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GETTING REAL OR STAYING POSITIVE

LEGAL REALISM(S), LEGAL POSITIVISM AND THE PROSPECTS OF NATURALISM IN JURISPRUDENCE

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The relationship between legal Realism and legal positivism has been a constant source of debate since the emergence of Realist theories in the first half of the 20th century. The discussion has been further complicated by the related difficulty of assessing the internal relationship between the two main original strands of legal Realism: American and Scandinavian.

More is at stake in this debate than taxonomic neatness. At stake are wide-reaching methodological questions as to what kind of a science the study of law should be according to legal Realism. Questions that are often formulated in a modern context as questions about the potential for *naturalism* in legal science, i.e. for associating the study of law with the ongoing empirical turn in epistemology and philosophy of science which implies that these previously *a priori* disciplines be transformed into empirical knowledge and science studies under the slogan: “Out of the armchair and into the field!”

Much confusion in the present debate seems to stem from a failure to correctly identify the kind of rule-skepticism underlying Realism – or from the related failure to correctly identify possible differences on this issue between the two kinds of Realism. The canonized understanding of the rule-skepticism of legal Realism has become known in the literature as *conceptual rule-skepticism*. It was Hart who originally ascribed this view to legal Realism (cf. 1959, 1994), and he is also the one who has been credited with formulating a decisive argument against it.

According to Hart conceptual rule-skepticism is the view that:

“... all talk of rules, and the corresponding words like ‘must’, ‘ought’, and ‘should’, is fraught with a confusion which perhaps enhances their importance in men’s eyes but has no rational basis. We merely *think*, so such critics claim, that there is something in the rule which binds us to do certain things and guides or justifies us in doing them, but this is an illusion even if it is a useful one. All that there is, over and above the clear ascertainable facts of group behaviour and predictable reaction to deviation, are our own powerful ‘feelings’ of compulsion to behave in accordance with the rule and to act against those who do not.” (Hart, 1994, p. 11)

Specifically with regard to legal rules conceptual rule-skepticism is the view “that to assert the validity of a rule is to predict that it will be enforced by courts or some other official action taken.” (Hart, 1994, p. 104)¹

The problem with this kind of rule-skepticism which Hart pointed to is that it leaves legal theory incapable of explaining how rules function in judicial decisions:

“This cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others’ behaviour or feelings. ‘This is a valid rule of law’ said by a judge is an act of recognition; in saying it he recognises the rule in question as one satisfying certain general criteria for admission as a rule of the system and as a legal standard of behaviour.” (Hart, 1959)²

This criticism launched by Hart has been extremely influential, and it arguably bears a considerable part of the responsibility for the somewhat marginalized role played by legal Realism since then – at least in philosophical circles. In the present context it may also be conceded, at least for the sake of argument, that Hart’s famous argument actually strikes the kind of “conceptual rule-skepticism” he described above. The only problem is that the argument is fundamentally misguided *qua* criticism of both American and Scandinavian legal Realism. It is misguided mainly because Hart fails with this account to adequately capture the kinds of rule-skepticism that should rightly be attributed to either strand of Realism. In other words, his argument is a straw man.

¹ Cf. also e.g. Hart (1994, pp. 136-137). Ascribing this view to legal Realism seems at least superficially well motivated in that it takes its cues from central quotes in the Realist literature. Cf e.g. Holmes (1897, p. XXX), Karl N. Llewellyn (2008, p. 7) with regard to American Legal Realism, and Ross (1958, p. 42) with regard to Scandinavian Legal Realism.

² Cf. also Hart (1994, p. 105).

Most scholars seriously studying either form of Legal Realism today seem to agree that Hart's criticism is somehow misguided.³ It seems however, that most attempts at setting the record straight in any greater detail have so far failed. And they have failed primarily because of an outspoken tendency among most scholars of Legal Realism to take (often patriotic) unilateral action, i.e. to focus their efforts on showing that Hart was mistaken only with regard to *one* of the two main Realist schools, i.e. their "own".⁴ And not rarely are these unilateral defenses accompanied by the (implied or explicitly stated) view that Hart must at least have been right about them other guys.⁵

This is unfortunate, not only because there is of course nothing to keep Hart from being in the wrong *both* with regard to American *and* with regard to Scandinavian rule-skepticism (which it appears he in fact was). It is unfortunate also because the true character of the admittedly quite different kinds of rule-skepticism to which each of these schools really subscribe is highlighted and much better understood only when it is contrasted with that of its transatlantic cousin. More specifically, it is unfortunate because by failing to correctly identify the kind of rule-skepticism rightly associated *only* with Scandinavian Realism, theorists have failed to see clearly a different way in which the American Realists, *qua* non-Scandinavians so to say, are *not* rule-skeptics. In other words, theorists have failed to make explicit a different way in which the American Realists must claim to have substantial *knowledge* about rules.

³ Cf. e.g. Leiter (2007, ch. 2) and Schauer (2011; 2009, pp. 137-138) with regards to American Realism, and Pattaro (2009), Eng (2011) and Holtermann (2012) with regard to Scandinavian.

⁴ Remarkably there are exceptions, cf. Pattaro (2009).

⁵ For an explicit version: "The S-naturalism [Leiter's terminology for the semantic kind of naturalism he, on the basis of Hart's description, ascribes to Scandinavian Realism] of the Scandinavian Realists is, today, more a museum piece than a live contender in jurisprudential debate. In an influential essay (reviewing Ross 1958) [Hart (1959)], H.L.A. Hart famously demolished this analysis. 'A valid law,' said Hart, can not be 'a verifiable hypothesis about future judicial behavior and its special motivational feeling' since such an account makes no sense of the 'meaning' of judgments of legal validity 'in the mouth of a judge who is not engaged in predicting his own or others' behavior or feelings': "'This is a valid rule" said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so as a legal standard of behavior' (1959, p. 165). This critique, expanded upon in Chapter 7 of Hart (1961), did much to consign Scandinavian Realism to the history of ideas, though it, unfairly, had the same impact on American Legal Realism, which was not, in fact, committed to this semantic analysis ..." (Leiter, 2008) Cf. also e.g. Leiter (2007, pp. 4, 191, and 2011 XXX).

