

## LEGAL REALISM AND LEGAL POSITIVISM RECONSIDERED AGAIN

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Comparing “isms” is never easy. It is particularly difficult when the first “ism” is a position associated with philosophers as early as Thomas Hobbes, had its “classical” period in the mid 19th century, and almost half of its most representative book is dedicated to the mistakes of earlier philosophers associated with it, while the most famous proponent of the second “ism” said that it was not a school, only a “movement” whose members were joined “only in their negations, and in their skepticisms.”<sup>1</sup> Still, for a long time there was a widely shared view was that legal positivism and legal realism are conflicting positions; this view was backed by a simple argument: positivism was identified with Langdellian formalism, and if there is one view the legal realists were undisputedly united in its “negation,” it is formalism. By simple substitution it follows that realism is opposed to positivism.<sup>2</sup> The problem with this argument is that its first premise, namely that positivism is (or implies) formalism, is false. This has been by now persuasively shown many times, and there is no need to repeat this here again.<sup>3</sup>

Of course, very little follows from showing that that argument was not sound, not even that positivism and realism are not inconsistent. The novelty in Brian Leiter’s arguments, which he put forward in a series of articles, was that he argued for a much stronger thesis.<sup>4</sup> His

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<sup>1</sup> Karl N. Llewellyn, “Some Realism about Realism – Responding to Dean Pound,” *Harvard Law Review* 44 (1931) 1222-64, pp. 1233-34.

<sup>2</sup> Throughout this article, when I say realism I mean legal realism, and when I say positivism I mean legal positivism.

<sup>3</sup> This has been pointed out already by H.L.A. Hart in “Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer,” *University of Pennsylvania Law Review* 105 (1957): 953-75, p. 955. More recently it was reiterated by, among others, Andrei Marmor, “No Easy Cases?” *Canadian Journal of Law and Jurisprudence* 3(2) (1990): 61-79, pp. 64-65; John Gardner, “Legal Positivism: 5½ Myths,” *American Journal of Jurisprudence* 46 (2002): pp. 199-227, pp. 211-14.

<sup>4</sup> The thesis is defended in most detail in Brian Leiter, “Legal Realism and Legal Positivism Reconsidered,” *Ethics* 111 (2001): 278-301 (further references to this article will be made parenthetically in the text to LRLP followed by page number). Other relevant articles are “Rethinking Legal Realism: Toward Naturalized Jurisprudence,” *Texas Law Review* 76 (1997): 267-315 (further references will be in the text to TNJ); “Legal Realism,” in *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson (Oxford: Blackwell, 1996) pp. 261-78; “Legal Realism, Hard Positivism, and the Limits of

thesis is that not only aren't positivism and realism inconsistent, but rather that the realists presupposed a theory of law along the lines of positivism; and not just any positivism, rather they presupposed the stronger version, the one known as hard (or exclusive) positivism.

No doubt, in one rather loose sense of legal positivism, Leiter is surely right. Positivism is associated with the view that law can have whichever content those with the power to make it wish it to have; the classical positivist position that immoral laws are still laws is only a special case of this more general claim. The realists' emphasis on what the law is, on taking the law as understood by the lawyer as an object of social scientific research seems indeed committed to the same view. Taking law as a social fact, epitomized in Hart's denunciation of "much metaphysics, which few could now accept" rings similar to the realist Felix Cohen's attack on "transcendental nonsense."<sup>5</sup> I do not wish to object that in this loose sense the realists can be seen as positivists. Leiter however is not content with this "family resemblance"; rather he offers a much stronger and specific claim.

One aim of this paper is then to examine Leiter's arguments. I will try to show that there are several ambiguities in Leiter's arguments, which once they are brought to light, damage his argument. I hope however that what I say will go beyond rebuttal of specific points in Leiter's thesis. I hope that something more general about the relationships between a theory of law and a theory of adjudication, as well as a better understanding of positivism will emerge in a way that will reflect on other debates in analytic jurisprudence, and in particular some of the charges Dworkin leveled against positivism, which have sometimes been dismissed too swiftly by positivists. I think these responses have not engaged with Dworkin's arguments. I hope what I say will at least hint toward the direction of better answers.

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Conceptual Analysis," in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, ed. J. Coleman, (Oxford: Oxford University Press, 2001) pp. 355-70 (further references in the text to "Limits"); "Naturalism and Naturalized Jurisprudence", in *Analyzing Law: New Essays in Legal Theory*, ed. B. Bix (Oxford: Clarendon Press, 1998) pp. 79-104 (further references in the text to NNJ). Similar themes are found also in "Positivism, Formalism, Realism," *Columbia Law Review* 99 (1999): 1138-64; "Legal Indeterminacy," *Legal Theory* 1 (1995): 481-492.

As is always the case when referring to one person's interpretation of another, it is not always easy to say whose view is presented. However in this case I believe there are enough hints that for the most part Leiter considers his reconstruction of the realists' arguments as essentially correct. I will assume both that the realists as they struck Leiter are indeed the realists' views and that Leiter, unless he explicitly rejects their view, endorses their views.

<sup>5</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed., 1994) p. 188; Felix Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809-49. I say more on Hart's naturalism in note 19 below.

## I FOUNDATIONALISM AND POSITIVISM

Leiter's thesis starts with an analogy he draws between the work of the realists and Quine's famous call for the "naturalization" of epistemology. The first step in Quine's route to naturalized epistemology was an argument against foundationalism. Subtleties aside, foundationalism is the thesis that there is non-inferential and infallible knowledge. The combination of non-inferentiality and infallibility is that one need not look for any evidence for believing a foundational proposition: grasping such proposition is all that is required for being justified in believing it, in *knowing* it. (Many modern epistemological foundationalists defend a weaker version of foundationalism, in which the requirement of infallibility is abandoned.) Inferential knowledge is then possible only if it is arrived at by means of the application of permissible knowledge- or truth-preserving logical operators (e.g., modus ponens) on foundational secure knowledge. Quine argued that all foundationalist theories are doomed to fail. And from this he argued (perhaps too hastily) that all justificatory accounts of knowledge are hopeless; and instead of trying to refine what could never succeed he famously suggested, "[w]hy not settle on psychology?"<sup>6</sup> If a justificatory account of epistemology is impossible, why not replace it with a description of the empirical (causal) relations between inputs, inferences, and outputs: the study of "a natural phenomenon, viz., a physical human subject. This human subject is accorded a certain experimentally controlled input – certain patterns of irradiation in assorted frequencies, for instance – and in the fullness of time the subject delivers as output a description of the three-dimensional external world and its history."<sup>7</sup>

It is important to understand how radical Quine's suggestion was: epistemology before Quine was understood as an attempt to provide an account of justified beliefs (what Ayer called "the right to be sure"). When Quine argued for what is sometimes called "replacement naturalism" he argued against the possibility of providing epistemic justification. In effect he suggested that epistemology as a philosophical discipline be abandoned: if all there is to the examination of beliefs are the experimental causal relations between inputs and outputs, then surely this is something that can be best (only?) properly examined in the laboratory of the experimental psychologist. To be sure, the experimental data gathered will require some analysis, and generalizations will have to be made based on the raw empirical findings. But all this is part of any scientific project. The need for this kind of theorizing does not seem to leave

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<sup>6</sup> W.V.O. Quine, "Epistemology Naturalized," in *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969) pp. 69-90, p. 75.

<sup>7</sup> *Ibid.*, pp. 82-83.

room for epistemology as an independent intellectual pursuit. Quine's argument is, in effect, an argument that shows the impossibility of philosophy of knowledge.<sup>8</sup>

Leiter argues that the legal realists offered a parallel replacement thesis with regard to adjudication with a similar two-step argument: Their first step was to reject foundationalism in the legal context, and the second was to offer an alternative non-justificatory account of adjudication. With regard to the first step the realists were anti-foundationalists in the sense that they "den[ied] that legal reasons justify a unique decision: the legal reasons underdetermine the decision (at least in most cases actually litigated)." (NNJ, 93; also 99).<sup>9</sup> The second step, the replacement, suggests that instead of a justificatory account of adjudication, i.e. some prescription as to how judges should decide cases, the realist provided a description of how judges actually decide cases.

Let us start with the first step, i.e. the claim that foundationalist theories of law are all bound to fail. Foundationalism about law would presumably be the thesis that there are "basic" and secure legal norms from which we could infer other legal propositions. It is important to see that the kinds of argument advanced by Quine and Leiter for their respective replacement theses are quite different: Quine argues that the theory of knowledge cannot be foundational; Leiter on the other hand, observes at legal practices and maintains that these do not fit any foundational description. There is no immediate move from the empirical findings of the realists to a claim about what is necessarily impossible. It may still be that legal foundationalism is possible, only that it does fit what we call law.

