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2013

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Repository Citation
Green, Michael S., "Felix Cohen on Legislation" (2013). *Faculty Publications*. 1921.
https://scholarship.law.wm.edu/facpubs/1921

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DOI: 10.5235/2050-8840.1.1.113

FELIX COHEN ON LEGISLATION

Michael S. Green*

Abstract

Felix Cohen's and Walter Wheeler Cook's prediction theory of law was a fundamentally positivist theory, according to which the law of a jurisdiction is reducible to regularities of official behavior. Cohen used the prediction theory to argue for philosophical anarchism – that is, the view that the existence of law does not entail a duty, even a prima facie duty, of obedience. In particular, Cohen extended philosophical anarchism to adjudication. The fact that officials in a jurisdiction regularly behave in a certain way does not give a judge adjudicating a case a moral reason to do the same. In deciding whether she should follow the law, a judge must always engage in particularized moral deliberation. Philosophical anarchism is a normative position concerning adjudication. But it also suggests a descriptive position. Cohen argued that the law often fails to have a causal effect on adjudication, not because it is rationally indeterminate (in the sense of failing to recommend a unique decision) but because judges resist the law on moral – or perceived moral – grounds. As a result, Cohen argued that legislation cannot be assessed solely on the basis of its expressed content. Any evaluation of legislation must consider law resistance, not merely by those subject to the law's commands, but also by those officials tasked with administering the law.

Keywords

Felix Cohen; Walter Wheeler Cook; legal realism; legislation; prediction theory of law; philosophical anarchism

A. LEITER AND THE 'RECEIVED VIEW' OF LEGAL REALISM

The American legal realists tended to focus on how judges respond to and produce law through adjudication. Teasing out their views about legislation is a difficult matter, which is why this special issue devoted to the topic is so welcome. In this essay, I will consider Felix Cohen's views on legislation. (I will

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have a bit to say about Walter Wheeler Cook as well, but my primary emphasis will be Cohen.) In exploring Cohen's views, I will rely upon the reading of the realists that I have presented in other writings.[1] I'll begin, therefore, with an account of this reading, by contrasting it both with what Brian Leiter calls the 'Received View' of the movement and with Leiter's alternative.

For Leiter, the 'Core Claim' of legal realism is that judges respond 'primarily to the stimulus of facts' and to 'non-legal reasons' – such as fairness to the parties – rather than to the applicable rules of law.[2] The realists accepted the Core Claim because they thought the law is rationally indeterminate, that is, that it is insufficient 'to *justify* only one outcome'.[3] Judges must look outside the law because it fails to provide them with sufficient guidance.

Although the Received View of the movement accepts the Core Claim, Leiter objects to the way that it formulates 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.[4]

The problem, as Leiter sees it, is in theses (2) and (3). Thesis (2) is mistaken because the realists did not think that judges' discretion is unfettered, in the sense of being completely unconstrained by legal rules. The law is not globally indeterminate, that is, indeterminate in all cases. Indeterminacy is local – primarily only in cases that make it to 'the stage of appellate review'.[5] Furthermore, even in appellate cases, a judge's options are restricted to some extent by the applicable legal rules. Leiter argues that thesis (3) is also mistaken because – Jerome Frank and Joseph Hutcheson excepted – the realists did not think that judges' decisions are based upon personal tastes and values.[6] Judges' decisions are not idiosyncratic. Instead, judges respond predictably to cases on the basis of shared views about the relevant non-legal considerations.

Another important difference between Leiter's reading of the realists and past readings concerns the prediction theory of law, which Leiter describes as 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

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[1] M.S. Green, 'Leiter on the Legal Realists' (2011) 30 *Law & Philosophy* 381; M.S. Green, 'Legal Realism as Theory of Law' (2005) 46 *Wm. & Mary L. Rev.* 1915.
[2] B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 21 and 24.
[3] *ibid.* 9.
[4] *ibid.* 16.
[5] *ibid.* 77.
[6] *ibid.* 16, 25 and 28.

