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LEGAL INDETERMINACY AND THE BIVALENCE OF LEGAL TRUTH

ALAN R. MADRY*

INTRODUCTION

The principle of bivalence is a logical rule that regards every descriptive sentence as either true or false.¹ Consider the simple sentence, 'The dog is in the car.' It purports to describe a current state of affairs in the world, that there is now a particular dog in a particular car. If the dog is in the car, then the sentence is true; otherwise, the sentence is false. There is no other possibility. The sentence must be either true or false.

Does the principle apply to sentences of law? Superficially, at least, there is little reason to suppose that it doesn't. If I say, "The speed limit on Interstate 43 between Milwaukee and Green Bay is 65 miles per hour," that sentence is true only if the speed limit is consistently 65 miles per hour; otherwise, it is false.

But the principle of bivalence is not itself universally regarded as true of all types of sentences. Aristotle, among others, claimed that sentences about contingent future events were neither true nor false.² A contingent event is one that is not yet causally determined either to occur or not to occur. While it is likely that there will be at least one traffic jam on Interstate 43 tomorrow morning between 9:00 and 9:15, it is also possible that there won't be even a single traffic jam. Whether or not there is at least one traffic jam is a function of myriad individual decisions, not all of which are yet causally determined one way or another.

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¹ The principle of bivalence is distinct from the related principle of excluded middle. The principle of excluded middle holds that the disjunction of a sentence and its negation is necessarily true. Or to put it somewhat differently, for any sentence P, it is necessarily the case that P or not P. The principle of bivalence focuses on individual sentences and insists that each sentence must be either true or false.

² See ARISTOTLE, DE INTERPRETATIONE ch. 9, reprinted in A NEW ARISTOTLE READER at 17 (J. L. Ackrill ed., trans. 1987).
Insistence on the existence of contingent future events obviously implies, and is indeed motivated by, a rejection of absolute determinacy. Because there is nothing about the world now that causally determines the occurrence or non-occurrence of a contingent future event, Aristotle reasoned, there is also nothing about the world now that makes a sentence about a future contingent either true or false. "Clearly, therefore," Aristotle wrote, "not everything is or happens of necessity: some things happen as chance has it, and of the affirmation and the negation neither is true rather than the other; with other things it is one rather than the other and as a rule, but still it is possible for the other to happen instead." Thus, the sentence, 'There will be no traffic jams tomorrow morning on I-43 between Milwaukee and Green Bay' is, according to Aristotle, neither true nor false. Bivalence does not hold for sentences of future contingents.

I will argue that similar considerations require us to reject the principle of bivalence for sentences of law as well. Like the indeterminacy that precludes the application of the principle to sentences of future interests, indeterminacy in the law precludes the bivalence of truth for sentences of law. Indeterminacy in the law is not causal however, but inferential. An area of law is considered indeterminate just because it fails to compel a single inference about the existence or nonexistence of a particular legal relationship. While I agree with Aristotle that this state of affairs requires us to reject bivalence, in this case for law, I will show that the rejection of bivalence does not require us to reject the possibility of truth or falsity for sentences about indeterminate law. Rather, it requires us to distinguish two types of falsity, a strong falsity that implies the truth of its contradiction, and a weak falsity that compels no such inference. Thus, truth in law is not bivalent, it is trivalent. It requires us to admit three truth-values: truth and two distinct kinds of falsity.

As a foundation for the discussion of the trivalence of legal truth, and to make clear the nature of legal indeterminacy, Part I below briefly discusses the ontology of law, both as a social fact and more specifically as a set of rules propounded by institutions with the recognized authority to make law. Part II presents the principle argument, that truth in law is not bivalent but trivalent. Though the discussion of the law's tri-

3. Id.
4. The analysis of bivalence in law does not necessarily apply beyond the law to include in particular sentences of future contingents, the sentences with which Aristotle was concerned. See infra note 26.
valence is of interest in itself, the conclusion also has the affect of blocking a particular argument offered by Ken Kress against the claim that truth in law is deflationary. Part III shows why.

I. ONTOLOGICAL INDETERMINACY

The indeterminacy at the root of Aristotle’s critique of bivalence is of a strong sort. It is indeterminacy in the fabric of the world. There is nothing about the world currently that causally determines whether some possible events will or will not occur. It is, in other words, ontological indeterminacy. Aristotle explained in this regard:

For we see that what will be has an origin both in deliberation and in action, and that, in general, in things that are not always actual there is the possibility of being and of not being; here both possibilities are open, both being and not being, and consequently, both coming to be and not coming to be.5

The indeterminacy of sentences of future contingents is not in any respect epistemological; it has nothing to do with our knowledge of the world. The indeterminacy of future contingents is not a product of our mere inability to predict a future event because of inadequate information. Even were we to have complete information about the current state of the world, all we would see is that the condition of the world now does not yet determine whether some future events, those that are contingent, will occur or not.

