On Law and Truth

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I. Introduction

I want to speak today about some of the complexities – and, perhaps, paradoxes – of truth in law, complexities that are particularly significant in Common Law legal systems, like those of the United States or England, but which are also present in Civil Law legal systems, like those of Sweden or Germany.

In what follows, I will first offer a few, quite basic observations – which I hope to be uncontroversial -- about truth in general, and then I will discuss why the application within and about the law creates special problems.

II. On Truth (Generally)

Truth is one of those simple and common notions that philosophers can argue about endlessly, but which most people (not corrupted by advanced philosophy texts) seem to understand perfectly well and seem able to use on a daily basis without difficulty or misunderstanding, even without the assistance of professional theorists. We say to one another, "it is raining outside," and we understand (or *think* we do) what it is in the world that would make that statement true or false.

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Among philosophers though, as noted, there can be fierce disagreements. Some commentators try to explain truth in terms of "correspondence" – that a descriptive statements, propositions, are "true" if they "correspond" to the way the world actually is.[2] Other philosophers argue that the truth of propositions should be evaluated according to the extent to which those propositions "cohere" with other propositions.[3] Still other theorists, perhaps a little critically or a little cynically, argue for a "deflationary" understanding of truth – saying that asserting regarding proposition "P" that "*P* is true" is no different than simply asserting "*P*."[4] These and yet other approaches vie for being the correct theory of truth for general propositions.

However, our current concern is not on the nuances of the philosophical debates about truth generally. As we will see, truth claims within and about law are distinctive, and one's view about truth in law may not derive, at least not in any simple way, from one's preferred general approach to truth for conventional propositions.

III. Truth in Law

I assume that most of the people here are law students or law professors. In either case, you are accustomed to making confident declarations of what the law is (that is – what the law is on some matter, in your home jurisdiction, at the present time). If you are speaking to someone not legally trained, after making your pronouncement, that person might ask, "is that true?" And you would answer, even more emphatically, "yes, it is."

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[2] *See, e.g.*, Marian David, "The Correspondence Theory of Truth" (2015), *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/truth-correspondence/.

[3] *See, e.g.,* James O. Young, "The Coherence Theory of Truth" (2018), *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/truth-coherence/.

[4] *See, e.g.*, Bradley Armour-Garb, Daniel Stoljar, and James Woodbridge, "Deflationism About Truth" (2021), *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/truth-deflationary//.

In this way, the truth of legal propositions *within* law or *about* law seem, on the surface, no different than assessing and asserting the truth or falsity of normal empirical propositions. Just as one says "'the cat is on the table' is true if and only if the cat is, in fact, on the table," surely one could say " 'a valid will requires two witnesses [in the State of California]' is true if and only if a valid will in that state in fact requires two witnesses." So, what is the difficulty?

Ronald Dworkin wrote: "What are propositions of law really about? What in the world could make them true or false?"[5] In offering this (and similar) comments, Dworkin is not pretending to be naïve or stupid. In fact, he had studied law at a very good American law school (as well as earlier studying in Oxford University on a Rhodes Scholarship);[6] Dworkin later worked as a judicial clerk for a well-known American federal appellate court judge,[7] and after that worked for several years at a prominent New York law firm.[8] He was clearly very able in doctrinal law (legal science), not just in abstract legal theory. When he says that it is in fact hard to state clearly what it is that makes legal propositions true, he is speaking from expertise as a lawyer. And if his comment strikes many of us as strange, at least on first reading, it is because we are frequently less aware than we might be of how much analysis, and what kind of analysis, goes into our sometimes-instant proclamations regarding how the law of our jurisdiction would apply to some real or hypothetical set of facts.

To be sure, sometimes determining what the law is on some matter at least *seems to be* straightforward. When you ask for proof that two witnesses are needed for a valid will in the

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[5] Ronald Dworkin, "Law as Interpretation," 60 *Texas Law Review* 527, 527 (1982).

[6] Harvard Law School (Class of 1957).

