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ABSTRACT. In this essay reviewing Brian Leiter's recent book *Naturalizing Jurisprudence*, I focus on two positions that distinguish Leiter's reading of the American legal realists from those offered in the past. The first is his claim that the realists thought the law is only locally indeterminate – primarily in cases that are appealed. The second is his claim that they did not offer a prediction theory of law, but were instead committed to a standard positivist theory. Leiter's reading is vulnerable, because he fails to discuss in detail those passages from the realists that inspired past interpretations. My goal is to see how Leiter's reading fares when these passages are considered. I argue that Leiter is right that the realists' indeterminacy thesis has only a local scope. Those passages that appear to claim that the law is globally indeterminate actually address three other topics: judicial supremacy, judges' roles as finders of fact, and the moral obligation to adjudicate as the law commands. With respect to the prediction theory, however, I conclude that Leiter's position cannot be defended. Indeed the realists offered two 'prediction' theories of law. According to the first, which is best described as a decision theory, the law concerning an event is whatever concrete judgment a court will issue when the event is litigated. According to the second, the law is reduced, not to concrete judgments, but to regularities of judicial (and other official) behavior in a jurisdiction. I end this essay with the suggestion that the realists' advocacy of the second prediction theory indirectly vindicates Leiter's reading of the realists as prescient jurisprudential naturalists.

Most closely associated with the influential twentieth-century philosopher Willard Van Orman Quine, naturalism has emerged as a significant movement in contemporary philosophy. In *Naturalizing Jurisprudence*,[1] Brian Leiter explores how the naturalistic turn might be applied to the philosophy of law.[2] Previously published, these

[1] Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (2007). All citations to Leiter's book will be in parentheses embedded in the text.

[2] 'Philosophy of law' is understood here broadly, for the seventh and eighth essays are concerned with the proper place, if any, of moral facts within a naturalistic framework.

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essays have already had an important effect on the field. In addition to inspiring a debate among philosophers of law concerning their reliance on conceptual analysis,[3] Leiter has also encouraged them to think more searchingly about how a normative theory of adjudication – a theory of how judges *ought* (legally) to decide cases – should, or can, fit within social-scientific accounts of the actual causes of judicial decisions.[4]

My focus, however, is on the first third of the book, in which he presents a novel and sympathetic reading of the American legal realists.[5] I will concentrate on two positions that distinguish Leiter's reading from those offered in the past. The first is his claim that the realists thought the law is only *locally* indeterminate – primarily in cases that are appealed. The second is his claim that they did not offer a prediction theory of law, but were instead committed to a standard positivist theory.

Leiter is to be praised for seeking a more reasonable reading of the realists in these two areas, for it is precisely here that philosophers of law have dismissed the realists as hopelessly confused. The realists may have been philosophically naïve,[6] but they were not idiots, and it is unlikely that their considered views were as absurd as they have been made out to be. But Leiter's reading is vulnerable, because he fails to discuss in detail those passages from the realists that inspired the interpretations he criticizes. My goal is to see how Leiter's reading fares when these passages are considered.

I will argue that Leiter is right that the realists' indeterminacy thesis has only a local scope. Those passages that appear to claim that the law is globally indeterminate actually address three other topics: judicial supremacy, judges' roles as finders of fact, and the moral obligation to adjudicate as the law commands.

With respect to the prediction theory, however, I conclude that Leiter's position cannot be defended. Indeed the realists offered *two* 'prediction' theories of law. According to the first, which is best

[3] See, e.g., Julie Dickson, 'Methodology in Jurisprudence: A Critical Survey', *Legal Theory* 10 (2004): 117, 133–141.

[4] See, e.g., Leslie Green, 'Law and the Causes of Judicial Decision', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374608.

[5] Although just who should be labeled a realist is a matter of some dispute, I will use Leiter's list of those most commonly thought to be members of the movement: Karl Llewellyn, Jerome Frank, Underhill Moore, Felix Cohen, Leon Green, Herman Oliphant, Walter Wheeler Cook, Max Radin, Hessel Yntema, and Joseph Hutcheson (16, 61).

[6] One of them clearly was not. Felix Cohen had a Ph.D. in philosophy from Harvard.

described as a *decision* theory of law, the law concerning an event is whatever concrete judgment a court will issue when the event is litigated. The decision theory is most evident in Jerome Frank's writings (although he subsequently came to regret having advocated it). According to the second, which is most clearly presented by Felix Cohen and Walter Wheeler Cook, the law is reduced, not to concrete judgments, but to regularities of judicial (and other official) behavior in a jurisdiction. The theory is broadly positivist, and indeed was presented by the realists in opposition to the prevailing natural law tradition. It remains non-standard, however, because it appears to identify as law those norms that are regular determinants of judicial decisions, whether or not they satisfy the officially-accepted criteria for law in the jurisdiction. I end this essay with the suggestion that the realists' advocacy of a prediction theory of law indirectly vindicates Leiter's reading of the realists as prescient jurisprudential naturalists.

I. THE SCOPE OF LEGAL INDETERMINACY

A. The Core Claim and the Received View

For Leiter, the 'Core Claim' of legal realism is that 'judges respond primarily to the stimulus of facts' rather than to the applicable rules of law (21, see also 16, 22, 89–90, 109). Since applying legal rules requires sensitivity to the facts of the case, one might wonder why responsiveness to facts and responsiveness to legal rules exclude one another. But Leiter clarifies that by 'facts' he means *non-legal facts* – that is, 'facts that are not made relevant by any legal rule' (22, n. 33). An alternative, and perhaps less misleading, formulation of the Core Claim is 'that judges are (primarily) responsive to *non-legal* reasons' (24) – such as fairness to the parties. It is these non-legal reasons that make facts, in Leiter's sense of the term, relevant to judges' decisions.

Leiter argues that the realists accepted the Core Claim because the law is *rationally indeterminate*. The law is rationally indeterminate in a decision situation if the class of legal reasons – that is, 'those reasons a court may properly give in justifying its decision'[7] – 'is

[7] Legal reasons include not merely legitimate sources of law (such as constitutional provisions, statutes and court decisions), but also legitimate means of interpreting these sources, of characterizing the facts of the case in terms of their legal significance, and of reasoning with legal rules and legally described facts (9).

insufficient to *justify* only one outcome in that case' (9). An alternative explanation of why judges decide on the basis of non-legal rather than legal reasons is that they simply ignore the latter, for example, due to irrationality, dishonesty, or incompetence (10). In other words, the relevant indeterminacy of the law might be causal rather than rational (9). Although he grants that some realists – Jerome Frank in particular – emphasized the law's causal indeterminacy,[8] Leiter takes the Core Claim to be primarily based upon its rational indeterminacy.

Although the prevailing interpretation of legal realism (which Leiter calls the 'Received View' of the movement) also attributes the Core Claim to the realists, it offers a particular version of the Claim. According to the Received View:

> Legal Realism is fundamentally: (1) a *descriptive theory* about the nature of judicial decisions, according to which, (2) judges exercise *unfettered discretion*, in order (3) to reach results based on their *personal* tastes and values, which (4) they then *rationalize* after-the-fact with appropriate legal rules and reasons. (16)

Leiter does not question theses (1) and (4). But he challenges theses (2) and (3) – the 'Judicial Volition' thesis that judges exercise unfettered discretion and the 'Judicial Idiosyncrasy' thesis that their decisions are based on personal tastes and values (16, 25).

Leiter's critique of the Judicial Idiosyncrasy thesis is persuasive. He grants that there was an 'Idiosyncrasy Wing' of legal realism – whose most prominent member was Jerome Frank (28).[9] But for the members of the larger 'Sociological Wing', legal decisions in cases 'fall into discernable patterns' (62). Judges respond *predictably* to situation-types on the basis of shared perceptions of fairness.

Indeed, if all the realists accepted the Judicial Idiosyncrasy thesis, two of their signature programs would lapse into incoherence. Many realists sought to apply the methods of the social sciences to adjudication in order to accurately predict judicial behavior (62–65). If they were all members of the Idiosyncrasy Wing, they would have thought that no meaningful predictions – beyond those applicable to individual judges – are possible (25).

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[8] Brian Leiter, 'Legal Realism', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (1996), p. 261 at 268.

[9] Another member of the Wing was Joseph Hutcheson (28).

In addition, some realists sought to reform the law by incorporating into legal rules the non-legal considerations that drive judicial decision-making. One example, familiar to any first-year civil procedure student, is the transformation of the law of personal jurisdiction over out-of-state corporations in *International Shoe Co. v. Washington*.[10] Traditionally a company incorporated under the laws of a sister state was amenable to personal jurisdiction if it was 'present' within the forum state.[11] Because a corporation supervenes upon entities that can indeed occur within the forum, if the presence of *any* such entity (for example, a single corporate employee) were sufficient for personal jurisdiction, the traditional approach would provide a determinate legal rule. But the presence of one such entity was not enough. Only a sufficiently pervasive level of contact constituted corporate presence. Because the criterion of presence gave judges no real guidance on how much contact was enough, they ultimately decided on the basis of non-legal considerations, which included, as Felix Cohen put it, 'the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation' and 'the possible hardship to corporations of having to defend actions in many states'.[12] In *International Shoe* and subsequent cases,[13] these non-legal considerations were incorporated into the applicable legal rule. Such reform would not be possible if no meaningful regularities could be found among judges deciding personal jurisdiction cases.

On the other hand, just what the Judicial Volition thesis is, and why it is misguided, are less clear. What does it mean to say that judges exercise 'unfettered' discretion? Leiter identifies two fetters: the legal reasons for a decision and the decision's 'causal determinants' (26, n. 57). With respect to the first fetters, he says, the thesis is accurate: 'The Received View claims that the Realists believe there are no fetters on judicial decisions in the sense of fetters *qua* legal reasons. All the Realists do, in fact, accept this part of the Received

[10] 326 U.S. 310, 316–319 (1945). See George Rutherglen, '*International Shoe* and the Legacy of Legal Realism', *Supreme Court Review* (2001): 347, 349–350; Logan Everett Sawyer III, 'Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to *International Shoe*', *George Mason Law Review* 10 (2001): 59. Leiter's preferred example (30) is Llewellyn's inclusion of an obligation of good faith in Article 2 of the U.C.C. E.g. U.C.C. § 2–103(j).