Similarly, the indeterminacy that requires the rejection of bivalence for the law is also ontological and not epistemological. Where the law is indeterminate, we may know everything that there is to know about the current state of the law. We may have before us everything that each authoritative governmental institution—the constitution, the legislatures, the courts and regulatory agencies—has said about the area. But all of that information may still fail to compel an inference to a single rule about the existence or non-existence of any particular legal relationship, here conceived along Hohfeldian6 lines. Even were we to have

5. ARISTOTLE, supra note 2, at 18.
6. See generally WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, AND OTHER LEGAL ESSAYS (1919). Hohfeld recognized that the concept of a legal right was used in the law ambiguously to refer to a number of distinct but related ideas. He also noticed that every one of the ideas referred to a relationship between individuals or groups of people. For example, if the law protects a particular interest of some person against invasion or frustration, it protected it against some other par-
reliable information about how a court will clarify the law some time in the future in the context of a particular lawsuit, or how a legislature might amend a law to fill gaps, the law today is still ontologically indeterminate. Information about certain future changes in the law might alter the advice that a lawyer would give a client about the consequences of a proposed course of action, after the changes are made, but it would not change the character of the law today, at this moment. If we know that in an hour the skies will darken and it will begin to rain, we may prepare for it and change our plans for the future. But that information about the future doesn't change the fact that right now, at the present moment, the sky is blue and the sun is shining.\(^7\)

To get a firmer grip on the nature of indeterminacy in the law, it is necessary to understand something of the nature of law and how the law can be indeterminate. In this country, most of us regard ourselves as governed by laws which both regulate our social and commercial lives and serve as rules of decision in resolving disputes brought to courts of law. Facts about that institution, including what we recognize as the specific laws of our various communities, are a species of what John Searle has called “institutional facts.”\(^7\) They are facts—and exist—only by virtue of our agreement or continued acceptance of them. Particular pieces of paper with a specific design and origin, for instance, are treated as money and used as a medium of exchange only because we accept

\(^7\) Aristotle of course would likely treat at least some and perhaps all sentences about future judicial decisions as sentences of future contingents and thus as having no truth-value. As I explain infra note 26, nothing in the analysis of sentences of law presented in this article is meant to apply to sentences of future contingents, including sentences of contingent future judicial decisions. Nor would I want to revive Holmes’s notoriously unsound claim that the law is nothing but a prediction of future judicial conduct. See, e.g., DAVID LYONS, ETHICS AND THE RULE OF LAW 38-40 (1984).

The law suffers an additional wrinkle in this regard because of the possibility that new law, or clarifications of ambiguous law, will be applied retroactively to the case in which the clarification is made. In situations where the law is applied retroactively, one might be tempted to say that the law at the time of the act was the law made later in the case concerning the act. The more perspicuous characterization, however, is that the law was changed and applied retroactively, \(i.e.,\) a norm is being applied that was not the norm at the time of the act. The second characterization has the virtue of revealing the moral choice that is at stake in applying law that was not clear or even extant at the time of an act currently being litigated.

them as such. In the absence of such agreement or acceptance, what we now regard as currency would have no greater significance than any other artfully decorated piece of paper. Many of us are considered married, with all of the obligations and benefits that we regard as entailed by marriage, because we endow certain rituals and words as creating the bond we call marriage. Were we to abandon the institution in the future, those rituals would have no such significance and there would be no such fact as the bond of marriage nor could it be a fact that any two people were married.

Searle characterizes the ontology of institutional facts as subjective; that is, institutional facts, whose existence depends upon our agreement and acceptance, are ontologically subjective because of their origin in our collective agreement and acceptance. Searle distinguishes institutional facts in this regard from brute facts. Brute facts, like the existence of Mount Everest, or the brute existence of the decorated bits of paper which we treat as money, as opposed to their existence as money, are ontologically objective because their existence depends in no way upon our belief in their existence. Our knowledge of institutional facts, on the other hand, can nonetheless be objective despite their ontological subjectivity. Their existence and character can be ascertained, indeed must be ascertained, by observation of the community for which institutional facts are facts. In this sense then, even clothing fashions, that most ephemeral of institutional facts, are facts with a subjective ontology but whose existence and nature at any moment can be known objectively by observing the clothing actually worn by distinct groups (teens at the mall, professors in their classrooms, mavens at the opera) or by flipping through the pages of magazines devoted to tracking fashion.

