Competing Conceptions of Legal Objectivity: An Ignored Publicity Versus a Surprisingly Unhelpful Naturalism

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INTRODUCTION

Law’s legitimacy depends, in part, on its objectivity. If law is not objective, but is partial, biased, subjective, arbitrary or irrational, its subjects would likely deem law’s use of coercive force as illegitimate. So, it is important to ask whether law is objective. But before we can ask whether law is objective, we need to define objectivity. This article sets itself at that task by assessing two competing conceptions of legal objectivity, one based on the works of Judge Richard Posner and Dr. Brian Leiter, and another based on work by Dr. Gerald Postema.

In 1990, Posner, in *The Problems of Jurisprudence*, forcefully argued that legal objectivity could not be meaningfully founded on practical or legal reason, and this argument was continued in his other works *Overcoming Law* and *The Problematics of Moral and Legal Theory*, published in 1995 and 1999, respectively. In these books, Posner held that the best model for legal objectivity was empirical science. In the same vein, Dr. Brian Leiter’s 2007 book *Naturalizing Jurisprudence* argued that legal objectivity should be sought through the methods of empirical science, not through *a priori* reasoning.

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1 See, e.g., Gerald J. Postema, *Objectivity Fit for Law, in Objectivity in Law and Morals* 99, 115-16 (Brian Leiter ed., 2001); c.f. Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. Chi. L. Rev. 1447, 1462 (1990) (reviewing RICHARD A. POSER, THE PROBLEMS OF JURISPRUDENCE (1990)) (“Law emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures.”).
Leiter edited a book in 2001, *Objectivity in Law and Morals*, which contained an article “Objectivity Fit for Law,” by Postema. Postema described a conception of legal objectivity called “Publicity” that was based on public deliberative reasoning. This kind of reason-based objectivity is exactly the type of objectivity that Posner and Leiter reject in favor of an objectivity based on the methods of empirical science. *Objectivity in Law and Morals* gave occasion for a direct debate between Leiter and Postema. Leiter claimed that Publicity provided no way of telling between better and worse ways of reasoning, and Postema argued that the relevance of empirical science to legal objectivity was in doubt. But that conversation was truncated and underdeveloped, and it was never specifically revisited. This article seeks to continue and expand on that conversation by assessing two conceptions of legal objectivity.

The first conception of legal objectivity to be considered is based on the works of Posner and Leiter and is a naturalistic conception. Naturalism assesses law’s objectivity based on the extent to which legal judgments correspond to empirical facts. The second conception we will consider is what Postema has called Publicity. Publicity assesses law’s objectivity based on whether legal judgments are products of public reason. To put it simply, Publicity assesses law’s objectivity by asking whether different people applying the same reasons and standards (reasons and standards which must be external to those judging the legal question) to a legal question come to the same conclusions. There are other conceptions of legal objectivity that are not considered in this article, for example, a conception that assesses law’s objectivity based on whether legal judgments conform to an objective, ontologically real order – a natural law or moral realist type of objectivity.\(^2\) I have chosen only to consider naturalistic legal objectivity and

\(^2\) Cf., *e.g.*, Christopher Wolfe, *Natural Law*, in *The Oxford Companion to the Supreme Court of the United States* 581, 581 (Kermit L. Hall et al. eds., 1992) (describing natural law as claiming “there is a certain order in nature that provides norms for human conduct.”); see,
Publicity for several reasons. First, I wanted to develop the unfinished conversation between Postema and Leiter about these two conceptions as standing over against one another. Second, Postema’s conception of objectivity has been virtually ignored in secondary literature, and I wanted to specifically draw attention to this conception of objectivity. And third, I did not want to distract from these goals by also assessing other controversial conceptions.

This article makes several contributions to the conversation started by Postema and Leiter. It offers a revised version of Publicity. Postema’s version includes a “regulative ideal of agreement” among those who participate in deliberative discourse, but it expressly does not require any actual agreement among those participants. I argue the contrary: Publicity does require some degree of actual agreement; why and how much I will explain below. Further, this article offers new arguments for preferring Publicity over naturalism. The first is that the best argument for naturalism, that science has been more successful than rationalistic reason, is actually a better argument for Publicity. A second is that the best argument against Publicity, the contingency of reason, is actually an argument for Publicity’s ability to assess legal objectivity. Also, this article describes an appropriate role for empirical science in a rationalistic approach to law like Publicity.

