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Legal Realism as Theory of Law

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LEGAL REALISM AS THEORY OF LAW

MICHAEL STEVEN GREEN*

TABLE OF CONTENTS

INTRODUCTION	1917
I. THE REALISTS' THEORIES OF LAW	1921
A. <i>What Are Legal Rules?</i>	1921
B. <i>What Is the Prediction Theory of Law?</i>	1926
C. <i>Did the Realists Have a Novel Theory of Law at All?</i> . .	1936
II. HART ON THE NORMATIVITY OF LAW	1939
A. <i>Hart's Theory of Law</i>	1940
B. <i>Can Hart Explain the Law's Normativity?</i>	1945
C. <i>Shared Cooperative Activities?</i>	1947
D. <i>The Revenge of the Natural Law Theorist</i>	1950
E. <i>Non-Cognitivism and the Internal Point of View</i>	1953
III. THE FIRST ARGUMENT AGAINST LEGAL RULES	1956
A. <i>Legal Rules Are Causally Inert</i>	1958
B. <i>The First Argument and the Rejection of Vested Rights</i>	1962
C. <i>The First Argument and the Decision Theory of Law</i> . .	1966

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IV. THE SECOND ARGUMENT AGAINST LEGAL RULES	1967
<i>A. Legal Obligation and Moral Autonomy</i>	1969
<i>B. The Second Argument and the Realists’ Theory of Adjudication</i>	1975
<i>C. The Second Argument and “Mechanical Jurisprudence”</i>	1982
V. EXPLAINING THE PREDICTION AND DECISION THEORIES OF LAW	1985
<i>A. The Decision Theory of Law Revisited</i>	1986
<i>B. Bishop Hoadly</i>	1988
<i>C. The Prediction Theory of Law Revisited</i>	1993
<i>D. The Scandinavian Realists</i>	1998
CONCLUSION	2000

INTRODUCTION

The legal realist movement flourished back in the 1920s and 30s, primarily at Yale and Columbia law schools and at Johns Hopkins's short-lived Institute of Law. And yet it is often said—indeed so often said that it has become a cliché to call it a “cliché”¹—that we are *all* realists now.² The cliché is wrong, however, for there is at least one identifiable (if not sizable) group that rejects realism—philosophers of law. To them, realism is dead, mercifully put to rest by H.L.A. Hart's decisive critique of “rule-skepticism” in the seventh chapter of *The Concept of Law*.³

Hart rejected two forms of rule-skepticism advocated by the realists. It was, on the one hand, a *theory of law*—the view “that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them”⁴ Hart's argument here was brief, for he thought that this form of rule-

1. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 229 (1986).

2. Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 131 (2002) (“We are all Realists now,’ as the saying goes.”); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267-68 (1997) (beginning with the premise that “we are all legal realists now” to discuss the meaning of legal realism); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (“All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.”); see also BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 165 (2d ed. 1999); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 382 (1973); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 460 (1979); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 834 (1989).

3. H.L.A. HART, *THE CONCEPT OF LAW* 124-54 (2d ed. 1994); see also THEODORE BENDITT, *LAW AS RULE AND PRINCIPLE* 46-47 (1978); RONALD DWORKIN, *LAW'S EMPIRE* 36-37 (1986); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 20-21 (1988); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 206-07 (1986) (noting that contemporary legal philosophers largely view Hart's critique of realism as cogent); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 657-59 (1995) (outlining Hart's critique of the realist prediction model); Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1694 (1996) (referring to Hart's argument “distinguish[ing] rules from other regularities of behavior” as “decisive” against philosophical realism); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 278 (2001) [hereinafter Leiter, *Legal Realism and Legal Positivism*] (noting the “widespread” view that Hart exposed realism as a “jurisprudential joke”); Leiter, *supra* note 2, at 270 (“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.”).

4. HART, *supra* note 3, at 136.

skepticism was an obvious failure.⁵ Decisions cannot be all there is to the law, for courts deciding cases are *guided by the law*—by the *legal rules* that can be found in constitutions, statutes, regulations and past judicial opinions. The philosophical community agreed. The realists' theory of law was, in the philosophers' words, "deeply implausible,"⁶ "open to easy refutation,"⁷ and "a jurisprudential joke."⁸

Hart took rule-skepticism as a *theory of adjudication* a bit more seriously. According to this theory, statutes and the like may be law, but they are too *indeterminate* to be significant influences on, or predictors of, judges' decisions. Because the law is indeterminate, judges actually decide cases on the basis of nonlegal considerations. Hart did not argue that this theory was incoherent, but he did think it was a "great exaggeration."⁹ The law is indeterminate at the margins, he argued—it has what he called "open texture"—but it is not indeterminate in its *core* as the realists claimed.

The seventh chapter of *The Concept of Law* has cast such a long shadow that only recently has the study of legal realism become halfway respectable in philosophical circles. A prominent example of the renewed interest in the realists is Brian Leiter's defense of their theory of adjudication against Hart's critique.¹⁰ But Leiter, like the rest of the philosophers, has nothing good to say about their theory of law; indeed, part of his strategy for rehabilitating the realists is insisting that they did not mean to offer rule-skepticism as a theory of law in the first place.¹¹

I will find little to criticize in Leiter's defense of the realists' theory of adjudication. But Hart was clearly right about the realists' desire to present rule-skepticism as a genuine theory of law.¹² If the realists are to be rehabilitated, we must defend this theory. That is the goal of this Article.

I will defend the realists' theory of law, however, only in the sense of showing that it is *plausible*, not that it is beyond criticism. A

5. *Id.* at 137.

6. DWORKIN, *supra* note 3, at 37.

7. JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 34 (1990).

8. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 278.

9. HART, *supra* note 3, at 147.

10. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3; Leiter, *supra* note 2.

11. See Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 290-93.

12. See *infra* Part I.C.

number of weaknesses, inconsistencies, and oddities will remain. But the theory is not the absurdity that the philosophical community has made it out to be.

Admittedly, it is dangerous to speak of a theory held by the realists as a group, even when the group is limited to those most commonly agreed to be realists—Karl Llewellyn, Jerome Frank, Walter Wheeler Cook, Felix Cohen, Hessel Yntema, Herman Oliphant, Max Radin, Leon Green, and Joseph Hutcheson.¹³ It is still more dangerous when the theory is in the philosophy of law, given that the realists—Cohen excepted¹⁴—did not have significant training in philosophy.¹⁵ Nevertheless, realism remains a subject of more than historical interest precisely because unifying themes can be found in the realists' writings. And some of the most important themes are philosophical. The fact that most of the realists lacked philosophical training does not mean they lacked philosophical opinions. All it means is that these opinions were expressed imperfectly in their works, making some philosophical reconstruction necessary.

As a part of this philosophical reconstruction, I will argue that the realists actually held a *number* of theories of law that differ in their degree of plausibility. Both the realists and their critics tend to treat these theories as if they were equivalent. Hart, for example, describes the realists' theory of law as the view that "talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them."¹⁶ But there are at least two theories of law in this description. The first is the idea that "talk of rules is a myth."¹⁷ Surprisingly, the realists' rejection of legal rules

13. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169 (1992). My list of realists is taken from Leiter, *supra* note 2, at 269; and Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 280.

14. Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032, 1032-33 (1981). Cohen had a Ph.D. in philosophy from Harvard, in addition to having a law degree from Columbia. Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 209 (2001).

15. See Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 290-93.

16. HART, *supra* note 3, at 136.

17. *Id.* Compare RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 15 (1977):

In [the realists'] view the concepts of "legal obligation" and "the law" are myths, invented and sustained by lawyers for a dismal mix of conscious and subconscious motives. The puzzles we find in these concepts are merely symptoms that they are myths. They are unsolvable because unreal, and our

is their most defensible theory of law, and it will be the focus of this Article. Properly understood, however, it does not deny that statutes and the like can be law; nor does it deny that these laws can guide a judge's decision making when the judge's attitudes recommend conformity with the law. Instead, the theory rejects the ability of the law to provide reasons for conformity with what the law recommends that exist independently of the judge's attitudes. The realists' rejection of legal rules was an attack on the idea of political obligation and the duty to obey the law. A statute can be the law without being a legal rule in the relevant sense, for its status as law may not provide a rebellious judge with any reason to adjudicate as the statute instructs.

But the realists were also committed to a less plausible theory of law—the famous prediction theory that they borrowed from Holmes.¹⁸ This theory is captured by the second part of Hart's description, that "law consists simply of the decisions of courts and the prediction of them,"¹⁹ and it does indeed cast doubt on the idea that statutes and the like can be law. Properly understood, however, even this theory (or rather theories, for the prediction theory took two forms in the realists' writings) was not quite as crazy as the philosophers make it out to be. What is more important, even though the prediction theories ultimately fail, they are at least *understandable* when seen in the light of the realists' rejection of legal rules. The realists thought—wrongly but reasonably—that these theories followed from the law's inability to provide reasons for obedience.

I will begin in Part I by clarifying the various theories of law that I will attribute to the realists, in addition to criticizing Leiter's argument that they did not mean to offer a novel theory of law at

concern with them is just one feature of our enslavement. We would do better to flush away the puzzles and the concepts altogether, and pursue our important social objectives without this excess baggage.

18. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Holmes's formulation was followed by many realists. See, e.g., WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 8, 29-30 (1942) [hereinafter COOK, LOGICAL AND LEGAL BASES]; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 828-29 (1935); Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 347-48 (1933) [hereinafter Cook, "Substance" and "Procedure"]; Max Radin, *Permanent Problems of the Law*, 15 CORNELL L.Q. 1, 3 (1929).

19. HART, *supra* note 3, at 136.

all. In Part II, I will set the stage for my defense of the realists' first theory of law—their rejection of legal rules—by briefly outlining the problems that Hart and his followers have encountered arguing for the normativity of law. Hart and the realists began from a very similar premise—that the law is fundamentally a matter of *social facts*. But Hart believed that this does not preclude the law's capacity to provide reasons for action. Hart's position has been persuasively criticized, however—most notably by Ronald Dworkin. In Parts III and IV, I will describe the two arguments that led the realists to think that the law is non-normative, the second of which has strong similarities to Dworkin's critique of Hart. I will end the Article, in Part V, with a discussion of why the realists were inclined toward prediction theories of law. Although I agree with the philosophers that the theories should be rejected, when seen in the light of the realists' rejection of legal rules they are more plausible than has been assumed.

I. THE REALISTS' THEORIES OF LAW

A. *What Are Legal Rules?*

It is important to identify the type of legal rules that the realists rejected, for there are alternative conceptions of legal rules in which their existence could not seriously be denied. Assume that I issue the following command: "Every payday, cash your paycheck and give the money to me." My command undoubtedly is (or expresses) a rule in *some* sense. You can act or fail to act in accordance with what my command instructs you to do. If you want to obey me—for example, because you love me, or fear the sanctions I might impose for disobedience—my command will *guide* your behavior. It has this guiding power by virtue of its propositional content, the meaning the command expresses. Conversely, the command "Every toves, cash your wabe and give the morogoves to me" is not a rule in this sense, because it lacks sufficient propositional content. Someone who wants to abide by this command will have no idea how to regulate her behavior to do so.²⁰

20. Scott Shapiro describes this guiding function as "epistemic guidance." Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 *LEGAL THEORY* 127, 146 (2000) ("Central to

The realists did not reject legal rules in the propositional sense of the term. Though they thought substantial indeterminacy infects the law (and not merely at the margins as Hart claimed), they admitted that the law can meaningfully instruct people to act in certain ways rather than others *to some extent*, and for this reason can guide the behavior of those who seek to obey its commands. If I want to abide by a statute that says that the speed limit is 55 m.p.h., I know what to do (namely, drive 55 m.p.h. or less). By the same token, a judge who wants to adjudicate in accordance with the statute knows what to do (namely, sanction only those who drive faster than 55 m.p.h.).

There is *another* sense of "rule," however, in which the existence of legal rules can be questioned. This is the idea of a rule as something providing a *reason for action*.²¹ If one violates a rule in this sense, one has done something *wrong*, something one ought not have done. My command is not a rule in this sense, for there is nothing about the fact that I command you to do something that gives you a reason to do what I say—nothing that justifies or makes appropriate your compliance with my command. I will argue that the realists rejected legal rules in this reason-for-action sense.

One important question, which I will leave largely unanswered, is whether the reasons for action that legal rules would provide if they existed must be *overriding* reasons (that is, reasons that trump all other reasons for action, including all moral reasons) or whether they may be *prima facie* reasons (that is, reasons that can be overridden by sufficiently weighty countervailing reasons).²² An example of a *prima facie* reason for action is the moral reason that I have to keep my promises. If I promise to loan you an axe, I have a *prima facie* moral reason to keep my promise in the sense that, absent any countervailing considerations, I ought to loan you my axe. Assume, however, that you recently killed fourteen people with an axe. You lost it soon after the murders, but you are sure to start

epistemic guidance is the fact that the rule was the source of *information* regarding what counts as conformity, not necessarily the source of *motivation* for conformity.”)

21. See H.L.A. HART, *ESSAYS ON BENTHAM* 243 (1982); Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 241, 241-42 (Dennis Patterson ed., 1996).

22. On the distinction between *prima facie* and overriding duties, see W.D. ROSS, *THE RIGHT AND THE GOOD* (1930) (discussing *prima facie* moral obligations); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 951-52 (1973).

again once you get your hands on another one. The moral reason I have to protect the lives of innocents is now a countervailing consideration that trumps my reason to keep my promise. Therefore, my reason to keep my promise is only *prima facie*, not overriding.

That legal rules, if they existed, would provide overriding reasons for action is suggested by the law's apparent claim to ultimacy in the practical reasoning of its subjects. Indeed, the law, it seems, does not merely claim to trump other reasons for action, but to *preclude the consideration of* these other reasons, in the sense that they should be removed from the subject's deliberation.²³ On the other hand, that legal rules provide only *prima facie* reasons for action is suggested by the fact that all other reasons—even the strongest of moral reasons, such as the moral reason not to kill innocents—are probably only *prima facie*. It is unlikely that the reasons for action provided by the law would be overriding when even the moral duty not to kill innocents can be trumped (for example, when killing an innocent would prevent the deaths of millions of people).

If it is true that legal reasons for action are *prima facie*, then legal rules in the relevant sense could exist even though a consideration of all available reasons for action would show civil disobedience to be permissible, indeed mandatory. The fact that one ought to disobey the law would simply mean that the balance of reasons, including moral reasons, was in favor of disobedience, *not* that the law did not provide reasons for action at all.

A number of further clarifications are in order. First, the fact that one has a reason to do what the law says is not enough to show that legal rules exist. Consider a statute prohibiting the killing of innocents. Although I have reasons not to kill innocents, the statute might not contribute to those reasons, for it may be that I would have had exactly the same reasons (namely, moral reasons) had the statute *not* been law.²⁴ For legal rules to exist, it must be the case

23. See, e.g., HART, *supra* note 21, at 253-56; JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 29-31 (1979). For a nuanced view, see KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 6-24 (1989).

24. See RAZ, *supra* note 23, at 233-34; Smith, *supra* note 22, at 951.

that there are reasons to do what the law says *because* the law says so.²⁵

Second, and most important, the relevant reasons for action must be *objective*. One has a *subjective* reason to act if the action is recommended by one's *de facto* attitudes. The simplest example of a subjective reason for action is the reason I have to do what I want to do. I have a subjective reason to sing "Leavin' on a Jet Plane," for example, if I want to sing "Leavin' on a Jet Plane." A slightly more complicated example of a subjective reason for action is the reason I have to do something that I do not directly want to do, but that I believe is instrumental to something that I directly want. If I want to drive a screw into a piece of wood, and believe that using a Phillips-head screwdriver is the action that will lead this want to be satisfied, then I have a subjective reason to use a Phillips-head screwdriver.

But subjective reasons for action need not depend only upon brute desires. More complex attitudes—including moral attitudes—can generate such reasons as well. For example, if I (wrongly) think that letting children drown is morally important, I would have a subjective reason not to save a drowning child.

To say that the reasons for action generated by legal rules are *objective* is to say that they exist independently of the attitudes of the person to whom they apply. In being objective, legal reasons for action look very much like moral reasons for action. I have a moral reason to keep my promises even if keeping my promises is not the best course of action in light of my attitudes. I do not escape the moral obligation to keep my promises simply because I really want to break my promises or because I think (wrongly) that breaking promises is morally important. Analogously, if legal reasons for action exist, citizens are not released from them simply because their attitudes recommend disobedience.

Third, if legal rules exist, then *everyone* to whom a valid law applies has a reason for compliance with its demands.²⁶ The second and the third requirements are related because the objectivity of legal reasons for action appears to be the only explanation of why

25. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35-37 (1986).

26. See William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 *LEGAL THEORY* 215, 215-16 (2004); Smith, *supra* note 22, at 951-52.

these reasons would exist for everyone to whom a valid law applies. Although there are subjective reasons for *most* people to obey *many* laws, it is not likely that *everyone* has a subjective reason to obey *every* valid law.

Consider the fact that the law is often backed up by sanctions. If, like most people, I do not want to lose my property or freedom, then these sanctions will give me a subjective reason to do what the law says. But sanctions cannot provide everyone with subjective reasons to obey all valid laws, for it is easy to imagine a legal system—our own, for example—in which some valid laws are not enforced.²⁷

The occasional coordinating function of the law also provides subjective reasons for obedience. The fact that the law of Britain says people should drive on the left gives me a powerful subjective reason to drive on the left while in Britain, because, given that other people are obeying the law, doing the same is the best way of satisfying my desire to avoid accidents. But legal systems can be imagined—once again, our own system is an example—in which not all laws bring with them the benefits of coordination. It is the law that one must pay to use the subway, but the fact that other people pay does not necessarily make it in one's interest to follow along. Indeed, as far as many people's attitudes are concerned, the best course of action may be to encourage others to pay and not to pay oneself.

Of course, one can come up with other explanations for why obedience to law is recommended by the attitudes of those subject to its commands. But it is not likely that these explanations could explain why *all* citizens, in *every* legal system, have a subjective reason to obey *all* the valid laws of the system. It is always possible to imagine people whose attitudes do not recommend conformity to valid law. If there are such things as legal reasons for action, they are surely objective—reasons for conformity to law that bind *whatever* one's attitudes.

Therefore, to say that the realists denied the existence of legal rules is to attribute to them the following position: The fact that something is valid law does not give those to whom the law applies an objective reason for obedience. In this sense, the realists' rule-skepticism is similar to *philosophical anarchism*. The philosophical

27. See Coleman & Leiter, *supra* note 21, at 245.

anarchist denies that valid law always gives those to whom it applies a moral reason (even a *prima facie* moral reason) for compliance.²⁸ But legal realism goes beyond philosophical anarchism as it is usually understood. The philosophical anarchist can accept that the law provides objective reasons for action that are *not* moral. He is concerned solely with rejecting the natural law position, in which legal obligation is a species of moral obligation. As we shall see, although H.L.A. Hart rejected natural law theory, he appears to have accepted that objective legal obligations—and so legal rules—exist. The realists, in contrast, rejected the idea of legal obligation entirely.

B. What Is the Prediction Theory of Law?

So far, I have only described what it means to reject legal rules in the relevant sense. I will offer my evidence that the realists in fact held this position in Parts III and IV, where I discuss the realists' two arguments that the social facts concerning official practices on the basis of which something is law do not give citizens—and in particular judges adjudicating cases—objective reasons for obedience.