[11] See, e.g., Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917).

[12] Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach', *Columbia Law Review* 35 (1935): 809, 810.

[13] See, e.g., McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

View, so understood' (*ibid*.). But the thesis is mistaken concerning the second fetters. The realists reject 'the claim that there are not fetters *qua* causal determinants of these decisions; thus, most Realists reject the image of judges as having unbounded volition in deciding cases – precisely the image that many writers infer from the Received View' (*ibid*.). Indeed, with respect to the second fetters, the Judicial Volition thesis is mistaken even concerning Frank: '[F]or Frank, judicial decisions are *determined*, so that, in reality, there is no room for judicial choice. It is just that both judges themselves, and we as observers of their behavior, will find it hard, if not impossible, to identify the determinants' (26, n. 59).

It appears, therefore, that the objectionable element in the Judicial Volition thesis is its incompatibilist libertarianism – the view that judges decide cases free from causal determinants.[14] I see no evidence of the thesis, so understood, in the examples of the Received View quoted by Leiter (15–16). These passages attribute to the realists the view that judges decide on the basis of 'personal values' (15), rather than legal reasons. They take no stand on whether the realists thought that these personal values are themselves caused.[15]

Another puzzle concerning the Judicial Volition thesis has to do with the *first* fetters. Although Leiter says that '[a]ll the realists do, in fact, accept' the part of the thesis that claims that 'there are no fetters on judicial decisions in the sense of fetters *qua* legal reasons' (26, n. 57), this cannot be his considered view. As we have seen, the Core Claim of legal realism is that judges *primarily* respond to non-legal reasons (21, 24), not that they *only* respond to such reasons. But if they respond to legal reasons to some extent, there are indeed *some* 'fetters *qua* legal reasons' on judicial decisions (26, n. 57).

What is more, Leiter elsewhere argues that the realists did not even think that judges *primarily* respond to non-legal reasons. One of the defects he sees in past interpretations – particularly those offered

[14] Leiter's position here is not easy to discern, because he speaks of this incompatibilist libertarianism not as *part* of the Judicial Volition thesis (which is itself part of the Received View), but only as something 'many writers *infer* from the Received View' (26, n. 57, italics mine). But if it is not part of the Judicial Volition thesis, then Leiter has no objection to the thesis at all.

[15] The only passage that might suggest incompatibilist libertarianism is by Fred Schauer, which describes the realists as holding 'that legal decision-makers are largely unconstrained by forces external to their own decision-making preferences'. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991), p. 191. But an examination of the context in which the passage occurs shows that Schauer is not concerned with whether the realists thought judges' decision-making preferences are themselves externally caused.

by members of the critical legal studies movement – is that the realists are treated as having made exaggerated claims about the law's indeterminacy (19–20, 41). The realists, Leiter argues, 'did not generally view the law as 'globally' indeterminate, that is, as indeterminate in *all* cases' (19).[16] They saw indeterminacy as primarily extending only to 'the stage of appellate review' (77, see also 23, 41, 77–79, 107–108, 110–111, 115–116). Cases that reach appeal are the minority of those litigated.[17]

In the light of these puzzles, it is tempting to read the Judicial Volition thesis as the misguided view that judges are free of fetters *qua* legal reasons. But whether or not this mistake is read into the thesis, it is clear that Leiter thinks that past interpretations have exaggerated the scope of the realists' indeterminacy claims. The realists are best understood as 'claim[ing] that the class of legal reasons underdetermines the outcome in cases that reach the stage of appellate review' (107).

B. Leiter's Argument for the Appellate Limitation

In the end, Leiter offers three arguments for the appellate limitation. First of all, the evidence of indeterminacy that the realists offered was overwhelmingly drawn from appellate opinions (108). But it is not clear how much can be drawn from this fact, since the realist Karl Llewellyn offers an alternative explanation for a reliance on appeals. He concentrates on appeals, he admits, because they offer a '*convenient* source of information' about judicial reasoning.[18]

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[16] To say that indeterminacy is local is not to say that it is a marginal phenomenon, as H.L.A. Hart argued. For Hart, the realists' indeterminacy claims relied upon the 'open texture' of the language by means of which the law is formulated. H.L.A. Hart, *The Concept of Law* (2nd ed. 1994), p. 123. So understood, indeterminacy is a problem only concerning items falling in the penumbra of a legal term (e.g., whether a bicycle falls under a regulation prohibiting 'vehicles' in a park). *Ibid*. at 126. With respect to the many core cases that clearly fall within the extension of a term (e.g., whether a motor-car falls under the regulation), the law will guide a judge to a unique result.

Leiter argues that Hart misidentified the realists' primary argument for the law's indeterminacy. It had its source 'not in general features of language itself, but in the existence of equally legitimate, but conflicting, *canons of interpretation* that courts could employ to extract differing rules from the same statutory text or the same precedent' (74). This 'move[d] indeterminacy from the margin to the center of cases actually litigated' (76). Nevertheless, the realists' indeterminacy thesis was not global because they never argued that legal reasons fail to recommend 'a unique outcome in *all* cases; rather it fails to do so … in a particular range of cases (e.g., the cases that reach the stage of appellate review)' (41).

[17] Theodore Eisenberg, 'Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes', *Journal of Empirical Legal Studies* 1 (2004): 659, 685 ('About 20% of cases with definitive trial court judgments generate appeals').

[18] Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930), p. 102.

The second argument appeals to passages in which the realists appear to put an explicit limit on the scope of their indeterminacy claims. Leiter particularly relies upon two.[19] In the first, Llewellyn states that indeterminacy applies to 'any case doubtful enough to make litigation respectable'.[20] In the second, Max Radin notes that judicial 'decisions will [] be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact that makes the entire body of legal judgments seem less stable than it really is'.[21]

In fact, the quotation from Radin is arguably compatible with global indeterminacy. He claims that decision will be called for only in cases in which *prognosis* is difficult. Prognosis might be easy even if the law is indeterminate, since, as Leiter himself emphasizes, the outcome of a case can be predictable due to the influence of non-legal considerations. What is more, even if both passages are understood as rejecting global indeterminacy, they appear compatible with indeterminacy extending well beyond appeals, to all cases that are actually litigated. After all, they speak of indeterminacy as existing in cases in which *litigation* is respectable and in which *decisions* are called for.[22]

Leiter's third argument is, in the end, the most compelling. Since it is manifestly false that legal indeterminacy is global, charity of interpretation recommends reading the realists' indeterminacy claims as local. Consider Jones, who entered into a contract to sell Blackacre to Smith. Smith refuses to pay and to take possession of the property and Jones sues him for breach of contract. If the applicable statute of frauds says that a contract to sell real property is not enforceable if not in writing, and the jury finds that the contract was not written, then the set of legal reasons justify a unique

[19] Leiter refers to these two passages as evidence of the appellate limitation twice in the book (20, n. 25 and 77–78). In my own research, I was able to find one other passage from a realist that suggests the appellate limitation. Felix Cohen speculates that "a preoccupation with the 'hard cases' of law which are sent to appellate courts for review and which alone fill the bulk of our reports, case-books, and treatises, has seriously distorted the views of some contemporary 'realists'". Felix S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (1933), p. 238. But this passage is not that helpful for Leiter, since Cohen clearly thinks that other realists made broader claims about legal indeterminacy.

[20] Karl N. Llewellyn, 'Some Realism about Realism – Responding to Dean Pound', *Harvard Law Review* 44 (1931): 1222, 1239.

[21] Max Radin, 'In Defense of an Unsystematic Science of Law', *Yale Law Journal* 51 (1942): 1269, 1271.

[22] Leiter also points to passages in which the realists argue that legal rules play *some* role in decisions (78). But that is compatible with indeterminacy being global. Legal rules could have this influence by *narrowing* the set of available decisions, while always leaving the choice within that set indeterminate.

decision – judgment for Smith. Nor is this a type of case that would never be actually litigated. The dispute between Jones and Smith might be over the facts of the case – namely whether the contract was in writing – not the legal consequences of the facts. Since none of this could possibly have been news to the realists, they could not have made global indeterminacy claims.

The puzzle is that there are many passages, ignored by Leiter, that appear to claim that legal indeterminacy is indeed a global phenomenon. For example, Frank often argues that judges always have discretion:

> [T]ry as men will to avoid it, judging involves discretion and individualization. The judge, in determining what is the law of the case, must choose and select, and it is virtually impossible to delimit the range of his choice and selection.[23]

Judicial discretion, Frank argues, is 'unavoidable'[24] and occurs 'in almost all cases'.[25] To claim that a judge has discretion suggests that the law is indeterminate. If judicial discretion is a global phenomenon, it seems that legal indeterminacy is as well.

Leiter unnecessarily weakens his argument by failing to explain what the realists meant in such passages. I will argue that they were concerned with three issues – each distinct from the question of legal indeterminacy as defined by Leiter.

C. Judicial Supremacy

The first is judicial supremacy. Assume that the law is rationally determinate, in the sense that it identifies a unique decision to a judge. It does not follow that if the judge fails to issue that decision her judgment is not binding. Indeed, virtually everyone agrees that in the American legal system judgments are binding even if the court misapplied or misinterpreted the law.[26] If the judge entertaining the

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[23] Jerome Frank, *Law and the Modern Mind* 149 (Anchor Books ed. 1963, originally published 1930).

[24] *Ibid*. at 399.

[25] *Ibid*. at 398.