Part I of this article will describe a naturalistic approach to law and legal objectivity. Part II of this article describes a conception of legal objectivity based on public reason, Publicity. I revise Postema’s version of Publicity by arguing that for a legal judgment to be objective, judging subjects must come to some degree of actual agreement. Part III of this article argues that Naturalism is the wrong approach to legal objectivity for at least four reasons: (1) the lack of

good reason to privilege scientific epistemology over a reason-based, rationalistic epistemology, (2) naturalism’s inability to account for normative discourse, (3) scientific epistemology’s lack of relevance to law’s legitimacy, and (4) the inability of a naturalistic conception of objectivity to assess law’s legitimacy. Part IV of this article argues that Publicity is an appropriate conception of objectivity for inquiring about law’s legitimacy because Publicity can assess law’s legitimacy and can account for normative discourse, while also being able to incorporate the “successes of science” into its framework and address adequately concerns about the contingency of a reason-based epistemology.

I. NATURALISTIC LEGAL OBJECTIVITY

This section describes a naturalistic conception of law and legal objectivity and is based on writings by Judge Richard Posner and Dr. Brian Leiter. Their work is independent, but it overlaps and describes essentially the same naturalistic approach to law and legal objectivity. To summarize their views, law is objective only to the extent that legal judgments correspond to empirical facts.

As I discuss a naturalistic approach to law and legal objectivity, I will use terms that have close relationships to one another: naturalism, empirical science, and pragmatism. Pragmatism will be used to describe an overarching philosophy with naturalism as its ontology, empirical science as its epistemology, and consequentialism as its ethics.³ While this may be oversimplified, it is sufficiently accurate for the purposes of this article. Naturalism, as an ontology, defines what exists (“facts”) as that which is mind independent and makes a causal

difference to the course of our experience. Empirical science is the epistemology of naturalism; it is the method by which we know “facts.” And consequentialism (which Posner and Leiter often refer to as pragmatism) is an ethical program in which conduct is judged based on its consequences or, as Posner or Leiter might put it, based on what “practical difference it makes to us.” My use of these terms often overlaps, but I believe the meaning of each term should be clear enough based on context.

Naturalism assumes that reality is identified and described by the empirical sciences. Naturalistic objectivity is concerned only with “empirical” or “observable” or “physically existing” facts. A fact is naturalistically objective if it (1) is mind independent and (2) makes a causal difference to the course of our experience. Naturalistic legal objectivity is based on the identification of deterministic cause and effects of legal phenomena while minimizing or eliminating from legal decision making non-empirical factors like morality, theology, human volition, agency, intuition, mind, free will, and most normative discourse. Naturalism is primarily an ontology, telling us what does and does not exist. Empirical facts exist; other

4 BRIAN LEITER, Postscript to Part II: Science and Methodology in Legal Theory, in NATURALIZING JURISPRUDENCE 183, 185 (2007); cf. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 13 (1999) (While Posner does equate the “real” with the “physically existing,” he is careful to note that he is not claiming that the only worthwhile knowledge is scientific knowledge, lest he be accused of “scientism.”).
5 LEITER, supra note 4, at 185.
6 POSNER, supra note 4, at 13.
7 LEITER, Objectivity, Morality, and Adjudication, in OBJECTIVITY IN LAW AND MORALS, supra note 1, at 67, 78–79.
phenomena do not. In short, reality is determined by science, and anything that cannot be observed empirically is eliminated by a naturalistic ontology.  

The naturalistic approach to law and legal objectivity is based on the methods and results of empirical science. A naturalistic approach to law leads to a program of identifying “an explanatory unification of legal phenomena with the other phenomena constituting the natural world . . . .” Thus, naturalism incorporates the sciences into law, including anthropology, sociology, psychology, and economics. Naturalism looks to “social scientific literature on law and legal institutions to see what concept of law figures in the most powerful explanatory and predictive models of legal phenomena such as judicial behavior.” A naturalistic approach to law may also consider other empirical data like public opinion and customs from around the world. Thus, a naturalistic legal objectivity would assess law’s objectivity by asking “to what extent are legal judgments based on empirical facts?”