With regard to our laws, then, if we are to ascertain what our laws are, or more generally, the nature of law in our society, we need to know how in fact, in practice, we collectively think about the origin and criteria for law. H.L.A. Hart usefully refers to the sum of that understanding for any society as the society’s ‘rule of recognition.’ The rule of recognition for any society, including our own, provides authoritative criteria for identifying all other valid laws for the society. Uniquely among the laws of a society, the rule of recognition is not ascertained from the application of some set of standards or norms. The rule of recognition is after all the ultimate set of such norms. It is to be ascertained objectively as an ontologically subjective social fact by observing how the of-

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9. See generally id.
ficial legal actors—judges and lawyers for example—identify their society's laws. Hart says of the existence of the rule of recognition, "the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons identifying the law by reference to certain criteria. Its existence is a matter of fact." The existence of particular laws is thus a function of the existence of a rule of recognition whose existence is in turn a function of accepted practices among the official actors of the community.

On the dominant theory of the rule of recognition in Anglo-American countries, legal positivism, though still somewhat controversial as I'll discuss later, the rule of recognition consists of the set of rules, of greater and lesser generality, properly promulgated by institutions with the political authority to make law, plus all of those rules, again of greater and lesser generality, that are unambiguously implied by the rules on the books. Thus the law consists of constitutions, statutes, administrative regulations, the judge-made common law, ordinances, etc. Nothing in the definition just given prevents the law from being inconsistent. And indeed, it is the experience of every lawyer, legal scholar, and law student that the law contains not only ambiguity, but conflicting, norms. Conflicts among laws can often be resolved by other rules establishing relative primacy and subordination. Constitutions have primacy over all other sources of law; judge-made common law is subordinate to statute, federal law is supreme over state law. Sometimes conflicts are simply segregated into the distinct domains of different doctrinal areas. In general, though, we might say that the law consists of the set of rules on the books, rules promulgated by institutions with the authority to make law. In addition to rules which appear unambiguously in the authoritative materials, the law also includes rules and perhaps more general principles of wide application that are unambiguously implied by the law on the books. The latter addition acknowledges the fact that when required we do extrapolate from authoritative sources for, among other reasons, the sake of consistency in the law. It may also be the case that authoritative sources, while ambiguous, nonetheless narrow the range of possible laws that can be introduced by the courts to fill gaps consistent with existing law.¹²

¹¹. Id.
¹². The question, 'How much indeterminacy is there in the laws of this society?' is an empirical question that probably cannot be answered with any certainty. Like the question about whether the number of stars are odd or even, we cannot possibly survey all of the laws in this society and make determinations about their ambiguity. Such an endeavor would undoubtedly exhaust any lifetime and during that lifetime the laws will have changed in many
One virtue of a theory of law that ties law fairly strictly to the pronouncements of authoritative bodies is that it is consistent with our larger political theories according to which the ultimate political power lies with the people collectively. The people, by a collective act, then delegate, or continue to delegate by their continued acceptance of the arrangement, some of their political authority to the institutions of government by the adoption of a constitution. The rules of those institutions have political authority by virtue solely of the fact that they were delegated such authority by the people as a group. Interpreting the law consequently becomes an act primarily of identifying the intent of the political body that promulgated the law.

Returning to the notion of indeterminacy then, on this account the law is indeterminate when the set of rules properly promulgated by the institutions with the authority to promulgate laws fails to compel the inference of a single rule of decision in a particular case. This might occur in either of two possible circumstances: First, when the law fails altogether to address the issue. For example, in the case of Pierson v. Post, a case familiar to all first-year law students, the court had to decide for the first time the conditions for acquiring ownership of a wild animal. There was no question that hunters could acquire ownership of wild animals—that much was well accepted. But at what point in the pursuit of the animal did the hunter acquire title and impose a corresponding duty on other hunters not to interfere? The court was forced to articulate a new rule, consistent with the established possibility that hunters did have the power to acquire title to their prey.

A second circumstance in which the law is indeterminate is when it addresses an issue but does so ambiguously. Statutes and regulations are ambiguous because the language is vague or the parts of the law are

13. Though surely not every pronouncement of a legally legitimate political body enjoys moral authority. The question of the law's moral authority, on the dominant, positivist view, is a question distinct from its legal authority. Thus some act may be morally required but not legally required or conversely, legally required but morally repugnant.


