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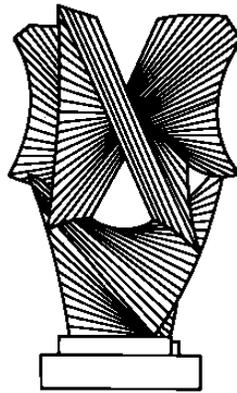
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NATURALIZING JURISPRUDENCE: THREE APPROACHES

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NATURALIZING JURISPRUDENCE: THREE APPROACHES

Brian Leiter

General jurisprudence—that branch of legal philosophy concerned with the nature of law and adjudication—has been relatively unaffected by the “naturalistic” strains so evident, for example, in the epistemology, philosophy of mind and moral philosophy of the past forty years.¹ In this paper, I want to sketch three ways in which naturalism might affect jurisprudential inquiry.²

By “naturalism” here, I shall mean a *methodological* doctrine about how we should approach philosophical inquiry. On this view, philosophy proceeds (as the most familiar metaphor has it) “in tandem with the sciences,” that is, as the abstract and reflective branch of the empirical sciences as they limn the causal structure of the world. Such an approach is agnostic about ontological questions: the sciences decide those, and since, as Jerry Fodor has repeatedly emphasized, the trend in the past fifty years has been towards the proliferation of the special sciences, rather than a systematic reduction to a basic science like physics, we should expect an acceptable naturalist ontology to be comparably pluralistic—though, to be sure, we won’t find in it any moral facts or supernatural entities since these play no role in any scientific enterprise with the “predict and control” *bona fides* of successful sciences.

¹ Why that should be so is an issue I will return to briefly at the end.

² This will largely constitute a précis of my recent collection *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007).

There have, of course, been *substantive* naturalistic programs in jurisprudence whose aim was to show that all the distinctive normative concepts of the law—“obligation,” “right,” “duty,” and so on—can be explicated in terms that admit of empirical investigation and confirmation. The mid-20th-century movement known as Scandinavian Legal Realism (because of the nationalities of its proponents) is the primary example in the last hundred years, but one of H.L.A. Hart’s decisive achievements was to demonstrate the failure of the Scandinavian program to account for the perspective of actors within a legal system--such a perspective, Hart argued plausibly, being essential to account for the social phenomenon of law.

From the standpoint of a methodological naturalism, there are three ways we might “naturalize” jurisprudential questions. Two of these pertain to questions about the nature of law, one to the nature of adjudication, that is, the formal procedures by which courts and official bodies decide legal disputes. Like most branches of philosophy, philosophy of law has been concerned with the distinctive features of its subject-matter: what demarcates legal norms from other kinds of norms, most notably moral ones; how we distinguish human societies with law from those with other forms of normative regulation; and what kind of normative force is characteristic of legal rules? The most important work of 20th-century jurisprudence was H.L.A. Hart’s 1961 book on *The Concept of Law*, which decisively displaced two influential alternative positions: on the one hand, Hans Kelsen’s view that the nature of law was essentially tied to its use of sanctions, and that its normative force was only explicable by reference to a non-natural transcendental fact, what Kelsen called the *Grundnorm*; on the other hand, the Scandinavian program, mentioned already, which sought reductive definitions of all

normative terms in law to empirical predictions about official behavior. Hart's own philosophical outlook, as his student Joseph Raz has emphasized, was a naturalistic one. *Contra* Kelsen, Hart thought one could explain legal systems and their apparent normative force in terms that were exclusively psychological and sociological—in terms of what legal officials actually do and their attitudes towards what they do—and thus without positing transcendental norms. With the Scandinavians, he shared the naturalistic view that ours was a world without normative facts, but *contra* the Scandinavians, he did not think this required reductive definitions of all normative terms in law. The normative terms in law, Hart thought, can be understood non-cognitively, and not simply as unsuccessfully referential terms. Talk of a “legal right” or “legal obligation” did not pick out properties in the world, but rather expressed the distinctive attitudes of actors within a legal system.³

In these respects, then, Hart's powerful articulation of a positivist theory of law—a theory according to what law depends on positive facts about official behavior—can be understood as, itself, informed by philosophical sympathies that are naturalistic in spirit.

