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Rethinking Legal Realism: Toward a Naturalized Jurisprudence

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I. Introduction

Considering the enormous influence Legal Realism has exercised upon American law and legal education over the last sixty years, and considering, too, as the cliché has it, that "we are all realists now," it remains surprising how inadequate—indeed inaccurate—most descriptions of Realism turn out to be.

Ronald Dworkin, for example, claims that according to Realism, "judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization."[1]

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1. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 3 (1977).

Dworkin is echoed by Judge Jon Newman of the Second Circuit who asserts that Realists believe that "the judge simply selects the result that best comports with personal values and then enlists, sometimes brutally, whatever doctrines arguably support the result."[2] John Hart Ely says the Realists "'discovered' that judges were human and therefore were likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasoning."[3] Steven Burton remarks that it is often "claimed, in legal realist fashion, that judges decide whatever they want to decide when the law is unclear (and it is often or always unclear)."[4] Fred Schauer describes Realists as holding "that legal decision-makers are largely unconstrained by forces external to their own decision-making preferences."[5] And Robert Satter, a Connecticut trial judge, says in a recent popular work that Realists "assert that a judge exercises unbridled discretion in making decisions; he works backward from conclusion to principles and uses principles only to rationalize his conclusions. [Realists] consider the judge's values all-important."[6]

Glosses on Realism like these are surely familiar to every student of the literature. But it may help to recast them in a slightly more systematic form to understand precisely what picture of Realism so powerfully grips the legal imagination. According to what I will call the "Received View," Legal Realism is fundamentally: (1) a descriptive theory about the nature of judicial decision, according to which, (2) judges exercise unfettered discretion, in order (3) to reach results based on their personal tastes and values, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons.

Like much "conventional wisdom," the Received View of Realism has an element of truth: the core of Realism is, indeed, a certain sort of descriptive claim about how judges decide cases, according to which judges rationalize, after the fact, decisions reached on other grounds. But it is, or so I shall argue, quite misleading to think of Realism as committed to the claim that judges exercise "unfettered" discretion[7] or that they make choices based on "personal" values and tastes. That Realism has been saddled with these claims—what I shall call the claims of "Judicial Volition" and "Judicial Idiosyncrasy"—has contributed in no small measure

2. Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 203 (1984).

3. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44 (1980).

4. STEVEN J. BURTON, JUDGING IN GOOD FAITH 43 (1992).

5. FREDERICK SCHAUER, PLAYING BY THE RULES 191 (1991).

6. ROBERT SATTER, DOING JUSTICE: A TRIAL JUDGE AT WORK 64 (1990).

7. I use "unfettered" in Schauer's sense of being "unconstrained by forces external to their own decision-making preferences." SCHAUER, *supra* note 5, at 191.

to the frequent reduction of Realism to a whipping boy for legal common sense.[8]

As a preliminary matter, however, any talk about the core of "Realism"—or even of "Realism" simpliciter—invites the objection that there simply is no such thing: there is no doctrine of "Realism" as apart from the views of individual writers.[9] This sort of familiar skepticism is, I think, largely false. For everyone commonly thought to be a Realist—Karl Llewellyn, Jerome Frank, Underhill Moore, Felix Cohen, Leon Green, Herman Oliphant, Walter Wheeler Cook, and Max Radin, among others—endorses the following descriptive claim about adjudication: in deciding cases, judges respond primarily to the stimulus of the facts. The Received View can then be seen as simply one interpretation of certain aspects of what I shall call this "Core Claim" of Realism, to which I return below.[10]

Indeed, I will suggest something further: that the misleading presentation of the Received View as the essence of Realism really represents what we may call the "Frankification" of Realism, *i.e.*, the now dominant tendency to treat Jerome Frank's particular interpretation of the Core Claim as identical to Realism.[11] Even among Realists, of course, Frank's view represented a particular sort of extreme—as Frank himself recognized.[12] Notwithstanding this, the Frankification of Realism, as evidenced by the many quotations with which I began, has been the distinguishing feature of Realism's long-term reception.[13] But Frank is not Llewellyn or Moore

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8. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 2, 2-3, 20, 393 (1995) (criticizing the "much-overblown movement" of Legal Realism for its reliance on nonlegal reasoning and lack of method).

9. For one recent version of this skeptical view, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 65 (1995) ("[L]egal realism 'is just a name. Like "chicken soup," it means what we choose to call it.'" (quoting John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 464 (1989) (book review))). On the difficulties with Duxbury's conception of "jurisprudence" and of Legal Realism in particular, see Brian Leiter, *Is There an "American" Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367 (1997).

10. *See infra* subpart II(A).

11. Some writers are even explicit about this identification. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 186-209 (1993). For an unself-conscious "Frankification" of Realism, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 6-8 (1986).

12. *See* Jerome Frank, *Are Judges Human?* (pt. 1), 80 U. PA. L. REV. 17, 22-23, 30 n.31 (1931).

13. These quotations may be usefully compared with the following apt summary of Frank's view:

> [H]ow *do* judges decide cases? To Frank, they begin with the desired conclusion and search for premises to substantiate it. Oriented to achieving certain results, judges rationalize their decisions by finding facts and selecting rules that justify the desired conclusion. By manipulating those facts and rules, judges enjoy unfettered discretion. But what persuades judges to reach one conclusion rather than another? . . . Most important, according to Frank, are the "uniquely individual factors" that are the product of the judge's "entire life-history."

or Oliphant, and while Frank shares in the Core Claim, none of these other writers share in the Frankified Received View. In Part II of this paper, I will set out the Core Claim of Realism and explore (as well as defend) its differences from the Received View.

In Part III, I turn to broader questions of jurisprudence, in order to locate Realism's place within it. Although Realism has had an undeniably powerful impact upon American legal education and upon how lawyers and judges think about what they do,[14] it has had almost no impact upon the mainstream of Anglo-American jurisprudence—the tradition running from Bentham and Austin in the nineteenth century, to Dworkin and Raz in the present. The cause of this neglect is clear: Hart's devastating critique of the Realists in Chapter VII of *The Concept of Law* rendered Realism a philosophical joke in the English-speaking world.[15] The Realists, on Hart's reading, gave us a "Predictive Theory" of law, according to which by the concept "law," we just mean a prediction of what the court will do.[16] Hart easily demolished this Predictive Theory of Law. For example, according to the Predictive Theory, a judge who sets out to discover the "law" on some issue upon which she must render a decision is really just trying to discover what she will do, since the "law" is equivalent to a prediction of what she will do! These, and other manifestly silly implications of the Predictive Theory, convinced most Anglo-American legal philosophers that Realism was best forgotten.[17]

Yet Hart, as legal philosophers have gradually begun to acknowledge,[18] misread the Realists as answering philosophical questions of conceptual analysis, questions about what particular concepts ("knowledge," "morally right," "law") mean—the questions that Hart himself was concerned to answer. But the Realists were not "ordinary language" philosophers, and were not explicitly concerned with analyzing

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Frank reveled in unfettered judicial discretion. . . .

ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 44-45 (1985) (quoting JEROME FRANK, LAW AND THE MODERN MIND 106, 115 (1930)) (emphasis in original). Note, in particular, the prominent place given to the themes of Judicial Volition and Judicial Idiosyncrasy in this capsule summary of Frank's view. But as I argue below, it is not clear that even Frank views judges as "unfettered." *See infra* note 66 and accompanying text.

14. For a brief survey, see Brian Leiter, *Legal Realism*, *in* THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA (C.B. Gray ed., forthcoming 1998).

15. H.L.A. HART, THE CONCEPT OF LAW 141-47 (1961).

16. The abbreviated discussion in the text is borrowed from Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 262-63 (Dennis Patterson ed., 1996).

17. *See, e.g.*, Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988, 1004 (1984); THEODORE BENDITT, LAW AS RULE AND PRINCIPLE *passim* (1978).

18. *See, e.g.*, JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW 35, 33-36 (Westview Press, Inc. rev. ed. 1990) (1984).

the "concept" of law as it figures in everyday usage. Yet if we do not view the Realists on the model of philosophy-as-conceptual-analysis, how can we understand them as engaged in recognizably jurisprudential inquiries? One possibility is to understand the Realists as forerunners of the deconstructionism and postmodernism that has recently swept the humanities—philosophy largely excepted.[19] Such an approach, embraced by a number of writers associated more or less loosely with Critical Legal Studies (CLS),[20] is unattractive on two counts: first, it does not help us locate Realism within the questions and problems of jurisprudence;[21] and second, it seems to defeat the purpose of achieving a sympathetic philosophical understanding of the Realists to see them simply as forerunners of bad philosophy.[22] Even more significant, though, is that the "postmodern" misreadings of Realism turn out to be fatally anachronistic. For the Realists, we must remember, came out of the intellectual culture of the 1920s and 1930s in the United States, a culture firmly in the grips of the world-view to which postmodernists are now reacting: a world-view which considered natural science the paradigm of all genuine knowledge,

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19. *See infra* notes 22, 93.

20. *See, e.g.*, Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152 (1985).

21. On these, see Leiter, *supra* note 9, at 370-71.

22. The generally low philosophical level of "postmodern" scholarship has been the subject of much discussion recently, in the wake of the "Sokal Affair." Alan Sokal, a physicist, wrote a parody of postmodern scholarship, full of postmodern slogans and nonsensical science. The article was then accepted by and published in a trendy cultural studies journal, *Social Text*. Alan Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, SOC. TEXT, Spring-Summer 1996, at 217. For a brief overview, see Alan Sokal, *A Physicist Experiments with Cultural Studies*, LINGUA FRANCA, May-June 1996, at 62, 62-63. The significance of this hoax is well-put by two prominent philosophers:

> The central issue raised by Alan Sokal's hoax . . . [is] the competence with which . . . [cultural] studies are conducted . . . .
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> For many years now, academics from a variety of disciplines have been grumbling . . . about the appallingly low standards of argument and evidence that appear to characterize work in this area . . . . As philosophers . . . we have often been struck by the sloppy and naive quality of what passes for philosophical argument . . . and at the central role that such argument has been made to play.

Paul Boghossian & Thomas Nagel, Letter to the Editor, LINGUA FRANCA, July-Aug. 1996, at 58, 58, 58-60. After giving an example from Sokal's piece, they observe, correctly, that,

> Only the complete scientific, mathematical, and philosophical incompetence of the editors of *Social Text* can explain how they were able to accept for publication such a tissue of transparent nonsense.
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> . . . .
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> . . . [I]n accepting Sokal's parody, these [postmodern] scholars have made it clear that . . . they are unable to tell the difference between a statement that no sane person could credit and its opposite.

Id. at 59-60. (As William Forbath points out to me, putatively "left" legal academics are overwhelmingly caught up in postmodernism. But as Sokal observes, "a scientific worldview, based on a commitment to logic and standards of evidence and to the incessant confrontation of theories with reality, is an essential component of any progressive politics." *Alan Sokal Replies*, LINGUA FRANCA, July-Aug. 1996, at 57, 57; *see also infra* note 93.)

distinguished by its methods of observation and empirical testing, and in which the social sciences aimed to emulate the natural sciences' methods and successes. Any plausible account of Realist jurisprudence cannot lose sight of this intellectual background.

Yet there has been more to the CLS reinvention of the Realists than the implausible reading of them as proto-postmodernists.[23] In fact, two other themes have been quite prominent in the literature. First, CLS brought the economist Robert Hale, a marginal figure in the Realist movement,[24] to the center of its picture of Legal Realism. Yet whatever Hale's importance and interest in his own right, he simply had nothing to contribute to the Realists' central jurisprudential concern with the theory of judicial decisionmaking.[25] Hale's crowning achievement, as CLS presents it, is instead supposed to be a decisive argument against the public-private distinction.[26] In its contemporary form,[27] the argument typically runs as follows:

> Since it is governmental decisions that create and structure the so-called "private" sphere (*e.g.*, by creating and enforcing a regime of

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23. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 193-268 (1992); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 379-83; Peller, *supra* note 20; Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 465 (1988) (reviewing KALMAN, *supra* note 11). Also illuminating in this regard are the introductory essays and editorial selections in AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993), a volume that views Realism through a CLS lens.

24. Milton Handler—himself an early Realist, professor at Columbia from 1927 to 1972, and a friend and colleague of both Hale and Llewellyn—has remarked regarding Hale that, "he carried very little influence with his colleagues . . . . I'm amazed now to find him regarded as one of the great Legal Realists." Memorandum from Milton Handler to Brian Leiter 12 (Apr. 27, 1995) (on file with author). Karl Llewellyn identifies Handler as a Realist in *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 & n.22 (1930) and in *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237, 1240 n.42, 1244 n.55, 1245 (1931) [hereinafter Llewellyn, *Some Realism About Realism*].

25. I take it to be uncontroversial that the Realists were centrally concerned with what judges do. *See, e.g.*, EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 541 (1953) ("The leading realists centered upon the judicial process."). The Realists, to he sure, also express interest in understanding the effects of legal rules in the real world, but this aspect of Realism does not, as I see it, bear on any recognizably jurisprudential questions. This concern of the Realists has been, in some ways, inherited by economic writers on law, especially institutional economists. For a useful overview, see OLIVER E. WILLIAMSON, REVISITING LEGAL REALISM: THE LAW, ECONOMICS, AND ORGANIZATION PERSPECTIVE (University of Cal. Berkley Program in Law and Econ. Working Paper No. 95-12, 1996).

26. The argument is typically attributed to Hale and to the philosopher Morris Cohen—the latter being better known as a critic of Realism! For the relevant papers, see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), *reprinted in* AMERICAN LEGAL REALISM, *supra* note 23, at 109 and Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), *reprinted in* AMERICAN LEGAL REALISM, *supra* note 23, at 101.

27. The CLS reinvention of Realism has been so successful that even non-CLS scholars have taken up these putatively "Realist" arguments. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 917-19 (1987).

> property rights), there should be no presumption of "non-interference" in this "private" realm (*e.g.*, the marketplace) because it is, in essence, a public creature. There is, in short, no natural baseline beyond which government action becomes "interventionist" and non-neutral, because the baseline itself is an artifact of government regulation.[28]

Unfortunately, this influential (and no doubt familiar) argument is based on a blatant non-sequitur. From the fact that a "private" realm is a creature of government regulation it does not follow that government action in that realm is normatively indistinguishable from government action in the "public" realm: for the key issue is the normative justification for drawing the baseline itself, not simply the fact that one has been drawn by an exercise of public power. If the underlying normative reasons for drawing the baseline are sound (*e.g.*, for demarcating a realm of "private" transactions), then these reasons provide an argument against intervention. That the "private" sphere is an artifact of government regulation is of no relevance.

Second, CLS writers have frequently enlisted the Realists as authority for the CLS claim that the law is indeterminate.[29] In so doing, they have introduced two important distortions of Realist jurisprudence. First, the Realists, unlike the CLS writers, did not generally view the law as "globally" indeterminate,[30] that is, as indeterminate in all cases. To the contrary, Realists were mainly concerned to point out the indeterminacy that exists in those cases that are actually litigated, especially those that make it to the stage of appellate review—a far smaller class of cases, and one where indeterminacy in law is far less surprising.[31] Second, the Realists based their argument for indeterminacy in law primarily on the existence of conflicting, but equally legitimate, interpretive methods: *e.g.*, conflicting ways of reading statutes, or of construing precedents.[32]

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28. This is my summary of the argument. For similar incarnations of this argument, see Balkin, *supra* note 23, at 380-81 (recognizing that the government's protection of racist speech in turn infringes on the rights of minorities to be free from racial oppression); Singer, *supra* note 23, at 487-91 (recognizing that the government's role in creating and enforcing property rights in turn creates power relationships among market participants); and Sunstein, *supra* note 27, at 875.