[7] Judge Learned Hand of the 2nd Circuit Court of Appeals. Judge Hand remains one of the highest regarded federal judges in American history, and he apparently considered Dworkin to be the best law clerk ever to serve in his chambers.

[8] Sullivan and Cromwell.

State of California, I can point to a state statute whose text declares: "the will shall be witnessed … by at least two persons".[9] However, as an experienced lawyer, you would still be cautious. In a common law jurisdiction like the United States, one would need to make sure that a court decision had not invalidated or modified the statute in a case. Perhaps there was some procedural problem with how the statute had been passed, or there was some possible conflict with a restriction imposed by the state or federal constitution, etc. Also, there might be some other statutes whose content overlapped or conflicted with the statute in question, at least when applied to certain fact situations, and the courts might have needed to modify one or more statutes to make them consistent. For example, in some states there are separate statutes allowing, in certain circumstances, a handwritten ("holographic") will to be valid despite the absence of witnesses.[10]

In any event, much of the time, when one is considering a question of what is legally authorized or prohibited, or what the extent of civil or criminal liability would be for certain actions, there is not any statute, constitutional provision, or case decision that is "directly on point." What we learn in law school, and what we begin to perfect in legal practice, is a method of coming to legal answers through a combination of more-or-less expansive interpretations of legal texts, use of analogies, and reference to a variety of legal sources, all brought together as predictions of how officials will act, based in part on past observations. When a persuasive doctrinal argument is brought together from disparate texts and sources, it almost has a certain kind of aesthetic beauty. But that is to take us away from the point.

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[9] *California Probate Code* § 6110.

[10] *See, e.g.*, *California Probate Code* § 6111.

The point to be emphasized, initially, is that legal truth is *rarely* a matter of simple correspondence, or anything similar. It is usually *not* a matter of simply pointing: the way one might point to a cat sitting on a table to show the truth of the statement, "the cat is sitting on the table." It is rather, at best, a bringing together of all the authoritative texts and decisions and principles that are relevant, in a complicated calculation that students of law, and even practitioners and judges, take years fully to master (if they ever do).

Already, one gets a hint of some complications for the truth of propositions of law: that whether **A** has a right to do **Y**, or **F** has a duty to **G**, will be true or false based *not* on simple correspondence, but rather based on a complicated line of reasoning, with which reasonable and competent practitioners can (and in many cases *will*) disagree. But there is more, much more, as I will explain.

IV. Complications Regarding Truth in Law

Let us return to some foundation aspects of law – "basic" points, both in their importance and their simplicity.

How do we get new legal rules? Perhaps the most common way involves legislatures enacting statutes: statutes add to the list of (valid) legal rules, and may also, either expressly or implicitly, modify or repeal some current legal rules.[11] This also reminds us that when considering propositions regarding what rules are valid legal rules in this jurisdiction, the claims

[11] Mark Greenberg has built his alternative view of law around denying this, See, e.g., Mark Greenberg, "How Facts Make Law," 10(3) *Legal Theory* 157-198 (2004), However, this is not the place to revisit debates about Greenberg's approach, cf. e.g., Larry Alexander, "In Defense of the Standard Picture: The Basic Challenge," 34 *Ratio Juris* 187-206 (2021); Brian H. Bix, "When Law Becomes Morality: Comments on Mark Greenberg's Moral Impact Theory of Law" (2014), ssrn.com/abstract=2434075, beyond noting that his views have not, to date, been widely accepted.

are expressly or implicitly relative to a particular point in time. For example, it may be the case that "norm **A** is a valid legal rule in our legal system" was true a year ago, but it may no longer be true, because of a law recently passed by the legislature.

Another way that law changes – at least in Common Law legal systems – is by court decision. Courts resolve the disputes that are brought before them. In Common Law legal systems – and what follows is *not* true, or is at least *less* true in Civil Law countries – the resolution of particular disputes also often changes the existing law. This change may be an alteration of how some authoritative text (like a statute or a constitutional provision) is interpreted, or it may be an alteration of that part of the law (in Common Law countries called simply "the Common Law") that is entirely judge-made. Generally speaking, much of contract law, accident law and property law, and parts of criminal law, are judge-made in this way. Like legislation, court decisions may simply add new legal rules to the law, or may change existing legal rules, by modifying or overruling them.