present occasion"'.[7] Past interpreters have generally attributed a prediction theory to the realists, although it is usually added that the theory is implausible or incoherent.[8] Leiter argues that the realists could not have been committed to the theory, because it is incompatible with their claims about legal indeterminacy. The realists claimed that the law – including statutes and past judicial decisions – is rationally indeterminate. They therefore must have been committed to the view that statutes and past judicial decisions – not merely the decision the court will make in the immediate case – are the law.[9] Leiter argues that what appears to be the expression of the prediction theory in the realists' writings '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'.[10]

Concerning the realists' views about legal indeterminacy, my reading largely overlaps with Leiter's. I agree with him, for example, that theses (2) and (3) of the Received View are mistaken. The realists' indeterminacy thesis was not global (even if it was not precisely limited to cases that make it to appeal). The realists recognized that the law sometimes recommends a unique decision to a judge, given the facts of the case. Furthermore, they generally did not think that in those cases in which the law is indeterminate, judicial decisions are based on personal values. They thought judges predictably adjudicate upon the basis of shared views concerning non-legal considerations.[11]

The heart of my disagreement with Leiter has to do with the prediction theory of law (or rather prediction theories, for – as we shall see – at least two prediction theories can be identified in the realists' works). There is overwhelming evidence that, by speaking of the law in terms of judicial decisions and predictions of decisions, the realists were concerned with more than how it is useful for lawyers to think about the law when advising their clients.[12] The realists claimed that the prediction theory applies to a judge adjudicating a case just as much as it does to lawyers advising their clients.[13] By offering the theory, they hoped to reveal something important and essential about the nature of law. It is not surprising, therefore, that Leiter is virtually alone in claiming that the realists were not committed to a prediction theory of law.

To be sure, Leiter is correct that the realists must have relied on a conventional theory of law, in which statutes and precedent can be law, when making their claims about legal indeterminacy. But that is not enough to show

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[7] B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 69.
[8] H.L.A. Hart, *The Concept of Law* (2nd edn., OUP 1994) 124–154; J.G. Murphy and J.L. Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* (Westview 1990) 34.
[9] B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 72–73.
[10] *ibid.* 71
[11] M.S. Green, 'Leiter on the Legal Realists' (2011) 30 *Law & Philosophy* 381, 384–389.
[12] *ibid.* 403–416.
[13] *ibid.* 405–406 and 410.

that they didn't offer a prediction theory. First – as we shall see – the prediction theory might be compatible with the view that statutes and precedent are law. Second, even if the prediction theory is incompatible with the usual view about the scope of the law, the realists might have offered the theory as useful reformation of the concept of law. The realists clearly recognized that there was a conventional concept of law – which they called 'law in books', 'formal law', 'Bealish Law' (after Joseph H. Beale), and 'paper rules' – in the light of which statutes and precedent were law.[14] The fact that their claims about legal indeterminacy were made in reference to this conventional concept does not mean that they didn't think that the prediction theory (or 'law in action')[15] was a superior alternative.

The question therefore is not whether the realists held the prediction theory, but why – something past readings of the realists have not adequately explained. In addressing this matter, it is useful to draw a distinction between two forms that the theory took in the realists' writings.

B. THE DECISION THEORY OF LAW

The first is a decision theory of law, in which the law concerning an event is whatever concrete judgment a court will issue when the event is litigated. This theory, which is most evident in the writings of Jerome Frank, is indeed incompatible with the view that statutes and precedent are law. Although the decision theory was not advocated by Felix Cohen (or Walter Wheeler Cook), it is helpful to outline briefly the possible reasons some realists held the theory.

One is legal indeterminacy. To the extent that the relevant legal rules – that is, statutes, precedent, and the like – are indeterminate, a judge adjudicating a case must make law to fill in the gaps. If the realists believed in global legal indeterminacy, they might be inclined to say that the law consists of the concrete decisions of courts. Imagine that the relevant legal rules never give judges any guidance about how a case should be resolved. If so, there would be some sense in the claim that the law really consists of how a judge would decide the case, since it is only through such a decision that the parties could have any concrete guidance about their legal obligations.