15. It held that a hunter acquires title only when he or she has either killed the animal or deprived it of its natural freedom. Certain capture is not sufficient. The rule has come to be known as the rule of capture and for generations was also used by analogy in the case of flowing minerals like oil, gas, and underground water. The holding ran counter to accepted custom among hunters. The rule was also later applied to reservoirs of underground migratory minerals, oil, gas, and water in particular, but then later replaced for oil and gas by statutes that attempted a more equitable distribution of the ownership of subsurface minerals among the owners of the surface lands. See generally J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST ch. 1 A (1998).
inconsistent. Judicial opinions can also be ambiguous because the reasons given for the outcome are vague or incoherent or fail to acknowledge and reconcile already existing and inconsistent law. Consider a variation on the now classic ordinance, first conceived by H.L.A. Hart and Lon Fuller—call it ‘Ordinance 5’—which prohibits “vehicles” from a particular municipal park—call it Gramercy Park.\textsuperscript{16} We might also imagine that other similar laws, applicable to other parks or pathways, more explicitly prohibit “motor vehicles.” Others refer only to “vehicles” in their operative provisions but provide a definition for the term that stipulates that the term is to include only a variety of motorized vehicles. Others still define “vehicle” to include a host of wheeled devices, both motorized and non-motorized, including toys. Does Ordinance 5 prohibit rollerblades from the pathways of the Gramercy Park? Ordinarily, we would look to the language of other similar statutes for guidance. But the other statutes in this instance provide little help. Obviously, on the account of the nature of law provided above, the question concerns the intentions of the body that adopted Ordinance 5. But they have left little to go on to ascertain their intentions. Either they never considered the scope of the term “vehicle” or simply failed to make their intentions clear. In any event, Ordinance 5 is ambiguous. In such a situation, a court might fall back onto some general principle, for example, to the effect that unless a legislature speaks clearly, it will not be held to have altered the common law, or to have eliminated an existing liberty. But canons of interpretation are notoriously soft and often conflict with other canons. Consequently, clarification of an ambiguous law by a court nearly inevitably involves the court itself in making judgments about the best law. But until it makes such a judgement, the law is ambiguous. No inference about the existence or non-existence of a duty is compelled.

Some have objected to this picture by insisting that there is in fact never any indeterminacy in the law, there is on the contrary always, at least almost always, a single correct interpretation of the law. One way to fill out the objection is to enrich the basis of the law by including in it as law, along with positive law, some view of morality such that in cases where the positive law fails to provide a single answer, morality always fills the gap and in only one way. This was Ronald Dworkin’s early po-

sition in *Taking Rights Seriously*. More recently, culminating in *Law's Empire*, Dworkin has shifted his focus away from what constitutes the basis of law as the significant inquiry. He now insists that identifying particular laws is essentially an interpretative enterprise and the law is the product of that interpretation. At any time, for every dispute or proposed course of action, there is a best interpretation of the basis of positive law, and that interpretation is the law at that moment. Dworkin has summarized his position as follows: "[A]ny proposition of law which is true, is true because it figures in, or is the consequence of, the best interpretation of a community's political history." And more generally, he claims of interpretation, "interpretation aims to make of the object of interpretation the best it can be of the genre to which it is taken to belong." Thus even if morality is not within the basis of the law, because it is necessary to appeal to morality or political ideals in interpreting the law, there is, Dworkin believes, a single best interpretation. It is the inclusion of morality or political philosophy in the interpretive process that sets Dworkin apart from positivists who might otherwise agree that particular laws are identified through a process of interpretation. Traditional positivism would limit the interpretive process to ascertaining the intent of the promulgating institution through a careful consideration of what has been said explicitly by authoritative institutions and what must be inferred from their declarations.

One crucial fault of this account of the nature of law is that it focuses on the wrong moments as revealing how lawyers think about the nature of law. Dworkin focuses on one or the other of the following two moments: first, when lawyers are formulating arguments intended to be used in the context of a legal action to persuade a court to interpret the law in a particular way, or, second, when a court is explaining the reasons why it has interpreted the law as it has. Both of these moments, as David Luban has pointed out, are moments of advocacy or rationalization. They are not times when a lawyer is coolly assessing the state of

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21. See David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 SMU L. REV. 1613, 1624-25 (1997). Luban appears to assume that legal language, presumably all of it, is essentially adversarial. He makes this claim in order to distinguish legal discourse from ordinary discourse and derivatively legal truth from truth more generally. The point in the text is not so radical. My concern is to distinguish some activities in which law-
the current law. In clarifying or elaborating on indeterminate law it is altogether appropriate, as Dworkin suggests, for the court to take into account considerations of conventional morality, prudence, political history or political theory, or even its own considered judgments about the fairness or reasonableness of a particular rule. And if it is thus appropriate for a court to consider these factors, it is appropriate for a lawyer to argue these factors. But that fact does not necessarily indicate how lawyers assess the state of the law at any given moment and thus how they regard the nature of law.