28. See Edmundson, *supra* note 26, at 218-19; see also RAZ, *supra* note 23, at 233-34; A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979); A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY (1993); A. John Simmons, *Philosophical Anarchism*, in FOR AND AGAINST THE STATE: NEW PHILOSOPHICAL READINGS 19 (John T. Sanders & Jan Narveson eds., 1996) [hereinafter Simmons, *Philosophical Anarchism*]; Smith, *supra* note 22. Some have argued, more strongly, that an obligation to obey the law is incompatible with autonomy. Because the law appears to displace other reasons for action (even moral reasons) in deliberation, obedience to law seems to require insensitivity to one's own moral views. See, e.g., ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 14 (1970) ("[The philosophical anarchist] may do what [the law] tells him, but not because he has been told to do it."). There is, however, a long philosophical tradition of attempting to show how *legitimate authority* can be possible. RAZ, *supra* note 23, at 3-27; Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991). Joseph Raz has argued for the possibility that an agent may be *more likely* to act on the moral reasons that apply to him by following the authority than by trying to act on the balance of reasons himself. RAZ, *supra* note 25, at 53-57. But most who offer such justifications—including Raz—seek only to show the *possibility* of legitimate authority. They do not argue that it exists with respect to *every* valid law in *every* legal system. Although Raz argues that the law always *claims* authority, RAZ, *supra* note 23, at 29-30, he does not argue that it always has it. RAZ, *supra* note 25, at 80. He argues that there is no duty, even a *prima facie* duty, to obey the law. RAZ, *supra* note 23, at 233-49.

In light of these arguments, the realists' rejection of legal rules emerges as a *theory of law*—a generally applicable philosophical account of the law. But it is not a comprehensive theory, for aside from telling us that the law is non-normative, it does not give us any idea which items should be identified as law. For example, it is entirely compatible with the realists' rejection of legal rules that statutes are law, provided that their status as law does not give one an objective reason for compliance with their demands.

The realists' prediction theory of law, in contrast, is an account of the items that should be identified as law. As we shall see, however, the prediction theory (in both its forms) is inadequate—for it, quite simply, identifies the *wrong* set of items as law. It often fails to identify constitutions, statutes and the like as law, even though these are clearly items that fall under our concept of law. As a consequence, the prediction theory cannot make sense of some judicial errors—for example, a decision by a court that is contrary to a valid statute.

But even if we must reject the prediction theory in the end, it is important to be fair to the realists when characterizing the items that the theory identifies as law. It is common—both now and at the time that the realists were active²⁹—for critics to misread the realists as arguing that the law for a judge deciding a case is a prediction of how *that judge* would decide. In order to decide in accordance with the law, a judge would have to *try* to abide by predictions of her decision. Since this is bizarre, the critics conclude that the prediction theory is bizarre as well. Brian Leiter offers such a criticism of the prediction theory, attributing it to H.L.A. Hart.³⁰

[A]ccording to the [prediction theory], a judge who sets out to discover the “law” on some issue upon which she must render a

29. For an example of the criticism at the time the realists were writing, see John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 844 (1931) (“The judge will find himself confronted with one or more legal rules applicable, or conceivably applicable, to the case before him. For him these rules cannot be conceived as mere rules of prediction. He is not interested in predicting what he himself is about to do.”). See also M.H. Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, 39 J. PHIL. 85, 87 (1942); Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1250 (1934).

30. Leiter may be wrong not merely in his reading of the prediction theory, but also in his reading of Hart, for it is not clear that this criticism can be found in Hart's discussion of the realists.

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 [prediction theory], convinced most Anglo-American legal philosophers that Realism was best forgotten.³¹

Leiter's argument is mistaken, however, for the realists did not think that the applicable law for a judge deciding a case is a prediction of how that judge will decide. The law, they argued, is the judge's decision itself.³²

"The law ... consists of *decisions*, not of rules. If so, then *when- ever a judge decides a case he is making law*."³³

"What ... officials do about disputes is, to my mind, the law itself."³⁴

"Law is made up not of rules for decision laid down by the courts but of the decisions themselves."³⁵

"[L]aw arises when some one is asked to determine the lawfulness—that is the rightness—of an event, necessarily a past event."³⁶

Indeed, the realists' position is better described as the *decision* theory of law. Predictions are relevant, not for judges, but for private citizens—especially litigants. Since the law is what a judge decides, we must predict how a judge will decide to determine what the law is. Predictions are attempts to discover the law, they are not themselves law:

31. Leiter, *supra* note 2, at 270; see also RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 224 (1990) (stating that the argument that the prediction theory fails because a judge "cannot predict his own behavior" is "formidable," but only with respect to "judges of the highest court of the jurisdiction"); Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 290 (offering an example of the prediction theory's "silly" implications); David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1577-78 (1997) ("If law is prophecies of what the courts will do, then court-made law consists of self-fulfilling prophecies.").

32. See ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 122 (1982).

33. JEROME FRANK, LAW AND THE MODERN MIND 128 (1930).

34. KARL N. LLEWELLYN, THE BRAMBLE BUSH 12 (1960). It should be kept in mind, however, that in the foreword to the second edition Llewellyn refers to this passage as "unhappy words" and "plainly at best a very partial statement of the whole truth." *Id.* at 9.

35. FRANK, *supra* note 33, at 125.

36. Radin, *supra* note 18, at 10.

For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.³⁷

Because whatever she decides will be the law, a judge, unlike a private citizen, is unconcerned about predictions of her behavior. She is concerned solely with what the law *should* be. The mistake in Leiter's argument is his assumption that it would be possible for a judge to discover the law at all if the decision theory were true. Since whatever a judge decides is law, there is simply no preexisting law to discover. This was precisely the realists' response to Leiter's argument: "When a judge puts this question [what is the law?], in the course of writing his opinion, he is not attempting to predict his own behavior. He is in effect raising the question, in an obscure way, of whether or not liability *should* be attached to certain acts."³⁸ Leiter's argument, Cohen claimed, wrongly "assume[s] that a judge's duty is to *find* the law rather than to *mould* it, an assumption which no realist makes."³⁹

But the realists' defense of the decision theory is short-lived, for even *properly* understood it is vulnerable to a withering objection, which also can be found in Leiter's discussion of the realists, as well as Hart's.⁴⁰ Precisely because there is no law limiting a judge's decision, the theory does violence to the notion that courts decide cases in a way that is *constrained* by the law. As Leiter puts it, the theory "makes it impossible to articulate the simple idea that the law is one thing, and a particular court's decision another."⁴¹ Judges

37. FRANK, *supra* note 33, at 46.

38. Cohen, *supra* note 18, at 840.

39. FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 13 n.16 (1933).

40. See HART, *supra* note 3, at 105; H.L.A. Hart, *Scandinavian Realism*, 1959 CAMBRIDGE L.J. 233, 237.

41. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 290; see also BENDITT, *supra* note 3, at 86-88; DWORKIN, *supra* note 3, at 36-37 ("[R]ealism remains deeply implausible as a semantic theory [of the meaning of the word 'law']. For it is hardly contradictory—indeed it is common—for lawyers to predict that judges will make a mistake

do not act as if they are absolute monarchs whose word is law. They act, rather, as if there is antecedently existing law with respect to which their decision can be correct or incorrect. In short, the decision theory of law cannot be right, because some decisions are *not law*. A judge can make an *illegal* decision—a decision that is *contrary* to the law.

This criticism does justice to the realists' views, for they often embraced the idea that judges cannot make legal mistakes. Consider the following passage from Jerome Frank's *Law and the Modern Mind*:

All ... decisions are law. The fact that courts render these decisions makes them law. There is no mysterious entity apart from these decisions. If the judges in any case come to a "wrong" result and give forth a decision which is discordant with their own or anyone else's rules, their decision is none the less law.⁴²

Felix Cohen provides another example. The existence of a contract, Cohen argues, is "a function of legal decisions": "The question of what courts *ought* to do is irrelevant here. Where there is a promise that will be legally enforced there is a contract."⁴³ Because a contract exists whenever a judge decides it exists, she is like an absolute monarch—whatever reasons she has for concluding a contract exists are valid reasons.⁴⁴

The decision theory is implausible not merely because some decisions are not law, but also because some non-decisions (statutes, constitutions and the like) are law. Hart argues, for example, that the realists would be unable to identify the very decisions to which they seek to reduce the law, without implicitly assuming that non-decisions are law:

"[R]ule-scepticism," or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the predictions of them ... is indeed quite incoherent; for the assertion that there are decisions of courts cannot consistently be combined with the denial that there are any

about the law"); SUMMERS, *supra* note 32, at 103-05, 123-35.

42. FRANK, *supra* note 33, at 125.

43. Cohen, *supra* note 18, at 839.

44. *Id.*

rules at all. This is so because ... the existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative.... There would be nothing to distinguish the decision of a private person from that of a court.⁴⁵

Without assuming that a non-decision like the United States Constitution is law, the realists would not be able to tell that nine people at 1 First Street N.E. in Washington D.C., rather than nine people stuck on a freeway in Los Angeles, are Justices of the Supreme Court.

Hart appears to think this argument undermines not only the decision theory, but also the realists' rejection of legal rules. The realists' reliance on the Constitution when identifying courts, he suggests, commits them to the Constitution's status as a legal rule in the reason-for-action sense. But this is a mistake. Even if the realists must admit that the Constitution should be called "law," they can still reject the idea that the Constitution's status as law gives people—including judges—objective reasons for compliance with its demands. To be sure, if a judge decides a case in a manner that is contrary to the Constitution she may have created a decision that is not law. But it does not follow that she has an objective reason to adjudicate in accordance with the Constitution, for she may have no objective reason to prefer the creation of law over non-law.

As an analogy, imagine some people are playing a game called "torture-the-kitten." The participants in the game have agreed to follow the rule (in the propositional sense) that a player must torture a kitten when he has scored a point. This is as much a valid rule in the game as the Constitution is a valid rule in our legal system. But the fact that it is a valid rule in the game does not mean that participants have objective reasons to torture kittens after scoring a point. One is still free to argue that they have no objective reasons, not even *prima facie* reasons, to do what that rule tells them to do. By the same token, even if the realist must accept that the Constitution is law, he can still maintain that its status

45. HART, *supra* note 3, at 136; *see also* Kantorowicz, *supra* note 29, at 1246 (arguing that courts can be identified only through rules); Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 289 n.40 (accepting Hart's argument).

as law fails to give judges objective reasons for adjudicating in accordance with its instructions.

Leiter, like Hart, criticizes the decision theory on the grounds that the realists were tacitly committed to non-decisions being law. He argues that the realists would be unable to articulate their theory of adjudication—that is, their view that “judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons”⁴⁶—if the decision theory were true:

The “class of legal reasons” is the class of reasons that may properly justify a legal conclusion (and thus compel it insofar as legal actors are responsive to valid legal reasons). So, for example, appeal to a statutory provision or valid precedent are parts of the class of legal reasons, while appeal to the authority of Plato’s *Republic* is not: a judge is not obliged to decide one way rather than another because Plato says so. Any argument for indeterminacy, then, presupposes some view about the boundaries of the class of legal reasons. When Oliphant argues, for example, that the promise-not-to-compete cases are decided not by reference to law but by reference to uncodified norms prevalent in the commercial culture in which the disputes arose, this only shows that the law is indeterminate on the assumption that the normative reasons the courts are actually relying upon are not themselves legal reasons.⁴⁷

Leiter is undoubtedly right that it is inconsistent for the realists to say, on the one hand, that the law consists only of decisions and, on the other hand, that judges arriving at these decisions are insensitive to law. To the extent that they thought that judges’ decisions are insensitive to law, they presupposed a standard theory of law in which non-decisions (e.g. statutes) can be law. But Leiter, like Hart, suggests that the realists were committed not merely to non-decisions being law, but also to these non-decisions being *legal*

46. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 281; see also Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 52-53 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter Leiter, *American Legal Realism*].

47. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 292.

rules, in the sense that they give judges objective reasons to adjudicate in accordance with them. This does not follow.

I say that Leiter “suggests” that the realists were committed to legal rules in the reason-for-action sense, because he *might* understand statutes and the like to be “legal rules and reasons” only in the sense that they provide *subjective* reasons for decisions. A statute penalizing driving in excess of 55 m.p.h. would be a “legal rule or reason” only in the sense that it was a reason to penalize driving in excess of 55 m.p.h. for those judges with attitudes recommending adjudication in conformity with the law.⁴⁸

If Leiter does understand legal rules objectively, however, his argument fails. The realists’ theory of adjudication gives us no reason to think they believed in such legal rules. Although it committed them to a standard theory of law under which statutes and the like are law, they could still maintain that the fact that a statute is valid law does not give judges an objective reason to adjudicate as the statute instructs.

Although the decision theory of law is prevalent in the realists’ writings, one can also find a prediction theory of sorts. But this is not the view that the law for a judge deciding a case is a prediction of how *that* judge would decide. It is instead the view that the law is a prediction of how judges and other officials in a jurisdiction

48. At one point, Leiter appears to address this issue, albeit with respect to *nonlegal* reasons. He notes that the talk about “reasons” in his account of the realists’ theory of adjudication presupposes a residual normativity: “[C]ausal explanation of decisions in terms of reasons (even nonlegal reasons) does require taking the normative force of the reasons *qua* reasons seriously.” Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 285. But he makes it clear that this residual normativity is the idea of human beings as rational agents—that is, as acting on the basis of their subjective reasons for action. To give up normativity in this sense would mean adopting a purely *behavioristic* approach. And, as Leiter rightly notes, the realists—Underhill Moore excepted—were not strict behaviorists.

Accepting this residual normativity is compatible with rejecting the more robust normativity provided by objective reasons for action. The economist, for example, is committed to residual normativity insofar as he explains human action as a product of ends-means reasoning. But he is not thereby committed to the more robust normativity of objective reasons for action. He draws no normative distinction between someone who saves a drowning child and someone who tortures kittens, provided that each acts in a manner calculated to satisfy his weighted preferences. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (3d ed. 1986); Herbert Hovenkamp, *Rationality in Law & Economics*, 60 *GEO. WASH. L. REV.* 293, 293 (1992); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1551 (1998). From the more robust normative perspective, in contrast, the first acts in a way that is sensitive to objective reasons for action, while the latter does not.

would generally decide. According to Walter Wheeler Cook, for example, a statement "that a certain 'rule of law' is the 'law of England' is ... merely a more or less convenient shorthand way of saying that, on the basis of certain observations of past phenomena, we predict certain future behavior of the appropriate English officials."⁴⁹ Assertions that legal rights exist are nothing "more than a conventional way of describing past and predicting future behavior of human beings—judges and other officials."⁵⁰ Such statements are true "if they accurately ... describe the past behavior and predict the future behavior of societal agents."⁵¹

According to this prediction theory, a judge's decision would *not* be law simply because it was made, nor would it be law by virtue of its conformity with predictions of how that particular judge would decide the case. It would be law only if it was in conformity with predictions of how judges would generally decide cases in that jurisdiction. An unprecedented decision could be law, therefore, only if its issuance led us to believe that other judges in the jurisdiction would decide similarly in the future. As Cook put it, a decision makes law only if it "has given us new data upon the basis of which we believe that we are able to predict action in another case like the case just decided."⁵² Accordingly, if a renegade judge decided a case in accordance with Plato's *Republic*, her decision would not be the law, because the *Republic* would still not be useful for predicting the future decisions of officials in the jurisdiction.

Not only are some decisions not law under this form of the prediction theory, some non-decisions (e.g. the Constitution) are law. A judge deciding a case would be able to call the Constitution "law" in the sense that she could predict that most judges would enforce it. Nevertheless, it is unlikely that the prediction theory would identify exactly the same items as "law" as a standard theory

49. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 476 (1924) [hereinafter Cook, *Conflict of Laws*]. Although Cook objected to being labeled a realist, Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 423 (1943), the non-normative approach to the law that he employed is a cornerstone of realist jurisprudence. See KALMAN, *supra* note 1, at 3-44. Cook has been included among the legal realists for just this reason. See, e.g., *id.* at 7.

50. COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 33.

51. *Id.* at 29.

52. *Id.* at 31 n.57.

of law. After all, if the realists' *theory of adjudication* is correct, much that we would normally call "law" is useless in predicting judicial behavior. According to the prediction theory, therefore, it would not be law. By the same token, some items that we would not normally call "law" could be useful for predicting judicial behavior and so would be law under the prediction theory. If, as Karl Llewellyn argued, judicial belief in an implicit obligation of good faith in contractual dealing drove contract decisions in a predictable fashion even *before* this obligation was included within Article 2 of the UCC, the obligation of good faith was the law according to the prediction theory even before it was so included.⁵³

The truth is, however, that Hart's primary criticism of the prediction theory is not that it picks out the wrong items as law. Even if the prediction theory identified precisely the same items that would be identified in a standard theory, the prediction theory would fail because it would be unable to explain the law's capacity to give reasons for action:

[I]t cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. Laws function in their lives not merely as habits or the basis for predicting the decisions of courts or the actions of other officials, but as accepted legal standards of behaviour. That is, they not only do with tolerable regularity what the law requires of them, but they look upon it as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others.⁵⁴

If all it meant to say that the Constitution is "law" were that judges in a jurisdiction predictably decide in accordance with the Constitution, a judge who recognized that the Constitution was law would have no reason to decide in accordance with the Constitution herself.

The fundamental problem with the prediction theory, according to Hart, is that it forces us to reject legal rules in the reason-for-

53. See *infra* note 202.

54. HART, *supra* note 3, at 137-38.

action sense. It treats a statement about the law as a statement about a non-normative fact—that a certain decision will, in fact, be arrived at—not the type of normative fact that could justify or give a reason for a citizen's or judge's conformity to law.

C. Did the Realists Have a Novel Theory of Law at All?

I have so far described three theories of law advocated by the realists. The first, and most plausible, is their *rejection of legal rules*—that is, their argument that the law fails to provide objective reasons for compliance with its demands. The second, and least plausible, is the *decision theory of law*, according to which only the concrete decisions of courts are law. The third is the *prediction theory of law*, in which statements about the law are equivalent to predictions of the decisions of courts within a jurisdiction.

As we have seen, both Hart and Leiter argue that the realists implicitly accepted a standard theory of law (in which statutes, for example, can be law) that is at odds with the decision and prediction theories. Although Hart uses this inconsistency to prove that the theories are incoherent, Leiter uses it to question whether the realists offered these theories—or indeed any novel theory of law—at all. The realists spoke of the law in terms of concrete decisions and predictions of decisions, Leiter argues, only because they were concerned with the practical meaning of the law to lawyers, whose job it is to protect their clients from adverse judgments.⁵⁵ They were “not aiming for a generally applicable analysis of the concept of law.”⁵⁶

But the evidence Leiter offers for his reading is weak. First of all, he concentrates on only two figures—Justice Holmes, who predated the legal realist movement, and Jerome Frank—without addressing the many expressions of novel theories of law, quoted earlier, from realists such as Cohen and Cook. Furthermore, it is only through selective quotation that Leiter is able to generate evidence concerning Holmes and Frank. Leiter argues, for example, that the prediction theory of law that Holmes offers in the *The Path of the*

55. See Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 261, 263 (Dennis Patterson ed., 1996); Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 291-92.

56. Leiter, *supra* note 55, at 263.

Law should not be taken as generally applicable,⁵⁷ because Holmes begins the essay “by emphasizing that he is talking about the meaning of law to lawyers who will ‘appear before judges, or ... advise people in such a way as to keep them out of court.’”⁵⁸ But the following is what Holmes actually says in the beginning of that essay: “When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court.”⁵⁹

Holmes does not suggest that he is *setting aside* a general conception of law in favor of the more narrow perspective of a lawyer advising his client. He talks about the lawyer’s perspective because he believes it is relevant to the law *in general*—the material studied by his audience.