But it is unlikely that legal indeterminacy was the primary motivation for the realists' decision theory. The reason is that, as Leiter emphasizes, the realists did not believe that legal indeterminacy is global. Indeed if they did, their decision

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[14] F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood 1976) 237. See also J. Frank, 'What Courts Do in Fact: Part One' (1931) 26 *Ill. L. Rev.* 645, 648; J. Frank, *Law and the Modern Mind* (Anchor Books 1963) 59; K.N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' (1930) 30 *Colum. L. Rev.* 431, 448.

[15] *ibid.* 237.

theory would collapse. We can identify courts only on the basis of preexisting legal rules. These rules must be able to provide meaningful direction or we would never be able to identify the judicial decisions to which the decision theory purports to reduce the law.

Furthermore, even if the realists did believe that global indeterminacy was true of the American legal system, the resulting decision theory would not be a genuine theory of law – that is, an account of what is essential to law. Unless global legal indeterminacy is necessarily true, the theory would not be true of every possible legal system.

An alternative explanation of the realists' advocacy of the decision theory – one offered by H.L.A. Hart – ties the theory to the phenomenon of judicial supremacy. Assume that the law is completely determinate. The fact remains that if a judge misapplies the law, her judgment is generally considered binding upon the parties, unless overturned on appeal.[16] This power to issue binding judgments in defiance of the applicable legal rules is commonly known as weak judicial supremacy. In addition, in the American legal system the highest court of appeals also generally has strong supremacy, in the sense that its misinterpretations of the law are considered binding upon officials in similar cases in the future. Officials are bound to replace the language of the legal rule with the court's misinterpretation.

These two forms of judicial supremacy give judges a type of freedom of decision that is unrelated to legal indeterminacy. To be sure, the freedom is not unlimited. A judge's misapplication of the law might be so profound (she, for example, might read the Due Process Clause of the United States Constitution as demanding that her salary be increased by $1 million a year) that weak judicial supremacy would not apply. Her judgment could permissibly be ignored by officials even if it had not been overturned on appeal. There are, one might say, misapplications of the law that undermine the status of the court's decision as a judgment at all.[17] By the same token, a highest court of appeals' misinterpretation of the law might be so extreme that strong judicial supremacy would not apply. American officials would be legally permitted (or required) to ignore the misinterpretation in future cases. Nevertheless, the simple fact that a judge misapplied or misinterpreted a determinate legal rule is not on its own sufficient for officials to deny the judge's decision legal effect.

Given the existence of judicial supremacy, there is again some sense in saying that the law consists of how a judge will decide a particular case. And it is clear,

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[16] *e.g.* Th.W. Merrill, 'Judicial Opinions as Binding Law and as Explanations for Judgments' (1993) 15 *Cardozo L. Rev.* 43, 46.

[17] M.S. Green, 'Legal Revolutions: Six Mistakes about Discontinuity in the Legal Order' (2005) 83 *N.C.L. Rev.* 331, 393–394.

particularly in Jerome Frank's writings, that judicial supremacy sometimes motivated the realists to present a decision theory.[18]

But there are problems with this version of the decision theory as well. Once again, it is not a genuine theory of law, for a legal system need not recognize judicial supremacy and – as we have seen – even in those systems with judicial supremacy, there are limits on the extent to which officials will give deference to judicial decisions that misapply or misinterpret the law. Second, the decision theory cannot apply to those fundamental legal rules that identify courts and their decisions. Although it is possible for a court to use its supremacy to increase (or decrease) its jurisdiction by misinterpreting existing legal rules on the matter, for judicial supremacy to function, nonjudicial officials must engage in the threshold application of legal rules to identify courts and their jurisdiction. Concerning this threshold application, judicial supremacy cannot coherently apply.

Furthermore, even in those areas where weak judicial supremacy applies, the fact that a court's judgment is legally binding upon other officials does not necessarily mean that it establishes the law. As H.L.A. Hart argued, participants in a legal system can understand the court's judgment as binding despite being legally in error. If so, the judgment would not change the prevailing legal rules, even concerning the event in connection with which the judgment was issued.[19] The same point is true about strong judicial supremacy. It is possible for the participants in the legal system to draw a distinction between the law and the court's binding interpretation of the law. The court's opinion can be understood as binding upon officials going forward despite being legally in error.