The far more appropriate moment which reveals the way lawyers think about the nature of law is the moment when a lawyer is advising a client about a proposed course of action, or about the likely outcome of a remote law suit, particularly before the suit has been assigned to a particular judge with known political or moral leanings. In such a situation, no lawyer would give great weight to matters of morality or political history or philosophy in assessing the current state of the law. Such items are simply too varied, their role in any particular judicial decision too unpredictable, to be given any definitive role in assessing the current state of law when the basis, restricted narrowly to positive law, is indeterminate. A lawyer advising a client would be far more likely to advise the client that the law on the books is, at that moment, indeterminate.

yers and judges engage, the adversarial activity or the act of justifying a decision, from other activities, that of counseling and planning, and to suggest that the latter are a better guide to how lawyers think about the nature of law.

22. Dworkin has long based his argument for a gap-less view of the law by referring to certain judicial opinions in which judges appear to regard themselves as finding an existing law, rather than creating new law, even when the positive law is silent on an issue. He then accuses positivists of engaging in the horror of implying that such a judge is guilty of essentially being less than fully honest about his conception of the law. See, e.g., supra note 18 at 37-44. The problem with this position, however, is that most positivists, recognizing the insights of the Legal Realists, would accept the accusation. Anyone with even the slightest familiarity with legal advocacy knows that it is always better to frame an argument as if the law required an answer. To argue for new law on the basis of prudence or political theory is to concede that there is no law supporting one's position and that one has lost the ability to insist on a particular legal reading of the law. Judges too do not want to be perceived as doing anything other than applying settled law. There are simply too many examples of judicial opinions silently misrepresenting fairly clear and stable law to assume that judges always believe that they are doing nothing more than applying existing law.

23. It was precisely to this circumstance that Oliver Wendell Holmes draws attention in his discussion of the nature of law when he famously imagined the bad man seeking advice on what the law would do to him. Though Holmes drew from the situation the wrong inferences about the nature of law, that law is nothing other than a prediction of what a judge would decide, he nonetheless was correct in identifying that moment as best revealing how significant legal actors thought about the nature of law. See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 457 (1897).
and, consequently and practically, any proposed course of action legally risky.

Consider again Ordinance 5. Imagine a client who is considering investing a substantial sum of money to open a stand outside of Gramercy Park from which the client would rent rollerblades to persons who would then rollerblade around the Park. A prudent lawyer, sensitive to her clients concerns will have to inform the client that the law is ambiguous. It is possible that a court in the future will interpret Ordinance 5 to prohibit rollerblades from Gramercy Park.

The Dworkin-Patterson scheme, if accurate, presumably envisions lawyers devising their best arguments for the law, in light of conventional morality or political history or prudence, and advising clients that such was in fact the law at that moment. In the case of the potential rollerblade vendor, the lawyer would assess the wisdom of allowing rollerblading in Gramercy Park, all things considered. Among other things, the lawyer would have to consider how crowded the park is, the compatibility of rollerblading with other likely uses for the park, the ability of law enforcement officers to keep rollerbladers from rollerblading recklessly, etc. But once the lawyer identifies and weighs the factors, the lawyer presumably will have arrived at a judgment about the prudence of permitting rollerblading in Gramercy Park. And that judgment, according to Dworkin and Patterson, is the law.

The problem with such a scenario is that it appears to ignore the fact that one of the more crucial services that lawyers provide to clients is to assess the legal risks of various courses of action. Were a Dworkonian or Pattersonian lawyer to take seriously that obligation, he or she would then have to add to his or her assessment of Ordinance 5 that it is altogether possible, however, that the court would disregard the law and adopt some other rule of decision. Surely this is gives the client a skewed picture of his situation. Courts do in fact from time to time disregard plain law for one reason or another. But that situation and the pressures on the court in it are distinct from the situation in which the law on the books is vague and needs clarification. The incentives, the pressures, the likelihood that a court will assess morality and political history differently from the lawyer in his office, and consequently the risks to the litigant, are altogether different.

By focusing exclusively on moments of advocacy and rationalization, Dworkin and Patterson also conceal an absurd conclusion that follows from their accounts. Under their theories of law, when a lawyer advises a client on a particular law in an area where the basis is indeterminate, the lawyer will be required to identify a single, morally best interpreta-
tion. That interpretation, both Dworkin and Patterson then allow, is a true sentence of the law. But if ten lawyers at the same moment arrive at a different “best” interpretation of the law, then each of their claims about what the law is has to be true, despite the fact that they may be incompatible!