[26] See, e.g., Thomas W. Merrill, 'Judicial Opinions as Binding Law and as Explanations for Judgments', *Cardozo Law Review* 15 (1993): 43, 46; Michael Stokes Paulsen, 'The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation', *Cardozo Law Review* 15 (1993): 81, 82; Edwin Meese III, 'The Law of the Constitution', *Tulane Law Review* 61 (1987): 979, 988–989; Larry D. Kramer, 'The Supreme Court, 2000 Term—Foreword: We the Court', *Harvard Law Review* 115 (2001): 4, 8. The sole exception I am aware of is Michael Stokes Paulsen, 'The Most Dangerous Branch: Executive Power to Say What the Law Is', *Georgetown Law Journal* 83 (1994): 217, 276–284.

case of *Jones v. Smith* ignored the plain language of the statute of frauds and entered a judgment for Jones, despite the jury's finding that the contract was not in writing, the judgment would have to be enforced. Of course, it could be overturned on appeal. But the fact that this step is necessary demonstrates the judgment's binding nature. Furthermore, if affirmed by the highest court of appeals, it will be binding permanently, unless it is abrogated by legislative action.

To be sure, in certain cases a judge's legal error will render her judgment a legal nullity that may be ignored by officials even if it has not been overturned on appeal. To take an extreme example, consider a federal district court judge who, in a temporarily deranged state, issues a 'judgment', in the absence of any filed lawsuit, that she is entitled to a $100,000 raise. Officials do not have to wait until the judgment is overturned on appeal to refuse to enforce it. There are, one might say, legal criteria for a decision being a *judgment* at all – and concerning these criteria judicial supremacy does not apply.[27] It is also probable that a wildly unreasonable application of the law might render a decision a legal nullity. For example, if the court in *Jones v. Smith* issued a judgment that Jones's failure to satisfy the statute of frauds required him to be summarily executed, officials would be legally permitted (or required) to ignore it, without waiting for appellate review. Nevertheless the simple fact that a judgment involved the misapplication or misinterpretation of the law is not on its own sufficient for officials to deny it legal effect.

Notice that the judicial supremacy identified here is *weak* – it extends only to concrete decisions applying to the parties, for example, the judgment that Smith owes Jones a certain amount of money. Judicial supremacy would exist in a stronger sense if any *interpretation* of the law in a court's written opinion is binding upon other officials going forward, in the sense that they are obligated to conform their behavior to the interpretation in circumstances unrelated to the concrete case in which it was articulated. It is likely that strong judicial supremacy also exists, at least to some extent, in the American legal system, for example, with respect to Supreme

[27] Michael Steven Green, 'Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order', *North Carolina Law Review* 83 (2005): 331, 393–394 & n. 165.

Court interpretations of the Constitution,[28] although whether it *should* exist is a matter of some debate.[29]

The difference between weak and strong judicial supremacy can be highlighted by considering the role of an umpire in baseball. Umpires have weak supremacy. Players in the game are bound to accept an umpire's concrete call that a pitch is a strike, even if the call is in error. But umpires do not have strong supremacy. Players are not bound to accept an umpire's interpretation of the rules of baseball in circumstances unrelated to any concrete call.

Thus when Frank argues that "no legal rule [] is 'discretion-proof'",[30] the discretion being referred need not have its source in the legal indeterminacy with which Leiter is concerned – that is, the failure of legal rules to identify to the judge a unique decision. It may instead rest on the judge's power to issue a binding judgment in defiance of determinate legal rules. Of course, Hart famously argued that judges do not have legal discretion simply because they have supremacy.[31] The fact that their judgments are binding if they ignore legal rules does not mean that they lack a legal duty to adjudicate in accordance with these rules. Determining the exact relationship between legal rules and judicial supremacy may be more difficult than Hart suggests.[32] But even if Hart was right, and the realists read too much into the phenomenon of judicial supremacy, the important point for our purposes is that their position is not contrary to Leiter's moderate reading of their indeterminacy thesis.

D. Fact-Skepticism

Fact-skepticism is another reason that the realists claimed that judges always have discretion. Here is Frank:

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[28] *Ibid*. at 394–395. The Supreme Court declared that its constitutional rulings are binding in this stronger sense in Cooper v. Aaron, 358 U.S. 1 (1958).

[29] See, e.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Robert C. Post, 'The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law', *Harvard Law Review* 117 (2003): 4; Larry D. Kramer, 'Popular Constitutionalism, circa 2004', *California Law Review* 92 (2004): 959, 959; Meese, supra note 26; Paulsen, supra note 26.

[30] Jerome Frank, '"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism', *New York University Law Review* 26 (1951): 545, 582.

[31] Hart, supra note 16, at 141–147.

[32] For a recent argument to this effect, see Kenneth Einar Himma, 'Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition', in Matthew D. Adler and Kenneth E. Himma (eds.), *The Rule of Recognition and the U.S. Constitution* (2009), p. 95. Himma concentrates on strong judicial supremacy.

Because, in common with the other fact skeptics, I stressed the effects of many non-rule ingredients in the making of court decisions, several critics complained that I cynically sneered at legal rules, considered them unreal or useless…. But the rules, statutory or judge-made, are not self-operative. They are frustrated, inoperative, whenever, due to faulty fact-finding in trial courts, they are applied to non-existent facts. Is the highly moral rule against murder actually enforced when a court goes wrong on the facts and convicts an innocent man? What of the rule against fraud when a court, through a mistake of fact, decides that a fraud-doer was guiltless of fraud?[33]

Frank is speaking not merely of a court's role in determining the legal significance of facts found by the jury,[34] but also its occasional role as the finder of fact. Of course, to the extent that it is a jury that acts as fact-finder, Frank points to it as a source of discretion.[35]

Frank's fact-skepticism helps explain not merely the scope of his claims about judicial discretion – including his claims that discretion is *greater* at trial than on appeal[36] – but also his emphasis on the idiosyncrasies of a judge's personality. He makes it clear that it is a judge's judgments about the credibility of evidence (and particularly witnesses), not his judgments about the legal consequences of established facts, that are most influenced by his personality:

To avoid misunderstanding, I must say emphatically that when I speak of the obscure influences – reflecting the trial judge's life history – which affect his decisions, I refer primarily to his biases and predilections not with respect to the rules … but with respect to the witnesses. I mean the trial judge's plus or minus reactions to women, or red-headed women, or spinsters, or to bearded men, or men with squints or nervous mannerisms, or to Catholics, or Masons, or Republicans, or labor leaders, when any such persons testify.[37]

Here too, one can question whether judges actually have *discretion*. It is true that determinate legal rules cannot recommend a unique decision to a judge acting as a fact-finder, since they can make no recommendation about what the facts of the case are. With respect to these legal rules, therefore, the judge might be said to have discretion. But if the *evidence* presented is rationally determinate

[33] Frank, supra note 23, at xxvii (preface to sixth printing). Fact-skepticism is a particularly strong theme in his later writings. See, e.g., Jerome Frank, 'Legal Thinking in Three Dimensions', *Syracuse Law Review* 1 (1949): 9, 11.

[34] This appears to be how Leiter understands Frank's fact-skepticism (9).

[35] Jerome Frank, 'What Courts Do in Fact', *Illinois Law Review* 26 (1932): 645, 651–652.

[36] Frank, supra note 30, at 582–584.

[37] Jerome Frank, 'Say It with Music', *Harvard Law Review* 61 (1948): 921, 936.

(in the sense that it justifies a unique conclusion concerning the facts), the judge, it would seem, still lacks discretion.[38]

At times Frank appears to argue that the evidence presented to a judge is usually rationally indeterminate.[39] But he most often focuses on judicial *bias* when engaging in fact-finding – that is, upon *causal* indeterminacy that would exist even if the evidence were rationally determinate. Such causal indeterminacy does not suggest that there is judicial discretion, except to the extent that it draws upon the argument from judicial supremacy, discussed above. Judges, Frank might be arguing, have discretion as fact-finders even when the evidence is rationally determinate, because their erroneous factual findings are binding, unless overturned on appeal.

But, once again, the issue is not whether Frank persuasively argues that judges acting as fact-finders have discretion. My point is solely that these claims are compatible with Leiter's moderate reading of the realists' indeterminacy thesis. Nothing in Frank's argument suggests that there is global legal indeterminacy in the sense identified by Leiter.

E. Philosophical Anarchism

The realists also suggest that the law is globally indeterminate when they insist that recourse to moral considerations in adjudication is inescapable. Here is an example from Walter Wheeler Cook:

> [T]he use [of rules] never can be really mechanical; [] the danger in continuing to deceive ourselves into believing that we are merely ''applying'' the old rule or principle to ''a new case'' by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics.[40]

Felix Cohen says much the same thing:

> What moral a court *ought* to draw from past cases is always a moral question. It is the function of ethics to bring to bear upon such questions a sound sense of human values. Logic cannot take the place of ethics in this service.[41]

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[38] Notice that the relevant burden of persuasion can result in a decision concerning the facts being rationally determinate, even when the evidence presented by both sides leaves the question of what actually happened in doubt. For example, if the plaintiff has this burden and the evidence is insufficient to prove the plaintiff's factual allegations, the court must decide for the defendant concerning the facts.

[39] See, e.g., Frank, supra note 35, at 657–658, 660.

[40] Walter Wheeler Cook, *The Logical and Legal Bases of the Conflicts of Laws* (1942), pp. 44–45.

[41] Felix S. Cohen, 'Modern Ethics and the Law', *Brooklyn Law Review* 4 (1934): 33, 44.

These passages appear to be counterexamples to Leiter's reading. To repeat, for Leiter the Core Claim of legal realism is a descriptive theory of adjudication, according to which 'judges reach decisions based upon what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law' (22). As we have seen, Leiter believes that the Core Claim applies only locally, to those cases – such as those brought on appeal – in which the law is rationally indeterminate. One would expect, therefore, for the realists to claim that considerations of fairness, and other extra-legal considerations of a moral nature, are relevant to adjudication only locally as well. But they clearly argue that recourse to moral considerations is a global phenomenon.

But these comments are compatible with Leiter's reading, if they are understood as concerning the question of whether a judge morally ought to adjudicate in accordance with the law. Let us assume that a judge is deciding a case in which the law is rationally determinate. If she issues the decision uniquely identified by the law, she is not merely engaging in a form of theoretical reasoning. She is acting in a way that has important consequences for others. Moral considerations might demand that she disobey the law – even that she do so surreptitiously. By applying the law, she is making the moral judgment (even if unconsciously) that considerations recommending disobedience are not dispositive.

