

NATURALIZED JURISPRUDENCE AND AMERICAN LEGAL REALISM REVISITED

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My thanks to Kenneth Himma for organizing this symposium on my book *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*¹ and to the editors of *Law & Philosophy* for agreeing to host it. I am especially grateful to the contributors—Julie Dickson, Michael Steven Green, and Mark Greenberg—for their thoughtful and detailed engagement with my work. I learned from their essays, even when I disagreed, and I also found much that I agree with. In what follows, I shall focus mainly on the remaining points of scholarly disagreement, ones where further progress might be made or where I think my original view of the matter still has some merit, the criticisms notwithstanding. I shall start by addressing the essay by Green, which takes up my interpretation of the American Legal Realists (hereafter “Realists”). I shall then turn to broader methodological issues in jurisprudence that arise in the essays by Greenberg (though his is also related to the issue of how to understand Realism) and Dickson.

Reply to Michael Green

Green’s scholarly and informative essay takes up two distinct issues: first, whether I am right that the Realists confined their claim about the rational indeterminacy of legal reasoning to those cases that reach the stage of appellate review; and second, whether I am right that the Realists did not embrace a “prediction theory of law,” but, instead, were tacit legal positivists. Green answers (roughly)

¹ Oxford: Oxford University Press, 2007.

in the affirmative on the first point, and in the negative on the second (though he thinks his own answer is consistent with my emphasis on the Realists' naturalism about adjudication).² He makes instructive points on both fronts, and so I shall highlight (just briefly) some points of agreement on the first, and then comment (at somewhat greater length) on some grounds for skepticism about some of what he says regarding the second.³

Green does a nice job explaining the context of remarks by Jerome Frank that *appear* to endorse the global indeterminacy of legal reasoning,⁴ but in fact are compatible with my thesis about the restricted scope of the indeterminacy thesis. Green also adduces striking evidence that Felix Cohen and Walter Wheeler Cook were proto-Keslenians who thought every judicial decision involved a *moral* decision by the judge about what ought to be done, but I am less sure this conflicts with my claim ~~that,~~ "Folene is hard-pressed to find the Realists expressing much interest in questions of political obligation."⁵ The "question" of political obligation is the question when and whether the fact that a norm is legally valid means there is a moral obligation for the judge to comply with it.⁶ Green's evidence suggests that the Realists, like the tacit legal positivists I claim they are, do *not* think legal validity entails a moral obligation to comply, though even Green does not contend either that the

Comment [EB1]: I thought this was a bit awkward with the comma

² Michael Steven Green, "Leiter on the Legal Realists," (first two pages).

³ Towards the end of his paper, Green does repeat Mark Greenberg's confusion about Quine's argument for naturalized epistemology. I take this up in the discussion of Greenberg, below, so won't belabor it here.

⁴ Green, sections 3 and 4 of his paper.

⁵ *Naturalizing Jurisprudence*, p. 118 n. 68.

⁶ Cf. Leslie Green, "Law and Obligations," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. J. Coleman & S. Shapiro (Oxford: Oxford University Press, 2001).

Realists have actual arguments for this position, or that they have a considered view about when judges ought to comply with the law.⁷

Green, like Michael Moore,⁸ thinks I am wrong to deny that most Realists accepted a “prediction theory of law,” that is, a view according to which the concept of law is best understood as a prediction of what a court will do. Some of the ~~cites-citations and quotes-quotations~~ Green offers in support⁹ are of a piece with material I myself cited, and which do nothing to settle the issue.¹⁰ No one, after all, has denied that the Realists often spoke of law as a prediction of what the courts will do, the question is always what they meant by doing so. But Green has a more precise and interesting challenge.

Comment [EB2]: Cite and quote are both verbs
– pedantic pet peeve of mine

First, Green pries apart two kinds of skeptical claims about law associated with the Realists: one is the “prediction theory,” just mentioned, but the other is the “decision theory” according to which the decision of the court *is* the law, and nothing else is the law. Green adduces compelling evidence that Frank, in fact, embraced the “decision theory,” not just, as I claimed, for the client’s perspective, but

⁷Regarding Jerome Frank, Green says, “If Freudian psychoanalysis really can explain judges’ personalities, decisions would not be unpredictable after all.” Green, p. ___ after n. 58. But my point was precisely that the Freudian theory of the mind is metaphysically determinate, but from the standpoint of any observer (other than the analyst of the judge!), the decision will be epistemically indeterminate. See *Naturalizing Jurisprudence*, p 26 n. 59. Green is right to point out that Frank invoked Freud *in part* to explain why people need to believe in “legal certainty,” and Frank’s revisionary account of his own view in a footnote in the preface to the sixth printing of the book (cited by Green at p. ___) is certainly striking. Frank was, of course, a fairly orthodox Freudian, and the Freudian picture of the mind involved psychic determinism. That surely explains why Frank, as late as *Courts on Trial* (194_) “urge[d]...each prospective judge [to] undergo something like a psychoanalysis” (*Courts on Trial: Myth and Reality in American Justice* [1973 edition], p. 250), a recommendation consistent with his earlier observation in *Law and the Modern Mind* (1930, p. 123) that “[w]e shall not learn how judges think until the judges are able to engage in ventures of self-discovery”—psychoanalytic ventures, obviously.