Does this difference matter? Leiter may, and probably does, argue that he is interested in describing the practice of law as it is in our world, not in some possible but very different world. So it is enough for him to show that law in our world is not foundational. Put modally, the anti-foundationalist's claim is that it is false that necessarily law is foundational. This means the legal anti-foundationalist has two potential opponents; the strong legal foundationalist, namely the one who argues that necessarily law is foundational, and the weak legal

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<sup>8</sup> In "What is Naturalized Epistemology?" in *Supervenience and Mind* (1993) pp. 216-38, pp. 224-25 Jaegwon Kim argued that if Quine is right, then the concept of knowledge is obsolete. In that case, a theory of knowledge makes as much sense as a theory of ghosts.

<sup>9</sup> In TNJ Leiter offers a different characterization of anti-foundationalism. Leiter says there that pragmatism consists of two main philosophical commitments, one is the "cash value" or "difference in practice" that should guide in theory-construction; the other is epistemological anti-foundationalism. He says there that the latter is the view that all justification of beliefs is inferential, that is, there are no self-validating beliefs. The justification of beliefs is ultimately derived therefore from an "a posteriori criterion of utility for particular human purposes" (TNJ 305). However, from TNJ 309 (e.g., "the Realists did not have worked-out epistemological views") it is evident that he does not take *this* to be an important element of the realists' pragmatism, and he confines their pragmatism only to the first of the two pragmatist theses.

foundationalist, who argues that while the modal claim of the strong foundationalist is wrong, law in our world is foundational. I believe strong legal foundationalism is false. It presupposes a platonic concept *law*, existing regardless of how it is understood by participants in legal practices. The realists deserve credit for showing the error of this view: legal practice is a reflective human activity and therefore it is at least partly constituted by human understanding of it. If strong foundationalism were true, it would entail that an entire community could be mistaken about its understanding of what law is and also about the content of its laws. This is very implausible we can set aside the claims of the strong foundationalist.

But what about the weak foundationalist thesis? Is there anyone who actually endorses it? The weak foundationalist thesis can come in two versions: it is either the view that the *content* of all legal norms is somehow contained in one (or few) master norm(s) and the other norms are applications to specific instances of what is already “in” that master norm. It would be something along the lines of trying to reduce all of morality to a single general norm like the Golden Rule. There are some legal theorists who come close to endorsing something along these lines (possibly Ernest Weinrib), although I believe no-one argues that all the law could be reduced to a *single* master norm. I believe this view is mistaken, but this is not the place to explain why. Weak foundationalism, however, can take another form, in which the derivation of non-foundational norms from foundational ones is not an explication of what is already implicit in the foundational norms, but rather is the result of a promulgation procedure of non-foundational norms in a way described in foundational (or less foundational) norms. Surprisingly, those who best fit this version of weak foundationalism are practically all modern legal positivists. All modern versions of positivism assume that something along the lines of Hart’s rule of recognition is essentially correct, and this gives their position a thoroughly foundationalist outlook. According to Hart’s version of positivism, a norm is a legal norm only if it is recognized by the rule of recognition. The rule of recognition itself is of course not validated by itself; rather it is social rule, viz. a kind of practice. From within that practice it is indubitable, as required from a foundational norm. Not all positivists agree on the details of Hart’s story about the rule of recognition, but I believe they all share the view that something like the rule of recognition is part of our concept of law, and it is one element that distinguishes a legal system from other normative systems in our world.

Nevertheless, Leiter argues that legal foundationalism is false, and by this he must mean that even weak foundationalism of the latter sort is false. His reason is that in a substantial number of cases the law is either indeterminate, i.e. does not rule out any possible legal outcome, or underdeterminate, which means that law rules out some outcomes that would otherwise have been possible, but still allows for more than one legal outcomes (TNJ, 295; in LRLP, 294 this view is called “empirical rule skepticism”). Does the in- or underdeterminacy of law undermine the Hartian version of legal foundationalism? We can trace two different claims in Leiter’s work. The first is:

(I.1) There are no valid legal reasons. There are what appear to be valid legal reasons, but actually these are irrelevant in explaining the legal decision. Legal norms are merely after-the-fact rationalization of decisions reached exclusively through consideration of non-legal reasons. Leiter says, for instance, that what he called the Core Claim of realism is that “judges decide for other reasons – their response to the facts – and not because of the legal reasons that fill their opinions” (TNJ 310). As an example of a realist endorsement of the Core Claim Leiter quotes Joseph Hutcheson who had said that “the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that decision” (TNJ 276). According to this characterization of legal realism, the judge is presented with the facts of the case, “feels” the ethically correct result, and then goes on to write his decision in “legalese.” Since the legal materials are so diverse and so nebulous they can be made to fit any conclusion the judge is disposed to reach on non-legal grounds, and therefore the “translation” to legal language never constrains on the decision the judge wishes to reach. It follows that legal norms have no justificatory or even explanatory power. They play no role in determining the outcome of the case. According to this view, then, legal norms are actually “norms” in scare quotes: they have the appearance of norms (“according to law, you ought to  $\phi$ ”), but (at least with regard to judges) no normative power.

(It is important to be careful with this thesis so as not to make it too strong: this thesis does not commit Leiter to the view that there can be no normative evaluation of legal decisions. It is still possible to say of a legal decision that it undermines equality, and is therefore morally wrong. (I.1) denies the possibility of an internal normative account of law: that is to say, it denies the existence of a standard of correctness *according to law*.)

At times Leiter argues:

(I.2) At least some legal norms are underdeterminate. In deciding cases judges rely on legal norms, but these norms on their own cannot tell the judge how a case should be decided. Leiter called this the “rational indeterminacy,” which occurs when “the class of legal reasons ... does not provide a justification for a unique outcome” (TNJ 295; LRLP 292-93) even under the best epistemic conditions (the judge knows all the law, is fully rational and unbiased). This is compatible with several sub-theses: (a) legal norms are determinate with regard to some cases (e.g., core cases) but not with regard to others (e.g., penumbral cases); (b) some norms are determinate, and others are not (e.g., while “rules” like those imposing speed limit are determinate, “standards” containing vague expressions like “reasonable” are not); (c) all legal norms are under-determinate in all cases, but they are nevertheless not without normative force, because they limit the discretion of the judge: while in every decision the judge has choice among several possibilities, the legal norm rules out some of the infinite number of decisions the judge could otherwise have taken. For present purposes I do not need to decide which (if any) of these sub-theses is the correct one, or

which one Leiter endorses, only to note that he occasionally ascribes this position to the realists.

Do any of these claims show that Hartian-style legal foundationalism is false? Of the two versions of realism only (I.1) can be considered anti-foundationalist in a sense roughly similar to Quine's. Foundationalism in epistemology, recall, is the thesis that there is some non-inferential knowledge from which we can infer other knowledge if such inferences are derived through permissible moves. There is nothing in this that's inconsistent with (I.2): (I.2) indeed allows for the fact that not all questions that courts deal with can be fully answered by legal norms exclusively, but (I.2) is consistent with all legal norms being foundationally secure, through something like the rule of recognition. To put it in other words, the analogy with the epistemological thesis would suggest that foundationalism in law is committed to the view that if  $X$  is a legal norm it is a legal norm in virtue of inference from self-validating foundations. There is nothing in this view that commits the legal foundationalist to the view that legal norms necessarily cover the entire practical domain, and therefore are determinate with regard to every practical question.

Contrary to (I.2), (I.1) is inconsistent with foundationalism, though in a somewhat indirect way: since (I.1) is a rejection of the fact that legal norms figure in reasoning about legal disputes, it amounts to a denial of the claim that valid legal norms actually exist. If they don't, it follows that foundationalism about legal norms is false, unless one takes the view that regarding what doesn't exist anything can be true or false.

Now, if the anti-foundational step fails, then we need not, indeed must not, take the second, replacement step, because if we take it, we will lose something of great importance for our understanding of law. If legal norms *qua* reasons are part of what determines the outcome of cases, then in order to understand how legal decisions are reached, we cannot disregard them. This would suggest that the first step Leiter has in mind is (I.1). But (I.1) is in tension with another aspect of Leiter's argument, *viz.* that the realists were tacit positivists, but it would be easier to see this if we examine in some detail the second, replacement, step in Leiter's argument.