Holmes looks at the law from the perspective of the lawyer advising his client for the same reason he looks at it from the perspective of the “bad man.” Freed of any feelings of obligation to the law, these people see the law for what it really is:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.... Take the fundamental question, What constitutes the law? ... [I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁶⁰

57. It appears that in the *The Path of the Law*, Holmes, like Cook, offers the prediction theory of law, not the decision theory. For example, Holmes does not deny that statutes are law—but he understands them as law only insofar as they allow us to predict how judges in a jurisdiction in general decide cases. See Holmes, *supra* note 18, at 457 (stating that statutes are “scattered prophecies of the past upon the cases in which the axe will fall”).

58. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 291 (quoting Holmes, *supra* note 18, at 457).

59. Holmes, *supra* note 18, at 457.

60. *Id.* at 459-61; see also William Twining, *Other People’s Power: The Bad Man and English Positivism, 1897-1997*, 63 BROOK. L. REV. 189, 204-06 (1997) (noting bad man

For Holmes, as for the realists, the prediction theory of law was generally applicable. And, like the realists, Holmes was inclined toward this theory because he thought it followed once one looked at the law non-normatively—that is, once one rejected the idea of legal obligation.

Holmes presents the prediction theory as a general theory of law elsewhere in the essay as well, arguing, for example, that “[t]he primary rights and duties with which jurisprudence busies itself again are nothing but prophecies.”⁶¹ Jurisprudence busies itself with the law in general, not merely the lawyer’s perspective on the law.

Leiter pursues the same strategy with respect to Frank, arguing that the decision theory presented in *Law and the Modern Mind* is not generally applicable, because “Frank cautions the reader early on that he ‘is primarily concerned with “law” as it affects the work of the practicing lawyer and the needs of the clients who retain him.’”⁶² Had Frank not concentrated on this perspective, Leiter suggests, he would have accepted that statutes and the like are law.

Let us set aside the fact that this cautionary language is in a footnote almost fifty pages into the book. Only by ignoring the rest of the footnote can Leiter make it appear as if Frank is not offering a generally applicable theory of law. To be sure, Frank says that reducing the law to the decisions of courts is “admittedly artificial” and that this artificiality has to do with his emphasis on the perspective of a lawyer. But the problem is not that his approach fails to treat statutes as law, but that emphasizing judicial behavior ignores “the ways of all governmental officials and ... the reactions of non-official persons to the ways of judges and other officials.”⁶³ A less distorting approach would not speak of statutes as the law, it would speak of the law as reducible to the decisions of judicial *and non-judicial* officials (and the reactions of private citizens to those decisions). Frank defends his focus on adjudication as “excusable,”

emphasizes the separability thesis); William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275, 282 (1973).

61. Holmes, *supra* note 18, at 458.

62. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 291 (quoting FRANK, *supra* note 33, at 47 n.*).

63. FRANK, *supra* note 33, at 47 n.*.

however, because “it roughly corresponds to the notion of the contemporary layman when consulting his lawyer.”⁶⁴

Indeed, Frank makes it clear that the decision theory applies beyond a lawyer’s perspective, for he describes it as appropriate for judges deciding cases as well:

The business of the judges is to decide particular cases. They, or some third person viewing their handiwork, may choose to generalize from these decisions ... and describe the common elements as “rules.” But those descriptions of alleged common elements are, at best, some aid to lawyers in guessing or bringing about future judicial conduct or some help to judges in settling other disputes. The rules will not directly decide any other cases in any given way, nor authoritatively compel the judges to decide those other cases in any given way Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law⁶⁵

And so Frank concludes, “[t]he law, therefore, consists of *decisions*, not of rules. If so, then *whenever a judge decides a case he is making law*.”⁶⁶

We must accept, even if Leiter cannot, that the realists meant what they repeatedly and unambiguously said. If the realists are to be defended, we must make sense of *why* they were inclined to the prediction and decision theories. A primary reason, I will argue, is that they wrongly thought that these theories followed from another, far more defensible position—their rejection of legal rules.

II. HART ON THE NORMATIVITY OF LAW

Before addressing the realists’ arguments against legal rules, it is useful to look at how H.L.A. Hart dealt with the same problem. This is not merely because Hart’s arguments in favor of legal obligation ran into difficulties that put the realists’ non-normative approach in a sympathetic light. It is also because, aside from their

64. *Id.* For a similar criticism of Leiter’s reading of the realists, see MICHAEL MOORE, EDUCATING ONESELF IN PUBLIC 36-37 (2000).

65. FRANK, *supra* note 33, at 127.

66. *Id.* at 128.

differing views about the law's normativity, the realists' theory of law was remarkably similar to Hart's.

A. Hart's Theory of Law

Hart, like most legal positivists,⁶⁷ believed that the foundation for a legal system—the ultimate explanation of why something is a valid law—was a set of *social facts*, in particular, the beliefs, attitudes and behavior of a population.⁶⁸ This is an attractive notion, not the least because revolutions, in which legal systems *change*, consist of transformations in social facts of this sort. The British legal system was replaced by the American legal system in late eighteenth century English-speaking North America, because of changes in the beliefs, attitudes and behavior of these English-speaking North Americans.

Hart argued, however, that an adequate explanation of a legal system in terms of social facts must also explain the *normativity* of law—that is, why it provides reasons for action.⁶⁹ The failure to explain the law's normativity is one of the primary reasons Hart rejected John Austin's philosophy of law, despite the fact that Austin, like Hart, explained the existence of a legal system in terms of social facts.

According to Austin, a legal system exists whenever there is a *sovereign*, understood as a person (or group of people) whose commands are habitually obeyed by the bulk of the population and who habitually obeys no one else.⁷⁰ All valid laws can ultimately be traced back to the sovereign's *command*—that is, an expression by the sovereign of his desire that someone act or refrain from acting, combined with the threat of sanctions for noncompliance.⁷¹

67. See Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1152 (2002) (reviewing JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 75-77 (2001)).

68. See HART, *supra* note 3, at 110, 292-93; Jeffrey D. Goldsworthy, *The Self-Destruction of Legal Positivism*, 10 OXFORD J. LEGAL STUD. 449, 452 (1990); Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart / Dworkin Dispute*, 75 MICH. L. REV. 473, 512 (1977).

69. See Coleman & Leiter, *supra* note 21, at 241-42; Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 286.

70. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 193-94 (Dartmouth Publ'g 1998) (1832).

71. *Id.* at 13-14.

One reason Hart criticized Austin's account has nothing to do with the law's normativity. Hart argued that Austin was unable to explain the possibility that everyone in a legal system was legally constrained. How can there be laws governing the succession of sovereigns within a legal system, Hart asked, if all laws emanate from a sovereign?⁷² The very idea of legal succession of sovereignty assumes that each sovereign is subject to an authorizing law he did not command.

But Hart also objected to Austin's view that the normativity of law—that is, its binding or obligatory character—could be explained by sanctions for noncompliance. Simple obedience out of prudence, as is the case when someone gives over his money to the person who threatens him with a gun, cannot explain the reasons for action that the law provides: “[W]e would say that [this person], if he obeyed, was ‘obliged’ to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that [the person] ‘had an obligation’ or a ‘duty’ to hand over the money.”⁷³

Likewise the Austinian conception of a *habit* of obedience cannot explain legal obligation. A habit, or mere convergence of behavior, “is not enough to constitute the existence of a rule requiring that behaviour”⁷⁴ For a rule to exist, there must be *reasons* for compliance, and Austinian habits cannot explain why these reasons exist.

Hart's alternative foundation for a legal system is a “rule of recognition”—that is, a secondary rule (or rule about rules) identifying valid laws within the system. As we have seen, however, the term “rule” is ambiguous. Sometimes Hart speaks of the rule of recognition as a *proposition* specifying the criteria of legal validity within the legal system.⁷⁵ Hart's approach is doomed, however, if the foundation of a legal system were a rule of recognition in the propositional sense, for an infinite number of these rules—and so an

72. HART, *supra* note 3, at 58-60.

73. *Id.* at 82.

74. *Id.* at 55.

75. See Benjamin C. Zipursky, *The Model of Social Facts*, in HART'S POSTSCRIPT 219, 227-28 (Jules Coleman ed., 2001). Although this content might be expressed linguistically (as is the case in the Code of Hammurabi), Hart notes that this is, in fact, rare. HART, *supra* note 3, at 101.

infinite number of legal systems—exist. Consider the following sentence: “Michael Green’s word is law.” This expresses the propositional rule of recognition that all valid laws must be traced back to *my* command. If the foundation of legal systems is propositions, a legal system in which I am an absolute sovereign must exist.

The solution to this problem is that Hart—adding a *third* meaning to the word “rule” (beyond the propositional and the reason-for-action senses)—also uses the term “rule of recognition” to refer to the *social fact* that a certain rule of recognition (in the propositional sense) is practiced by officials. The proposition is practiced in the sense that officials agree to enforce only whatever satisfies the criteria in the proposition.⁷⁶ For example, the British rule of recognition (in the social facts sense) is the practice of British officials enforcing only whatever satisfies the criteria in the rule of recognition (in the propositional sense) that is expressed by the following sentence: “What the Queen-in-Parliament enacts is law.”

Rules of recognition explain why sovereignty can be limited legally. If officials identify as *law* a principle governing the succession of sovereigns, then it *is* law, even though it is not itself the command of any sovereign.⁷⁷ More important for our purposes, Hart believed that the set of social facts that constitute a rule of recognition, unlike those social facts to which Austin appealed, can explain the normativity of law—that is, why the law consists of rules in the *reason-for-action* sense. The foundation of Hart’s argument is that a rule of recognition is a “social rule.”⁷⁸ A social rule exists when, in addition to convergence of behavior, “deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity”⁷⁹ Not only is deviation from a standard criticized, but the criticism is regarded as legitimate, not merely by those criticizing, but also by most of those

76. The existence of a rule of recognition in a legal system also requires that the primary rules that are valid according to the rule of recognition are generally—although not necessarily *always*—obeyed by the population. HART, *supra* note 3, at 116-17.

77. One should not conclude from the fact that officials generate the practice that establishes the legal system that officials are sovereign within that system. For a discussion of this confusion, see Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 352-74 (2005).

78. HART, *supra* note 3, at 55.

79. *Id.*

criticized: “[E]xcept by a minority of hardened offenders, such criticism and demands are generally regarded as legitimate, or made with good reason, both by those who make them and those to whom they are made.”⁸⁰

An example of a social rule is a game of chess. The participants in this game do not merely find that their behavior converges, they “have a reflective critical attitude to this pattern of behaviour: [T]hey regard it as a standard for all who play the game.”⁸¹ Someone who moves the Queen like a Knight will be criticized, and probably will criticize herself, in normative terms: “I (You) ought not to have moved the Queen like that’, ‘I (You) must do that’, ‘That is right’, ‘That is wrong’.”⁸² Because the rule of recognition is a social rule—and so has the pressure for conformity and the critically reflective attitudes characteristic of all social rules—Hart believed that it could explain why the law provides reasons for compliance.

Hart rather quickly scales back his explanation of legal obligation, however. Even if the *rule of recognition* has to be a social rule, the laws identified by the rule of recognition do not. Citizens need not have a critically reflective attitude toward deviation from every law in their legal system. They may obey out of sheer terror. This means that Hart cannot use the idea of a social rule to explain why citizens (and perhaps even officials) have an obligation to obey these laws.⁸³ The most Hart can do is explain the obligations that officials have by virtue of their participation in the rule of recognition—for example, their obligation to enforce the laws identified by the rule.⁸⁴

But even if one sets aside this substantial gap in Hart’s theory, the question still remains how rules of recognition generate these limited obligations on officials. We know that the obligations cannot be explained by the fact that officials are compelled by formal or

80. *Id.* at 56.

81. *Id.* at 57.

82. *Id.*

83. See Coleman & Leiter, *supra* note 21, at 247. To be sure, Hart insists that a legal system exists only when citizens in general abide by the norms that the rule of recognition identifies as law. See HART, *supra* note 3, at 201. He admits that citizens, however, unlike officials, can lack the tendency to criticize one another for nonconformity with the law. See *id.* at 201-03. The majority of citizens in a legal system might have only the fear of naked force as their reason for compliance. See *id.* at 201; see also Goldsworthy, *supra* note 68, at 457-58; Himma, *supra* note 67, at 1167-69. Himma calls this “the Payne Problem.” *Id.* at 1167 n.127; see also Michael Payne, *Hart’s Concept of a Legal System*, 18 WM. & MARY L. REV. 287 (1976).

84. HART, *supra* note 3, at 114-15; see also Coleman & Leiter, *supra* note 21, at 247.

informal sanctions for disobedience. Otherwise Hart, like Austin, would be explaining only why the officials are "obliged" to conform to the rule of recognition, not why they have an "obligation" to do so.

Indeed, it seems that the officials' reasons for conformity must be independent not merely of their desire to avoid sanctions, but of *all* their attitudes. Although a rule of recognition exists only when *most* officials have attitudes recommending conformity with the rule, the obligations created by the rule bind everyone, including those Hart calls the "minority of hardened offenders"—that is, those whose attitudes fail to give them subjective reasons for conformity. The reasons for conformity must, it seems, be objective.

Consider, for example, Hart's emphasis on "the normative terminology of 'ought', 'must', and 'should'"⁸⁵ used by participants in social rules. This terminology expresses the views of the participants that there are reasons for conformity. But the terminology is used to apply to all those who deviate, including hardened offenders. If the normative terminology referred only to subjective reasons for conformity, the hardened offenders would be excused from any obligations.

Although the reasons for action provided by the rule of recognition look objective, Hart makes it clear that they are *not moral*.⁸⁶ Legality does not necessarily depend on moral merit: "[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."⁸⁷

Unfortunately, Hart has little to say about how legal and moral reasons for action figure together in determining what officials, on the balance of reasons, ought to do. He does suggest, however, that legal reasons are not overriding. The law's demands must be balanced against moral concerns.⁸⁸ But the fact remains that insofar as he is committed to the existence of legal obligation, he appears committed to legal reasons for action as *factors* in determining what officials ought to do.

85. HART, *supra* note 3, at 57.

86. *See id.* at 202-03.

87. *Id.* at 185-86. The distinction between legal and moral obligation that Hart draws is essential to his positivism, for a distinguishing feature of positivism is the "separability thesis." *See* COLEMAN, *supra* note 67, at 152.

88. HART, *supra* note 3, at 210 (arguing that "the certification of something as legally valid is not conclusive of the question of obedience").

B. Can Hart Explain the Law's Normativity?

Can Hart's idea of a social rule explain these nonmoral objective reasons for official conformity to the rule of recognition?⁸⁹ Consider a social rule according to which men remove their hats when they enter a church. Such a practice would not exist, of course, unless most participants had subjective reasons to conform. But what about the "hardened offenders," who lack subjective reasons? What objective reasons do they have?

Hart suggests that objective reasons for action exist because, without them, social rules cannot be distinguished from habits. Let us assume, however, that when people enter a church, 96.7% of the men wearing hats remove them. Assume further that the participants have no objective reasons for conformity. Are we now at a loss to distinguish what goes on in church from mere regularity of behavior? Must we treat the removal of hats the same way we would treat people's tendency to blink more when the wind picks up—as a simple habit? Are we unable to account for the fact that people tend to criticize those who fail to remove their hats?

Of course not. We can understand those who remove their hats as motivated by certain attitudes in a way that those who blink in the wind are not—attitudes that incline them to criticize hardened offenders and to think that they have good reasons for criticism. The conformists act as they do, not because of blind habit, but because they have subjective reasons to conform. But, by the same token, the hardened offenders act as they do because they have subjective reasons to resist conformity. Since the attitudes that give the participants their divergent subjective reasons are matters of psychological and social fact, an explanation in terms of these attitudes is available to people describing the practice without committing them to the view that the practice provides its participants with objective reasons for conformity.

A more promising approach is to argue that, by failing to remove their hats, the hardened offenders will upset the settled expectations or sensibilities of the other churchgoers or that, by entering the church, they implicitly promised to conform to accepted practice. These are reasons for conformity that would exist no matter what

89. For a similar argument to the following, see Zipursky, *supra* note 75, at 237-47.

one's attitudes. I do not escape my obligation to keep my promises simply because I have subjective reasons to break them—for example, because I *really want* to break them or think (wrongly) that breaking promises is obligatory. But the problem with such an argument is that these reasons for conformity, although objective, look *moral*, and Hart seeks to distinguish legal and moral obligation.

Because the only objective reasons for conformity to the rule of recognition that seem available are moral, Hart's positivism is threatened, for positivists insist upon the separation of legal and moral obligation. Ronald Dworkin identified this problem early in his career and it stands at the center of his critique of Hart:

We might say that the sociologist's assertion of a social rule is true (or warranted) if a certain factual state of affairs occurs, that is, if the community behaves in the way Hart describes in his example. But we should want to say that the church-goer's assertion of a normative rule is true (or warranted) only if a certain normative state of affairs exists, that is, only if individuals in fact do have the duty that they suppose they have in Hart's example.⁹⁰

As Dworkin makes clear,⁹¹ the "normative state of affairs" is the *moral* obligation that all church-goers—even the hardened offenders—have to remove their hats given the social facts described.

Of course, if the only objective reasons for conformity to a social rule are moral, the normativity of *games* would have to be explained in moral terms too. Consider the set of social facts that constitutes the practice of chess. The practice would not exist unless participants' attitudes largely recommended conformity. But some participants might have attitudes that recommend nonconformity. They might consider it important to move the Queen like a Knight. It seems that our only avenue for showing that they have objective reasons to move the Queen as the others do would be moral (for

90. DWORKIN, *supra* note 17, at 51; see also Andrei Marmor, *Legal Conventionalism*, 4 LEGAL THEORY 509, 530 (1998) ("Whether judges, or anyone else, should or should not respect the rules of recognition of a legal system is a purely moral issue that can only be resolved by moral arguments."); Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 LEGAL THEORY 329, 337 (1998).

91. See *infra* Part II.D.

example, because it is morally wrong to upset the settled expectations of the participants or because, by sitting down to play a game of chess, they promised to conform to the practice).

Of course, we could explain the normativity of chess without recourse to morality if we gave up the idea that rules provide participants with objective reasons for conformity. They could be understood simply as a set of *propositions* that guide the actions of those whose attitudes recommend conformity. Consider a game of torture-the-kitten that is kept in play through threats by a superior. The rules of the game would exist, despite the absence of objective reasons for conformity, as an identifiable set of propositions that guide the actions of the coerced participants.

Although this understanding of rules may have a good deal of merit, it is not one that Hart can adopt, for the commands of an Austinian sovereign are rules in this attenuated sense. A state in which officials conform to a rule of recognition solely due to fear of reprisals from a tyrant would be rule-governed in the attenuated sense, but Hart makes it clear that this would be a system in which the officials were only obliged, not obligated, to conform.

C. Shared Cooperative Activities?

Positivists following in Hart's footsteps have run into many of the same difficulties explaining law's normativity. Consider the approach *du jour*—the notion that a “shared cooperative activity” is able to “make[] intelligible the claim that the rule of recognition can be a duty-imposing rule.”⁹² Shared cooperative activities were introduced into the philosophical lexicon by the philosopher Michael Bratman.⁹³ Those who intend to participate in such activities share a commitment to joint action and therefore have reasons to respond to one another, as well as to support one another in the roles they

92. COLEMAN, *supra* note 67, at 98; *see also id.* at 95-100; Kenneth Einar Himma, *Inclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002) (discussing Bratman's theory); Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 LEGAL THEORY 387, 417, 432 (2002) (same).