With both legislation and Common Law court decisions, the law is the result of choices made by legal officials. But with court decisions – both Common Law decisions in Common Law countries and decisions of statutory and constitutional interpretation in all countries – the judges generally purport to be declaring what the law *already is*. The implication of these decisions is that there is a right answer regarding the question of interpretation or application of the law. Judges in their opinions always give the appearance of confidence and certainty whether they feel that way or not. But, importantly, however confident judges may *appear to be* in their decisions – and however confident the judges *in fact are* – they will sometimes be mistaken. They will sometimes think that precedent requires one outcome in a case, when in fact the best understanding requires the opposite outcome. And the judges will sometimes think that the right

understanding of the statute requires that it *does* apply to the facts of a particular case, when in fact the best understanding is that the statute does *not* apply. And so on.

Let me pause here for a moment to note a potential complication, one we will return to later. To say that judges might have been wrong in their application of precedent or in their interpretation of a statute is to assume that we can speak about "right" and "wrong" answers here, at least tentatively, independently of what the judges actually decide. When the great American judge and commentator, Oliver Wendell Holmes, wrote that law is just a prediction of what the courts will do in fact,[12] though this may be an exaggeration, it does remind us that there is a close connection between "what the law is" and "what the courts do."

At the same time, it is clear that we must take it as possible to speak about right answers separate from particular court decisions. After all, if there were no possibility of being able to speak about individual judges sometimes being wrong in their decisions, then we could not make sense of some basic aspects of legal life. Most obviously, and prominently, the idea of appealing a decision to a higher court depends on being able to make sense of the claim that the lower court was mistaken.

And the idea of a court's potentially having been mistaken in its interpretation of a statute or its application of past court decisions is also a basic assumption behind a court's decision (among those courts who have this power) to overrule earlier decisions by the same court. When this happens, when the court overrules a prior decision, it is generally not merely a matter of a court deciding to go in a different direction, as a legislature might, but the court's conclusion and reasoning usually is built around a claim that the prior decision was incorrect even at the time it was decided.

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[12] Oliver Wendell Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 460-461 (1897).

One more point, though this is the least important of all: the way most law professors teach law assumes that judges can be mistaken. It is common practice – certainly in my country – for law professors to criticize particular decisions (whether relatively unimportant decisions about whether a contract was breached or very significant decisions from the highest court about the powers of government) as having been mistaken. This is not merely a claim of the sort: I prefer to watch ballet, while you would rather watch football; each to their own taste. Rather, the claim is that there was an objective right answer to find, and the court (allegedly) failed to find it.

So, an essential starting point for this analysis, and one which *should* not be controversial (though occasionally a few will resist it) is that court decisions *can* be wrong, and they at least occasionally *are* wrong. I then want us to focus on the time periods before and after just such a wrong decision.

Consider a potential wrong decision applying **Statute X** to **Facts a, b & c**, determining (*erroneously*) that the statute does *not* apply under those facts. Before the decision was made, when individuals consulted with very good lawyers about the statute's application to situations with **Facts a, b & c.**, those very good lawyers would have said, correctly applying the jurisdiction's principles of statutory interpretation to the enactment, that the statute *does* apply to those facts. The very good lawyers would state confidently that *this is what the law is*, just reminding us that we generally speak of "the law" (in our jurisdiction) as including not only the words of the statute, but also the interpretation that follows under the accepted rules and principles of interpretation – "doctrinal reasoning" or "legal science," according to the phrase used in the community.

Now, what will happen when we speak to those same very good lawyers *after* the judge comes down with the decision, a decision applying the statute in a way contrary to what those

lawyers had said was the *right way* to interpret the statute? That is, after the judge's *wrong* decision. And for the moment, let us assume that the judge in question is at the bottom rung of the judicial hierarchy. In the American legal system, in both the federal court system and the court system of most states, the trial court judge is at a low rung, and above that level (in the federal system and in almost all states) is an intermediate appellate court, and, above that, the highest court (often known as the "supreme court").