So although the configurations may have changed somewhat in recent years I do not think that we are much farther along today with regard to an understanding of the general relationship between legal Realism, legal positivism and rule-skepticism than where Hart left us half a century ago with his hugely influential but equally mistaken writings on legal Realism. A fact that is doubly unfortunate now that we see sustained efforts at revitalizing legal Realism by adding the prefix “new” to it and aligning it with the ongoing empirical turn in epistemology and science studies – simply because the dilemma between an “American” and a “Scandinavian” model persists today with regard to a New Legal Realism.

What seems to be needed therefore is a comprehensive theory which allows us to contrast the two Realist theories in a systematic fashion. It is against this background that I introduce in this paper as analytical tools two kinds of rule-skepticism, *forward-looking* and *backward-looking rule-skepticism*, and I try to show how they can be seen (at least in suitably ideal-typical philosophical reconstructions) to fit American and Scandinavian legal Realism respectively.

A preliminary remark on my use of “American” and “Scandinavian” which is admittedly somewhat idiosyncratic: as already indicated my argument is not so much one of textual exegesis as it is one of philosophical reconstruction. Hence, I do not claim complete historical accuracy in my use of the labels “American” and “Scandinavian”. Instead, as to my use of American Legal Realism: I associate myself quite closely with the philosophical readings of that school provided by Schauer (2011; 2009) and in particular Leiter (2007, 2008) whose influential reconstruction of the American Realists as prescient naturalists will be a constant discussion partner throughout this paper. I believe, however, for reasons that will hopefully transpire, that my reading is nevertheless sufficiently distinct to justify a renewed treatment.

My use of Scandinavian is perhaps even more idiosyncratic, yet also more exegetically correct. It is idiosyncratic in that I focus primarily on the legal philosophy of Alf Ross rather than on striking some median position between Hägerström, Ross, Olivecrona, etc. But at the same time I believe that, with the exception of the alignment

of his theory with naturalism, my use of Ross is perhaps somewhat closer to the original and less of a philosophical reconstruction.⁶

1. Forward-looking Rule-skepticism: the American Way

On this account, then, the rule-skepticism of American Legal Realism is (primarily) *forward-looking* because it is *implicational* and *decisional*. That is, it begins *in medias res* as it were, assuming prior knowledge of a given set of legal reasons, a body of valid law, and it claims indeterminacy only with regard to which legal decisions can be seen to *follow* from these reasons. In other words, it deals only with the *inferential steps* made in all adjudication from legal rule to legal decision.⁷

On this skeptical view, then, the key problem with any given legal rule (say, a rule prohibiting vehicles in the park) has nothing to do with its *existence* as a legal rule; with its possession of *legal validity*, or the like. Thus, the Americans tended to accept and presuppose as more or less unproblematic traditional claims about the validity of ordinary legal rules such as the one prohibiting vehicles in the park. The crucial problem in their eyes had to do, rather, with the inescapable indeterminacy that the *application* of such a rule gives rise to in actual legal practice, i.e. in adjudication. *Assuming* that the rule prohibiting vehicles in the park is a valid legal rule, the Americans asked what actual decisions are *implied* by it. And their critical claim, i.e. their *rule-skepticism*, was that, like virtually every other valid legal rule, the particular rule prohibiting vehicles in the park does not imply, or determine, any one decision in concrete judicial decision making but rather can be seen to justify several different and at times even contradictory decisions. In other words, legal decisions regarding vehicles in the park are *underdetermined* by the rule.

There exists a rich literature on the American Legal Realists' general motivations for adopting this distinctive kind of forward-looking rule-skepticism with regard to judicial decisions, but following Leiter we can for present purposes boil them down to

⁶ I have argued elsewhere at length for the possibility of reading Ross as a naturalist, see Holtermann (2006). For somewhat different approaches, see Spaak (2009) and Mautner (2010).

⁷ In fact, in the American version this kind of rule-skepticism is further limited *even qua* forward-looking, i.e. to cases considered worth litigating and worth appealing. I will get back to this aspect below.

three main types.⁸ The first of these actually originates with Hart rather than with the American Realists proper. It has to do with the well-known linguistic phenomena of *vagueness* and *open texture*.⁹ These are intrinsic features of language, and because of these features any given law will always leave a penumbra in which its application is uncertain. It is because of these features of language that we cannot know for certain whether for instance a military truck intended for a war memorial, or a man in a wheelchair should be banned from the park. The mere wording of the law does not determine any one decision in such cases.

The second argument for forward-looking rule-skepticism attracted somewhat stronger attention from the American Realists themselves. It has to do with the availability of several different, equally acceptable *canons of interpretations of the law*. Referring to Llewellyn, Leiter mentions precedents can be interpreted “strictly” and “loosely”, and one will get different conclusions in given cases depending on one’s choice between them. Correspondingly with regard to statute interpretation which can lead to mutually inconsistent conclusions depending on the interpretive strategy followed (e.g. intentionalism, originalism, purposive interpretation, structural interpretation, etc.). If we have no principled way of choosing between conflicting canons of interpretation (and the Americans saw no such way) this gives us yet another reason for forward-looking rule-skepticism.

The American Realists’ final reason for their forward-looking rule-skepticism is also their only strictly empirical argument. It points to the manifest discrepancy between the existing legal rules and the outcomes in actual legal decision-making. Leiter describes it thus:

“[I]t is based on the *observation* that the decisions courts reach do not fall in to patterns that correlate with the rules they invoke; rather the decisions reflect judges’ response to the underlying facts of the cases. [...] What causes judges to decide as they do, according to the Realist, is not legal rules, but a sense of what would be fair on the facts of the case at hand. [...] In short, the core of the Realist defense of Empirical Rule-Skepticism is, in fact, *empirical*: they looked at what the courts really did, and found that

⁸ The following few paragraphs follow Leiter’s account (2007, pp. 72-79) closely.

⁹ Cf. Hart (1994, pp. 124-136).

legal rules were clearly not the determining factors in a large number of cases.” (Leiter, 2007, pp. 76-77)

To cut a long story short, these are the main arguments on which the Americans built their case for rule-skepticism, and which earned them their reputation as the rebels of the legal Academy.