The use of moral reasoning in legal decisions is therefore a global phenomenon. But this moral reasoning is compatible with Leiter's reading of the realists' indeterminacy claims. Leiter's concern is the realists' views about the law's *propositional* indeterminacy – that is, the extent to which the law fails to *describe* the unique decision a judge ought to arrive at. And nothing about the fact that judges must always reason morally about whether the law should be followed suggests that the propositional indeterminacy of the law is global.

Leiter denies that the realists were concerned about judges' moral duties to apply the law: '[O]ne is hard-pressed', he claims, 'to find the Realists expressing much interest in questions of political obligation!' (118, n. 68). His conclusion is unfortunate, because it threatens his own interpretation of the realists. If the moral considerations that the realists insist are inescapable in adjudication are not about whether

the judge should adjudicate in accordance with the law, then they would appear to concern how gaps created by the law's indeterminacy should be filled. But that means that the realists must have thought that the law was globally indeterminate.

In order to respond to Leiter's concerns, however, I will offer evidence that at least three realists – Cohen, Cook, and Frank – gave substantial attention to judges' political obligations.

1. *Cohen*

The argument that the mere existence of law cannot morally justify adjudication in accordance with the law is particularly prominent in the writings of Felix Cohen. Cohen acknowledges that by issuing a decision recommended by the law a judge will act in a way that is *consistent*. But whether consistency should be pursued is a moral question that is not answered by the law's existence:

> [T]he ethical value of certainty and predictability in law may outweigh more immediate ethical values, but this is no denial of the ethical nature of the problem. *Consistency* … is relevant to such a problem only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical. The proposition that courts ought always to decide 'in accordance with precedent or statute' is an ethical proposition the truth of which can be demonstrated only by showing that in every case the following of precedent or statute does less harm than any possible alternative.[42]

Much of Cohen's article 'Transcendental Nonsense and the Functional Approach' (the most cited article by any legal realist[43]) is devoted to rejecting the view that the existence of a statute or precedent *on its own* gives the judge a moral reason to adjudicate as it recommends.[44] Cohen argues that when the natural law view – exemplified for Cohen by Blackstone[45] – is rejected '[t]he ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects

[42] Felix Cohen, 'The Ethical Basis of Legal Criticism', *Yale Law Journal* 41 (1931): 201, 215.

[43] Fred R. Shapiro, 'The Most-Cited Law Review Articles Revisited', *Chicago-Kent Law Review* 71 (1996): 751, 770.

[44] The same theme is prominent in *Ethical Systems and Legal Ideals*, Cohen, supra note 19.

[45] Cohen, supra note 12, at 836.

human lives for better or worse and is therefore subject to moral criticism'.[46] The mistaken belief that laws give judges moral reasons to adjudicate 'hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy'.[47]

Of course, as Cohen himself recognized, there are many very good moral reasons for adjudicating as laws recommend, for example, because this will protect 'human expectations based upon past decisions, the stability of economic transactions, and [] the maintenance of order and simplicity in our legal system'.[48] But the fact remains that these are moral arguments that cannot be answered simply by appeal to legal rules, no matter how determinate.

2. *Cook*

The same theme is prominent in the writings of the realist (and great choice-of-law scholar) Walter Wheeler Cook. Consider a simple choice-of-law case: A New York court is entertaining *Jones v. Smith*. Under English law, there is no statute of frauds. Under New York law, there is. Both Jones and Smith are domiciled in England, Blackacre is located there, the agreement was entered into there, and Smith's payment was to take place there. Under the traditional theory of choice of law at the time that the realists were writing, Jones would be taken to have a *vested right*, which would *obligate* the New York court to apply English law.[49]

Cook rejected the vested rights approach. The heart of his argument was a prediction theory of law:

> ''Right,'' ''duty,'' and other names for ''legal relations'' are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question, but terms by means of which we describe to each other what prophecies we make as to the probable occurrence of a certain sequence of events – the behavior of the officials.[50]

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[46] *Ibid.* at 828–829.

[47] *Ibid.* at 840.

[48] *Ibid.*

[49] Joseph H. Beale, *A Treatise on the Conflict of Laws*, vol. 3 (1935), p. 1969. See also Michael S. Green, Note, 'Legal Realism, Lex Fori, and the Choice-of-Law Revolution', *Yale Law Journal* 104 (1995): 967, 968–973.

[50] Cook, supra note 40, at 30.

To say that something is the law of England therefore is 'merely a more or less convenient shorthand way of saying that, on the basis of certain observations of past phenomena, we predict certain future behavior of the appropriate English officials'.[51] Although I will discuss Cook's prediction theory of law in greater detail later, for our present purposes it is enough to note that Cook denies that the existence of an English legal right gives a New York court a reason to apply English law absent moral considerations: 'The decision [to apply foreign law] thus appears not as an inevitable outcome from fixed premises (that the forum is enforcing an *obligatio* created by foreign law …), but for what it is … – a practical result based upon reasons of policy'.[52] Of course there are very good reasons – such as the expectations of the parties – for the New York court to apply English law in *Jones v. Smith*. But that does not change the moral nature of this decision. Like Cohen, Cook argues that although adjudication in accordance with law (in this case, English law) would be consistent, whether consistency should be pursued remains a moral question.

One might interpret Cook's argument not as concerning the moral considerations that come into play in a New York court's decision, but rather domestic legal considerations. A New York court should apply English law when New York *choice-of-law rules* say so. The policies that the New York court must consider in choosing whether to apply English law are those expressed in these domestic legal rules. But Cook argues that the application of law even in domestic cases 'is really being guided by considerations of social and economic policy or ethics'.[53] Domestic legal rights, like foreign legal rights, are the prediction of official behavior.[54] To say that a New York legal right exists is to make a descriptive claim about the probable actions of New York officials. This fact does not obligate even a New York judge to adjudicate in the same manner, absent a moral argument for obedience.

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[51] Walter Wheeler Cook, 'The Logical and Legal Bases of the Conflict of Laws', *Yale Law Journal* 33 (1924): 457, 476.

[52] Cook, supra note 40, at 35. The same point is made in Hessel E. Yntema, 'The Hornbook Method and the Conflict of Laws', *Yale Law Journal* 37 (1928): 468, 478.

[53] Cook, supra note 40, at 45.

[54] *Ibid.* at 43.

3. *Frank*

The political obligation of judges is also a prominent theme in the writings of Jerome Frank. Like Cook and Cohen, Frank uses the prediction theory of law to argue that legal rules lack 'authoritativeness':

> Nor can any rule of law, by whomever made, be ''authoritative.'' For whether a rule be considered as an historical summary – a brief, generalized statement of what courts have done – or as a prediction of what courts will do, it cannot be final, binding, dictatorial. That is, the notion of ''authoritativeness'' is alien to the character of a rule, looked at either as a bit of historical description or as a bit of prophecy. The announcement of a rule by a court cannot, therefore, confer upon it an authoritative quality.[55]

The 'authoritativeness' that Frank refuses to attribute to legal rules is clearly moral authority. Frank denies that legal rules are 'entitled to acceptance or obedience', 'peremptory', 'imperative', 'compulsory',[56] or that they have an 'obedience-compelling character'.[57] Moral judgment is required even when the law is rationally determinate.

This issue of a judge's political obligations is essential to making sense of Frank's reliance on Freudian psychoanalysis in *Law and the Modern Mind*. Leiter claims that Frank used Freud to explain why a judge's personality generates *unpredictable* decisions: '[W]e explain the decision in terms of the 'hunch'; and we explain the 'hunch' psychoanalytically (at least for Frank)' (45).[58] He attributes this position to Frank even though it is paradoxical: If Freudian psychoanalysis really could explain judges' personalities, decisions would not be unpredictable after all.

This gets Frank wrong. To be sure, he speaks of the idiosyncrasies – the hunches – that give rise to judicial decisions and findings of fact.

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[55] Frank, supra note 23, at 298.

[56] *Ibid.* at 287.

[57] *Ibid.* at 289.

[58] Or again:

> [F]or Frank, judicial decisions are *determined*, so that, in reality, there is no room for judicial choice. It is just that both judges themselves, and we as observers of their behavior, will find it hard, if not impossible, to identify the determinants. For that, the hard work of Freudian psychoanalysis is required.

Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence', *Texas Law Review* 76 (1997): 267, 280, n. 66 (emphasis mine). Leiter makes the same claim elsewhere. Leiter, supra note 8, at 271 (Frank accepted a 'Freudian psychic determinism' concerning judicial decisions).

But he does not use *Freud* to investigate what those hunches are. Indeed, Frank himself rejected Leiter's reading. To those who interpreted him as 'tr[ying] to explain the uncertainty in law in terms of Freudian complexes', he responded, 'Of course I did nothing of the kind. I sought to uncover one of the roots of a yearning for an unattainable legal certainty'.[59] What Frank explains through Freudian psychoanalysis is a certain *jurisprudential* view. The question is why judges are committed to the 'self-delusion' that 'they are merely applying the commands given them by some existing external authority'.[60] This belief is a delusion, first of all, because in many cases the law is indeterminate. But it is also a delusion because even when only one decision is recommended by the law, a judge must make the *autonomous* moral choice about whether the law should be followed.

This belief in the certainty and compulsory character of the law is the 'basic myth'[61] around which the book is organized. It is because this myth is a 'stubborn illusion'[62] that Frank resorts to Freud. Why, if the myth is false, are so many judges committed to it? Their pathological unwillingness to take responsibility for their moral judgment begs for a Freudian explanation. Frank argues that 'they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father'.[63] 'They must rid themselves of this reliance on a non-existent guide, they must learn the virtue, the power and the practical worth of self-authority'.[64]

4. *The Rejection of Natural Law*

In denying that the existence of law necessarily imposes upon a judge a moral duty to adjudicate as the law demands, the realists were reacting against the prevailing natural law tradition.[65] At the

[59] Frank, supra note 23, at xxiv (preface to sixth printing, internal quotations omitted).

[60] *Ibid.* at 130.

[61] *Ibid.* at 3–13.

[62] *Ibid.* at 14.

[63] *Ibid.* at 22.