⁸ I dispute Moore’s objection in *Naturalizing Jurisprudence*, pp. 103-107.

⁹ See esp. p. ___ n. 72 (citing Radin and Llewellyn).

¹⁰ See *Naturalizing Jurisprudence*, pp. 17-18, 25-29, 104-105.

also even for the judge’s perspective on the law.¹¹ This, alas, just confirms one’s general impression of Frank’s muddle-headedness, but as Green notes, Frank later recanted his account,¹² and Llewellyn, of course, denied holding any such view.¹³ The good news, then, from the standpoint of Realism, as well as my interpretation of it, is that there is no evidence that Llewellyn, Herman Oliphant, Max Radin, Underhill Moore, or Leon Green—among other major Realists-- accepted the absurd “decision theory,” and that Frank even regretted endorsing it at one time.¹⁴

With regard to the “prediction theory” proper, Green emphasizes Felix Cohen’s commitment to it, but also Walter Wheeler Cook’s, about which Green’s evidence is *prima facie* persuasive.¹⁵ Green notes that I had, of course, acknowledged Cohen’s commitment to the prediction theory, but then makes the silly observation that, “It is awkward that Leiter’s ‘philosophical reconstruction of Legal Realism’ should relegate to the sidelines the one realist [i.e., Cohen] who had a PhD in philosophy—from Harvard.”¹⁶ The point, however, of a philosophical reconstruction is to make good philosophical sense of a theoretical position, not simply to describe the views, however confused, of people with PhDs in philosophy. Cohen was clearly a mediocre mind, his PhD “from Harvard” notwithstanding. The real

Comment [EB3]: I think this is what the author meant

¹¹ Green, circa n. 77 ff., and esp. nn. 85-86

¹² Green, circa n. 95-96

¹³ Green circa nn. 93-94. Green claims that Llewellyn later “repudiated” the “decision theory” (n. 95), but the passages he cites to show that Llewellyn ever held it, from the second edition of *The Bramble Bush*, refer not to the “decision theory,” but to the claims about “predicting” what courts will do.

¹⁴ Green takes issue with my claim that it is obviously anachronistic to read the Realists as **profferingproffering** claims about the “concept” of law, on the grounds that even John Austin was interested in a “definition of positive law.” Green circa nn. 91-92—**This, This** is unpersuasive on two counts: first, it would require a showing that the American Realists were influenced by the Austinian approach; and second, Hart’s program of conceptual analysis was not supposed to be definitional, as Hart never tired of emphasizing.

¹⁵ Green, _____. I neglected Cook in my original discussion, so Green is right to call attention to Cook’s view.

¹⁶ Green circa n. 103

question at issue, in any case, is whether it is necessary to make sense of the jurisprudence of most Realists to saddle them with a commitment to the prediction theory, and, on this score, as I read him, Green agrees with me that it is not: “since the prediction theory is a non-standard theory of law, Leiter’s observation that the realists did not employ it when making claims about legal indeterminacy applies.”¹⁷ Green’s ambitious attempt to square the “prediction theory” with Hartian positivism stalls over the problem that the “prediction theory” does not appear to have any room for the internal point of view, as Green appears to recognize.¹⁸ He correctly concludes that we should understand Realists like Cohen (and perhaps Cook) as proposing a reforming definition of the concept of law,¹⁹ though the reasons to think such a reform worthwhile are not addressed, and would, in any case, be a subject for a different day.

Reply to Mark Greenberg

In *Naturalizing Jurisprudence*, I replied²⁰ to Greenberg’s as-of-then unpublished essay on the analogy between Quine’s argument for naturalized epistemology and the Realist argument for naturalizing the theory of adjudication (Greenberg’s original~~y~~ essay is, happily, now published in this volume). Greenberg’s new essay here replies to my reply, and I fear that on certain issues (in particular, whether there is an analogy between Realism and Quine’s argument for naturalized epistemology) we would be well past the point of diminishing returns were my sur-reply to Greenberg’s reply to my reply to his original essay go on at a length commensurate to his reply to my reply! Yet Greenberg’s new

¹⁷ Green, circa n. 131.

¹⁸ Green circa nn. 115, 123.

¹⁹ Green circa n. 126

²⁰ *Naturalizing Jurisprudence*, pp. 112-118.

essay—which will be my focus here—raises some issues that do merit more extended discussion, and I will devote most of my space to those.