29. For examples of this approach, see the sources cited *supra* note 23 and *infra* notes 33-34.

30. For more on the terminology and conceptualization here, see Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995).

31. *See, e.g.*, Llewellyn, *Some Realism About Realism*, *supra* note 24, at 1239 ("[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."); Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1271 (1942) ("[Judicial] [d]ecisions 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.").

32. See, for example, Llewellyn's seminal discussion of the "strict" and "loose" views of precedent in K.N. LLEWELLYN, THE BRAMBLE BUSH 72-75 (1930), and his treatment of the conflicting

Because statutes or cases could be read in two ways, a statute or case could generate at least two different rules. Thus, even an honest application of the "methods" of legal reasoning and interpretation would fail to determine as a matter of law a unique decision. The CLS writers, by contrast, have tended to locate the source of legal indeterminacy either—loosely following Derrida and Wittgenstein—in general features of language itself,[33] or—loosely following Hegel via Lukács via Unger—in conflicting moral and political principles that purportedly exist beneath the surface of the law, at some suitable level of abstraction.[34] The Realists made distinctively lawyerly arguments for legal indeterminacy, while CLS writers have relied on more explicitly philosophical considerations—though often they have misunderstood these considerations.[35]

If, then, we are indeed "all Realists now," this is a royal "we" that manifestly does not include legal philosophers. Within Anglo-American jurisprudence, Realism remains a joke, viewed simply as a movement that appealed to philosophically superficial lawyers, but which made no substantial contribution to philosophical thinking about law.[36] Outside Anglo-American jurisprudence, meanwhile, legal theorists have selectively represented—or simply mispresented—Realism, and in ways that do not bode well for understanding the Realists as offering anything to a philosophical theory of law.

Thus our situation today: Realism is omnipresent in American law schools and legal culture, but almost entirely absent from serious legal philosophy. It is the aim of this Article to change that situation. I hope to show that the Realists laid the foundation for a jurisprudence distinguished by two novel philosophical commitments: naturalism and pragmatism. Naturalism is an unfamiliar term in the jurisprudential universe (though not, as I note, elsewhere in philosophy). Pragmatism, by

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"canons of statutory construction" in Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399-406 (1950).

33. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007-09 (1985); Peller, *supra* note 20, at 1160 n.6 & 1161; Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 536-37 (1984).

This position should be distinguished from that of Hart, who finds indeterminacy in the "open texture" of language. *See* HART, *supra* note 15, at 124. But this focus means that Hart, too, never actually engages the arguments for indeterminacy most important to the Realists.

34. For examples of these arguments for indeterminacy, see generally ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 109-17 (1986); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Peller, *supra* note 20; Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). On the intellectual pedigree of this argument, see Leiter, *supra* note 9, at 383-84.

35. For a representative critique, see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993).

36. *See supra* note 15 and accompanying text.

contrast, is much talked about, but, I argue, poorly understood, especially as it applies to Realism. A naturalized jurisprudence predicated on a pragmatic outlook—in the precise sense with which I will be concerned—will turn out to be the real Realist legacy in legal philosophy.

A final methodological caveat bears noting. I regard what I am doing here as a philosophical reconstruction of Legal Realism. The Realists themselves were often badly confused about philosophical matters, which accounts, in part, for their sorry reputation among legal philosophers. Nonetheless, they had genuine insight into law and adjudication—more than most legal philosophers—and these insights reflect a philosophical sensibility of sorts. This Article tries to reconstruct and defend this sensibility. Such an account has been sorely missing from the literature on Realism.[37] While we now have a rich variety of historical materials on Realism,[38] there has been no sympathetic interpretation of Realism from a philosophical perspective. A philosophical interpretation of Realism will, of course, require us to sift through the mass of Realist writings, in order to produce a theory of law worthy of philosophical attention. This theory—what I call a "naturalized jurisprudence"—is one that remains, I hope to show, recognizably Realistic in spirit, if not in all its details.

II. The Real Legal Realism

A. The Core Claim

The Core Claim of Legal Realism consists of the following descriptive thesis about judicial decision-making: judges respond primarily to the stimulus of facts.[39] Put less formally—but also somewhat less accurately—the Core Claim of Realism is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law.[40]

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37. Robert Summers tried, I think, to produce such an account in his INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982), but his book has had little impact on Anglo-American legal philosophy. Some of the reasons for this are persuasively set out in Moore, *supra* note 17 (reviewing SUMMERS, *supra*). In a nutshell: Summers never gives an adequate defense of the Realist turn to descriptive, empirical theory as a jurisprudential undertaking.

38. *See, e.g.*, DUXBURY, *supra* note 9; KALMAN, *supra* note 11; JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

39. Proper emphasis must be put on the word "primarily": no Realists (except perhaps Underhill Moore) claimed that rules never mattered to the course of decision. *See* Leiter, *Legal Realism*, *supra* note 16, at 268; *infra* note 56.

40. Obviously, an applicable rule of law makes certain facts relevant, and thus even a judge who is following the legal rule must take these facts into account. Conversely, a judge must first look at the facts to see which legal rules are relevant. But this is a plainly trivial sense of fact-responsiveness. The Realist idea is that judges are responding to the underlying facts of the case, facts that are not made relevant by any legal rule. A useful statement of the point comes from the eminent UCC scholar James

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; 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."[41] Oliphant's claim was confirmed by Judge Hutcheson's admission that "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause."[42] Similarly, Jerome 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 decided 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 . . . .'"[43] 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."[44] As Frank pointed out, the very same advice had been offered by a former president of the American Bar Association.[45]

J. White, discussing what he correctly calls "the central tenet" of the Realist Movement, namely that "judges' decisions arise not merely from the rules they state in their opinions, but at least as much from unstated reasons—from the facts before them, from the expectation of the parties in the trade, and from the judges' own judgment about fairness." James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code*, *in* PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 401, 401 (Werner Krawietz et al. eds., 1994). In fact, I argue below, it was the dominant view among Realists that, at least in commercial disputes, what judges thought was fair on the facts tracked "the expectation of the parties in the trade." *See infra* text accompanying note 53.

41. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928).

42. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

43. FRANK, *supra* note 13, at 104 n.* (1930) (emphasis omitted) (quoting a personal letter from Chancellor Kent).

44. LLEWELLYN, *supra* note 32, at 76. This point is surely familiar to all litigators. When I wrote my first brief straight out of law school, the older litigator on the case put it to me (roughly) this way: "Cases are won or lost on the facts section of the brief. By the time the judge finishes the facts, you want him to think our client was screwed, and that fairness and justice dictate a decision for us. The law section of the brief just gives the judge a place to hang his hat." It is no small virtue of the Realists' Core Claim that it captures what every practicing lawyer knows.

45. FRANK, *supra* note 13, at 102 n.* (referring to comments made by S.S. Gregory). For a more recent statement of a similar point, see Sam Sparks, *Tribute to the Honorable Homer Thornberry*, 74 TEXAS L. REV. 949, 949-50 (1996) (describing the late Judge Thornberry of the U.S. Court of Appeals for the Fifth Circuit as having "a strong sense of what was 'right' and what was 'wrong.' When it appeared to the judge that the law presented a hurdle to what he thought was the fair and right thing to be done, he would struggle with this dilemma and argue with his law clerks or fellow judges until he was satisfied that his personal decision was both consistent with the law and the most fair determination under the circumstances.").

Especially at the appellate level, Llewellyn maintained that one had to understand "how far the proposition which seems so abstract has roots in what seems to be the due thing on the facts [before the court]."[46] Later on, Llewellyn would speak of "the fact-pressures of the cases"[47] and of "the sense of the situation as seen by the court"[48] as determining the outcome. Although the notion of the "situation-sense" was rendered cryptic by the later Llewellyn, who located it in a new cognitive "faculty" capable of detecting "immanent laws,"[49] it began life in Realist thought as a sensible and naturalistically respectable[50] phenomenon. Thus, Max Radin, in keeping with the Core Claim, suggested that the decision of a judge was determined by "a type situation that has somehow been early called up in his mind."[51] Type situations were simply "the standard transactions with their regulatory incidents[, which] are familiar ones to [the judge] because of his experience as a citizen and a lawyer."[52] We explain, in other words, the judge's "sense" of a particular situation by reference to the relevant psycho-social facts about the judge's professional and social history: by his having encountered such situations, say, in his prior practice as a corporate litigator and his having formed, accordingly, certain characteristic assumptions about what is right and fair in such circumstances, based in significant part on his familiarity with the local norms of conduct in that trade or practice. Judges are fact-responsive, and the facts, for Radin and Llewellyn, present themselves in ways that reflect what we might call the "sociological" profile of the judge.

The Realists, then, share a commitment to the view that in deciding cases, judges respond primarily to the stimulus of the facts of the case. Note, now, two points about this way of formulating the Core Claim.

First, the contrasting view here—usually dubbed "Formalism"—is committed to the descriptive claim that judges respond primarily—indeed,

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46. LLEWELLYN, *supra* note 32, at 29.

47. Llewellyn, *Some Realism About Realism*, *supra* note 24, at 1243; *cf.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 122 (1960) (discussing "the differential impact of the facts of the individual case and the facts of the situation taken as a type").

48. Llewellyn, *supra* note 32, at 397.

49. LLEWELLYN, *supra* note 47, at 122. For discussion, see Brian Leiter, *supra* note 16, at 272-74. For a more sympathetic reading of the later Llewellyn, see KRONMAN, *supra* note 11, at 209-25.

50. A naturalistically respectable faculty or property is one that has a place in the explanatory theories of successful natural and social sciences. For more on naturalism, see the discussion *infra* subpart III(B).

51. Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 362 (1925).

52. *Id.* at 358. A similar notion was developed at length by Underhill Moore in a series of papers in the late 1920s and early 1930s. *See, e.g.*, Underhill Moore & Theodore Hope, Jr., *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 705 (1929) (analyzing "the relation between judicial behavior and institutional . . . ways of behaving . . . in the contemporary culture of the place where the facts happened and the decision was made").

perhaps exclusively—to the rational demands of the applicable rules of law and modes of legal reasoning.[53] We can gloss the Formalist's descriptive claim as saying that judges are (primarily) rule-responsive, while the Realist claims that judges are (primarily) fact-responsive.[54]

This gloss is potentially misleading in one respect. What the descriptive Formalist really claims is that judges are (primarily) responsive to legal reasons, while the Realist claims that judges are (primarily) responsive to nonlegal reasons. This point is obvious enough in the case of the Formalist picture: statutes, precedents, and deductive inferences all give judges legal reasons for deciding one way rather than another.[55] But when a judge responds to the underlying facts of the case, what we are really saying is that the judge has nonlegal reasons—*e.g.*, "I think it wouldn't be fair to penalize the defendant here"—for deciding the way she does.[56] The real dispute between the Formalist and the Realist then concerns whether the reasons that determine judicial decision are primarily legal reasons or nonlegal reasons.[57] This means, of course, that this dispute presupposes a way of demarcating legal reasons from nonlegal ones.[58] We shall have to revisit these issues below in discussing the naturalism of the Realists.

A second preliminary point, however, about my formulation of the Core Claim requires comment. My formulation invokes (intentionally, of course) the language of behaviorism, the dominant movement in psychology at the time the Realists were writing. According to the behaviorist, all human behavior can be explained in terms of the pairings of certain

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53. The applicable legal rules also make certain facts relevant and thus require judges to respond to them; but this, of course, is a trivial sense of fact-responsiveness that no one denies. *See supra* note 40.

54. "Formalism" can also name a normative view, to the effect that judges ought to be primarily rule- and legal-reason-responsive. Theories of adjudication, of course, typically make both descriptive and normative claims. *See* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253, 255-58 (1996).

55. For a more precise characterization of the "Class of Legal Reasons," see Leiter, *supra* note 30, at 481 (describing the components of the class of legal reasons).

56. The only Realist who would deny this would have been Underhill Moore, who took behaviorism in psychology more seriously than other Realists. For the behaviorist, of course, the mind is a black box, not to be invoked in explaining behavior. Thus, reasons are only relevant as certain types of (aural, visual) stimuli, but are not relevant in virtue of their rational content or meaning! "A proposition of law," says Moore, "is nothing more than a sensible object which may arouse a drive and cue a response." Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 3 (1943). For the behaviorist, then, responsiveness to reasons really means nothing more than seeking out the lawful correlations between the stimuli that constitute the input (*e.g.*, facts, laws, reasons, etc.) and the cognitive output (*e.g.*, a judicial opinion). This, of course, was precisely Moore's program, under the heading of the institutional method. For further discussion, see Leiter, *supra* note 16, at 268. Since most of the Realists, happily, were not orthodox behaviorists, the notion of being responsive to reasons—legal or nonlegal—is compatible with their work.

57. I am grateful to Joseph Raz for clarification on this issue.

58. On these points, see Leiter, *supra* note 30, at 489-90, and Leiter, *supra* note 16, at 275-76.

responses to certain stimuli; no reference to mental states—beliefs, desires, etc.—is required. The rhetoric of behaviorism—if not generally behaviorism itself—permeated the writings of the Realists: hence the sense of formulating the Core Claim in terms of fact-responsiveness. For the Realist-cum-behaviorist, the only question is: which stimuli trigger the judicial response? The Realists hold that it is primarily the underlying facts of the case, rather than the rules of law, that "trigger" the response.

Yet my formulation of the Core Claim is, importantly, still compatible with articulations of the same basic view by decidedly antibehavioristic Realists, like Jerome Frank. Thus, when 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,'"[59] I take him to be supposing the truth of the Core Claim. In the same vein is Frank's observation that "the judge's innumerable unique traits, dispositions and habits . . . shap[e] his decisions" by determining "what he thinks fair or just with reference to a given set of facts."[60] Similarly, in formulating his own descriptive claim, Frank characterizes the opposing "conventional theory" as holding that "Rule × Facts = Decision," while his own view is that "the Stimuli affecting the judge × the Personality of the judge = Decisions."[61] It is, of course, Frank's injection of the "Personality of the judge" into the formula that puts the distinctive stamp on Frank's interpretation of the Core Claim: drop that and you have the Core Claim itself.

B. The Core Claim and the Received View

What interpretation of the Core Claim would not yield the Received View, one might wonder? Recall the two aspects of the Received View of Realism that are at issue here: first is the claim of "Judicial Volition," *i.e.*, that judges exercise unfettered choice in picking a result; and second is the claim of "Judicial Idiosyncrasy," *i.e.*, that judges make this choice in light of personal or idiosyncratic tastes and values. In its extreme, Frankified form, the theses of Judicial Volition and Judicial Idiosyncrasy lead to the conclusion that judicial decision is utterly unpredictable, as it is never possible to isolate the significant idiosyncratic facts about the individual judge that influence his essentially unconstrained choice of outcome.[62]

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59. FRANK, *supra* note 13, at 102-03 n.* (quoting S.S. Gregory).

60. *Id.* at 110-11.

61. Jerome Frank, *Are Judges Human? Part Two: As Through a Class Darkly*, 80 U. PA. L. REV. 233, 242 (1931) (emphasis omitted).

62. This is a key theme in FRANK, *supra* note 13, at 111. Of course, it is possible that we could formulate good predictive theories even in the absence of knowledge about the causes of decision. Knowledge of deterministic causation guarantees prediction, but plainly the inverse does not hold. Yet Frank seems to assume—with at least good epistemic reason—that absent a knowledge of what causes judges to decide as they do, we will not be able to predict how they will decide.

But it is precisely this upshot of the Received View that ought to raise a question about its adequacy. For surely one of the most familiar themes in the writings of the Realists is their interest in predicting judicial decisions (or prophesying them, as some Realists put it).[63] But if on the Received View of Realism, prediction of judicial decision is impossible (as Frank would have it), then the Received View could not possibly be an adequate account of the views of all those Realists who aimed to provide predictive theories of judicial decision.