93. *See* MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* (1999); Michael E. Bratman, *Shared Cooperative Activity: Three Features*, 101 PHIL. REV. 327 (1992) [hereinafter Bratman, *Shared Cooperative Activity*]; Michael E. Bratman, *Shared Intention*, 104 ETHICS 97 (1993) [hereinafter Bratman, *Shared Intention*].

are playing.⁹⁴ An example of a shared cooperative activity is painting a house together.⁹⁵ The intention to engage in such a practice gives the participants reasons for action. For example, my intention to paint a house with you gives me a reason to share my brush if your brush gets dirty.⁹⁶

Some have suggested that if the rule of recognition is a shared cooperative activity, it could generate obligations of conformity for officials participating in the rule:

The notion of [a shared cooperative activity] involves more than just a convergence of unilateral acceptances of the rule of recognition. It involves a joint *commitment* on the part of the participants to the activity governed by the rule of recognition And there is no mystery (at least not one that a legal theorist is obliged to solve) about how joint commitments can give rise to obligations; insofar as such commitments induce reliance and a justified set of expectations (whether explicitly or not), they can give rise to obligations.⁹⁷

But Dworkin's critique applies to this explanation of legal obligation as well. If one uses justified expectations and reliance to explain why all officials—even the hardened offenders—are obligated to conform to legal practices, it looks like legal obligation is a species of moral obligation.⁹⁸

94. Bratman, *Shared Cooperative Activity*, *supra* note 93, at 328.

95. *Id.* at 331-33.

96. *See id.* at 328.

97. COLEMAN, *supra* note 67, at 98 (quoting Himma, *supra* note 92, at 134-35).

98. *See* Thomas Christiano & Stefan Sciaraffa, *Legal Positivism and the Nature of Legal Obligation*, 22 *LAW & PHIL.* 487, 489-90 (2003) (reviewing COLEMAN, *supra* note 67, and claiming that a shared cooperative activities approach to legal obligation is akin to a natural law approach); Stephen R. Perry, *Method and Principle in Legal Theory*, 111 *YALE L.J.* 1757, 1783-86 (2002) (reviewing COLEMAN, *supra* note 67, and noting the similarity between Coleman's notion that shared cooperative activities commit judges to the rule of recognition to achieve a "durable legal practice" and Dworkin's approach).

Coleman's argument is complicated by his insistence that an account of the "normativity of law" does not have to explain why there is legal obligation. Indeed, Coleman insists that "legal rules that purport to impose duties may not in fact do so." Himma, *supra* note 67, at 1167 (quoting Jules Coleman, *Conventionality and Normativity* (manuscript)). An account of the law's normativity must only "make intelligible law's claim to govern by imposing content independent duties." *Id.* It is the job of the political philosopher to answer the question "under what conditions is law's claim to so govern true." *Id.* Shared cooperative activities need only make the law's claim to impose obligations *intelligible*; it apparently does not matter that they

The only nonmoral reasons for conformity that shared cooperative activities provide are subjective in the sense that they are binding only given one's *continued* intention or commitment to participate. It is for just this reason that Bratman himself doubts that shared cooperative activities can explain legal obligation. A rule of recognition could not give rise to obligations on unwilling judicial participants without the introduction of moral concerns:

[W]hat happens when the authority knows that a subject does not in fact have the relevant intention? Perhaps a higher-court judge knows that a particular lower-court judge does not actually intend that the higher-court judge's orders be a reason for him. The present account gives us no basis for saying that the lower-court judge, by virtue of his role, nevertheless has reason to conform to the rulings of the higher-court judge. It is natural here to say that the authority's orders still provide reasons for the subject because the subject has, by taking on the relevant role, assured the authority and others or (anyway) intentionally given them the reasonable expectation that he (the subject) would treat the orders in this way. The advantage of this story is that it does not depend upon the subject's actually intending that the orders be reasons. A possible problem is that a defense of this story will, I suppose, appeal to moral principles of assurance-based obligation. And that may be a kind of appeal to morality that is in tension with the legal positivists' project.⁹⁹

This problem is evident when we consider whether reasons for conformity that bind unwilling participants would exist for shared cooperative activities that are immoral. Imagine that we have decided to torture a kitten together, using instruments to be constructed collaboratively. I am torturing the kitten with our most recently completed instrument, and you are busy constructing the

fail actually to generate obligations. But if what makes a claim to impose obligations intelligible need not explain why there actually are obligations, why not simply appeal to the lawmaker's chutzpah—the fact that he believes, however wrongly, that his commands are imposing obligations? Why doesn't that make his claims intelligible? At any rate, it is clear that Coleman's approach is not Hart's because Hart thought he needed to explain why legal obligation actually exists. *See id.* at 1169.

99. Michael E. Bratman, *Shapiro on Legal Positivism and Jointly Intentional Activity*, 8 LEGAL THEORY 511, 517 (2002) (footnotes omitted); *see also* BRATMAN, *supra* note 93, at 132-36; Bratman, *Shared Intention*, *supra* note 93, at 111-12.

next one. It becomes clear that you need my help. It would not sound odd to say that, as a willing participant in the activity, I have a reason to stop torturing the kitten and help you. But it would sound worse than odd to say that I have a reason to help you if, disgusted, I try to end the project entirely.¹⁰⁰

D. The Revenge of the Natural Law Theorist

For those who insist that practices such as chess and law *must* provide objective reasons for compliance, the temptation to appeal to morality to explain these reasons is powerful. On the one hand, morality can provide grounds for criticizing hardened offenders that are independent of the attitudes and intentions the offenders actually have. Furthermore, it is not implausible that there would be moral reasons for conformity, at least in some cases. Consider what Jeffrey Goldsworthy, a vocal critic of positivism, has to say about games: "Although players may enter a game for any number of reasons, by entering it they tacitly agree to abide by its rules, and it is surely this, and the consequent unfairness to other players if they renege, which makes sense of, and justifies, the demand that they do so."¹⁰¹

To be sure, Goldsworthy distinguishes the obligations of participants in games from legal obligations. Legal systems "demand[] the obedience of all to whom [their] laws apply, whether or not they have agreed to do so, either expressly or tacitly."¹⁰² But this gives us

100. Himma, defending Coleman's argument, recognizes that the obligations created through shared cooperative activities can be seen as moral obligations. He responds as follows:

[I]f [a shared cooperative activity] can give rise to a moral obligation, the most stringent kind of obligation, then one can plausibly infer that it can give rise to lesser sorts of obligation, such as purely social obligations (whatever they are). Ideally, of course, one would prefer to have an account of what social obligations are and how they differ from moral obligations; however, there is little reason to think it is the job of the conceptual jurisprudent to produce such an analysis.

Himma, *supra* note 67, at 1166 (footnotes omitted). It is, however, most emphatically the job of any conceptual jurisprudent like Coleman—who insists that legal obligations are different from moral obligations, COLEMAN, *supra* note 67, at 143—to come up with an account of what these nonmoral legal obligations might be. As it is, Himma and Coleman have given us no reason to believe that they exist.

101. Goldsworthy, *supra* note 68, at 456.

102. *Id.*

more reason to believe that legal obligation is a species of moral obligation. It is even more doubtful than in the case of a game “that this kind of authority, and the demands and criticisms which issue from it, can be anything other than moral in nature.”¹⁰³

We are now firmly on the path to natural law theory, in which legal and moral obligation are identified. Because of positivists’ difficulty in explaining legal normativity, natural law theorists have remained permanent members of the jurisprudential landscape—no matter how often positivists use *Dred Scott*¹⁰⁴ or the Nürnberg decrees to show that one can be legally obligated to do something that is morally impermissible. Natural law theory is attractive precisely because refusing to ground legal obligations in morality seems to leave us without anything like legal obligation at all.

If legal obligation exists only to the extent that moral reasons for conformity to legal practices can be found, a judge adjudicating a case must *interpret* legal practices in a moral light in order to assess her legal obligations as a judge. If the practices cannot be made sense of morally—if they are like our imagined kitten-torturing project—then she will have no legal obligations at all. The practices will be normatively inert. It is not surprising, therefore, that such moral interpretation is a crucial part of Dworkin’s account of how judges ought to adjudicate cases.

Indeed, Dworkin takes much the same position concerning adjudication in games like chess. Consider an official facing a “hard case” in chess—for example, whether a game is forfeit because one player has “unreasonably” annoyed the other in the course of play.¹⁰⁵ The official, Dworkin argues, must answer this question by interpreting the practice of chess in a moral light. Only after such interpretation will the official be able to discover whether he has a reason to adjudicate one way rather than another:

[The official] must bring to his decision a general theory of why, in the case of his institution, the rules create or destroy any rights at all, and he must show what decision that general theory requires in the hard case. In chess the general ground of institutional rights must be the tacit consent or understanding

103. *Id.*

104. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

105. See DWORKIN, *supra* note 17, at 102.

of the parties. They consent, in entering a chess tournament, to the enforcement of certain and only those rules, and it is hard to imagine any other general ground for supposing that they have any institutional rights.¹⁰⁶

Although Dworkin uses the example of a hard case, the same point would be true in an easy one. Even when a player tries to move the Queen like a Knight, the official “must bring to his decision a general theory of why, in the case of his institution, the rules create or destroy any rights at all”¹⁰⁷ To be sure, if the official refused to allow the move he would decide in a way that is consistent with the practice. But the moral question remains: Why does consistency matter?¹⁰⁸

The same point is true of judges. As Dworkin puts it: “If a judge accepts the settled practices of his legal system—if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules—then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices.”¹⁰⁹ A judge is legally obligated to decide a case one way rather than another only in the light of a moral theory interpreting legal practices. Once again, although Dworkin emphasizes this point in connection with *hard* cases, his point applies just as much to a judge deciding an easy case. In an easy case, it is clear that one decision rather than another would be consistent with legal practices. But the moral question still remains: Why does consistency matter?

Because adjudication is fundamentally a moral decision, Dworkin offers as the ideal adjudicator Hercules—that is, a judge who decides cases only after having provided a theory of why participants in legal practices have moral obligations to conform to their demands. Rather than simply following the constitution, Hercules

106. *Id.* at 104; see also Michael Steven Green, *Dworkin's Fallacy, Or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897, 1916 (2003) (describing Dworkin's interpretive jurisprudence).

107. DWORKIN, *supra* note 17, at 104.

108. So Dworkin argues that the practice of interpretation, by which disputes within a practice are resolved, requires the interpreter to “settle[] on some general justification for the main elements of the practice.... This will consist of an argument why a practice of that general shape is worth pursuing, if it is.” DWORKIN, *supra* note 3, at 66.

109. DWORKIN, *supra* note 17, at 105.

“develop[s] a full political theory that justifies the constitution as a whole.”¹¹⁰ Instead of blindly following a statute, “Hercules must begin by asking why any statute has the power to alter legal rights.”¹¹¹

E. Non-Cognitivism and the Internal Point of View

Hart, of course, cannot use Dworkin’s explanation of legal obligation without relinquishing his positivism. Given the problems Hart faces explaining legal obligation without recourse to morality, perhaps we should reassess whether he thought social rules have the capacity to generate objective reasons for conformity in the first place.

But if Hart did *not* think that a rule of recognition can generate objective reasons for conformity, why did he criticize Austin’s theory of law for failing to account for the law’s normativity? For Hart’s rules of recognition are no better than Austin’s habits of obedience in explaining why participants are obligated to conform to law. One possibility is that Hart understood the statement that someone is “legally obligated” as a non-normative claim that most participants in the rule of recognition within which the person participates do not merely conform, but also *take themselves* to have objective reasons to do so (although they may not actually have such reasons). It is for this reason that Hart emphasized the *internal perspective* of the willing participants in his account of the law.¹¹²

Although this could make sense of Hart’s disagreement with Austin, the disagreement would be relatively minor. Because Austin thought conformity to law is due to fear and habit, he ignored the fact—apparently crucial for legal obligation in this non-normative sense—that most participants conform because they take themselves to have objective reasons to do so. As Michael Moore, adopting this interpretation of Hart, has put it:

What is wrong about the ... Dworkin critique is the assumption that Hart had to jump to the natural lawyer’s conclusion that law *morally* obligates to be law It is much more consistent to

110. *Id.* at 106.

111. *Id.* at 108.

112. HART, *supra* note 3, at 102.

interpret Hart as basically redoing Austin but staying on Austin's side of the divide. For both Hart and Austin, law necessarily obligates (creates 'legal obligations') only in the sense that those subject to such law by-and-large obey it. For Austin, such obedience can be because of habits or fear, while for Hart, a subset of people (judges) at least must obey ... because they believe them to be morally obligatory. But for Hart no less than Austin, law's existence depends on its 'obligatoriness' only in this behavioural sense, a sense that has nothing to do with actual moral obligation.¹¹³

If Moore's interpretation of Hart is correct, Hart and the realists *agreed* that legal rules, in the reason-for-action sense, do not exist. The social facts on the basis of which something is valid law do not generate objective reasons for conformity with the law. But Hart could still disagree with the realists' *prediction* theory of law, for, like Austin's, this theory speaks of the law in terms of judicial behavior, without reference to the internal perspective. We shall deal with this criticism of the prediction theory in Part V.

Since this approach to legal obligation is non-normative, a hardened offender could accept that he is legally obligated and yet legitimately deny that anything about what he ought to do follows from this fact. Indeed, it seems that even a willing participant should consider legal obligation to be irrelevant to her reasons for action. To be sure, in saying that she was legally obligated she would be describing *herself* as believing that objective reasons for conformity exist. But the fact that she believes she has objective reasons is not a justification for the reasons' existence. Since the reasons are objective, they must exist *independently of her attitudes*.

But Hart may also have been committed to a form of non-cognitivism about value, in which normative statements about objective reasons for action do not *describe* such reasons as existing,

113. MOORE, *supra* note 64, at 13. This reading of Hart is allied with the idea that Hart's approach is *hermeneutic* in nature. See, e.g., Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 176 (1999). A sociological approach will understand the participants in legal systems poorly unless it speaks in terms of the obligations that the participants *take themselves* to possess. This is unobjectionable, but it should be noted that the minority attitudes of the hardened offenders are just as much an internal perspective as those of the majority. Someone who investigated the attitudes of both would appear to be the better sociologist, rather than someone who *privileged* the internal perspective of the majority.

but only *express* one's *attitudes* that reasons for action exist.¹¹⁴ Someone adopting the internal perspective would therefore have objective reasons for conformity with law *subjectively*, as it were—insofar as she would have the attitudes that lead her to *say* that she has objective reasons for conformity. Her statements about legal obligation might not merely *describe* the non-normative fact that a rule of recognition exists, but also *express* these attitudes.

I cannot pursue this non-cognitivist interpretation of Hart in further detail. But two points are worth noting. First, if Hart's approach is non-cognitivist, Dworkin's critique would still apply, insofar as natural law theory would be true *from within the internal perspective*. Those adopting the internal perspective take all participants in the rule of recognition, including the hardened offenders, to have objective reasons for conformity. But, according to Dworkin's critique, the only objective reasons they could reasonably take all participants to have are *moral*. The internal perspective would be a moral perspective.

But this is not a conclusion that Hart was willing to accept. In keeping with his demand that legal and moral obligation are distinct, Hart insisted that the acceptance that is essential to the internal perspective need not be moral. The law can be accepted in the requisite sense even if one takes oneself to have no moral obligation to obey the law.¹¹⁵ He argues that officials'

allegiance to the system may be based on ... long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.¹¹⁶

114. See HART, *supra* note 21, at 159-60; see also Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW & PHIL. 619, 640 (2002) (providing examples of Hart's analysis and noting that "Hart is the most famous proponent of a non-cognitivist analysis of legal discourse").

115. See HART, *supra* note 3, at 202-03. For arguments that the internal point of view must be the view that abiding by the law of the system is morally obligatory, see Goldsworthy, *supra* note 68, at 452-60; Richard Holton, *Positivism and the Internal Point of View*, 17 LAW & PHIL. 597, 600-06 (1998); Joseph Raz, *The Purity of the Pure Theory*, in *ESSAYS ON KELSEN* 79, 92-93 (Richard Tur & William Twining eds., 1986).

116. HART, *supra* note 3, at 203.

But that makes it hard to understand why an official, when expressing his acceptance of the rule of recognition, would speak of the hardened offenders as legally obligated. As far as the official's attitudes are concerned, the hardened offender may be more praiseworthy than he is. This is a reason to question a non-cognitivist interpretation of Hart.

Second, a non-cognitivist account of statements of legal obligation (when made from the internal perspective) would still be compatible with the realists' view that legal rules do not exist, in the sense that the social facts on the basis of which something is valid law would still not give reasons for conformity to those whose attitudes suggest disobedience. The realists' position would not be fundamentally changed through the recognition that willing participants also *express* their acceptance in statements of legal obligation. Indeed, insofar as the realists were themselves skeptical about the existence of objective reasons for action,¹¹⁷ they would have been sympathetic to a non-cognitivist account of normative language, including legal language.¹¹⁸

III. THE FIRST ARGUMENT AGAINST LEGAL RULES

In many respects, the realists' theory of law was similar to Hart's. Like Hart (and most other positivists),¹¹⁹ the realists believed that the law exists because of *social facts*, in particular facts about official practices.¹²⁰ To be sure, they did not offer anything as detailed as Hart's idea of a rule of recognition. Indeed,

117. See *infra* Part III.A.

118. See Cohen, *supra* note 18, at 812:

Logicians sometimes talk as if the only function of language were to convey ideas. But anthropologists know better and assure us that "language is primarily a pre-rational function." Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience. The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold.

119. Kelsen is the exception to this rule. See Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365, 375-89 (2003).

120. See Jeremy Waldron, "Transcendental Nonsense" and *System in the Law*, 100 COLUM. L. REV. 16, 31 (2000).

Llewellyn was skeptical about distinguishing legal systems from similar systems of control:

I am presupposing the presence of "rules of law," *i.e.*, at least assuming law as a semi-specialized activity of control distinguished from other mechanisms of control Just how far this first assumption reaches I am sure I do not know; I should be inclined to regard any special assembly held for the purpose of adjusting disputes, by say village elders otherwise without official position or authority, as one instance of its presence.¹²¹

But despite his skepticism about uniquely identifying legal from nonlegal systems, he clearly accepted that when the law exists, it does so because of a set of social facts concerning the beliefs, attitudes and behavior of officials.

Llewellyn also makes it clear that these official practices involve agreement concerning a rule of recognition in the propositional sense: "The statement 'this is the rule' typically means: 'I find this formula of words in authoritative books.'"¹²² In speaking of certain books (e.g. F.3d or U.S.C.) as *authoritative*, Llewellyn assumes that accepted criteria for identifying valid law exist. What is more, if books like F.3d or U.S.C. are authoritative, Llewellyn must accept that statutes and past judicial opinions are law. This is merely another example of the tension, discussed earlier, between the realists' decision theory and their fundamental commitment to a standard theory in which non-decisions can be law.¹²³ Finally, Llewellyn, like Hart, assumes that the laws identified by the rule of recognition exist as legal rules in the *propositional* sense. They are "formulas of words" capable of instructing people how to behave, at least to some extent.¹²⁴

Despite these substantial areas of agreement, Hart and the realists disagree about whether the social facts standing behind the law are *normative*—that is, whether these facts create objective

121. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 436 n.4 (1930).

122. *Id.* at 439; see also LLEWELLYN, *supra* note 34, at 13 (stating that rules come "from authoritative sources (which in the case of the law are largely statutes and the decisions of courts)").

123. See *supra* Part I.B.

124. Llewellyn, *supra* note 121, at 442.

reasons for obedience to the law. Hart thought the law was normative. The realists disagreed, and it is this rejection of legal rules (in the reason-for-action sense) that is the foundation of their novel theory of law. Indeed, as I will argue in Part V, the realists were committed to the decision and prediction theories of law because they thought these theories followed from their rejection of legal rules.