I'll start with a few brief words about the old issue. Greenberg and I discussed these issues at some length during his year in Austin in 2007, and I believed, and Greenberg confirms,²¹ that we had reached a kind of *rapprochement*: namely, that there are clear analogies between Quine's argument for naturalizing epistemology and the Realist argument for a causal-explanatory theory of judicial decision-making, but there are also ways in which the projects are disanalogous, depending on what one emphasizes. The analogy between the Realist argument and Quine's attack on foundationalism in epistemology is straightforward.²² Quine suggested that if the foundationalist project of grounding the special epistemic status of science in sense experience failed (as he argued it did, the upshot of his semantic and confirmation holism), then we might as well replace that project with a *naturalized* kin, one in which we explore the *causal* relationship between inputs (sense experience) and theoretical output (the theories of science). So, too, the Realists (on my account) suggest that if we can't justify judicial decisions (the outputs) on the basis of the inputs (fact and legal reasons), then we might as well examine the causal-explanatory relation between the two relata. I invoked Quine's argument for naturalized epistemology, by the way, not because I thought most philosophers agreed with Quine (Greenberg seems unduly impressed by current consensus on this and other matters²³), but because it was an example familiar to philosophers of an argumentative strategy which would allow us to

²¹ As Greenberg wrote to me subsequent to sending me his second essay (and gave me permission to quote): "I do certainly agree that there are levels of description at which there are analogies."

²² See *Naturalizing Jurisprudence*, pp. 34-46, 63-64.

²³ He says, e.g., that "Quine's arguments are *notoriously* inadequate to support" his replacement naturalism and that "normative epistemology has flourished" since Quine. Greenberg, [first page] and notes 2 and 3 (emphasis added). Later, he claims that there is a "widespread recognition of the mismatch between Quine's arguments and his replacement proposal...." Greenberg, p. __ n. 16.

understand the Realists as not simply being confused. (I am, in fact, sympathetic to Quine and the Realists *on the merits*, but we'll return to that later.)

Now here's an obvious disanalogy: Quine thinks that science is the basic arbiter of all matters epistemic and metaphysical: if you want to know what there is and what we can know, look to the sciences.²⁴ Nobody, of course, thinks anything similar is true about law. Greenberg's interest in disanalogies turns largely on this latter point (though at least partly on a [partial](#) misunderstanding of Quine, about which more in a moment). The following passage captures well, I think, what's in dispute between us. Greenberg writes:

The lesson of the failure of Cartesian foundationalism should be understood not as the thesis that evidence cannot justify belief in scientific theories, but as the thesis that the project of providing a foundation for science from outside of science is misguided. What Quine should be understood to reject is not the possibility of justified belief in scientific theories, but rather the foundationalist's understanding of what kind of justification scientific theories require.²⁵

Now Quine certainly thinks that we can not provide a foundation for science *outside* of science: that's a point I emphasized *ad nauseam*.²⁶ But he also thinks that logic and evidence do not rationally compel acceptance of any scientific hypothesis: that is, after all, the whole point of his famous claim about the underdetermination of theory by evidence (i.e., his confirmation holism), about which Greenberg is strikingly silent. If confirmation holism were false (and semantic holism were false), then we might

²⁴ Peter Hylton's *Quine* (London: Routledge, 2007) is particularly good on the radical naturalism of Quine's approach on this score.

²⁵ Greenberg, p. __. Greenberg lays a lot of emphasis on the fact that he used the words "in effect" in claiming Quine's argument was a *reductio* (a point I disputed), but I think we can bracket the import of the punctuation for purposes of the real issue.

²⁶ See, e.g., *Naturalizing Jurisprudence*, pp. 146-149.

construct a rational justification for belief in scientific hypotheses, and a vindication of the special epistemic status of science. But the failure of the foundationalist program from Descartes to Carnap is supposed to show that this isn't in the offing: particular scientific theories are accepted as true *not* because of facts and logic but because of all the pragmatic norms of justification scientists employ and that Quine and Ullian famously describe in *The Web of Belief*. So Quine, in fact, rejects—*contra* Greenberg—both the foundationalist justification of particular scientific [hypotheses](#) ~~theories~~ and the idea that science can be justified by philosophical standards external to science (Greenberg acknowledges only the latter). But as I said in my original reply, “Quine thinks we have no vantage point on the kind of question about justification the foundationalist was asking,”²⁷ since, as Roger Gibson famously puts it²⁸ in describing Quine’s view, “there is no Archimedean point of cosmic exile from which to leverage our theory of the world.”²⁹ Quine commits to science (confirmation holism notwithstanding) as the arbiter of what there is and what we can know for *pragmatic* reasons,³⁰ but that’s why a kind of pragmatism is essential to Quine’s view,³¹ though invisible on Greenberg’s reconstruction. Greenberg calls attention to

²⁷ *Naturalizing Jurisprudence*, p. 116.

²⁸ Quoted at *id.*

²⁹ Gibson, “Willard van Orman Quine,” in *A Companion to Metaphysics*, ed. J. Kim & E. Sosa (Oxford: Blackwell, 1995), p. 427.

³⁰ As I argued in *Naturalizing Jurisprudence*, p. 117. Thus, when I point out that according to the Realists, appellate decisions are similarly underdetermined by the inputs, the analogy is, *contra* Greenberg (p. ___ circa n. 12 & above), still quite intact and compatible with the Realist confidence in law and courts. The fact that law officially “sets itself a standard of rationality determinacy that it fails to live up to” (Greenberg, p. ___) is not in any way at all an indictment of adjudication for the Realists: to be sure, they commend greater candor, but they think that courts, despite the rhetorical obfuscation of their opinions, do remarkably well at identifying the normatively significant features of disputes and resolving them accordingly.

