Chapter 3

American Legal Realism

Brian Leiter

Introduction

American Legal Realism was the most important indigenous jurisprudential movement in the United States during the twentieth century, having a profound impact not only on American legal education and scholarship, but also on law reform and lawyering. Unlike its Scandinavian cousin, American Legal Realism was not primarily an extension to law of substantive philosophical doctrines from semantics and epistemology. The Realists were lawyers (plus a few social scientists), not philosophers, and their motivations were, accordingly, different. As lawyers, they were reacting against the dominant "mechanical jurisprudence" or "formalism" of their day. "Formalism," in the sense pertinent here, held that judges decide cases on the basis of distinctively *legal* rules and reasons, which justify a unique result in most cases (perhaps *every* case). The Realists argued, instead, that careful empirical consideration of how courts *really* decide cases reveals that they decide not primarily because of law, but based (roughly speaking) on their sense of what would be "fair" on the facts of the case. (We shall refine this formulation of the "core claim" of Realism shortly.) Legal rules and reasons figure simply as *post hoc* rationalizations for decisions reached on the basis of nonlegal considerations. Because the Realists never made explicit their philosophical presuppositions about the nature of law or their conception of legal theory, one of the important jurisprudential tasks for Realists today is a philosophical reconstruction and defense of these views, especially against the criticisms of legal philosophers, notably H. L. A. Hart.

But Realism also bore the marks of an intellectual culture which it did share with its Scandinavian cousin. This culture – the dominant one in the Western world from the mid-nineteenth century through at least the middle of the last century – was deeply "positivistic," in the sense that it viewed natural science as the paradigm of all genuine knowledge, and thought all other disciplines (from the social sciences to legal study) should emulate the methods of natural science. Chief among the latter was the method of *empirical testing*: hypotheses had to be tested against observations of the world. Thus, the Realists frequently claimed that existing articulations of the "law" were not, in fact, "confirmed" by actual observation of what the courts were really doing. Also influential on some Realists was behaviorism in psychology – John Watson's version, not the later, and better known, brand associated with B. F. Skinner – which was itself in the grips of a "positivistic" conception of knowledge and method. The behaviorist dispensed with talk about a person's beliefs and desires – phenomena that were unobservable, and thus (so behaviorists thought) not empirically confirmable – in favor of trying to explain human behavior strictly in terms of stimuli and the responses they generate. The goal was to discover laws describing which stimuli cause which responses. Many Realists thought that a genuine science of law should do the same thing: it should discover which "stimuli" (e.g., which factual scenarios) produce which "responses" (i.e., what judicial decisions). This

understanding of legal "science" is most vivid in the work of Underhill Moore, to whom we return below. For most of the Realists, however, the commitment to "science" and "scientific methods" was more a matter of rhetoric and metaphor than actual scholarly practice: one sees it, for example, in the common Realist talk about the necessity of "testing" legal rules against experience to see whether they produced the results they were supposed to produce.

American Legal Realism claimed Oliver Wendell Holmes, Jr., as its intellectual forebear, but emerged as a real intellectual force in the 1920s at two law schools in the Northeastern United States, Columbia and Yale. Karl Llewellyn, Underhill Moore, Walter Wheeler Cook, Herman Oliphant, and Leon Green were among the major figures in Legal Realism associated with these two schools (though Green ultimately spent most of his career at Northwestern and Texas, while Cook soon departed Columbia for Johns Hopkins). Not all Realists, however, were academics. Jerome Frank – who has had a disproportionate impact on the long-term reception of Realism – was a lawyer with considerable trial experience, who (like many Realists) later worked in President Franklin D. Roosevelt's "New Deal" Administration during the 1930s, and eventually served as a federal judge; he never held an academic appointment. Among legal theorists, the Realists are certainly notable for the sizable number who also enjoyed distinguished careers in the practice of law, including, for example, William O. Douglas (appointed to the US Supreme Court by Roosevelt), and Thurman Arnold, founder of a prominent Washington, DC law firm that still bears his name.

Legal Indeterminacy

The Realists famously argued that the law was "indeterminate." By this, they meant two things: first, that the law was *rationally* indeterminate, in the sense that the available class of legal reasons did not *justify* a unique decision (at least in those cases that reached the stage of appellate review); but second, that the law was also *causally* or *explanatorily* indeterminate, in the sense that legal reasons did not suffice to explain why judges decided as they did. Causal indeterminacy *entails* rational indeterminacy on the assumption that judges are responsive to applicable (justificatory) legal reasons. Of course, that assumption is not a trivial one, and at least one Realist, Jerome Frank (1931), drew attention to the indeterminacy that results from judicial incompetence or corruption. From a jurisprudential point of view, of course, this indeterminacy is trivial, since no legal theorist, of any school, denies that the law does a poor job of predicting what courts will do when courts are ignorant of or indifferent to the law!

Realist arguments for the rational indeterminacy of law generally focused on the existence of conflicting, but equally legitimate, canons of interpretation for precedents and statutes. Llewellyn demonstrated, for example, that courts had endorsed *both* the principle of statutory construction that, "A statute cannot go beyond its text," but also the principle that "To effect its purpose a statute must be implemented beyond its text" (Llewellyn 1950: 401). But if a court could properly appeal to either canon when faced with a question of statutory interpretation, then the "methods" of legal reasoning (including principles of statutory construction) would justify at least two different interpretations of the meaning of the statute. In that case, the question for the Realists was: why did the judge reach that result, given that law and legal reasons did not require the judge to do so?

Llewellyn (1930a) offered a similar argument about the conflicting, but equally legitimate, ways of interpreting precedent. According to Llewellyn's (incautiously) strong version of the argument, *any* precedent can be read "strictly" or "loosely," and either reading is "recognized, legitimate, honorable" (1930a: 74). The strict interpretation characterizes the rule of the case as specific to the facts of the case; the loose interpretation abstracts (in varying degrees) from the specific facts in order to treat the case as standing for some general norm. But if "each precedent has not one value [that is, stands for not just one rule], but two, and . . . the two are wide apart, and . . . whichever value a later court assigns to it, such assignment will be respectable, traditionally sound, dogmatically correct" (Llewellyn 1930a, 76), then precedent, as a source of law,

cannot provide reasons for a unique outcome, because more than one rule can be extracted from the same precedent.

One difficulty with these Realist arguments is that they rely on a tacit conception of *legitimate* legal argument. The assumption is that if lawyers and courts employ some form of argument – a "strict" construal of precedent, a particular canon of statutory construction – then that form of argument is *legitimate* in any and all cases. Put this incautiously, the assumption cannot be right: not *every* strict construal of precedent will be legally proper in every case. Even Llewellyn must recognize this, as suggested by his famous – but clearly facetious – example of the "strict" reading that yields, "This rule holds only of red-headed Walpoles in pale magenta Buick cars" (1930a: 72). But that is hardly likely to ever be a legitimate construal of a precedent, barring some bizarre scenario in which all these facts turned out to be legally relevant, and Llewellyn surely knows as much. The claim cannot be, then, that *any* strict or loose construal of precedent is *always* valid. It must only be that lawyers and judges have this interpretive latitude often enough to inject a considerable degree of indeterminacy into law.