C. THE PREDICTION THEORY OF LAW

So much for the decision theory. But there was a very different theory of law offered by the realists – which we can call the prediction theory – that did not depend upon legal indeterminacy or judicial supremacy. Consider the following statements made by 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.[20]

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[18] M.S. Green, 'Leiter on the Legal Realists' (2011) 30 *Law & Philosophy* 381, 389–391; M.S. Green, 'Legal Realism as Theory of Law' (2005) 46 *Wm. & Mary L. Rev.* 1915, 1987–1993.
[19] H.L.A. Hart, *The Concept of Law* (2nd edn., OUP 1994) 141–146.
[20] W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (HUP 1942) 33.

> [A] statement, for example, that a certain 'rule of law' is the 'law of England' 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.[21]

Cook used the prediction theory to criticize the prevailing view about a court's legal duty to apply the law of a foreign jurisdiction. According to the vested rights or 'obligatio' theory, if a jurisdiction enacts a law concerning activities in its territory, a violation of the law gives the wronged party a vested right to the application of the jurisdiction's law, which foreign courts taking the case are legally obligated to respect.[22] This obligation transcends social facts in the forum, in the sense that the forum court is legally obligated to respect the foreign right no matter what forum officials say or do.

Cook used the prediction theory to critique this notion of vested rights. A right legally binding upon the forum, he argued, must be tied to social facts about forum officials. This means that there are as many legal rights concerning an event as there are jurisdictions willing to adjudicate in favor of the plaintiff, even when the event being litigated has no connection with the forum. There are no necessary limits on the territorial scope of a jurisdiction's law:

> Shall we, must we, say that there are as many 'rights', all growing out of the one group of facts under consideration, as there are jurisdictions which will give the plaintiff relief? Since such an assertion is merely a shorthand way of making the prophecy that the appropriate persons, the officials, in each of these jurisdictions would react to the situation, if it were presented to them, so as to 'give relief' to the plaintiff, there seems to be no other statement to make. Thus interpreted, the statement is not only not startling but plain common sense.[23]

Notice that there is nothing in Cook's argument that depends upon legal indeterminacy or judicial supremacy. Rather, Cook offers the prediction theory of law as a fundamentally positivist account of the law – that is, an account in terms of social facts in a jurisdiction. The problem with vested rights theory according to Cook is that it assumed the existence of legal rules (in particular, rules limiting the territorial scope of a jurisdiction's law) that did not depend upon such social facts.

Notice as well that Cook's prediction theory is not the same as the decision theory. Under the decision theory, the law concerning an event is how the court that gets the case will in fact adjudicate it. The prediction theory, in contrast, looks beyond a court's actual decision in two ways: it looks to the behavior of

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[21] W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (HUP 1942) 29.
[22] *ibid.* 34–39.
[23] *ibid.* 33.

officials (not just judges) and to officials generally (not the behavior of any particular official). To the extent that the judge that gets a case diverges from officials in general, the judge has diverged from the law. Indeed, Cook even looks beyond the behavior of officials to the citizenry as a whole. It is not enough that officials predictably act in certain ways. The population as a whole must acquiesce in the officials' actions for law to exist.[24]

So understood, the prediction theory may not be incompatible with a conventional understanding of the law as including statutes and precedents. If statutes and precedents are predictably enforced by officials in a jurisdiction and the population as a whole generally abides by them, there is a sense in which they are law under the prediction theory.

To be sure, there are differences between the prediction theory and other positivist accounts of law. Consider H.L.A. Hart's theory of law, as presented in *The Concept of Law*. Hart insists that officials' attitudes, not merely behavior, are relevant to the existence of law. For a statute to be law, it is not enough that officials predictably enforce it and the population generally abides by it. Officials must take the 'internal point of law' – that is, they must enforce the statute because it satisfies criteria that they have accepted as appropriately governing their actions.[25] Under the prediction theory, in contrast, it does not appear essential to law that officials adopt the internal point of view. They might, for example, all act as they do simply because of fear of reprisals for disobedience.