The incorporation of science into law should lead to “fruitful a posteriori research programs” and “useful ‘inventions.’” The scientific method is based largely on the use of controlled or natural experiments. In a naturalistic approach to law, legal theories should generate predictions that are empirically refutable, and then such theories would be tested by

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9 Cf. Leiter, supra note 4, at 185 (citing the Quinean assumption “that it is within science itself, and not in some prior philosophy, that reality is to be identified and described.”).
10 Id. at 184.
11 See Leiter, Legal Realism, supra note 8, at 135.
12 Id. at 134; Posner, supra note 8, at 63 (giving special emphasis to the role of economics in understanding and reforming law).
13 Leiter, supra note 4, at 184.
14 Posner, supra note 4, at 252.
15 See Leiter, Legal Realism, supra note 8, at 134.
16 See Posner, supra note 4, at 60; see also Posner, supra note 8, at 62, 69 (One example of a “useful invention” might be pretrial conferences, which may foster settlement by reducing uncertainty about trial outcomes.).
17 Posner, supra note 8, at 61.
comparing a theory’s predictions to be compared with observable results.\(^{18}\) For example, a naturalistic approach to law should lead to judicial decisions being determinate and replicable.\(^{19}\) As with natural science, it is sometimes impossible, impractical or unethical to obtain observable results of a theory.\(^{20}\) In such a case, through indirect evidence or inference, a theory may be indirectly, and often reliably, verified.\(^{21}\) The incorporation of science into law is meant to allow us to predict,\(^{22}\) understand, and perhaps even control our physical and social environment by yielding knowledge.\(^{23}\)

A naturalistic approach to law is about “means” not “ends.”\(^{24}\) This is because “means” are debatable as they depend on factual assertions such as “this law led to a decrease in bankruptcies and interest rates.” But “ends” or purposes or morals are not debatable because they depend on non-empirical claims about values, such as “the number of bankruptcies should decrease.”\(^{25}\) Posner gives an example of an argument for free speech:\(^{26}\) free speech leads to intellectual progress.\(^{27}\) Posner claims that whether free speech leads to intellectual progress is an appropriately debatable question about means because it can be refuted or confirmed by facts.\(^{28}\) But, he notes, there are no empirical facts about whether we should value intellectual progress; therefore, such a question cannot be fruitfully debated.\(^{29}\) A naturalistic approach to law concerns

\(^{18}\) See Posner, supra note 4, at 13.
\(^{19}\) See Posner, supra note 8, at 7, 125.
\(^{20}\) See Posner, supra note 4, at 13; see also Posner, supra note 8, at 62.
\(^{21}\) See Posner, supra note 4, at 13.
\(^{22}\) Posner, supra note 8, at 26. The scientific approach to law owes much to Justice Oliver Wendell Holmes, Jr.’s prediction theory of the law.
\(^{23}\) See Posner, supra note 3, at 14.
\(^{24}\) Id. at 60.
\(^{25}\) See id. at 63.
\(^{26}\) See id. at 67.
\(^{27}\) See id.
\(^{28}\) See id.
\(^{29}\) Id.
itself only with the debatable means, not the non-debatable ends. Debates about means (i.e., whether free speech had led to intellectual progress) could be naturalistically objective since they can be assessed by empirical facts, but a debate about whether intellectual progress should be valued could not be naturalistically objective because there is no scientific way to determine what should be valued.

Similarly, naturalistic objectivity is focused on “effects” and “results” not “concepts.”

“Effects” (like “means”) are empirical facts, but concepts are not. Posner gives the example of the doctrine of hypothetical jurisdiction (now rejected by the U.S. Supreme Court) in which

[I]f there are two possible grounds for dismissing a suit filed in federal court, one being that it is not within the court’s jurisdiction and the other that the suit has no merit, and if the jurisdictional ground is unclear but the lack of merit is clear, the court can dismiss the suit on the merits without deciding whether there is jurisdiction.