There is a related difficulty, pertaining to another suppressed assumption of the Realist argument. For notice that the Realist argument for the indeterminacy of law – really the indeterminacy of law and legal reasoning – is based on an implicit view about the *scope* of the class of legal reasons: that is, the class of reasons that judges may properly invoke in justifying a decision. The Realists appear to assume that the legitimate sources of law are exhausted by statutes and precedents, since they focus, almost exclusively, on the conflicting but equally legitimate method for *interpreting* statutes and precedents in order to establish law's indeterminacy. Unfortunately, the Realists themselves never gave arguments for this assumption. Later writers, like Ronald Dworkin, have argued that much indeterminacy in law disappears once we expand our notion of what constitute legitimate sources of law to include not only statutes and precedents, but also broader moral and political principles. The Realists, consistent with their positivist intellectual culture, largely presumed that moral principles were subjective and malleable. There are certainly reasons to think the Realists were right, and Dworkin wrong, in this regard (cf. Leiter 2001), but the topic is, unfortunately, unaddressed by the Realists themselves.

One final point about the Realist indeterminacy thesis bears emphasizing. Unlike the later Critical Legal Studies writers, the Realists, for the most part, did not overstate the scope of indeterminacy in law. The Realists were (generally) clear that their focus was indeterminacy at the stage of appellate review, where one ought to expect a higher degree of uncertainty in the law. Cases that have determinate legal answers are, after all, less likely to be litigated to the stage of appellate review. Thus, Llewellyn explicitly qualified his indeterminacy claim by saying that, "[I]n any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and . . . the two are mutually contradictory as applied to the case at hand" (Llewellyn 1931: 1239). And Max Radin noted that judicial "decisions will consequently be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact that makes the entire body of legal judgments seem less stable than it really is" (Radin 1942: 1271).

The Core Claim of American Legal Realism

All the Realists agreed that the law and legal reasons are rationally indeterminate (at least in the sorts of cases that reach the stage of appellate review), so that the best explanation for why judges decide as they do must look beyond the law itself. In particular, all the Realists endorsed what we may call "the Core Claim" of Realism: in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons. It is possible to find some version of the Core Claim in the writings of all the major Realists.

Oliphant, for example, gives us an admirably succinct statement when he says that courts "respond to the stimulus of the facts in the concrete

cases before them rather than to the stimulus of over-general and outworn abstractions in opinions and treatises" (1928: 75). Oliphant's claim is confirmed by Judge Joseph Hutcheson's admission that "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause" (1929: 285). Similarly, Frank cited "a great American judge," Chancellor Kent, who confessed that, "He first made himself 'master of the facts.' Then (he wrote) 'I saw where justice lay, and the moral sense dictated the court half the time; I then sat down to search the authorities . . . but I *almost always found principles suited to my view of the case*' " (Frank 1930: 104 note). Precisely the same view of what judges really do when they decide cases is presupposed in Llewellyn's advice to lawyers that, while they must provide the court "a technical ladder" justifying the result, what the lawyer must really do is "on the facts . . . persuade the court your case is sound" (Llewellyn 1930a: 76). Similarly, Frank quotes approvingly a former ABA President to the effect that " 'the way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination' " (Frank 1930: 102).

Several points bear noting about how we should understand the Core Claim of Realism. First, it is not simply the trivial thesis that judges must take account of the facts of the case in deciding the outcome. Rather, it is the much stronger claim that in deciding cases, judges are reacting to the underlying facts of the case, *whether or not those facts are legally significant*, that is, whether or not they are relevant in virtue of the applicable legal rules. Second, the Core Claim is not the thesis that legal rules and reasons *never* affect the course of decision; rather it is the weaker claim that they generally have no (or little) effect, especially in the sorts of cases with which the Realists were especially concerned: namely, that class of more difficult cases that reached the stage of appellate review. Llewellyn is representative when he asks, "Do I suggest that . . . the 'accepted rules,' the rules the judges say that they apply, are without influence upon their actual behavior?" and answers, "I do not" (Llewellyn 1930b: 444). The Realist approach, says Llewellyn, "admits . . . *some* relation between *any* accepted rule and judicial behavior" but then demands that *what* that relation is requires empirical investigation, since it is not always the relation suggested by the "logic" (or content) of the rule (1930b: 444). As he puts the point elsewhere: realists deny that "traditional . . . rule-formulations are *the* heavily operative factor in producing court decisions" (1931: 1237, emphasis added). But to deny only *this* claim is to admit that rules play *some* causal role in decisions.

Third, many of the Realists advanced the Core Claim in the hope that legal rules might be reformulated in more fact-specific ways: this, more than anything, accounts for the profound impact Realism had on American law and law reform. Thus, for example, Oliphant (1928) spoke of a "return to *stare decisis*," the doctrine that rules laid down in prior cases should control in subsequent cases that are relevantly similar. Oliphant's critique was that the "legal rules," as articulated by courts and scholars, had become too general and abstract, ignoring the particular factual contexts in which the original disputes arose. The result was that these rules no longer had any value for judges in later cases, who simply ignore the abstract official doctrine in favor of a situation-specific judgment appropriate to the particular facts of the case. Oliphant argued that a meaningful doctrine of *stare decisis* could be restored by making legal rules more fact-specific. So, for example, instead of pretending that there is a single, general rule about the enforceability of contractual promises not to compete, Oliphant suggested that we attend to what the courts are really doing in that area: namely, enforcing those promises, when made by the seller of a business to the buyer; but not enforcing those promises, when made by a (soon-to-be former) employee to his employer (1928: 159–60). In the former scenario, Oliphant claimed, the courts were simply doing the economically sensible thing (no one would buy a business, if the seller could simply open up shop again and compete); while in the latter scenario, courts were taking account of the prevailing informal norms governing labor relations at the time, which disfavored such promises. (The *2nd Restatement of Contracts*, produced by the American Law Institute (ALI), later codified something very close to Oliphant's distinction.)

Two Branches of Realism

Although all Realists accepted the Core Claim, they parted company over the question of how to explain why judges respond to the underlying facts of the case as they do. The "Sociological" Wing of Realism – represented by writers like Oliphant, Moore, Llewellyn, and Felix Cohen – thought that judicial decisions fell into *predictable* patterns (though *not*, of course, the patterns one would predict just by looking at the existing rules of law). From this fact, these Realists inferred that various "social" forces must operate upon judges to force them to respond to facts in similar, and predictable, ways.

The "Idiosyncracy Wing" of Realism, by contrast – exemplified most prominently by Frank and Judge Hutcheson – claimed that what determines the judge's response to the facts of a particular case are idiosyncratic facts about the psychology or personality of that individual judge. Thus Frank notoriously asserted that "the personality of the judge is the pivotal factor in law administration" (1930: 111). (Note, however, that no Realist ever claimed, as popular legend has it, that "what the judge ate for breakfast" determines his or her decision!) Or as Frank formulated the point elsewhere: the "conventional theory" holds that "*Rule* plus *Facts* = *Decision*," while his own view is that "the *Stimuli* affecting the judge" plus "the *Personality of the judge* = *Decision*" (1931: 242). It is, of course, Frank's injection of the "personality of the judge" into the formula that puts the distinctive stamp on his interpretation of the Core Claim: drop that and you have the Core Claim itself.

Now notwithstanding the behaviorist rhetoric in the preceding formulation, Frank was, in fact, primarily influenced by Freudian psychoanalysis, a doctrine anathema to behaviorists since it dispenses with the behaviorist prohibition on reference to what goes on in the "black box" of the mind: beliefs and desires – *unconscious* ones no less! – are the very stuff of psychoanalysis. Despite that difference, Freudianism retains the scientistic self-conception characteristic of behaviorism, and so Frank could still think of his approach as contributing to a science of law.