The realists had two arguments against legal rules. The *second* argument, which I will discuss in Part IV, is closely connected to Dworkin's critique of Hart. Like Dworkin, the realists believed that the only objective reasons a judge has to conform to legal practices are moral. But, unlike Dworkin, the realists insisted, with Hart and the positivists, that legal obligation cannot be a species of moral obligation, because moral obligations of obedience do not exist with respect to every valid law. The realists concluded, therefore, that legal obligation cannot exist at all.

The realists' first argument against legal rules, in contrast, was a global attack on the idea of objective reasons for action of *any* sort (including moral reasons for action). This argument was a product of the realists' commitment to methodological empiricism.¹²⁵ Because objective reasons for action could not be observed to play a role in human action (particularly adjudication), the realists denied that they exist. To describe adjudication empirically is to describe it non-normatively, without any *oughts* with respect to what *is* the case—that is, what a judge is *actually* motivated to do—could be in error.

A. Legal Rules Are Causally Inert

To appreciate the realists' first argument against legal rules, we must consider cases where the law is determinate. That a statute prohibiting citizens from "gyring and gimbling" does not have a

125. See Leiter, *supra* note 55, at 264; Leiter, *supra* note 2, at 271-72. Leiter argues that this is a sign of the realists' commitment to naturalism. *Id.* at 285; see also EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 74-94 (1973); David E. Ingersoll, *Karl Llewellyn, American Legal Realism, and Contemporary Legal Behaviorism*, 76 ETHICS 253, 253 (1966). The realists' empiricism is evident in COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 4-5, 46-47; Cohen, *supra* note 18, at 822; and Cook, *Conflict of Laws*, *supra* note 49, at 457-59.

causal effect on adjudication tells us nothing about whether legal rules exist. Any lack of causal efficacy may be due solely to the fact that the statute is indeterminate—it does not meaningfully tell judges what to do. To show that legal rules do not exist we must show that they are unnecessary to explain cases where judges follow determinate statutes. This means we need to consider a relatively neglected area of the realists' theory of adjudication, namely their theory of judicial *conformity* to law—their explanation of why *determinate* law tends to be followed by courts. The realists, I will argue, thought that even in these cases, objective reasons for action, and so legal rules in the relevant sense, were causally inert.

The realists' account of judicial conformity to law was pluralistic.¹²⁶ Some judges conform to law out of prudential considerations. The fact that judges can be overturned on appeal, pressured by their colleagues, and threatened with impeachment will usually make it prudent for them to uphold the law.¹²⁷ In the end, however, the realists argued that most judicial conformity to law is not prudential. Judges abide by the law because it is directly recommended by their attitudes, for example, "inertia,"¹²⁸ "conservatism,"¹²⁹ "laziness,"¹³⁰ "respect for predecessors, superiors or brothers on the bench,"¹³¹ or a "habit of deference to the expectations of the bar or the public."¹³² Furthermore, some of the most important attitudes recommending conformity with the law are moral. Many judges believe that upholding the law is morally important because

126. At times Leiter is rather cavalier on this point, arguing, for example, that "[i]f the law were determinate, then we might expect—except in cases of ineptitude or corruption—that legal rules and reasons would be reliable predictors of judicial outcomes." Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 284. He also identifies as the "background conditions" that would enable determinate law to cause judicial decisions that "judges are rational, honest and competent." Leiter, *supra* note 55, at 265. This takes judicial conformity to determinate law for granted, as something that would naturally occur provided a judge knows the law and hasn't been bribed. But he also acknowledges that the realists' theory of adjudication should include a more robust theory of judicial conformity to law, which would describe judges' shared conception of how they "ought ideally to decide cases." The psychological fact that they have this conception would empirically explain why they conform to the law (when it is determinate enough to allow them to so do). *Id.* at 275.

127. See COHEN, *supra* note 39, at 213.

128. FRANK, *supra* note 33, at 263; see also Cohen, *supra* note 18, at 839.

129. Cohen, *supra* note 18, at 839.

130. FRANK, *supra* note 33, at 263.

131. Cohen, *supra* note 18, at 839.

132. *Id.*

of its consequences, for example, because it will protect "human expectations based upon past decisions, the stability of economic transactions, and ... the maintenance of order and simplicity in our legal system."¹³³ But moral concerns of a non-consequentialist sort also play a role—for example, the belief that a moral duty to uphold the law was created by the oath of judicial office.¹³⁴ Indeed, the realists even accepted that some judges uphold the law because they take themselves to be *legally*, not morally, obligated to do so.¹³⁵

But if one admits that attitudes *about* objective reasons for action (both legal and moral) empirically explain conformity with the law, why would one deny that the objective reasons themselves exist? The answer is that the attitudes about the reasons are sufficient to explain conformity. The attitudes would motivate conformity even if the reasons did not exist. Furthermore, the attitudes, unlike the reasons, are necessary to explain conformity. If the reasons existed, but the attitudes did not, conformity would not occur.

It is precisely because objective reasons for action do not figure in an empirical explanation of judicial decision making that the realists treated a legal rule as if it were a bizarre metaphysical postulate—a "mysterious entity apart from [a judge's] decisions"¹³⁶ or something "extra-experiential."¹³⁷ A judge's attitudes can be empirically observed. We can describe how they lead her to conform or fail to conform to the law. But an obligation to decide in conformity to law that exists *independently* of her attitudes cannot be observed and does not come into play when empirically describing her behavior.

Admittedly, the realists' argument is effective, not merely against legal reasons for action, but also against *moral* reasons. The realists did not deny, of course, that people—including judges—have attitudes about morality or that these attitudes affect their decision making. Such attitudes are a matter of psychological fact.¹³⁸ But what one *takes* to be one's moral reasons for action and what

133. *Id.* at 840.

134. See COHEN, *supra* note 39, at 242.

135. As we shall see, to the extent that the realists argued that judges ought not decide on the basis of considerations of legal obligation, see *infra* Part IV.A, they must have thought that attitudes about legal obligation exist.

136. FRANK, *supra* note 33, at 125.

137. *Id.* at 54.

138. Cohen, *supra* note 18, at 839-40.

actually *are* one's moral reasons are clearly different things. And, according to the realists' first argument, we should conclude that the latter do not exist. Explaining empirically why someone saved a drowning child may be impossible without taking into account her belief that doing so is morally correct. But it is possible to explain her action without recourse to the actual moral correctness of saving a drowning child. Because the first argument undermines moral as well as legal reasons for action, we should not be surprised that many realists were indeed skeptics about morality.¹³⁹

Indeed, it appears that the realists' argument is so strong that a mistake of *any* sort becomes impossible. The heart of the first argument is that no reason for action can exist unless it also figures in an empirical explanation of how the action was *caused*.¹⁴⁰ But the whole point of a mistake is that one was *not* caused to do what one had a reason to do. Mistakes occur precisely *when* reasons are causally inert. Accordingly, whenever there is a mistake, we should question whether the reason in the light of which it was a mistake exists, and thus whether a mistake occurred at all.

For example, the first argument, if taken seriously, would appear to threaten even *subjective* reasons for action. I can fail to use a Phillips-head screwdriver even though I believe it is the best means of satisfying my desire to drive in a screw. According to the first argument, therefore, subjective reasons for action should be as mysterious as objective reasons.

To explain human behavior in a way that does not presume subjective reasons for action would be to give up on the idea of human beings as *rational agents*—to replace explanation on the basis of intentional attitudes with a purely behavioristic (or stimulus-response) approach. Predictably, a few realists—notably Underhill Moore—embraced behaviorism, precisely because it took empiricism in the explanation of human behavior truly seriously.¹⁴¹

139. See, e.g., COHEN, *supra* note 39, at 180-84; FRANK, *supra* note 33, at 29-31; Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 12-13, 23 (1932); Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 612 (1923); Wilfred E. Rumble, Jr., *The Paradox of American Legal Realism*, 75 ETHICS 166, 170 (1965).

140. This formulation was suggested by Brian Leiter.

141. See Moore, *supra* note 139; Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 3 (1943) (noting that statutory language is "nothing more than a sensible object which may arouse a drive and cue a

But the majority of realists, although committed to empiricism, explained human behavior in intentional terms according to the rational agent model.¹⁴²

Is the excessive strength of the realists' first argument a reason to believe that it is somehow flawed? Perhaps, but my goal in this Article is not to show that the realists' theory of law cannot be criticized. It is solely to show that it is philosophically *plausible*, and the first argument is unquestionably philosophically plausible.

B. The First Argument and the Rejection of Vested Rights

A good (although perhaps surprising) place to find the first argument in the realists' writings is their attack on what was at the time the reigning approach in choice of law—vested rights theory. According to this theory, if a state enacts a law concerning activities in its territory, a violation of the law gives the wronged party a *vested right* to the application of the state's law, which foreign courts taking jurisdiction of the case are legally obligated to respect.¹⁴³ The theory was often called the "obligatio" theory.¹⁴⁴ Vested rights are objective legal reasons for decisions, in the sense that foreign courts have an *obligation* to apply the state's law, even if they do not actually do so.

Walter Wheeler Cook used the first argument to attack the idea of vested rights. The alleged legal obligations created by vested rights simply make no causal difference to adjudication. Consider the legal rule, insisted upon by vested rights theorists, that a court has no "power" to apply the criminal law of its jurisdiction to someone who committed no act there. Where, Cook asks, can the empirical effect of this legal rule be observed? How can it bind courts, when it is only as strong as their willingness to respect it?¹⁴⁵

response"). For a description, see Leiter, *supra* note 55, at 268.

142. See Leiter, *supra* note 55, at 268.

143. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.1 (1935); COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 8, 34-39.

144. See Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904).

145. Cook, *Conflict of Laws*, *supra* note 49, at 462-63:

[If it is asserted that there exists] some inherent or immutable principle limiting the "jurisdiction," i.e. the power, of the *state* concerned to authorize its courts to deal with the situation and apply its law to the offender, so that any attempt of the *state* so to do is necessarily void, I for one cannot follow the argument. The

It is not as if courts are, as an empirical matter, *unable* to extend the criminal law of their jurisdiction beyond its borders. They do it all the time.¹⁴⁶ Since the vested rights theorists' *ought* cannot be observed to constrain what *is*, what reason is there to believe such an *ought* exists at all?

As an extreme case, Cook asks what would happen if England applied its criminal law everywhere in the world.¹⁴⁷ We would not hesitate to conclude, he argues, that "English 'law' applies to determine for England and English officials the legal consequences of acts and results, all of which happen abroad."¹⁴⁸ English criminal law would apply validly to foreign events whether or not it violated any "vested rights."

Of course, Cook admits that there is such a thing as a foreign legal right that English courts can recognize or fail to recognize. But unlike a vested right, this right is not a legal obligation. It is instead the social fact that a foreign court would have applied its own law had the case been brought there,¹⁴⁹ a fact that gives the English jurisdiction no reason to do anything except in light of English interests.

Cook's argument against vested rights depends upon an empirical account of choice of law decisions as responses to the interests of the forum. Because forum interests are enough to explain these decisions empirically, he rejects the idea that a forum can be subject to legal obligations that constrain these interests.¹⁵⁰ To assume that

reason why I cannot is that I find states actually doing the supposedly impossible thing, and doing it without successful challenge by anyone.

146. See COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 10:

[A] state or country, if it deems wise to do so, can punish people, on whom it can lay its hands for "acts" done in other states or countries, at least where some "result" of the act takes place within the state or country in which the prosecution is had.

147. Cook, *Conflict of Laws*, *supra* note 49, at 465.

148. *Id.*

149. *Id.* at 481 ("To assert that a foreign primary right exists ... is but a way to predict what courts in the given foreign state would do if the person asserted to be under the primary duty correlative to the right were to act in a certain way.")

150. See COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 35-36; Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 478 (1928):

[I]n the last analysis, it is a simple question of convenience and equity, roughly controlled by the traditions of the forum, as to how far the court will, can, or should relax its domestic habits of decision to give a judgment more or less remotely resembling that which might be secured in the court of another

such obligations exist would be to “thingify” or hypostatize ‘rights,’”¹⁵¹ in violation of the realists’ empiricism.

One might argue, however, that the realists’ attack on vested rights undermines only legal rules that bridge legal systems. It remains possible that legal rules exist *within* a system. For example, a judge might have a legal obligation to apply foreign law when the interests of her jurisdiction recommend it, no matter what the judge’s personal attitudes might say about the matter.

But Cook extended the first argument to *domestic* legal rights as well. Legal rights within a judge’s jurisdiction are no different from foreign legal rights. They cannot be observed to limit a judge’s decision, since they are only as strong as a judge’s willingness to recognize them. If the judge’s attitudes recommend disobedience, the legal right will do nothing to stop it. This means that there are no legal rules—no unobservable obligations that bind a judge’s decision independently of her motivations.¹⁵²

Cook’s attack on vested rights is instructive because it reveals the relationship that the realists perceived between their rejection of legal rules and Holmes’s prediction theory of law. Cook adopted this theory precisely because he sought an empirical understanding of legal rights that did not carry with it a suggestion of legal obligation. We must guard ourselves, he argued, “against thinking of our assertion that ‘rights’ and other legal relations ‘exist’ or have been ‘enforced’ as more than a conventional way of describing past and predicting future behavior of human beings—judges and other officials.”¹⁵³ Since there is no legal *oughts*, “[a] statement ... that a certain ‘rule of law’ is the ‘law of England’ [must be] merely a more or less convenient shorthand way of saying that, on the basis of

jurisdiction. The basis of departure is the practice of the forum and the equities of the instant case, and not universal principle or vested right.

See also COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 35 (describing a choice-of-law decision as “a practical result based upon reasons of policy established in prior cases”).

151. Cook, *Conflict of Laws*, *supra* note 49, at 476.

152. See Walter Wheeler Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 308 (1927) [hereinafter Cook, *Scientific Method*]; see also Michael S. Green, *Legal Realism, Lex Fori, and the Choice of Law Revolution*, 104 YALE L.J. 967, 981-85 (1995); Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 841-42 (1991) (reviewing LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* (1991)).

153. COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 33.

certain observations of past phenomena, we predict certain future behavior of the appropriate English officials."¹⁵⁴

These were precisely the same concerns that motivated Holmes to present the prediction theory. A legal right, understood as capable of generating an obligation, is really "the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it"¹⁵⁵ The bad man's perspective reveals the true nature of the law because, having no feelings of duty to the law, he will not be inclined to think of it in terms of obligations that cannot be empirically observed.¹⁵⁶

Karl Llewellyn likewise used the first argument to cast doubt upon the notion of legal rights that are possessed by wronged parties and that put obligations upon courts when deciding cases.¹⁵⁷ Like Cook, Llewellyn argues that such rights are mysterious because they cannot be empirically observed. Decisions of courts and the motivations generating decisions are observable social facts, but rights that are the "purposes" behind decisions—with respect to which decisions can be right or wrong—are not:

It would ... be a heresy to argue ... that the right could rather more accurately be phrased somewhat as follows: if the other party does not perform as agreed, you can sue, and *if* you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay. To argue thus would be to confuse the remedy (which you can see) with the substantive right (which you cannot see, but which you know is there—somewhere; people tell you so). The substantive right in this body of thought has a shape and scope

154. Cook, *Conflict of Laws*, *supra* note 49, at 476.

155. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

156. *See supra* Part I.C.

157. Llewellyn, *supra* note 121, at 437-38.

independent of the accidents of remedies.... They are not answerable to fact.¹⁵⁸

C. The First Argument and the Decision Theory of Law

The realists also perceived—or, as we shall later see, misperceived—a relationship between their rejection of legal rules and the decision theory of law. For this reason, some of the best evidence that the realists accepted the first argument can be found in their discussion of the decision theory. Consider, once again, the following passage from Frank's *Law and the Modern Mind*:

All ... decisions are law. The fact that courts render these decisions makes them law. There is no mysterious entity apart from these decisions. If the judges in any case come to a "wrong" result and give forth a decision which is discordant with their own or any one else's rules, their decision is none the less law.¹⁵⁹

The only way that we could understand the court's decision not to be law, Frank argues, is if we assumed that a nonempirical "legal rule" existed—a mysterious entity giving the judge a reason to decide one way rather than another no matter what her attitudes are.

It is crucial to see that Frank is not arguing for the decision theory solely because he thinks that the law is indeterminate. It is true that if the law were *radically* indeterminate something like the decision theory would probably follow. Because a statute prohibiting "gyring and gimbling" fails to tell a judge what to do, whatever the judge decides is compatible with the statute. It would be reasonable to conclude from this that the judge could not fail to issue a legally valid decision concerning the proper application of that statute. Furthermore, if *all* laws were as indeterminate as the statute, then judges' decisions would *always* be legally valid. Judges would be like absolute monarchs, whose word was law.

But Frank argues that the law should be reduced to decisions even when legal rules—that is, statutes and the like—are determinate: "If the judges in any case come to a 'wrong' result and give

158. *Id.*

159. FRANK, *supra* note 33, at 125.

forth a decision which is discordant with their own or anyone else's rules, their decision is none the less law." A decision cannot be "discordant with" a rule unless the rule is determinate. Yet Frank still insists that however a judge decides is law.

Frank reduces the law to judicial decisions, because even determinate statutes cannot create legal obligations on judges. Freed of any legal duty to decide one way rather than another, a judge is as unconstrained when the law is determinate as when it is indeterminate. And from this the decision theory seems to follow—a judge's decision is law.

This argument is even more evident in Cohen's writings, for he took Frank to task for exaggerating the indeterminacy of the law.¹⁶⁰ Yet Cohen, like Frank, accepts the decision theory of law. The existence of a contract, he argues, is "a function of legal decisions":

The question of what courts *ought* to do is irrelevant here. Where there is a promise that will be legally enforced there is a contract. So conceived, any answer to the question 'Is there a contract' must be in the nature of a prophecy, based, like other prophecies, upon past and present facts.¹⁶¹

Cohen was inclined toward the decision theory of law because he thought that judges were freed of *oughts*—of legal obligation—entirely.

IV. THE SECOND ARGUMENT AGAINST LEGAL RULES

As we have seen, the realists' first argument against legal rules is just as much an argument against morality, since morality also provides objective reasons for action that cannot be observed to influence human behavior.¹⁶² Although many realists were skeptics

160. See COHEN, *supra* note 39, at 238; see also Cohen, *supra* note 18, at 834:

The "hunch" theory of law, by magnifying the personal and accidental factors in judicial behavior, implicitly denies the relevance of significant, predictable, social determinants that govern the course of judicial decision. Those who have advanced this viewpoint have performed a real service in indicating the large realm of uncertainty in the actual law. But actual experience does reveal a significant body of predictable uniformity in the behavior of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches.

161. Cohen, *supra* note 18, at 839.

162. That the realists' descriptive approach precluded ethical assessments has been called

about morality;¹⁶³ most did not shy away from making moral (usually utilitarian)¹⁶⁴ judgments, including judgments about what the law ought to be.¹⁶⁵ The realists were morally committed to reforming the law, which they saw as a social instrument to be assessed on the basis of its consequences.¹⁶⁶

The realists did not, in general, attempt to explain why they were justified in making these moral judgments, given their empiricist objections to objective reasons for action.¹⁶⁷ Most simply assumed that the empiricism they adopted when describing the law could be set aside when the law was morally assessed. For example, Llewellyn advocated "[t]he *temporary* divorce of Is and Ought for purposes of study[ing the law]."¹⁶⁸ The divorce of *is* and *ought* was *temporary*, in the sense that the ethical perspective could be adopted *after* the law was understood as an *is*.¹⁶⁹

Insofar as the realists' acceptance of moral judgments is in tension with their first argument against legal rules, we have a reason to accuse them of inconsistency. But we do *not* have a reason to question whether they were philosophically committed to the first argument. All skeptics about morality make moral judgments at one time or another. It would be too easy a victory over them to argue that, by making these moral judgments, they are not really skeptics after all.

the "paradox of American legal realism." Rumble, *supra* note 139, at 169.