## II REPLACEMENT

Briefly, the argument here is this: once we have realized that all justificatory accounts of adjudication are impossible, we should settle for an alternative, "naturalized" account. Echoing Quine's words Leiter asks: "Why not replace, then, the 'sterile' foundational program of justifying one legal outcome on the basis of the applicable legal reasons with a descriptive and explanatory account of what input – *i.e.*, what combination of facts and reasons – produces what output – *i.e.*, what judicial decision?" (TNJ, 295). The second step is then to adopt the methods of natural and social science and to report what judges do in fact: the theory of

adjudication is “naturalized’ because it falls into place ... as a chapter of psychology (or anthropology or sociology).” (TNJ, 296).

Something like the ambiguity we encountered in the previous section with regard to the first step for naturalization of jurisprudence appears in the second step as well. The first possibility is suggested by the analogy with Quine:

(II.1) Instead of a doomed attempt to provide justification for particular judicial decisions, we should try to opt for a scientific explanation of (probabilistic) causal relations between inputs and outputs. Such an explanation has no place in it for reasons. In the quote above Leiter indeed talks about the “combination of facts and reasons” that “produces” the judicial decision, but this, I believe, trades on the ambiguity of the term reasons between explanatory and justificatory reasons, confining his account to the former together with the further idea that these explanatory reasons are causes. This sort of causal explanation through reasons is (or at least some versions of it are) non-normative.<sup>10</sup> Leiter writes that the vast majority of the realists “thought that the task of legal theory was to identify and describe – not justify – the patterns of decision; the social sciences were the tool for carrying out this nonnormative task” (LRLP, 282).

At other times, however, the replacement Leiter argues for is different:

(II.2) We should replace an account of legal reasons (i.e., “there is a legal rule according to which one should  $\phi$  in situation  $S$ ;  $S$  obtains; therefore one should  $\phi$ ”) with an account of non-legal reasons (i.e., “it is fair that one should  $\phi$  in  $S$ ;  $S$  obtains; therefore one should  $\phi$ ”). Leiter for instance says that “[t]he real dispute between the Formalist and the Realist ... concerns whether the reasons that determine judicial decision are primarily legal reasons or nonlegal reasons” (TNJ, 278). Sometimes the reliance on non-legal reasons is not so transparent, but the move is essentially the same. Thus for instance, Leiter mentions (TNJ 281-82; LRLP 281-82) a research that showed, that judges created a distinction and ruled differently among factual situations that on the basis of legal rules alone appeared similar. The distinction corresponded to the judges’ feelings of fairness.<sup>11</sup>

Now, for his analogy with Quine to even get off the ground, Leiter must show not only that the realists simply left the question of justification to others simply because they were more

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<sup>10</sup> On the distinction between justifying and explanatory reasons see Michael Smith, *The Moral Problem* (Oxford: Blackwell, 1994) pp. 94-98. The classical statement that reasons are causes is Donald Davidson, “Actions, Reasons, and Causes,” in *Essays on Actions and Events* (Oxford: Oxford University Press, 2nd ed., 2001) pp. 3-19.

<sup>11</sup> Two comments: first, (II.2) collapses into (II.1) if moral reasons are naturalized as well, but this does not follow from the “naturalization” of legal reasons. Second, strictly speaking the two moves described in (II.2) are not identical: the first move, but not the second, is consistent with moral particularism, namely the view that moral reasons cannot be “codified” into principles.

interested in a descriptive account; it is not even enough to show that they offered an alternative normative account of judicial work; rather he must show that the realists offered a descriptive account and did so only after, and as a result of, an argument to the effect that a normative account of law is impossible. The two different interpretations of each of the steps in Leiter's argument can be combined in different ways that yield different arguments. The first is a combination of (I.1) and (II.1). This combination seems to fit best the analogy with Quine. However, it is hindered by a serious problem. Even by Leiter's own lights a theory of law must explain how "legal norms play a distinctive role in the practical reasoning of citizens" (LRLP 286). But (I.1) denies exactly this, and since any version of legal positivism I know of tries to explain the role legal norms play in practical reasoning, if as (I.1) maintains, there are no such things, then legal positivism, and indeed any theory of law which tries to explain law in terms of legal reasons, is false.<sup>12</sup>

We are not forced to couple (II.1) with (I.1). (II.1) *follows* from (I.1) only if we can give no alternative justificatory account of judicial decisions. But much of what the realists (and Leiter) say suggests that we can explain legal decisions through reasons, only not legal reasons. To say this is essentially to repeat the point made above: (I.1) is a denial of the possibility of providing a theory that explains law through reasons, but since Leiter does not deny this, we are not forced to accept (II.1). But if there are no valid legal reasons, but there are other reasons that figure in judicial reasoning, then the sort of replacement called for is very different from the one suggested by Quine. The analogy with Quine's replacement thesis would suggest that the notion of reasons in explaining a judicial decision is meaningless or pointless. Hence the replacement of a normative account with a non-normative one. (I.1) without (II.1), however, suggests only a replacement of legal reasons with non-legal reasons. This would be fully consistent with a normative account of law. The combination of (I.1) and (II.2) is exactly such an account: assuming moral reasons (such as fairness) are normative or justificatory (see note 11), the argument bears very little similarity to that of Quine's.

This is why (I.2) seems at first much more promising. Recall that the gist of (I.2) was, that there are valid, although underdeterminate, legal reasons. So according to (I.2) legal norms have some role in reasoning about legal matters. How does (I.2) fit with Leiter's Core Claim that the

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<sup>12</sup> This conclusion is perhaps not surprising. Cf. Kim's view in note 7 above. This point also questions Leiter insistence of considering the realists as legal philosophers. Without trying to determine what the proper "province" of legal philosophy within the confines of a footnote, it seems that if this is the realists' argument then at best they can be granted for giving a philosophical argument to the effect that philosophy of law is impossible. I say "at best" because it is worth remembering that having a "philosophical" presupposition implicit in one's argument is not akin to actually making a philosophical argument. That every criminal law textbook presupposes some philosophical argument on free will or compatibilism of determinism with responsibility does not imply that it actually contains one.

realists believed that “judges respond primarily to the stimulus of facts” (TNJ, 275) and not to the stimulus of legal norms? As I see it, an answer will require something along the following lines: first, it calls for understanding the Core Claim as the claim that judges respond *not only* to legal norms; in addition it requires that we allow that, and explain how, judges’ “response” to legal norms can be unconscious. But again, (I.2) is not very close to Quine’s argument. (I.2) does not call for any replacement but to an addition. We need first to explain what legal reasons are and then explain the limited but undeniable role they play in a normative account of judicial decisions. We then add an explanation of the role of the non-legal reasons in a normative account of law. This becomes apparent when we try to combine (I.2) with either (II.1) or (II.2). In either case (I.2) insists on the role of legal reasons in understanding law, while (II.1) and (II.2) both presuppose that this is false. This leaves us with (I.2) alone, a possibility that will be explored below.

To sum up: we could trace three possible arguments that Leiter advances: (I.1) combined with (II.1), (I.1) together with (II.2), and (I.2) alone. Of the three the analogy with Quine’s argument pulls toward the first, but this argument is at odds with any theory of law that explains law in terms of reasons. Now, as we have seen above, and as we shall presently see in more detail, the distinction between the legal and the non-legal realms is crucial for Leiter’s claim that the realists were tacit legal positivists, but the combination of (I.1) and (II.2), apart from its dissimilarity with Quine’s argument, still denies the existence of legal reasons, even if it retains the importance of reasons for explaining judicial practice. It appears that this version of the replacement thesis would also not lead to the conclusion that the realists were positivists, at least not based on Leiter’s argument. This leaves us with (I.2), which we have seen, does not fit at all well with the analogy with Quine’s replacement naturalism. However, only (I.2) requires a clear demarcation of the legal and the non-legal, which is essential for Leiter’s argument for a logical relationship between the realist Core Claim and legal positivism. To the examination of this idea I turn now.

### III WERE THE REALISTS POSITIVISTS?

This section has two parts. In the first I briefly outline the distinction between hard and soft positivists; I then argue that the distinction between the two versions of positivism has nothing to do with Leiter’s argument. That is, if the realists are tacit positivists there is nothing in their arguments to substantiate the claim that they were positivists of the hard stripe. In the second sub-section I move to discuss in greater detail the claim that the realists presupposed legal positivism without committing themselves to hard positivism. I draw attention there to a distinction between three kinds of positivism or three versions of what positivism is about. I argue that Leiter’s claim is true only with regard to one of the three, but in this sense his claim is rather trivial since that version of positivism is so weak that there isn’t anyone who would seriously deny it.