Influenced by Freud's idea that the key to the personality lay in the buried depths of the unconscious, however, Frank felt that it would be impossible for observers of judicial behavior to discover the crucial facts about personality that would determine a judge's response to the facts of a particular case. As a result, Frank concluded that prediction of judicial decision would be largely impossible; the desire of lawyers and citizens to think otherwise, Frank suggested, reflected merely an infantile wish for certainty and security.

Frank's skepticism about our ability to predict how judges will decide cases flies in the face of the experience of most lawyers. While the outcome of some cases is hard to fathom, most of the time lawyers are able to advise clients as to the likely outcome of disputes brought before courts: if they weren't, they'd be out of business! Yet despite the fact that Frank's skepticism sits poorly with practical experience, a striking feature of the long-term reception of Realism is that Frank's view is often taken as the essence of Realism (cf. Leiter 1997: 267-8, and the sources cited therein). This "Frankification" of Realism does justice neither to the majority of Realists who felt that judicial decision was predictable – because its determining factors were identifiable social forces, not opaque facts about personality – nor to those Realists who envisioned a refashioned regime of legal rules that really would describe and predict judicial decisions, precisely because they would take account of the particular factual contexts to which courts are actually sensitive.

Recall Oliphant's example of the conflicting court decisions on the validity of contractual promises not to compete. Oliphant claims that in fact the decisions tracked the underlying facts of the cases:

> All the cases holding the promises invalid are found to be cases of employees' promises not to compete with their employers after a term of employment. Contemporary guild [i.e. labor union] regulations not noticed in the opinions made their holding eminently sound. All the cases holding the promises valid were cases of promises by those selling a business and promising not to compete with the purchasers. Contemporary economic reality made these holdings eminently sound. (Oliphant 1928: 159–60)

Thus, in the former fact-scenarios, the courts enforced the prevailing norms (as expressed in guild regulations disfavoring such promises); in the latter cases, the courts came out differently because it was economically best under *those* factual circumstances to do so. Llewellyn provides a similar illustration (1960: 122–4). A series of New York cases applied the rule that buyers who reject the seller's shipment by formally stating their objections thereby waive all other objections. Llewellyn notes that the rule seems to have been rather harshly applied in a series of cases where the buyers simply may not have known at the time of rejection of other defects or where the seller could not have cured anyway. A careful study of the facts of these cases revealed, however, that in each case where the rule seemed harshly applied, what had really happened was that the market had fallen, and the buyer was looking to escape the contract. The court in each case, being "sensitive to commerce or to decency" (1960: 124), applied the unrelated rule about rejection to frustrate the buyer's attempt to escape the contract. Thus, the commercial norm – buyers ought to honor their commitments even under changed market conditions – is enforced by the courts through a *seemingly* harsh application of an unrelated rule concerning rejection. It is these "background facts, those of mercantile practice, those of the situation-type" (Llewellyn 1960: 126) that determine the course of decision.

Underhill Moore tried to systematize this approach in what he called "the institutional method" (Moore and Hope 1929). Moore's idea was this: identify the normal behavior for any "institution" (e.g., commercial banking); then identify and demarcate deviations from this norm quantitatively, and try to identify the point at which deviation from the norm will *cause* a judicial decision that corrects the deviation from the norm (e.g., how far must a bank depart from normal check-cashing practice before a court will decide against the bank in a suit brought by the customer?). The goal is a predictive formula: deviation of degree X from "institutional behavior (i.e., behavior which frequently, repeatedly, usually occurs)" (1929: 707) will cause courts to act. Thus, says Moore: "the semblance of causal relation between future and past decisions is the result of the relation of both to a third variable, the relevant institutions in the locality of the court" (Moore and Sussman 1931: 1219). Put differently: what judges respond to is the extent to which the facts show a deviation from the prevailing norm in the commercial culture.

The thesis of Sociological Wing Realists like Llewellyn, Oliphant, and Moore – that judges enforce the norms of commercial culture or try to do what is socioeconomically best on the facts of the case – should not be confused with the idea that judges decide based, for example, on how they feel about the particular parties or the lawyers. These "fireside equities," as Llewellyn called them (1960: 121), may sometimes influence judges; but what more typically determines the course of decision is the "situation-type," that is, the general pattern of behavior exemplified by the particular facts of the disputed transaction and what would constitute normal or socioeconomically desirable behavior in the relevant commercial context. The point is decidedly not that judges usually decide because of idiosyncratic likes and dislikes with respect to the individuals before the court (cf. Radin 1925: 357). So, for example, Leon Green's groundbreaking 1931 textbook on torts was organized not by the traditional *doctrinal* categories (e.g., negligence, intentional torts, strict liability), but rather by the factual scenarios – the "situation-types" – in which harms occur: for example "surgical operations," "traffic and transportation," and the like. The premise of this approach was that there was no general law of torts *per se*, but rather predictable patterns of torts decisions for each recurring situation-type that courts encounter.

But why would judges, with some degree of predictable uniformity, enforce the norms of commercial culture as applied to the underlying facts of the case? Here we must make an inference to the best explanation of the phenomenon: there must be features of the "sociological" (as opposed to the idiosyncratic psychological) profile of the judges that explain the predictable uniformity in their decisions. The Realists did little more than gesture, however, at a suitable psychosocial explanation. "Professional judicial office," Llewellyn suggested, was "the most important among all the lines of factor which make for reckonability" of decision (1960: 45); "the *office* waits and then moves with the majestic power to

shape the man" (1960: 46). Echoing, but modifying, Frank, Llewellyn continued: "The place to begin is with the fact that the men of our appellate bench are human beings. . . . And one of the more obvious and obstinate facts about human beings is that they operate in and respond to traditions. . . . Tradition grips them, shapes them, limits them, guides them. . . . To a man of sociology or psychology . . . this needs no argument. . . ." (1960: 53). Radin suggested that "the standard transactions with their regulatory incidents are familiar ones to him [the judge] because of his experience as a citizen and a lawyer" (1925: 358). Felix Cohen, by contrast, simply lamented that "at present no publication [exists] showing the political, economic, and professional background and activities of our judges" (1935: 846), presumably because such a publication would identify the relevant "social" determinants of decision. "A truly realistic theory of judicial decision," says Cohen, "must conceive every decision as something more than an expression of individual personality, as . . . even more importantly . . . a product of social determinants" (1935: 843), an idea taken up at length in recent years by political scientists studying courts (cf. Cross 1997).

In sum, if the Sociological Wing of Realism – Llewellyn, Moore, Oliphant, Cohen, Radin, among others – is correct, then judicial decisions are causally determined (by the relevant psychosocial facts about judges), and at the same time judicial decisions fall into predictable patterns because these psychosocial facts about judges (e.g., their professionalization experiences, their backgrounds) are not idiosyncratic, but characteristic of significant portions of the judiciary. Rather than rendering judicial decision a mystery, the Realists' Core Claim, to the extent it is true, shows how and why lawyers can predict what courts do.

We can now see, also, that only the Sociological Wing Realists could hold out the hope of crafting legal rules that *really* would "guide" decision, or at least accurately *describe* the course of decision actually realized by courts. This is precisely why Oliphant, for example, spoke of a "return" to *stare decisis*: the problem for Oliphant, as for most of the Realists in the Sociological Wing, wasn't that rules were pointless, but rather that the existing rules were pitched at a level of generality that bore no relation to the fact-specific ways in which courts actually decided cases. Where it was impossible to formulate situation-specific rules, the Realists advocated using general norms, reflecting the norms that judges actually employ anyway. This formed a central part of Llewellyn's approach to drafting Article 2 of the Uniform Commercial Code in the United States – an undertaking that would seem pointless if Realists didn't believe in legal rules! Since the Sociological Wing claimed that judges, in any event, enforced the norms of commercial culture, Article 2 tells them to do precisely this, by imposing the obligation of "good faith" in contractual dealings (Sec. 1–203). "Good faith" requires, besides honesty, "the observation of reasonable commercial standards of fair dealing in the trade" (Sec. 2–103). For a judge, then, to enforce the rule requiring "good faith" is just to enforce the norms of commercial culture – which is precisely what the Realists claim the judges are doing anyway! (For discussion, see White 1994.)