But in spite of the Americans’ rebellious image this is also a kind of rule-skepticism that is substantively limited – and it is limited in two ways. The first of these limitations start from the observation that even in spite of all these indeterminacy factors it simply seems an undeniable fact that there are straightforward cases of law. If, for instance, the Johnsons should decide to take their SUV into the park in brought daylight for a nice scenic drive along the animal path not many competent lawyers would seriously doubt that the family had violated the rule prohibiting vehicles in the park. And, as Schauer notes, the “[l]aw abounds with such straightforward examples – we can call them ‘easy cases’.” (2009, p. 137)¹⁰

Being good pragmatists the American Realists of course knew this plain fact of real life full well. And thus, in spite of their often quite scornful remarks about legal rules,¹¹ most of them seem in their more sobering moments to have been quite well aware that legal rules are anything but impotent in large areas of their operation. For instance, Llewellyn explicitly limited the under-determination claim to “any case doubtful enough to make litigation respectable” (1931, p. 1239), and in the same vein Radin emphasized that “[judicial] decisions will consequently be called for chiefly in what might be called marginal cases, in which prognosis is difficult and uncertain. It is this fact that makes the entire body of legal judgments seem less stable than it really is.” (1942, p. 1271)

¹⁰ Schauer illustrates the point thus: “Many Americans would prefer to pay their taxes on a date somewhat later than the April 15 deadline, but the implausibility of finding legal support for that position means that the question whether ‘April 15’ in the Internal Revenue Code means April 15 will rarely be disputed, even more rarely be litigated, and more rarely yet wind up in an appellate court. Similarly, in the normal course of things, bills get paid, police officers obtain warrants, contracts are honored, and insurance companies whose insured cause accidents make payments to the victims.” (2009, p. 137)

¹¹ Cf. e.g. Holmes (1897), op.cit. n 1, and Llewellyn (2008), op.cit. n. 1.

As many present day commentators seem to agree these qualifications have the effect of significantly narrowing the *scope* of the American Legal Realists' rule-skepticism regarding judicial decision-making only to cases that are litigated, and in particular to appellate cases. Or, to put the point in philosophical jargon, the Americans' claim about indeterminacy of judicial decision-making is ultimately a claim only about *local*, not *global* indeterminacy.¹²

But as already indicated the rule-skepticism of the Americans is significantly limited also in another way, i.e. in that it actually presupposes substantial knowledge about legal rules; about valid law. While the primarily pragmatically motivated limitations of skepticism regarding judicial decision-making to appellate review are quite well-covered in the literature, this separate and significantly different limiting factor seems to have attracted less attention. And in view of the movement's rather rebellious image thus claiming that American Legal Realism relies substantively on orthodox legal doctrine may also strike many as considerably more controversial. But Leiter presents an interesting argument why this not only happens to be the case but actually cannot be otherwise for logical reasons. As he says, "at the *philosophical* or *conceptual* level, Realism and Positivism are quite compatible, and, in fact, the former needs the latter." (Leiter, 2007, p. 60)

The argument for this seemingly controversial claim focuses on one of the core reasons which the American Realists cited above for their rule-skepticism, i.e. the claim that there is a fundamental discrepancy between the set of legal reasons available and the actual decisions made in appellate courts. For in order to be able to establish that there is such a discrepancy one plainly has to be able to identify what those legal reasons are, i.e. what valid law is. And this is why, according to Leiter, "... the Realist arguments for the indeterminacy of law – like *all* arguments for legal indeterminacy –

¹² Cf. also Leiter: "[T]he Realists – unlike many of the later Critical Legal Studies writers – did not overstate the irrelevance of rules. For one thing, Realists were (generally) clear that their focus was indeterminacy at the stage of appellate review, where one ought to expect higher degree of uncertainty in the law. ... Empirical Rule-Skepticism is surely more plausible when it is not advanced as a *global* claim about adjudication and the law. ... Realist skepticism encompasses the 'core' of appellate litigation." (2007, pp. 77-78) Cf. also Schauer (2009, pp. 137-138) for an analogue analysis.

in fact presupposes a non-skeptical account of the concept of law.” (Leiter, 2007, pp. 71-72)

In other words, the American Realists simultaneously *had* to rely, even if only implicitly (and to them this was indeed only implicitly), on a philosophical theory about the identification of valid law. And this is where, among legal philosophies generally, the specific connection with *legal positivism* enters the picture – because as Leiter points out, the set of rules which the American Legal Realists tended to identify as *the legal rules*, consisted primarily of what we would ordinarily describe as hard positive law. That is, in Dworkinian terms, the Americans tended to identify among the set of legal reasons *rules* rather than *principles* or *policies*:

“What concept of law is being presupposed here in these arguments for legal indeterminacy, a concept in which statutes and precedent are part of the law, but uncodified norms and policy arguments are not? It is certainly not Ronald Dworkin’s theory, let alone any more robust natural law alternative. Rather, the Realists are presupposing something like the Positivist idea of a Rule of Recognition whose criteria of legality are exclusively ones of pedigree: a rule (or canon of construction) is part of the law in virtue of having a source in legislative enactment or a prior court decision. The Realists, in short, cannot be Conceptual Rule-Skeptics, because their arguments for the indeterminacy of law presuppose a non-skeptical account of the criteria of legality, one that has the most obvious affinities with that developed by Hard or Exclusive Positivists.” (Leiter, 2007, pp. 72-73)

Combined with the previous considerations we thus get the following preliminary picture of what may perhaps seem a surprisingly limited American forward-looking rule-skepticism: It is limited first in that it does not question the existence or validity of positivistically identified legal rules from the outset but only directs its skeptical claim forward toward the judicial decision, and it is further limited *even qua* forward-looking in that it narrows its scope to litigated and in particular to appellate cases.

We also see why Schauer on the basis of related considerations (although he does not discuss the particular *forward-looking* aspect) dubs American Legal Realism *tamed Legal Realism* (2012 xxx).¹³ On this analysis of their rule-skepticism it is arguably hard

¹³ Schauer goes on to discuss whether perhaps there is another *untamed* version of American Legal Realism that does not fall prey to the same limitations. I shall not pursue this theme further here.

to see any principled differences between American Legal Realism and Hartian style legal positivism. All that remains seem to be primarily pragmatically motivated disagreements about where exactly to draw the line, i.e. about the exact ratio between easy cases and hard cases – plus perhaps a divergence in research interests, i.e. in views on which of the two aspects of this overall picture is most worthy of our attention.