Second, under the prediction theory statements about the law are about social facts. For this reason, a statute, understood as a propositional entity or a norm, is not, strictly speaking, law. To say a statute is law is really an elliptical way of speaking about social facts concerning official behavior and popular acquiescence. For Hart, in contrast, officials' statements about the law of their own legal system do not describe but instead presuppose social facts about officials and the citizenry and are normative in the sense that they express the speaker's acceptance of the legal system.[26] Thus, under Hart's theory, when an official says that a statute is law, she is genuinely speaking of the statute as a norm. Indeed, Hart criticized legal realism because it treated legal statements solely as descriptions of social facts.[27]

There is another possible difference between the prediction theory and Hart's. Under Hart's theory, something can be law only if it satisfies the criteria to which officials actually appeal when justifying their actions, criteria that Hart calls the 'rule of recognition' of the legal system.[28] A statute is law if it satisfies these

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[24] W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (HUP 1942) 30 fn. 54: "If, for example, a majority of the community were not in the habit of acquiescing in the acts of the officials, there would be not law but the absence of law."

[25] M.S. Green, 'Leiter on the Legal Realists' (2011) 30 *Law & Philosophy* 381, 414–415; M.S. Green, 'Legal Realism as Theory of Law' (2005) 46 *Wm. & Mary L. Rev.* 1915, 1997–1998.

[26] H.L.A. Hart, *The Concept of Law* (2nd edn., OUP 1994) 102–103.

[27] *ibid.* 104.

[28] *ibid.* 94.

official criteria, even if the statute is, as a matter of fact, ignored by judges when adjudicating cases. Conversely, something is not law, even if it is a regular determinant of courts' decisions, if it fails to satisfy the official criteria for law.

The prediction theory, on the other hand, might treat as relevant all and only those considerations that actually have systematic effects on courts' decisions (or other official action). Consider the obligation of good faith in contractual dealing, which Karl Llewellyn thought regularly motivated decisions in contract cases, even though it was not a reason explicitly identified as law.[29] Under Hart's theory the obligation would not be law. In contrast, some realists, applying the prediction theory, would call it law. These realists recognized, however, that in calling it law they were recommending that the concept of law be reformed, rather than identifying the scope of the concept as it is currently employed.[30]

D. THE PREDICTION THEORY AND PHILOSOPHICAL ANARCHISM

As we have seen, Cook introduced the prediction theory in the context of the conflict of laws. The existence of a foreign legal right simply means that an event will be treated in a certain way by foreign legal officials. Such social facts do not necessarily generate any legal restrictions on the forum. The legal rights of the parties as far as the forum is concerned is solely a question of social facts about the forum's legal officials.

But the prediction theory also has implications for how a court treats domestic legal rights.[31] Under the prediction theory, the existence of a domestic legal right is simply a question of the behavior of domestic officials. For the judge adjudicating the case, it is merely a descriptive fact. Nothing about this fact tells the court how it ought to behave.

The realist who most emphasized this argument is Felix Cohen. Cohen argued that the law, as a set of social facts, does not give a court a moral reason to adjudicate one way rather than another. Even when the law is fully determinate, it cannot on its own tell a judge how to decide a case, for it does not answer the question of whether the judge should decide in accordance with the law:

> Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every

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[29] B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 30.

[30] M.S. Green, 'Leiter on the Legal Realists' (2011) 30 *Law & Philosophy* 381, 406–407. Cohen's position on the matter is equivocal. F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood 1976) 236–238.

[31] *ibid.* 397; W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (HUP 1942) 43–45.

> legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge is not whether a legal rule or concept actually exists but whether it *ought* to exist. Clarity on two fronts is the result.[32]

The problem with past conceptions of the law, Cohen argued, is that they muddled the descriptive question of what the law is with the moral question of how a judge should adjudicate in the light of the law. Sometimes this undermined accurate description of the law: "If legislatures or courts disagree with a given theory, it is a simple matter to show that this disagreement is unjust, unreasonable, monstrous and, therefore, not 'sound law'."[33] But past conceptions of the law also undermined the moral evaluation of the law. Judges would take the fact that the law exists to answer the question of how they ought to adjudicate: "[I]f the law is something that commands what is right and prohibits what is wrong, it is impossible to argue about the goodness or badness of any law, and any definition that deters people from criticism of the law is very useful to legal apologists for the existing order of society."[34]

