

TRUTH, TRUTHS, “TRUTH,” AND “TRUTHS” IN THE LAW

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The best way to get a clear view of questions about truth—in the law or anywhere else—is to start, not with debates over “modernism” versus “post-modernism,” and the whole dubious history of ideas they presuppose, but with a few simple distinctions.

Truth is the property of being true, what it is to be true. Of the umpteen competing philosophical theories of truth, the most plausible are, in intent or in effect, generalizations of the Aristotelian Insight that “to say of what is that it is, or of what is not that it is not, is true.”¹ These theories explain truth without reference to what you or I or anyone believes, without reference to culture, paradigm, or perspective. Some of them, the various versions of the correspondence theory, turn the emphatic adverb for which we reach when we say that p is true just in case actually, *really, in fact*, p, into serious metaphysics, construing truth as a relation, structural or conventional, of propositions or statements to facts or reality.² Others, such as Tarski’s semantic theory,³ Ramsey’s “redundancy” theory,⁴ and the contemporary deflationist, minimalist, disquotationalist, and prosententialist theories that are their descendants,⁵ don’t require such an elaborate ontological apparatus.

Truths are the many and various propositions, beliefs, etc., which *are* true, including: particular empirical claims, scientific theories, historical propositions, mathematical theorems, logical principles, textual interpretations, statements about what a person believes or wants or

1. ARISTOTLE, *Metaphysics Book IV*, in *THE METAPHYSICS* 146, 201 (Hugh Tredennick trans., Harvard Univ. Press 1933).

2. For a survey of philosophical theories of truth, see SUSAN HAACK, *PHILOSOPHY OF LOGICS* 86-134 (1978).

3. See Alfred Tarski, *The Semantic Conception of Truth and the Foundations of Semantics* (1944), in *READINGS IN PHILOSOPHICAL ANALYSIS* 52-84 (Herbert Feigl & Wilfrid Sellars eds., 1949).

4. See FRANK PLUMPTON RAMSEY, *ON TRUTH* (Nicholas Rescher & Ulrich Majer eds., 1991) (Papers from 1927-29) “Redundancy” is the usual, but rather misleading, label given to Ramsey’s theory.

5. For more on deflationist, minimalist, disquotationalist, etc., theories, see PAUL HORWICH, *TRUTH* (1998); SCOTT SOAMES, *UNDERSTANDING TRUTH* 228-55 (1999).

intends, about social roles and rules, etc. To say that a claim is true is not to say that anyone, or everyone, believes it, but that things are as it says. However, some claims are such that the relevant things—a person's beliefs or intentions, a legal or grammatical rule—depend, in one way or another, on us; and some are such that it makes sense to ascribe a truth-value only relative to this or that community or social practice. Moreover, not every sentence, not even every declarative sentence, manages to express something true or false; some, for instance, are too indeterminate in meaning to have a truth-value.

The effect of scare quotes is to turn an expression meaning "X" into an expression meaning "so-called 'X'." So scare-quotes "truth," as distinct from truth, is what is taken to be truth; and scare-quotes "truths," as distinct from truths, are claims, propositions, or beliefs, which are taken to be truths—many of which are not really truths at all. We humans, after all, are thoroughly fallible creatures. Even with the best will in the world, finding out the truth can be hard work; and we are often willing, even eager, to take pains to *avoid* discovering, or to cover up, unpalatable truths.

The rhetoric of truth, moreover, can be used in nefarious ways. Hence an important source of the idea that truth is merely a rhetorical or political concept: the seductive, but crashingly invalid, argument I call the "Passes-for Fallacy."⁶ What passes for truth, the argument goes, is often no such thing, but only what the powerful have managed to get accepted as such; *therefore* the concept of truth is nothing but ideological humbug. Stated plainly, this is not only obviously invalid, but also in obvious danger of undermining itself. If, however, you don't distinguish truth from scare-quotes "truth," or truths from scare-quotes "truths," it can seem irresistible.

Nowadays, it seems, the Passes-for Fallacy is ubiquitous. Perhaps it is rooted in the philosophies of Marx and Freud, in the idea of false consciousness and the "hermeneutics of suspicion."⁷ It is enabled by regimes of propaganda and, in our times, by the overwhelming flood of information, and misinformation, which promotes first credulity and then, as people realize they have been fooled, cynicism. For when it becomes notorious that what are presented as truths are not really truths at all—that *Pravda* is full of lies and propaganda, that the scientific

6. I first introduced this term in *Knowledge and Propaganda: Reflections of an Old Feminist*, 60.4 *PARTISAN REV.* 556-64 (1993), reprinted in SUSAN HAACK, *MANIFESTO OF A PASSIONATE MODERATE: UNFASHIONABLE ESSAYS* 123-36 (1998).

7. See PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 20-36 (Denis Savage trans., 1970).

breakthrough or miracle drug prematurely trumpeted in the press was no such thing—people become increasingly distrustful of truth-claims, increasingly reluctant to speak of truth without the precaution of neutralizing quotation marks; until eventually, they lose confidence in the very idea of truth, and formerly precautionary scare-quotes cease to warn and begin to scoff: “‘Truth?’ Yeah, right!”

This can be exacerbated when it comes to questions specifically about truth in the law, as we shall see. But first I need one more distinction: between the ordinary factual claims at issue in legal disputes, and legal claims. In practice, these are often intimately intertwined, but conceptually they are different enough to need separate treatment.