As mentioned above, and as should be quite obvious by now, this account of American Legal Realist rule-skepticism as forward-looking and decisional-implicational has not begun completely from scratch – in spite of my initial critical remarks regarding the present state of debate. On the contrary, the account admittedly owes much in particular to the so-called empirical rule-skepticism which Leiter ascribes to American legal Realism in his influential attempts to resurrect American Legal Realism. There are however two reasons for departing from Leiter's analysis.

First, by calling the American rule-skepticism *empirical* and contrasting it with Hart's *conceptual* kind Leiter arguably connotes that the former is based exclusively on *a posteriori* reasons while the latter is based on *a priori* reasons. And as far as I can see this is not the case. The last of the Americans' three rule-skeptical arguments mentioned is admittedly *empirical* or *a posteriori* but at least the first and also the second of the cited reasons are about the *meanings* of legal language in a way that is no more or less *conceptual* or *a priori* than the reasons originally mentioned by Hart in his criticism of conceptual rule-skeptical.

Secondly, and more importantly in this context, Leiter's analysis implicitly assumes, for the same reasons, that the field is divided between and exhausted by these two kinds of rule-skepticism. And this is a partitioning of the field that is ill-conceived and unfortunate. More specifically the problem is that it fails to capture the most distinctive feature of the Americans' rule-skepticism, i.e. its *forward direction*, and, hence, how much substantial knowledge about legal rules it actually takes for granted, also beyond the mere *concept* of law. As already noted, this comes out more clearly only when the Americans' distinctive kind of forward-looking rule-skepticism is juxtaposed with what it is not, i.e. backward-looking.

2. Backward-looking rule-skepticism: The Scandinavian Model

On quite another view, then, the rule-skepticism of legal Realism is primarily *backward-looking*, because it is *regressive-foundational*. Here, the epistemological worry runs deeper, and the skeptical challenge to legal knowledge and doctrine is far more radical. It starts, in a way, just like forward-looking rule-skepticism: with the ordinary legal rules of which we assume knowledge in everyday life, i.e. with rules like the one prohibiting vehicles in the park. But it asks a different question. Backward-looking rule-skepticism asks, not the *implicational* question as to what legal decisions follow or do not follow from this or that legal rule; it asks the *regressive* question: “What *justifies* this rule in the first place?”

Backward-looking rule-skepticism thus questions, not our capacity to decide and rationally justify judicial outcomes on the basis of presupposed legal rules. It questions, rather, precisely what the Americans tended to presuppose: our initial presumption of knowledge of those legal rules. It asks how it is that we know that these particular rules and not others are *the valid legal rules*. It asks, in short, what our grounds are for holding them in the first place.

This kind of rule-skepticism is backward-looking, then, because of the *regress* it initiates. In terms of skepticism it thus taps into a far more classical philosophical worry than did forward-looking rule-skepticism. Backward-looking rule-skepticism initiates this regress because it takes seriously a line of questions that have been taken seriously by philosophers from Ancient skeptics like Agrippa and Sextus Empiricus through Descartes to, at least, the logical positivists – to mention just a few. These philosophers all shared the fundamental presumption that for anybody to *know* a given proposition *p*, then (1) that person has to be able to justify her belief that *p* by reference to another proposition *q*, and (2) she has to know also that proposition – which of course only displaces the initial challenge because she now has to ask the same question with regard to *q*, i.e. how that proposition is justified, and so on. Hence the regress.

Traditionally, the options available in the attempt to meet this kind of challenge have been considered rather limited: either i) the infinite regress, ii) the circle; or iii) foundationalism. Jointly, these alternatives constitute what is often called Agrippa’s

trilemma, and a skeptic is anyone who poses the initial question and finds all three of these strategies fatally flawed.

In accordance with this account, a backward-looking *rule*-skeptic in this context is anyone who poses the same initial question but does so *specifically with regard to legal rules*, and who finds that question unanswerable on all three strategies. As it happens, this description fits the rule-skepticism of Scandinavian Realism – at least in its Rossean mold. Alf Ross’s entire Realistic legal philosophy is best conceived as a comprehensive attempt to accommodate the skeptical conclusion which he reaches after having launched this classical epistemological challenge on apparently valid traditional legal rules like the one prohibiting vehicles in the park.¹⁴

Of the above three anti-skeptical strategies Ross only seems to seriously consider one: foundationalism. Like Kelsen (and Hart?), Ross takes very seriously the naturalistic fallacy. Seeing that ordinary statements about valid legal rules are normative propositions (*directives* in Ross’s terminology) their validity can therefore never be derived from descriptive propositions, from facts. We therefore need a foundational *norm* of some kind, if we are to avoid rule-skepticism. And Ross does not think that such a norm is forthcoming.

The first candidate whose alleged foundational failure Ross never tires of exposing is of course natural law. In his interpretation, natural law pursues a *rationalist* epistemological strategy: it tries to derive the validity of such normative statements of law from a foundation of self-evident truths of reason. More specifically, natural law tries to derive legal validity from one fundamental, intuitively valid *idea of justice* which is constitutive of law, and to which all human beings, qua rational creatures, have access and will assent (cf. Ross, 1958, pp. 65-66).¹⁵

¹⁴ Although Ross’s favorite example was the (no less prosaic) rule in section 62 of the Uniform Negotiable Instruments Act which states that “the acceptor of a negotiable instrument has a duty to pay it according to the tenor of his acceptance (cf. 1958, p. XXX)

¹⁵ As an example of such an idea of justice Ross mentions Kant’s formulation of the highest principle of law: “A course of action is lawful if the liberty to pursue it is compatible with the liberty of every other person under a general rule.” (Kant, quoted in Ross, 1958, p. 276) Thus when, e.g., the acceptor of a negotiable instrument has a duty to pay it according to the tenor of her acceptance (or when the driver of a vehicle is prohibited from driving it into the park) it is ultimately because it would be incompatible with the liberty of every other person under a general rule if she did not have such a duty.