³¹ See Brian Leiter, “Science and Morality: Pragmatic Reflections on Rorty’s Pragmatism,” *University of Chicago Law Review* 74 (2008), esp. pp. 933-935.

the respect in which Quine does not repudiate normative questions,³² but so did I of course.³³ What Greenberg does not mention is that Quine's idea of "normative" epistemology is basically descriptive: that is, a *description* of the norms that successful sciences actually use.

So let's leave Quine interpretation behind. We will call a "Foundationalist Story" any normative account of the following form³⁴: given inputs X, Y and Z, only one output is *justified*. My claim was that the Realists deny that we can tell a Foundationalist Story about judicial decision in appellate cases. The Duhem-Quine thesis about the underdetermination of theory by evidence (among other considerations) means that we cannot tell such a story about scientific hypotheses either. So why not do something else, say the Realists and Quine: why not *describe* what kinds of inputs *actually* produce what kinds of outputs? Greenberg, like a lot of Quine's critics, seems confused about what this means. It certainly does not rule out descriptive sociology about the norms--simplicity, consilience, minimum mutilation of evidence--that are actually employed by successful sciences in winnowing sensory input so that it stands in a justificatory relationship with theoretical output. But not all of the "normative epistemology that has flourished" since Quine, according to Greenberg,³⁵ is that kind of descriptive sociology (which is plainly correct). Greenberg, alas, seems unduly impressed by a very different kind of descriptive sociology, namely, about what professors currently publish: e.g., he appeals to the fact that academics currently produce armchair epistemology as evidence that it is "flourishing" and that therefore "normative philosophical work" can not be "sterile."³⁶ But philosophical theology is, as a sociological

³² [cites]

³³ *Naturalizing Jurisprudence*, p. 38 nn. 110, 111, p. 145.

³⁴ This tracks what I said originally in *Naturalizing Jurisprudence*, pp. 39-40.

³⁵ Greenberg, first page

³⁶ Greenberg, p. __.

fact about Anglophone philosophy, also “flourishing,” in the sense of proliferating, but it’s hard to believe anyone really thinks that has any bearing on whether that philosophical enterprise is sterile or fruitful. Greenberg, alas, repeats the same form of “argument” with respect to legal philosophy: again, he notes—citing himself, Marmor, and Shapiro, among others—that normative projects about (as he puts it in Dworkin-speak³⁷) “the relation between the grounds of law and the content of law...are flourishing.”³⁸ But no part of my argument turned at all on what employed academics were publishing, and so I assume Greenberg must mean something more: namely, that such work is philosophically substantial and important. Alas, all he adduces by way of evidence is that it is written and published.

Let us put the sociology of what academics produce to one side, and turn to a more interesting issue: have Quine or the Realists given us a good reason to replace Foundationalist Stories with causal-explanatory theories?³⁹ Greenberg pronounces my use of the phrase “theory of adjudication” “unusual,”⁴⁰ and I am afraid I can only return the compliment, with one qualification: “theory of adjudication” has no standard usage at all (Greenberg adduces no contrary evidence, his

³⁷ He even says later that “the relation of the determinants or grounds of legal content to the content of the law is a central question in philosophy of law. It is perhaps the central project of what is sometimes called ‘general jurisprudence.’” *Id.* at p. ___ (circa n. 21). I am not sure I recognize this as a description of the tradition of general jurisprudence in the twentieth-century. General jurisprudence in writers like Kelsen, Hart, and Raz has been concerned with what is distinctive of those norms that are *legally valid*, validity being the mode of existence of norms, as Kelsen says. This might have been what Greenberg means by the “grounds of legal content,” except he thinks it is a further question what the relationship is between the “grounds of legal content” and “the content of law.” But the criteria of legal validity fix the content of the law (at least, when they are not themselves indeterminate), so there would be, on this reading, no puzzle about the relationship between the “grounds of legal content” and “the content of the law”: the former fix the latter, unless indeterminate.

³⁸ [cite]

³⁹ It was actually no part of my argument in the papers on Realism to argue that the Realist case for ‘replacement naturalism’ was persuasive, though I am sympathetic to it. It was, rather, to show that we could make sense of what they were doing from a (naturalistic) philosophical point of view, even if we rejected their position.