Notice, again, why the problem arises. Where decision is based on unfettered choice, then there is no way to predict decision: what gives us an anchor for prediction is precisely the presence of fetters.[64] If, for example, choice of decision is a rigid function of race or gender or class, then these fetters on decision form a basis for predicting decision.

But what "fetters" does the Frankified Received View offer? On the Received View, the foundation of judicial decision is the various idiosyncrasies of the individual judge, which not only govern his sense of justice on a given set of facts, but "the very processes by which he becomes convinced what those facts are."[65] Here, then, the problem is epistemological: There are indeed determinants of decision (as, of course, Frank's vulgar armchair Freudianism would imply), but they are inaccessible to the observer, the would-be predictor of judicial decision. No lawyer or scholar could possibly track all the peculiarities of life history and psychological coloring that go into the process of decision necessary to predict what judges do. When the "fetters" upon decision are idiosyncratic, the key to prediction will remain epistemologically opaque.[66]

We can now see the contours of the interpretation of the Core Claim that are needed to distinguish it from the Received View. First, choice of decision must, in fact, be sufficiently fettered that prediction is possible. And second, these fetters upon choice must not consist in idiosyncratic

63. *See, e.g.*, LLEWELLYN, *supra* note 47, at 4; O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 609-12 (1923).

64. There are really two senses of "fetters" at issue here. The Received View claims that the Realists believe there are no fetters on (at least many appellate) judicial decisions in the sense of fetters in the form of legal reasons. All the Realists do, in fact, accept this part of the Received View, so understood. What they reject, however, is the claim that there aren't fetters in the form of causal determinants of these decisions; thus, most Realists reject the image of judges as having unbounded volition in deciding cases—precisely the image that many writers infer from the Received View. (For clarification on these issues, I am indebted to Steven Burton.)

65. FRANK, *supra* note 13, at 110-11.

66. Notice that this means the emphasis on the theme of Judicial Volition is really mistaken even in the case of Frank: for Frank, judicial decisions are determined, so that, in reality, there is no room for judicial choice. It is just that both judges themselves, and we as observers of their behavior, will find it hard, if not impossible, to identify the determinants. For that, the hard work of Freudian psychoanalysis is required.

facts about individual judges, but rather must be of sufficient generality or commonality to be both accessible and to permit formulating general scientific laws of the kind that make prediction possible. I shall call the former the Determinism Thesis and the second the Generality Thesis. Supplement the Core Claim with these two theses, and you get not the Frankified Received View, but a view which, I shall claim, is the dominant view among Realists.

C. *Determinism and Generality*

What facts about judges would constitute both fetters on decision and be sufficiently common among judges that they would form the basis for lawful (or at least lawlike) predictive generalizations about patterns of decision? The Realists are, unfortunately, clearer about the patterns than about the fetters. Yet it is natural to construe them as offering something like an "inference to the best explanation":[67] given the actual existence of regular patterns of decision (which we Realists identify), the best explanation for the existence of such regularities must be that judges share certain features that channel their decisions into these patterns. We can make all this more concrete by considering some actual examples from the Realist literature.

The Realists tend to draw their best examples of the Core Claim from the realm of commercial law (rather, say, than constitutional law—a point of some significance, to which I return later). Typically, the Realists argue that what judges decide on the facts in such cases falls into one of two patterns: either (1) judges enforce the norms of the prevailing commercial culture; or (2) they try to reach the decision that is socio-economically best under the circumstances. Oliphant, looking at a series of conflicting court decisions on the validity of contractual promises not to compete, illustrates both ways in which decisions track the underlying facts of cases:

> [A]ll 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.[68]

Thus, in the former fact-scenarios, the courts enforced the prevailing norms (as expressed in guild regulations disfavoring such promises); in the latter

67. Gilbert H. Harman, *The Inference to the Best Explanation*, 74 PHIL. REV. 88, 88 (1965).
68. Oliphant, *supra* note 41, at 159.

cases, the courts came out differently because it was economically best under those factual circumstances to do so.

Llewellyn provides a similar illustration.[69] A series of New York cases applied the rule that a buyer who rejects the seller's shipment by formally stating his objections thereby waives 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. But a careful study of the facts of these cases revealed 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,"[70] 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"[71] that determine the course of decision.

Underhill Moore tried to systematize this approach in what he called "the institutional method."[72] 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 a bank must 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 "[i]nstitutional behavior—*i.e.*, behavior which frequently, repeatedly, usually occurs"[73]—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."[74] Put differently, what judges respond to is the extent to which the facts show a deviation from the prevailing norm in the commercial culture.

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69. *See* LLEWELLYN, *supra* note 47, at 122-24.

70. *Id.* at 124.

71. *Id.* at 126.

72. Moore & Hope, *supra* note 52.

73. *Id.* at 707.

74. Underhill Moore & Gilbert Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—VI. The Decisions, the Institutions, and the Degree of Deviation*, 40 YALE L.J. 1219, 1219 (1931).

We may call this approach—to distinguish it from Frank's "Idiosyncrasy Wing" of Realism[75]—the "Sociological Wing" of Realism, for reasons that will be made clear momentarily, if they are not apparent already. Notice, first, that the theory of the Sociological Wing—that judges enforce the norms of commercial culture or try to do what is socio-economically 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"[76] may sometimes influence judges, but what more typically determines the course of decision is the "situation-type," *i.e.*, the general pattern of behavior exemplified by the particular facts of the disputed transaction,[77] and what would constitute normal or socio-economically 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.[78]

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 is where 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.[79] The Realists did little more than gesture, however, at a suitable psycho-social explanation. "Professional judicial office," Llewellyn suggested, was "the most important among all the lines of factors which make for reckonability" of

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75. Frank was joined in this wing by Judge Hutcheson and the Yale psychologist Edward Robinson. *See* EDWARD STEVENS ROBINSON, LAW AND THE LAWYERS (1935); Hutcheson, *supra* note 42. The label ("Idiosyncracy Wing") is, however, mine.

76. LLEWELLYN, *supra* note 47, at 121.

77. This becomes clear in the sort of instructional materials Realists prepared, which were organized not around doctrinal categories, but rather around factual scenarios or "situation types." For example, Leon Green's torts casebook was originally organized not by the typical doctrinal categories (*e.g.*, negligence, intentional torts, strict liability), but rather by the situation types in which harms occur: *e.g.*, *Surgical Operations* (Chapter 2), *Keeping of Animals* (Chapter 3), *Manufacturers, Dealers* (Chapter 5), *Builders, Contractors, Workmen* (Chapter 6), *Traffic and Transportation* (Chapter 9). LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES at ix-x (1931). For Green, the Realist, there was no law of torts per se, but rather a regime of tort rules for "surgical operations," another for "manufacturers," etc. For a similar approach to a different area of law, see CHARLES ALAN WRIGHT, CASES ON REMEDIES (1955) (dividing the subject not by type of remedy, but by type of injury). A related view of law (notably contract law) has been taken up more recently in transaction cost economics. *See, e.g.*, WILLIAMSON, *supra* note 25, at 13-16.

78. *Cf.* Radin, *supra* note 51, at 357.

79. By dubbing the profile "sociological," I mean to be inclusive, rather than exclusive: the idea is that judges instantiate general characteristics, rather than idiosyncratic ones. What these general characteristics are may be illuminated by sociology, or social psychology, or anthropology.

decision;[80] "the *office* waits and then moves with majestic power to shape the man."[81] 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 . . . .[82]

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."[83] Felix Cohen, by contrast, simply lamented that "at present no publication [exists] showing the political, economic, and professional background and activities of our various judges,"[84] presumably because such a publication would identify the relevant "social" determinants of decision.[85]

Thus, if the Sociological Wing of Realism—Llewellyn, Moore, Oliphant, Cohen, Radin, among others—is correct, then judicial decisions are causally determined by the relevant psycho-social facts about judges, and at the same time judicial decisions fall into predictable patterns because these psycho-social facts about judges—their professionalization experiences, their backgrounds, etc.—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.

Notice, too, that for the Sociological Wing it should also be possible to craft legal rules that really would "guide" decision, or at least accurately describe the course of decision actually realized by courts. This is exactly 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.[86] Where it was impossible

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80. LLEWELLYN, *supra* note 47, at 45 (emphasis omitted).

81. *Id.* at 48 (emphasis in original).

82. *Id.* at 53.

83. Radin, *supra* note 51, at 358.

84. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 846 (1935).

85. "A truly realistic theory of judicial decisions," says Cohen, "must conceive every decision as something more than an expression of individual personality, as . . . even more importantly . . . a product of social determinants . . . ." *Id.* at 843. This notion is taken up at length in the extensive political science literature on judicial decisionmakiug. *See infra* text accompanying note 139.

86. *See* Oliphant, *supra* note 41, at 72. Charles Alan Wright, President of the American Law Institute and a self-identified Realist, points out to me that the Restatements have gradually moved in precisely the direction of crafting more fact-specific rules, reflecting the Realist insight.

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 UCC—an undertaking that would seem impossible for the Realist-as-Rule-Skeptic of popular imagination. 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.[87] "Good faith" requires, among other things, "the observation of reasonable commercial standards of fair dealing in the trade."[88] 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!

III. Naturalism and Pragmatism in Legal Theory

A. Introduction

So far, we have seen that the dominant view among Legal Realists is not the Frankified Received View so common in the secondary literature, but rather the Core Claim as seen through the lens of the Determinism and Generality Theses. On this account, Realists advance (1) a descriptive theory about the nature of judicial decision, according to which (2) judicial decisions fall into (sociologically) determined patterns, in which (3) judges reach results based on a (generally shared) response to the underlying facts of the case, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons.[89] If this theory of judicial decision-making is different from Frank's psychologistic interpretation of the Core Claim, it is even more different from the inquiries constituting traditional jurisprudential theories. It is to these profound differences with the mainstream of the jurisprudential tradition that I want to turn in the remainder of this Article.

As a jurisprudential theory, Realism is marked by two distinctive philosophical commitments: what I shall call "Naturalism" and "Pragmatism." According to the Naturalism, a satisfactory theory of adjudication must be continuous with empirical inquiry in the natural and social sciences.[90] According to the Pragmatism, a satisfactory theory of

87. U.C.C. § 1-203 (1994).

88. *Id.* § 2-103(1)(b).

89. Compare this formulation with the Received View set forth *supra* text accompanying notes 6-7.

90. For some representative statements of the "naturalistic" position in philosophy, see Daniel Dennett, *Foreword* to RUTH GARRETT MILLIKAN, LANGUAGE, THOUGHT, AND OTHER BIOLOGICAL CATEGORIES at ix-x (1984) and Peter Railton, *Naturalism and Prescriptivity*, *in* FOUNDATIONS OF MORAL AND POLITICAL PHILOSOPHY 155-63 (Ellen Frankel Paul et al. eds., 1990). Railton calls this view "methodological" naturalism. *Id.* at 155, 155-57.

adjudication for lawyers must enable lawyers to predict what courts will do.[91] Naturalism and Pragmatism are linked in the following way: To predict reliably and effectively what courts will do one should know what causes courts to decide as they do. The causes of judicial decision, in turn, are only available to the sort of empirical inquiry modeled on the natural and social sciences that the Realists advocate.[92] A naturalistic theory of adjudication, then, must produce a pragmatically valuable theory for lawyers, *i.e.*, one that will enable them to predict what courts will do.

In the following sections, I explicate the notions of Naturalism and Pragmatism and their relevance to legal theory—though I do so for differing reasons. In the case of Naturalism, its import for jurisprudence has yet to be recognized; in the case of Pragmatism, its import has been generally misunderstood or crudely understood. To construe the Realists as introducing Naturalism and Pragmatism into jurisprudence is to understand them to be doing something quite precise.

B. Naturalism

Naturalism is a familiar development in recent philosophy—indeed, it would not be wrong to say that it is the distinctive development in philosophy over the last thirty years. The linguistic turn of the first half of this century (in which traditional philosophical problems were framed as problems about our use of language) has either given way to or been supplemented by the naturalistic turn, in which traditional philosophical problems are thought to be insoluble by the a priori, armchair methods of the philosopher, and to require, instead, embedding in—or replacement by—suitable empirical theories.[93] To name the major philosophical thinkers

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91. I will follow the Realists in analyzing these problems primarily from the standpoint of litigators rather than transactional lawyers.

92. This assumes, of course, that the Realists are correct that the law is rationally indeterminate, *i.e.*, that the applicable legal reasons do not justify a unique outcome.

93. In some measure, this may sound surprising to those who associate recent philosophy with "postmodernism," understood as a philosophical position to the effect that there is no objective truth, that objective knowledge of the world is impossible, that there are no "essences," that the era of "metanarratives" (in Lyotard's famous phrase) is past. *See* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION at xxiii-xxiv (Geoff Bennington & Brian Massumi trans., 1984). Postmodernism in this philosophical sense, however, is distinguished by two characteristics: first, almost no philosophers believe it; second, it is supported by bad arguments. The two characteristics are obviously connected.

The had arguments take two forms: what we may call the "Disappointed Absolutist" argument (to borrow Hart's apt term for a similar view in *The Concept of Law*, HART, *supra* note 15, at 135), and the "Flesh & Blood" argument. The Disappointed Absolutist argument runs as follows: Assuming some impossibly high standard for what will count as "justification," "objectivity," or "semantic determinacy," it turns out that no beliefs are justified, that no claims about the world are objective, and that no texts have determinate meanings. *See id.* (noting that skepticism about legal rules often stems from the adoption of an unattainable standard for what is to count as a rule). The problem with this argument, which leads almost all philosophers to dissent from it, is that it never queries whether the

of the last quarter century is to name philosophers with profoundly naturalistic commitments (of varying sorts): W.V.O. Quine, Jerry Fodor, David Armstrong, David Lewis, Jaegwon Kim, and Alvin Goldman, among

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underlying standard of justification, objectivity, or semantic determinacy is sensible or plausible, or whether it is what we really mean when we talk about justification or objectivity or determinacy. *See, e.g.*, JOHN M. ELLIS, AGAINST DECONSTRUCTION 77-79 (1989); JAMES S. FISHKIN, BEYOND SUBJECTIVE MORALITY 129 (1984); HILARY PUTNAM, REASON, TRUTH AND HISTORY 160-68 (1981); Judith Jarvis Thomson, *Moral Objectivity*, *in* GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY 65, 154 (1996). (Some philosophers dissent for a slightly different reason: they think the high standard of justification or of objectivity can be met. *See, e.g.*, PANAYOT BUTCHVAROV, SKEPTICISM IN ETHICS 3-10 (1989). The postmodernist literature never evinces even an awareness of these arguments.)

The Flesh & Blood argument runs this way: since, as knowers, we cannot escape our human situation—we cannot transcend, as it were, our flesh and blood (not to mention our race, our gender, our class, etc.)—we can never have objective knowledge of the world. *See, e.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY 1, 5-6 (1989). To some extent, this argument piggy-backs on the Disappointed Absolutist argument. Yet it also introduces a new element, an explanation for why we cannot meet the high standards the latter argument presupposes: because we are always "situated." The mistake of this argument is to draw a false inference from the fact (is it an objective fact?) of our being "situated" to the conclusion that we cannot transcend our situation. There is certainly not a philosopher alive today who would deny that, as knowers, our beliefs about the world are shaped by our "situation": our particular cultural and historical moment, the particular traditions that inform our sensibility and judgment, the theoretical paradigms that determine how the world appears to us, and the natural and bodily endowment that may make us who we are. Almost all of this is banal in the post-Kantian philosophical universe; and even in the pre-Kantian one, it has its adherents, like Hume. (This notwithstanding Steven Winter's wildly mistaken claim that Hume was guilty of an "emphasis on Reason as a transcendent faculty." Steven L. Winter, Bull Durham *and the Uses of Theory*, 42 STAN. L. REV. 639, 658 (1990).) Even if we are situated—as no one denies—it may still be possible to have objective knowledge of a strongly objective world. This is precisely what post-Kuhnian and post-Quinean philosophers like Richard Boyd, Philip Kitcher, and Peter Railton have been arguing for the last twenty years. Perhaps they are wrong. But if they are, it is not because they do not recognize the banal fact that we are "situated"; rather, it is because their arguments for how we overcome the limits of our situation are wrong. But, once again, the postmodernist literature is blissfully unaware that there could even be such arguments.