To Alf Ross the logical positivist, however, the problem with such intuitions is that they (in contrast to sense data) are inextricably private. Intuitions can vary from person to person and patently do so quite often. As Ross puts it in one of his most quoted passages:

“Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to nature. And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just as good as yours? Evidence¹⁶ as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them above any force of inter-subjective control and opens the door wide to unrestricted invention and dogmatics.” (Ross, 1958, p. 261)

What is more often overlooked, however, and of the greatest importance in this particular context, is that Ross is equally dismissive (even if less hostile) of *the legal positivists'* attempts to meet the challenge of rule-skepticism. From Ross's point of view, legal positivism tries, just as much as natural law, to save the valid legal rule *qua* norm. And their preferred model of justification for legal rules shares the exact same fundamental structure in terms of epistemological design or architecture, i.e. *foundationalism*.

To be sure, the two schools differ markedly with regard to the particular *kind of Archimedean point* they each choose to rely on (idea of justice vs. morally neutral basic norm/rule of recognition). They may even differ with regard to their views as to the inferential steps made at each level of the justificatory process (static vs. dynamic). But legal positivism and natural law agree fundamentally with regard to the foundationalist structure of the answers they seek, i.e. with regard to the view that a claim that a given rule is valid can be justified only if there is a first norm from which it can be seen to follow.

The regressive-foundational structure also of the legal positivist model is very clearly illustrated in this longer passage from *The Concept of Law*:

¹⁶ [note on the misleading translation? XXX]

“The sense in which the rule of recognition is the *ultimate* rule of a system is best understood if we pursue a very familiar chain of legal reasoning. If the question is raised whether some suggested rule is legally valid, we must, in order to answer the question use a criterion of validity provided by some other rule. Is *this purported by-law of the Oxfordshire County Council* valid? Yes: because it was made in exercise of the powers conferred, and in accordance with the procedure specified, by *a statutory order made by the Minister of Health*. [...] We may query the validity of the statutory order and assess its validity in terms of *the statute empowering the minister to make such orders*. Finally, when the validity of the statute has been queried and assessed by reference to *the rule that what the Queen in Parliament enacts is law*, we are brought to a stop in enquiries concerning validity: for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.” (Hart, 1994, p. 107, all but first emphasis added)¹⁷

In Ross’s eyes, however, legal positivism encounters more or less the same problem as natural law in its attempt thus to provide an Archimedean point for our claims about validity of given primary rules – in short because it will always be possible to construe different foundational norms that justify different sets of valid legal rules, and we have no uncontroversial way of authoritatively deciding between them.¹⁸ In other words, it is not only natural law but also legal positivism that is like a harlot: at the disposal of everyone.¹⁹

¹⁷ Cf. Kelsen, e.g. 1934, pp. 65-6 for passages to the same effect.

¹⁸ Cf. e.g.: Ross (1958, p. 70). XXX

¹⁹ Note that this is not *conceptual* rule-skepticism because it does not question the *concept* of a valid legal rule. It accepts that concept – i.e. that to state that a given rule is valid *means* that it can be justified, that we can give (ultimately foundational) reasons for holding it – but it argues that it is impossible in principle to provide such a foundation. And it decides (qua skepticism) to refrain from making such statements.

Note also that this backward-looking rule-skepticism does not preclude Ross (or other Scandinavians) from simultaneously adopting some or other measure of forward-looking rule-skepticism, at least not in a *hypothetical* version, i.e. even *if (per impossibile)* we presuppose that a given rule prohibiting vehicles in the park is valid, then that rule would not determine a specific judicial decision in a given situation. In fact Ross *did* ascribe also to this kind of hypothetical kind of rule-skepticism – and for much the same reason as the American Realists, i.e. the vagueness and open texture of language (cf. notably 1958, ch. 3), and the availability of conflicting canons of interpretations (cf. notably 1958 ch. 4). Like the American Realists, however, Ross subscribed only to a moderate version. He too believed in the possibility of making at least *some* valid inferences from normative premises. After all he did write a full deontic logic late a few years after *On Law and Justice* (Ross, 1968).

This is also, incidentally, another reason why Ross was not a conceptual rule-skeptic in Hart’s sense. Nothing in his backward-looking kind of rule-skepticism implies that statements of valid law should be

3. Methodological implications - deep or shallow naturalism in law?

Taking a skeptical stance with regard to some specific domain of human reasoning (or, more neutrally: belief-formation) obviously has to have some methodological consequences. One cannot, *qua* scientist, in good conscience pass a skeptical judgment with regard to some intellectual domain, and then continue to participate in it as if nothing happened.

And this, of course, goes also for the legal scientist who becomes a rule-skeptic. Her rule-skepticism, it seems, has to have methodological consequences. And so it did for both the Americans and the Scandinavians. In spelling out these differences we simultaneously come to see clearly the quite divergent degree and character of the prospects of naturalism available to each kind of Legal Realism.²⁰ As one might expect, these differences originate ultimately from the differences in scope and character of the different kinds of rule-skepticism endorsed by the two Realist schools respectively. I shall consider the two in turn but first it makes sense to say a few more words about what is meant by naturalism in the present context.

3.1 What is *naturalism*?

Naturalism as it is used here is not an ontological or a semantic theory. It is first of all a theory about the proper approach to the study of knowledge and science. More specifically, it is a *negative* claim about the prospects of providing *a priori* philosophical justification for science, and it is a *positive* or *constructive* claim about what we should do instead.

Thus conceived, naturalism takes its cue from, and finds a paradigmatic formulation in the philosophy of W.V. Quine, notably from his two main works “Two

literally *meaningless*; that their *real meaning* is to predict official action (although I admit that Ross could have been more careful not to invite that widespread reading of him. For an extended discussion, see Holtermann (2012) XXX.

²⁰ Several scholars have pointed to these parallels in recent years. With regard to American Legal Realism, see Leiter (2007), and with regard to Scandinavian Legal Realism, see e.g. Holtermann (2006), Spaak (2009), and Mautner (2010) – although Spaak’s and in particular Mautner’s discussions start from a somewhat different understanding of naturalism from the one applied here.

Dogmas of Empiricism” (1980/1951) and “Epistemology Naturalized”²¹ (1969). This kind of naturalism makes two key claims:²²

First of all, it proclaims the inevitable failure of epistemic foundationalism as such. To this end, naturalism investigates the 20th century’s most prominent attempt to meet *generally with regard to science* the same kind of regressional-foundational challenge which Ross investigated specifically with regard to the doctrinal study of law, i.e. the logical positivists’ ambitious attempt to justify all of science by deriving it from an Archimedean point; a secure foundation with the epistemic power to suffuse our theories with truth and validity.²³ Only, instead of a *basic norm* or an idea of justice the logical positivists tried to stop the threatening infinite regress by placing *sense data* at the foundations of science.