The prediction theory forces judges to face the fact that adjudication is always a moral decision that cannot be answered by determining existing law. Under the prediction theory, '[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 human lives for better or worse and is therefore subject to moral criticism'.[35]

Like Cook, Cohen did not argue for the prediction theory on the basis of legal indeterminacy. Indeed, Cohen criticized other realists for exaggerating the extent to which the law is indeterminate.[36] Nor did Cohen's argument for the prediction theory depend upon judicial supremacy. He did not reduce the law to how a judge actually decides a case. If a judge's decision deviates from how other judges and officials would treat the case, her decision deviates from the law.[37] To be sure, given judicial supremacy, her decision will remain legally binding, unless overturned on appeal. But this legal effect of her decision is, for Cohen, itself a function of regularities of behavior among officials – including the non-judicial officials who enforce the decision.[38] In the absence of such regularity there is no

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[32] F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colum. L. Rev.* 809, 841.
[33] *ibid.* 838.
[34] *ibid.*
[35] *ibid.* 828–29.
[36] F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood 1976) 238.
[37] M.S. Green, 'Legal Realism as Theory of Law' (2005) 46 *Wm. & Mary L. Rev.* 1915, 1934.
[38] F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colum. L. Rev.* 809, 844.

judicial decision at all.[39] The heart of Cohen's prediction theory was not legal indeterminacy or judicial supremacy, but a fundamentally positivist approach to the law as constituted by social facts.

In arguing that the law does not generate moral obligations on a judge to adjudicate one way rather than another, Cohen did not deny, of course, that there are often – indeed usually – good moral reasons for adjudicating as the law recommends. For example, he noted that adjudication in accordance with law will often uphold 'human expectations based upon past decisions, the stability of economic transactions, and the maintenance of order and simplicity in our legal system'.[40] But he thought that there was no necessary relationship between the existence of law and reasons to adjudicate in accordance with the law. Identifying such reasons always requires particularized moral deliberation:

> [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.[41]

I have argued elsewhere that Cohen's position amounts to extending philosophical anarchism – that is, the view that there is no moral duty to conform to the law – from private citizens to judges adjudicating cases.[42] For the philosophical anarchist, the existence of law does not on its own create a moral duty of obedience. It does not even create a prima facie duty, that is, a duty that might be defeated by countervailing moral duties. If philosophical anarchism applies to judges, that means that there is nothing about being in the position of a judge that necessarily entails a prima facie moral duty to adjudicate in accordance with the law.

That Cohen would adopt philosophical anarchism concerning adjudication is understandable given his largely consequentialist ethical perspective.[43] The moral

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[39] F.S. Cohen, 'The Problems of a Functional Jurisprudence', (1937) 1 *M.L.R.* 5, 8 (reducing the law to regularities of, not just judicial decisions, not also "other acts of state-force").

[40] F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colum. L. Rev.* 809, 840.

[41] F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood 1976) 33.

[42] M.S. Green, 'Legal Realism as Theory of Law' (2005) 46 *Wm. & Mary L. Rev.* 1915, 1925–1926.

[43] *e.g.* F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood 1976) 51–52.

advisability of adjudicating in accordance with the law depends upon its effects, and what effects an act produces is always a contingent matter. Indeed, even if Cohen recognized non-consequentialist prima facie duties to adjudicate in accordance with the law – for example, those flowing from a judge's promise as part of her oath of office[44] – a judge would not necessarily have these duties by virtue of holding her position, although being a judge and possessing the duties would, of course, usually coincide.

Philosophical anarchism is a normative position concerning the law. In attributing it to the realists, therefore, I depart from both Leiter's reading and the Received View, both of which treat realism as primarily a descriptive claim about adjudication, according to which the law fails to have a causal effect on how judges resolve cases because it does not recommend a unique decision to them.