[64] *Ibid.* at 130–131. Although Cohen, Cook and Frank are the most prominent examples, other realists also attacked the idea that the law brings with it a moral duty of obedience. Llewellyn argues that the realists 'conce[ive] of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other'. Llewellyn, supra note 20, at 1236.

[65] As found, for example, in Swift v. Tyson, 41 U.S. 1 (1842).

time the realists were writing, there was often no clear distinction drawn between the law (particularly the common law) of a jurisdiction and the standard of behavior recommended by morality. For this reason, the fact that something was the law was commonly taken as entailing a moral obligation on judges to adjudicate as the law commands. The realists rightly rejected this notion.

Furthermore, the passages from the realists quoted above can be understood as taking an even stronger position. One can deny that the law necessarily gives judges an all-things-considered moral obligation to adjudicate as the law commands, while insisting that it necessarily gives them a *prima facie* duty, that is, a duty that can be overridden by other moral considerations. But the realists appeared to reject even the *prima facie* duty. After all, the existence conditions for law that they employ – namely patterns of judicial or official behavior – are unlikely to necessarily entail the existence of such a duty.

So understood, the realists were philosophically prescient, for philosophical anarchism – the view that the existence of law does not entail even a *prima facie* moral duty of obedience – has only recently become the majority view among philosophers.[66] Indeed, by applying philosophical anarchism to *judges*, the realists are still ahead of the curve, for many philosophers of law remain committed to the goal – fruitless to my mind – of showing that the existence of law gives judges and other officials a *prima facie* moral reason to adjudicate as the law commands.[67]

II. THE PREDICTION THEORIES OF LAW

To repeat, Leiter's reading of the realists' indeterminacy thesis can be defended. Leiter is concerned with the realists' claims about the *propositional* indeterminacy of the law – that is, the failure of the law to recommend a unique decision to a judge. He is right that the realists thought that the law's propositional indeterminacy was a local phenomenon – even if they might not have adopted the particular appellate limitation that he attributes to them.

[66] William A. Edmundson, 'State of the Art: The Duty to Obey the Law', *Legal Theory* 10 (2004): 215.

[67] I discuss this matter in Michael Steven Green, 'Legal Realism as Theory of Law', *William and Mary Law Review* 46 (2005): 1915, 1939–1956.

Leiter's reading of the realists is less easily defended as we move on to his assertion that the realists – Felix Cohen 'arguably' excepted (70) – did not hold a prediction theory of law.[68] Leiter considers the matter largely in the context of H.L.A. Hart's critique of the realists' 'rule-skepticism' in Chapter Seven of *The Concept of Law*. Leiter distinguishes between three versions of the rule-skepticism that Hart attributed to the realists. One version, which Leiter thinks can be defended, is *empirical* rule-skepticism. The empirical rule skeptic argues that 'rules of law do not make much (causal) difference to how courts decide cases' (69). As we have seen, Leiter thinks that the realists were right to be empirical rule skeptics, because the law is rationally indeterminate, at least in appellate cases.

Another version is *conceptual* rule-skepticism, which offers a non-standard account of the concept of law. The account is non-standard because it rejects what Leiter calls 'the Simple View', according to which 'certain prior official acts (like legislative enactments and judicial decisions) constitute 'law' (even if they do not exhaust it)' (69). In its place, the conceptual rule skeptic presents an ''account of the concept of law, according to which, 'The law is just a prediction of what a court will do' or 'The law is just whatever a court says it is on the present occasion''' (69). Although Leiter occasionally describes this as a 'predictive' theory of law (17, 71), it is more accurately described as a *decision* theory, since the law is ultimately reduced to judicial decisions, not predictions of those decisions. If a court issues a surprising decision that is contrary to one's prediction, I take it that for the conceptual rule skeptic, as Leiter understands him, the law is the decision rather than the prediction. Predictions of judicial decisions are relevant only in determining what the law, as the conceptual rule skeptic understands it, is likely to be.

Leiter briefly mentions a third version of rule-skepticism, which denies that there are any rules (68, n. 38). Since both conceptual rule-skepticism and this no-rules version, it seems, speak of law in terms of judicial decisions, it is not clear in what sense they are different. The solution to this puzzle probably rests, however, in

[68] For similar skepticism about Leiter's views on the realists' prediction theory of law, see Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (2000), pp. 32–33.

Leiter's observation that the no-rules version is incompatible with the assertion that there are decisions of courts. A *complete* reduction of law to judicial decisions is incoherent, because 'the existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative' (68, n. 38).[69] The law differentiating judicial decisions from, say, statements that I make in my living room cannot, on pain of vicious circularity, be itself reduced to judicial decisions.[70] My guess, therefore, is that Leiter understands conceptual rule skepticism, unlike the no-rules version, as allowing that *some* statutes and constitutional provisions are law – namely those necessary to identify judicial decisions.[71] The remaining statutes and constitutional provisions, however, are not law.

[69] Quoting Hart, supra note 16, at 136.

[70] In Green, supra note 67, I offer an interpretation, which I will not discuss in detail here, that seeks to explain why the realists at times categorically denied the existence of legal rules. I argue that they sometimes understood legal rules as necessarily entailing a moral duty of obedience and denied that legal rules, in this sense, could exist. *Ibid*. at 1967–1985. Oddly, Leiter reads me as claiming that the realists were natural law theorists: 'Green seems to think the Realists are natural law theorists who deny that apparent laws, like statutes, are *really* laws (law 'in the relevant sense' he calls it) since they fail to provide decisive reasons for action' (118, n. 68). In fact, I never say that the realists were natural law theorists, and the sentence from which Leiter quotes the phrase 'in the relevant sense' says just the opposite: 'A statute *can be the law* without being a legal rule in the relevant sense, for *its status as law* may not provide a rebellious judge with any reason to adjudicate as the statute instructs'. Green, supra note 67, at 1920 (emphasis mine). The question is not whether the realists thought the statute was *law*, but whether they thought it was a *legal rule* in the relevant sense.

But even if I had said that the realists thought that *law* exists only if it necessarily entails a duty of obedience, it would hardly follow that they were natural law theorists. The natural law theorist does not merely claim that law, if it exists, necessarily carries with it a moral duty of obedience. He also believes that such law is *possible*, indeed *actual*. But the realists, I argued, denied that legal rules in the relevant sense can exist. By Leiter's reasoning, the atheist is actually a theist, since she agrees with the theist that if God exists, he is omnipotent and omniscient.

In the same article, I also argued that the realists were skeptics about the existence of legal rules due to more comprehensive questions about the possibility of reasons for action, including moral reasons for action. *Ibid*. at 1956–1967. Although Leiter does not address the evidence I offer in favor of this reading, he criticizes me for describing the realists' position as 'philosophically *plausible*', because of some deficiencies in their argument that I failed to address (118, n. 68). But I stated at the outset of the article that I sought to show that the realists' positions were 'plausible' in the sense that they were 'not the absurdity that the philosophical community has made [them] out to be'. Green, supra note 67, at 1919. I did not seek to show that they were 'beyond criticism'. *Ibid*. at 1918. Leiter's objection amounts to foisting upon my article an understanding of 'plausible' different from the one I specifically identified.

[71] Hart describes such a position as 'moderate' rule-skepticism. Hart, supra note 16, at 137.

A. *The Decision Theory of Law*

Although evidence of a decision theory of law can be found in a number of the realists' writings,[72] the theory is most prominent in Frank's *Law and the Modern Mind*:

> Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them.[73]
>
> The law, therefore, consists of *decisions*, not of rules. If so, then *whenever a judge decides a case he is making law*. The most conservative or timid judge, deny it though he may, is constantly engaged in law-making.[74]
>
> For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.[75]
>
> All [] decisions are law. The fact that courts render these decisions makes them law. There is no mysterious entity apart from these decisions. If the judges in any case come to a 'wrong' result and give forth a decision which is discordant with their own or anyone else's rules, their decision is none the less law.[76]
>
> A rule tells something about law, but is not law. For, to repeat, law is what has happened or what will happen in concrete cases.[77]

One of Frank's motivations for offering the decision theory was clearly judicial supremacy.[78] As we have seen, in legal systems with weak

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[72] See, e.g., Max Radin, 'The Permanent Problems of the Law', *Cornell Law Quarterly* 15 (1929): 1, 15:

> Present lawfulness is a prediction…. It is a prediction of what a judge will or would say about a present situation…. Obviously, as I have said before, this does not concern the judge at all, but us. He need have no qualms in advance. When the ghost of the past event is evoked before him, he will characterize it as unlawful or lawful, and it will be what he says it is – or rather it will have been what he says it was. He is quite infallible.

See also Karl N. Llewellyn, 'Law and the Modern Mind: A Symposium', *Columbia Law Review* 31 (1931): 82, 83–84 ('Holmes is the true prophet. *The law of any case is what the judge decides* – decisions, not rules').

[73] Frank, supra note 23, at 137.

[74] *Ibid.* at 138.

[75] *Ibid.* at 50.

[76] *Ibid.* at 134.

[77] *Ibid.* at 297.

[78] Hart offers judicial supremacy as a probable motivation for the realists' decision theory of law. Hart, supra note 16, at 141. See also Green, supra note 67, at 1987–1993. For another motivation for the theory, see *ibid.* at 1986–1987.

judicial supremacy, concrete judgments are legally binding even if they involve erroneous interpretations or applications of a legal rule. Officials may not refuse to enforce a judgment simply because the court got the law wrong. Furthermore, if there is strong judicial supremacy, not only the judgment, but also the erroneous interpretation of the law in the court's written opinion is binding, in the sense that officials are bound to respect that interpretation in future situations.