Yet Hart's own method of inquiry is one that hardly looks to be naturalistically respectable. Influenced by the then-dominant “ordinary language” philosophy of J.L. Austin, Hart relied on appeals to intuitive claims about law manifest in ordinary language and in the understanding of, as he put it, a “modern municipal legal system” possessed by the ordinary man—or at least the “ordinary man” as conceived (perhaps correctly) by Oxford dons. Serious jurisprudence has, since then, been so spectacularly Oxford-centric

³For the most systematic development of this idea, see Kevin Toh, “Hart's Expressivism and His Benthamite Project,” *Legal Theory* 11 (2005: 75-123).

that it would not be wrong to say that intuitions that ring true in the vicinity of High Street have set the course of modern legal philosophy.

All of this calls to mind Robert Cummins's dismissive remarks about the "Twin Earth" industry in philosophy of mind spawned by Hilary Putnam:

It is a commonplace for researchers in the Theory of Content to proceed as if the relevant intuitions [about the Twin Earth cases] were undisputed....The Putnamian take on these cases is widely enough shared to allow for a range of thriving intramural sports among believers. Those who do not share the intuitions are simply not invited to the games.⁴

Should legal philosophers be worried that the "intuitions" invited to the general jurisprudence "game" have been unrepresentative and thus unreliable? Perhaps they should. But before the question gets off the ground, a very different worry is likely to occur: namely, what alternative could there possibly be to appeal to intuitions about the extension of the concepts under investigation?

Quine famously suggests that naturalism is "the recognition that it is within science itself, and not in some prior philosophy, that reality is to be identified and described."⁵ In that Quinean spirit, Cummins proposes that,

We can give up on intuitions about the nature of space and time and ask instead what sorts of beasts space and time must be if current physical theory is to be true and explanatory. We can give up on intuitions about our representational

⁴ Robert Cummins, "Reflections on Reflecting Equilibrium," in *Rethinking Intuition: The Psychology of Intuition and Its Role in Philosophical Inquiry*, ed. M. DePaul & W. Ramsey (Lanham, Maryland: Rowman & Littlefield, 1998), p. 116.

⁵ "Things and Their Place in Theories," in W.V.O. Quine, *Theories and Things* (Cambridge, Mass.: Harvard University Press, 1981), p. 21. Quine, unfortunately, never seems to have noticed that the psychological science of the 1930s--to which he was wedded--was subsequently discredited.

content and ask instead what [mental] representations must be if current cognitive theory is to be true and explanatory.⁶

That Quinean version of methodological naturalism about philosophical inquiry may work well where we have *bona fide* sciences—for example, space-time physics or cognitive neuroscience--to turn to for guidance. But how do we fare when we turn to social scientific accounts of law?

Consider perhaps the leading predictive-explanatory theory of judicial decisions in the political science literature, Segal's and Spaeth's "Attitudinal Model."⁷ Developing ideas first broached by the American Legal Realists,⁸ Segal and Spaeth argue that the best explanation for judicial decision-making (more precisely, decisions by the U.S. Supreme Court) is to be found in the conjunction of the "the facts of the case" and "the ideological attitudes and values of the justices."⁹ Segal and Spaeth identify the "ideological attitudes" of judges based on "the judgments in newspaper editorials that characterize nominees prior to confirmation as liberal or conservative" with respect to particular issues (for example, civil rights and liberties).¹⁰ Looking at more than thirty years of search-and-seizure decisions—court decisions about the constitutionality of police practices involving the arrests of criminal suspects and searches of their cars, homes, and property--Segal and Spaeth found that their Attitudinal Model correctly predicted 71% of the votes by justices: that is, the ideological attitudes of the judge towards the underlying

⁶ Cummins, "Reflections on Reflective Equilibrium," pp. 117-118.

⁷ Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

⁸ *Id.* At 87-89.

⁹ *Id.* At 86.

¹⁰ *Id.* at 321. As Segal & Spaeth remark: "Although this measure is less precise than past votes, it nonetheless avoids the circularity problem, is exogenous to the justices' behavior, and is reliable and replicable." *Id.*

factual situations (and their variations) explained the vote of the judge nearly three-fourths of the time.

Of course, to show that their explanation is the best one, Segal and Spaeth must compare the Attitudinal Model with some alternatives--most importantly, with what they call "the Legal Model" of decision.¹¹ On the Legal Model, it is valid sources of law, in conjunction with valid interpretive methods applied to those sources, that determine outcomes (call the valid sources and interpretive methods "the class of legal reasons"). The difficulty is that the class of legal reasons is indeterminate: it justifies more than one outcome in appellate disputes. Thus, as Segal and Spaeth write:

If various aspects of the legal model can support either side of any given dispute that comes before the Court, and the quality of these positions cannot be reliably and validly measured a priori, then the legal model hardly satisfies as an explanation of Supreme Court decisions. By being able to "explain" everything, in the end it explains nothing.¹²