We will need first a clearer understanding of Leiter's argument for his claim that the realists were tacit positivists. Here is one succinct formulation of the argument:

the realist argument for indeterminacy turns on a conception of what constitutes *legitimate* members of ... what count as legitimate *legal* reasons. This, of course, is just to presuppose some view of the criteria of legality ... in demonstrating the indeterminacy of *law* by concentrating on indeterminacy in the interpretation of *statutes and precedents* the realists seem to be supposing that these exhaust the authoritative sources of law, a thesis easiest to justify on positivist grounds.<sup>13</sup>

This then is the argument:

(i) The realists argue that the law is often indeterminate.

Leiter (and I will not question this point here) takes (1) to be identical with:

(i') The realists argue that legal norms are often indeterminate.

Which, with some (for our purposes) uncontroversial assumptions, is the same as:

(i'') The realists argue that legal reasons are often indeterminate.

(ii) The realists' argument crucially depends upon a clear distinction between legal and non-legal sources for judicial decisions, where statutes and precedents exhaust those sources.

(iii) Only hard positivism makes this distinction clear.

Hence (iv) The realists were tacit hard positivists.

Much more would still have to be said about each of the premises of this argument, but it would suffice for now for the examination of the first question, namely whether the realists were committed to hard positivism.

#### (a) *Legal Realism and Hard Positivism*

Leiter insists that hard positivism is an implicit premise in the realists' argument for the indeterminacy of law. Therefore "[i]f, in fact, positivism has a more relaxed view of the criteria of legality than Hard Positivism supposes, then Realist arguments [for the indeterminacy of law] depend on unsound tacit premises about legal validity."<sup>14</sup> It is important not to miss this point: Leiter does not say that the realists were positivists, and since it turns out (on other grounds) that the only defensible version of positivism is hard positivism, it so happens that the realists can only be hard positivists. Rather, he says that if hard positivism is false, then the realists' argument for indeterminacy of law includes a false premise, and is therefore unsound. It is worth rehearsing briefly first the distinction between the two views. Hard positivism is the thesis that in any possible legal system what the law is can be determined by recourse to social sources alone. Whenever the law refers to moral concepts (justice, fairness,

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<sup>13</sup> "Legal Realism," in *Companion* pp. 268-69 (all emphases in original). The reference to hard positivism does not appear explicitly in this quote, but it is alluded to in limiting legal sources to "statutes and precedents." The reference to hard positivism is explicit in e.g., "Limits."

<sup>14</sup> "Limits" p. 356. The rest of the article is then dedicated to showing the superiority of hard positivism over soft positivism.

reasonableness) it calls for the application of an external (that is, necessarily non-legal) moral standard. Soft positivists deny this: they agree that law can be entirely source based, but they believe it need not be: when the law refers to moral standards, those moral standards are thereby incorporated into the law. (This is why soft positivism is also sometimes called incorporationism.) Both positions are presented here only roughly, and as a matter of fact my account of inclusive positivism glosses over several somewhat different versions of this position. For present purposes suffice it to say that all positivists believe that a norm is legal only if it is “posited,” i.e. belongs to the law through a chain of derivation that can be traced to a rule of recognition. The difference between the two versions is best put in modal terms: hard positivists believe that the content (i.e., moral merit) of a norm can never be a condition for its legality, whereas soft positivists think that this can – although need not – be the case, so long as the merit-based standard is part of, or can be traced back to, a rule of recognition.<sup>15</sup>

What is usually considered (including by Leiter: “Limits” p. 363) the most powerful argument in favor of hard positivism is one offered by Joseph Raz, and it derives from the authoritative nature of law. Raz argued that something is an authority (practical or theoretical) if an agent takes its words as providing a special sort of reasons for actions (or belief etc.), which Raz called exclusionary reasons, since they exclude action based on some of the reasons for or against a particular action; in addition an authority also provides a different first-order reason for action in that situation. Thus, for instance, a commanding officer’s order is typically taken by the officer’s subordinates as authoritative; this means that it is not merely taken as one more consideration to be added to the balance of reasons a subordinate has to consider when thinking whether the commanded action should be taken. Rather authoritative order (contrary to advice), provides a second-order reason to exclude from the balancing of reasons at least some of the first-order reasons bearing on the situation; those considerations do not play a role in thinking whether to take the action or not. In addition to excluding those reasons, the command gives the soldier an additional first-order reason for action, viz. to act as the commander ordered. Now, what is true of an officer’s command is true, at least in principle, of the law as well: law is not made and is not usually taken by those subject to it as an advice. When the law requires something, it is, so to speak, the end the matter. Of course, legal norms can fail in numerous ways in creating such valid exclusionary reasons, for example if they are extremely unclear and therefore cannot guide action. There is however a more

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<sup>15</sup> In “Limits”, pp. 356-57, Leiter gives, I think, an inadequate characterization of the difference between hard and soft positivists. He limits there the difference between hard and soft positivists to their views on the content of the rule of recognition. But imagine a legal system the rule of recognition of which consists only of social facts, but that at the same time this legal system contains a norm that says that unfair contracts should not be enforced. Soft positivists (or at least some of them) would say that this norm incorporates fairness into the law, whereas hard positivists would deny this.

fundamental way in which a law can fail to be an authority. To use Raz's phrase, for law to be an authority it must "claim authority," that is it must be capable of purporting to provide the combination of exclusionary reasons and replacing first-order actions. But if soft positivism is true, then laws that refer to moral standards incorporate these moral standards into law. But from this it follows that the law does not even claim authority in such instances: it simply tells the agent to act on the underlying first-order reasons. Since such ostensive norms do not even claim authority, and since law according to Raz necessarily claims authority, we have a contradiction: we have something that purports to claim authority (in virtue of belonging to a legal system) and at the same time does not claim authority because of its content. The contradiction is resolved if we say that whenever the law refers to moral standards, it is not the case that law incorporates morality. Rather in such cases there is a gap in the law, and the law directs the judge to decide the case according to the balance of non-legal reasons.<sup>16</sup> (Of course, in legal systems that recognize precedents as a source of law once a high court has laid down a decision on such a matter, it may be that the gap has been filled by the legal norm created by the judgment.)

There have been various attempts to find fault in this argument, but I do not think there is any need to decide upon them here, because whether this argument is sound or not, it does not look like there is anything in the hard-soft debate that is in any way relevant to the issues the realists were interested in. The argument for hard positivism is purely conceptual: it is not that hard positivists think that judges are precluded from relying on morality when moral concepts are mentioned in the law. Indeed, even without reference to morality there will be times that a judge will have to rely on moral reasons in deciding a case, when those are not excluded by the law. The debate is also not about whether reference to moral concepts in legal norms is desirable or not. The debate is on the sole question whether, when relying on moral standards to which a reference is made in legal standards, the judge is within or outside the purview of the law. How could such a debate be relevant to what the realists were concerned with?

Let us try to find some argument in support of Leiter's view. I repeat that for an argument to be successful it must be an argument for hard positivism *and at the same time* an

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<sup>16</sup> Raz's explanation of authority in terms of exclusionary reasons appears in *Practical Reason and Norms* (Oxford: Oxford University Press, 2nd ed., 1999) pp. 35-48. The application to law is a central theme of Raz's *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979). The argument sketched in the text for hard positivism is derived from, though it is not stated there in exactly this way, Raz's *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, revised ed., 1994) essay 10. To avoid misunderstanding, I will add that nothing in this argument entails that the law must always be obeyed. This depends on the separate question whether the authority is legitimate.

essential premise in the realists' argument for the indeterminacy of law. I will suggest, quite briefly, several such possible arguments. I provide some textual support for them from Leiter's various papers on the subject, but I must stress that I am not sure whether he would endorse them. I provide them as I believe they seem to have some superficial plausibility as supporting the view that the realists were hard positivists.

1. *Pedigree*. Leiter says that the realists presupposed a theory according to which every legal rule is identified by its "pedigree" ("Limits," 370). We can bypass the question whether the realists' arguments indeed presuppose such a theory for the identification of norms, because *this* is not a distinguishing factor between hard and soft positivism. As I said above, a theory of law is considered positivist if it requires that legal norms be in some sense "posited," i.e. that they are *legal* norms because they are recognized by something like the rule of recognition. In this respect the difference between hard and soft positivists is on the question whether merit-based considerations can be part of the pedigree test. Some think that this idea is incoherent, but even if this is the case, it is so regardless of the arguments of the realists. In short, what all positivists insist upon is that legal norms have "pedigree": either they belong to the rule of recognition or they can be traced back to it.