The clients will probably return to their very good lawyers and want explanations. The clients will say: you stated that the statute *does* apply to these facts, but we have now learned that a trial court judge has decided *precisely the opposite way*. The lawyers will respond that they still think that their earlier statement about the statute was correct, and they might add (with varying levels of confidence, depending on what else they know about the judges and the local practices), that they expect the judge's *mistaken* decision to be corrected – to be overturned on appeal.

However, these same very good lawyers, because they *are* very good lawyers, will likely add that there is a chance – how *big* a chance depending on the local judges and practices – that the incorrect decision will *not* be overturned. The matter might not get reviewed at all, or the appellate court might even affirm the lower court's mistaken decision.

So, if pressed by their original clients, or perhaps if approached by new clients, *after* the court decision, and the clients are asking about the application of the statute, the very good lawyers will now hesitate, and they will hedge in the answers they give. They will say that, on the one hand, they still think that the statute *does* apply, but that, on the other hand, a judge has now decided otherwise, and that there is a chance that this decision – wrong as the very good lawyers think it is – will be allowed to stand.

Let us push forward in time, and consider a scenario where that judicial decision, considered wrong by all very good lawyers, is nonetheless affirmed by the appellate courts, including the highest court in the jurisdiction. Now, when clients approach the very good lawyers and ask them about the statute, the lawyers will comment that the courts have said that the statute means one thing, even when all very good lawyers know – or at least *once knew* – that it meant something different. And the very good lawyers will give advice in line with the judicial decision, not in line with their own prior views. The shorthand that "the law is what the courts say it is" works for many, and perhaps most, purposes.

And now let us move even further ahead in time: the decision that very good lawyers considered "incorrect" has by now not only been affirmed; it is now well-established and frequently cited by courts and commentators. Yet, very good lawyers (and law professors) still believe that it is not the best understanding of the statute it purports to apply. Here I would like to bring in Connie Rosati's discussion in connection with a notorious American Supreme Court case, *Plessy v. Ferguson*.[13] In that case from 1896, the United States Supreme Court decided that facilities that were racially segregated could still be consistent with the equal protection requirements of the 14th Amendment to the United States Constitution. It is a decision that is now universally considered to have been badly wrong, but it remained the settled law of the United States for almost 60 years.[14] Rosati comments: "It is a puzzling feature of our legal practices that we can intelligibly say …: 'The law is *Plessy*, but *Plessy* was wrongly decided.'"[15] This already has the sound of paradox (perhaps like the paradox of propositions and belief: "the cat is on the table, but I do not believe it"). Rosati, in fact, presses the paradoxical nature of that

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[13] 163 U.S. 537 (1896).

[14] Until *Brown v. Board of Education*, 347 U.S. 483 (1954).

[15] Connie S. Rosati, "Some Puzzles About the Objectivity of Law," 23 *Law and Philosophy* 273, 291 (2004).

claim. She writes: "To say that the law is *Plessy* but *Plessy* was wrongly decided is thus to say that the law is and is not *Plessy*."[16]

There is a sense that the wrongly-decided case – whether a notorious case of important constitutional interpretation, or our more modest example of the application of a statute to a recurring set of facts – creates a circumstance in law contrary to the standard rules of logic: that a propositions (here, "*Plessy* is the law (at this point in time)") and its opposite ("*Plessy* is not the law") seem both to be true at the same time.

Let us retrace our steps and see how we got here. In most legal systems (even those without court-made Common Law rules), there are distinct authoritative sources in the law, which usually reinforce one another, but which can, on occasion, conflict. Some conflicts have a clear hierarchy set by the system itself, so we know how to resolve conflicts. For example, in the United States, legislation has priority over judge-made Common Law rules, federal statutes have priority over state statutes, and the federal Constitution has priority over federal statutes.