Nevertheless, by emphasizing the lack of a necessary relationship between the existence of law and moral reasons to adjudicate in accordance with the law, my reading does suggest that the realists held a descriptive account of adjudication – different from Leiter's and the Received View – according to which the law fails to have a causal effect on how judges resolve cases, not because it fails to recommend a unique decision to them, but because they find insufficient moral reasons to adjudicate in accordance with the law. To be sure, simply because there is no necessary relationship between the existence of law and moral reasons for a judge to adjudicate as the law recommends, it does not follow that the law's causal effect on adjudication will be reduced, for judges might wrongly believe such a necessary relationship exists or might adjudicate in accordance with law blindly, without considering whether it is morally justified. Philosophical anarchism merely suggests the possibility that judges resist applying the law due to moral objections. It does not show that they actual do so. Nevertheless, the normative position of philosophical anarchism highlights the descriptive possibility that judges choose, for actual or perceived moral reasons, to ignore the law.

Leiter recognizes as a minor theme in the realists' writings that even determinate law can fail to have a causal effect on adjudication. Curiously, however, he offers only 'ineptitude or corruption' as the explanation.[45] Any 'rational, honest, competent, and error-free' judge, he argues, will adjudicate as determinate legal rules recommend.[46] He ignores the possibility that a judge might ignore determinate legal rules on legitimate moral grounds.

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[44] Cohen notes that judges often take their acceptance of their office as putting upon them a duty of loyalty to the legal order. F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood 1976) 241–242. But I have not been able to find him saying that they are right.

[45] B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 64.

[46] *ibid.* 9.

E. THE PREDICTION THEORY APPLIED TO LEGISLATION

With Cohen's account of adjudication in mind, we can now attempt to tease out his views concerning legislation. As realism is usually understood – that is, as a claim about the causal inefficacy of legal rules due to their rational indeterminacy – not much interesting about the act of legislation follows. The most one can say is that legislation can, as a descriptive matter, suffer from the same rational indeterminacy as judge-made law and that, as a normative matter, it is best when it overcomes this indeterminacy.

But what would Cohen say about legislation under my reading? One might think that the consequences of the prediction theory for legislation are relatively minor as well. After all, everyone agrees that a legislator generally engages in autonomous moral reasoning. Legislation is the attempt to bring about good moral consequences within certain social constraints. What is radical about my reading is that Cohen applied this same perspective to a judge.

To be sure, it would also follow from my reading that, for Cohen, a legislator should have the same attitude toward the law governing his activities that a judge should have toward the law governing hers. Just as the existence of a statute does not give a judge a moral reason to adjudicate in accordance with the statute, the existence of, say, a constitutional restriction does not give a legislator a moral reason to take the restriction into account. To say that a constitutional restriction exists is simply a descriptive claim about social facts concerning official behavior. What a legislator should do in response requires particularized moral reasoning. (I have not been able to find Cohen making such a claim, but it is a natural consequence of his prediction theory.)

But the prediction theory has another important implication for a normative theory of legislation. As we have seen, by drawing a distinction between the law, as a set of social facts, and the moral reasons judges have to adjudicate in accordance with the law, the prediction theory draws attention to the possibility that legal rules can fail to have a causal effect on judicial decisions, not because they are indeterminate, but because judges resist applying them due to moral, or perceived moral, objections. Any assessment of legislation must take into account this phenomenon.

Cohen forcefully criticized those assessing statutes for ignoring law resistance. Statutes are generally evaluated solely on the basis of their expressed content:

> A rule of law commanding or permitting a good thing or prohibiting a bad thing is held to be good, and a rule commanding or permitting a bad thing or prohibiting a good thing, bad. All questions of the actual extent to which law

> will secure obedience and of the actual nature and results of this degree of obedience are held to be irrelevant to our value judgments.[47]

Furthermore, to the extent that law resistance is considered, the emphasis is on popular resistance, in which a statute is resisted by those to whom it is directed.[48] The evaluation of statutes and other legal rules ignores the 'personal moral reactions of individuals to whom the administration of law is entrusted toward the substance of the particular legal element'.[49]

Once law resistance among judges and other officials is taken into account, a statute with positive expressed content can be rejected, and one with negative expressed content affirmed. As Cohen noted, this occurs when courts of appeals assess the legal rules created by trial courts: "The appellate judge, aware of the tenuous and sporadic nature of his control over lower courts, is inclined to approach a case on appeal with some bias in favor of a judgment of affirmance."[50] Despite finding the expressed content of the rule articulated by the lower court deficient, the appellate court can be inclined toward accepting it, even in cases where the appellate court's formal standard of review is *de novo*. But Cohen argued that the same point should be true of legislation. A statute should be accepted – despite the moral deficiencies of its expressed content – because of anticipated judicial resistance to alternatives.