Naturalized Jurisprudence?

Sociological Wing Realists – who were, recall, the vast majority – 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. While the Realists looked to behaviorist psychology and sociology, it is easy to understand contemporary law-and-economics (at least in its descriptive or "positive" aspects) as pursuing the same task by relying on economic explanations for the patterns of decision. See ECONOMIC RATIONALITY IN THE ANALYSIS OF LEGAL RULES AND INSTITUTIONS.

As a result of this Realist orientation, there is a sense in which we may think of the type of jurisprudence the Realists advocated as a *naturalized* jurisprudence, that is, a jurisprudence that eschews armchair conceptual analysis in favor of continuity with *a posteriori* inquiry in the empirical sciences (cf. Leiter 1997, 1998). Just as a *naturalized* epistemology – in Quine's famous formulation – "simply falls into place as a chapter of psychology" (Quine 1969: 82), as "a purely

descriptive, causal-nomological science of human cognition" (Kim 1988: 388), so too a naturalized jurisprudence for the Realists is an essentially descriptive theory of the causal connections between underlying situation-types and actual judicial decisions. (Indeed, one major Realist, Underhill Moore, even anticipates the Quinean slogan: "This study lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field" (Moore and Callahan 1943: 1).) There are, of course, competing conceptions of what it means to *naturalize* some domain of philosophy, and we cannot enter here the debates on their merits and demerits (see Leiter 1998, 2002). What bears emphasizing is that the *method* that the Realists bring to bear in legal theory (at least, in the theory of adjudication) might, fruitfully, be thought of as a *naturalistic* method, akin to Quine's proposal for naturalizing epistemology.

Notice, in particular, that both Quine and the Realists can be seen as advocating naturalization for analogous reasons. On one familiar reading, Quine advocates naturalism as a response to the failure of the traditional foundationalist program in epistemology, from Descartes to Carnap. As one commentator puts it: "Once we see the sterility of the foundationalist program, we see that the only genuine questions there are to ask about the relation between theory and evidence and about the acquisition of belief are psychological questions" (Kornblith 1994: 4). That is, once we recognize our inability to tell a *normative* story about the relation between evidence and theory – a story about what theories are *justified* on the basis of the evidence – Quine would have us give up the normative project: "Why not just see how [the] construction [of theories on the basis of evidence] really proceeds?" (Quine 1969: 75).

So, too, the Realists can be read as advocating an empirical theory of adjudication precisely because they think the traditional jurisprudential project of trying to show decisions to be *justified* on the basis of legal rules and reasons is a failure. For the Realists, recall, the law is rationally indeterminate; that is, the class of legitimate legal reasons that a court might appeal to in justifying a decision fails, in fact, to justify a *unique* outcome in many of the cases. If the law were determinate, then we might expect – except in cases of ineptitude or corruption – that legal rules and reasons would be reliable predictors of judicial outcomes. But the law in many cases is indeterminate, and thus in those cases there is no "foundational" story to be told about the particular decision of a court: legal reasons would justify just as well a contrary result. But if legal rules and reasons cannot *rationalize* the decisions, then they surely cannot *explain* them either: we must, accordingly, look to other factors to explain why the court actually decided as it did. Thus, the Realists in effect say: "Why not see how the construction of decisions really proceeds?" The Realists, then, call for an essentially *naturalized* and hence *descriptive* theory of adjudication, a theory of what it is that causes courts to decide as they do.

We should not overstate, though, the force of the analogy (though it will prove helpful in seeing shortly where later legal philosophers have gone wrong in assimilating Realism to the paradigm of philosophy-cum-conceptual-analysis). For one thing, we should not think that the Realists are committed to proto-Quinean doctrines across the boards. We can see this at two places. First, as we will see shortly, the Realists end up presupposing a theory of the concept of legality in framing their arguments for law's indeterminacy; thus, while they may believe the only fruitful account of *adjudication* is descriptive and empirical, not normative and conceptual, they themselves need a concept of *law* that is not itself empirical or naturalized. The analogy with naturalized epistemology, in other words, must be localized to the theory of adjudication, and not the whole of jurisprudence.

Second, the crux of the Realist position (at least for the majority of Realists) is that nonlegal reasons (e.g., judgments of fairness, or consideration of commercial norms) *explain* the decisions. They, of course, explain the decisions by *justifying* them, though not necessarily by justifying a unique outcome (i.e., the nonlegal reasons might themselves rationalize other decisions as well). Now clearly the descriptive story about the nonlegal reasons is not going to be part of a nonmentalistic naturalization of the theory of adjudication: a causal explanation of decisions in terms of reasons (even nonlegal reasons) does require taking the normative force of the reasons

qua reasons seriously. The behaviorism of Quine or Underhill Moore is not in the offing here, but surely this is to be preferred: behaviorism failed as a foundation for empirical social science, while social-scientific theories employing mentalistic categories have flourished. Moreover, if the non-legal reasons are themselves indeterminate – that is, if they do not justify a *unique* outcome – then any causal explanation of the decision will have to go beyond reasons to identify the psychosocial facts (e.g., about personality, class, gender, socialization, etc.) that cause the decision. Such a "naturalization" of the theory of adjudication might be insufficiently austere in its ontology for Quinean scruples, but it is still a recognizable attempt to subsume what judges do within a (social) scientific framework.

How Should Judges Decide Cases?

The naturalism of the Realists – as manifest in the Core Claim and their desire to achieve a sound empirical understanding of how courts *really* decide cases – leaves unaddressed the *normative* question that has most often interested legal theorists in recent years: how *ought* courts to decide cases? The Realists do not speak univocally on this score, but two dominant themes do emerge. Some Realists (Holmes, Felix Cohen, Frank on the bench) think judges should simply adopt, openly, a legislative role, acknowledging that, because the law is indeterminate, courts must necessarily make judgments on matters of social and economic policy. These Realists – let us call them "the Proto-Posnerians," to mark their anticipation of a view familiar in our own day (Posner 1999: 240–2) – would simply have courts make these judgments openly and candidly. Rather than engaging in the facade of legal reasoning, judges would tackle directly exactly the kinds of political and economic considerations a legislature would weigh.

Another prominent strand in Realism, associated especially with Llewellyn and Frank in his theoretical writings, embraces a kind of "normative quietism," according to which it is pointless to give normative advice to judges, since how judges decide cases (as reported by the Core Claim) is just an irremediable fact about what they do: it would be idle to tell judges they *ought* to do otherwise. The strongest form of this doctrine is apparent in Frank, who views hunch-based decision making as a brute fact about human psychology: "the psychologists tell us," he says, that "no human being in his normal thinking process arrives at decisions by the route of any . . . syllogistic reasoning . . . " (1930: 108–9). (No actual psychological evidence is cited.) Similarly, Frank says regarding what he dubs "Cadi justice" – essentially justice by personal predilection – that "the true question . . . is not whether we should 'revert' to [it], but whether (a) we have ever abandoned it and (b) we can ever pass beyond it" (1931: 27). Advocating a " 'reversion to Cadi justice' " – as some critics wrongly accuse Realism of doing – "is as meaningless as [advocating] a 'reversion to mortality' or a 'return to breathing' " (1931: 31). This is because "the personal element is unavoidable in judicial decisions" (1931: 25).