When we look at the correct moment, the moment when a lawyer apprises a client of the current state of the law, it is apparent that lawyers look to the positive law, the law on the books, including authoritatively established canons of interpretation. In light of that moment and what it suggests about the nature of the law, political morality, political history, and considerations of public policy not already unambiguously adopted as principles, are seen, as positivists have long insisted, as sources of law when the law needs to be clarified, but not themselves definitive of law or a part of the basis of the law. Thus, it is altogether possible, and the actual experience of those familiar with the law that the law is indeed indeterminate with regard to many kinds of conduct.

In sum, the law for our society consists of the collection of rules promulgated by institutions recognized as having the authority to create law. The law is indeterminate when it fails to give unambiguous guidance to potentially regulated parties or to judges charged with resolving disputes according to law. It is appropriate in these circumstances to talk of ontological indeterminacy rather than semantic indeterminacy or epistemological indeterminacy because the indeterminacy is a feature of the law as the law exists at the moment it is consulted for guidance.

II. INDETERMINACY AND TRUTH

To acknowledge the possibility of ontological indeterminacy in the law is to admit that at any time, with respect to a possible course of action or the resolution of a particular dispute, the law could be in one of three exclusive states. Consider a possible duty, say the duty to refrain from engaging in a certain conduct, X. With regard to this duty, there are three possible states of the law:

(i) the law unambiguously imposes a duty on some class of people to refrain from X, or in other words, the people in the regulated class have a duty to refrain from X,

(ii) the law unambiguously rejects a duty to refrain from X, or in other words, there is no duty to refrain from X, on the contrary the law affirms a liberty to engage in X free from the burden of duty, or

(iii) the law is indeterminate with regard to a duty to refrain from X.
Now imagine that at the present time, the law does indeed unambiguously impose upon some class of people a duty to refrain from engaging in X. Then the sentence (1) 'The law does not impose a duty to refrain from X' is false. It is false because it inaccurately characterizes the current state of the law. But similarly, if the law were in fact now indeterminate about the duty to refrain from X, (1) would still be false and for the same reason—it still inaccurately characterizes the current state of the law. The current state of the law is that the law is indeterminate, and that fact excludes the possibility that the law currently either imposes a duty or rejects a duty. Consequently, any sentence to the contrary about the state of the law would be false. The only true sentence about the current state of the law is that it is indeterminate.

Someone might object that if we regard a sentence contrary to fact as false when the law is indeterminate, then we risk the following paradox: if we say it is false that there is a duty to refrain from X, then we are committed to the truth of its negation, there is no duty to refrain from X. But we’ve already concluded that ‘there is no duty’ is also false. It was additionally a consideration of this sort that led Aristotle to insist that sentences of contingent future events had no truth-value at all, they were neither true nor false. He wrote:

Nor, however, can we say that neither is true—that it neither will be nor will not be so. For, firstly, though the affirmation is false the negation is not true, and though the negation is false the affirmation, on this view, is not true ....

These and others like them are the absurdities that follow if it is necessary for every affirmation and negation either about universals spoken universally or particulars, that one of the opposites be true and the other false, and that nothing of what happens is as chance has it, but everything is and happens of necessity.24

With regard to law, the paradox is underscored by Wesley Hohfeld’s influential analysis of the notion of a legal right.25 Hohfeld identified two basic legal relations. The first is the right/duty relation. Assigning

24. ARISTOTLE, supra note 2, at 17-18. Independent of this reason for rejecting bivalence is the reason discussed earlier, that there is nothing about the world now which determines a future contingent. That is the very nature of contingency. Consequently, there is nothing now which makes a sentence of a future contingent either true or false. See supra text accompanying note 2.
25. See HOHFELD, supra note 6.
to someone a legal right logically implies the imposition on someone else of a duty to honor the right. Thus, whenever someone has a right, someone else has a correlative legal duty to honor the right. Derivatively, when someone is unencumbered by a duty to either refrain from action or to undertake action, that person is said to be at liberty. In other words, the lack of a right implies liberty to act or not act. The second relation Hohfeld described is that of power/liability. Power is the ability to make changes in some set of existing legal relationships. Congress has the power to impose new duties, repeal existing rights, create new powers, etc. All of us have powers in some circumstances to convey property, enter into contracts, etc. The existence of a power implies a liability in the persons whose relationships are subject to the power. Again, derivatively, the lack of a specific power in someone implies an immunity in others to having some among their legal relationships altered by the person lacking the power. Under the Hohfeldian analysis then, by definition, the lack of a right implies a liberty and similarly, by definition, the lack of a power implies immunity. There is no middle ground. Consequently, under this analysis, the falsity of a sentence suggesting the non-existence of a duty necessarily implies the truth of the sentence’s negation.