⁴⁰ Greenberg, p. ___.

pronouncements notwithstanding), so writing as though there is a usual meaning is, itself, “unusual.” I was quite clear, as Greenberg’s discussion reveals, about what I meant by it, and so the real question is whether anyone is committed to a Foundationalist Story about the theory of adjudication.⁴¹ Greenberg, however, makes the surprising claim that no one is so committed. (I will follow Greenberg in ignoring figures like Blackstone—ancient history, after all—and focus only on the present.) Recognizing that Dworkin is one possible target of the Realist critique as I reconstruct it, Greenberg claims that “the right-answer thesis is not central to Dworkin’s project.”⁴² The right-answer thesis—the idea that every case has a right answer as a matter of law—would be an example of a Foundationalist Story about adjudication, and so the Realist critique would then have a potent, living target. When Greenberg claims the Foundationalist aspect of Dworkin’s theory isn’t central, he is not making a claim about the amount of effort Dworkin devotes to defending the right-answer thesis, which is obviously substantial.⁴³ Greenberg’s real claim is that the Dworkin of *Law’s Empire* is not necessarily committed to the right-answer thesis (the earlier Dworkin obviously is, though Greenberg doesn’t concede the point quite that plainly). I rather agree with Greenberg that Dworkin “is most concerned to establish...that law depends in a particular way on morality” and that “the right-answer thesis...is a downstream consequence of his overall theory of law in conjunction with his view about morality”⁴⁴ So far, this is just a complicated admission that Dworkin accepts a Foundationalist Story about adjudication; the best Greenberg can do

⁴¹A word in passing about Greenberg’s repeated confusion about what I said about “predicting” judicial decisions. See Greenberg, pp. ___-___. I did not attribute an interest in predicting judicial decisions to anyone other than the Realists. The Realists were practical folks, thinking about the needs of lawyers, and so they thought being able to reliably predict judicial behavior would be useful. I realize that this view is not shared by other legal philosophers, and I did not claim otherwise.

⁴² [cite]

⁴³ See, e.g., Chapters 4 and 13 in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Chapters 5 and 7 in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985).

⁴⁴ Greenberg, p. ___ (circa n. 25).

is assert “that most of [Dworkin’s] arguments could succeed consistent with the falsity of the right-answer thesis.”⁴⁵ Greenberg does not show that this is Dworkin’s view, and it is certainly not Dworkin’s view in his early work, since the “retroactivity” objection to legal positivism⁴⁶ turns, quite clearly, on the truth of the right-answer thesis. Greenberg may be correct that one could have a view about the nature of morality different than Dworkin’s and give up the right-answer thesis: John Mackie would be a case in point, though not the one Greenberg has in mind, and not one Dworkin would be happy with. But none of this changes the fact that the *actual Ronald Dworkin* holds a theory of adjudication involving the Foundationalist Story because he holds a particular view about law *and* morality.

Comment [EB4]: Citation missing

Greenberg, to his credit, acknowledges that “if the indeterminacy thesis is correct, then not all of Dworkin’s arguments are successful.”⁴⁷ That also means that if the Realist claim about indeterminacy is correct, then the Foundationalist Story is not successful. But I do agree with Greenberg that, “It is not at all obvious... what should be rejected” in those circumstances.⁴⁸ I also agree that the Realists were not directly addressing Dworkin’s arguments, since he was a babe when they were writing.⁴⁹ I even agree that the central Realist argument for the indeterminacy of law—namely, the existence of what lawyers and judges take to be equally legitimate but conflicting canons of interpretation for authoritative sources of law—is one to which Dworkin could respond. Of course, I have other arguments in *Naturalizing Jurisprudence* that undermine Dworkin’s position,⁵⁰ but it was no part of my

⁴⁵ *Id.*

⁴⁶ [Ronald Dworkin, *Taking Rights Seriously* \(1977\), Chapter 2.](#)~~[cite]~~

⁴⁷ Greenberg, p. __.

⁴⁸ *Id.* [same]

⁴⁹ I’m a bit puzzled why Greenberg bothers to make this point (*id.* at __ [a bit before n. 27]), since I never claimed otherwise.

⁵⁰ See, e.g., Chapter 8, “Objectivity, Morality and Adjudication.”

thesis about the Realists that they supply all the arguments for giving up Foundationalist Stories about adjudication. My primary ambition was to give a rational reconstruction of the Realist position that would show *why* they might have been motivated to replace a normative account of adjudication with a causal-explanatory account. It is a separate question whether they had good reasons for that project, though especially against their Blackstonian formalist targets, I should think they did—and on that point, Greenberg is also silent. As it happens, I think the profoundly mistaken character of Dworkin’s jurisprudential project⁵¹ makes a Realist alternative especially attractive—and, if I were as impressed by descriptive sociology of academia as Greenberg seems to be, I might note that most legal scholars have opted *en masse* for the quasi-Realist empirical study of judicial behavior in recent years, as against Dworkinian just-so stories. But I am not impressed by the herd behavior of academics, so let me just rest on the merits of the arguments I offered against Dworkin’s position as a reason for taking the ‘replacement’ project of the Realists seriously.

Because Greenberg runs together the question about what the law is with the question how courts should decide cases, he does not understand how I can claim that, “The Realist does not call for ‘naturalizing’ theory of adjudication in that range of cases where legal reasons are satisfactory predictors of legal outcomes.”⁵² I, of course, agree with Greenberg that an argument for the indeterminacy of legal reasoning depends on an account ~~feof~~ of the nature of law: I say so explicitly.⁵³ The Realists do not *naturalize* the theory of law, just -the theory of adjudication. Only because Greenberg conflates the question “what the law is” with the question “how should a court decide a

⁵¹ *Id.* See also, Brian Leiter, “The End of Empire: Dworkin and Jurisprudence in the 21st Century,” *Rutgers Law Journal* 36 (2005): 185-___; “Explaining Theoretical Disagreement,” *University of Chicago Law Review* 76 (2009): 1215-___.