Alas, Frank had no sound empirical support for his strong assumptions about hunch-based decision making and the role of the "personal element." Indeed, the Sociological Wing of Realism, as we have seen, criticized Frank precisely on the grounds that these assumptions weren't plausible, given the predictability of much of what courts do.

A more subtle version of quietism, however, is apparent in Llewellyn's work. Here the Realists are not entirely silent on normative questions; they simply give as *explicit* advice that judges *ought* to do what it is that they largely do anyway. So, for example, if judges, as a matter of course, enforce the norms of commercial culture, then that is precisely what Realists tell them they ought to do. That, as we have seen, is exactly the view that informed Llewellyn's approach to the Uniform Commercial Code (cf. White 1994 on this topic).

This weaker version of quietism – tell judges that they *ought* to do what they by-and-large do anyway – resonates with the views of at least some of the Proto-Posnerian Realists. Holmes, for example, complains that "judges themselves have failed adequately to recognize their duty of [explicitly] weighing considerations of social advantage" (1897: 467). But having just noted that

what is really going on in the opinions of judges anyway is "a concealed, half-conscious battle on the question of legislative policy" (Holmes 1897: 466), it follows that this "duty" is in fact "inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious" (1897: 467). Thus, what Holmes really calls for is for judges to do explicitly (and perhaps more successfully, as a consequence) what they do unconsciously anyway.

In a striking case of the divide between theory and practice, Frank on the bench was much more clearly a Proto-Posnerian – at least of the Holmesian variety – than a believer in the inevitability of Cadi justice. For example, in his concurring opinion in *Ricketts v. Pennsylvania R. Co.* (1946), Judge Frank, now sitting on the US Court of Appeals for the Second Circuit, rejected the majority's doctrinal analysis of the case (which involved an injured employee, who had, unwittingly, and as a result of bad legal advice, signed away his right to sue the railroad):

> I think we should . . . reject many of the finespun distinctions [invoked by the majority that are] made by Williston [in his treatise on contracts] and expressed in the Restatement of Contracts. . . .
>
> As Mr. Justice Holmes often urged, when an important issue of social policy arises, it should be candidly, not evasively, articulated. In other contexts, the courts have openly acknowledged that the economic inequality between the ordinary employer and the ordinary individual employee usually means the absence of "free bargaining." I think the courts should do so in these employee release cases. . . .
>
> Such a ruling will not produce legal uncertainty, but will promote certainty – as anyone can see who reads the large number of cases in this field, with their numerous intricate methods of getting around the objective theory [of contracts]. Such a ruling would simply do directly what many courts have been doing indirectly. It is fairly clear that they have felt, although they have not said, that employers should not, by such releases, rid themselves of obligation to injured employees, obligations which society at large will bear – either [by taxes or charity]. (*Ricketts v. Pennsylvania R. Co.* 1946 at 760, 768, 769)

Note that the familiar, contemporary questions about the legitimacy of unelected judges engaging in this kind of policy-driven "legislating from the bench" were not questions that concerned the Proto-Posnerians. Indeed, they would likely regard such questions as pointless and distracting: "Legitimate or not," one can imagine Judge Frank saying, "this is what judges are really doing – so let's just do it openly and directly."

Of course, some Proto-Posnerians among the Realists had no quietist pretensions. Cohen (1935), most notably, recommended that judges address themselves to questions of socioeconomic policy *instead* of the traditional doctrinal questions he claimed they had been addressing.

Keep in mind, too, that the "quietism" of some Realists is quietism about normative guidance *for judges*. It is quite clear, of course, that quietists like Llewellyn thought it was *good* that judges were inclined in commercial disputes to try to enforce the norms of commercial culture. That, of course, is a normative view about how judges *ought* to decide cases; the quietism emerges in the fact that these Realists don't think there is any point to a normative theory that tells judges they ought to decide in some different way. Llewellyn, like other Realists, was a New Deal liberal, and offered no explicit theoretical rationale for his normative preferences. Yet, as has been recently argued (Schwartz 2000), one can understand Llewellyn's preference for judges who attended to the norms of commercial culture as reflecting a kind of nascent appreciation of efficiency norms in legal rule making.

Legacy of Legal Realism I: Legal Education and Scholarship in the United States

Within American law and legal education, the impact of Legal Realism has been profound. By emphasizing the indeterminacy of law and legal reasoning, and the importance of nonlegal considerations in judicial decisions, the Realists cleared the way for judges and lawyers to talk openly about the political and economic

considerations that in fact affect many decisions. This is manifest in the frequent discussion – by courts, by lawyers, and by law teachers – of the "policy" implications of deciding one way rather than another. The modern legal textbook is largely an invention of the Realists as well. The "science" of law envisioned by Christopher Langdell, Dean of Harvard Law School in the late nineteenth century, was to be based exclusively on a study of the opinions issued by courts: from these, the scholar (or student) could formulate the rules and principles of law that governed decisions. The Realists, who very much shared the ambition of making the study of law "scientific," disagreed profoundly with Langdell over what that entailed. For if the Realists were correct that judges' published opinions at best hint at and at worst conceal the real nonlegal grounds for decision, then the study only of cases could not possibly equip a lawyer to advise clients as to what courts will do. To really teach law, the Realists thought, it was necessary to understand the economic, political, and social dimensions of the problems courts confront, for all these considerations figure in the decisions of judges. Thus, the modern legal teaching materials are typically titled, "Cases *and Materials* on the Law of . . . ," where the materials are drawn from nonlegal sources that illuminate the various nonlegal factors relevant to understanding what the courts have done.

Realism has also had a significant impact upon law reform, including the work of the American Law Institute. This may, at first, seem surprising, since the Realists were famously hostile to the ALI at its inception. Leon Green declared that, "The undertaking to restate the rules and principles developed by the English and American courts finds in the field of torts a most hopeless task" (1928: 1014). And no student of Legal Realism or the American Law Institute can forget Yale psychologist Edward Robinson's impassioned denunciation in the pages of the *Yale Law Journal* in 1934:

> And so the American Law Institute has thought that it can help simple-minded lawyers by giving an artificial and arbitrary picture of the principles in terms of which human disputes are supposed to be settled. . . . [But] [s]uch bodies of logically consistent doctrines as those formulated by the experts of the American Law Institute are obviously not to be considered as efforts to understand the legal institution as it is. When one considers these "restatements" of the common law and how they are being formulated, one remembers how the expert theologians got together in the Council of Nicaea and decided by a vote the nature of the Trinity. There is a difference between the two occasions. The church fathers had far more power than does the Law Institute to enforce belief in their conclusion. (Robinson 1934: 260–1)

Yet the real worry of these Realists was the one articulated by Oliphant (1928), discussed earlier. The Realist critics of the ALI feared that the Restatements would simply codify "over-general and outworn abstractions" (Oliphant 1928: 75) that courts might recite but which shed no light on what they were doing. Yet, in practice, the Restatements have been pursued in precisely the spirit in which Oliphant called for a return to *stare decisis*: namely, as a way of restating legal doctrines in ways that were more fact-specific, and thus more descriptive of the actual grounds of decision. (Recall that the *2nd Restatement of Contracts* in fact incorporates something very close to Oliphant's distinction between different kinds of promises not to compete.)