2. *Moral anti-realism*. At least some of the realists were moral anti-realists, i.e. they rejected the view that moral values and reasons exist in some sense independent of human beliefs and desires. Underhill Moore for instance asked rhetorically "are there no ultimate ends which are rational?" and immediately replied: "Human experience discloses no ultimates."<sup>17</sup> If this view is correct, it follows that appearances to the contrary notwithstanding, all references to morality in laws are actually references to social conventions. It follows (so the argument goes) that moral values have no intrinsic merit, and from this it follows that it is never the case that law includes merit-based standards. Hence, the realists were hard positivists.

There are two problems with this argument, even granting its premises. First, this is not an argument that shows that the realists presupposed hard positivism, rather it is an argument that shows that the distinction between hard and soft positivism is false, because both sides to the hard-soft debate make the false assumption that valid moral reasons exist. Second, even if soft positivism can provide some answer to the previous point, hard positivism, so long as it is based on the argument from authority described above, still faces what seems an insurmountable problem. Hard positivism presupposes that there are valid moral (or more generally, merit-based) standards: assuming Raz's explanation of the nature of authority is correct, it still remains an open question what makes an authority legitimate (or justified) in general, and what justifies the authority of law. The common hard positivist answer is, very roughly, that the justification of authority normally rests on whether an agent would conform

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<sup>17</sup> Underhill Moore, "Rational Basis of Legal Institutions," *Columbia Law Review* 23 (1923): 609-17, p. 612.

better to the reasons that apply to her if she followed the authority than if she tried to act on (what she perceives to be) the first-order reasons that apply to her. This explanation, which requires quite a lot of cashing out, makes sense only if there are valid reasons towards which law can guide us. Since law guides action it seems likely that these will be in the vicinity of what is commonly called morality. But if there are no such moral reasons, then law's claim to authority does not make sense, which is destructive for the argument for hard positivism.<sup>18</sup>

3. *Naturalism*. Leiter argues that the realists were naturalists (TNJ, 294-302; NNJ, 92-103). Could it be that hard positivism is necessarily a naturalistic thesis, whereas soft positivism is not? Hardly so. In order to give a detailed answer to this question we need to a precise definition of naturalism, a term that's always dangerously close to being tautologically empty. It all depends on what nature consists in. Thus, for instance, theories belonging to the family of natural law theories are occasionally called naturalistic theories of law, but all versions of natural law theories with which I am familiar are anti-naturalistic in the sense that Leiter uses the term naturalism. Leiter himself has shown that the term was taken by various writers to mean different things (NNJ, 80-84).

It is possible to trace at least four different senses (partly overlapping, partly inconsistent) in which the realists can be considered naturalists in any of the senses Leiter gives to this term:

- (a) At least some realists accepted both (I.1) and (II.1). They were naturalists in the Quinean sense, eschewing all justificatory account of reasons. As we have seen, this is inconsistent with any version of legal positivism.
- (b) At least some realists were moral anti-realists (see above). There is a common (though by no means uncontroversial) argument from ontological naturalism (or physicalism) to moral anti-realism.
- (c) At least some realists were trying to offer a "naturalistic" account of normativity, by trying to offer a reductive account of obligation.
- (d) Realists rejected "armchair metaphysics" and a priori conceptual analysis in favor of empirically-informed theorizing.

However, holding any of these views does not commit its holder, on its own, to hard positivism. Hart, who in the Postscript to *The Concept of Law* is explicit about his support for soft positivism, was clearly a naturalist in the sense of (b) and (c) and in my view also (d).<sup>19</sup>

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<sup>18</sup> I see two (related) retorts for the last move in the text: (i) it is a mistake to think that moral anti-realism entails that there are no valid reasons for action; (ii) the authority of law may be explained and justified in a way different to what is proposed in the text. Discussing these possible lines of argument cannot be done here, but what is clear is that both require a detailed argument. In any case, it is not clear what would be left of the hard-soft distinction after such an argument.

<sup>19</sup> It is not one of the purposes of this essay to offer a detailed analysis of Hart's writing, but a few brief bibliographic notes are in order. With regard to his views on the origins and nature of morality he

On the other hand, Joseph Raz, the most notable of the hard positivists clearly rejects (b) and (c), and possibly also (d). (I am non-committal regarding (d) in the case of both Hart and Raz is because it is extremely vague.) To be sure, this is an *ad hominem* argument: it may be that both Hart and Raz hold inconsistent views. I don't think this is the case, but showing this would require too lengthy a detour. And without an argument to the contrary there is little reason to think that they both hold inconsistent views. We can conclude then that the distinction between naturalistic and non-naturalistic legal positivists cuts across the distinction between hard and soft positivists, resulting in four different possible positions.

4. *Vagueness and contestedness of moral concepts.* I said earlier that according to Leiter the realist argument for the indeterminacy of law depended on the distinction between what is law and what is non-law. The main reason is that the realist according to Leiter believed that while the law is many times in- or underdeterminate, the outcome of a case may still be predictable. This arguably requires that of the elements that go into making a decision could clearly be separated into legal and non-legal ones, and only hard positivism provides such clear identification. Why? There are two possible arguments here: one is that if some part of morality is incorporated into the law, then because of the deep disagreements and vagueness

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endorses a clearly Humean position in *The Concept of Law* ch. 9, esp. pp. 185-200; see also his review, "Morality and Reality," *New York Review of Books* (9 March 1978) pp. 35-38, where he is generally sympathetic to the views of Harman's *The Nature of Morality* and Mackie's *Ethics: Inventing Right and Wrong*. As for his views on the explanation of the normativity of law (which he took to be simply the fact that law is "rule-governed", *Concept* p. 239) in terms of social attitudes (his "practice theory of rules"), this is surely one of the more important themes of *The Concept of Law* esp. chs. 2, 5-6. As for his views on "conceptual analysis" and the role of language in understanding concepts: as early as his inaugural lecture from 1953 "Definition and Theory in Jurisprudence", reprinted in *Essays in Philosophy and Jurisprudence* (Oxford: Clarendon Press, 1983) pp. 21-48, Hart stressed the importance of offering an account of the law which is in line with the one given by practicing lawyers (*ibid.*, pp. 21-22). See also his clear views on the issue in "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence," *ibid.*, pp. 265-77. In *The Concept of Law* he famously described his project as "descriptive sociology" (*ibid.*, p. v), and much of his criticism of the classical positivists and the prediction theory of legal norms was premised on the view that these views misrepresent the way participants in the practice of law take the law to be. In particular his insistence on the importance of the "internal aspect of rules" shows that the way lawyers and officials understand law is of great importance for the understanding of law. As I understand his quote of J.L. Austin's words of the importance of "sharper awareness of words to sharpen our perception of the phenomena" (*ibid.*, pp. vi, 14), he means by it that by paying attention to the attitudes and understandings that participants in a practice take toward that practice, we can achieve better understanding of that practice. In the case of a practice such as law this, according to Hart, can be done primarily if not exclusively by analysis of the participants' pronounced attitudes. For more on Hart's naturalism see Joseph Raz's comments in "Two Views on the Nature of the Theory of Law: A Partial Comparison," in *Hart's Postscript* 1, 4-6.

of moral standards we would not be able to know whether a given proposition is a proposition of law. A different argument is that the incorporation of morality into law would render the distinction between law and non-law unclear, since presumably morality is one of the non-legal elements that affect the outcome of legal decisions.

As for the first argument, even if morality is never incorporated into law there are other factors that could make the determination of whether a certain proposition is legally true, the most obvious being the vagueness of most words used in natural languages. As a matter of fact, it is the deep disagreements about morality that help explaining why law is (as the realists argued) indeterminate; and if hard positivism is true, then it would come as a bit of a surprise that the non-legal element that goes to the determination of outcomes of cases and makes the prediction of their outcomes possible, includes a component as contested as morality.

The second argument would be sound only if we would think that morality exhausts the entire realm of non-law factors that affect the outcome of legal decisions. But there is little reason to accept this assumption, and it was surely denied by the legal realists themselves who stressed that a multitude of factors, including personal factors about the particular adjudicator, affect the outcome of the decision. And since soft positivism is a positivist position, it is premised on the idea that only those references to morality that are part of the rule of recognition of a particular legal system, or specific legal norms in a given legal system, would be incorporated into law, therefore even within the realm of morality incorporation does not stand in the way of delineating law (including *incorporated* morality) and non-law (including *non-incorporated* morality).