⁵² *Naturalizing Jurisprudence*, p. 41, quoted by Greenberg at p. ___.

⁵³ *Naturalizing Jurisprudence*, pp. 71-72.

particular case”—the trademark error of all Dworkinians—does he find my disentangling of the two positions puzzling.

I can conclude, happily, on a more positive note. It seems to me that Greenberg’s meta-reflections about naturalism in philosophy are mostly sensible, at least as I interpret them. I agree that naturalism in philosophy is motivated by the thought that “it makes sense to copy the most successful explanatory strategy we have,” and this entails both positive (try to emulate successful paradigms of scientific explanation) and negative (don’t invoke as explanatory properties that have no standing in the successful sciences) morals for philosophical practice.⁵⁴ I agree that “we should be cautious about constraints imposed for the negative” reason, since “it is easy to mistake a transient scientific movement for the true scientific methodology”⁵⁵ (Against that note of caution, however, I would point out that there are fewer transient scientific fads than philosophical ones, so if one *really* had to choose, it is not obvious that we should opt for the ‘philosophical’ one.) I also agree that “imposing strong naturalistic constraints motivated by scruples about unreduced properties can diminish the fruitfulness of our explanations,”⁵⁶ but it is important to emphasize that this is no part of my naturalistic project in legal or moral philosophy (especially through my work on Nietzsche). Indeed, I criticize Quine’s behaviorism precisely on this score,⁵⁷ namely that, as Greenberg puts it, “[h]igh-level sciences routinely employ notions of which they cannot give a reductive account.”⁵⁸ If behaviorist psychology had succeeded, Quine would have been right, but in reality, it was an explanatory and predictive failure,

⁵⁴ Greenberg, p. __. Cf. my discussion of naturalism in *Nietzsche on Morality* (London: Routledge, 2002), Chapter 1.

⁵⁵ Greenberg, p. __.

⁵⁶ Greenberg, p. __

⁵⁷ *Naturalizing Jurisprudence*, pp. 3-4.

⁵⁸ Greenberg, p. __.

supplanted by the cognitive revolution of the last fifty years. If the cognitive sciences are explanatory, then we have every reason to subscribe to the ontology they require to do their explanatory work, whether or not it is reducible to physics or biology. That has been central to my understanding of the naturalism of both the Realists and of Nietzsche. On these issues, Greenberg and I appear to have no dispute.

Reply to Julie Dickson

I have learned a great deal from Julie Dickson's characteristically careful and probing engagement with the views of other legal philosophers, in this case my own! Dickson observes, quite correctly, that the "content of [my] criticisms" of the methodology of jurisprudence "have shifted over time," and for precisely the considerations she calls attention to in note 26 of her paper, namely, the unimpressive results of the current social science of law.⁵⁹

Philosophers are often interested in the nature of various "things": mind, space, time, even law. The history of philosophy is littered with mistaken theories of things, in just about every case deemed mistaken because of subsequent scientific discoveries. This history supports an inductive inference: namely, that the methods of philosophy (the reliance on "intuitions" or what is "intuitively obvious" in particular) are not particularly reliable, while the various methods of the sciences (even if not wholly unitary) are much more reliable (cf. the conclusion of my discussion of Greenberg, above). Thus is born the naturalistic hope in philosophy: if you want to want to know what some kind of X is like, find out what the science of X says about it. There's still lots for philosophers to do on this picture, since scientists are notoriously lax about conceptual entailments and boundaries, and philosophers are often

⁵⁹ Dickson, p. __.

good on precisely these points. But on the classic philosophical question—what is X—scientific methods are the ones that an induction over past successes and failures gives us most reason to trust.

That was the spirit in which I approached one aspect of the project of naturalizing jurisprudence, but my initial optimism faded the more I learned about the epistemically feeble condition of the social scientific work on law and courts. It became clear, alas, that the existing “science” was quite predictively unimpressive—perhaps adequate for puncturing the pretensions of constitutional law professors who think legal doctrine explains decisions, but wholly inadequate to warrant confidence that it had meaningfully cut the joints of the socio-legal world. But Dickson is quite correct that on my view it is possible “that, in the future, empirical research into legal phenomena...may improve” sufficiently to warrant epistemic confidence. And thus her fair questions about “the direction of justification or support” between scientific findings and the nature of law, or any X, deserve a response.

The only claim I have defended in my work is (to quote Dickson’s gloss) “that the explanatory power of the Attitudinal Model [or a genuinely predictively successful theory of judicial behavior], itself established...on the grounds of its predictive power in empirical studies, vindicates or gives us reason to endorse Raz’s hard positivism.”⁶⁰ Dickson’s apparent uncertainty about the direction of epistemic support at work in this claim is evident in her observation that:

Leiter seems to be saying that hard positivism is supported by the explanatory power of the Attitudinal Model, based on the latter’s predictive power, but that in order even to explain what the Attitudinal Model is, to differentiate it sufficiently from the Legal Model, and hence to be able to delineate and then test the relative predictive strengths of each of the postulated models, *we need hard positivism to be true*. So, in Leiter’s explanation of it, the

⁶⁰ Dickson, p. __ (circa n. 24).