In any event, it is safe to say that outside of parts of academic culture in the humanities, social sciences, and law, postmodernism (in the philosophical sense described above) has been almost completely irrelevant. Recent years, in fact, have witnessed a proliferation of essentialist theories about human beings and other naturalistic "metanarratives." Peter Kramer's best-seller is typical of the real zeitgeist. "Our culture is caught in a frenzy of biological materialism," observes Kramer. "[The] impressive, close-up view of the power of biology over an unexpectedly broad spectrum of human behavior [provided by psychopharmacological drugs like Prozac] . . . ha[s] done a good deal to move my assumptions about how people are constituted in the direction of the contemporary zeitgeist." PETER D. KRAMER, LISTENING TO PROZAC at xiii, xv (1993). Postmodernists would do well to heed Nietzsche's methodological proclamation that

> the basic text of homo natura must again be recognized: . . . To translate man back into nature . . . to see to it that man henceforth stands before man as even today, hardened in the discipline of science. . . . Why did we choose this insane task? Or, putting it differently: why have knowledge at all?

FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 161-62 (Walter Kaufmann trans., 1966). (On Nietzsche's naturalism, see Brian Leiter, *Nietzsche and Aestheticism*, 30 J. HIST. PHIL. 275, 278-80 (1992), and Brian Leiter, *The Paradox of Fatalism and Self-Creation in Nietzsche*, *in* WILLING AND NOTHINGNESS: SCHOPENHAUER AS NIETZSCHE'S EDUCATOR (Christopher Janaway ed., forthcoming 1998).)

others. It remains true, of course, that there are powerful philosophical voices aligned against Naturalism, like that of Richard Rorty,[94] or recent Hilary Putnam,[95] or John McDowell.[96] It is beyond the scope of this paper to explain fully where these philosophers go wrong, though I shall make some responsive points in what follows.[97] Suffice it to say that theirs is a minority position in contemporary philosophy.[98]

What really bears noticing here is that while every area of philosophy—metaethics, philosophy of language, epistemology, etc.—has undergone a naturalistic turn over the last quarter-century, Anglo-American legal philosophy has remained untouched by these intellectual developments. Of course, this observation constitutes no argument; what I hope to show in the following pages is that the isolation of Anglo-American jurisprudence in this regard is a mistake, and that it is in the Realists themselves that we will find the first paradigm for a naturalized jurisprudence.

1. The Varieties of Naturalism.—What is Naturalism and how is it relevant to legal theory? This is a large question, which will receive only a partial answer here.[99] I propose to concentrate in what follows on that aspect of Naturalism most relevant to an understanding of the Legal Realists, what I call below "Replacement Naturalism."

Naturalism in philosophy is always first a methodological view to the effect that philosophical theorizing should be continuous with empirical

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94. *See, e.g.*, RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE *passim* (1979).

95. *See, e.g.*, HILARY PUTNAM, *Objectivity and the Science/Ethics Distinction*, *in* REALISM WITH A HUMAN FACE 166 (1990). See also Putnam's reply to me—in which the anti-naturalism is quite explicit—in Hilary Putnam, *Replies*, 1 LEGAL THEORY 69, 70-72 (1995).

96. *See, e.g.*, JOHN MCDOWELL, MIND AND WORLD 66-86 (1994). McDowell views himself as a "naturalist," just not what he calls a "bald naturalist." *Id.* at 72. Many philosophers, myself included, are inclined to think that McDowell's "naturalism" simply represents an unprincipled expansion of the category to encompass precisely those phenomena that seem to have a dubious status in a naturalistic conception of the world. For critical discussion, see Crispin Wright, *Human Nature?*, 5 EUR. J. PHIL. 235 (1996) (reviewing MCDOWELL, *supra*).

97. For a splendid critique of McDowell's cryptic brand of anti-naturalism, see Jerry Fodor, *Encounters with Trees*, LONDON REV. BOOKS, Apr. 20, 1995, at 10, 10-11 (reviewing MCDOWELL, *supra* note 96). Of the many critiques of Rorty, one of the best and most to-the-point remains Jaegwon Kim, *Rorty on the Possibility of Philosophy*, 77 J. PHIL. 588 (1980).

98. If one looks at, say, the top five graduate programs in philosophy—Princeton, Rutgers, NYU, Michigan, and Pittsburgh—only Pittsburgh (where McDowell teaches) could be described as having any significant representation of the anti-naturalist position (broadly construed). By contrast, naturalism (in one shape or another) clearly dominates the research programs at Princeton, Rutgers, NYU, and Michigan. As Thomas Nagel (at NYU) has recently observed, the naturalistic approach "that sees philosophy as continuous with science, only more abstract and more general . . . is now very common among analytic philosophers, including many of the best minds in the subject. . . . [T]he Carnap-Quine [naturalistic] tradition has come to dominate the profession." THOMAS NAGEL, OTHER MINDS 6 (1995).

99. For a more substantial treatment, see Brian Leiter, *Naturalism and Naturalized Jurisprudence*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (Brian Bix ed., forthcoming 1998).

inquiry in the sciences.[100] The naturalist, following Quine, rejects the idea that there could be a "first philosophy," a philosophical solution to problems that proceeds a priori, that is, prior to any experience.[101] Instead, the philosophical naturalist demands continuity with the natural and social sciences in one or both of the following ways: what I will call "Results Continuity" and "Methods Continuity."

Results Continuity requires that the claims of philosophical theories be supported by the results of successful sciences. Epistemologists like Alvin Goldman look to the results of psychology and cognitive science to find out how the human cognitive apparatus really works; only with that information in hand, argues Goldman, can the epistemologist construct norms for how humans ought to form beliefs.[102] Methods Continuity, by contrast, demands only that philosophical theories emulate the methods of inquiry and styles of explanation characteristic of successful sciences.[103] Historically, this has been the most important type of Naturalism in philosophy, evidenced in writers from Hume to Nietzsche.[104] Hume and Nietzsche, for example, both construct "speculative" theories of human nature—modelled on the most influential scientific paradigms of the day (Newtonian mechanics, in the case of Hume; nineteenth-century physiology, in the case of Nietzsche)—in order to "solve" various philosophical problems.[105] Their speculative theories are "modelled" on the sciences most importantly in that they take over from science the idea that we can understand all phenomena in terms of deterministic causes.[106]

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100. The failure of philosophers to solve the so-called "demarcation problem"—*i.e.*, the problem of what demarcates genuine science from pseudo-science—does not, as far as I can see, doom this definition of naturalism, just as the "paradox of the heap" does not doom our ability to distinguish heaps from single grains—even if, in both cases, there are fuzzy borderline cases.

101. It bears emphasizing here that most contemporary naturalists do not go as far as Quine in repudiating the idea of a "first philosophy" (nor in embracing his austere physicalism—*see, e.g.*, CHRISTOPHER HOOKWAY, QUINE: LANGUAGE, EXPERIENCE AND REALITY 124 (1988)). While all would concur with Quine that philosophy cannot be exclusively an a priori discipline, most naturalists still think there is significant work for conceptual analysis to do. A classic example is ALVIN I. GOLDMAN, EPISTEMOLOGY AND COGNITION (1986).

102. *See* GOLDMAN, *supra* note 101, *passim*.

103. Such a view does not suppose the methodological unity of the various sciences; so as not to be empty, it does require that the methods of the sciences not be so various as to encompass all possible methodological postures.

104. On Hume, see the discussion in BARRY STROUD, HUME 1-16, 219-50 (1977); on Nietzsche, see the discussion in the sources cited *supra* note 93.

105. The similarity between these two thinkers goes even deeper. Both can be read as arguing that given the failure of rational vindications of our beliefs—moral and otherwise—we must seek a naturalistic explanation for them. If there is an important difference between Hume and Nietzsche, it is that Nietzsche's speculative theories are generally more plausible than Hume's.

106. "[T]he key to understanding Hume's philosophy is to see him as putting forward a general theory of human nature in just the way that, say, Freud or Marx did. . . . And the theories they advance are all, roughly, deterministic." STROUD, *supra* note 104, at 4. For Freud, the deterministic causes are various unconscious drives and desires; for Nietzsche, they include both drives and

Just as we understand events in the inanimate world by identifying the natural causes that determined them, so, too, we understand human beliefs, values, and actions by locating their causal determinants in various features of human nature.

Methodological Naturalists, then, construct philosophical theories that are continuous with the sciences either in virtue of their dependence upon the actual results of scientific method in different domains or in virtue of their employment and emulation of distinctively scientific ways of looking at and explaining things.[107] But we must still distinguish between two different branches of Methodological Naturalism: the Quinean and the Goldmanesque. The former I will call Replacement Naturalism; the latter Normative Naturalism. Goldman's paradigm of Normative Naturalism has dominated philosophical research in the area,[108] though it is Quine's notion of Replacement Naturalism that bears most immediately on Legal Realism. Since both Replacement and Normative Naturalists share the methodological commitment distinctive of Naturalism—to make philosophical theorizing continuous with and dependent upon scientific theorizing—the difference must be located elsewhere: not in methodology, but in goal. According to Replacement Naturalists, the goal of theorizing is description or explanation; according to Normative Naturalists, the goal

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physiological causes. *See* Leiter, *The Paradox of Fatalism and Self-Creation in Nietzsche*, *supra* note 93. Other aspects of scientific "method" that have also been influential in philosophy include a commitment to seeking empirical confirmation of theoretical claims, and, concomitantly, a commitment to the experimental method.

107. Many naturalists go beyond methodological naturalism, however, and embrace a substantive doctrine. "Substantive Naturalism" in philosophy is either the "ontological" view that the only things that exist are natural or physical things; or the "semantic" view that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry. In the ontological sense, Substantive Naturalism is often taken to entail physicalism—the doctrine that only those properties picked out by the laws of the physical sciences are real. In the semantic sense, Substantive Naturalism is just the view that predicates like "morally good" can be analyzed in terms of characteristics—*e.g.*, "maximizing human well-being"—that admit of empirical inquiry—*e.g.*, by psychology and physiology, assuming that well-being is a function of psychological and physical condition.

Many philosophers are drawn to some type of Substantive Naturalism by their Methodological Naturalism: being a philosophical naturalist in the methodological sense sometimes leads a philosopher to think that the best philosophical account of some concept or domain will be in terms that are substantively naturalistic. But it is important to notice that a commitment to Methodological Naturalism does not entail this conclusion: methodologically, it is an open question whether the best philosophical account of morality or mentality or law must be in substantively naturalistic terms. Too often, it seems to me, philosophers conflate "naturalism" with substantive naturalism. *See, e.g.*, Philip Pettit, *Naturalism*, *in* A COMPANION TO EPISTEMOLOGY 296-97 (Jonathan Dancy & Ernest Sosa eds., 1992) ("[Naturalism] is the doctrine that there are only natural things: only natural particulars and only natural properties."); Steven J. Wagner & Richard Warner, *Introduction* to NATURALISM: A CRITICAL APPRAISAL 1-3 (Steven J. Wagner & Richard Warner eds., 1993). But from the standpoint of the Methodological Naturalist, this prejudges too many issues in precisely the a priori fashion that Methodological Naturalism was meant to rule out.

108. *See, e.g.*, Philip Kitcher, *The Naturalists Return*, 101 PHIL. REV. 53 (1992) (surveying recent literature).

is regulation of practice through the promulgation of norms or standards.[109] I plan to concentrate here on Replacement Naturalism; I take up the relationship between Realism and Normative Naturalism elsewhere.[110]

The locus classicus of Replacement Naturalism is, of course, Quine's 1968 paper, *Epistemology Naturalized*.[111] The central enterprise of epistemology on Quine's view is to understand the relation between our theories of the world and the evidence (*i.e.*, sensory input) on which they are based. Quine's target is one influential construal of this project: Cartesian foundationalism, particularly in the sophisticated form given to it in the twentieth century by Rudolf Carnap in *Der Logische Aufbau der Welt*.[112] The foundationalist wants an account of the theory-evidence relation that would vindicate the privileged epistemic status of at least some subset of our theories: our theories (in particular, our best theories of natural science) are to be "grounded" in indubitable evidence (*e.g.*, immediate sense impressions). As is quite familiar, foundationalism, for Quine, is a failure, rendered unrealizable by Quinean meaning holism on the one hand (theoretical terms get their meanings from their place in the whole theoretical framework, not in virtue of some point-by-point contact with sensory input), and the Duhem-Quine thesis about the underdetermination of theory by evidence on the other (there is always more than one theory consistent with the evidence, in part, because a theoretical hypothesis can always be preserved in the face of recalcitrant evidence by abandoning the auxiliary hypotheses that informed the test of the hypothesis).[113]

What becomes, then, of epistemology? Hilary Kornblith has summed up Quine's view as follows:

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109. Notice that this latter goal is not peculiar to Normative Naturalism—it is equally well the goal of traditional epistemology, from Descartes to the early Carnap. The methods employed to realize this goal distinguish the Normative Naturalist from the traditional epistemologist. *See* GOLDMAN, *supra* note 101, at 6-9 (contrasting scientific approaches to cognition with historical epistemology).

110. *See* Leiter, *supra* note 99.

111. W.V. Quine, *Epistemology Naturalized*, *in* ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69 (1969); *see also* W.V. Quine, *Grades of Theoreticity*, *in* EXPERIENCE AND THEORY 1 (Lawrence Foster & Joe Swanson eds., 1970).

112. RUDOLF CARNAP, DER LOGISCHE AUFBAU DER WELT (1928). The title is usually translated as "The Logical Structure of the World," though the literal rendering of *aufbau* as "building-up" conveys nicely the foundationalist flavor of the project.

113. See the astute summary in Jaegwon Kim, *What is "Naturalized Epistemology"?*, 2 PHIL. PERSPECT. 381, 385-86 (1988). For reasons of simplicity of presentation, I am blurring two issues here. The foundationalist program, at least in the early Carnap (who later repudiates it), has two parts: semantic and epistemic. The semantic program is to translate all sentences referring to physical objects into the language of sense-data (*e.g.*, "I am being appeared to greenly now."). The epistemic program is to show that scientific theories about the physical world are uniquely justified on the basis of sensory experience. Semantic holism dooms the first project. Hume on induction and the Duhem-Quine thesis about underdetermination doom the second.