If anything a case such as that discussed above provides an argument for thinking that both the hard and the soft positivists are wrong. If indeed the outcome of the case is predictable, then it lends some credibility to the idea that it is not the moral concept *equality* that plays a role in the reasoning towards the legal decision, but rather some other concept, surely influenced by the moral concept but not exactly like it. If this is true, then the hard and soft positivists are wrong to think that it is “the true” morality that is referred to (or is being incorporated into law) in such instances.

5. *Legal and non-legal morality.* Here is another attempt to make the same point. It is based on a footnote in Raz’s early take on the hard-soft distinction. He wrote there:

Supporters of [soft positivism] have to provide an adequate criterion for separating legal references to morality, which make its application a case of applying pre-existing legal rules from cases of judicial discretion in which the judge, by resorting to moral consideration, is changing the law. I am not aware of any serious attempt to provide such a test.<sup>20</sup>

If Raz is right on this point, soft positivists seem to have a problem that hard positivists avoid: if, plausibly, not all morality is incorporated into law, soft positivists must be able to explain

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<sup>20</sup> Joseph Raz, “Legal Positivism and the Sources of Law,” in *The Authority of Law* (1979) 37-52, 47 note 8.

which cases of judicial reliance on moral premises are cases of reliance on incorporated moral norms (which are in virtue of their incorporation legal norms) and which are cases of reliance on non-incorporated morality. If soft positivism cannot provide a criterion for making this distinction, then together with the premise that legal realists presupposed a clear distinction between legal and non-legal norms, it would follow that the realists presupposed hard positivism. Note first, that (as Raz himself admits elsewhere<sup>21</sup>) that this argument applies only to one type of soft positivism, one that allows some moral norms to be part of the law simply because of their moral merit (so called sufficiency condition soft positivism). So at best this argument rules out this type of soft positivism, which is not favored by most champions of soft positivism, but does not affect other kinds of soft positivism. Even with regard to this kind of soft positivism, I think soft positivists would answer that only the moral standards which are recognized by the rule of recognition, that is to say, are accepted by the legal community as belonging to the law, will be part of the law. It may be that there will be some unclear cases here, but the fact that the distinction is epistemically vague does not necessarily mean that it cannot be made.

I hope all these arguments amply show why I think the hard-soft distinction is irrelevant to the realists' concerns. I want to add briefly another consideration for the conclusion of this section. Leiter argues that besides being naturalists the realists were pragmatists in the sense that they believed "theorizing should make a difference to practice (or experience)" (TNJ, 304). But then it seems that the realists would have considered the hard-soft debate pointless, as it has no effect on how cases should be decided. If forced to take sides on this issue, then given their adoption of lawyers' understanding and point of view of what law is (a point also stressed by Leiter in, e.g., LRLP, 291-92) they would probably have taken the more common, and what pre-theoretically appears the more natural view, viz. that moral norms mentioned in the constitutions and statutes of various legal systems are incorporated into the law. Indeed, some proponents of soft positivism consider the fact that hard positivism is "counter-intuitive" a reason to reject it.<sup>22</sup>

The conclusion that there is nothing about the realists that commits them to hard positivism is not surprising considering the very different nature of the positivist conceptual thesis (or theses) and the realist empirical observations. And while it is possible that a different argument for hard positivism may be provided, it seems to me that any such argument would not have bearing on the legal realist project.

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<sup>21</sup> Joseph Raz, "Incorporation by Law," unpublished manuscript, pp. 22-23.

<sup>22</sup> W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press) pp. 158-59.

(b) *Legal Realism and Positivism*

We can safely set aside the distinction between hard and soft positivism. However, a weaker thesis may still be true, namely that the realists presuppose positivism, without being committed to a particular version of it. We now need to look at Leiter's argument with greater care. As we have seen, the realists all shared the view that law is indeterminate (or at least under-determinate). It does not follow from the indeterminacy of law that predicting the outcomes of judicial decisions is impossible, if judges are influenced by non-legal reasons, and these can be predicted with considerable accuracy. Here is one possibility:

*Argument A*

- (1) The realists argued that the law is rationally indeterminate.
- (2) If legal positivism is the correct theory of law, then the realists' argument is sound.
- (3) Legal positivism is the correct theory of law.

Hence: (4) The realists were right regarding (1), i.e. the law is (rationally) indeterminate.

It does not matter now what is the argument for (2). What is clear from Argument A is that the proof of (3) must be one that does not depend on law's indeterminacy. But after rehearsing the common arguments for (hard) legal positivism, Leiter says that

what would ultimately vindicate the conceptual arguments for Hard Positivism is not simply the assertion that they best account for the 'real' concept of law, but that the concept of law they best explicate is the one that figures in the most fruitful a posteriori research programmes, i.e. the ones that give us the best going account of how the world works. ... The Realists, in fact, undertook such inquiries, and they did so, as noted at the beginning, employing a (tacit) Hard Positivist view of legality." ("Limits," 369.)

But this is plainly circular, because Leiter says here is that the proof of (3) is (4).

This quote then suggests that Leiter's argument might actually be this:

*Argument B*

- (1) The realists argued that law is rationally indeterminate.
- (4) The realists were right regarding (1), i.e. the law is rationally indeterminate.
- (5) The theory that best explains (1) is legal positivism.

Hence: (3) Legal positivism is the correct theory of law.

The conclusion does not follow deductively from the premises, but this need not detain us; a probabilistic weakening of (3) would solve this problem. With this clarification Argument B seems to fit better with what Leiter says in the quote above. What is argued here is not that the realists presupposed positivism, but rather that their research serves as a kind of argument to the best explanation for the truth of legal positivism. But what is the argument for (4)? Of course, to rely on the truth of legal positivism would be question-begging. Leiter seems to think that (4) is simply an empirical observation: if one looks at the legal practice and considers available legal materials, one can see that it is always possible to construct an argument that would lead to any conclusion one wishes. I think this is part of what Leiter has in mind when he says, that "Realism is essentially a descriptive theory of adjudication" (LRLP

p. 279, also p. 284). But this view is mistaken, because (4) presupposes a theory of law, even if a “folk theory of law.”<sup>23</sup> If the folk theory of law is legal positivism, then the argument is tautological; if the folk theory is not legal positivism, then the argument equivocates, because law in (4) and (3) mean different things.

So here is one final attempt to reconstruct the argument:

*Argument C*

(1) The realists argued that the law is (sometimes) rationally in- or underdeterminate.

(6) (1) presupposes that the realists identified some phenomena as the law.<sup>24</sup>

(7) The theory of law that best demarcates the law from non-law is (hard) positivism.

Hence: (8) The best explanation of the legal realists' argument is that they presupposed legal positivism.

Note that Argument C does not require that the realists' claims about law's indeterminacy be true! To be sure, if legal positivism is false, then, because of (7), doubt will be cast on the realists' claim that the law is indeterminate, but as long as positivism and the realist indeterminacy argument rise and fall together, Argument C is valid. This is a virtue of Argument C because it salvages it from danger of circularity. Argument C also implies that the folk theory of law the realists relied upon is rather similar to legal positivism. Since Argument C is valid, it is now the time to examine whether its premises are true.

#### IV THREE VERSIONS OF LEGAL POSITIVISM

I won't contest (1) and (6), because I think they are true: both are descriptions of what the realists believed, and therefore are true even if the beliefs themselves are false. If so, the soundness of Argument C rests on the truth of (7), which in turn rests on what is identified as law under legal positivism. I will argue now that there are actually three competing

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<sup>23</sup> The term “folk theory of law” is phrased after “folk psychology” in the philosophy of mind. However, the analogy with folk psychology is a bit misleading, because the “folk” referred to in the folk theory of law consists of people who are constantly engaged with the law, i.e. mostly lawyers. The reason to limit the folk only to these people is that unlike the case of psychology, where everyone constantly comes into contact with beliefs, desires, intentions and the rest of the propositional attitudes that make up folk psychology, most people do not engage enough with the law to form a theory of law.

<sup>24</sup> To present the realist argument more fully would require a slight (but for our purposes unimportant) amendments:

(1') The realists argued that the law is (sometimes) rationally in- or underdeterminate, but judicial decisions are usually predictable.

(6') Nonetheless to argue for (1') the realists presupposed that it is possible to distinguish law from non-law (otherwise to say that the law on a question is indeterminate but the outcome of the case is predictable wouldn't make sense).

characterizations of what positivism is about, the first is what I will call “positivism of norms,” a second that will be called “positivism of texts” and the third “positivism of sources.”<sup>25</sup> I believe that Leiter’s argument takes positivism in either of the two latter senses, which are quite different. However, both arguments are unsuccessful although for quite different reasons: in the case of positivism of texts because this is a highly implausible theory of law; in the case of positivism of sources because his argument is true but trivial.