However, there are other conflicts which are more subtle and whose resolution is a little more complicated. For example, a statute is an authority within a legal system, as is a court's interpretation of that statute. And when one believes that the court's interpretation of a statute is mistaken, then there is, in a sense, a conflict between the statute and how the court interpreted it. In most jurisdictions, the court's interpretation basically takes priority – it states the law – in case of a conflict, though this is not the whole story.

One might say, in a case of a mistaken interpretation of a statute, that a statute that once meant **A** has changed – has *been changed* by the courts – and now means **B**. However, matters, though seemingly settled regarding this change of meaning, may not be settled forever. In most

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[16] *Id.*

jurisdictions, some courts – including, usually, the highest appellate court – have the authority *to change their mind* on legal matters. Generally, there are both principled and pragmatic reasons for why such powers are and should be used only sparingly. But those powers generally *are* used. By one recent count, the United States Supreme Court has expressly reversed itself 146 times (out of over 25,000 decisions).[17] This does *not* include the far more frequent occasions when the Court majority claims to be following precedent, while dissenting Justices and some commentators argue that the majority is in fact mis-characterizing precedent and has in fact effectively, if secretly, overturned prior law.

Perhaps the most famous recent example of the U.S. Supreme Court overturning prior law is the 2022 decision overruling an earlier decision on the issue of a constitutional right to abortion: the earlier case had held that the federal constitution does protect a woman's right to obtain an abortion, while the recent decision held that the Constitution does *not* protect that right.[18]

One reason that a court's overruling of its own prior decisions is even *conceptually* possible, is that while there is a sense (as already discussed) that a court's interpretation of an authoritative text (a statute or constitutional provision) is the law, even when that interpretation arguably conflicts with the text it purports to interpret, the legal text – that statute or constitutional provision -- retains its authoritative status. So, a later court can refer to the legal text as a justification for rejecting the earlier interpretation, and that later court can claim that the earlier interpretation was wrong, and that it had always been wrong.

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[17] David Ross, "8 Landmark Supreme Court Cases That Were Overturned" (October 2022), https://www.history.com/news/landmark-supreme-court-cases-overturned.

[18] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973).

When the United States Supreme Court in 2003, in *Lawrence v. Texas*, overruled a 1986 decision, *Bowers v. Hardwick*, on whether it was constitutionally permitted to criminalize homosexual sodomy[19] (the earlier case said "yes," the later case said "no") the Court stated: "*Bowers* [the earlier case] was not correct when it was decided, and it is not correct today."[20]

However settled a case might seem within a legal system – and this is true whether the case was, in the general view, correctly decided or incorrectly decided – it is always possible, at least in jurisdictions that allow courts to overrule themselves, for that settled law to be upended. Part of the dynamic underlying the problems about truth in law I am discussing today, is that *no law is entirely settled, once and for all*. Statutes can be revised and interpretations can be changed.

This might be a good place to note a matter that is obvious, but not often enough made prominent in these sorts of discussions: that *which* decisions are mistaken (and which ones are "clearly" or "egregiously" mistaken), is itself often highly controversial. While it would be very hard to find a reasonable judge or academic in the United States who would defend the pro-racial-segregation decision, *Plessy v. Ferguson*, reasonable academics and judges are far more divided on whether it was the recent anti-abortion rights decision, *Dobbs*, or the pro-abortion rights decision of 50 years ago, *Roe v. Wade*, that was "clearly mistaken." And such controversies complicate the analysis. Some people might be tempted by the idea that clearly wrong decisions never really become law (just as some are tempted by the slogan associated with some natural law theories, that "an unjust law is no law at all"[21]); but this view much of its

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[19] *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 48 U.S. 186 (1986).

[20] *Lawrence*, 539 U.S. at 578.

[21] *See generally* Norman Kretzmann, "*Lex Iniusta Non Est Lex*: Laws on Trial in Aquinas' Court of Conscience," 33 *American Journal of Jurisprudence* 99 (1988).

attractiveness when one recognizes that there will rarely be a consensus about which decisions are "clearly wrong."