> 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.[114]

This view Kornblith aptly dubs Quine's "replacement thesis": "the view that epistemological questions may be replaced by psychological questions."[115] Here is how Quine puts it:

> The stimulation of his sensory receptors is all the evidence anybody has had to go on, ultimately, in arriving at his picture of the world. Why not just see how this construction really proceeds? Why not settle for psychology? Such a surrender of the epistemological burden to psychology is a move that was disallowed in earlier times as circular reasoning. If the epistemologist's goal is validation of the grounds of empirical science, he defeats his purpose by using psychology or other empirical science in the validation. However, such scruples against circularity have little point once we have stopped dreaming of deducing science from observations.[116]

Quine continues that on his proposal,

> [e]pistemology, or something like it, simply falls into place as a chapter of psychology and hence of natural science. It studies 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. The relation between the meager input and the torrential output is a relation that we are prompted to study for somewhat the same reasons that always prompted epistemology; namely, in order to see how evidence relates to theory, and in what ways one's theory of nature transcends any available evidence.[117]

Thus Quine: the central concern of epistemology is the theory-evidence relationship; if the foundationalist story about this relationship is a failure, then that leaves only one story worth telling about this relationship, namely, the story told by "a purely descriptive, causal-nomological science of human cognition."[118] The science of human cognition replaces armchair epistemology: we naturalize epistemology by turning over its central

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114. Hilary Kornblith, *Introduction: What Is Naturalistic Epistemology?*, *in* NATURALIZING EPISTEMOLOGY 4 (Hilary Kornblith ed., 2d ed. 1994).

115. *Id.* at 4.

116. Quine, *Epistemology Naturalized*, *supra* note 111, at 75-76.

117. *Id.* at 82-83.

118. Kim, *supra* note 113, at 388.

question—the relationship between theory and evidence—to the relevant empirical science.

We can now generalize Quine's point as follows. Let us say that a Replacement Naturalist in any branch of philosophy holds that:

> For any pair of relata that might stand in a justificatory relation—*e.g.*, evidence and theory, reasons and belief, legal reasons and judicial decision—if no normative account of the relation is possible, then the only theoretically fruitful account is the descriptive/explanatory account given by the relevant science of that domain.[119]

This generalizes Quine's point in one important respect, for Quine infers Replacement Naturalism only from the failure of foundationalism—which is simply one possible normative account of the evidence-theory relationship, but not the only one. Quine's arguments simply do not show that no other normative account of the evidence-theory relationship is possible. Quine has been extensively criticized on precisely this score.[120] The key to a successful defense of Replacement Naturalism, in my view, lies in the implicit notion of fruitfulness of theoretical investigation. The Quinean rejoinder must take the form of saying: "Once we give up on the foundational project of justification, nothing we have to say about justification will be of much theoretical interest; theorizing about justification will collapse, as it were, into a banal descriptive sociology of our justificatory practices."[121] Put more simply: if we can't carry out the

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119. One might, of course, hold that the descriptive account just gives us all there is to justification: so, *e.g.*, describing the causal history of a belief may be all there is to justifying that belief. See the discussion in Fodor, *supra* note 97. The possibility, however, has no bearing on the project here.

120. *See, e.g.*, BARRY STROUD, THE SIGNIFICANCE OF PHILOSOPHICAL SKEPTICISM 211-54 (1984); Stephen Stich, *Naturalizing Epistemology: Quine, Simon and the Prospects for Pragmatism*, *in* PHILOSOPHY AND COGNITIVE SCIENCE 3-5 (Christopher Hookway & Donald Peterson eds., 1993); *see also* GOLDMAN, *supra* note 101, at 3, 2-3 (arguing that "traditional epistemology has a strong evaluative normative strain" neglected by Quine's conception of epistemology as a branch of psychology); Kim, *supra* note 113, at 391. For a rather different view, however, see Richard Foley, *Quine and Naturalized Epistemology*, 19 MIDWEST STUD. PHIL. 243 (1994). Foley rejects the "standard interpretation of Quine's view,"—roughly, my interpretation in the text—calling attention instead to places where Quine affirms a normative role even for his naturalized epistemology. *Id.* at 246, 246-50. While Foley correctly recognizes that for Quine these norms admit of no a priori justification, he seems to think this is trivial, since (1) the norms Quine favors are ones we could almost never give up anyway; and (2) Quine identifies them, according to Foley, from the "armchair" rather than empirically. *Id.* at 253-59. Foley's provocative paper, in my view, underestimates how much of a break this really is from the tradition, and overestimates how much normative epistemology Quine really offers. I hope to take up these ideas elsewhere.

121. This view of Quine is implicit in Rorty's provocative interpretation in RORTY, *supra* note 94, at 165-212. As Rorty says of Wilfrid Sellars and Quine: "[T]heir holism is a product of their commitment to the thesis that justification is not a matter of a special relation between ideas (or words) and objects, but of conversation, of social practice. . . . [W]e understand knowledge when we understand the social justification of belief . . . ." *Id.* at 170. But this gets Quine wrong in an

program of normative foundationalism, then we might as well do something useful and interesting, namely empirical theory.

Why is normative theory sterile without foundationalism? Let me give one brief example to illustrate the point. It is now a familiar result of cognitive psychology that human beings regularly make mistakes in logical reasoning.[122] So a mere descriptive theory of belief-formation, of the sort Quine appears to recommend, would simply record these mistakes. But shouldn't epistemology tell us that beliefs ought not to be formed illogically? One can hardly imagine why Quine would disagree: one ought not to form beliefs illogically. But the question is whether this piece of banal advice adds up to a fruitful research program. Quine, I take it, thinks it does not. The descriptive project of Replacement Naturalism may record certain irrational cognitive processes in studying the evidence-theory relationship, but given the underdetermination of theory by evidence, even when we correct for logical mistakes, we still won't have an account of which theoretical beliefs are warranted and which are not. The Quinean intuition is that we'll learn more from the empirical inquiry than from systematizing our mundane normative intuitions about irrationality. Moreover, this latter project will still have to collapse into the descriptive sociology of knowledge unless we have some foundational point outside our epistemic practices from which to assess the epistemic issues. Otherwise we can do no more than report what it is we do. But it is precisely the viability of such an external standpoint that Quine denies.[123]

2. Naturalism and Legal Theory.—We saw that Quine's argument for Replacement Naturalism moved in two steps. Step one was antifoundationalism: no unique theory is justified on the basis of the evidential input. Step two was replacement: since no foundational story can be told about the relation between input (evidence) and output (theory), why not replace the normative program with a purely descriptive inquiry, *e.g.*, the psychological study of what input causes what output? We can

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important respect, for it makes it sound like Quine has some positive view about justification, namely that it consists in "social practice." But Quine's point, as I read him, is that there's nothing to "understand [about] knowledge" at all, if "understanding knowledge" means understanding justification. If we could have told the foundationalist story about justification, that would have been interesting, but we can't, thinks Quine, so justification simply drops out of the picture as a topic for fruitful theoretical inquiry. Someone might do the descriptive sociology and map the "social justification of belief" as we find it, but that wouldn't shed special light on justification. Quine's preferred alternative is to study the evidence-theory relationship as a matter of empirical psychology—again, not as a way of analyzing "justification," but as a way of understanding "knowledge," *i.e.*, the "theories" we construct on the basis of meager evidence.

122. For an overview of some relevaut results, see Stephen P. Stich, *Could Man Be an Irrational Animal?*, 64 SYNTHÈSE 115, 116-20 (1985), *reprinted in* NATURALIZING EPISTEMOLOGY, *supra* note 114.

123. *Cf. infra* note 172 and accompanying text (discussing pragmatism and "Neurath's boat").

find, I shall argue, analogues of both steps in the Realists' approach to the theory of adjudication.

Theory of adjudication is concerned not with the relationship between "evidence" and "scientific theory," but rather with the justificatory relationship between "legal reasons" (the input, as it were) and judicial decision (the output). Theory of adjudication tries to tell judges how they ought to decide cases, *i.e.*, it seeks to "ground" judicial decisionmaking in reasons that require unique outcomes.[124] The Realists are "anti-foundationalists" about judicial decisions in the sense that they deny that the legal reasons justify a unique decision: the legal reasons typically underdetermine the decision (at least in most cases actually litigated through the stage of appellate review). More precisely, the Realists claim that the law is rationally indeterminate in the sense that the class of legal reasons—*i.e.*, the class of legitimate reasons a judge may offer for a decision—does not provide a justification for a unique outcome.[125] Just as sensory input does not justify a unique scientific theory, so legal reasons, according to the Realists, do not justify a unique decision.

The Realists also take the second step that Quine takes: replacement. According to the Realist indeterminacy thesis, legal reasons underdetermine judicial decisions, meaning that the foundationalist enterprise of theory of adjudication is impossible. 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?[126] To give such an account is just to vindicate the Core Claim of Realism. As Underhill Moore puts it at the beginning of one of his articles: "This study lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field . . . ."[127] Notice how closely this echoes Quine's idea that, "Epistemology . . . simply falls into place as a

124. I take it this last assumption about the ambitions of theory of adjudication is contested in BURTON, *supra* note 4 and in Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 235 (1989). I take up the general worry *infra* subsection III(B)(2)(b).

125. That the Realists think the law is "indeterminate" is, of course, quite familiar. On some of the problems about how to formulate the Realist view about indeterminacy, see Leiter, *supra* note 30.

126. Such a naturalized jurisprudence would be in tension with most of modern legal philosophy, which follows H.L.A. Hart in accepting a hermeneutic model for understanding the social world. *See, e.g.*, Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, *in* LAW AND INTERPRETATION 97 (Andrei Marmer ed., 1995). According to this model, we do not look for lawful regularities in the external behavior of social actors; rather, to understand social actors we must adopt their "internal" point of view and understand, for example, what their reasons mean to them. *See id.* at 102-12. We can understand the Realists as contesting whether such an approach is really more explanatorily and predictively fruitful than their non-hermeneutic approach to the social world.

127. Moore & Callahan, *supra* note 56, at 1.

chapter of psychology . . . ."[128] Jurisprudence—or, more precisely, the theory of adjudication—is "naturalized" because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology). Moreover, it does so for the essentially Quinean reason that the foundational account of adjudication is a failure—a consequence of accepting the Realists' famous claim that the law is indeterminate.[129]

We must note immediately, however, four potential problems for this account. First, insofar as the Realists do not claim that the law is indeterminate in all cases, the analogy with Quine collapses. Second, the analogy also fails insofar as theory of adjudication is not essentially a foundationalist program. Third, even if legal reasons underdetermine the decision, there still may be nonlegal reasons—*e.g.*, reasons of morality or policy—that do justify a unique decision; in which case, why think this must be described in strictly naturalistic or "causal" terms? Fourth, even if each of these problems is overcome, it still seems that not all of jurisprudence has been naturalized: for example, the Realist argument for the indeterminacy of law is parasitic upon a conceptual account of the criteria of legality, *i.e.*, of the legitimate sources of law. I take up each of these issues in turn.

a. Global Indeterminacy.—As noted earlier, the Realists, unlike the later writers of Critical Legal Studies, do not claim that the law is "globally" indeterminate: they do not claim that the class of legal reasons fails to justify a unique outcome in all cases, but rather fails to do so "locally," *i.e.*, in a particular range of cases, particularly those that reach the stage of appellate review.[130] But to concede that there is some other range of cases where the law is determinate is just to concede that the "foundationalist" program can be carried out for those cases: that is, we can give an account of the unique decision justified by the applicable legal reasons. But the possibility of foundationalism eliminates the motive for replacement of the normative inquiry with a purely descriptive one. Thus, it appears the analogy with Quinean Replacement Naturalism breaks down.

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128. Quine, *Epistemology Naturalized*, *supra* note 111, at 82.

129. If this account provides a philosophical pedigree for one strand in Realism, it does so, of course, at the cost of getting the chronology all wrong: Moore's remark, for example, predates Quine's by a quarter-century! Yet both Quine and the Realists were nurtured in a similar intellectual millieu—one dominated by "naturalism" and, more particularly, by behaviorism in psychology. In any event, the point of introducing Quine here is only to establish the intellectual credentials for the style of argumentation we find in the Realists. The Realists depart from Quine, needless to say, on many issues—as might many philosophers who nonetheless accept naturalism and the rejection of the analytic-synthetic distinction. *See, e.g.*, HOOKWAY, *supra* note 101, at 124 ("It is not out of the question that someone could accept the views defended in 'Two dogmas' yet deny Quine's version of physicalism.").

130. *See supra* text accompanying note 31.

The Realist may concede as much, and indeed, has no reason not to do so. For the Realist does not call for "naturalizing" theory of adjudication in that range of cases where legal reasons are satisfactory predictors of legal outcomes—in precisely those cases where the foundationalist program can be carried out.[131] One may worry, again, about whether there is an interesting or fruitful normative story to be told (rather than a merely mundane one), but it suffices for the analogy with Quine that there remains some substantial domain of cases where the foundational program cannot be carried out, so that the case for replacement remains intact.

b. Foundationalism.—Perhaps, though, theory of adjudication—even for "hard" cases—is not a foundationalist theory: it may aspire to delimit the range of legal reasons that ought to be brought to bear in deciding some legal question, but it does not seek to delimit the reasons such that they justify a unique outcome. In that case, the fact that the reasons underdetermine the outcome does not threaten the genuine normative ambitions of theory of adjudication.

This objection is just a variation on one of the familiar objections to Quinean Naturalism, namely, that it wrongly infers the futility of normative theorizing from the failure of only one sort of normative program, *i.e.*, foundationalism.[132] The proper naturalistic rejoinder, as noted earlier, is to query whether nonfoundational normative theorizing is a fruitful undertaking. This worry is particularly vivid in the case of theory of adjudication. If the objection under consideration is correct, then a normative theory that specifies what the antifoundationalist concedes—namely, that there is more than one (though not simply any) judicial decision that can be justified on the basis of the class of legal reasons—must, in some measure, be a theory worth having. Arguably, such a theory might be adequate to deflect the challenge to the political legitimacy of adjudication based on the indeterminacy of law,[133] but does it provide the normative guidance to judges we want from a theory?[134] Does a theory that tells judges they would be justified, on the basis of the class of legal reasons, in deciding for the plaintiff on theory x or the defendant on theory y—but not the plaintiff or defendant on theory z!—really provide normative guidance for judges worth having? My lawyerly intuition is that normative

131. *See infra* notes 156-83 and accompanying text (discussing "Pragmatism").

132. *See* Kim, *supra* note 113, at 385-89.

133. *See, e.g.*, BURTON, *supra* note 4, at 112; Kress, *supra* note 124, at 285-95. I adopted a similar view in Coleman & Leiter, *supra* note 35, at 579-80, but I now think that part of the argument is mistaken.

134. Consider the analogous question that the Quinean might pose to the nonfoundationalist epistemologist: do we provide useful normative guidance to scientists when we tell them that they are justified in accepting more than one—though not simply any—theory in light of the evidence?

guidance like this, which underdetermines the final outcome, is not of much value to judges or to lawyers. Indeed, if we take seriously the pragmatic ambition of the Realists—to enable lawyers to predict what courts will do—then formulating a nonfoundational normative theory of adjudication will be inadequate, precisely because it provides the lawyer with insufficient tools for predicting the actual decision in the case at hand.[135]

c. Nonlegal Reasons.—Yet even the Realists concede that judges decide for reasons; it is just that they do not decide for reasons of law, which are indeterminate. For example, in the context of commercial disputes, some of the Realists claim that what judges try to do is enforce the norms of commercial practice: the norms of commercial practice provide reasons for deciding one way rather than another.[136] Even granting the truth of antifoundationalism regarding legal reasons, then, why think we should replace such theories with "naturalistic" ones, *i.e.*, with descriptive accounts of what "inputs" cause what "outputs"? Moreover, if we do think such naturalistic explanations are called for in those cases that involve consideration of nonlegal reasons, why confine naturalistic explanations only to those cases: why not, in other words, demand a naturalistic explanation of even "easy" cases, controlled by rationally determinate legal reasons? Put more simply, the challenge is this: why "naturalize," in the sense of seeking deterministic causes, where reasons, legal or nonlegal, will suffice to explain?

A Realist has at least four possible responses:[137]

First: Conceding the relevance of nonlegal reasons does not obviously defeat the naturalistic program. To give a causal explanation of decisions in terms of reasons does require taking the normative force of the reasons qua reasons seriously.[138] So to give a causal explanation of the decision, as the naturalist wants to do, we must attend to the rationality of the reasons. But this is just a constraint on naturalization in the domain, not an objection to the naturalistic program.