Law resistance by judges was a reason that the realists often recommended replacing the language of a legal rule with the considerations that have been actually driving judicial decisions. A classic example of such an approach is Karl Llewellyn's inclusion of an obligation of good faith in contractual dealing in Article 2 of the Uniform Commercial Code,[51] on the ground that this criterion was already being employed by courts in contract cases. Another example is the Supreme Court's transformation of the law of personal jurisdiction over out-of-state corporations in *International Shoe Co. v. Washington*,[52] a decision that appears strongly influenced by Cohen's article 'Transcendental Nonsense and the Functional Approach'.[53] Cohen argued that the actual factors driving judicial decisions in such cases were non-legal considerations such as 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

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[47] F.S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (Greenwood Press 1976) 62.
[48] *ibid.* 259.
[49] *ibid.* 241.
[50] *ibid.* 242.
[51] U.C.C. § 2–103(j).
[52] *International Shoe Co. v. Washington*, 326 U.S. 310, 316–19 (1945).
[53] G. Rutherglen, '*International Shoe* and the Legacy of Legal Realism' (2001) 2001 *Sup. Ct. Rev.* 347, 349–350.

corporations of having to defend actions in many states'.[54] In *International Shoe* and subsequent cases,[55] these non-legal considerations were incorporated into the applicable legal rule.

It is my sense that Cohen's recommendation that the assessment of statutes take into account law resistance is still largely being ignored. Statutes tend to be evaluated on the basis of their expressed content. To the extent that law resistance is considered, it is resistance by those to whom the statutes directly apply. Crafting statutes to take into account resistance by the officials who enforce the law is, as Cohen put it, still thought to be vaguely 'obscene'.

I would like to end by considering one more question about Cohen's attitude toward legislation. This concerns how judges respond, and should respond, to legislation, compared to judge-created law. As we have seen, Cohen argued that the existence of law does not entail moral reasons for a judge to adjudicate as the law recommends. Whether a judge has reasons to follow the law is a contingent question requiring particularized moral reasoning. He gives us no reason to think that this is any less true when a judge is considering legislation as opposed to judge-made law. Nevertheless, it might be the case that she has moral reasons to abide by legislation more often than judge-made law, or that these reasons, when they exist, are more weighty. Since democratically-enacted legislation expresses other citizens' views about the appropriate content of legal rules, she might give the statute greater weight in her deliberation about how to adjudicate, even when she thinks the content of the legislation is morally misguided.

After considerable searching, however, I have not been able to find Cohen expressing such a position. This reveals, I believe, a significant gap in his normative views on adjudication. Cohen – adopting a broadly consequentialist approach – emphasized a judge's obligation to consider the effects of her actions when determining whether she should adjudicate in accordance with law. He does not draw attention to broader moral considerations that would recommend that she defer to the views of her fellow citizens.

In offering this criticism, I do not mean to suggest that Cohen's philosophical anarchist position is incorrect. Particularized moral reasoning is still required to determine whether adjudication in accordance with a statute is morally justified. The question is simply what sorts of considerations this reasoning might take into account.

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[54] F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colum. L. Rev.* 809, 810. In *International Shoe*, the reason the original legal rule was ignored was largely its rational indeterminacy, however, rather than judges' law resistance.

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

This normative gap in Cohen's account has a descriptive corollary. Just as Cohen ignores the question of whether judges should defer to statutes more than judge-made law, he also ignores the descriptive question of whether statutes in fact have greater causal effect upon adjudication, precisely because judges feel themselves to be more bound to comply with their demands. If so, the phenomenon of law resistance would be less significant in connection with statutes.