That Frank's decision theory of law depended upon weak rather than strong judicial supremacy is evident in his discussion of John Chipman Gray. Although Gray argued that statutes are only *sources* of law, rather than being law themselves,[79] he reduced the law to judicial *interpretations* of such sources, rather than to concrete decisions: '[S]tatutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law*'.[80] Frank criticizes Gray on the ground that judges have weak judicial supremacy even with respect to past judicial interpretations of law. A judgment that is contrary to a past interpretation remains binding (unless overturned on appeal):

> Gray defines law not as what courts decide but as the ''*rules* which the courts lay down for the determination of legal rights and duties'' or ''the *rules of decision* which the courts lay down''. If a court in deciding a particular case fails to apply the ''rule generally followed'', that decision is not law.... Now this stress on generality as the essence of law is a remnant of the old myth. And a vigorous remnant.[81]

Because a judgment is legally binding even if it violates past interpretations of legal rules, the law, Frank argued, consists of the judgment rather than the interpretation. The interpretation cannot be treated as the law, because its violation has no legal effect in the face of a contrary judgment by a court:

> Of course those old gentlemen in deciding cases do not follow their own whims, but derive their views from many sources. And among those sources are not only statutes, precedents, customs and the like, but the rules which other courts have announced when deciding cases. Those rules are no more law than statutes are law. For, after all, rules are merely words and those words can get into action only

[79] John Chipman Gray, *The Nature and Sources of the Law* (2nd ed., 1921), pp. 123–124, 152, 308.

[80] *Ibid*. at 170.

[81] Frank, supra note 23, at 133–134.

through decisions.... The shape in which rules are imposed on the community is those rules as translated into concrete decisions.[82]

B. *Leiter on the Decision Theory*

Leiter argues, however, that Frank's statements should not be understood as offering a theory of law.[83] He was concerned instead with describing what about the law is of interest to a lawyer and her client:

> How, then, do we understand [the realists'] talk about ''predicting'' what courts will do?... This is not a claim about the ''concept'' of law, but rather a claim about how it is *useful* to think about law for attorneys who must advise clients what to do. For your client, the franchisee in Connecticut, does not simply want to know what the rule on the books in Connecticut says; he wants to know what will happen when he takes the franchisor to court. So from the practical perspective of the franchisee, what one wants to know about the ''law'' is what, in fact, the courts will do when confronted with the franchisee's grievance. That is all the law that matters to the client, all the law that matters to the lawyer advising that client. And that is all, I take it, the Realists wanted to emphasize (71).

From the perspective of the judge deciding a case, Leiter argues, the realists were committed to the Simple View, in which statutes and the like can be law.

Leiter is correct that when Frank speaks of *predictions* of future decisions, he claims to be offering only 'what, in a rough sense, the law means to the average man of our times when he consults his lawyer'.[84] But that does not mean that he thought the Simple View applied once we adopted a judge's perspective. Indeed, Frank explicitly states that from that perspective the law is whatever the judge decides. For example, in 'Are Judges Human?', Frank describes the following passage as made 'from the point of view of a judge':

> Whenever a judge decides a case he is making law: the law of that case, not the law of future cases not yet before him. What the judge does and what he says may

[82] *Ibid*. at 134–135.

[83] Leiter makes the same claim about Holmes's prediction theory of law (71). I have argued elsewhere that he is mistaken. Green, supra note 67, at 1936–1938. But even if he were right about Holmes, that would provide no evidence that realists who quoted Holmes favorably did not themselves take it to be a generally applicable theory of law. Indeed, Leiter ignores two articles by realists devoted to Holmes's theory, neither of which supports his interpretation. Hessel E. Yntema, 'Mr. Justice Holmes' View of Legal Science', *Yale Law Journal* 40 (1931): 696; Walter Wheeler Cook, 'Oliver Wendell Holmes: Scientist', *American Bar Association Journal* 21 (1935): 211.

[84] Frank, supra note 23, at 46.

somewhat influence what other judges will do or say in other cases. But what the other judges decide in those other cases, as a result of whatever influences, will be the law in those other cases. The law of any case is what the judge decides.[85]

And in *Law and the Modern Mind*, he argues:

From the point of view of the practical work of the lawyer, law may fairly be said to be past decisions (as to past events which have been judged) and predictions as to future decisions. From the point of view of the judge, the law may fairly be said to be the judging process or the power to pass judgment.[86]

Leiter also argues that the realists could not be committed to conceptual rule skepticism, because it is incompatible with their claims about legal indeterminacy. The realists claimed that *the law* – that is, statutes and the like – is rationally indeterminate, in the sense that it fails to identify to a judge a unique decision. They therefore must have been committed to the Simple View, according to which statutes can be the law. Indeed, Leiter argues, they presumed something like a positivist theory of law, akin to Hart's, under which legal rules are identified on the basis of their pedigree:[87]

Any argument for indeterminacy, then, presupposes some view about the *boundaries* of the class of legal reasons. When Oliphant argues, for example, that the promise-not-to-compete cases are decided not by reference to law, but by reference to uncodified norms prevalent in the commercial culture in which the disputes arose, this only shows that the law is indeterminate on the assumption that the normative reasons the courts are actually relying upon are not themselves *legal* reasons. (72)

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[85] Jerome Frank, 'Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings', *University of Pennsylvania Law Review* 80 (1931): 17, 39 & 40, n. 58 (quoting Frank, supra note 23, at 136).

[86] Frank, supra note 23, at 295, n. 14. Instead of addressing these passages, Leiter relies upon a footnote, *ibid*. at 51, n. 4, in which "Frank cautions the reader early on that he 'is primarily concerned with "law" as it affects the work of the practicing lawyer and the needs of the clients who retain him'" (71). Had Frank not been interested in this perspective, Leiter suggests, he would have spoken of statutes as law. In fact, Frank claims that his emphasis on decisions of courts is 'admittedly artificial' only because it omits 'the ways of all governmental officials and [] the reactions of non-official persons to the ways of judges and other officials'. Frank, supra note 23, at 51, n. 4. He does not suggest that a less distorted approach would speak of statutes as law. It would instead speak of the law in terms of the behavior of courts, other officials and private citizens.

[87] At times, Leiter claims that the realists were committed to a form of *exclusive* legal positivism (67, 73). Exclusive legal positivism is the view that the law's 'existence and content can be identified by reference to social facts alone, without resort to any evaluative argument'. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), p. 211. Although it is not clear why the positivism presumed by the realists must be of an exclusive form, see Danny Priel, 'Were the Legal Realists Legal Positivists?', *Law & Philosophy* 27 (2008): 309, 323–336, I will not address that issue here.

But it does not follow from the fact that the realists employed the Simple View when making their indeterminacy claims that they did not offer an *alternative* theory of law as more adequate. Frank drew a distinction between the law as he thought it should be understood, and 'formal law'[88] or 'Bealish Law'[89] (after Joseph H. Beale). Llewellyn too described as 'paper rules' those rules which 'have been treated, traditionally, as rules of law'.[90] The realists' indeterminacy claims concerned this formal law or paper rules.

Finally, Leiter argues that the attribution to the realists of *any* account of the concept of law is a mistake:

> The question is whether, in [talking about prediction], they are fairly read as offering an analysis of the concept of law. Only Hart's grossly anachronistic reading suggests an affirmative answer. The idea that philosophy involves 'conceptual analysis' via the analysis of language is an artifact of Anglo-American analytic philosophy of the twentieth century; indeed, as practiced by Hart, it really reflects the influence of fashionable views in philosophy of language current at Oxford in the 1940s and 1950s. The Realists were not philosophers, let alone analytic philosophers, let alone students of G.E. Moore, Russell, and the early Wittgenstein, let alone colleagues of J.L. Austin. (70–71, see also 104)

But simply because the realists were not engaging in the type of ordinary-language philosophy common at Oxford in the mid-twentieth century does not mean that they were not attempting to come up with a general theory of the law by attending to the meaning of the word 'law'. For example, in *The Province of Jurisprudence Determined*, published in 1832, John Austin offered the following as a 'definition of positive law':

> Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme.[91]

Plenty of people think that this is a lousy theory of law, but none, to my knowledge, deny that it is a general theory of law at all, even though John Austin too was not a colleague of J.L. Austin (no relation) at Oxford. Austin was quite clearly seeking to offer an

[88] Frank, supra note 35, at 648 and passim.

[89] Frank, supra note 23, at 59.

[90] Karl N. Llewellyn, 'A Realistic Jurisprudence – The Next Step', *Columbia Law Review* 30 (1930): 431, 448 and passim.

[91] John Austin, *The Province of Jurisprudence Determined* (1995), p. 285 (originally published 1832).

account of the essential features of law wherever it occurs and was doing so well before the mid-twentieth century. The same can be said about the decision theory of law, which Frank offered – if provisionally – as a 'definition' of law.[92]

Indeed, Leiter's claim of anachronism is undermined precisely by those realists who *resisted* offering such a general theory. Llewellyn, for example, refused to ''fram[e] any concept of 'law'''[93] or 'to attempt a definition of law'.[94] And he regretted those passages in which he expressed the decision theory.[95] Eighteen years after the original publication of *Law and the Modern Mind*, Frank too admitted, 'I seriously blundered when I offered my own definition of the word Law'.[96] These passages show that the project of providing a general theory of law on the basis of the meaning of the word 'law' was not unknown at the time the realists were writing and that the realists, at times, engaged in it.

I think that the conclusion is inescapable that Frank – as well as a number of other realists – offered a decision theory of law. Frank was right, however, to regret it, since the theory is fatally flawed. As a fundamental matter, the weak judicial supremacy upon which the theory is based is itself a contingent legal matter. There might be legal systems in which officials are not obligated to respect judgments involving erroneous interpretations of the law. The decision theory cannot, therefore, be a *generally applicable* theory of law, for it does not apply to legal systems without weak judicial supremacy. Furthermore, the theory in its no-rules version is incomplete, for it is unable to account for law that identifies judicial decisions. Finally, even in legal systems with weak judicial supremacy, judgments involving wildly unreasonable interpretations of statutes or constitutional provisions are not binding upon other officials. Officials do not have to wait for such judgments to be overturned on appeal or abrogated by legislative action to refuse to give them effect. Given that statutes put *some* legal limit on a court's discretion they must themselves be understood as law.

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[92] Frank, supra note 23, at 46, 50. Cohen also offered his prediction theory of law – once again provisionally – as a 'definition of law'. Cohen, supra note 12, at 835.

[93] Llewellyn, supra note 90, at 431.