163. See KALMAN, *supra* note 1, at 32-33, 42-43; see also *supra* note 139.

164. See Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 875 (1981).

165. See *id.* at 875-80; Golding, *supra* note 14, at 1056-57; see also Green, *supra* note 152, at 978. So Frank spoke of realists as "stimulated by a zeal to reform, in the interests of justice, some courthouse ways." FRANK, *supra* note 33, at vii.

166. See, e.g., Cook, *Scientific Method*, *supra* note 152, at 308; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-37 (1931).

167. Felix Cohen argued (unsuccessfully to my mind) that the moral quality of goodness was empirically verifiable. COHEN, *supra* note 39, at 145-227. Cook argued that evaluative inquiry can largely be understood as a factual investigation into the satisfaction of wants. Walter Wheeler Cook, *Essay*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 49, 57-58 (Northwestern Univ. ed., Julius Rosenthal Found., photo. reprint 1987) (1941); see also SUMMERS, *supra* note 32, at 47-48.

168. Llewellyn, *supra* note 166, at 1236.

169. See Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 945 (1931) ("The 'normative' conception of legal science ... precludes the objective narration of conventional legal principles by confusing law and ethics").

The real inconsistency to worry about is this: If the realists thought they could set aside their empiricism when assessing the law morally, why did this not also open up a place for legal obligation? If one form of objective reason for action can be let in through the back door, why not the other?

A. Legal Obligation and Moral Autonomy

The reason that the realists did not reintroduce legal obligation when adopting a normative perspective on the law is that they were committed to a second argument against legal rules, an argument with strong similarities to Dworkin's critique of Hart. As we have seen, the realists agreed with Hart that the law depends upon social facts concerning official practices. Like Dworkin, however, the realists thought that the only available objective reasons for conformity to these practices are *moral*. Dworkin's response is to adopt a type of natural law theory in which officials' legal obligations are a form of moral obligation. But natural law theory can succeed only if there is a moral duty to obey *every* valid law, something the realists rejected. They understood the law "as a means to social ends and not as an end in itself."¹⁷⁰ Disobedience might be morally justified: "Gone is the ancient assumption that law is because law is; there has come since, and remains, the inquiry into the purpose of what courts are doing, the criticism in terms of searching out purposes and criticizing means. Here value-judgments reenter the picture, and should."¹⁷¹

The realists did not merely believe that citizens have no moral duty to obey every valid law, they also believed that judges have no moral duty to enforce every valid law. This means that the facts concerning official practice that make something valid law must not be *intrinsically morally salient* for a judge. Since a *promise* to enforce the law is a fact that creates a *prima facie* moral duty, the realists must have thought that the facts concerning official practice do not necessarily involve promises on the part of participants. It is possible to become a judge without having promised, in either an express or implied fashion, to enforce all valid law. The same point

170. Llewellyn, *supra* note 121, at 449.

171. *Id.*; see also Cook, *Scientific Method*, *supra* note 152, at 308.

is true of the prima facie moral duty to enforce the law that a judge might have due to concerns about the public's reliance on the law's stability. The realists must have believed that these concerns do not arise with respect to *every* valid law.

There is an alternative interpretation of the second argument against legal rules, however. The realists *may* have believed only that there is no *overriding* moral duty to enforce every valid law. If this is true, however, the realists' argument fails. To be sure, the realists would still be able to argue—as did Dworkin—that legal obligation does not exist in Hart's sense of a *nonmoral* duty of conformity to law. But the realists would have no argument against those natural law theorists (including Dworkin) who believe that legal obligation exists as a prima facie moral duty.

The realists do not appear to have been sensitive to the distinction between prima facie and overriding duties. Their argument against legal obligation tended to emphasize only that judicial nonconformity to law can be morally justified, which does not tell us whether they thought a prima facie duty of conformity exists. But because the success of the realists' argument depends upon judges' having no prima facie moral duty to enforce every valid law, I will assume that this is the realists' position.

This second argument against legal rules was strikingly different from their first. Whereas the first denied the existence of all objective reasons for action, including morality, the second was essentially a moral argument. A belief in legal obligation, the realists argued, would make judges reach decisions that are morally wrong.

The second argument is evident in the realists' repeated arguments that adjudication is a moral decision.¹⁷² When the law is indeterminate, judges are faced with the moral question of how the gaps in the law should be filled in. Adjudication is no less a moral decision, however, when the law is determinate. In such a case, the law unambiguously instructs the judge to adjudicate in a certain way. But the moral question remains: Ought she follow the law?

172. See Singer, *supra* note 2, at 474-75; Yntema, *supra* note 169, at 950-51; see also FRANK, *supra* note 33, at 120-21 ("[The judge] must balance conflicting human interests and determine which of the several opposing individual claims the law should favor in order to promote social well-being.").

Although the realists did not deny that there were often good moral reasons for adjudicating in conformity with the law, they did not think that it was always the correct course of action. As Cohen put it:

[T]he ethical value of certainty and predictability in law may outweigh more immediate ethical values, but this is no denial of the ethical nature of the problem. *Consistency* ... is relevant to such a problem only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical. The proposition that courts ought always to decide "in accordance with precedent or statute" is an ethical proposition the truth of which can be demonstrated only by showing that in every case the following of precedent or statute does less harm than any possible alternative.¹⁷³

Because adjudication in accordance with the law is always a moral decision, a judge who treats the law as authoritative has relinquished her autonomy. If a judge blindly follows the law—if she considers the fact that the law instructs her to decide a certain way as *sufficient* for her to so decide, without even considering the moral arguments for disobedience—her capacity to act as a moral agent is undermined. In contrast, when legal obligation is rejected, "[t]he ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or worse and is therefore subject to moral criticism."¹⁷⁴

Of course, because a judge could find consistency to be of overriding moral importance (although the realists did not), strict conformity with all valid law is compatible with moral autonomy. A judge who thinks that respecting settled expectations trumps all other moral considerations, or that she created an unbreakable moral duty to adjudicate in accordance with the law when she took the

173. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 215 (1931).

174. Cohen, *supra* note 18, at 828-29.

judicial oath of office, could continue her task of simply "following" the law.

But for those judges for whom consistency has been motivated by a belief in legal obligation; an acceptance of realism can—and *should*—increase the amount of judicial activism. The idea that the law is obligating "hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy."¹⁷⁵ The law must be treated as a set of non-normative social facts to keep beliefs about legal obligations from competing with legitimate moral concerns.¹⁷⁶

Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge is not whether a legal rule or concept actually exists but whether it *ought* to exist. Clarity on two fronts is the result.¹⁷⁷

To do their intricate job well our judges need all the clear consciousness of their purpose which they can summon to their aid. And the pretense, the self-delusion, that when they are creating they are borrowing, when they are making something new they are merely applying the commands given them by some existing external authority, cannot but diminish their efficiency.¹⁷⁸

Because both the natural law theorist and the legal realist agree that only morality can provide a judge with the reasons she has to uphold the law, they are close allies.¹⁷⁹ Indeed the realists' and Dworkin's views about how judges should adjudicate cases are

175. *Id.* at 840.

176. See Yntema, *supra* note 169, at 944; COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 29.

177. Cohen, *supra* note 18, at 841.

178. FRANK, *supra* note 33, at 121.

179. See Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 808 (1961).

remarkably similar. Both insist that a judge cannot derive normative conclusions from the social fact that a legal practice exists unless she *interprets* the practice in the light of moral concerns. As Dworkin puts it: "If a judge accepts the settled practices of his legal system—if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules—then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices."¹⁸⁰ The realists, like Dworkin, argued that the idea of a legal obligation that is not animated by moral concerns undermines the judge's status as a moral agent.

Furthermore, because they saw adjudication as a moral decision, the realists were also like Dworkin in demanding that judges emulate, to the extent that it is practical, Dworkin's model of Hercules—by deciding cases only after having answered why participants in legal practices have moral obligations to conform to their demands. Dworkin and the realists differ solely on how we should describe the activities of the Herculean judge. For the realists, she is thinking morally about whether she should follow the law—understood as a set of non-normative practices.¹⁸¹ For Dworkin, she is thinking about what the law—understood as the moral obligations generated by the practices—is.

Although the realists' second argument against legal rules is plausible, I do not want to suggest that its details cannot be criticized. One problem, of course, is that the second argument is inconsistent with the first. According to the second argument, legal obligation cannot exist because it is incompatible with our moral obligations. But, according to the first argument, neither legal nor moral obligation exists.

Another problem is the realists' assumption—common among philosophical anarchists—that obedience to authority is incompatible with moral autonomy. This ignores the possibility, explored most fully by Joseph Raz, that authority might be morally justified because the agent is *more likely* to act on the relevant moral reasons

180. DWORKIN, *supra* note 17, at 105.

181. Cohen, *supra* note 173, at 203-04 ("Law is law, whether it be good or bad, and only upon the admission of this truism can a meaningful discussion of the goodness and badness of law rest.").

by following the authority than by trying to act on the balance of reasons herself.¹⁸²

But even if the realists were wrong to treat obedience to law as *always* incompatible with moral autonomy, they were not wrong to treat obedience to *every valid law* as incompatible with moral autonomy. Raz himself agrees that only some laws possess legitimate authority. It is easy to imagine circumstances (a German judge in the late 1930s faced with enforcing the Nürnberg decrees, for example) where obedience to law would *not* make the judge more likely to act on the relevant moral reasons. Since not all laws rightfully command obedience, the argument that one's moral autonomy is undermined by accepting the authority of *all valid law* remains strong.

The realists' second argument can also be criticized as question-begging. Rather than *demonstrating* that legal obligation cannot exist, the realists tended to simply assume that adjudication is a moral decision, that is, that the only objective reasons a judge would have for conforming to legal practices are moral. This begs the question of whether a form of *nonmoral* obligation like that created by legal rules might be relevant. But this is less a problem than it seems, for the burden is surely upon those who believe in legal obligation to show that these nonmoral objective reasons for action exist. This is particularly true given that those who have attempted to argue for legal obligation—Hart's followers, for example—find themselves lapsing into natural law, in which legal obligation is a species of moral obligation.¹⁸³

In the end, the most serious problem with the realists' second argument is their failure to answer those natural law theorists who argue that legal obligation is a form of *prima facie* moral obligation. That enforcement of the law is not *always* justified on the balance of moral reasons does not show that judges do not have *prima facie* moral obligations to enforce all valid laws. Those situations where enforcement of the law is not morally justified—such as a German judge deciding whether to enforce the Nürnberg decrees—may simply be cases where the moral obligation to enforce all valid law is overridden by other considerations. And once we have identified

182. See RAZ, *supra* note 25, at 53-57.

183. See *supra* Parts II.B-D.

judges' prima facie moral obligation to enforce every valid law, it is possible to equate this moral obligation, as Dworkin does, with legal obligation.

But to say that this is a substantial gap in the realists' argument is not to say that it cannot be filled. There is a large and growing literature on philosophical anarchism, and persuasive arguments against even prima facie moral duties to obey the law have been offered.¹⁸⁴ Once again, the realists' theory of law, although not without its defects, is philosophically plausible.

B. The Second Argument and the Realists' Theory of Adjudication

One reason to attribute the second argument to the realists is that many of the more radical and implausible claims in their *theory of adjudication* start making sense. The realists' theory of adjudication, it will be remembered, is the view, in Leiter's words, that "judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons."¹⁸⁵ This is because the law is "rationally indeterminate, that is, the class of legitimate legal reasons that a court might appeal to in justifying a decision fails, in fact, to justify a unique outcome in many of the cases."¹⁸⁶

Some realists, most notably Jerome Frank, apparently went even further, arguing that the idiosyncrasies of judges' personalities made it impossible to find any meaningful regularities in judicial decisions at all. But most realists accepted that judicial decisions can often be predicted.¹⁸⁷ Their point was that they could be predicted on the basis of something *other than law*.

But the realists' claims about the indeterminacy of law often appear far more comprehensive than their arguments for indeterminacy would justify. One reason that the realists argued that the law is indeterminate is that the concepts used in the law are too vague to determine unique results,¹⁸⁸ something Hart spoke of as the *open-*

184. See *supra* note 28.

185. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 281; see also Leiter, *supra* note 55, at 269-70.

186. Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 284.

187. *Id.* at 281; see, e.g., COHEN, *supra* note 39, at 238; COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 44-45; Cohen, *supra* note 18, at 834; Cook, *Scientific Method*, *supra* note 152, at 308.

188. See LLEWELLYN, *supra* note 34, at 56-69; Altman, *supra* note 3, at 208; John Hasnas,

textured nature of legal language.¹⁸⁹ Although the set of possible decisions will be *narrowed* by vague law, the judge will have to use her moral judgment to choose a decision from within that set. But this argument cannot justify the realists' comprehensive claims about legal indeterminacy. Indeterminacy due to vagueness exists only at the *margins* of a word. It may be unclear whether "vehicles are not allowed in the park" applies to bicycles, but we *know* it applies to cars.¹⁹⁰ It is for this reason that Hart dismissed realism as a "great exaggeration."¹⁹¹

Leiter argues that Hart fails to consider another argument for indeterminacy of far greater importance to the realists. The realists thought that the law was indeterminate because incompatible instructions can be drawn from legal sources on the basis of alternative, but equally legitimate, *canons of interpretation*.¹⁹² This is a problem that occurs not merely at the margins of the law, but also in its core.

Leiter is unquestionably right that this second argument was more important to the realists than the argument from vagueness. It is worth noting, however, that the realists had a third argument for indeterminacy. According to this argument, some legal language was not so much vague as lacking meaning entirely.

Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument, 45 DUKE L.J. 84, 88 (1995); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 868-69 (1929).

189. HART, *supra* note 3, at 127-28.

190. *See id.* at 128-29.

191. *Id.* at 147.

192. *See* Llewellyn, *supra* note 166, at 1252 ("[I]f there is available a competing but equally authoritative premise that leads to a different conclusion—then there is a choice in the case; a choice to be justified; a choice which can be justified only as a question of policy"); *see also* LEON GREEN, JUDGE AND JURY 27 n.2 (1930) (observing that legal rules "hunt in 'packs' instead of 'pairs' and ... it is seldom that there are as few as a 'pair' in a 'pack'"); Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 10-11 (1937) ("Legal principles have a habit of running in pairs, a plaintiff principle and a defendant principle."); Walter Wheeler Cook, Book Review, 38 YALE L.J. 405, 406 (1929) (noting that legal rules are "in the habit of hunting in pairs"); Karl N. 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, 401-06 (1950); Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1249-53 (1938). For further discussion, see Altman, *supra* note 3, at 209; Leiter, *Legal Realism and Legal Positivism*, *supra* note 3, at 295-96; and Hasnas, *supra* note 188, at 88-89.

Consider Felix Cohen's discussion of Justice Cardozo's opinion in *Tauza v. Susquehanna Coal Co.*¹⁹³ A summons and complaint had been served at the New York branch office of Susquehanna, a corporation chartered in Pennsylvania. The question facing Cardozo was whether the corporation was subject to personal jurisdiction in New York state courts.

According to Cohen, Cardozo treated the case as if it were a matter of applying the following instruction: A corporation is subject to the jurisdiction of a state's court if it is *present* within the state.¹⁹⁴ This, Cohen argued, is "legal magic and word-jugglery."¹⁹⁵ The instruction fails to recommend anything at all.¹⁹⁶ A corporation is not a physical entity that can be observed to be present or absent in a state. To be sure, it is ultimately constituted by physical things—human beings, buildings, mines, cars, coal. But just how many and what kinds of physical things need to be in a state to make the corporation "present" there? Are a mine and a headquarters necessary or are one employee and a company car enough?

Clearly other criteria are needed to answer this question, criteria that cannot be supplied by the empty notion of corporate presence. Since the questions cannot be answered by the official legal instruction, a judge will have to answer it on the basis of the nonlegal criteria that she believes are morally salient.¹⁹⁷ These, Cohen argues, might include "the actual significance of the relationship between a corporation and the state of its incorporation, ... difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation ... [and] possible hardship to corporations of having to defend actions in many states."¹⁹⁸

193. 115 N.E. 915 (N.Y. 1917).

194. Cohen, *supra* note 18, at 809-10. Whether Cohen's characterization of Cardozo's opinion was fair is not relevant for my analysis here. For the record, however, I am inclined to think it was not.

195. *Id.* at 821.

196. *See id.* at 820.

197. *See id.* at 840-42.

198. *Id.* at 810. For other examples of the magic words argument, see COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 36; Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 5-6 (1932); and Yntema, *supra* note 150, at 481-82. *See also* KALMAN, *supra* note 1, at 25-27.

All three of the realists' arguments concern thinness of the law's propositional content—the inability of the linguistic meanings within the law to tell judges what to do in future cases. The primary difference between the argument that Leiter emphasizes and the first and third arguments is that, in Leiter's argument, the thinness of propositional content is at a higher level: The problem is not really in the primary legal materials, but in the law governing the appropriate choice of a canon for interpreting the primary materials.

Even with these three sources of indeterminacy, however, it hardly seems true that judicial decisions are comprehensively underdetermined by the relevant legal materials. Even if indeterminacy exists at the core of the law and not merely at the margins, that does not mean it is global—that is, that it exists in every legal decision a judge faces. Leiter, recognizing this fact, argues that the realists did not mean to claim that the law is globally indeterminate. Indeed he limits the scope of the realists' indeterminacy arguments substantially, claiming that they primarily apply to decisions faced by courts of appeals.¹⁹⁹ But some realists—most notably the *bête noire* of realism, Jerome Frank—argued that *all law* is indeterminate: “[J]udging involves discretion and individualization. The judge, in determining what is the law of the case, must choose and select, and it is virtually impossible to delimit the range of his choice and selection.”²⁰⁰

The expansiveness of Frank's claims about the law's indeterminacy forces Leiter to segregate him from the majority of the realists. Indeed, he argues that realism's reputation has been sullied due to the “Frankification” of the movement²⁰¹—in which Frank's views (including the idea that “judges exercise ‘unfettered’ discretion”) have been taken as the views of the realists as a whole.²⁰²

199. See Leiter, *supra* note 2, at 273, 295.

200. FRANK, *supra* note 33, at 138; see also Cook, *Scientific Method*, *supra* note 152, at 308 (arguing that a judge “must legislate, whether he will or no”).

201. Leiter, *supra* note 2, at 268.

202. See *id.* According to Leiter, the problem with Frank is not merely his view that the law is globally indeterminate. Leiter also segregates Frank in the “idiosyncrasy wing” of legal realism, for whom judicial decisions are driven in “the judge's innumerable unique traits, dispositions and habits.” *Id.* (quoting FRANK, *supra* note 33, at 110). In contrast, for the “sociological wing” of legal realism (represented by Llewellyn, Moore, Oliphant, Cohen, Radin and others), legal decisions are driven by shared views. For the members of the sociological wing, decisions remain predictable even when the law is indeterminate, for they can be predicted on the basis of judges' shared perceptions about the criteria (or “situation types”)

The truth is, however, that Frank looks more radical than he really was, because the discretion that he attributed to judges deciding cases did not result solely from the law's indeterminacy, but also from the absence of a legal duty to adjudicate in conformity with the law. The law always leaves a judge with the discretion to adjudicate as she sees morally fit because she has an obligation to enforce the law at all only to the extent that she can find moral arguments for such enforcement. Frank's attack on legal rules was not solely directed at the law's determinacy but also at a conception of the law as "authoritative,"²⁰³ "binding,"²⁰⁴ "dictatorial,"²⁰⁵ "compulsory,"²⁰⁶ and possessing an "obedience-compelling character."²⁰⁷ Frank came to this conclusion because of his commitment to the second argument against legal rules: Legal obligation cannot exist, because the social practices that make something the law recommend obedience only in the light of moral considerations.²⁰⁸

It is for this reason that Frank insisted, with the other realists, that adjudication is *always* a moral decision. A judge cannot escape morally assessing whether the law should be followed at all:

that are relevant to a decision. Indeed, the sociological wing sought to reform official legal rules by replacing them with situation types, allowing for a better cognitive fit between law and decisions. The transformation of the law of personal jurisdiction over corporations in *International Shoe v. Washington*, 326 U.S. 310, 316-19 (1945) and subsequent cases is an example of such reform. In this sense, *International Shoe* was a product of legal realism. See George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 349-50; Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to International Shoe*, 10 GEO. MASON L. REV. 59 (2001). Another example of such reform is Llewellyn's inclusion of an obligation of "good faith" in contractual dealing in Article 2 of the UCC, on the ground that this criterion was driving contract cases in a predictable fashion anyway. See U.C.C. § 2-103(j) (2004); Leiter, *American Legal Realism*, *supra* note 46, at 56. In contrast, for the idiosyncrasy wing, judges' unique personality—not shared moral views—determine their resolution of these cases, making any project of legal reform fruitless. Leiter also argues that for Frank, even cases where the law is determinate may be unpredictable, because judges personal tendencies make them causally insensitive to the law. See Leiter, *supra* note 55, at 268; Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481, 482 n.2 (1995).