Returning to the argument, what courts and commentators *do* agree on is that judges sometimes make mistakes, even if they disagree on *which* decisions are the mistaken ones. And judges and very good lawyers, law professors, and law students also all know that a legal system has a variety of authoritative sources – what a philosopher might call the different "truth makers" of propositions of law – and that these sources of authority can sometimes conflict, creating complications for truth in law.

V. Legal Truth, Defeasibility, and Indeterminacy

There are two important topics in law and legal theory with which the present discussion of truth in law might seem to be connected, or at least overlap. They are defeasibility and indeterminacy. Each of these topics are intricate and have evoked a large literature, while I can here only offer only a sketch, but I did want to at least point to some of the differences between the topics.

A. Defeasibility

Defeasibility defines a group of related types of reasoning and logic, and some commentators – prominently, H. L. A. Hart, in one of his earliest publications – argued that defeasibility was distinctive of legal reasoning.[22] Hart was thinking of situations where some evidence is sufficient to justify a legal conclusion, but if certain additional information came in

[22] H. L. A. Hart, "The Ascription of Responsibility and Rights," 49 *Proceedings of the Aristotelian Society* 175 (1948-49). For a useful collection on defeasibility, see Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds.), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford, 2012).

later, the conclusion would be reversed: in a sense, defeated. Think of contract law. Under American rules, if I can show that there was offer, acceptance, and consideration connected with an agreement, this would be sufficient for a court to conclude that a valid and enforceable contract existed. If no other evidence were introduced, that would be the legal conclusion of the case. However, there is evidence the other party might introduce – evidence that in no way contradicts my evidence of offer, acceptance and consideration – that can defeat the claim: e.g., evidence of fraud or duress or the absence of a required writing. Evidence of that sort would be sufficient to ground a court's conclusion that there *was no* enforceable contract (even though offer, acceptance, and consideration had been present).

Thus, defeasibility, at least of this type, *does* involve the changing of the truth of a proposition based on other, additional evidence: the truth of the proposition "there is a valid contract between me and her" changes as and when that defeating evidence comes in. And this is not a simple matter of the law changing because a legislature has added additional enactments. The world has not changed; it is simply that additional facts have revealed – facts of a different sort – that cause us to change our conclusions. But, unlike the *Plessy* discussion above, it is *not* the case, under the defeasibility examples, that at any one point, "there is a valid contract between me and her" is both true and not true *at the same time*.

B. Legal Indeterminacy

The debates about legal determinacy and indeterminacy[23] – which were more vibrant a few decades back, but which have not entirely disappeared -- were, like the present discussion,

[23] *See, e.g.*, Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 54 *University of Chicago Law Review* 462 (1987).

sometimes couched in terms of legal truth. Claims of legal determinacy, like Ronald Dworkin's "right answer" thesis,[24] could be characterized as the claim that all propositions of what the law is (as regards some dispute being heard by a court) were either true or false. Some claims of legal indeterminacy, in turn, would be best understood that certain propositions of what the law is (relating to especially hard cases) were *neither* true nor false.

The issue of legal determinacy ranges across a number of sub-topics, but the main focus was whether there were right answers to all or even most legal disputes. And the question was often made more precise by the clarification of whether any right answer derived from legal materials on their own, rather than, say, the judges' shared political or social biases. Some theorists who argued for widespread legal *in*determinacy made clear that their view was consistent with pervasive *predictability* of outcomes; their argument was only that the predictability of outcomes derived from social and political forces and biases, not from the legal materials themselves.

As mentioned, debates about legal determinacy and indeterminacy often turned on claims that for particular legal disputes – in particular, the "hard cases" that are fought up to the highest courts of the jurisdiction – there is *no truth* regarding the outcome (at least before decision is rendered). One can thus see the contrast between advocates of legal indeterminacy and the present discussion as follows. For some advocates of legal indeterminacy, for many, perhaps most, hard legal questions, the proposition of what the law is, is *neither true nor false*, while in the present discussion, the proposition of what the law is (e.g., right after *Plessy* was decided, "*Plessy* is good law"), may occasionally be *both* true and not true.