The paradox is only apparent, however. Hohfeld never considered the affect of indeterminacy in the law on his analysis. The recognition of ontological indeterminacy requires us to amend the Hohfeldian analysis in such a way, for instance, that liberty is implied only by the absence of both an unambiguous duty and indeterminacy, not by the absence of a duty alone. Furthermore, as Simon Blackburn has discussed, it may be useful in circumstance like that of the law, as well as in fiction, to recognize two levels of falsity, a weak falsity that does not imply the truth of the negation of the false sentence, and a strong falsity that does. In the case of both law and fiction, the truth or falsity of sentences depends upon inferences compelled by texts, and those texts might be silent or

26 See Simon Blackburn, Spreading the Word 204-10 (1984). A somewhat similar analysis can be applied to sentences about future contingents but only if we regard such sentences as referring to a present condition in the world. In that case, when we so regard the reference of such a sentence, the sentence fails to accurately describe the world now. But that failure does not imply the truth of the sentence’s negation. Thus the sentence and its negation would both be weakly false. However, if we regard sentences of future contingents as referring to the future, as would appear to be the more natural interpretation, then the analysis does not apply and it is more appropriate to follow Aristotle and say that the sentence has no truth value at all. We can't say anything about future contingents except that there is nothing yet that determines these future events one way or the other and therefore we have no basis for assigning truth-value to sentences about future contingents.
ambiguous about a particular possible fact.

Consider the following sentences about Melville’s character Billy Budd:

(B1) Billy Budd was a fish.
(B2) Billy Budd was a woman.
(B3) Billy Budd would have opposed tobacco subsidies.

Both B1 and B2 are strongly false because there are facts in Melville’s story that are clearly inconsistent with the truth of either. Consequently, their negations are true. B3 on the other hand is only weakly false. All of the facts about Billy Budd are contained in Melville’s short story and there are no facts in the story which imply the truth of B3. Thus, B3 inaccurately characterizes the only facts existing regarding Billy Budd and for that reason B3 has to be regarded as false. But there are no facts suggesting the negation either and a sentence asserting that Billy Budd favored tobacco subsidies would have to be considered false as well. It too inaccurately characterizes the facts about Billy Budd, which facts are exhaustively comprised by the text of the story.

Similarly in the law, all of the facts about the existence of a duty, for instance, are contained in the texts. If the law says nothing or is at best ambiguous about the existence of a particular duty, then any sentence suggesting otherwise, either to the effect that there is a duty or there is no duty, or there is a power or no power, has to be regarded as false. But the sentence is only weakly false just because the same ontological state of the law also makes the negation of the sentence false as well and for the same reason. Thus, law must admit three truth-values: truth, strong falsity and weak falsity. A sentence of law will be true if and only if the law is clear and the sentence accurately describes the clear law. A sentence of law will be strongly false, on the other hand, if and only if the law is clear, but the sentence inaccurately describes the clear state of the law (either by asserting its negation or claiming that the law is indeterminate). Finally, a sentence of law is weakly false whenever the law is indeterminate and the sentence describes the law as if it were clear. In that case, the falsity of the sentence does not imply that the negation of the sentence is true.

To sum up the foregoing, indeterminacy in the law is a third exclusive ontological state of the law as a whole with regard to the existence of a particular legal relationship. To say that the law is indeterminate is to say that the law does not unambiguously imply a particular relation-
ship or the absence of the relationship and consequently any sentence suggesting the existence of the relationship has to be false.

I've suggested that this analysis requires us, on the one hand, to amend the traditional Hohfeldian analysis of legal relationships to recognize that the law sometimes implies neither a relationship nor its absence. On the other hand, the analysis requires that we recognize two kinds of falsity, a weak falsity that does not imply the truth of the negation of the falsehood, and a strong falsity that does. Thus truth in law is not bivalent, but trivalent, and the principle of bivalence does not apply to truth in the law.

III. TRIVALENCE AND DISQUOTATIONALISM

In the course of an extensive and critical review of Dennis Patterson's *Law and Truth*,27 Ken Kress constructs an argument intended to undermine the claim that truth in law is disquotational.28 Kress's argument trades on his own claim that truth in law, because of the law's indeterminacy, is trivalent. However, rather than treating sentences of law as false, albeit weakly so, when they inaccurately characterize indeterminate law as if it were clear, Kress assigns to those sentences the truth value 'indeterminate.' When such sentences are more accurately assigned the value of weak falsity, Kress's argument, as I will show, fails to go through.