“This bullet was fired from that gun.” “His exposure to that chemical promoted the plaintiff’s cancer.” “The defendant believed the victim was about to kill him.” “There was a stop sign at the intersection at the time of the accident.” Crucial as they are to justice, the factual claims at issue in legal proceedings are usually straightforwardly true or else false, and should cause no special unease about truth or objectivity. If they sometimes do, perhaps it is the result in part of a confusion of what *is* true with what is *known* or *proven* to be true, and in part of immersion in the adversary system, which can give people the idea that there must always be two sides to every question, that it is arrogance to suppose that we can ever really know the truth, that there are always grounds for doubt, that all we can do is give due consideration to rival “truths”—which makes the Passes-for Fallacy even more seductive.

In the adversarial system a jury is asked to decide, on the basis of evidence presented by competing advocates, whether guilt or liability has been established to the required degree of proof. This is a very special kind of inquiry into a very special kind of proposition; because it is constrained not only by epistemological desiderata, but also by policy considerations, by formal rules of evidence, and by the need to arrive at a decision in a reasonably short time, its procedures are very different from those of ordinary scientific or historical inquiry, or even investigative journalism or detective work. But when inquiry generally is assimilated to this very special case, the differences are obscured: the exchange of ideas and mutual criticism which forward scientific or historical inquiry are confused with the interactions of rival advocates trying to persuade a jury, and even the distinction between inquiry and advocacy may be blurred.

As for legal claims—claims to the effect that the law is thus and so—

the first and most obvious thing to be said is that they make sense, and hence can be true or false, only when construed as implicitly referring to some legal system or systems (and to a time). “Novel scientific evidence is admissible only if it is generally accepted in the field to which it belongs,” for example,⁸ is presently true in state courts in Florida, but false in federal courts. Truth is not relative to a legal system, but legal claims are. Moreover, legal systems—though certainly real, not fictions or figments—are also, in a sense, socially constructed: they exist, and are as they are, only because of our institutional practices. Legal claims are made true or false by legislation or precedent; although, once made, their truth-value is a matter to be discovered—or sometimes re-made through persuasive reinterpretation.

For legal claims are subject to indeterminacies of meaning, and, as with partially defined predicates or functions in logic or mathematics, may be definitely correct or definitely incorrect only in some applications. So, they are susceptible to truth-value gaps. Is Federal Rule of Evidence 702 compatible or incompatible with the *Frye* test? There was no true or false answer until 1993, when, making FRE 702 more determinate, the Supreme Court ruled that the Federal Rules superseded *Frye*.⁹ And whether a legal claim is made true or made false is doubtless often the result, in whole or in part, of political pressures or advocates’ rhetorical skills—as the *Daubert* court’s reading of the Federal Rules as requiring reliability as well as relevance may be attributable in part to the influence of Peter Huber’s rhetoric about the ubiquity of “junk science” in tort cases.¹⁰ Truth is not a political or rhetorical concept; but sometimes, when legal truths are brought into being, it is in part by political or rhetorical means.

Statements to the effect that you ought (or ought not) to do such and such have both legal and moral interpretations. When people describe this law as good, that as bad, they may be advocating or criticizing it on moral grounds—as with proponents, and opponents, of liberal abortion

8. The *Frye* test, requiring that novel scientific evidence, in order to be admissible, must be generally accepted in the field to which it belongs, derives from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993), the U.S. Supreme Court ruled that the Federal Rules of Evidence have superseded the *Frye* test in federal trials. In *Flanagan v. State*, 625 So.2d 827, 829 n.2 (Fla. 1993), noting the U.S. Supreme Court’s movement away from *Frye*, the Florida Supreme Court reaffirmed Florida’s reliance on the *Frye* test; and in *Hadden v. State* 690 So.2d 573, 577, 580 (Fla. 1997), the court again reaffirmed the *Frye* test, expanding on its rationale and proper implementation.

9. *Daubert*, 509 U.S. at 587 (“They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree.”)(citation omitted).

10. PETER W. HUBER, GALLEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

laws, or of laws allowing same-sex marriage (or, no doubt, proponents, and opponents, of the law in Oliver Cromwell's Commonwealth prescribing the death penalty for persons convicted of adultery). However, not all legal norms concern matters of any moral significance; and those that do may be *either* good *or* bad from a moral point of view. Propositions to the effect that you legally ought to do a certain thing are logically independent of propositions to the effect that you morally ought to do it.

Are moral claims true or false, or only, as some Logical Positivists maintained, expressions of emotion?¹¹ If they are true or false, are they statements of the speaker's subjective preferences, or of something more objective? Are they relative to culture or community, or absolute? If they are true or false objectively and absolutely, does this require a moral reality, perhaps a non-natural realm of moral facts? What should the relation be of legal to moral norms? And what kind of "should" is that? Fortunately, such deep and difficult questions bear only quite obliquely on the issue before us; so I won't apologize for having no better answer than: "Get back to me in five years when I've had time to think."

11. See, e.g., ALFRED JULES AYER, *LANGUAGE, TRUTH, AND LOGIC* 102-120 (1936); Charles Leslie Stevenson, *The Emotive Meaning of Ethical Terms*, 46 *MIND* 14, 14-31 (1937); CHARLES LESLIE STEVENSON, *ETHICS AND LANGUAGE* (1945).