The paradigm of scholarship established by the Realists – contrasting what courts say they're doing with what they *actually* do – is one that has become so much the norm that distinguished scholars practice it without even feeling the need, any longer, to self-identify as Realists. Consider the classic modern debunking of what courts call "the irreparable injury rule" (Laycock 1991). The irreparable injury rule states courts will not enjoin misconduct when money damages will suffice to compensate the victim. According to Professor Laycock, however:

> Courts do prevent harm when they can. Judicial opinions recite the rule constantly, but do not apply it . . . When courts reject plaintiff's choice of remedy, there is always some other reason, and that reason has nothing to do with the irreparable injury rule. . . . An intuitive sense of justice has led judges to produce sensible results, but there has been no similar pressure to produce sensible explanations. (Laycock 1991: vii)

Like the Realists, Laycock finds a disjunction between the "law in the books" and the "law in action," and, also like the Realists, he invokes as an explanation for that disjunction the decision makers' "intuitive sense of justice." Like Oliphant before him, Laycock seeks, in turn, to reformulate and restate the rules governing injunctions to reflect the *actual* pattern of decisions by the courts following this intuitive sense of justice.

Legacy of Legal Realism II: Legal Theory

Although the Realists profoundly affected legal education and lawyering in America, they have had less influence within recent Anglo-American jurisprudence. The history of Realism in this respect is complex. With the advent of World War II, many scholars (especially at Catholic universities) criticized the Realists on the grounds that their attacks on the idea of a "rule of law" simply gave support to fascists and other enemies of democracy. At the same time, scholars at Yale (notably Harold Lasswell and Myres McDougal) propounded a watered-down version of Realism under the slogan of "policy science." These writers emphasized the Realist idea of using social scientific expertise as a way of enabling legal officials to produce effective and desired results. "Policy science" is now, happily, defunct, since it had far more to do with rationalizing American imperialism than it did with science.

In the 1950s, American legal education was swept by the "legal process" school, which largely suppressed the lessons of Realism. The Legal Process School, associated with the work of Henry Hart and Albert Sacks at Harvard, identified the distinctive institutional competence of judges as providing "reasoned elaboration" for their decisions; this could be done well or poorly, and it was the business of legal scholars to monitor the performance of judges in this regard, and thus to help ensure that judicial opinions would provide a reliable guide to the future course of decision. Absent in all this was any principled response to the Realist argument that the law and legal reasoning were essentially indeterminate. (Within Anglo-American jurisprudence, the work of Ronald Dworkin is usefully understood as a philosophical defense of the Legal Process conception of adjudication.)

The decisive blow for Legal Realism as a jurisprudential movement, however, was dealt by the English legal philosopher H. L. A. Hart. In his seminal 1961 work, *The Concept of Law* (2nd edn. 1994), Hart devoted a chapter to attacking "rule-skeptics," by whom he meant the Realists (though he did not, unfortunately, distinguish carefully between the American and Scandinavian versions of Realism). Early on, Hart characterizes rule-skepticism as "the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the predictions of them" (1994: 133). Indeed, much of the discussion is devoted to attacking this version of rule-skepticism. But Hart identifies a second type of rule-skepticism: "Rule-scepticism has a serious claim on our attention, but only as a theory of the function of rules in judicial decision" (Hart 1994: 135). This second rule-skeptic claims, in particular, "that it is false, if not senseless, to regard judges as themselves subject to rules or 'bound' to decide cases as they do" (135). Let us call the former doctrine "Conceptual Rule-Skepticism" and the latter "Empirical Rule-Skepticism."

Conceptual Rule-Skepticism proffers a skeptical account of the concept of law. The account is skeptical insofar as it involves denying what we may call, for ease of reference, "the Simple View" of law. This is the view that certain prior official acts (like legislative enactments and judicial decisions) constitute "law" (even if they don't exhaust it). (The view is simple to be sure, but not false!) A Conceptual Rule-Skeptic offers an account of the concept of law which denies the Simple View: according to this rule-skeptic, rules previously enacted by legislatures or articulated by courts are not law. This follows from the skeptic's own account of the concept of law, according to which, "The law is just a prediction of what a court will do" or "The law is just whatever a court says it is on the present occasion." Positivism, by contrast, is a nonskeptical account, since the Legal Positivist notion of a Rule of Recognition – a rule constituted by a

practice among officials of deciding questions of legal validity by reference to certain criteria – is fully compatible with the insight captured in the Simple View. See LEGAL POSITIVISM.

Empirical Rule-Skepticism, by contrast, makes an empirical claim about the causal role of rules in judicial decision making. According to this skeptic, rules of law do not make much (causal) difference to how courts decide cases. In Hart's version of this type of skepticism, skeptics are said to believe this because of their view that legal rules are generally indeterminate, an argument to which we return below.

Hart's refutation of Conceptual Rule-Skepticism is swift and devastating, as a modified version of just one of his counterexamples will illustrate. Suppose a judge must decide the question whether a franchiser can terminate a franchisee in Connecticut with less than 60 days' notice. The judge would presumably ask herself something like the following question: "What is the law governing the termination of franchisees in this state?" But according to the Conceptual Rule-Skeptic, to ask what the "law" is on termination and notice is just to ask, "How will the judge decide this case?" So a judge who asks herself what the law is turns out – on the skeptic's reading – to really be asking herself, "What do I think I will do?" But this is clearly *not* what the judge is asking, and so the skeptical account has missed something important about our concept of law. As Hart puts it: the "statement that a rule [of law] is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in [this] court, and constitutes not a prophecy of but part of the *reason* for [the] decision" (1994: 102; cf. 143).

Now one of the American Legal Realists arguably was a Conceptual Rule-Skeptic: Felix Cohen. (Some of the Scandinavian Realists were also Conceptual Rule-Skeptics, but that was a consequence of their commitments in metaphysics and semantics.) But Cohen is nowhere cited by Hart; Hart's Realism is an amalgamation, largely, of Frank, Holmes, and Llewellyn. It is undeniably true that these writers, like most Realists, talk about the importance of "predicting" what courts will do. The question is whether, in so talking, they are fairly read as offering an analysis of the concept of law. Only Hart's grossly anachronistic reading suggests an affirmative answer. The idea that philosophy involves "conceptual analysis" via the analysis of language is an artifact of Anglo-American analytic philosophy of the twentieth century; indeed, as practiced by Hart, it really reflects the influence of fashionable views in philosophy of language current at Oxford in the 1940s and 1950s. The Realists were not philosophers, let alone analytic philosophers, let alone students of G. E. Moore, Russell, and Wittgenstein, let alone colleagues of J. L. Austin. The idea that what demands understanding about law is the "concept" of law as manifest in ordinary language would have struck them as ludicrous. While the Realists had much to say about adjudication and how legal rules work in practice, they had nothing *explicit* to say about the *concept* of law.

How, then, do we understand their talk about "predicting" what courts will do? Frank (1930: 47 note) cautions the reader early on that he "is primarily concerned with 'law' as it affects the work of the practicing lawyer and the needs of the clients who retain him." Holmes begins "The Path of the Law" by emphasizing that he is talking about the meaning of law to lawyers who will "appear before judges, or . . . advise people in such a way as to keep them out of court" (1897: 457). Against this background, infamous statements like Llewellyn's – "What these officials do about disputes is, to my mind, the law itself" (1930a: 3) – make perfect sense. This is not a claim about the "concept" of law, but rather a claim about how it is *useful* to think about law for attorneys who must advise clients what to do. For your client the franchisee in Connecticut doesn't simply want to know what the rule on the books in Connecticut says; he wants to know what will happen when he takes the franchiser to court. So from the practical perspective of the franchisee, what one wants to know about the "law" is what, in fact, the courts will do when confronted with the franchisee's grievance. That is all the law that matters to the client, all the law that matters to the lawyer advising that client. And that is all, I take it, the Realists wanted to emphasize.