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Attitudinal Model appear to need the hard positivist view of law to be true in order even to delineate itself as a distinct model and hence get the testing it requires off the ground; but then, having thus got itself off the ground, and having established, based on its predictive power in empirical studies, that it outperforms its rival model, *this* then vindicates hard positivism?⁶¹

I have italicized the portion of Dickson's account of my position that is at issue. The Attitudinal Model does *not* "need hard positivism to be true"; it needs to *assume* a hard positivist account of law in order to generate its explanatory and predictive model. That the model involving such assumptions is predictively powerful is *then* a reason to think its assumptions warrant credence. If a model that rejected hard positivist assumptions about the nature of law were more predictively fruitful, then that would constitute a reason, from the naturalistic point of view, to think those assumptions more plausible.

Dickson is correct to observe that Ian Farrell's critique of my earlier view persuaded me that conceptual analysis need not be "glorified lexicography," and that there might be a role for "modest" conceptual analysis in jurisprudence. Of course, modest conceptual analysis, even if it is "an exercise in sophisticated conceptual ethnography,"⁶² will yield immodest results if the concept in question is what I called in *Naturalizing Jurisprudence* a "Hermeneutic" one⁶³--that is, one whose reference is fixed by the role it plays in how people make sense of themselves and their social world.⁶⁴ She usefully identifies my ambiguous comments on this point in my earlier discussion of Farrell's account of modest

⁶¹*Id.* at p. __ (emphasis added).

⁶² Dickson quotes me to this effect at p. __, n. 37, citing *Naturalizing Jurisprudence*, p. 6.

⁶³ *Naturalizing Jurisprudence*, p. 173.

⁶⁴ Stefan Sciaraffa and his students impressed this point on me in a seminar at McMaster University.

conceptual analysis.⁶⁵ So let me see if I can now clarify the matter here. With respect to Natural Kind Concepts,⁶⁶ modest conceptual analysis tries to clarify how the “folk” are using the concept, which then permits us to see whether or not it picks out the natural kind in question (the latter being a deliverance of the pertinent science). With respect to Hermeneutic Concepts, however, the clarification of the concept entails the clarification of the referent. If it turns out that by the Hermeneutic Concept of “wolverine” we mean the “mascot of the University of Michigan sports teams,” then modest conceptual analysis of “wolverine” also tells us what wolverines are, *from the hermeneutic point of view*. Of course, it also turns out that this concept of wolverine does *not* successfully pick out the referent of the Natural Kind Concept of wolverine, but the latter (the referent, that is) is not a discovery of modest conceptual analysis, but of science. If that is right, then *the* most important methodological issue in general jurisprudence is whether the concept of law is, or is not, a Hermeneutic Concept. As I noted in *Naturalizing Jurisprudence*,⁶⁷ almost all 20th-century legal philosophers, with the possible exception of the Scandinavian Realists, have assumed that it is. But what argument do they have for that assumption? Many Natural Kind Concepts figure in the self-understanding of human agents—“wolverine” for University of Michigan sports fans is, again, an example, and so too is baptismal “water” for the Catholic (it need not be H₂O!). And while we understand that there are also Hermeneutic Concepts of “wolverine” and “water,” we also understand that wolverines and water are *really* the kinds of things picked out by biology and chemistry.

But why is the latter claim true? It is obviously not meant as a sociological claim about what the “folk” believe about the concept of “water”: after all, it is most likely that the folk think water is a clear,

⁶⁵ Dickson no. 45 and following text.

⁶⁶ *Naturalizing Jurisprudence*, pp. 172-173.

⁶⁷ *Id.* at 173.

potable liquid (or whatever is used in Baptismal ceremonies!), and wolverines are furry dog-like creatures used as mascots by the University of Michigan sports teams. So when we say that the Natural Kind Concepts of water and wolverine have priority over the Hermeneutic Concepts in specifying what the referents of these terms *really* are, what we are actually saying is that we have other epistemic and pragmatic reasons for privileging one concept over the other. That's easy enough to specify in the case of "water," for example: the epistemic and practical advantages of acknowledging that the macro-properties of some clear, potable liquids are explicable by the micro-properties of two parts hydrogen and one part oxygen have now been borne out by more than two hundred years of scientific and engineering triumphs predicated on an appreciation of the molecular constitution of the observable macro-properties of liquids. If, in fact, a powerful social-scientific theory of law emerged, I suspect its epistemic and pragmatic advantages would trump anyone's intuitions about how the "folk" use the concept.