[94] *Ibid.* at 432.

[95] In the acknowledgments to the second edition of *The Bramble Bush*, he describes the theory as 'unhappy words' and as 'plainly at best a very partial statement of the truth'. Llewellyn, supra note 18, at x.

[96] Frank, supra note 23, at viii (preface to sixth printing).

C. *The Prediction Theory of Law*

But the realists offered another 'prediction' theory of law. For most realists, this second theory was muddled together with the decision theory. But it was offered in an unadulterated form by Felix Cohen and Walter Wheeler Cook:

> [W]e must as always guard ourselves against thinking of our assertion that ''rights'' and other legal relations ''exist'' or have been ''enforced'' as more than a conventional way of describing past and predicting future behavior of human beings – judges and other officials.[97]

> Our statements of the ''law'' are therefore ''true'' if they accurately and as simply as possible describe the past behavior and predict the future behavior of these societal agents [e.g. judges and legislators].[98]

> Consider the elementary legal question: ''Is there a contract?'' When the realist asks this question, he is concerned with the actual behavior of courts. For the realist, the contractual relationship, like the law in general, is a function of judicial decisions…. So conceived, any answer to the question ''Is there a contract'' must be in the nature of a prophecy, based, like other prophecies, upon past and present facts.[99]

> [L]egal rules are simply formulae describing uniformities of judicial decision.[100]

> Applied within the field of law itself, [the functional] approach leads to a definition of legal concepts, rules, and institutions in terms of judicial decisions or other acts of state-force.[101]

Cook and Cohen argue that a statement about the law is ultimately a claim about regularities in behavior exhibited by judges (and other officials) in the jurisdiction. The theory is put in terms of prediction, because in making a claim about present or future law, one is making a prediction that the relevant regularities obtain or will obtain.

This is not the decision theory of law. Under the decision theory, the law concerning certain facts is the judgment that will be issued if those facts are adjudicated. In the passages above, the law is not reduced to how an *individual* judge decides. The law consists instead of regularities of judicial and other official behavior. If an individual judge decides contrary to the relevant regularities, the judge's decision did

[97] Cook, supra note 40, at 33. See also Walter Wheeler Cook, '"Substance' and 'Procedure' in the Conflict of Laws'', *Yale Law Journal* 42 (1933): 333, 348.

[98] Cook, supra note 40, at 29.

[99] Cohen, supra note 12, at 839.

[100] *Ibid.* at 847.

[101] Felix S. Cohen, 'The Problems of a Functional Jurisprudence', *Modern Law Review* 1 (1937): 5, 8.

not conform to the law. For example, if the judge deciding *Jones v. Smith* holds for Jones, despite the jury's having found that the contract was not in writing, the decision would be contrary to the law, because most judges – appealing to the statute of frauds – would have found for Smith. I have not been able to find evidence of a decision theory of law in either Cohen's or Cook's writings. What is more, Cohen explicitly criticizes Frank for adopting a decision theory.[102]

As we have seen, Leiter argues that the realists' statements about prediction concern only what about the law is of interest to a lawyer and her client. But this will not do. A lawyer and her client are not interested in regularities of judicial behavior, except to the extent that they help them predict how the particular judge hearing their case will decide. If they know the judge's decision will diverge from the regularities, they are concerned only about the decision. But the prediction theory insists that the law consists of the regularities, not the decision.

Furthermore, Cook explicitly described the prediction theory as applying, not just to the litigants, but to a judge: The theory, he claimed, is an 'examin[ation] into the meaning of the terms 'law' and 'right' as they are commonly used by judges and lawyers'.[103] And even Leiter admits that Cohen 'arguably' offered the prediction theory as a theory of law (70), not simply as an account of what about the law is interesting to a lawyer and her client. (It is awkward that Leiter's '*philosophical reconstruction* of Legal Realism' (21), should relegate to the sidelines the one realist who had a Ph.D. in philosophy – from Harvard.)

I will argue that in offering the prediction theory, Cook and Cohen were attempting to provide a positivist theory of law. The best way of appreciating this fact is by comparing it with a rule-of-recognition theory like Hart's.

Hart believed that in every legal system there is a rule of recognition, which sets out the ultimate criteria of legality within the system. This ultimate rule exists by virtue of its general, although not necessarily universal, acceptance by officials (judges, legislators, sheriffs, and the like) for identifying those norms that may be backed up by official force.[104] Official acceptance of the rule of recognition need not be moral. It could be based on 'calculations of long-term

[102] Cohen, supra note 12, at 835, n. 72.

[103] Cook, supra note 40, at 29.

[104] Hart, supra note 16, at 94.

interest;… an unreflecting inherited or traditional attitude; or the mere wish to do as others do'.[105] Hart also argued that the existence of a legal system requires that the norms identified by the rule of recognition be *efficacious*, in the sense that they are generally – although not necessarily always – obeyed by the population.[106] Let us call the facts that Hart believed stand at the basis of a legal system *rule-of-recognition facts*.

Hart's theory is a form of positivism. One distinguishing feature of positivism is the *social fact thesis*, according to which the existence of criteria of legality in a legal system is ultimately a matter of social facts.[107] In the case of Hart's theory, the relevant social facts are rule-of-recognition facts. Hart's theory also satisfies what is often thought to be another distinguishing feature of positivism, the separability thesis.[108] In its most plausible form, this thesis is that the content of the law need not overlap with the content of morality, or, as Hart puts it, 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so'.[109]

Cook's and Cohen's prediction theory satisfies the social fact thesis, since under their theory whether an item counts as law is ultimately grounded in social facts about regularities in official behavior. Furthermore, they were attracted to the prediction theory precisely because the separability thesis followed. Both Cook and Cohen argued that an advantage of Holmes's definition of law as 'prophecies of what courts will do in fact'[110] is that it allowed for a distinction between law and morality.[111]

This does not mean that they thought that Holmes's formulation was perfect. One problem was that it failed to make clear whether the law was the decision that a particular judge would arrive in a case – as the decision theory insists – or whether it was determined by the regularities of judicial (and other official) behavior that stand at the foundation of a legal system. Cook and Cohen aside, this

[105] *Ibid*. at 203.

[106] *Ibid*. at 116–117.

[107] Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001), p. 161.

[108] Himma, supra note 32, at 96–97.

[109] Hart, supra note 16, at 185–186.

[110] Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review* 10 (1897): 457, 461.

[111] Cohen, supra note 12, at 828–829; Cook, supra note 83.

ambiguity caused serious confusion among the realists. But, while recognizing that Holmes's theory was inadequate as it stood, Cohen believed that the theory was on the right track in satisfying the separation thesis:

> ''What courts do'' is not entirely devoid of ambiguity…. But these sources of ambiguity in Holmes' definition of law are peripheral rather than central, and easily remedied. They are, therefore, far less dangerous sources of confusion than the basic ambiguity inherent in classical definitions of law which involve a confusion between what is and what ought to be.[112]

Some amendments that Cook and Cohen offered to Holmes's theory brought it closer to Hart's. For example, they insisted that one should look not merely to regularities of judicial behavior, but also of the behavior of officials more generally.[113] Indeed, Cohen recognized that one cannot identify a judicial decision without looking to the behavior of non-judicial officials. To determine whether a decision is binding, one must look to 'certain predictable uniformities of official behavior, e.g. that a sheriff or marshall will enforce the decision, in one way or another, over a period of time'.[114] Furthermore, Cook recognized that the existence of a legal system also requires that the population generally abide by enforced norms.[115]

But some important differences between the prediction theory and Hart's remain. One has to do with their semantic account of legal statements. For the realists, a statement about the law can be reduced to a statement about social facts. For simplicity's sake, let us assume for the moment that the realists thought that the relevant social facts were the rule-of-recognition facts emphasized by Hart. If so, the statement 'The Securities Exchange Act is valid law', would be roughly reducible to 'The Securities Exchange Act satisfies the enforceability criteria generally accepted by officials in the United States'. But Hart disagrees with this account. For Hart, 'The Securities Exchange Act is valid law' is an *internal* legal statement,[116]

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[112] Cohen, supra note 12, at 836.

[113] Cook, supra note 40, at 30. Other realists recognized the same thing. For Llewellyn, 'the focus, the center of law, is not merely what the judge does… but what *any* state official does, officially'. Llewellyn, supra note 90, at 456.

[114] Cohen, supra note 12, at 844.

[115] Cook, supra note 40, at 30, n. 54.

[116] Hart, supra note 16, at 102–103. Internal legal statements include those using normative language, such as, 'You (legally) ought to…' or 'You have a (legal) duty to…'. *Ibid*. at 57, 90.

whereas the sociological statement about officials' enforceability criteria is *external*.[117]

One distinguishing feature of an internal legal statement for Hart is that the speaker *expresses* (rather than describes) her acceptance of the rule of recognition as standard for her behavior.[118] This explains why she uses normative terminology and takes the statement to entail the presence of reasons for action.[119] Furthermore, she presupposes (but, once again, does not describe) the existence of rule-of-recognition facts.[120] Indeed, Hart criticized the legal realists for treating legal statements as purely sociological descriptions:

> One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy. It would however be wrong to say that statements of validity ''mean'' that the system is generally efficacious.[121]

Although Hart emphasizes in this passage the inadequacy of reducing internal legal statements to statements about *efficacy*, he would be no more satisfied if they were reduced to statements about rule-of-recognition facts more generally. Someone who speaks of such facts, he argues, has ceased to talk about legal validity from within the internal perspective.[122]

It is not clear, however, why Hart insists that someone making an internal legal statement must presuppose rather than describe rule-of-recognition facts.[123] Indeed, Hart himself admitted that '[i]f the truth of this presupposition [of rule-of-recognition facts] were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications'.[124] Internal legal statements might be understood, therefore, as

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[117] *Ibid*. at 102–103.

[118] *Ibid*. at 102.

[119] See generally Kevin Toh, 'Hart's Expressivism and his Benthamite Project', *Legal Theory* 11 (2005): 75, 81–105.

[120] Hart, supra note 16, at 102–103.

[121] *Ibid*. at 104.