The difficulty with resting content with this line of response is twofold. First, it makes "naturalistic" explanation redundant on ordinary explanation by appeal to reasons, unless we supplement the latter with a naturalistic account of reasons. But this suggests a second problem. For

135. Writers like Burton who do not accept Pragmatism (in my sense) as a constraint on theorizing will, presumably, be unmoved by this objection. *See* BURTON, *supra* note 4, at 128-29.

136. As noted earlier, this descriptive claim informed Llewellyn's drafting work on Article 2 of the UCC. *See supra* text accompanying notes 86-88. For a rich discussion, see White, *supra* note 40.

137. The discussion that follows is indebted to fruitful debates on these issues with Jules Coleman, Joseph Raz, and Scott Shapiro.

138. For the seminal discussion, see Donald Davidson, *Actions, Reasons, and Causes*, 60 J. PHIL. 685 (1963), *reprinted in* ESSAYS ON ACTIONS AND EVENTS 3 (1980).

presumably we could just as well "naturalize" the decision of easy cases, where the legal reasons are determinate. The rule says, "Anyone going faster than fifty-five miles per hour shall pay a fifty dollar fine." Newt was clocked going faster than fifty-five miles per hour. Therefore, the judge decides, Newt must pay the fine. No doubt we could tell a "naturalistic" story about the normativity of the reasons that figure in this decision—*e.g.*, about the psychological mechanisms that make deductive inferences possible and "intuitive" to creatures like us—but surely this seems like a pointless exercise. Where reasons rationalize a decision determinately, why think there is any need for a naturalistic explanation, even if one could be given? This suggests the need for a second, more promising, response.

Second: If we are going to invoke intuitions about whether naturalistic explanations that do not invoke reasons as causes are more or less useful—or "fruitful" or "needed"—than rationalizing explanations, then surely it is an open empirical question which sorts of explanations we should prefer. The enormous political science literature trying to correlate judicial decisions with the background of judges is predicated on the assumption that the former, not the latter, explanations are more interesting and more illuminating. This literature seeks to "explain" judicial decisions without reference to reasons, not because such reasons couldn't be given—no doubt the Republican judges, for example, have "Republican" reasons for deciding as they do—but because it is thought that the "naturalistic" explanations here are more useful, more fruitful, and more informative than the explanations in terms of reasons.[139] The Realist might concede, then, that we could understand judicial decisions in terms of responsiveness to nonlegal reasons, but contend that naturalistic explanations that make no reference to reasons, but only to relevant psycho-social facts about judges, represent the more fruitful way to go.

But whether this is true, to repeat, is an open empirical question, and thus the Realist would do well to have additional responses.

Third: The most likely response for the Realist to make—and, indeed, the most plausible—is to claim that even the nonlegal reasons—*e.g.*, reasons of "policy" or of "morality"—are rationally indeterminate: just as the legal reasons underdetermine the decision, so, too, do the nonlegal

139. *See, e.g.*, Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966); Stuart Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981).

reasons. The fact that moral considerations are not "objective" makes it likely that moral reasons will be indeterminate.[140] We can also understand certain CLS arguments as supporting the same point about the indeterminacy of moral and policy reasons.[141] If these considerations are correct, then any explanation of the decision in terms solely of reasons, legal or nonlegal, will necessarily be incomplete. The Realist goal is to locate and articulate the real cause of the decision, which requires going beyond the domain of reasons.[142]

Fourth: Even where reasons are rationally determinate, there is still work for a naturalistic story to do. Often it is interesting and informative—rather than trivial—to understand why persons respond to the reasons they do. Some law professors find considerations of efficiency compelling; others respond more to reasons arising out of empathetic engagement with the experiences of actual individuals. These differences often track differences in character, personal style, and temperament. Of course, if we assume that responsiveness to reasons is determined exclusively by considerations of rationality, then we will be confident that reason itself tells all there is to tell about why persons respond to particular reasons: either they are rational or irrational. What is known as the "Strong Programme" in the sociology of knowledge[143] denies this: what passes as "rationality" itself, as much as irrationality, requires explanation in terms of social and psychological forces. We needn't go that far, however. It suffices to render naturalistic explanations illuminating if we assume that there are incommensurable rational systems, so that within any system, there are purely rational explanations for decisions, but the fact that an agent has adopted that rational system itself requires nonrational, naturalistic explanation. Philosophers, Nietzsche says,

> . . . all pose as if they had discovered and reached their real opinions through the self-development of a cold, pure, divinely unconcerned dialectic . . . .; while at bottom it is an assumption, a hunch, indeed a kind of "inspiration"—most often a desire of the

140. On this issue, with particular reference to Ronald Dworkin's curious writings on the subject, see Brian Leiter, *Objectivity, Morality, and Adjudication*, *in* OBJECTIVITY IN LAW AND MORALS (Brian Leiter ed., forthcoming 1998).

141. For an illuminating overview, see Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986).

142. The assumption here is that reasons are insufficient to cause a decision when they do not rationally justify the decision, assuming the judges are rational. For more on this, see Leiter, *supra* note 30.

143. *See, e.g.*, BARRY BARNES, SCIENTIFIC KNOWLEDGE AND SOCIOLOGICAL THEORY (1974); DAVID BLOOR, KNOWLEDGE AND SOCIAL IMAGERY 3-23 (1991); Barry Barnes & David Bloor, *Relativism, Rationalism and the Sociology of Knowledge*, *in* RATIONALITY AND RELATIVISM 21 (Martin Hollis & Steven Lukes eds., 1982).

> heart that has been filtered and made abstract—that they defend with reasons they have sought after the fact.[144]

From this Nietzsche concludes we need a two-step naturalistic explanation of the views of a philosopher: we explain the philosophical views in terms of the "morality" at which he "aim[s]"; but we explain the "morality" at which he aims in terms of "the innermost drives of his nature."[145] Substitute talk of a judge's decision for the views of the philosopher, and we quickly recognize the Frank-Hutcheson "hunch" theory of judicial decision: we explain the decision in terms of the "hunch," and we explain the "hunch" psychoanalytically (at least for Frank). But even the Sociological Wing of Realism could propose that responsiveness to reasons itself requires explanation, it is just that the relevant explanation is sociological in character, not psychological.

d. Naturalized Jurisprudence?—Even if the Realist is successful in defending his case for the "naturalization" of theory of adjudication (on the Quinean model), this hardly shows that jurisprudence has been naturalized. Recall, for example, that to make the case for Replacement Naturalism we must make the case for antifoundationalism which, in the legal case, is just the claim that the class of legal reasons does not justify a unique decision—*i.e.*, the law is "rationally" indeterminate.[146] But it is impossible to formulate an argument for rational indeterminacy of law without presupposing certain conceptual views about the criteria of legal validity.[147] When Holmes, for example, chalks up judicial decision not to law but to a half-conscious judgment of policy,[148] he is plainly presupposing that reasons of policy are not part of the "law" in the sense of the class of legitimate recognized *legal* reasons. And in demonstrating the indeterminacy of law by concentrating on indeterminacy in the interpretation of statutes and precedents,[149] Realists like Llewellyn and Radin seem to be supposing that these exhaust the authoritative sources of law.[150] This means, of course, that the Realists are working with an implicit theory of the concept of law, a theory on which the argument for indeterminacy

144. NIETZSCHE, *supra* note 93, at 12.

145. *Id.* at 14.

146. *See supra* text accompanying notes 111-29.

147. *See generally* Leiter, *supra* note 30.

148. *See* Holmes, *supra* note 63, at 467.

149. *See, e.g.*, LLEWELLYN, *supra* note 32, at 70-76; Llewellyn, *supra* note 32, at 401-06 (attributing indeterminacy to conflicting canons of statutory interpretation); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-85 (1930) (analyzing indeterminacy in statutory interpretation); *see also* Leiter, *supra* note 16, at 268-69.

150. Llewellyn even remarks on one occasion that judges take rules "in the main from authoritative sources (which in the case of the law are largely statutes and the decisions of the courts)." LLEWELLYN, *supra* note 32, at 13.

piggy-backs. (Indeed, in many respects they seem to hold to a fairly crude type of legal positivism as a conceptual theory.[151]) But this implicit conceptual theory is manifestly not a naturalized theory: the "concept" of law is not illuminated or fixed by empirical inquiry in the natural and social sciences. So it seems that there is still room for non-naturalized jurisprudence, after all.

And so there is! But I do not see that the Realist should argue otherwise. The Realists call for the "naturalization" of theory of adjudication; but in so arguing, they may require traditional philosophical help in crafting theories of the "concept" of law that analytic jurisprudents have typically provided. Jurisprudence per se is not naturalized—just that part of jurisprudence concerned with the theory of adjudication. For Quine, of course, to naturalize philosophy is just to put philosophers out of business and turn the whole affair over to empirical inquirers.[152] But Quine's conception of naturalization is especially radical in this regard. Most "naturalistic" philosophers think that there remains some characteristically philosophical work to do (*e.g.*, conceptual analysis[153]), even if philosophical questions ultimately require naturalistic answers.[154] The Realists naturalize theory of adjudication, but that still leaves conventionally philosophical work to be done in the broader field of jurisprudence.[155]

C. Pragmatism

1. What is Pragmatism?—Unlike Naturalism, "Pragmatism" is surely a familiar term to lawyers. Unfortunately, it has been so recklessly overused in recent years that it has been rendered, by now, either utterly

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151. *See* Leiter, *supra* note 16, at 268-69. I say "crude" positivism, because positivists have historically recognized customary practices as legitimate sources of law, while the Realists often seem to assume that law is exhausted by legislation and court decisions. *See id.* Of course, even this assumption could be better defended within the contours of a positivistic theory than any of the typical "natural law" alternatives.

152. Or it means that philosophers have to take up "[a]rmchair [empirical] learning theory," which Quine increasingly does. HOOKWAY, *supra* note 101, at 55.

153. Quine's famous attack on the analytic-synthetic distinction and the factuality of "meaning" has embarrassed a lot of philosophers out of saying openly that this is what they are doing (*i.e.*, conceptual analysis or the analysis of meaning). *See* WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20-37 (1953). But once one concedes the temporally and perhaps culturally relative character of the concepts to be analyzed—as most contemporary philosophers do, *cf.* Kim, *supra* note 97, at 592-96 (responding to Rorty)—then there is no reason to be worried about Quine's attack.

154. This is certainly true of Alvin Goldman's program which, as noted earlier, is the paradigm for most philosophical research in the area. *See* GOLDMAN, *supra* note 101, at 1-3.

155. Realism, as I hope to show on another occasion, needs Legal Positivism as its conceptual theory of law.

banal or simply empty.[156] The banality is particularly evident in discussions of the "Pragmatism" of the Realists. For example, Joseph Singer writes that:

> The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends. Law and legal reasoning are a part of the way we create our form of social life.[157]

Although there is little to disagree with in this pleasantly innocuous "pragmatic" attitude, one ought to worry that this is because hardly anyone has ever disagreed with these sentiments.[158] If the Realists are pragmatists, it had better be in a sense more interesting than this.

But what is the more interesting sense of Pragmatism? Contrary to the impression left by much recent "jurisprudential" writing,[159] to be a

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156. *See, e.g.*, Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Steven Walt, *Some Problems of Pragmatic Jurisprudence*, 70 TEXAS L. REV. 317 (1991) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)). For other admissions of the "banality" of pragmatism, see Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1811-13 (1990) and Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989). For sturdier and more substantial accounts of pragmatism, with affinities to my own, see Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 539-45 and Susan Haack, *Pragmatism*, *in* A COMPANION TO EPISTEMOLOGY, *supra* note 107, at 351-56.

157. Singer, *supra* note 23, at 474. On Singer's penchant for the banal, see Warner, *supra* note 156, at 539-40.

158. The usual suspects—Beale and Langdell—have been unfairly slurred as "legal Platonists." See the useful, corrective discussion in Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2078-90 (1995). Although I fully endorse Sebok's historical scholarship on this point, I reject his ultimate jurisprudential conclusions, which are deeply wrongheaded: *e.g.*, that Realism is incompatible with Legal Positivism and that the Legal Process school is implicitly positivistic. Sebok's mistake is to conflate a historical fact—the reckless use of "formalism" and "positivism" as interchangeable labels—with the philosophical claim that positivism is committed to a particular theory of adjudication, namely formalism. The positivists specifically reject this latter claim. *See* H.L.A. Hart, *Analytic Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 955-56 (1957).

Positivism is primarily a conceptual theory about the nature of law, while formalism is a claim about how judges do—and ought to—decide cases. That the Realists rejected formalism as an adequate descriptive theory of adjudication has no bearing on whether or not they were positivists! *See generally* Leiter, *supra* note 16. Additionally, I would have thought that Vincent Wellman had demonstrated decisively the close connections between Legal Process and Dworkin—not positivism. *See* Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987). Sebok, in short, "misunderstands" positivism himself, though in ways that differ, to be sure, from those he criticizes.

159. *See, e.g.*, Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1457-58 (1990); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L.

philosophical "pragmatist" is not to be a thinker who refuses to draw distinctions, engage in abstract argument, develop a coherent point of view, or construct theories.[160] "Pragmatism"[161] is, instead, characterized by a double commitment, pertaining, on the one hand, to the enterprise of theorizing itself, and on the other, to epistemology. The pragmatic view of theory-construction is essentially the view expressed most famously by Marx in the "Theses on Feuerbach": "Man must prove the truth, that is, the reality and power, the this-sidedness of his thinking in practice. The dispute over the reality or non-reality of thinking which is isolated from practice is a purely scholastic question."[162] In other words, theorizing should make a difference to practice (or experience). Notice that this is centrally a normative maxim, concerning what sort of theorizing is worth doing. It is not a substantive metaphysical or semantic doctrine to the effect that, *e.g.*, theoretical claims that make no difference to practice or experience are meaningless and without cognitive content. "The advice"

REV. 1699, 1706-07 (1990); Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1031-32 (1991); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEXAS L. REV. 1195, 1223-24 (1989).

160. *See, e.g.*, Radin, *supra* note 159, at 1706 (arguing that pragmatists aren't interested in definitions of concepts—like "pragmatism" or "feminism"—in terms of necessary or sufficient criteria); *id.* at 1718 (stating that pragmatists do not seek any "overarching universal conception or set of principles that could harmonize" conflicting notions); *id.* at 1719 (claiming that pragmatists are neither "tough-minded," nor "tender-minded"—in William James's sense of those terms—but rather accept and embrace both (quoting WILLIAM JAMES, PRAGMATISM 13 (1975))); *id.* at 1720 ("pragmatic distinctions" are not "hard and fast"). Radin does assert that it is a "misunderstanding" of pragmatism "to suppose that it scorns every rationalistic notion as so much jabber and gesticulation, that it loves intellectual anarchy as such and prefers a sort of wolf-world absolutely unpent and wild and without a master or a collar to any philosophic class-room product, whatsoever." *Id.* at 1715. This is, unfortunately, a "misunderstanding" that Radin's discussion decidedly invites. Richard Posner, whose account of pragmatism suffers from other defects, *see generally* Walt, *supra* note 156, does, at least, try to mute the anti-intellectual tone of much recent legal pragmatism. *See, e.g.*, POSNER, *supra* note 8, at 19.

161. The "definition" that follows is only partly stipulative. In characterizing "Pragmatism," we have two benchmarks to go by. One is the set of views embraced by self-identified "pragmatist" philosophers like Charles Peirce, William James, and John Dewey—who unfortunately disagreed more than they agreed (though they had more in common with each other than any do with Richard Rorty). A second is the meaning of the word "pragmatist," and its cognates, in ordinary language. Happily, the two overlap in some measure. But as with any concept that has enjoyed wide and varied usage, the ultimate criterion for a definition of the concept must be its contribution to fruitful theory-construction (itself a pragmatic criterion!). For some pertinent discussion, see Haack, *supra* note 156, at 351-56 and Warner, *supra* note 156, at 539-43.