Posner notes that this doctrine is conceptually illogical because a decision on the merits presupposes the concept of jurisdiction. However, the pragmatic approach (which is closely related to naturalism) to this question would utilize this doctrine because of its effects: (1) dismissing a case on its merits will not enlarge federal judicial power, which is the point of jurisdiction in the first place, keeping powerful courts within their bounds; (2) in a case that

30 Id., at 243.
32 POSNER, supra note 4, at 243.
33 Id.
34 Simply put, pragmatism asks “what practical difference does it make to us?” The incorporation of naturalism into pragmatism can be seen in that naturalism similarly requires that for phenomena to be considered a fact, it must “make a practical difference to us” by making a causal difference in the course of our experience.
clearly is without merit, the result will be the same for the litigants regardless of which court decides the question; and (3) determining a question that makes no practical difference wastes resources.\textsuperscript{35} Pragmatism requires us to consider the results and effects a decision will have when we answer a legal question. Posner illustrates a contrary, non-pragmatic, conceptual approach by pointing to Justice Scalia’s rejection of hypothetical jurisdiction: “[F]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.”\textsuperscript{36} Notice that this analysis is entirely formal and conceptual. It is driven by the idea of jurisdiction and makes no reference to the effects of the Court’s decision.\textsuperscript{37} Such a judgment is not naturalistically objective because there is no empirical fact about what “jurisdiction” is. And because there is no empirical “fact” about what jurisdiction is, “jurisdiction” cannot be objectively debated or understood: no one can empirically observe jurisdiction and tell you whether it’s present in a given case. But effects and results can be observed, and the naturalistic approach to law is result-oriented and avoids conceptual formalism.\textsuperscript{38}

This naturalistic approach makes law a practical instrument that is used to achieve definite social ends.\textsuperscript{39} In this way, law would resemble engineering, and the lawyer the social engineer who does not choose goals for society but, rather, makes goals feasible.\textsuperscript{40} Put differently, a naturalistic approach to law must separate the positive inquiry from the normative

\textsuperscript{35} POSNER, supra note 4, at 244.
\textsuperscript{36} Id. (quoting Steel Co., 523 U.S. at 101–02).
\textsuperscript{37} Id.
\textsuperscript{38} See id.
\textsuperscript{39} See POSNER, supra note 8, at 14 (discussing Jeremy Bentham as the originator, in a limited but important respect, of Posner’s pragmatic concept of law).
\textsuperscript{40} See id. at 63. The sanitized echo of Holmes’ famous statement “if my fellow citizens want to go to Hell I will help them. It’s my job.” is unmistakable. Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 248–249.
(whether dismissing the case will enlarge federal judicial power versus whether it should do so).

Although a naturalistic approach to law is about means not ends, results not concepts, ends or purposes or “norms” still necessarily play a part in legal analysis. “No type of instrumental reasoning can be put to human use without some normative choice, or at least without positing some end or goal.”\(^{42}\) In order to know whether means are successful, we must know toward what end those means were directed.\(^{43}\) Posner gives the example that the goal of a bankruptcy statute might be to reduce the number of bankruptcies and lower interest rates; whether this goal was satisfied could be known empirically.\(^{44}\) Although a naturalistic approach to law separates the normative inquiry (whether there should be fewer bankruptcies and lower interest rates) from the positive, empirical one (whether the new statute accomplishes this goal), the naturalistic approach still requires a practical goal or else the naturalistic project of measuring whether the law is advancing the goal becomes unintelligible.

It is uncontroversial that a naturalistic or pragmatic legal program needs norms. But scholars question where such norms can come from. Pragmatic insights to law “in no way dictate which politically contestable theory of adjudication or which set of moral values a judge should adopt or allow to influence her decisions,” Dr. Eric Rakowski has noted.\(^{45}\) Pragmatic norms cannot come from rationalistic evaluative schemes because naturalistic ontology denies the

\(^{41}\) See Posner, supra note 6, at 69.
\(^{43}\) See Posner, supra note 8 at 122; cf. Bradley, supra note 42 at 1903 (“We have heard Posner say that economic … analysis needs posited ends to get going … But Posner’s pragmatism … does not generate ends and goals…”).
\(^{44}\) Posner, supra note 8 at 122.
existence of non-empirically verifiable entities like “moral values.” Thus, Dr. Sanford Levinson has described Posner’s approach as being in the spirit of Critical Legal Studies, reducing all legal problems to ethical or political problems. Professor Gerard V. Bradley argues that Posner ultimately only allows norms to be supplied by economics, though Bradley also says that Posner looks to evaluative concepts such as “progress,” “better,” and “consequences.”