Thus, to the logical positivists, for any purported law of science (say, Boyle-Mariotte’s law, that the relationship between pressure and volume of a contained gas is inversely proportional) what justifies our belief in it was ultimately the possibility of deriving it (through an inferential chain involving empirical generalizations and observation sentences) from indubitable impressions upon our senses.

Quine is widely credited with formulating a definitive argument why this project is fatally flawed. Simplifying somewhat (i.e. considerably), the problem is that sense data are not quite as solid as the logical positivists had hoped – in Quine’s words because in the end, “[a]ny statement can be held true come what may, if we make enough adjustments elsewhere in the system.” (Quine, 1980, p. 43, emphasis added) In other words, it is not only natural law and legal positivism that is like a harlot, at the disposal of everyone. The same turns out to be true of science – at least if we insist on pursuing the traditional goal of first philosophy: Cartesian certainty.

²¹ Hence the (somewhat unfortunate) word *naturalism* and the specific meaning attached to it here. To be sure, the fundamental rationale exposed by Quine as naturalistic has had numerous theoretical precursors – as witnessed, e.g., by the fact that I attribute it (to some or other degree) to both American and Scandinavian Legal Realism!

²² The full story about (epistemological) naturalism is of course considerably longer and more complicated. For more elaborated accounts and critical discussion, see e.g. Kitcher (1992), Haack (2009), and (Stroud, 1984).

²³ For the classical formulation of the program, see Carnap (1928).

And this leads to the second key claim of naturalism. Because Quine makes the point that not only was this traditional epistemological project doomed to fail. It is also fundamentally misconceived, in short because: “Cartesian doubt is not the way to begin.” (Quine, 1975, p. 68) Properly understood, the genuine epistemological assignment simply is not to save science from skepticism but rather to record and explain its actual existence as a matter of fact: “But why all this creative reconstruction, all this make-believe? ... *Why not just see how this construction [of our picture of the world] really proceeds?*” (Quine, 1969, p. 75, my emphasis)

Instead of trying in the abstract to justify given scientific propositions as being *correct* or *true* the relevant epistemological assignment is rather to describe empirically how, as a matter of fact, certain propositions (and not others) have come to be thus considered by the *scientific community*. That is, instead of looking at the abstract logical relationship between e.g. Boyle-Mariotte’s law and other *propositions* that may or may not justify it, naturalized epistemology focuses squarely upon the actual socio-psychological relationship between Boyle-Mariotte’s law and members of the scientific community – taken individually and as a group. That is, the fact that, and the way in which scientists hold and have come to hold it as a scientific truth.

And investigating that question is a matter for the empirical sciences and not for any first philosophy. Hence, the naturalists’ slogan: “Out of the armchair and into the field.” (Dennett, 1988) Staying true to his background in the Vienna circle Quine tended quite idiosyncratically to think of this empirical investigation narrowly as a research program for behaviorist psychology.²⁴ I think, however, that it is more helpful to think of naturalism in much broader terms so as to encompass that whole vigorous empirical turn in which a long line of empirical disciplines – from neuroscience through evolutionary biology and cognitive psychology to sociology of science²⁵ – have come to the fore and triumphantly claimed (apparently each discipline for itself) to be “heir to the subject that used to be called philosophy” (to use Wittgenstein’s phrase).

²⁴ “Epistemology, or something like it, simply falls into place as a chapter of psychology ...” (Quine, 1969, p. 82).

²⁵ [References to e.g. Bloor, Bourdieu, Foucault, Letour, etc, etc. XXX]

In the following, I shall not rely on any particular view as to the relative strength and relevancy of any of these competing perspectives. I will simply presuppose that it is possible, at an appropriate level of abstraction, to ascribe to these different and often competing theoretical schools the two main naturalist tenets as described above: i) the failure of justificatory foundationalism; and ii) the view that this normative armchair program should be replaced by a descriptive empirical study.

3.2 Naturalism and Scandinavian Legal Realism – Getting Real:

We have already noticed the parallels between the kind of rule-skepticism advocated by the Scandinavian Alf Ross and the generalized kind of skepticism asserted by naturalism. In both cases, the skepticism was *backward-looking* in the sense that it was *regressive-foundational*, i.e. both denied the availability of an Archimedean point (though the candidates which they considered relevant of course differed quite considerably). But in so far that we are investigating the potential for naturalism in Legal Realism this can only be half the story. We have to establish also a parallel with regard to the other tenet of naturalism, i.e. that the project that has thus been proven futile should be replaced with an empirical study of the relevant kind beliefs.

As it happens, this turns out to be possible too – because the key move made in Ross’s legal philosophy is precisely a transformation of the fundamental perspective from being justificatory and normative to being empirical and descriptive. More specifically, it changes the perspective from being *norm-expressive* to being *norm-descriptive* – to use an extremely important but often overlooked or misunderstood distinction from Ross.

Because unlike what Hart thought, Ross was not ignorant to the fact that legal science was still dealing with a normative field, a normative order; he was not at all ignorant to the meaning that “this is a valid rule of law” has in the mouth of a judge who is engaged in pronouncing a decision. On the contrary, and Hart’s misreadings notwithstanding, Ross explicitly insisted that a meaningful study of law could only be possible “by means of the hypothesis of a certain ideology [i.e. belief in the validity of law] which animate the judge and motivates his actions.” (Ross, 1958, p. 37)

Ross only maintained that on grounds of backward-looking rule-skepticism, i.e. on grounds of the failure of (legal) rule-foundationalism, a Realistic legal science cannot itself adopt those same normative beliefs. Legal science should record instead, the empirical fact that a certain part of the population, i.e. judges, happen to think that certain rules (like the rule prohibiting vehicles in the park) are valid. It should not *qua* science endorse these rules, or prescribe which they should be, but rather describe neutrally and with the help of the relevant scientific disciplines what these rules are, and which forces helped shape them.