162. KARL MARX, *Theses on Feuerbach*, *in* THE MARX-ENGELS READER 107, 108 (Robert C. Tucker ed., 1972). This, in a nutshell, is also the central point of Mark Johnston's important recent paper, *Objectivity Refigured: Pragmatism Without Verificationism*, *in* REALITY, REPRESENTATION AND PROJECTION (John Haldane & Crispin Wright eds., 1993). Johnston argues powerfully against the tendency of modern so-called "pragmatists" (*e.g.*, Hilary Putnam, Nelson Goodman, Richard Rorty) to construe "pragmatism," instead, as a substantive view about the truth-predicate. Some difficulties with Johnston's argument, however, are discussed in Alexander Miller, *Objectivity Disfigured: Mark Johnston's Missing Explanation Argument*, 55 PHIL. & PHENOMENOLOGICAL RES. 857 (1995).

contained in the pragmatic maxim, says Mark Johnston, "comes not from the right account of the concepts of meaning and truth, but from common sense as it applies to cognitive labor."[163] As Johnston puts it, pragmatism involves an "anti-speculative norm" to the effect that "it is idle to aim at inaccessible truth."[164]

The pragmatic commitment in epistemology is more philosophically substantial: namely, antifoundationalism. Antifoundationalism is a claim about the justification of belief, to the effect that all justification is inferential—all justification, in other words, is of the form, "we are justified in believing *X*, because we can infer it from our belief *Y*." Since all of our beliefs are justified only insofar as they are inferrible from other beliefs, it follows that our beliefs do not, ultimately, rest on a "foundation" of beliefs that are justified simpliciter, *i.e.*, self-justified in some sense, without depending on any other belief. How, then, do we get started in epistemic matters? What beliefs should we start with and what norms of justification should we embrace? The distinctive pragmatic view is that at least some beliefs and norms must be accepted solely on the a posteriori criterion of utility for particular human purposes. Rather than think all acceptable beliefs must satisfy certain epistemic demands—*e.g.*, "corresponding to reality," or "being warranted under ideal epistemic conditions," or "figuring in our best scientific account of the world," or "being inferable from some set of foundational beliefs"—the pragmatist holds that some beliefs have to be accepted simply because they "work" relative to various human ends.

So understood, of course, pragmatism clearly has nothing against distinctions, definitions, coherence, abstract argument, or theoretical edifices: it is at least an open question whether or not these tools of the intellect are or are not useful for human purposes. Indeed, in certain domains—*e.g.*, scientific inquiry—it is clearly a closed question: such intellectual tools are plainly useful for human purposes (aeronautical engineering does not work without definitions and theories, and without such engineering the planes neither go up nor come down where we humans want them to). But even in ethical and social matters, it is hardly obvious that the intellectual's tools are a pragmatic vice. To the contrary, to eschew a self-consciously theoretical perspective, to forego a "totalizing" critique (in favor, say, of "confront[ing] each dilemma separately and choos[ing] the alternative that will hinder empowerment the

163. Johnston, *supra* note 162, at 97; *see also id.* at 112 ("Although the Pragmatism of John Dewey and William James is characteristically anti-metaphysical, it nowhere needs to claim that metaphysical statements, because neither verifiable nor falsifiable, are devoid of truth value. It is enough that an interest in such unconstrained claims is just idle.").

164. *Id.* at 117.

least and further it the most"[165]) may really be a political, not philosophical, move—an implicit endorsement of "incrementalism" against radicalism. It may, after all, require an abstract theory to reveal the pernicious character of incrementalism,[166] so that it is nothing more than the self-serving palliative prattle of those invested in the status quo to renounce "theory" in favor of dealing with "concrete problems" in particular contexts.[167] Ultimately, it is an ironic commentary on the irrelevance of so much of the academic Left, which talks about taking seriously "the perspective of the oppressed,"[168] that it should fail to notice that the perspective of the oppressed is decidedly not pragmatic, that the oppressed do not eschew "transcendence . . . and atemporal universality,"[169] but rather embrace and affirm absolute and universal human rights against their oppressors—who typically understand the meaning of pragmatism in political practice all too well.[170]

I find a certain type of pragmatism attractive—indeed, unavoidable—but it is both more modest and more radical than the apology for fuzziness that masquerades as pragmatism in the law journals. This pragmatism is a relative of the type one finds in philosophers like Carnap and Quine,[171]

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165. Radin, *supra* note 159, at 1704.

166. Such a theory could come in two forms. First, one could have a theoretical view of social and historical causation that has no consequences for practice, because it reveals human actions to be impotent. A materialist view of history like Braudel's, in which the causal determinants of human affairs are geography, climate, and demography, arguably gives us such a picture. *See* FERNAND BRAUDEL, THE STRUCTURES OF EVERYDAY LIFE 31-103 (Sian Reynolds trans., 1981). (Marx's materialism is often suspected of entailing a similar conclusion, though Marx did not embrace this view. *See, e.g.*, SHLOMO AVINERI, THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX 143-44 (1968).) Alternatively, one could have a theoretical view of social and historical causation such that incremental changes (of the sort Radin recommends) in the service of some good (*e.g.*, human liberation through the abolition of race, gender, and class discrimination), turn out to make the realization of that good less likely. Such a view is also associated with various writers in the Marxist tradition. *See, e.g.*, KARL MARX, *On the Jewish Question*, *in* KARL MARX: EARLY WRITINGS, at 1 (T.B. Bottomore ed. & trans., 1963), *reprinted in* THE MARX-ENGELS READER, *supra* note 162, at 24, 42-45. Radin's "pragmatism" would, on this latter view of historical and social evolution, actually preclude achievement of her moral and political agenda.

167. For a stunning example of precisely this tendency towards incrementalism among self-proclaimed "pragmatists," see Putnam, *supra* note 95, at 73 (claiming that a "highly flawed" democratic method of piecemeal problem solving is justified because most people endorse such a method as modestly successful).

168. Radin, *supra* note 159, at 1723.

169. *Id.* at 1707.

170. This point is well made in Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUMAN. 197, 214 (1994) (replying to Pierre Schlag and Steven Winter). Of course, it is tempting to argue, á la Nietzsche, that it is simply prudent (or pragmatic) of the oppressed to employ the vocabulary of universal human rights. But even so, this would still show that, on pragmatic grounds, there is no reason to bracket abstract, transcendent, universal theories. This point is helpfully discussed in Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEXAS L. REV. 523, 523 (1996).

171. *See, e.g.*, Rudolf Carnap, *Empiricism, Semantics and Ontology*, *in* SEMANTICS AND THE PHILOSOPHY OF LANGUAGE 207 (Leonard Linsky ed., 1952); QUINE, *supra* note 153, at 20. Quine

and that has entered the philosophical lexicon in the metaphor of "Neurath's boat."[172] The radicalism of this pragmatism resides in its recognition that the only possible criteria for the acceptance of epistemic norms—norms about what to believe—are pragmatic: we must simply accept the epistemic norms that work for us—that help us predict sensory experience, that allow us to manipulate and control the environment successfully, that enable us to "cope." Pragmatic criteria are, at the limit, the only possible criteria for the acceptance of epistemic norms precisely because we can't defend our choice of any particular epistemic norm on epistemic grounds ad infinitum. At some point, we must reach an epistemic norm for which the best we can say is, "it works."

But which norms actually work for us? Take an example: "Don't believe in a hypothesis that figures in a non-consilient explanation of experience" is a norm for belief—call it the "consilience" norm. A non-consilient explanation is one that posits an explanans—the thing that does the explaining—that seems too narrowly tailored to the explanandum—the event to be explained.[173] Here's how this consilience norm works in our lives. Suppose while sitting at home, all the lights in the house suddenly go out at the very same moment. What fact about the world explains this? Explanatory hypothesis number 1:

> Conspiring leprechauns have simultaneously thrown all the light switches in the house.

By contrast, explanatory hypothesis number 2 proposes that:

> There has been a general power failure, *i.e.*, electrical current has stopped entering the house.

Both explanatory hypotheses suppose an ontology: mischievous leprechauns on the one hand; electricity, wires, and currents on the other. But the appeal to leprechauns is non-consilient: it seems a gratuitous ontological

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would, of course, reject Carnap's view that there is a timeless, immutable line between the "external" questions, which receive pragmatic answers, and the "internal" questions, which don't.

172. *See* Otto Neurath, *Protokollsätze*, 3 ERKENNTNIS 204, 206 (1932). Neurath analogizes our epistemological situation to sailors who are trying to rebuild their ship while at sea. Since they cannot rebuild the whole ship at once—they cannot step outside the ship, as it were, and rebuild it from scratch—they must choose to stand firm on certain planks in the ship while reconstructing others. They will, of course, choose to stand firm on the planks that work the best—a pragmatic criterion—while rebuilding those that are less dependable or useful or necessary. Of course, at a later date, the sailors may choose to rebuild the planks they had stood on previously, and in so doing they will again stand on some other planks that serve their practical needs. Our epistemic situation, for Neurath, is the same: we necessarily stand firm on certain planks of our theoretical conception of the world—hypotheses, epistemic norms, and the like—while evaluating other claims about the world. The planks we choose to rest our epistemic edifice upon are just those that have worked the best for us in the past; but nothing precludes the possibility that at some point in the future, we will rebuild those planks as well, while relying upon a new theoretical conception.

173. On consilience, see Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76, 79-85 (1978).

posit, precisely because supposing that leprechauns exist doesn't help explain anything else. Their existence doesn't explain our observations—we haven't seen any—nor does it help explain the restoration of power—we neither need to "exterminate" the leprechauns in order to retain power, nor do we even need to turn on all the light switches they are hypothesized to have flipped. By contrast, assuming the existence of electrical currents proves a very fruitful ontological posit: it not only cues us to the appropriate steps to take to restore power in the house, but it helps explain a range of ordinary phenomena, like why the television goes off when unplugged from the socket. Since the consilience norm favors the electricity ontology over the leprechaun ontology, and since the former works better than the latter, it appears that a good reason to accept the consilience norm is because of its practical cash-value.

Indeed, the consilience norm—and its other relatives in a scientific epistemology—have worked very well for us humans: they helped depopulate our ontology of leprechauns and gods and ethers, and they are foundational norms in scientific practice, a practice that sends the planes into the sky, keeps the food from spoiling in the refrigerator, and alleviates human suffering through modern medicine. From a philosophical standpoint, what bears special notice is that the epistemic norms of common sense and the epistemic norms of science are simply on a continuum. As Quine remarks, "The scientist is indistinguishable from the common man in his sense of evidence, except that the scientist is more careful."[174] The pragmatic necessity of successfully predicting the course of experience is central to ordinary life and to the scientific enterprise; but this means, in turn, that the pragmatic rationale for our most basic epistemic norms can be found in universal features of the human situation, for example, the need to explain our experience with an eye to figuring out what will happen next. Science succeeds at this better than any other practice, and this is why Quine, unlike the antifoundationalist postmodernists, continues to agree with the positivists that science is the paradigm of genuine knowledge.[175]

Yet the modesty of this type of pragmatism should also now be apparent: for once we accept a framework of epistemic norms, then the criteria for belief acceptance need not be pragmatic, except to the extent

174. W.V. QUINE, *The Scope and Language of Science*, *in* THE WAYS OF PARADOX AND OTHER ESSAYS 215, 220 (1966). For more on these issues, see Peter Hylton, *Quine's Naturalism*, 19 MIDWEST STUD. PHIL. 261 (1994).

175. *See, e.g.*, HOOKWAY, *supra* note 101, at 2-3. It is for this reason in particular that lumping Quine with the postmodernists, as Dennis Patterson does, seems a mistake. *See* DENNIS PATTERSON, LAW AND TRUTH 158-61 (1996) and Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 270, 270-79 (1992). For more on this issue, see Brian Leiter, *Why Quine Is Not a Postmodernist*, 50 SMU L. REV. 1739 (1997).

that the epistemic norms we accept—on pragmatic grounds—themselves embody pragmatic criteria. But it is completely consistent for the pragmatic philosopher, in the sense being discussed here, to distinguish sharply between, say, facts and values,[176] precisely because he has accepted, on pragmatic grounds, epistemic norms that invite this distinction.[177] This is why, for example, the great pragmatist philosopher Quine is a thoroughly tough-minded philosopher in the Jamesian sense, and not Radin's wishy-washy pragmatist who accepts both the "tough-minded" and "tender-minded" philosophical virtues.[178] For Quine, the tough-minded epistemic norms characteristic of the world-view he calls "naturalism" have simply worked the best.[179] By pragmatic criteria, that is reason enough to repudiate "tender-mindedness"—at least, until experience forces us to think otherwise.

2. Pragmatism and Legal Theory.—Although the Realists do not have worked-out epistemological views, the pragmatism we find in their writings is analogous to the pragmatic view in epistemology and, at the same time, reflects the basic pragmatic commitment to make theorizing relevant to practice. The analogy, simply put, is this: just as philosophical pragmatists hold that it is a criterion of acceptability for particular epistemic norms that they work for us humans—*e.g.*, by helping us predict sensory experience—so, too, it is a criterion of acceptability for a theory of adjudication for the Realists that it work for lawyers. "Work for lawyers," for the Realists, means that it enables them to predict what courts will do.

It is only in this quite specific sense that I want to understand the Realists as pragmatists. For the Realists, it is a constraint on theory-construction in jurisprudence that such theories have practical cash-value

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176. Contra Richard Thompson Ford, *Facts and Values in Pragmatism and Personhood*, 48 STAN. L. REV. 217, 225 (1995) ("A characteristic feature of pragmatism is the blurring of the distinction between facts and values.").

177. *See, e.g.*, ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 105-06 (1990). This point also helps vitiate Putnam's complaint that I am a "scientific imperialist." Putnam, *supra* note 95, at 70. "Scientific imperialism" implies that there is an unjustified and unjustifiable reaching out by the epistemic norms of science—*e.g.*, only believe in facts that figure in the best explanation of experience—to foreign domains where they do not belong—*e.g.*, the domain of value. But from the Quinean perspective, this gets it all backwards: the epistemic norms of science work—they have proved a fruitful way of coping with reality—so the burden is on the philosopher who would abandon such norms to give us a reason why (other than the blatantly question-begging reason that his favored properties can thereby secure a place in his ontology).

178. James's "tough-minded" philosopher is an empiricist and materialist, among other things; James's "tender-minded" philosopher is sympathetic to rationalism, idealism, and religion. *See* Radin, *supra* note 159, at 1712 (quoting WILLIAM JAMES, PRAGMATISM 13 (1975)).

179. That Quine's criteria for naturalism are pragmatic becomes clearest when he says that if telepathy turned out to really work, then we would have to revise our naturalistic view of the world accordingly. But, he adds, "[i]t is idle to bulwark definitions against implausible contingencies." *See* W.V. QUINE, PURSUIT OF TRUTH 21, 20-21 (1990).

by making it possible to predict what courts will do. Notice, moreover, that there is nothing banal about this pragmatism. Indeed, in conjunction with the Realists' Core Claim, it entails a startling conclusion: that the dominant approach to theory of adjudication in the Anglo-American world is based on a mistake. Under the influence of Dworkin's important writings, analytic theory of adjudication is predicated on the assumption that what the theory must account for is the reasons judges give in their opinions for their decisions. Indeed, it has been one of Dworkin's consistent charges against Hart's positivism that it does not describe adequately how judges decide hard cases.[180] But if the Realist Core Claim is correct, then the construction of a theory that is descriptively adequate in Dworkin's sense is an idle exercise: judges decide for other reasons—their response to the facts—and not because of the legal reasons that fill their opinions. What but a fetish for pedantry would compel one to construct a theory around the latter impotent reasons, rather than the former effective reasons?