In other words, one can generate no testable predictions from the Legal Model because the class of valid legal reasons justifies, and thus, predicts, multiple outcomes.¹³

Following Cummins, a naturalized jurisprudence might ask what must law be if current social-scientific theory of adjudication (namely, the Attitudinal Model) is to be true and explanatory? For the Attitudinal Model to be true and explanatory, there has to be, among other things, a clear demarcation between the ideological attitudes of judges (which are causally effective in determining the decisions) and the valid sources of law

¹¹ *Id.* at 48-85. Their treatment of the "Legal Model" is, in several respects, crude; I have cleaned it up considerably for purposes of presentation in the text.

¹² *Id.* At 86.

¹³ This is because prediction tracks justification on the Legal Model.

which are central to the Legal Model's competing explanation of judicial decision. Thus, implicit in the Attitudinal Model is quite plainly a concept of law as exhausted by authoritative texts (precedents, statutes, constitutions) which are the raw material of the competing Legal Model, and which exclude the ideological attitudes central to the Attitudinal Model. The concept of law, in turn, that vindicates this assumption is none other than Raz's "hard positivist" notion of a rule of recognition whose criteria of legality are exclusively ones of pedigree: a rule (or canon of interpretation) is part of the law by virtue of having a source in legislative enactments, prior court decisions or constitutional provisions. That is the view of law required by the Legal Model, and it is the view of law required to vindicate the Attitudinal Model as providing the best explanation of judicial decision. Raz's Hard Positivism, in short, captures what law must be if the Attitudinal Model is true and explanatory. To be sure, this defense of Hard Positivism is very different from Raz's own—to which we'll return in a moment—but for the naturalist it suffices that the Hard Positivist concept of law figures in the best explanatory account of legal phenomena.

Yet is one thing to turn to space-time physics, whose explanatory and predictive success is extraordinary, to understand the "essential" nature of space or time; it is quite another to think the feeble social scientific models churned out by political scientists are cutting the social world at its causal joints. The Attitudinal Model, for example, looking only at a limited range of cases, and making some fairly crude assumptions about the competing Legal Model, is able to predict outcomes only 71% of the time. Predictive success of 50% would be achieved by the "flip the coin" model. A 71% success rate is, in short, not the stuff of which scientific credibility is made. Yes, the Attitudinal Model

requires the truth of the positivist concept of law. Given the predictive feebleness of that Model, this should hardly be comforting to the naturalist.

If naturalizing jurisprudential questions about the nature of law by appeal to pertinent sciences of law is not a viable option, that still leaves unanswered the worries about the robustness of the Oxford-centric intuitions that undergird claims about the nature of law and authority central to Anglophone jurisprudence. There is, however, a second possible way in which jurisprudential questions about the nature of law might be naturalized, namely, by taking a page from the experimental philosophers. If “ordinary” intuitions are to be decisive in fixing the extensions of concepts, why not investigate, empirically, what those intuitions really are? Why not find out, to borrow Hart’s phraseology, what the “ordinary man” *really* thinks?

Consider the Razian argument for the Hard Positivist doctrine mentioned a moment ago, according to which all norms that are legally binding are so in virtue of their source or pedigree. Raz claims that it is part of the concept of law that all law necessarily claims authority, that is, it claims the right to tell its subjects what it is they must do. But in order to even claim authority, Raz argues, legal rules must be intelligible without recourse to the practical considerations on which they are based—they must, in Raz’s terms, be “exclusionary” reasons for action that preclude consideration of the reasons on which they are based. According to Raz, this is because the concept of authority appropriate to law is what Raz calls the “service conception,” according to which a claim to authority is justified insofar as it helps those subject to the authority do what they really ought to do more successfully than they would without the mediation of the authoritative directives. If law, as a purportedly authoritative directive, were not

intelligible with recourse to the reasons on which it was based, then it could not perform any service for its subject.

But are authoritative directives *really* exclusionary reasons? That is, quite explicitly, an intuitive claim about the nature of authority. It has been contested by a number of legal philosophers, who think that *authoritative* reasons are simply *weighty*, rather than *exclusionary*, reasons, and so nothing significant follows about the nature of law, they claim, from the fact that all law claims authority. I confess my own intuitions line up with Raz's, but so what? Raz himself emphasizes that the concept "law" is one "used by people to understand themselves," adding that "it is a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves."¹⁴ It is curious, indeed, then, that no one has made any effort to figure out what "people"--as distinct from the subset of them who work in the vicinity of High Street--actually understand by the concept. General jurisprudence awaits, and stands in need of, colonization by experimental philosophy.