And this is precisely the move that Ross meant to capture by the distinction between norm-expressive and norm-descriptive propositions.²⁶ In virtue of this paraphrasing the doctrinal study of law is no longer a study of how judges *ought* to behave in their capacity as judges (let alone how ordinary citizens ought to behave). It is, roughly speaking, a doctrine of how *judges believe* that they ought to behave in their capacity as judges; of which rights and duties *they believe* that they have (and hence, but only indirectly, which rights and duties *they believe* that the citizens have). In Ross's words:

“A national law system, considered as a valid system of norms, can accordingly be defined as the norms which actually are operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed.” (Ross, 1958, p. 35)

And this corresponds quite well with the central move made in naturalized epistemology as described above. To the Quinean naturalist the real issue is not either whether or not e.g. Boyle-Mariotte's law *is* true, but rather whether or not *scientists actually believe* that it is true.

Thus, to summarize, we get the following general picture of how Scandinavian Legal Realism fits in with naturalism. After the empirical turn, we get a conception of

²⁶ Technically speaking, the latter kind of propositions are a particular kind of so-called *propositional attitude-reports*, i.e. of complex propositions that record the existence of certain attitudinal relations between given agents and propositions (e.g. “Peter hopes that/feels that/believes that P, where p can be any proposition including normative propositions). And as Frege tells us (ref. to “Über Sinn und Bedeutung” XXX), in propositional attitude contexts the truth value of the embedded proposition has no bearing on the truth value of the compound proposition, i.e. the full propositional attitude report.

science which, after the failure of foundationalism, simply “looks after itself”. Here we have a long range of various disciplines that are busy studying various aspects of empirical reality. And among those, some (so-called epistemologists or sociologists of science) have taken it upon themselves to study the creation of all sorts of beliefs within that particular species which is called *Homo sapiens*. And within *this* part of empirical science a small subsection (so-called Legal Realists) have specialised in the detailed study of how one group of people called judges (or jurists generally) arrive at their particular beliefs regarding valid law. In other words, Legal Realism is engaged in exploring that niche within comprehensive empirical epistemology that can be summarised in the question: “Why not see how this construction [of judges’ beliefs valid law] really proceeds?” (cf. Quine, 1975, p. 75).

Ross’s own answer to this question was perhaps surprisingly conservative. Thus, he believed that the four sources of law (legislation, precedent, custom and the tradition of culture/“reason”) jointly constitute “the aggregate of factors which exercise influence on the judge’s formulation of the rule on which he bases his decision...” (1958, p. 77) For present day sociologists of science this particular theory may seem to be in need of some heavy trimming. But this is immaterial to the naturalist character of the Legal Realist program on which it rests.

3.3 Naturalism and American Legal Realism – Staying Positive?

By comparison, it seems that the prospects of naturalism in legal science are somewhat more limited if we conceive Legal Realism along the American model. To be sure, there are, as Leiter has repeatedly and forcefully argued, clear parallels between American Legal Realism and the two main tenets of naturalism which make it natural to suggest some kind of combination.

First of all, the American Realists seem to share the fundamental skeptical impetus of naturalism. In the words of Leiter:

“The Realists are ‘anti-foundationalists’ about judicial decisions in the sense that they deny that the legal reasons justify a unique decision: the legal reasons underdetermine the decisions (at least in most cases actually litigated). More precisely, the Realists claim that the law is *rationaly* indeterminate in the sense that the class of legal reasons – i.e. the class

of legitimate reasons a judge may offer for a decision – does not provide a *justification* for a unique outcome. Just as sensory input does not *justify* unique scientific theory, so legal reasons, according to the Realists, do not *justify* a unique decision.” (Leiter, 2007, p. 39)

Furthermore, the American Realists advocated in response to this fact of underdetermination a *replacement* program that has obvious parallels with the empirical turn advocated in naturalism:

“The Realists also take the second step that Quine takes: replacement. According to the Realist indeterminacy thesis, legal reasons underdetermine judicial decisions, meaning that the foundationalist enterprise of theory of adjudication is impossible. Why not replace, then, the ‘sterile’ foundational program of justifying some one legal outcome on the basis of the applicable legal reasons, with a descriptive/explanatory account of what input (that is, what combination of facts and reasons) produces what output (i.e. what judicial decision)?” (Leiter, 2007, p. 40)

Regardless of these parallels, however, the version of naturalism that one finds in American Realism turns out to be somewhat narrow or limited (or tamed to use Schauer’s wording). And it is limited or tamed precisely because of the limited or tamed character of the rule-skepticism on which it rests. A rule-skepticism which, by not looking backwards but restricting itself exclusively to the move from valid law to legal decision, and then only in appellate courts, in fact presupposes a substantive body of rather traditional doctrinal legal knowledge.

Because of this limited rule-skepticism the methodological consequences drawn by the American Realists are correspondingly moderate in scope: In terms of legal scholarship, they first and foremost urge the abandonment, *only in such hard cases*, of any attempts of rationalizing or justifying legal decisions through the identification of authoritative general methods and interpretive canons (e.g. by way of Dworkin – to use an anachronistic example). Granting the truth of forward-looking rule-skepticism as described here *this* is the only project that has proven itself futile. And instead of a continuing engagement with this traditional legal doctrinal project the American Realists propose that we pursue an alternative project, i.e. a descriptive empirical study of what actually goes on in such adjudicative processes.

To be sure, Leiter is well aware of limitations in the scope of the project, and he stresses precisely for that reason that all the American Realists did was to naturalize our theory of *adjudication*, not *jurisprudence* as such:

“The Realists call for the ‘naturalization’ of *theory of adjudication*; but in so arguing, they may require traditional philosophical help in crafting theories of the ‘concept’ of law that analytic jurists have typically provided. Jurisprudence *per se* is *not* naturalized; just that part of jurisprudence that has to do with the theory of adjudication.” (Leiter, 2007, pp. 45-46)

Leiter seems, however, to overlook, or at least to downplay considerably, the implications of this admission with regard to the overall relationship of American Realism with traditional foundationalist epistemology – and hence also with naturalism. In particular, Leiter passes by in silence the fact that the Americans, thus reconstructed, in effect adopt a theoretical position with regard to the vast legal field that lies outside appellate courts which is perhaps best described as the exact antithesis of naturalism, viz. a foundationalist *and* normative theory.