Leiter’s thesis is based on a distinction between theory of law and theory of adjudication. The first is an explanation of “the nature of law,” i.e. an explanation of “certain familiar features of societies in which law exists” (LRLP 285), and a theory of adjudication, which is an explanation of how judges decide cases and also possibly how they ought to decide cases. According to Leiter, positivism is a theory of law, while realism is a theory of adjudication. What is the relation between the two? Leiter is not very clear on this point, and I will suggest two different ways of drawing the distinction between the two.

The first way to distinguish between a theory of law and a theory of adjudication is as follows: a theory of law explains what the properties of laws are, what properties a thing has to have in order to be a law. A theory of adjudication, on the other hand, is an explanation of the workings of judges. At first sight the two theories may seem quite independent of each other, but this is not so: assuming we have a way of knowing what laws are, that is that the properties that make a thing law are epistemically available to us, then a theory of law entails an explanation of how to go about identifying laws, namely, to put it bluntly: to look for things with the properties that laws have. And unless we adopt something like (I.1), i.e. the thesis that legal norms play no role in judicial decisions, it follows from the view that laws make up part of what judges decide cases upon, that what we identified as laws are relevant for adjudication.

This way of distinguishing a theory of law and a theory of adjudication points to one way of characterizing positivism, one that I will call “positivism of norms,” since it claims that what the rule of recognition identifies are legal norms, i.e. statements about how one should (or should not, or is permitted to etc.) act in a particular fact situation according to law. To be sure, not all fact situations will have an applicable legal standard, and it may even be that there will be overlapping and inconsistent valid legal norms; such cases will require judges to be creative. But legal positivism of this sort is the theory of law that there are “easy cases” or “regulated disputes,”<sup>26</sup> and that in such cases there is a norm that’s applicable to a case in a

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<sup>25</sup> To avoid any misunderstanding I emphasize that this distinction has nothing to do between the distinction between hard and soft positivism. It is important to stress this because hard positivism sometimes goes by the name “the sources thesis.” However, the sources thesis and positivism of sources are two different theses. Positivism of sources is consistent with both hard and soft positivism.

<sup>26</sup> This term is Raz’s. See *The Authority of Law* p. 181.

more or less straightforward way. I think this view about legal positivism is what Hart had in mind in the first edition of *The Concept of Law*: “Wherever ... a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation.”<sup>27</sup>

If this is true, then at least in “regulated disputes,” the difference between a theory of law and a theory of adjudication almost vanishes. Knowing what the properties of laws are, together with the plausible assumptions that these properties are knowable and that when there is law on a given question the judge ought to follow it, implies the way such a case ought to be decided according to law. This description is a bit inaccurate for two reasons, first because a large part of the work of those in charge of deciding a case (judges or jury) is dedicated to determining the facts upon which the legal norms are to be applied. Indeed in the majority of cases this is what the dispute between the parties is about. But this qualification is harmless since I am here concerned only with the applicative stage of adjudication. Second and more important, a theory of adjudication will also explain when judges should change the law. But even granting this point, in normal cases, once one locates the relevant legal norm that applies to a case, adjudication is over.

Contrast this now with a different way of carving up the distinction between a theory of law and a theory of adjudication, according to which the theory of law is what identifies the *sources* of valid legal norms. Applied to positivist theory, it means that something like the rule of recognition is what tells us what the relevant materials are, not what the content of legal norms is. Accordingly, getting to know the content of legal norms is part of the theory of adjudication. In the Postscript to *The Concept of Law* Hart seems to slide towards this interpretation of what positivism is about. He writes there that for Dworkin's theory “something very [much] like a rule of recognition *identifying the authoritative sources of law ... is necessary.*”<sup>28</sup>

The distinction I drew here is not part of some scholastic debate as to where exactly to draw the line between “law” and “adjudication.” This distinction reflects the most fundamental debates about the nature of law. We can see a little bit of this in the difference between positivism of sources and positivism of norms. If, for instance, one argues for positivism of

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<sup>27</sup> Hart, *Concept* p. 100 (emphasis added). For a defense of this version of positivism see Marmor, “No Easy Cases?” Strictly speaking, Hart is mistaken here, since the rule of recognition would provide the authoritative criteria for identifying all other norms, not just “primary rules of obligation.” This error does not affect the point made in the text.

<sup>28</sup> Hart, *Concept* p. 266 (emphasis added). The same slide towards the weaker thesis can be found in the work of others who have made a similar claim, e.g., Steven Burton, “Ronald Dworkin and Legal Positivism,” *Iowa Law Review* 73 (1987) 109-29, p. 120: “[Dworkin's] account of the identity of legal practice treats legal institutions as *sources* of the rules and standards that constitute legal practice, consistent with the positivists' sources thesis.” (Emphasis added.)

sources, then one must add an explanation on how people get to know what the legal norms are, not just what makes up the relevant materials for deciding this question. A second, related, point is that positivism of sources is a very weak thesis, one that no legal theorist has ever really challenged. All it says is that there are materials that are in some way relevant for knowing the content of the law. Even Dworkin, usually considered the arch-critic of positivism, would not deny that statutes and judicial precedents are relevant to law, since he concedes that what he calls the “preinterpretive’ stage” of interpretation is where “the rules and standards taken to provide the tentative content of the practice are identified.”<sup>29</sup>

Deceptively similar but substantially different from positivism of sources is what I call “positivism of texts.” Here some materials are identified as the relevant sources of law, and then the gap between the identification of sources and knowing the content of specific norms is filled in by an “explicit meaning” of texts theory: the results of such readings are “the law”: only what is clear in the text of the law is what makes up the law. This theory then is a species of positivism of norms. This version of positivism is false because it relies on a false theory of meaning. It also mistakes legal norms for sections in statutes or the holding of a case. But a legal norm or rule in the jurisprudential sense is not identical to the sense of these words in lay terms. Positivism of texts is a wrong thesis because it individuates norms according to the way they appear in the statute books.

Furthermore, this version of positivism fails to take account of the fact that part of the law is what Raz called “implicit law.”<sup>30</sup> The law, according to this positivism of sources,

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<sup>29</sup> Ronald Dworkin, *Law's Empire* (Cambridge Mass.: Harvard University Press) pp. 65-66. It must be admitted that Dworkin's discussion of the preinterpretive stage in *Law's Empire* is very terse, which makes it difficult to confidently ascribe to him this position, and he does say that even the preinterpretive stage is interpretive. Still, as I understand Dworkin, he does not challenge the fact legal norms have an institutional aspect – how could anyone challenge that? He indeed says quite explicitly at times, that this is not his challenge against positivism (Ronald Dworkin, “Legal Theory and the Problem of Sense,” in R. Gavison ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987) pp. 9-20, p. 19-20. This is even clearer in recent, unpublished material. His main challenge is rather how to know the meaning or content (or “sense”) of legal propositions *given the relevant sources*. Dworkin ascribes to positivists either the view according to which the content of legal norms consists in identifying the legal sources; this is the view attacked in his “semantic sting” argument. Alternatively, he ascribes to positivists a specific view about how to go about determining the content of legal norms from the sources but argues that this view is mistaken; this is his argument against the his interpretive version of positivism, what he called “conventionalism.”

<sup>30</sup> Joseph Raz, “Dworkin: Another Link in the Chain,” *California Law Review* 74 (1985) 1103-1119, pp. 1105-107; see also David Lyons, “Moral Aspects of Legal Theory,” in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge: Cambridge University Press, 1993) pp. 64-101, pp. 84-87.

consists of the clear pronouncements of legal “rules” as they plainly appear in authoritative legal texts. Whatever is not so gleaned from the legal texts is not law. However, if law does not include implicit law, then lawyers never interpret *the law* in order to discover what the law is: either there is law on a certain question, which then is by definition explicit and does not require interpretation; or there is no law on the question, which means they create law. The pervasiveness of references to interpretation (albeit in a loose and ambiguous sense) in law makes this view *prima facie* implausible. If I am right, then while positivists of texts deny that there is ever implicit law, Dworkin argues that there is implicit law that covers *every* question.

Positivism of norms denies both claims. It follows from positivism of norms that the content of the rule of recognition is more complex than what is usually assumed by both positivists and their critics. It includes not only norms about the identification of the institutions competent to issue legal norms, but also norms about the effect of texts issued by one source on another. To some extent this point is probably accepted by all positivists, since most legal systems contain a hierarchical structure of norms in which each norm lower on the normative ladder cannot presumably contradict or change a norm higher on the ladder. The rule of recognition explains how such conflicts should be resolved. It should be noted, however, that in reality such conflicts are more complex than is usually assumed: in the United States for example the content of the Constitution is constantly changed by the legislature and the judiciary. “Freedom of speech” has a different meaning in American law today than it did fifty or a hundred years ago, despite the fact that the text of the First Amendment has not changed. That this happens is not dictated by logic and may or may not be desirable, but it is a fact about American law. What makes it possible is a rule of recognition whose content is more complex than it is commonly assumed.