But now let us put to one side questions about the nature of law and turn to adjudication. Within American law, the most influential academic movement of the 20th-century was known as "American Legal Realism," which I alluded to earlier. The American Legal Realists—lawyers and legal scholars writing most actively in the 1920s and 1930s—urged that we look realistically at what courts are doing when they decide cases. If we do so, they argued, we will find that many of the legal doctrines and arguments that judges give in their opinions do little to explain the results they reach; the published opinions more often conceal, rather than illuminate, the actual grounds of decision. In fact, the judges are responsive to the underlying factual scenarios—what the

¹⁴ Joseph Raz, "Authority, Law and Morality," *The Monist* 68 (1995), pp. 321-322.

Realists call “situation-types”—and craft responses to those situations in light of non-legal norms of fairness and economic efficiency. The “legal arguments” they then give are post-hoc rationalizations for decisions based on other considerations.

The details of the Realist theory do not really matter for our purposes here; what is significant is how they conceived their theoretical task. The Legal Realists thought that the task of legal theory was to identify and describe--*not* justify--the patterns of court decisions; the social sciences—or at least social-scientific-type inquiries—were to be the tool for carrying out this non-normative task. There is a sense, then, in which we may think of the jurisprudence of adjudication the Realists advocated as a *naturalized* jurisprudence on the model of something like Quine’s naturalized epistemology. Just as a *naturalized* epistemology--in Quine’s famous formulation--“simply falls into place as a chapter of psychology”¹⁵ as “a purely descriptive, causal-nomological science of human cognition,”¹⁶ so too a naturalized jurisprudence for the Realists is an essentially descriptive theory of the causal connections between underlying situation-types and actual judicial decisions. (Indeed, one Legal Realist, Underhill Moore, even anticipates the Quinean slogan: “This study lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field.”¹⁷)

Notice, in particular, that both Quine and the Realists can be seen as advocating naturalization for analagous reasons. On one familiar reading, Quine advocates naturalism as a response to the failure of the traditional foundationalist program in

¹⁵ W.V.O. Quine, “Epistemology Naturalized,” in *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969), p. 82.

¹⁶ Jaegwon Kim, “What is ‘Naturalized Epistemology?’” *Philosophical Perspectives* 2 (1988), p. 388.

¹⁷ Underhill Moore & Charles Callahan, “Law and Learning Theory: A Study in Legal Control,” *Yale Law Journal* 53 (1943), p. 1.

epistemology, from Descartes to Carnap. As Hilary Kornblith aptly puts it: “Once we see the sterility of the foundationalist program, we see that the only genuine questions there are to ask about the relation between theory and evidence and about the acquisition of belief are psychological questions.”¹⁸ That is, once we recognize our inability to tell a certain kind of *normative* story about the relation between evidence and theory--a story about what theories are *justified* on the basis of the evidence--Quine would have us give up the normative project: “Why not just see how [the] construction [of theories on the basis of evidence] really proceeds?”¹⁹

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

¹⁸ “Introduction: What is Naturalistic Epistemology,” in *Naturalizing Epistemology*, 2nd edition, ed. H. Kornblith (Cambridge, Mass.: MIT Press, 1994), p. 4.

¹⁹ Quine, “Epistemology Naturalized,” p. 75.

proceeds?” The Realists, then, call for an essentially *naturalized* and hence *descriptive* theory of adjudication, a theory of what it is that causes courts to decide as they do.

This way of naturalizing jurisprudence will no doubt call to mind the Attitudinal Model, discussed earlier, though the use to which such a theory is being put is now different. Whereas earlier we considered the possibility that we might look to social scientific theories of adjudication to figure out what concept of law renders those theories true and explanatory, the Legal Realist proposal under consideration is more modest: it suggests that rather than pretending that the law *justifies* one and only one decision in the kinds of legal disputes that attract the most attention (e.g., decisions of the U.S. Supreme Court), we would be better served—as theorists and as lawyers—in constructing explanations that make sense of the empirical evidence, namely, the patterns of decisions by courts across differing situation-types. That research program is a thriving one in legal scholarship,²⁰ though largely disdained by legal philosophers. But it may constitute the most successful instance of one kind of “naturalized jurisprudence” that we presently have on offer.

²⁰ See, e.g., Thomas J. Miles & Cass R. Sunstein, “The New Legal Realism,” *University of Chicago Law Review* 75 (2008): 831-851 for a useful overview of pertinent literature.

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