This is so because, in so far that our depiction of the rather limited scope of the forward-looking rule-skepticism of the American Realists is correct, they do not merely, as Leiter seems to think, adopt from the legal positivists a *semantic* theory about the *concept* of law, about its *meaning*. In so far that the American Realists actually do presuppose as epistemically sound that same set of valid primary rules which the legal positivists obviously accepted, then they arguably adopt also, even if only implicitly, that whole *epistemological* theory which the Scandinavians rejected as part of their arguments for backward-looking rule-skepticism, i.e. that fairly traditional Cartesian-foundational justificatory story which legal positivists from Kelsen through Hart to Raz have told exactly to confirm the epistemic soundness of our initial presuppositions about the validity of the primary rules like the rule prohibiting vehicles in the park.

The distance between *this* story and any one that could be told by naturalism could hardly be bigger. For any given (primary) legal rule its validity is explicitly *not* conceived by legal positivism as a social or psychological fact. It has nothing directly to do with what people actually believe or not. In the words of Hart: “[I]t is plain that

there is no necessary connection between the validity of any particular rule and *its* efficacy ..." (Hart, 1994, p. 103) Thus also Raz in the following passage where he compares doctrinal legal statements with doctrinal statements about religion:

"It is important not to confuse such statements from a point of view [i.e. of scholarly statements of valid law] with statements about other people's beliefs. *One reason is that there may be no one who has such a belief.* The friend in our example may be expressing a very uncommon view on an obscure point of Rabbinical law. [...](Raz 1979, pp. 156 XXX)

As we saw in the example from Hart, valid law is conceived of, instead, as a set of *normative* conclusions arrived at through a chain of deontic reasoning from a given foundational norm:

"To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. ..." (Hart, 1994, p. 103)

To be sure, this whole foundational legal positivist project is considerably less neurotic, especially in its Hartian version (if not in the Kelsenian...), than was the original Cartesian version to which naturalism is traditionally contrasted in general epistemology. But it is undeniably a project which is quite a far cry from the Quinean dictum: "Why not see how this construction [of valid law] really proceeds?" On the contrary, legal positivism, in its attempts to identify valid law through this process of deontic reasoning, seems precisely to be engaged in quite a bit of "creative reconstruction".

This creative reconstruction may perhaps seem quite manageable and straightforward in our little toy-example with the rule prohibiting vehicles in the park where we moved in four easy steps from that Oxfordshire by-law to the rule of recognition stating that "What the Queen in Parliament enacts is law". But the whole exercise soon becomes extremely complicated when, as in real life, we deal with comprehensive legal fields like tort law or European Union Law – especially because

these fields involve far more complicated rules of recognition including for instance precedents among the legitimate sources of law.

Creative or not, performing this reconstruction is more or less the traditional armchair exercise in deontic reasoning from foundational premises which doctrinal legal scholars have engaged in since days of yore in countless law faculties around the world. And this is the kind of work they should continue doing according to the legal positivists.²⁷ And in so far that we are right in limiting, with Leiter, the naturalism of the American Realists to the study of the adjudicative process in appellate cases; in so far we follow him in considering the Americans more or less legal positivists beyond that field, then they seem committed to the same view.

The congeniality in principle with legal positivism is further emphasized by the fact that Hart actually agrees with the fundamental relevance of the American kind of forward-looking rule-skepticism: "Rule-scepticism has a serious claim on our attention, but only as a theory of the function of rules in judicial decision." (Hart, 1994, p. 138) His only objection against this kind of skepticism is that the Americans vastly exaggerate the number of cases where it is relevant:

"It does not follow from the fact that such rules [like the rule requiring promises to be kept] have exceptions incapable of exhaustive statement, that in every situation we are left to our discretion and are never bound to keep a promise. A rule that ends with the word 'unless...' is still a rule." (Hart, 1994, p. 139)

On this account, then, the whole disagreement between legal positivism and American Legal Realism reduces to a dispute over where exactly to draw the line between cases that are underdetermined and cases that are perfectly determined by law.

²⁷ Cf. Hart on the scholarly or academic character of this activity (in the lingo of legal positivism the outcome of this exercise is so-called *detached normative statements* or *detached* or *uncommitted statements of law*): "[N]ormative statements of law (not merely about the law) may be made from the point of view of one who may accept the law of some system as guides to conduct, but though made from that point of view are in fact made by one who may be an anarchist and so does not share it. These are detached or uncommitted statements of law It is of course common for a *jurist expounding the law of some system for theoretical purposes* to do so in the form of detached normative statements." (Hart, 1983, p. 154, emphasis added XXX)

While the American Realists may therefore be generally sympathetic to naturalism outside the legal field, and while they may vigorously advocate the application of empirical methods specifically to the study of appellate reviews, it seems that on Leiter's reconstruction they cannot but subscribe to a wholly different and indeed contradictory approach in the vast legal field outside appellate courts, i.e. to an approach that is justification-centered and foundationalist.

With regard to *that* vast legal field American Realism therefore in effect continues the long standing tradition for epistemological exceptionalism in jurisprudence. When it comes to questions regarding the justification of claims regarding valid law and of legal decisions everywhere else but in appellate courts, American Realism in effect pursues an epistemological strategy that is wholly unique to legal science, i.e. of deontic reasoning from a presupposed foundation that is peculiar to law. It ends up with a foundationalist philosophical account of that particular kind of knowledge that is different in principle from anything found in the rest of the Academy. In short, like so many of its predecessors American Legal Realism ends up with *a pure theory of law*.

4. The New Legal Realism? [from extended abstract – to be expanded]

With a view to the future these considerations arguably leaves legal theory with a dilemma between two mutually exclusive models or starting points for modern legal Realism: an “American” model based on forward-looking rule-skepticism and a “Scandinavian” model based on backward-looking rule-skepticism.

I suggest in closing that the American kind of middle-position between “real” legal Realism and legal positivism – and correspondingly between wholehearted naturalism and traditional foundationalist justificatory jurisprudence – is inherently unstable and ultimately untenable. This in contrast with the Scandinavian model. In spite of being obviously outdated in a number of ways, this kind of Realism both presents a clear and consistent alternative to legal positivism and remains fully compatible with modern naturalism in philosophy. In so far that one is sympathetic to the naturalist impulse of going “into the field” this latter position seems to present the only viable Realist alternative to simply staying in the armchair with legal positivism and natural law.

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