In fact, there is a deeper theoretical reason why the Realists could not have been Conceptual Rule-Skeptics. For the Realist arguments for the indeterminacy of law – like *all* arguments for legal

indeterminacy (cf. Leiter 1995) – in fact presuppose a nonskeptical account of the concept of law. Indeed, they presuppose an account with distinct affinities to that developed by the Legal Positivists. The central claim of legal indeterminacy, recall, is the claim that the "class of legal reasons" fails to justify a unique outcome in some or all cases. The "class of legal reasons" is the class of reasons that may properly justify a legal conclusion (and thus "compel" it insofar as legal actors are responsive to valid legal reasons). So, for example, appeals to a statutory provision or a valid precedent are parts of the class of legal reasons, while an appeal to the authority of Plato's *Republic* is not: a judge is not obliged to decide one way rather than another because Plato says so. Any argument for indeterminacy, then, presupposes some view about the *boundaries* of the class of legal reasons. When Oliphant argues, for example, that the promise-not-to-compete cases are decided not by reference to law, but by reference to uncodified norms prevalent in the commercial culture in which the disputes arose, this only shows that the law is indeterminate on the assumption that the normative reasons the courts are actually relying upon are not themselves *legal* reasons. So, too, when Holmes chalks up judicial decisions not to legal reasoning but to "a concealed, half-conscious battle on the [background] question of legislative policy" (1897: 467) he is plainly presupposing that these policy concerns are not themselves *legal* reasons. The famous Realist arguments for indeterminacy which focus on the conflicting, but equally legitimate, ways lawyers have of interpreting statutes and precedents only show that the law is indeterminate on the assumption either that statutes and precedents largely exhaust the authoritative sources of law or that any additional authoritative norms not derived from these sources conflict. It is the former assumption that seems to motivate the Realist arguments. Thus, Llewellyn says that judges take rules "in the main from authoritative sources (which in the case of law are largely statutes and the decisions of the courts)" (1930a: 13).

What concept of law is being presupposed here in these arguments for legal indeterminacy: a concept in which statutes and precedent are part of the law, but uncodified norms and policy arguments are not? It is certainly not Ronald Dworkin's theory, let alone any more robust natural law alternative. Rather, the Realists are presupposing something like the Positivist idea of a Rule of Recognition whose criteria of legality are exclusively ones of pedigree: a rule (or canon of construction) is part of the law in virtue of having a source in a legislative enactment or a prior court decision. The Realists, in short, cannot be Conceptual Rule-Skeptics, because their arguments for the indeterminacy of law presuppose a nonskeptical account of the criteria of legality, one that has the most obvious affinities with that developed by some legal positivists.

That leaves us with Hart's attack on Empirical Rule-Skepticism. Hart's version of the doctrine (1994: 135) involves two claims: (1) legal rules are indeterminate; and, as a result, (2) legal rules do not determine or constrain decisions. Notice that Hart's way of framing the skeptical argument makes it depend upon a philosophical claim about law, namely, that it is indeterminate. But (2) could be true even if (1) were false (that would be *pure* Empirical Rule-Skepticism, we might say). Yet Hart is surely correct that most Realists (Moore may be the main exception) argue for both (1) and (2). But he is wrong about the Realist argument for (1), and thus underestimates the amount of indeterminacy in law.

Hart's central strategic move is to concede to the skeptic, right up front, that legal rules are indeterminate, but to argue that this indeterminacy is a marginal phenomenon, one insufficient to underwrite far-reaching skepticism. The skeptic is portrayed, accordingly, as having unrealistically high expectations for the determinacy of rules, as being "a disappointed absolutist" (1994: 135). The strategy depends, however, on Hart's account of the source of indeterminacy, an account that is, in fact, quite different from the arguments given by the Realists.

According to Hart, legal rules are indeterminate because "there is a limit, inherent in the nature of language, to the guidance which general language can provide" (1994: 123). Language is, in Hart's famous phrase, "open-textured," in the sense that while words have "core" instances – aspects of the world that clearly fall within the extension of the word's meaning – they also have "penumbras," cases where it is unclear

whether the extension includes the aspect of the world at issue. (A Mercedes-Benz sedan is clearly a "vehicle"; but what about a motor scooter?) In cases in which the facts fall within the penumbra of the key words in the applicable legal rule, a court "must exercise a discretion, [since] there is no possibility of treating the question raised . . . as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests" (Hart 1994: 128).

The Realists, however, located the indeterminacy of law not in general features of language itself, but – as we saw above – in the existence of equally legitimate, but conflicting, *canons of interpretation* that courts could employ to extract differing rules from the same statutory text or the same precedent. Indeterminacy, in short, resides for the Realists not in the rules themselves, but in the ways we have of characterizing what rules statutes and precedents contain. Thus, even if we agreed with Hart that the open texture of language affects rules only "at the margins," the Realists have now given us an *additional* reason (beyond Hart's) to expect indeterminacy in law. If the Realists are right, then not only do legal rules suffer from the open texture that Hart describes, but statutes and precedents will frequently admit of "manipulation" – legally proper manipulation, of course – and thus be indeterminate in this additional respect as well. The *combination* of sources of interdeterminacy (the open texture of language, and the conflicting canons of interpretation) seems sufficient to move indeterminacy from the margins to the center of cases actually litigated.

Hart, of course, is not entirely insensitive to the Realist arguments, though he treats them extremely cursorily. In response to Llewellyn's point, for example, that a court can interpret a precedent both "loosely" and "strictly" and thus extract two different rules from the same prior decision, Hart says simply this: "in the vast majority of decided cases there is very little doubt [as to the rule of the case]. The head-note is usually correct enough" (1994: 131). But every first-year litigation associate knows that this approach to precedent would be a recipe for disaster. To extract "holdings" without regard to the facts of the case – which is all a head-note typically provides – is mediocre lawyering. Skillful lawyers know exactly what Llewellyn describes: that the "rule" of a prior case can be stated at differing degrees of specificity, and so made to do very different rhetorical work depending on the needs of the case at hand.

Now there does remain a genuine point of dispute between Hart and the Realists. While both acknowledge indeterminacy in law, and while both acknowledge, accordingly, that rules do not determine decisions in some range of cases, they clearly disagree over the *range* of cases about which these claims hold true. Theirs, in short, is a disagreement as to *degree*, but it is a real disagreement nonetheless. While Hart would locate indeterminacy, and thus the causal irrelevance, of rules "at the margin," Realist skepticism encompasses the "core" of appellate litigation.

So how does Hart, in the end, respond to the Realist contention that, at least in appellate adjudication, rules play a relatively minor role in causing the courts to decide as they do? Here is, I take it, the crux of Hart's rejoinder:

> [I]t is surely evident that for the most part decisions . . . are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged. (Hart 1994: 137)

Alas, the argument here consists in just four words: "it is surely evident." But that is no argument at all. Hart simply denies what the Realists affirm, but gives no reason for the denial other than his armchair confidence in the correctness of his own view. Of course, Hart *may* be correct, but given the devastating impact Hart's chapter had upon Realism among legal philosophers, it is surely more than ironic that on the crucial point of dispute with Realism – to what extent rules matter in appellate adjudication – Hart never offers any argument at all.