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[24] *See, e.g.*, Ronald Dworkin, *A Matter of Principle* 119-45 (Harvard University Press, 1985) ("Is There Really No Right Answer in Hard Cases?").

Under Mark Tushnet's distinctive view,[25] legal indeterminacy is a function of time combined with the resources of advocacy groups and their elite lawyers and commentators. Such litigation, lobbying and scholarly advocacy can make arguments acceptable that had earlier been dismissed as ridiculous, and eventually can even make "legally true" what had earlier been "legally false" (this change occurring without any action by a legislature). Thus in the United States, even recently, a constitutional amendment that had once been treated as offering **no** protection to individual gun owners, now is held to give individuals **significant** rights to own and carry those weapons,[26] and (on the other side of the political spectrum) an amendment that was once held to offer **no** protection to same-sex couples has now been held to require states to include same-sex couples in their marriage statutes.[27] What was legally false before has become legally true (and the opposite), again, without any action by traditional law-makers.

Conclusion

Most legal systems recognize authoritative legal rules based both on (some version of) reason and (some version of) choice. Reason is legal reasoning, doctrinal reasoning; "will" or "fiat" are the choices made by lawmakers among available options, including choices made by judicial lawmakers.[28] Because law is the product of both reason and will, there will always be the potential – greater in some legal systems than others – that the two criteria will conflict,

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[25] Mark Tushnet, "Defending the Indeterminacy Thesis," 16 *QLR [Quinnipiac Law Review]* 339-356 (1996). Jack Balkin has recently put forward a similar view: Jack M. Balkin, "From Off the Wall to On the Wall: How Social Power Shapes Legal Reason" (2026), available at ssrn.com/abstract=7174099.

[26] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[27] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[28] *See generally* Brian Bix, "Will versus Reason: Truth in Natural Law, Positive Law, and Legal Theory," in *Truth: Studies of a Robust Presence* 208-231 (Kurt Pritzl, ed., Catholic University of America Press, 2010).

leading to uncertainty about the legal truth on some matters, including the possibility that two contradictory propositions about the law will have equally (or at least comparably) strong claims to be correct.

In a way, this may just reflect an even more general truth about law mentioned earlier: that legal norms and norms about law within a particular system may conflict, and the legal system might or might not have the resources to offer quick or widely accepted methods of resolving those conflicts. From time to time, more than one legal norm may apply to a set of facts, and occasionally, those legal norms are not merely in tension; they contradict one another.

What can we take from all of this? The present work is not offering any general claims – and certainly no general *revolutionary* claims – about the nature of truth. "Truth" in law is particular; it is woven into *the practice* of law, and it is that practice which grounds the somewhat paradoxical claims of the present work. I would not here call those claims "unconventional," as it is only saying something what experienced practitioners already know at some level, even if they are not always conscious of it.

When I have presented versions of this work before, some have commented that what I am missing is the way that claims of truth in law are contextual, situational. What is legally justified for a lawyer advising a client or arguing before a local court may be different from what is legally justified for a lawyer arguing before the highest court (with the power to overrule precedent) or for a legal commentator. Of course, I do not question any of that, but I think that there is a sense of "what the law is" in a particular legal system at a particular time that is independent of, or transcends, the type of contextual assertions just mentions. As Brian Leiter comments, it was a central insight underlying H. L. A. Hart's approach to law that "Law exists

primarily outside of courts and serves primarily to guide people's conduct."[29] This reflects both the value of equating "law" with what the courts will do in fact, and the limits of doing so.

Because of the conflicting sources of authority, truth in law is, in small ways – on the margins or in the background – unstable and unsettled, or at least subject to *becoming* unsettled. It *can* be the case that, to take our earlier example, that *Plessy* both *is* and *is not* valid law.

[29] Brian Leiter, *From a Realist Point of View* (Oxford, 2026), p. 170.