[122] *Ibid*. at 107–108.

[123] For a more detailed discussion of the role of rule-of-recognition facts in Hart's semantics of legal statements, see Michael Steven Green, 'Kelsen, Quietism, and the Rule of Recognition', in Matthew D. Adler & Kenneth Einar Himma (eds.), *The Rule of Recognition and the U.S. Constitution* (2009), pp. 351, 354–361.

[124] Hart, supra note 16, at 108. See also *ibid*. at 245.

describing the existence of the relevant rule-of-recognition facts, provided that they also expressed acceptance (although not necessarily moral acceptance) of the rule of recognition as a standard of conduct.[125] Even if Hart made this concession, however, the realists' semantic account of legal statements remains importantly different. The realists understand legal statements as *purely* descriptive. For Hart, internal legal statements are normative, in the sense that they retain an important expressive element.

As an account of actual usage, Hart's approach is closer to the truth. But the realists' appeared to recognize, at least at times, that they were suggesting that legal language be reformed. Cohen, for example, admitted that legal language can perform an expressive function,[126] but he recommended the prediction theory, since otherwise a judge 'is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged'.[127]

Although I cannot address the matter in detail here, the realists' proposed reform has much to recommend it. As we have seen, Hart thought that internal legal statements express a wide variety of motivations for conformity to the rule of recognition, motivations of very different normative significance. In addition to moral reasons for conformity, there are 'calculations of long-term interest;… an unreflecting inherited or traditional attitude; or the mere wish to do as others do'.[128] The use of a single set of normative legal language to cover all these reasons for action discourages clarity about what one's actual reasons are and whether they are good ones.

The final and most significant difference between the realists' prediction theory and Hart's has to do with the social facts that Hart and the realists looked to when identifying law. For Hart, officials' *attitudes* – in particular, their acceptance of certain criteria for norm-enforcement – are crucial. Consider, for example, an obligation of good faith in contractual dealing, which Karl Llewellyn thought regularly motivated decisions in contract cases, even though it was not (until the U.C.C.) a reason explicitly identified as law (30). Under Hart's theory, there is no *legal* obligation of good faith, because this

[125] This is apparently how Joseph Raz understands Hart's semantics of internal legal statements. Joseph Raz, 'The Purity of the Pure Theory', *Revue Internationale de Philosophie* 35 (1981): 441, 448; Joseph Raz, 'H.L.A. Hart (1907–1992)', *Utilitas* 5 (1993): 145, 148.

[126] Cohen, supra note 12, at 812.

[127] *Ibid*.

[128] Hart, supra note 16, at 203.

norm does not satisfy the enforcement criteria identified by judges. In contrast, it appears that the realists would treat the obligation as law, because it is regularly employed by judges.

To be sure, in many cases, the realists expressed their prediction theory without making specific claims about which regularities of judicial behavior were relevant. It is possible to read them as offering a rule-of-recognition theory of law that is distinct from Hart's only in insisting that statements about the law are (or should be) purely descriptive rather than expressive. But the realists certainly appeared to recommend at times that any consideration regularly employed in adjudication be designated 'law', even if it failed to satisfy the rule of recognition in the legal system.

A possible way of putting matters is that the prediction theory does not yield a *hermeneutic* concept of law. As Leiter describes it, a hermeneutic concept 'satisfies two conditions: (i) it plays a hermeneutic role, that is, it figures in how humans make themselves and their practices intelligible to themselves, and (ii) its extension is fixed by this hermeneutic role' (173). The concept of law clearly figures in how humans (particularly officials) understand themselves and their practices, but the prediction theory does not privilege this self-understanding in identifying what is law. Although officials see themselves as enforcing law on the basis of the criteria in the rule of recognition, the prediction theory treats these criteria as unimportant in figuring out what is law.

But there is a sense in which the realists' prediction theory *can* be understood as offering a hermeneutic concept of law.[129] Llewellyn, for example, did not understand officials as enforcing an obligation of good faith in contractual dealing *mindlessly*. They did so for *reasons* – namely their belief that the obligation exists as a moral matter. Although the prediction theory does not privilege the *public* self-understanding that judges present in their opinions, it may do justice to their true self-understanding when deciding cases.

This hermeneutic aspect of the prediction theory can be obscured by the realists' use of the term 'prediction', which makes it appear as if they were concerned solely with behavioral responses.[130] But, as

[129] For a similar argument by Leiter himself, in a context independent of his discussion of the realists, see pp. 191–192.

[130] Although I cannot discuss the matter here, I believe that the same mistake was made by Hart concerning the Scandinavian realists, especially Alf Ross.

Leiter notes, few realists adopted a strict behaviorism (24, n. 49). Most recognized that judges decide on the basis of reasons. The question was solely what those reasons were and which should be relevant when identifying law.

Indeed, Hart's theory of law is as concerned with prediction as the realists'. For Hart, someone who states that the Securities Exchange Act is valid law presupposes that the set of rule-of-recognition facts that have been in place – for example, that American officials look to promulgation in accordance with the United States Constitution as a criterion for norm-enforcement – are still there. This presupposition involves a prediction about official attitudes and behavior. (Although this prediction is easy to make in normal cases, it can be difficult in a revolution.) The distinction between Hart's theory and the realists' is not whether social facts concerning officials must be predicted to identify law, but what the relevant social facts are.

Of course, since the prediction theory is a non-standard theory of law, Leiter's observation that the realists did not employ it when making claims about legal indeterminacy applies. If the obligation of good faith is the *law*, then the law is not indeterminate in contract cases. In arguing that the law is indeed indeterminate in such cases, the realists must have been employing a standard concept of law, according to which the obligation of good faith is not the law. But, once again, the fact that the realists' indeterminacy claims involved a standard concept of law – what the realists called 'paper rules'[131] or 'formal law'[132] – does not mean that they did not offer the prediction theory as a superior alternative. The realists recommended that the concept of law be revised. It is precisely in explaining this recommendation that Leiter's reading of the realists as jurisprudential naturalists is most useful.

III. CONCLUSION

Leiter argues that the realists were prescient jurisprudential naturalists because of an analogy between their descriptive theory of adjudication and Quine's naturalized epistemology. The realists' reaction to our inability to justify judicial decisions by legal reasons, Leiter argues, is comparable to Quine's reaction to the failure of

[131] Llewellyn, supra note 90, at 448 and passim.

[132] Frank, supra note 35, at 648 and passim.

Rudolf Carnap's epistemological foundationalism, which sought 'to show that scientific theories about the physical world are uniquely justified on the basis of sensory experience' (36, n. 102). Just as Quine replaces justification of scientific theories with a descriptive-psychological account of how theories are constructed, so the realists replaced justification of judicial decisions with a descriptive-psychological account of how judges decide cases. The realists replaced ''the 'sterile' foundational program of justifying some one legal outcome on the basis of the applicable legal reasons, with a descriptive/explanatory account of what input (that is, what combination of facts and reasons) produces what output (i.e. what judicial decision)'' (40). The theory of adjudication 'falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology)' (40).

The adequacy of Leiter's claimed analogy can be questioned. Quine rejected Carnapian foundationalism because it makes philosophically inappropriate demands for the justification of scientific theories. For Leiter's analogy to work, one would expect the realists to have rejected as philosophically inappropriate the attempt to justify judicial decisions in terms of legal rules. But the realists do not think that such justification is philosophically inappropriate. It is hardly 'sterile'. Indeed, as Leiter himself emphasizes, they thought legal decisions were usually justified by legal rules, outside of cases brought on appeal. The realists simply denied that justification succeeded in some cases.[133]

What is more important for our purposes, however, is another element of philosophical naturalism emphasized by Leiter outside of his discussion of the realists, namely, skepticism about conceptual analysis. The traditional conception of the philosophical method – including the method as employed in the philosophy of law – is that it involves the analysis of the meanings of our terms or the contents of the concepts associated with these terms. Such analytic statements are necessarily true. In contrast, synthetic reasoning involves arriving at truths by appeal to empirical evidence.

Quine rejected the analytic-synthetic distinction. As Leiter puts it:

> [Quine] argues that all statements are answerable to experience … that none are ''true in virtue of meaning'' alone. Those we tend to call ''analytic'' are simply

[133] This criticism of Leiter's analogy was first offered in Mark Greenberg, 'Naturalism and Normativity in the Philosophy of Law', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987523. For Leiter's response see pages 112–117 of *Naturalizing Jurisprudence*.

those that we are least willing to give up at that particular point in the history of inquiry: whatever the empirical facts are, we are going to adjust other parts of our theory of the world to accommodate those facts, before we think about rejecting the ''analytic'' statements. (144)

The question arises, therefore, whether philosophy, as distinct from science, can exist: '[T]he collapse of the analytic-synthetic distinction puts all questions into the domain of science *because science is already the domain in which synthetic questions – questions of fact – are answered*' (146).

The philosophical naturalist takes Quine's critique of the analytic-synthetic distinction to heart, by recognizing that there is nothing privileged about one's intuitions about the nature and scope of a concept. Instead, philosophers should 'clarify[] the contours and extensions of concepts that have been vindicated by their role in successful explanation and prediction of empirical phenomena' (184). Applying this method to the philosophy of law 'would mean taking seriously the enormous social scientific literature on law and legal institutions to see what concept of law figures in the most powerful explanatory and predictive models of legal phenomena such as judicial behavior' (184). The result would be what we can call a *scientistic* concept of law.

In one of the richest sections of the book, Leiter considers and rejects the adoption of a scientistic concept, primarily because he believes that 'there is no robust, hence epistemically credible, social science of adjudication' (192). He comes to this conclusion as a statement of his own views concerning what naturalizing the philosophy of law should entail. But he does not consider whether the realists – convinced that their descriptive account of adjudication was robust – might have advocated a scientistic concept, in the form of the prediction theory. Like the philosophical naturalist, the realists did not privilege our intuitions about the scope of the concept of law, intuitions that would yield a standard theory of law like Hart's. They advocated the prediction theory, because they thought it was vindicated by social-scientific inquiry into judicial decision-making. If so, the realists were more naturalists than Leiter himself realizes.

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