Meritorious or not, Hart's critique had the effect of turning the attention of professional philosophers away from Legal Realism. In the 1970s, and continuing into the 1980s, nonphilosophers associated with the Critical Legal Studies

("CLS") movement brought the Realists back to prominence within American legal thought. CLS, however, invented its own version of Realism, one more congenial to its distinctive theoretical ambitions. See CRITICAL LEGAL THEORY. For example, while claiming to embrace the Realist claim that the law is indeterminate, CLS writers went beyond Realism in two important respects. First, unlike the Realists, many CLS writers claimed that the law was "globally" indeterminate, that is, indeterminate in all cases (not just those that reached the stage of appellate review). Second, unlike the Realists, CLS writers generally grounded the claim of legal indeterminacy not in the indeterminacy of methods of interpreting legal sources, but rather in the indeterminacy of all language itself. Here they took their inspiration – albeit very loosely (and often wrongly) – from the later Wittgenstein and deconstructionism in literary theory.

CLS writers also made much out of an argument against the "public–private" distinction, due to the Columbia economist Robert Hale and the philosopher Morris Cohen. (Both were marginal figures in Realism; indeed, Cohen was primarily known at the time as a critic of Realism!) The argument runs basically as follows: since it is governmental decisions that create and structure the so-called private sphere (i.e., by creating and enforcing a regime of property and contractual rights), there should be no presumption of "non-intervention" in this "private" realm (i.e., the marketplace) because it is, in essence, a public creature. There is, in short, no natural baseline against which government cannot pass without becoming "interventionist" and nonneutral, because the baseline itself is an artifact of government regulation. This argument has proved popular with legal academics in recent years – including non-CLS writers like Sunstein (e.g., Sunstein 1987) – yet it involves a blatant non sequitur. It simply does not follow that it is normatively permissible for government to regulate the "private" sphere from the mere fact that government created the "private" sphere through establishing a structure of rights; the real question is whether the *normative* justification for demarcating a boundary of decision making immune from governmental regulation is a sound one. Nonetheless, this flawed argument became central to the CLS version of Legal Realism (a version well represented by the introductory materials and selections in Fisher et al. 1993).

References

Cohen, Felix. 1935. Transcendental nonsense and the functional approach. *Columbia Law Review* 35: 809–49.

Cross, Frank B. 1997. Political science and the new legal realism: A case of unfortunate interdisciplinary ignorance. *Northwestern University Law Review* 92: 251–326.

Fisher, W. W., Horwitz, M. J., and Reed, T. A. (eds.). 1993. *American Legal Realism.* New York: Oxford University Press.

Frank, Jerome. 1930. *Law and the Modern Mind.* New York: Brentano's.

Frank, Jerome. 1931. Are judges human? Parts I & II. *University of Pennsylvania Law Review* 80: 17–53, 233–67.

Green, Leon. 1928. The duty problem in negligence cases. *Columbia Law Review* 28: 1014–45.

Green, Leon. 1931. *The Judicial Process in Torts Cases.* St. Paul, MN: West Publishing.

Hart, H. L. A. 1994. *The Concept of Law*, 2nd edn. Oxford: Clarendon Press.

Holmes, Oliver Wendell, Jr. 1897. The path of the law. *Harvard Law Review* 10: 457–78.

Hutcheson, Joseph. 1929. The judgment intuitive: The function of the "hunch" in judicial decision. *Cornell Law Quarterly* 14: 274–88.

Kim, Jaegwon. 1988. What is "naturalized epistemology"? *Philosophical Perspectives* 2: 381–405.

Kornblith, Hilary. 1994. Introduction: What is naturalistic epistemology? In H. Kornblith (ed.), *Naturalizing Epistemology*, 2nd edn. Cambridge, MA: MIT Press, 1–14.

Laycock, Douglas. 1991. *The Death of the Irreparable Injury Rule.* New York: Oxford University Press.

Leiter, Brian. 1995. Legal indeterminacy. *Legal Theory* 1: 481–91.

Leiter, Brian. 1997. Rethinking legal realism: Toward a naturalized jurisprudence. *Texas Law Review* 76: 267–315.

Leiter, Brian. 1998. Naturalism and naturalized jurisprudence. In B. Bix (ed.), *Analyzing Law: New Essays in Legal Theory.* Oxford: Oxford University Press, chapter 4.

Leiter, Brian. 2001. Objectivity, morality, and adjudication. In B. Leiter (ed.), *Objectivity in Law and Morals.* Cambridge, UK: Cambridge University Press, 66–98.

Leiter, Brian. 2002. Naturalism in legal philosophy. In E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/archives/fall 2002/entries/lawphil-naturalism/>.

Llewellyn, Karl. 1930a. *The Bramble Bush.* New York: Oceana.

Llewellyn, Karl. 1930b. A realistic jurisprudence – the next step. *Columbia Law Review* 30: 431–65.

Llewellyn, Karl. 1931. Some realism about realism – responding to Dean Pound. *Harvard Law Review* 44: 1222–64.

Llewellyn, Karl. 1950. Remarks on the theory of appellate decision and the rules and canons about how statutes are to be construed. *Vanderbilt Law Review* 3: 395–406.

Llewellyn, Karl. 1960. *The Common Law Tradition: Deciding Appeals.* Boston: Little, Brown & Co.

Moore, Underhill and Callahan, Charles. 1943. Law and learning theory: A study in legal control. *Yale Law Journal* 53: 1–36.

Moore, Underhill and Hope, Theodore. 1929. An institutional approach to the law of commercial banking. *Yale Law Journal* 38: 703–19.

Moore, Underhill and Sussman, Gilbert. 1931. Legal and institutional methods applied to the debiting of direct discounts – VI. The decisions, the institutions, and the degree of deviation. *Yale Law Journal* 40: 1219–50.

Oliphant, Herman. 1928. A return to stare decisis. *American Bar Association Journal* 14:71–6, 107, 159–62. Also in W. W. Fisher et. al. (eds.), 1993. *American Legal Realism.* New York: Oxford University Press, 199–201.

Posner, Richard A. 1999. *The Problematics of Moral and Legal Theory.* Cambridge, MA: Harvard University Press.

Quine, W. V. O. 1969. Epistemology naturalized. In W. V. O. Quine, *Ontological Relativity and Other Essays.* New York: Columbia University Press, 69–90.

Radin, Max. 1925. The theory of judicial decision: Or how judges think. *American Bar Association Journal* 11: 357–62.

Radin, Max. 1942. In defense of an unsystematic science of law. *Yale Law Journal* 51: 1269–79.

Ricketts v. Pennsylvania R. Co. 1946. 153 F2d 757.

Robinson, Edward S. 1934. Law – an unscientific discipline. *Yale Law Journal* 44: 235–61.

Schwartz, Alan. 2000. Karl Llewellyn and the origins of contract theory. In J. Kraus and S. Walt (eds.), *The Jurisprudential Foundations of Corporate and Commercial Law.* Cambridge, UK: Cambridge University Press.

Sunstein, Cass. 1987. Lochner's legacy. *Columbia Law Review* 87: 873–919.

White, James J. 1994. The influence of American Legal Realism on Article 2 of the Uniform Commercial Code. In W Krawietz, D N MacCormick and G H von Wright (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems.* Berlin: Duncker and Humbolt.

Further Reading

Leiter, Brian. 2001. Legal realism and legal positivism reconsidered. *Ethics* 111: 278–301.

Schlegel, John Henry. 1995. *American Legal Realism and Empirical Social Science.* Chapel Hill: University of North Carolina Press.

Twining, William. 1973. *Karl Llewellyn and the Realist Movement.* Norman: University of Oklahoma Press.