophical problem. The prior court was simply mistaken, and there was one legal truth all along, even if a court give an erroneous declaration that confused matters for a while. However, there are other Supreme Court decisions that commentators consider to have been mistaken (which decisions those are will vary by which commentator one consults, of course), but which have not been “corrected” (and keep in mind that *Plessy* was “good law” for almost 60 years).

The philosophical problems do not go away easily, even for “corrected” decisions. What shall we say about the truth-value of the legal proposition(s) announced by a court while it is being appealed? What should we say about those propositions after the “correction”—that they were true for a time but are no longer (like legislation that is changed), or that they were never true, even though they were treated as true for a period of time? In all such cases, the temptation to say that there is either multiple, inconsistent truths about what the law requires (at least for a period of time) is strong.

To be clear: I am not here advocating any sort of postmodern doubt about truth, or, for that matter, any classical form of skepticism about truth.⁴⁰ The analysis in this article assumes conventional understandings of truth, but asserts that within the domain of law generally—and known legal systems (for the present discussion, the United States legal system) in particular—there are some significant complications in certain types of instances of asserting what is legally true.

In a prior work, I emphasized a traditional binary when thinking about truth in morality, law, and other, comparable discourses: will and reason⁴¹ (Lon Fuller called it “fiat and reason”⁴²). Truth in law is always a product of a combination of reason—doctrinal/practical reasoning from the authoritative legal texts—and will: the choices of officials who have the authority to make choices for the community. Sometimes these choices are what John Finnis (following Aquinas) call “*determinatio*”: making choices among equally legitimate alternatives.⁴³ At other times, though, the choice can be one made contrary to “reason,” in the sense of being doctrinally wrong. The court decision may be the law because the court said so (and reaffirmed that interpretation of the law consistently over time). What is legally true is inevitably a mixture of reason and will; on occasion, though, reason and will point in different directions, and we are simply left uncertain (as in those occasions where *Plessy* both *was* and *was not* a true statement of American law).

CONCLUSION

Throughout her long, very productive, and very influential career, Prof. Susan Haack has been a reliable—and necessary—guide to the intricacies of understanding truth in many forums: truth in science, evidential truth, and truth in law generally. This article has tried to dive into the intricacies of statements of truth within and about law, in ways that are consistent with Prof. Haack’s writings, but which push on some matters further than she had occasion to discuss.

As this article elaborated, truth about particular legal propositions often turns on some combination of “will” and “reason”: the decisions made by officials authorized to make choices for the community, on one hand, and what follows from those decisions, as a matter of the distinct form of practical reasoning known as “doctrinal reasoning.” And where will and reason conflict, sometimes there may be, if only temporarily, more than one legal truth.⁴⁴

NOTES

- 1 Among the works of hers that have helped me the most in developing my own ideas are Haack 1998, 2003, 2004, 2005, 2006, 2008, 2014, 2016, 2018a, and 2018b.
- 2 E.g. Haack 2005, 2006, 2008, 2009, 2018a, 2018b.
- 3 Haack 1998.
- 4 E.g., Haack 2018a.
- 5 We were commenting on Tamanaha 2017. Our contributions were Haack 2018b and Bix 2018.
- 6 In the United States, individuals are subject to both federal and state law. Contract law, the example given in the text, is primarily a matter of state law.
- 7 There are scholars who claim that one cannot speak abstractly or conceptually about law in general,
- 8 This refers to part of Robert Alexy's theory of law. Alexy 2002.
- 9 See, e.g., Moore 2000.
- 10 Haack 2014: 305 (emphasis added).
- 11 *U.S. Constitution*, 8th Amendment.
- 12 In fact, the United States Supreme Court has held the death penalty unconstitutional as applied both to the mentally disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002), and to persons who committed their crime while a juvenile, *Roper v. Simmons*, 543 U.S. 551 (2005).
- 13 Haack 2014: 304. She offers Aristotle's summary: "to say of what is that it is, or of what is not that it is not, is true." Haack 2003: 17 (quoting Aristotle 1933: 201). In another article, she paraphrases Peirce: "to say that something is true is say that it is SO, whether you, or I, or anybody believes it is so or not." Haack 2019: 268.
- 14 Haack 2014: 304-305 (emphasis omitted).
- 15 Haack 2014: 308.
- 16 See, e.g., Baghramian and Carter 2015.
- 17 Haack 2014: 317; cf. Haack 2018b: 1072-1073.
- 18 In a parenthetical in the same paragraph, Prof. Haack writes about a judicial decision, "*Daubert III*" (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), see Haack 2014: 306 n. 51): "after *Daubert III*, that *Frye* had been superseded federally was a true proposition that could be discovered by legal research." Haack 2014: 317. It is thus clear that for Prof. Haack—at least in the view presented in Haack 2014—where the court has not yet spoken on some issue, there is no legal truth to be discovered.
- 19 See, e.g., Kelsen 1992: §31(e), at 70. Karl Llewellyn also seemed to flirt with a similar idea. Llewellyn 1933: 72-74, quoted (in translation) in Fuller 1934: 445.
- 20 Dworkin 1985: 119-145 ("Is There Really No Right Answer In Hard Cases?").
- 21 I have written on those topics at some length before. See, e.g., Bix 1993: 77-132; Bix 2019: 93-107.
- 22 E.g., Raz 2009: 37-52.
- 23 E.g. Dworkin 1985: 144.
- 24 See, e.g., Segal and Spaeth 2002.
- 25 Holmes 1897: 460-461.
- 26 E.g., Llewellyn 1930: 437-438, 447-449.
- 27 Haack 2005: 79-80; Haack 2018b: 1059.
- 28 Rosati writes: "[C]laims about what the law really is are often offered precisely to support decisions that run contrary to what we would reasonably predict." Rosati 2004: 294-295.
- 29 E.g., Haack 2008: 461-467.
- 30 E.g., Ackerman 2007.
- 31 E.g., Waluchow 2011.
- 32 E.g. Haack 2008: 469-470 (on the changing constitutional rules and principles regarding freedom of religion).
- 33 The analysis also raises issues surrounding the question of "global error"—whether all legal officials (at a given time, in a given legal system) could be wrong about some legal question. See, e.g., Kramer 2008, Bix 2009.

- 34 Rosati 2004: 306-322
- 35 Rosati 2004: 308-310.
- 36 Rosati 2004: 317-322.
- 37 163 U.S. 537 (1896).
- 38 Rosati 2004: 291.
- 39 See *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
- 40 Comesaña and Klein 2019.
- 41 Bix 2010.
- 42 Fuller 1946.
- 43 E.g., Finnis 2012: 284-289.
- 44 An earlier version of this work was written for the 2020 University of Girona Seminar in Connection with the International Prize on Legal Culture given to Susan Haack (a Seminar which was ultimately cancelled due to the Coronavirus Pandemic).

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