Of course, law is not a natural kind like water or wolverine, since it has no distinctive micro-constitution, one that could be specified by one of the natural sciences. But if "law" can not be individuated by its natural constitution, then the question arises why a human artifact, like law, should be thought to have an essential constitution at all?⁶⁸ Precisely because Hermeneutic Concepts figure in human self-understandings, it turns out that all of them have been resistant to robust or stable analysis in terms of their essential characteristics, or so the history of philosophy for the last two thousand years suggests. I would not want to be a slave to fashion, to be sure, but two thousand years, at least in matters philosophical, does seem like a long time. As Dickson notes, it does appear "startling" to conclude "that theoretical inquiry regarding a familiar and actually existing social institution having far-reaching effects on the lives of those living under it cannot yield knowledge of that social

⁶⁸ See my "The Demarcation Problem in Jurisprudence: A New Case for Skepticism"

~~institution~~institution itself.”⁶⁹ But that wasn’t quite my claim. I am sure there is lots of sociological, anthropological, and psychological knowledge about law to be had. What I doubt is that there is any intuition-derived knowledge about the “essence” of the Hermeneutic Concept of law to be had. We can have fleeting, ethnographic knowledge about how the folk “around here” think about law, but that would be all that is on offer.

Dickson, of course, correctly notices that I am skeptical of the epistemic value of intuitions about the extension of concepts—a skepticism hostage, as just noted, to the question whether or not law is a Hermeneutic Concept. She doesn’t get my skepticism quite right, however. She ascribes to me the complaint that the “intuitions” underlying conceptual analysis in jurisprudence “are empirically unsupported and unrepresentative in character.”⁷⁰ The first charge is certainly one I make, but the second is not. I consider it an open empirical question whether the intuitions in questions are representative or not. That Anglophone jurisprudence is Oxford-centric (in a way no other branch of philosophy is, I should add) raises the specter of a possible selection effect on the intuitions about law, authority, obligations, and so on that are thought to count, but only empirical inquiry, of the kind pursued by experimental philosophers in epistemology and philosophy of language, ~~can, can~~ determine that that’s what has happened.⁷¹ Dickson, however, offers the following cautionary note regarding such inquiry:

[T]he kind of research regarding people’s actual intuitions to which experimental philosophy has so enthusiastically turned can at best supplement and can certainly not

⁶⁹ Dickson, ____

⁷⁰ *Id.* at ____.

⁷¹ This is why I do not, as Dickson notes, “dwell on “the biographical or social backgrounds” of legal philosophers. See Dickson, text at n. 48. I should add that John Mikhail’s interesting work on moral intuitions about substantive normative questions (see Dickson n. 54) is *not* relevant to the question at issue in the text.

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replace the kinds of arguments which legal philosophers develop and attempt to defend.

Data regarding people's intuitions about law and other legal concepts may be all very well, but we still have to decide what to do with the data so collected (including, for example, what to do with it if it reveals disagreements in intuitions hailing from those from the same and/or different cultural backgrounds....).

To start, it is very important to emphasize what an absolutely central role intuitions in the relevant sense actually play in legal philosophy--and the puzzle that emphasis presents for a position like Dickson's, in the passage just quoted. As Hart aptly observed in "The Postscript," the "starting-point" for his task in *The Concept of Law* was "the widespread common knowledge of the salient features of a modern municipal legal system which on page 3 of this book I attribute to any educated man,"⁷² and thus the argument of the book is replete with appeals, explicit and implicit, to what "any educated man" would intuitively recognize: e.g., that there is a difference between having an obligation and being obliged to do something; or that legal rules can persist in force after the demise of the sovereign who first promulgated them; and so on. He is not alone in that approach. Just to take one of many possible examples, Joseph Raz claims, *explicitly*, that one of the two main arguments for the "sources thesis" is that it "reflects and explicates our conception of law," where this is, presumably, the conception of law held, however inchoately, by the educated man familiar with a modern municipal legal system. Hart and Raz never adduce any evidence of what "any educated man" knows or believes, but in that regard they are no different than traditional epistemologists or philosophers of language appealing to "ordinary" intuitions about knowledge or reference.

⁷² H.L.A. Hart, *The Concept of Law*, 2nd edition (Oxford: Clarendon Press, 2004), p. 240.

If, as Dickson says in the passage quoted, above, legal philosophers must decide which intuitions “are most relevant in understanding law’s important and significant features” and [whether](#) some of the intuitions of Hart’s “educated men” “may be confused, mistaken, insufficient focused or vague,”⁷³ [but yet](#) it is still supposed to the case that the concept in question is a Hermeneutic Concept, then it is fair to ask what the *criteria* are by which the theorist sorts the wheat from the chaff? That it seems to make sense in an Oxford seminar room? Or that it would be reflectively endorsed by the “folk” if suitably explained? Or something else? It could turn out that the concepts related to law by which the folk make sense of themselves and their social world are, in fact, confused and vague, and so the “cleaning up” done by philosophers might really signify a betrayal of the idea that underlies the work of, e.g., Hart and Raz, namely, that “law” is a Hermeneutic Concept. But once we give up on hermeneutic constraints on the concept of law, why not go all the way and prefer the concept of law that figures in potent explanatory schema?

No one has thought more carefully about methodological issues in jurisprudence than Julie Dickson, so I hope these thoughts in reply to her criticisms will stimulate her further work on the subject.

⁷³ Dickson, p. __ [near end]