The Realists' pragmatism, coupled with the truth of the Core Claim, if it is true, would entail discarding most jurisprudential work on the theory of adjudication. This conclusion is indeed hinted at, though not drawn, in one of the seminal critiques of Dworkin's program, by John Mackie.[181] Mackie observes that

> There is a distinction—and there may be a divergence—between what judges say they are doing, what they think they are doing, and the most accurate objective description of what they actually are doing. They may say and even believe that they are discovering and applying an already existing law, they may be following procedures which assume this as their aim, and yet they may in fact be making new law. Such a divergence is not even improbable, because even where new law is being made, it will seem fairer if this fact is concealed and the decision is believed to enforce only presently existing rights . . . .[182]

Mackie, like a good Realist, would urge against Dworkin a descriptive claim about what it is judges are really doing. Mackie would, in other words, contest with Dworkin the data that the theory is supposed to capture. For Dworkin, it is "what judges say they are doing, what they think they are doing,"[183] while for Mackie and the Realists it is "what

180. For discussion of this critique and possible positivist responses, see Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 16, at 250-51.

181. John Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 1 (1977), *reprinted in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161, 163 (Marshall Cohen ed., 1983).

182. *Id.* at 163.

183. For evidence that this is Dworkin's view, see DWORKIN, *supra* note 1, at 22, 112.

they are actually doing" that requires theoretical explication. For the Realist, this choice of data is easy to explain: a theory about anything else will not be useful for lawyers. Moreover, for the reasons set out above, such a Realist theory is necessarily naturalistic.

D. Do the Realists Deliver a Naturalized Jurisprudence?

It is well and good to talk about making jurisprudential theories continuous with empirical inquiry in the natural and social sciences, but do the Realists really help us in this regard? Many readers may sympathize with Richard Posner's recent observation that, "The empirical projects of the legal realists, which not only failed but in failing gave empirical research rather a bad name among legal academics, illustrate the futility of empirical investigation severed from a theoretical framework."[184] It is, of course, slightly ironic to hear an advocate of economics attack any group of theorists for having a failed empirical research program.[185] And Posner is also plainly wrong that the failing of Realism was lack of a theoretical framework:[186] the problem, more often, was rather adherence to a bad

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184. POSNER, *supra* note 8, at 19. Posner continues: "Modern economics can furnish the indispensable theoretical framework for the empirical research that the law so badly needs." *Id.*

185. "[E]conomic theory [is] one of the more dismal empirical failures in the history of science . . . ." John Dupré, Book Review, 104 PHIL. REV. 147, 151 (1995). Let us recall, for example, that even the predictions generated from the Coase Theorem have been empirically falsified. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). Despite all the "empiricist" rhetoric by proponents of economics, actual empirical researchers in various areas of law have found economic analysis distinctly indifferent to reality. The work of those we might call the "Texas Empiricists" is particularly instructive in this regard. *See, e.g.*, Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1416 (1983) (criticizing Epstein's review of the American system of labor relations for "comment[ing] critically . . . without regard to observed actualities"); Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1870-75 (1993) (noting the inconsistency of classical economic theory with actual productivity in unionized workplaces); Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463 (1996); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997) (criticizing the existing theories of secured lending as inadequate due to a lack of empirical testing); Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257, 1262 (1994) (criticizing academics who apply abstract principles of economic analysis to real-life dilemmas, noting that "authors who are not themselves empiricists should at least take account of the empirical work that has been done"). For a balanced discussion of the failings of economics as science, and an interesting—if contestable—philosophical account of why that should be so, see generally ALEXANDER ROSENBERG, ECONOMICS—MATHEMATICAL POLITICS OR SCIENCE OF DIMINISHING RETURNS? (1992). For a more substantial discussion of the problems with economics understood as an empirical science than that offered here, see Brian Leiter, *Holmes, Economics, and Classical Realism*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR.: THE PATH OF THE LAW AND ITS INFLUENCE (Steven J. Burton ed., forthcoming 1998).

186. The same misguided complaint has been made by others besides Posner. *See, e.g.*, Williamson, *supra* note 25, at 1 ("That [Legal Realism] foundered while [law & economics] flourished is explained in large measure by the absence of an intellectual framework for Legal Realism and the use by law and economics of the powerful framework of neoclassical economics."). For a different, debunking explanation of the rise of law and economics, see Leiter, *supra* note 9, at 385-87.

theoretical framework—Watsonian behaviorism. But surely Posner is right to speak as he does of the "empirical studies that went nowhere"[187] that Realism bequeathed us.[188] In that case, why think of Realism as the fountainhead of a naturalized jurisprudence?

The answer depends partly on what we expect from the philosophical proponents of a naturalized jurisprudence. The Realists, as seen through the lens of philosophical naturalism, give us arguments against much of traditional theory of adjudication, and in favor of empirical studies. They may not give us paradigms of good empirical studies, but perhaps we should not look to them for that. The Realists give us the philosophical motivation and cues for how we should proceed, even if they do not carry off the project themselves.

Yet even this may concede too much. For contrary to Frank's skepticism about predicting what judges will do,[189] it appears that lawyers frequently are able to predict what courts will do: how else would they stay in business, after all? But if the Realists are correct that judges decide in accordance with the Core Claim, yet have failed to deliver (as Posner charges) a successful scientific theory of judicial decision, then how do lawyers predict what courts will do? To anyone who has litigated, the answer seems plain enough: lawyers work with some degree of informal psychological, political, and cultural knowledge about judges and courts that constitutes what I have called elsewhere a "folk" social-scientific theory of adjudication.[190] The success of this folk theory—which is, after all, largely coextensive with the talents of lawyers, *i.e.*, their ability to advise clients what to do, when to go to trial, when to settle, etc.—constitutes the core of a naturalized jurisprudence.

We should not be misled here by the fact that in certain domains "naturalization" is thought to require supplanting folk theories—that is, theories that rely on our common-sense categories of belief and desire to explain behavior.[191] Philosophers of many persuasions have argued that the basic "folk" categories are compatible with a naturalistic program.[192]

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187. POSNER, *supra* note 8, at 393-94.

188. The most notorious—but also, I should add, the least well conceived—is the infamous "parking study" reported in Moore & Callahan, *supra* note 56, *passim*. For a related complaint about Hume's naturalism, and a reply, see STROUD, *supra* note 120, at 223-24.

189. *See* FRANK, *supra* note 13, at 100-17.

190. *See* Coleman & Leiter, *supra* note 35, at 585.

191. *See, e.g.*, STEPHEN P. STICH, FROM FOLK PSYCHOLOGY TO COGNITIVE SCIENCE: THE CASE AGAINST BELIEF (1983); Paul M. Churchland, *Eliminative Materialism and the Propositional Attitudes*, 78 J. PHIL. 67 (1981).

192. *See, e.g.*, JERRY A. FODOR, THE LANGUAGE OF THOUGHT (1975); Terence Horgan & James Woodward, *Folk Psychology Is Here To Stay*, 94 PHIL. REV. 197 (1985); JAEGWON KIM, *Multiple Realization and the Metaphysics of Reduction*, 52 PHIL. & PHENOMENOLOGICAL RES. 1 (1992), *reprinted in* SUPERVENIENCE AND MIND 309, 329-30 (1993). Note that for Kim "the scientific possibility of, say, human psychology is a contingent fact (assuming it is a fact); it depends on the

In any event, such an objection would be unavailable to someone like Posner who advocates economic explanations, since such explanations are, of course, just one way to systematize folk-psychological explanations (though predicated on a particularly simple-minded folk psychology).[193]

Recall, too, what is required for a "naturalized" jurisprudence: we seek methodological continuity with the natural and social sciences. Folk theories plainly satisfy this demand: they are predicated on empirical observation of judicial decisions; they seek causal explanations for these decisions, inasmuch as they understand "reasons" as "causes"; and they look for regular, law-like—ideally lawful—patterns of decision. Indeed, it is common in the extensive political science literature on judicial behavior to correctly identify Realism with precisely such a naturalistic research program.[194] That lawyers possess workable, if informal, folk theories of judicial decision serves to vindicate and instantiate Realism's naturalistic program.

Of course, the folk theories of adjudication that lawyers employ all the time seem to lack the systematicity characteristic of genuine scientific theories: in particular, they fail to generate laws of judicial behavior.[195] The political science literature—which dispenses with folk psychology in favor of seeking "lawful" correlations between the crude demographic profiles of judges and their decisions—has not been much more successful.

But if the political science literature on judicial decisionmaking has not met with great success,[196] perhaps it is because it abandons too readily

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fortunate fact that individual humans do not show huge physiological-biological differences that are psychologically relevant." *Id.* at 329.

193. *See* Alexander Rosenberg, *If Economics Isn't Science, What Is It?*, 14 PHIL. F. 296, 301-03 (1983). Rosenberg's philosophical explanation for the failure of economics as science depends on the Davidsonian argument that psychology cannot promulgate genuine causal explanations because causal laws must be strict. The Davidsonian premise, contrary to Rosenberg, however, has been widely contested. *See, e.g.*, Tyler Burge, *Philosophy of Language and Mind: 1950-1990*, 101 PHIL. REV. 3, 35 (1992) ("I do not think it a priori true, or even clearly a heuristic principle of science or reason, that causal relations must be backed by any particular kind of law.").

194. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) ("Since the rise of legal realism, it has been axiomatic that the background and worldview of judges influence cases."); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324-25 (1992) (discussing the evolution of Realism in the political science literature). George and Epstein, however, wrongly think that the Realists utterly discounted the relevance of legal rules and reasons—no doubt because they suppose a Frankified version of Realism. *See id.* at 324.

195. It is a contested topic among philosophers of science what constitutes a "law." A common idea is that "laws" state certain necessary truths about nature. But this doesn't help too much since the concept of "necessity" is equally hard to get a handle on. For a recent discussion and critique, see BAS C. VAN FRAASSEN, LAWS AND SYMMETRY 15-128 (1989).

196. For one recent and pertinent discussion, see Ashenfelter et al., *supra* note 194, at 260-66, 277-81. Although these authors "find surprisingly little evidence that the identity of the judge hearing a particular case influences the case's outcome," this may be because they characterize the judge's identity in gross sociological-demographic terms: "political party, sex, race, religion, law school, and

Frank's insight that "the personality of the judge is the pivotal factor in law administration."[197] To concede this would, of course, pull us away from the Generality Thesis embraced by the mainstream of Realism—a thesis, moreover, that does seem apt for the sorts of commercial law disputes on which the Realists focused. But perhaps in areas like constitutional law—where the issues engage the personality of the judge in special ways—we need to reconsider the merits of Frank's approach. Of course, Frank conjoined his insight into the importance of personality with excessive skepticism about our capacity to attain epistemic access to the features of personality that are causally determinative.[198] Certainly on an orthodox conception of psychoanalytic method, we as mere observers could not hope to get access to the deep facts about personality that determine the course of decision. But psychoanalytic explanations are, importantly, on a continuum with ordinary folk psychological explanations,[199] and as with folk explanations, those of us living in the post-Freudian world have acquired a similar competence to observe and explain behavior in broadly Freudian terms. Perhaps, then, Frank's skepticism is unwarranted. Indeed, judicial opinions are a rich repository of material for the armchair "folk" psychoanalyst. Surely, for example, the astonishing rigidity of Justice Scalia's constitutional jurisprudence, especially his fear of "unconstrained" judgment[200] or Justice Thomas's almost pathological incapacity for—or unwillingness to engage—empathetic feelings,[201] both cry out for psychoanalytic explanations. If the Sociological Wing of Realism describes the right program of research for understanding the area of commercial law, there may yet be reasons to think that the Idiosyncrasy Wing—minus Frank's skepticism—points the right way to a naturalized account of decisionmaking in other domains.[202]

E. Conclusion

The reception of Realism, like the reception of any prominent and controversial movement, has been marked by misunderstandings. Realism

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age." *Id.* at 260-66. Perhaps what is really needed is a more fine-grained—though of course harder to get—account of a judge's identity.

197. FRANK, *supra* note 13, at 111.

198. *See id.*

199. For a concise articulation of this point, see Thomas Nagel, *Freud's Permanent Revolution*, N.Y. REV. BOOKS, May 13, 1994, at 34, *reprinted in* NAGEL, *supra* note 98, at 26, 28-29. For a stout defense of Freud's "science" of the mind, see David Sachs, *In Fairness to Freud: A Critical Notice of* The Foundations of Psychoanalysis by Adolf Grünbaum, 98 PHIL. REV. 349 (1989), *reprinted in* THE CAMBRIDGE COMPANION TO FREUD 309 (Jerome Neu ed., 1991).

200. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

201. *See* Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting).

202. I hope to show elsewhere that this approach is, indeed, fruitful.

was slurred as proto-fascism in the 1940s,[203] suffered "Frankification" in the 1950s and 1960s,[204] and was "CLSified" during the 1970s and 1980s.[205] As we approach the turn of the century, I hope we may see Realism reborn yet again, this time as a naturalized approach to jurisprudence. The Realists, we must remember, were very much a product of their intellectual milieu, which was decidedly not postmodern. The 1920s and 1930s marked the heyday of "positivism" in philosophy and the social sciences: natural science was viewed as the paradigm of all genuine knowledge, and any discipline—from philosophy to sociology—which wanted to attain epistemic respectability had to emulate its methods: it had to be "naturalized."[206] While philosophical "positivism" may have been on the defensive in the 1950s and 1960s, its basic ideals—especially regarding natural science as the paradigm of objective knowledge—have been successfully defended and revived more recently.[207] The Realists came of intellectual age in a positivistic and naturalistic culture, and their approach to jurisprudential questions bears the mark of that origin. With the benefit of philosophical advances of the last thirty years, we are finally in a position to recognize what most jurisprudents have missed: that the Realists were not bad legal philosophers, but rather prescient ones, philosophical naturalists before their time.

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203. *See, e.g.*, Francis E. Lucey, Jr., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942); Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569 (1945).

204. *See, e.g.*, Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1038 (1961) ("A judge's holding in a case is an ad hoc response to a unique state of facts, rationalized, after the event, with a dissimulation more or less conscious, and fitted willy-nilly into the Procrustean bed of approved doctrine. The motivations of the judicial response are buried, obscure, unconscious and—even to the judge—unknowable.").

205. *See supra* notes 23-35 and accompanying text.

206. Even the Deweyan pragmatism of that era was heavily colored by Dewey's naturalism. *See, e.g.*, John Dewey et al., *Are Naturalists Materialists?*, 42 J. PHIL. 515 (1945), *reprinted in* AMERICAN PHILOSOPHIC NATURALISM IN THE TWENTIETH CENTURY 102 (John Ryder ed., 1994); John Dewey, *Antinaturalism in Extremis*, *in* NATURALISM AND THE HUMAN SPIRIT 1 (Yervant H. Krikorian ed., 1944). One would not know about Dewey's naturalism, though, to look at how he figures in much recent legal pragmatism.

207. Only the apparently widespread ignorance of recent developments in philosophy of science since Kuhn and Feyerabend in the 1960s leaves large portions of the academy with a contrary impression. For relevant discussion, see PHILIP KITCHER, THE ADVANCEMENT OF SCIENCE (1993) and LARRY LAUDAN, SCIENCE AND RELATIVISM (1990). It bears noting that Quine, perhaps the most important philosophical critic of positivism, nonetheless "remained faithful to the underlying spirit of positivism." HOOKWAY, *supra* note 101, at 2.