A disquotational account of the meaning of truth is a deflationary. It asserts that the concept of truth, properly understood, does little, if any, work, and certainly no explanatory work. The notion of disquotationalism derives from Alfred Tarski's semantic definition of truth for a formal language.29 Preliminarily to presenting his definition of truth, Tarski stated one material condition that any acceptable definition of truth must satisfy. An acceptable definition of truth must accord with our core intuitions about when a sentence is true and when it is false. Consider the simple descriptive sentence 'Snow is white.' Tarski claims that among our core intuitions about truth, now applied to our example,

27. DENNIS PATTERTON, LAW AND TRUTH (1996).
28. See Ken Kress, Modern Jurisprudence, Postmodern Jurisprudence, and Truth, 95 MICH. L. REV. 1871, 1889-92 (1997). Apart from the differences noted in the text, Kress's account of the trivalence of legal truth is similar to that proposed in this article. In particular, Kress too regards indeterminacy in the law as an ontological fact about the law and not an epistemological or semantic fact. He also agrees that indeterminacy in the law does not deprive sentences concerning indeterminate law of truth-value.
is that 'Snow is white' is true only if snow is white. Similarly, 'Snow is white' is false if snow is any color but white. Any definition of truth must comport with those intuitions. Combining the two, we get the equivalence

'Snow is white' is true if and only if snow is white.

Abstractly, we can say that for any sentence ‘P,’ ‘P’ is true if and only if P. Regarded as a condition that any definition of truth must honor, Tarski referred to the abstract schema as ‘Condition T’. Regarded alone it can be referred to as ‘Schema T’.

Many philosophers, the logical positivist Rudolf Carnap as well as W.V.O. Quine and others, seized on Schema T not only as providing a minimum condition for an acceptable definition of truth. They regarded Schema T as saying about all that was of interest concerning the concept.30 The meaning of any sentence, any ‘P’, is just given by the sentence itself, that is, by simply removing the quotation marks and stating (rather than mentioning) ‘P’. Hence, ‘disquotationalism.’ On this account, asserting that a sentence is true does no more than simply reasserting the sentence itself. To say that a sentence is true, therefore, explains nothing about the sentence, in contrast in particular, for example to saying that a sentence is confirmed by prediction. When we assert that a sentence is confirmed by prediction, we say something important about the sentence. To say simply that a sentence is true tells us no more than reasserting the sentence, no additional information is given.

Now let ‘P’ be a sentence about the law, a sentence that purports to describe the law as if the law was determinate. But the law that ‘P’ describes is in fact indeterminate. If we adopt Kress’s convention, ‘P’ would have the truth-value indeterminate. But if ‘P’ is indeterminate, then Schema T comes out false.

‘P’ is true if and only if P.

Schema T is a biconditional and biconditionals are true only if both parts of the biconditional have the same truth-value. Ordinarily, where the principle of bivalence holds, both sides would have to be either true

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or false for the biconditional to be true. But where there is a third truth value, then both sides of the biconditional must be true, false or the third truth value for the biconditional itself to be true. Where ‘P’ is indeterminate, however, the left side of the biconditional comes out false (because it is false that ‘P’ is true) but the right side comes out indeterminate. Thus the biconditional is false. But at a minimum, disquotationalism insists that any instance of Schema T always come out true. Thus, Kress concludes, disquotationalism provides an inadequate account of truth in law. Truth in law must be more robust.

If we adopt the convention of distinguishing between a-weak falsity and a strong falsity, however, the truth of Schema T is preserved. Again, let ‘P’ be a sentence of the law that describes the law as if it were determinate when in fact that law is indeterminate.

‘P’ is true if and only if P.

The left side of the biconditional is false, but only weakly so, it does not imply the truth of its negation (i.e., the strong falsity of ‘P’) and the right side of the biconditional is also merely weakly false. Thus both sides of the biconditional have the same truth-value, weak falsity, and therefore the truth of the biconditional is preserved.

I don’t mean here to defend disquotationalism, either in general or as applied to the law. The proper conclusion from this argument is only that Kress’s argument against disquotationalism is unsound. And well it should be. If Kress’s argument were sound, it would not only refute disquotationalism for law, it would also show that there was something wrong with the intuitions behind Condition T. It bears some emphasis that Kress’s argument purports to show not merely that Condition T is insufficient, but that it is false. Tarski is surely right, however, about the importance of Condition T and the intuitions behind it—‘Snow is white’ is true if and only if snow is white. It is thus a virtue of the distinction between strong and weak falsity that it is consistent with and preserves the force of Tarski’s Condition T.

An effective argument against disquotationalism is not going to succeed then simply by attempting to overthrow Condition T; it is going to have to show that there is more to the concept of truth than is shown by Condition T. The argument will have to show, in other words, that the concept of truth really does do some explanatory work, that when we say of a sentence that it is true, we are doing substantially more than
simply reasserting the sentence. We are saying something interesting about the sentence.  

31. Many have attempted to do just this. Among the most recent and most cogent is John Searle in THE CONSTRUCTION OF SOCIAL REALITY. See supra note 8.