Another important aspect of the rule of recognition implied by positivism of norms concerns the interpretation of norms. Again, much of it seems to go quite often without saying and may be, at least partly, the result of what is considered the “correct” way of interpreting texts in a particular society. So when we can trace a change in the understanding of particular legal texts in a particular society, the “location” of that change sometimes is the rule of recognition. This explains what happens when we see a change in the legal “climate” from one period to another: when such a change occurs, we can expect not only the small, constant changes in the law, the ones which are part of every living legal system. Rather, we will see major changes in the way all or many legal questions are tackled. This can help in understanding both diachronic developments in the law and synchronic disagreements. In the former case we can understand how relatively similar materials can result in completely different understanding of the content of the law in different times. In the latter we can see why we occasionally see deep disagreements among lawyers – they stem from their accepting somewhat different rules of recognition for their legal system: there is much overlap in their

rules of recognition, which explains why the content of much of the law is relatively uncontroversial; but the differences about the rule of recognition explain why some differences go beyond disputes about the application of legal concepts in penumbral cases. This also explains why these deep disagreements are quite often not confined to a specific issue but appear again and again across a whole range of legal disputes.

Defending this position in full would have to wait for another occasion. The little I said above raises many questions I cannot address here, for instance: does it make sense to say that a single legal system has several partially conflicting rules of recognition? When would we say that two rules of recognition belong to a single legal system and when would we say that they relate to two different legal systems? Isn't the notion of such a complex rule of recognition stand in conflict, or at least in tension, with the supposed availability of the law for everyone who wishes to know it? How can one explain the possibility of legal mistakes if differences between judgments can be explained by differences in accepted rules of recognition? More generally, I see three major challenges that anyone who thinks that positivism is a thesis about norms would have to answer. One is that it has to be assimilated with a plausible theory of meaning. This for the most part is not a specific task of legal philosophy, although it may turn out that positivism of norms cannot be accommodated with such a theory of meaning; if this would be so, then positivism of norms would be false. Secondly, positivism of norms would have to be accompanied by an account of norm individuation. This challenge is not confined exclusively to law, and a question of norm individuation could be raised about any normative domain, but the question of individuation is particularly pressing in the case of positivism about *norms*. The unique ways of creating and changing norms in law raise particular questions. Finally, all these worries must be accommodated with a conflicting one: the account must not be too specific or too parochial so as to allow for different legal systems having different legal norms and not be question-begging at the same time – we do not want a theory of law the upshot of which is that the law is what the law turns out to be.

Now which of the three versions of positivism does Leiter (or the realists) adopt? Occasionally it seems that he adopts positivism of sources. He writes that “the rule of recognition for [the American] legal system identifies the federal Constitution and state statutes as valid *sources of law* (among many others), while it accords no such significance to Plato's *Republic*” (LRLP, 288; emphasis added) The problem is, as I said earlier, this is not a very interesting claim. Moreover, if I am right and positivism of sources is consistent with Dworkin's theory, then this is at odds with Leiter's characterization of his view as opposed to Dworkin (NNJ, 101-02).

At other times, he seems committed to positivism of texts. At one point he says that a statement like “What these officials do about disputes is ... the law itself' ... 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. [They don't] simply want to know what the

rule on the books ... says" (LRLP, 292). This suggests that "the concept of law," yields "the rule on the books." And by this he seems to mean that the rule of recognition identifies "the rule on the books," which is a sort of positivism of texts. But this shows most clearly that positivism, as Leiter presumably understands it here, is either false or uninteresting: why should we care about how to identify "the rule on the book" if this tells us nothing about how we should act according to law? In what sense can we meaningfully say that the law (if that is what is identified by the rule of recognition) requires that we do a certain action, if actually we may be required (by what exactly?) to act differently? Isn't it more natural to say that it is the law that requires that we act in a certain way, and that the content of that law is not identical to the rule on the books?<sup>31</sup>

Is there a way of accommodating realism as Leiter presents it with positivism of norms? The answer depends partly on which of the various theses discussed above we adopt, but I will try to give reasons to doubt the thought that it can. Positivism of norms entails that there are legal mistakes. If a specific norm is applicable to a case, and the judge fails to apply that norm to that case, then she has made a mistake. By this I do not mean that she has acted immorally or has behaved improperly in any other sense, e.g. that her decision is too long or incomprehensible or that its style is awkward (although all these things may be true). What I mean to say is that she has made a *legal* mistake: by law's own lights she erred. The existence of legal mistakes is of course only a special case of the question of explaining the normativity of law, i.e. how and in what sense exactly does law create obligations or provide reasons for action. If Leiter's argument is interpreted as the denial of legal reasons and their replacement with some non-normative account of inputs and outputs, then there is no place for recognizing a legal mistake: it makes no sense to talk about an effect being incorrect. Leiter may argue that all participants in the legal practice are in error, and that appearances to the contrary there are no correct and incorrect laws. It may be that this is what some of the legal realists had in mind. But to say this is not to say that the realists were tacit legal positivists, but to suggest that all current theories of law, including positivism are false.

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<sup>31</sup> Occasionally Leiter endorses a view that commits him to some version of positivism of norms, although he does not seem to be aware of this: Leiter thinks that there are some determinate cases (e.g., TNJ, 296-97; LRLP, 298-99), that is to say, there are cases in which the legal materials on their own settle the dispute. Now, the argument he deployed to show that some cases are rationally in- or under-determinate, namely that the legal materials can be interpreted broadly or narrowly, according to the "plain meaning" of the text or according to the intention of legislature etc. (LRLP, 295). But if this is so, then there should not have been any cases (except, *maybe*, some of those dealing with traffic violations) that would not be indeterminate. Since Leiter does not think the law is globally indeterminate, he must realize that there is something *in the law* that rules out some otherwise conceivable interpretations of legal norms.

What about the possibility that the realists adopted (I.2) alone? (I.2), recall, is the view that legal rules are valid but they underdetermine many cases. (I.2) is a far cry from Quine's replacement naturalism. Nevertheless, if it was held by some legal realists it is worth examining its relation to positivism of norms. The extent to which this view is consistent with positivism depends on how pervasive is the underdeterminacy of law supposed to be. The problem is this: if we take the view that only a small number of cases are underdeterminate then it does not seem to represent the view of the realists, who believed underdeterminacy is prevalent. If, on the other hand, we believe that the underdeterminacy of law is a common feature of legal systems, then it is not clear that this is something most positivists, at least as the term is currently understood, would happily endorse. This is because most positivists believe that it is conceptually true that law necessarily claims practical authority. If the indeterminacy of law is common, it cannot guide action in most cases, and does not claim such authority.

## V CONCLUSION

I said in the beginning that there is some loose sense in which the realists were positivists. Moreover, there is probably a historical link between the positivism of Bentham and Austin and its influence on Oliver Wendell Holmes to the realists from Holmes was a father figure. Holmes's account of legal obligation in terms of the bad man's prophecies of what the courts will do has obvious affinities with the predictive accounts of legal obligations of the "classical" positivists. Yet these versions of positivism are usually agreed, even by contemporary positivists, to be mistaken.

This historical link suggests, however, that instead of thinking of the realists as progenitors of Quine, it would be more fruitful to consider their work for what it was: a product of its period. Compare the realist Felix Cohen's statement that "It is a consequence of the functional attack upon unverifiable concepts that many of the traditional problems of science, law, and philosophy are revealed as pseudo-problems devoid of meaning" with the English-language manifesto of logical positivism, A.J. Ayer's *Language, Truth, and Logic*: "no statement which refers to a 'reality' transcending the limits of all possible sense-experience [i.e., is verifiable] can possibly have any literal significance; from which it must follow that the labours of those who have striven to describe such a reality have all been devoted to the production of nonsense."<sup>32</sup>

Not many years would pass before these views were criticized decisively, and many believe beyond resurgence, in one of the most famous articles in 20th century philosophy, "Two Dogmas of Empiricism." It was written by Quine.

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<sup>32</sup> Felix Cohen, "Transcendental Nonsense," p. 823; A.J. Ayer, *Language, Truth, and Logic* (Harmondsworth: Penguin, 1971) (originally published in 1936) p. 46.