203. FRANK, *supra* note 33, at 277.

204. *Id.*

205. *Id.*

206. *Id.* at 269.

207. *Id.*

208. See *id.* at 277 ("[T]he notion of 'authoritativeness' is alien to the character of a rule, looked at either as a bit of historical description or as a bit of prophesy. The announcement of a rule by a court cannot, therefore, confer upon it an authoritative quality.").

[A judge] must determine whether to fit a particular case into the terms of some old rules (either because they are working well, or because men have acted in reliance upon them and he considers the protections of such reliance socially valuable) or to "legislate" by revising and adjusting the preëxisting rules to the circumstances of the instant controversy.²⁰⁹

Frank cannot be describing only situations where the "old rules" are indeterminate. For public *reliance* upon the old rules would not be possible if that were true.²¹⁰ He is arguing that *whether or not* these rules are indeterminate, they are *non-normative*—the judge must use moral reasoning to decide whether they should be followed at all.

The second argument also allows us to make sense of Frank's notorious claim that the judge's "personality"²¹¹ or "hunches"²¹² are the driving force in judicial decisions. This is commonly understood to mean that judicial decisions are always unpredictable, something that is plainly false.²¹³ But Frank argues that one class of "hunch-producers"—that is, one class of "stimuli which make a judge feel that he should try to justify one conclusion rather than another"—consists of the "rules and principles of law."²¹⁴ Accordingly, a judge who *predictably* decides a case in response to the plain language of a statute is acting on a *hunch* just as much as one who decides idiosyncratically.

In fact, Frank understands the hunch as the judge's full evaluative response to the facts—her "biases," "sympathies," and "antipathies."²¹⁵ A judge's decision to predictably abide by the plain language of a statute is just as much a hunch as any other decision, because it is only in the light of her biases, sympathies, and antipathies that she will be motivated to follow the statute at all. That hunches drive decisions does not necessarily mean that decisions are unpredictable, only that the law cannot authoritatively force its own application. This helps explain why, on the one hand,

209. *Id.* at 121; *see also id.* at 142-43.

210. *See id.* at 35-36.

211. *Id.* at 111.

212. *Id.* at 104.

213. *See Leiter, American Legal Realism, supra note 46, at 54.*

214. FRANK, *supra note 33, at 104.*

215. *Id.* at 106.

Frank can make seemingly radical claims that all decisions are hunches and, on the other hand, more temperately admit that the extent to which the law is unpredictable is an empirical question that has yet to be determined.²¹⁶

Frank's use of psychoanalysis—what Leiter calls his “vulgar armchair Freudianism”²¹⁷—also makes more sense in light of the second argument against legal rules. According to Leiter, Frank uses Freud to explain why a judge's personality generates unpredictable judicial decisions.²¹⁸ He attributes this position to Frank, even while noting that it is paradoxical: If Freud can really explain judges' personalities, judicial decisions would not be unpredictable after all.²¹⁹

In fact, Frank uses Freud for an entirely different purpose: to explain why judges (and average citizens) believe that the law commands obedience—that is, why it gives us a reason to follow it, whatever our own moral views on the matter are. Judges' belief that they “are merely applying the commands given them by some external authority” is, Frank rightly argues, a “delusion.”²²⁰ The act of adjudication is an *autonomous* moral choice. Judges “must rid themselves of this reliance on a non-existent guide, they must learn the virtue, the power and the practical worth of self-authority.”²²¹

Why do judges treat themselves as if they lack moral autonomy? Frank suggests that they—and we—“have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father.”²²² Although Frank's Freudianism is indeed armchair, it is not implausible.

216. See *id.* at 111.

217. Leiter, *supra* note 2, at 280.

218. *Id.*

219. *Id.* at 280 n.66.

220. FRANK, *supra* note 33, at 121.

221. *Id.*

222. *Id.* at 21.

C. *The Second Argument and "Mechanical Jurisprudence"*

The realists' second argument against legal rules can also make sense of another problematic element of their theory of adjudication, namely their opposition to "mechanical jurisprudence,"²²³ or the view that adjudication consists of "logical deductions."²²⁴ The realists' rejection of the role of logical deduction in adjudication looks excessive. Assume there is a statute stating that anyone driving in excess of 55 m.p.h. ought to be fined \$100. Assume further that a judge concludes that the defendant was driving 85 m.p.h.²²⁵ Given these assumptions, why is the following syllogism not all that is needed to conclude that the defendant ought to be fined \$100?

Major Premise: All people who drive in excess of
55 m.p.h. ought to be fined \$100.

Minor Premise: The defendant drove in excess of
55 m.p.h.

Conclusion: The defendant ought to be fined \$100.²²⁶

223. The term is Pound's. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

224. Yntema, *supra* note 150, at 477; see also FRANK, *supra* note 33, at 32, 120; Karl Llewellyn, *The Effects of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665, 670-71 (1925).

225. No one, not even the mechanical jurists, thought that the facts of a case could be arrived at through pure deduction.

226. We set aside, for the purposes of this Article, worries about whether sentences expressing obligation can generate logical inferences at all. The example provided suggests that they can. On the other hand, it is natural to think of logical inference in terms of truth-preservation, and if sentences that express obligation are not capable of truth values—if they are, for example, expressions of certain attitudes—then our example would not be a valid inference at all. It would instead amount to the following less convincing argument:

Major Premise: Hooray for fining those who drive in excess of 55 m.p.h.!

Minor Premise: D drove in excess of 55 m.p.h.

Conclusion: Hooray for fining D!

This problem in deontic logic (the logic of sentences of obligation and permission) is known as Jørgensen's Dilemma. See Jørgen Jørgensen, *Imperatives and Logic*, 7 ERKENNTNIS 288 (1937-38); Alf Ross, *Imperatives and Logic*, 7 THEORIA 53 (1941).

On the other hand, if sentences expressing obligation are thought of as possessing truth-values, new problems surface, for normal logical rules of inference do not always work when sentences of obligation are added. The following is a valid logical inference:

John posted the letter.

John posted the letter or he burned it.

The inference is truth preserving—the second sentence must be true if the first is—but the

The realists' categorical rejection of mechanical jurisprudence sounds like the claim that the law is globally indeterminate. For only then would logical deductions be as useless in adjudication as the realists appeared to suggest.²²⁷

But, once again, the realists' attack on mechanical jurisprudence makes sense in the light of their second argument against legal rules. The fact that the syllogism is valid does not mean that the judge has a reason to adjudicate in accordance with the major premise. The judge's decision to do so is an autonomous moral choice.²²⁸

[T]he danger in continuing to deceive ourselves into believing that we are merely "applying" the old rule or principle to "a new case" by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into consideration all the relevant facts of life required for a wise decision.²²⁹

Of course, the realists also distrusted mechanical jurisprudence because they thought the law was indeed indeterminate (although only locally, not globally). In areas of indeterminacy, syllogistic reasoning will be insufficient even assuming that a judge has come to the moral decision to adjudicate in conformity with the law. Further moral reasoning will be needed to fill in the gaps.

It is worth noting as well that there is another understanding of mechanical jurisprudence that was commonly muddled together with skepticism about logical reasoning in the law. This is the conception of law (or, at any rate, of the common law) as "unchang-

same is not true when used in connection with sentences of obligation:

John is obligated to post the letter.

John is obligated to post the letter or burn it.

This is known as Ross's Paradox (after the Danish deontic logician and legal theorist Alf Ross).

227. See NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 19-52 (1978).

228. See Felix S. Cohen, *Modern Ethics and the Law*, 4 *BROOK. L. REV.* 33, 43-44 (1934); Cook, *Scientific Method*, *supra* note 152, at 308; Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71, 159-61 (1928).

229. COOK, *LOGICAL AND LEGAL BASES*, *supra* note 18, at 44-45.

ing, eternal"²³⁰—a conception allegedly endorsed in *Swift v. Tyson*²³¹ and rejected in *Erie*.²³² The realists rejected *Swift's* understanding of the common law as "a brooding omnipresence in the sky" in favor of *Erie's* conception of it as "the articulate voice of some sovereign or quasi sovereign that can be identified"²³³

There is no essential connection between *Erie* and the rejection of mechanical jurisprudence in the sense outlined earlier in this section.²³⁴ Someone can believe that the law is maximally determinate and that it provides objective reasons for compliance with its demands—while insisting that the law exists only because some lawmaking *authority* (such as a legislature or judge) created it.²³⁵

Because the realists failed to distinguish between *Erie* and the core realist positions, they were inclined to think that *Erie* was somehow a vindication of realism as a whole. This was a dangerous strategy, however, since it encouraged critics to dismiss the realists on the grounds that they were attacking a straw man. After all, no

230. Llewellyn, *supra* note 224, at 665; see also FRANK, *supra* note 33, at 32, 118.

231. 41 U.S. 1 (1842). In fact, there are good reasons to question whether *Swift* was committed to the view that the common law is discovered rather than created. Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 674 n.7 (1998). The holding in *Swift* can probably be justified by the fact that federal courts are authorized to *create* their own common law for use in diversity cases. The *Swift* Court could concede—indeed insist—that this federal common law, like the common law used by state courts, exists only because it was created *by a court*. One virtue of this approach is that it would make sense of the exception in *Swift* for "local usages." Under *Swift*, federal courts were obligated to use the common law as articulated by state courts if this law was "local" in nature, that is, if it concerned "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." *Swift*, 41 U.S. at 18. If federal courts, no less than Congress, can regulate interstate commerce (but only such commerce), then they would be bound to respect local usages because they concerned activities that are beyond their regulatory powers. One would expect, however, that valid federal common law would be binding, through the Supremacy Clause, upon state courts as well.

232. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

233. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

234. This confusion is probably supported by the fact that the patron saint of realism, Justice Holmes, was also an early critic of *Swift*, for example, in his dissents in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) and *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917). The realists themselves were not the only ones confused about their relationship to *Erie*. The idea that *Erie* and legal realism are essentially connected is shared by many current legal scholars. See Goldsmith & Walt, *supra* note 231, at 674 n.7.

235. See Dorf, *supra* note 3, at 707-08.

one believes (and probably no one has ever believed) that the law is an eternal brooding omnipresence:

Of course, the [legal realists] think they know how the rest of us use these concepts. They think that when we speak of 'the law' we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges The theory that there are such rules ... they call 'mechanical jurisprudence,' and they are right in ridiculing its practitioners. Their difficulty, however, lies in finding practitioners to ridicule. So far they have had little luck in caging and exhibiting mechanical jurisprudents.... [I]t is clear that most lawyers have nothing like this in mind when they speak of the law A superficial examination of our practices is enough to show this for we speak of laws changing and evolving.²³⁶

Although Dworkin is probably right that the mechanical jurist attacked in *Erie* is a straw man, the realists' other enemies are real. Dworkin cannot dismiss the realists as easily as he suggests.

V. EXPLAINING THE PREDICTION AND DECISION THEORIES OF LAW

Despite their differences, both of the realists' arguments against legal rules yield a picture of the law as a set of non-normative social facts concerning official practices. Nothing about how a judge ought to decide a case follows from the fact that these practices identify something as law. Under the first argument, this is for the simple reason that nothing about what anyone should ever do follows from social (or any empirical) facts. The only conclusions one can ever draw are descriptive, not normative. The second argument, in contrast, opens up the possibility that certain social facts may generate obligations. For example, if a judge promises to enforce the law or reasonable expectations will be frustrated otherwise, she would have a moral obligation to enforce the law. But the social facts about official practices that identify something as valid law need not include facts that would morally obligate judges to enforce what is identified. Legal obligation, therefore, cannot be a species of

236. DWORKIN, *supra* note 17, at 15-16.

moral obligation. Furthermore, there are no *other* relevant obligations that these social facts would generate besides the moral. An intrinsically *legal* obligation to enforce valid law cannot exist.

The realists' rejection of legal rules is a plausible theory of law. But it is also worthy of attention because it allows us to understand the realists' less plausible theories. The realists advocated the prediction and decision theories of law, I will argue, in part because they thought these theories followed from the law's non-normativity.

A. The Decision Theory of Law Revisited

As we have seen, the realists advocated a decision theory of law, according to which all and only concrete decisions are law, even though it is incompatible with many commonsense notions—for example, that the United States Constitution is law or that a judge who decides in accordance with Plato's *Republic* has not made a legally valid decision.²³⁷ Indeed, the realists advocated the theory even though they, in unguarded moments, spoke of constitutions, statutes, and the like as law. Why were they so attracted to the theory when it was so implausible?

I believe one reason is that they thought (wrongly) that it followed from their rejection of legal rules. The realists confused the comprehensive absence of legal obligation that followed from their rejection of legal rules with the localized absence of legal obligation that arises when the law is indeterminate. When the law is indeterminate, judges are usually given the discretion to fill in the gaps in the law. Their decisions become lawmaking acts. The realists, recognizing that judges have no legal obligation to decide a particular way even when the law is *determinate*, concluded that a judge *always* has discretion and that *every* decision is a lawmaking act.

But this is a mistake. Consider, once again, the game of torture-the-kitten. Under the rules of the game—that is, the propositions that the participants generally accept for controlling their play—a player *must* torture a kitten when he has scored a point in the game. Within the game, he has no discretion on the matter.

237. See *supra* Part I.B.

But let us assume, plausibly, that these rules are non-normative, in the same way that the law is non-normative for the realists. The social facts about the practice that identify these propositions as the rules of the game do not give the participants objective reasons to follow the rules. A player may—indeed should—refuse to torture a kitten after scoring a point. Nevertheless, it would be wrong to conclude that a player has discretion *within the game* to do so. It remains true that a player who refuses to torture a kitten has not made a *correct* move within the game.

The same lesson applies to the law. If the realists' arguments against legal rules are successful, then the fact that the United States Constitution is law does not give a judge a reason to adjudicate in accordance with its demands. But that does not mean anything she decides is law—it only means that she has no reason to create a decision that is law rather than non-law. In short, the realists confused two judicial tasks: the cognitive task of identifying what should be called “law” and the moral task of determining whether it should be followed.

I believe that this confusion stands behind the following passage from Frank's *Law and the Modern Mind*, quoted earlier:

All ... decisions are law. The fact that the courts render these decisions makes them law. There is no mysterious entity apart from these decisions. If the judges in any case come to a “wrong” result and give forth a decision which is discordant with their own or anyone else's rules, their decision is none the less law.²³⁸

Frank may be right to treat a legal obligation to come to a particular decision as “mysterious.” But that simply means that a judge has no obligation to choose law over non-law. It does mean that whatever she decides is law.

Although this confusion is *one* reason the realists advocated the decision theory, I doubt that they would have presented it as forcefully as they did, if they did not also think that it followed from the doctrine of the finality of judicial interpretations of the law. This second argument for the decision theory is not related to their rejection of legal rules. Indeed, many legal theorists who believe in

238. FRANK, *supra* note 33, at 125.

legal obligation have worried about whether the principle of judicial finality does not mean that the law is whatever a judge says it is.²³⁹

B. Bishop Hoadly

We can call this second argument the *Bishop Hoadly* argument, for it was Hoadly who said: "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them."²⁴⁰ According to the principle of judicial finality, judicial interpretations of the law are binding. But that seems to make interpretations, not the law that is interpreted, the true law.

Hoadly's argument is more than the commonplace observation that courts have the authority to engage in interstitial lawmaking—that is, to fill in gaps when the law is indeterminate.²⁴¹ That would show only that courts have lawmaking powers where the preexisting law fails to speak. Hoadly's point is that even *erroneous* interpretations of the law are legally binding. A judge creates law when interpreting a statute because her interpretation is valid law regardless of whether it is a correct interpretation.²⁴² The statute, it seems, cannot be law for it has no effect in the legal system—it

239. An example of a legal theorist who struggled with this problem is Hans Kelsen. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 250-51 (2003) (arguing that Kelsen's philosophy "creates a space for economics in law" because it gives judges a law-creating function); Stanley L. Paulson, *Kelsen on Legal Interpretation*, 10 *LEGAL STUD.: J. SOC'Y PUB. TCHRS. L.* 136 (1990) (explaining Kelsen's evolving views on law creation through legal interpretation); Stanley L. Paulson, *Material and Formal Authorisation in Kelsen's Pure Theory*, 39 *CAMBRIDGE L.J.* 172 (1980) (discussing Kelsen's doctrine of normative alternatives); Stanley L. Paulson, *Subsumption, Derogation, and Noncontradiction in "Legal Science,"* 48 *U. CHI. L. REV.* 802, 814-18 (1981) (discussing the problem of validity of erroneous judicial rulings in Kelsen's thought).

240. Benjamin Hoadly, Bishop of Bangor, Sermon Preached Before King George I, at 12 (1717), quoted in JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 172 (2d ed., The MacMillan Co. 1921) (1909).

241. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting) ("Congress declares its purpose imperfectly or partially, and compatible judicial construction completes it.").

242. See GRAY, *supra* note 240, at 125 ("The shape in which a statute is imposed on the community as a guide for conduct is that statute interpreted by the courts. The courts put life into the dead words of the statute.").

must be something that the judge takes into account (to a greater or lesser extent) when creating the law.

To assess Hoadly's argument, it is useful to draw a distinction between two ways that judicial misinterpretations of the law can be binding.²⁴³ On the one hand, the *judgment* that the judge issues can be binding—in the sense that officials must respect and enforce the judgment even if the law was misinterpreted. On the other hand, the interpretation of the law in the court's written opinion can be binding, in the sense that officials are bound to respect that interpretation in future situations.²⁴⁴

No one seriously has doubted that interpretations are—and should be—binding in the first sense.²⁴⁵ A concrete judgment (for example, providing damages to a plaintiff or acquitting a criminal defendant) is respected and enforced even by those who believe that it is based upon a misinterpretation of the law.²⁴⁶ On the other hand, some have questioned whether federal courts' interpretation of federal law—and particularly the United States Constitution—should be binding upon the other branches of the federal government, or even upon the states, in future situations.²⁴⁷ The very existence of these critiques, however, is evidence that these

243. See Brian M. Feldman, Note, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 988-91 (2003).

244. *Id.*

245. The sole exception I am aware of is Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 276-84 (1994).

246. See Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 8 (2001); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 988-89 (1987); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 82 (1993).

247. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (detailing several ways to deny the Supreme Court the final word on constitutional interpretation); Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 959 (2004) (analyzing the resurgence of popular constitutionalism, the role of the people in interpreting the law); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1269-70 (1996) (describing limits on interpretive authority of the judicial branch and arguing for executive branch's right to interpret the law); Meese, *supra* note 246, at 982-89 (clarifying the difference between constitutional law and the Constitution, and concluding that the Supreme Court is not the only interpreter of the Constitution); Paulsen, *supra* note 245, at 223-24 (discussing the executive branch's power to interpret the law). The Supreme Court declared that its constitutional rulings are binding in this stronger sense in *Cooper v. Aaron*, 358 U.S. 1 (1958).

interpretations are treated as binding in our legal system, whether or not they should be.

Hoadly was probably referring to judicial supremacy in this second sense. Furthermore, John Chipman Gray, who often quoted Hoadly,²⁴⁸ and who was an influence on the realists, was certainly referring to this form of judicial supremacy when he argued that statutes are not law.²⁴⁹

Thus far we have seen that the Law is made up of the rules for decision which the courts lay down; that all such rules are Law; that rules for conduct which the courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity "The Law" apart from these rules; and that the judges are rather the creators than the discoverers of the Law.²⁵⁰

Uninterpreted statutes are the sources of law, rather than being the law itself.²⁵¹

It is worth noting that even if Gray is right, we still would not have the decision theory. For Gray, the law consists of judicial interpretations that obligate other legal actors, including lower courts. A lower court decision that is contrary to a higher court's interpretation would, it seems, be legally invalid. Indeed, it is for precisely this reason that Frank distinguished Gray from the realists.²⁵²

[Y]ou will detect more than a trace of the old philosophy in Gray's views. You will note his constant reiteration of the words "rules" and "principles." Gray defines law not as what courts decide but as the "*rules* which the courts law down for the

248. See GRAY, *supra* note 240, at 172; see also *id.* at 102, 125.

249. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 33, 49-54, 215-17 (1995); SUMMERS, *supra* note 32, at 22-23, 26, 36, 44-47.

250. GRAY, *supra* note 240, at 121; see also *id.* at 170 ("[S]tatutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law.").

251. See *id.* at 123-24, 152, 308.

252. For arguments that Gray's views were not essentially realist, see TWINING, *supra* note 2, at 20-22 (looking at both aspects of Gray's writing and objecting to his treatment "as the first American legal realist"); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1529-46 (2001).

determination of legal rights and duties” or “the *rules of decision*” which the courts lay down. If a court in deciding a particular case fails to apply the “rule generally followed,” that decision is not law.... Now this ... is a remnant of the old myth. And a vigorous remnant. It is found in the thinking of perhaps ninety percent of even those who, like Gray, scoff at the idea that law-making occurs anywhere but in the court-room. Unless, they say, a court announces a new rule ... it is not making law. Law equals legal rules—rules which the courts use, not anyone else’s rules, but rules nevertheless; such judge-made rules constitute the law.²⁵³

Here Frank appears to return to the *previous* argument for the decision theory, which depends, not upon judicial supremacy, but upon the absence of legal obligation. All lower courts’ decisions are law, Frank argues, because lower courts do not have legal obligations to decide in accordance with higher courts’ interpretations. Nevertheless, it seems likely that Frank and the other realists were at least influenced by the idea of judicial supremacy when presenting the decision theory.

Hoadly’s argument is rarely taken seriously by philosophers, largely as a result of Hart’s influential critique in the *Concept of Law*.²⁵⁴ Although I have defended the realists against other aspects of Hart’s critique, here he was convincing.²⁵⁵

Hart asks us to consider the analogy of a game (let us assume it is baseball) in which the scorer’s misapplications of the rules are nevertheless binding on the players.²⁵⁶ At first glance it looks as if Hoadly’s argument applies. Consider the rule (2.00 in the Official Rules of Baseball) that defines a “strike” as a pitch which is “not struck at, if any part of the ball passes through any part of the strike zone.”²⁵⁷ Hoadly would argue that violation of Rule 2.00 has no effect within the game. The reason is that there is another rule—Rule 9.02(a)—giving the umpire’s rulings finality.²⁵⁸ Whether

253. FRANK, *supra* note 33, at 123-24 (footnote omitted).

254. See HART, *supra* note 3.

255. The following is a condensed version of my argument in Green, *supra* note 77, at 393-403.

256. See HART, *supra* note 3, at 142-47.

257. THE OFFICIAL RULES OF MAJOR LEAGUE BASEBALL 2.00 (1994).

258. *Id.* 9.02(a).

a pitch is a strike according to Rule 2.00 is irrelevant. Something is a strike only if the umpire says it is a strike.

But Hart argues that Rule 2.00 *has* an effect within the game:

[T]he scorer's determinations ... are unchallengeable. In this sense it is true that for the purposes of the game "the score is what the scorer says it is." But it is important to see that the scoring rule remains ... and it is the scorer's duty to apply it as best he can. "The score is what the scorer says it is" would be false if it meant that there was no rule for scoring save what the [official] scorer in his discretion chose to apply. There might indeed be a game with such a rule, and some amusement might be found in playing it if the scorer's discretion was exercised with some regularity; but it would be a different game. We may call such a game the game of "scorer's discretion."²⁵⁹

The difference between baseball and scorer's discretion is that baseball players make independent judgments (according to Rule 2.00) about how the game is proceeding. They often conclude that the umpire is mistaken and criticize him for violating that rule. If they were playing the game of scorer's discretion, such criticism would make no sense. The very point of scorer's discretion is doing *whatever* the scorer says—there is no ground, from within the rules of the game, for criticizing his decisions.

Because the players make judgments on the basis of Rule 2.00, at a certain point that rule will limit the finality of the umpire's rulings.²⁶⁰ Assume that an umpire rules that a strike has occurred even though no pitch has been thrown. Unlike a less egregious ruling, this ruling would very likely be treated as invalid, in very much the same way that the rulings of a deranged fan who ran on the field and started acting like an umpire would be treated as invalid. Furthermore, when the players came to the conclusion that it was invalid, they would be relying upon the Rule 2.00 instructions defining a strike.

In short we can find a role for Rule 2.00 *within* the game of baseball, a role that is compatible with the finality of the umpire's

259. HART, *supra* note 3, at 142.

260. See Green, *supra* note 77; Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC'Y 149, 163-68 (2003).

rulings. The rule sets up a broad standard of *reasonableness* beyond which the umpire's rulings will be invalid. For this reason, Hoadly's argument fails as far as baseball is concerned—a pitch is not *always* a strike if the umpire says it is a strike, Rule 9.02(a) notwithstanding. Although a ruling can be valid even if it violates the explicit language of Rule 2.00, it will be invalid if it violates the standard of reasonableness the players draw from that rule.

The same argument applies to legal systems in which judges' interpretations of law are given finality. Circumstances can be imagined where a judgment that radically misinterprets the law would be treated as a nullity within the legal system. For example, if a judge ruled that the author of a materially misleading proxy statement should be summarily executed or should be liable to the judge herself for the sum of ten million dollars, she would find her decision treated as void, in much the same way that a delusional citizen who jumped into the judge's seat would find his decisions treated as void. Her decision would not have to be nullified—for example, on appeal or through legislative action—it would instead be a nullity *ab initio*.

In short, the law is not (always) what courts say it is. The realists were therefore wrong to derive the decision theory from the principle of judicial finality. Statutes have just as much a right to be called "law" as judicial decisions, for they play an important role within a legal system.

C. *The Prediction Theory of Law Revisited*

Although the realists' *decision* theory of law clearly fails, their *prediction* theory is far more plausible than the philosophers give it credit for. As we have seen, the theory is *not* that the law for a judge deciding a case is a prediction of how *that judge* would decide. A judge does not discover the law by predicting her own behavior.²⁶¹ Instead, the law is a prediction about how judges in a jurisdiction would generally decide.²⁶²

Unlike the decision theory, the prediction theory does not treat all decisions as law. If a deranged judge ruled that the United States

261. See *supra* notes 29-39 and accompanying text.

262. See *supra* notes 49-54 and accompanying text.

Constitution is henceforth illegal, her decision would not be the law. After all, it would be contrary to how we predict judges would decide. Furthermore, it would not make new law, according to the prediction theory, because, as Cook puts it, it would not have "given us new data upon the basis of which we believe that we are able to predict action in another case like the case just decided."²⁶³ Not only can some decisions fail to be law under the prediction theory, some non-decisions (constitutions, statutes and the like) can be law, in the sense that we predict that judges will adjudicate in accordance with them.

Indeed, the prediction theory of law is best understood as the realists' attempt to describe (albeit sketchily) the official practices that stand at the basis of the law. And since, as we have seen, the realists and Hart were in substantial agreement about what these practices were,²⁶⁴ the prediction theory is not all that different from Hart's theory of law.

Consider how Hart would describe the fact that the United States Constitution is law. It is not enough that the Constitution exists as a set of propositions or a piece of paper. A rule of recognition (understood as a set of social facts about official practices) must exist under which the Constitution is accepted as valid law.²⁶⁵ Like the realists, Hart thought the fact that the Constitution is law is a fact about officials' behavior. So how is the prediction theory of law different from Hart's?

One possibility is that Hart speaks of the behavior of officials in general (legislators, administrative agencies, sheriffs), whereas the realists speak only of judges. Often, however, the realists expressed the prediction theory in terms of official behavior more generally.²⁶⁶ Indeed, Cook even took into account the behavior of the population as a whole:

To be accurate we must add that the assertion that A has a 'right' and B a 'duty' is an assertion that not only the officials but also the members of a given political community are in the habit of reacting in certain ways to certain stimuli. It is because these

263. COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 31 n.57.

264. See *supra* notes 120-24 and accompanying text.

265. See *supra* Part II.A.

266. See, e.g., COOK, LOGICAL AND LEGAL BASES, *supra* note 18, at 30.

habit-patterns exist that we can safely predict; and the total prediction must be as to the reaction of the vast majority of the inhabitants of the country as well as of the judges, or we cannot speak of law as 'existing.'²⁶⁷

Furthermore, when the realists did speak of judicial behavior only, they sometimes admitted that omitting other officials' behavior was distorting.²⁶⁸

Once the prediction theory takes into account all officials' behavior, its conclusions about which items should be called "law" line up even more closely with Hart's theory, for the prediction theory no longer carries a presumption of judicial supremacy. For example, if judges predictably decided that a statute was not valid law, but other officials (or the civilian population as a whole) predictably refused to give these decisions practical effect and treated the statute as if it were valid law—the realists, like Hart, could conclude that the statute, not the judges' decisions, were legally valid.

A more significant difference between Hart's theory of law and the realists' prediction theory is that the realists refused to consider a statute to be law, even if all officials predictably *called* it "law," if it was not useful in predicting these officials' *nonlinguistic* behavior—in particular their coercive acts of law application. In the context of the realists' theory of adjudication, this was an important difference. If some items that officials call "law" are too indeterminate to make a causal difference to adjudication, they are law under Hart's approach, but are not under the prediction theory. Furthermore, if some criteria (such as an implicit obligation of good faith in contractual dealing)²⁶⁹ influence adjudication in a predictable fashion even though officials do not call them "law," they are not law under Hart's approach, but are under the prediction theory.

We must concede that Hart gets the better of the realists here. Indeed, as Leiter shows, the realists employed something like Hart's theory of law when presenting their theory of adjudication, insofar as they argued that *the law* was not influencing adjudication.²⁷⁰

267. *Id.* at 30 n.54.

268. See *supra* notes 62-64 and accompanying text.

269. See *supra* note 202.

270. See *supra* Part I.B.

Under the prediction theory, if the law is not influencing adjudication, it is not the law at all. I cannot, therefore, defend the prediction theory as a general theory of law.

But the prediction theory is not the absurdity that the philosophers make it out to be, for it comes *close* to identifying the same items as Hart's theory. What is more, the realists were inclined toward the prediction theory for an understandable, albeit mistaken, reason. As we have seen, Cook and Holmes thought that the theory followed once the law was understood non-normatively.²⁷¹ In one sense, the connection the realists saw between the law's non-normativity and the behavior of officials was correct. The law's foundation in social facts about official behavior and its inability to generate objective reasons for obedience are intimately connected. But the realists wrongly privileged officials' *coercive* behavior over their *linguistic* behavior: A statute that officials predictably called "law" was not the law according to the realists, because it did not make a difference to officials' coercive acts. The realists came to this conclusion because they thought that a meaningful non-normative concept of law would be used solely for avoiding sanctions—it would concern only the law as understood by the bad man.

The realists themselves provided an example of why a meaningful concept of law could be broader. Although the realists thought that the law is non-normative, they needed a broader concept precisely to make the point that much of the law is *useless* for avoiding sanctions. If the realists thought that their *theory of adjudication* was meaningful, they must have thought that this broader concept of law was as well.

There are other reasons to be interested in this broader concept. Even one who understands the law non-normatively can accept that at times she has reasons to obey the law. Furthermore these reasons can go beyond prudential concerns about avoiding sanctions. I can think myself morally obligated to uphold the law, for example, because I *promised* to do so—and the obligation created by my promise would surely encompass the law broadly understood, not merely the law as seen by the bad man.

The final and most significant difference between Hart's theory and the prediction theory of law is the realists' Austinian focus

271. See *supra* Part III.B.

solely upon the *behavior* of officials, without considering the internal perspective—the fact that officials *take themselves* to have reasons for behaving as they do. As we have seen, Hart's argument that the internal perspective can explain the normativity of law is unlikely to succeed. The internal perspectives of the willing participants cannot explain why the hardened offenders have objective reasons to conform with legal practices.²⁷²

But Hart might be able to object to Austin's and the realists' behavioral focus while still allowing that the law is non-normative. Consider, once again, the interpretation of Hart offered by Michael Moore:

For both Hart and Austin, law necessarily obligates (creates 'legal obligations') only in the sense that those subject to such law by-and-large obey it. For Austin, such obedience can be because of habits or fear, while for Hart, a subset of people (judges) at least must obey some of the rules ... because they believe them to be morally obligatory. But for Hart no less than Austin, law's existence depends on its 'obligatoriness' only in this behavioral sense, a sense that has nothing to do with actual moral obligation.²⁷³

Hart might be able to object to the realists' prediction theory for the same reason he objects to Austin's theory of law under Moore's interpretation. By speaking of the law as *predictions* of official behavior, the realists fail to account for the fact that officials conform to the law for *reasons* (not merely out of habit).

Hart is surely right that we would be disinclined to call the Constitution "law" if we discovered that all officials in the American legal system were actually robots. A simple behaviorist approach to the law is probably not enough. But the realists—who, it will be remembered, were not generally behaviorists—could happily concede this.

Furthermore, if Hart's objection is that officials conform not merely for reasons, but because they take themselves to have objective reasons to do so, once again, the realists can agree, for they

272. See *supra* Part II.B-E.

273. MOORE, *supra* note 64, at 13.

describe official conformity to law in the same way.²⁷⁴ If there is a disagreement between Hart and the realists, it must be this: By speaking only of predictions of official behavior, and failing to *mention* these officials' attitudes about objective reasons that make official behavior predictable, the realists must not believe that the presence of these attitudes is *necessary* for law. Hart, as interpreted by Moore, thinks it essential to law that officials conform because they take themselves to have objective reasons to do so. It would not be enough that they conform prudentially—for example to avoid sanctions.

Although this is a genuine disagreement between Hart and the realists, it looks like the realists are on the right side. Why should a practice in which officials intentionally enforce certain identifiable commands, but only because of fear of reprisals from a tyrant, not be called a "legal system"? Why are the enforced commands not law?

D. The Scandinavian Realists

If my interpretation is correct, the American legal realists were similar to the Scandinavian legal realists, especially Alf Ross. The Scandinavian realists shared with the Americans a commitment to empiricism that motivated them to reject legal obligations.²⁷⁵ A judge's only reasons for a decision are those that are subjectively recommended by her attitudes. Furthermore, much like the Americans, the Scandinavians thought a prediction theory of law followed once legal obligation was rejected.

Consider Alf Ross's account of a valid legal rule. Ross accepts that a rule, understood as propositional content, can exist and guide those who seek to conform to its instructions.²⁷⁶ But a statement that a rule in that sense is legally *valid* is the empirical claim that the content is "effectively followed [by authorities applying the law], and followed because they are experienced and felt to be socially binding."²⁷⁷ In speaking of the feeling of being "bound," Ross, like the Americans, concedes that officials generally conform to the law

274. See *supra* notes 133-35 and accompanying text.

275. See ALF ROSS, *ON LAW AND JUSTICE* 67 (Univ. of Cal. Press 1974) (1958); Alexander, *supra* note 2, at 149; Hart, *supra* note 40, at 233.

276. ROSS, *supra* note 275, at 16-18.

277. *Id.* at 18.

because they take themselves to have objective reasons to do so, although he notes that the motivations for judicial conformity to law are varied.²⁷⁸ Unlike the Americans, however, Ross does not insist that items can be law only if they are useful for predicting officials' coercive acts. Content can be "effectively followed" *linguistically* (for example, when officials identify it as law in judicial opinions). He does not privilege the bad man's perspective on the law.

Ross is also like the American realists in rejecting as nonempirical any understanding of legal obligation as objective²⁷⁹—that is, as independent of this attitude of feeling bound. Valid law understood as "a claim, absolutely binding on human action and human volition"²⁸⁰ is sheer metaphysics. It is because he rejects legal obligation that Ross offers something like a prediction theory. To speak of legal validity he argues, is to make a purely descriptive claim that the propositional content of the rule "will be applied in future legal decisions"²⁸¹ Furthermore, despite his empiricism, Ross, also like most American realists, avoided purely behaviorist explanations of human action.²⁸² Adjudication he admitted, cannot be understood without recourse to the judge's beliefs and desires, despite the fact that this approach has a residual normative element.²⁸³ But an explanation on the basis of beliefs and desires (including the judge's feeling of being "bound" by the rule) is sufficient to explain adjudication without descending into the metaphysics of rules and obligations.

Ross is more consistent than the American realists, however, in his commitment to empiricism. Because he relies solely upon the first argument against legal obligation, he attacks all conceptions of objective reasons for action, including moral reasons. Although this strand of argument can be found among the American realists, they often rejected only legal obligations precisely because they interfered with what we are morally obligated to do.

278. *See id.* at 54.

279. *Id.* at 40, 61, 65.

280. *Id.* at 65.

281. *Id.* at 44.

282. *See supra* note 48.

283. *See ROSS, supra* note 275, at 33.

CONCLUSION

In this Article, I have defended the realists' rejection of legal rules and have attempted to render at least intelligible their decision and prediction theories of law. Rather than being the embarrassment that the philosophers have made it out to be, realism is, I believe, a respectable competitor in the jurisprudential marketplace.

That does not mean, however, that better approaches cannot be imagined. The realists share with both natural law theorists and with Hart (as I have interpreted him) a commitment to a conception of legal rules as giving people objective reasons for action. It is for this reason that realism denies that these rules exist.

The fact that this denial sounds so counterintuitive should give us pause. Perhaps the main value of the realists' arguments is to show that this conception of legal rules and legal obligation should be abandoned. If this alternative succeeds, then the realists' critique of legal rules would fail—for we would have a perfectly acceptable theory of legal rules, as propositions capable of guiding those who take themselves to have reasons to obey the law, that is compatible with the realists' important lesson that the law gives judges and private citizens no objective reasons for action. Indeed, the fact that legal rules in this sense do not give us objective reasons for action is surely a virtue of the theory. If we can explain the law without saddling ourselves with questionable conclusions about our obligation to obey the law, we should do so.

But even if this competitor to legal realism succeeds, its success is itself evidence of legal realism's importance as a theory of law. For it is only in the light of the realists' sustained attack on legal rules, traditionally understood, that the plausibility of a nontraditional conception emerges.