Most accurately, for the pragmatist, laws’ norms are supplied by society’s majority interests. “According to Posner, pragmatism … relies on social consensus both as a way of deciding cases and as a source of legitimacy for judicial decisions.”

Naturalism requires that for law to be objective, it concern itself with only empirical facts. This conception has a tense relationship with normative discourse, since in many instances norms are not empirical facts and are effectively eliminated from a naturalistic reality. Yet norms are necessary for the naturalistic project to be intelligible, and so naturalists look to social consensus to provide legal norms. But normative evaluation does not play a role in naturalistic legal objectivity. Instead, naturalism deems legal judgments objective to the extent they are

46 Except to the extent “moral values” are mental states or attitudes, which may have empirically verifiable causal effects. For example, a judge may believe in morality, and that belief may affect his judgments. But morality itself, as something free standing apart from people’s attitudes or minds, is denied ontological status by naturalism. Cf. LEITER, supra note 4 at 187.

47 See Sanford Levinson, Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner, The Problems of Jurisprudence, 91 COLUMBIA LAW REVIEW 1221, 1240-41 (June 1991). I understand Levinson’s point to be that, for both Posner and CLS, legal problems are not decided by abstract legal principles. Instead, they are ultimately decided by political considerations, for example, majority rule.

48 Bradley, supra note 42, at 1903-04.

49 See POSNER, supra note 6, at 63.


51 Except when they exist as empirically-verifiable mental states. Brian Leiter, Postscript to Part II: Science and Methodology in Legal Theory, supra note 2, at 187.
reducible to empirical facts. Correspondingly, to the extent legal judgments incorporate non-empirical norms, the naturalistic conception of objectivity should deem law non-objective.

Posner’s and Leiter’s thought bears a strong relationship to that of Oliver Wendell Holmes, Jr., Roscoe Pound, and Benjamin Cardozo “in seeing law as an instrument for the conscious pursuit of social welfare, an instrument whose master term was policy rather than principle, whose master institution was the legislature rather than the courts, and whose servants should devote themselves to social engineering rather than doctrinal geometry.”52 Like these legal realists, Posner and Leiter characterize law as “instrumental problem solving rather than detached speculation . . .,” as a “means to an end” meant to promote social welfare.53 They seem to agree with these earlier thinkers in locating legal legitimacy in democratic consensus.54 Fulfilling Holmes’ prophecy that the lawyer of the future “is the man of statistics and the master of economics,”55 Posner and Leiter urge “lawyers to become ‘social engineers,’ systematically investigating social problems, familiarizing themselves with the available methods of reform, and testing whether these had the intended effects.”56 Thus, Posner and Leiter are situated neatly in line with thinkers like Holmes, Pound, and Cardozo, a relationship they of course acknowledge.57

II. LEGAL OBJECTIVITY AS PUBLICITY

53 Grey, supra note 52, at 498.
54 Cf. id.
55 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).
56 See Grey, supra note 52, at 499.
57 See Leiter, Introduction: From Legal Realism to Naturalized Jurisprudence, supra note 4, at 1-8; see, e.g., POSNER, supra note 8, at 16, 28.
An alternative to Naturalism is what Gerald Postema has called objectivity as Publicity. In general, objectivity has three main structuring features: (1) judgments must be independent; (2) judgments must be capable of being assessed for correctness; and (3) judgments must be intersubjectively invariant. These structuring features of objectivity apply to any domain, not just law. When these general features of objectivity are applied specifically to legal discourse, legal objectivity requires that

(1) Participants in the deliberative process conduct their deliberation only with normatively relevant reasons and arguments in view and assess the merits of the arguments only by normatively relevant standards; and (2) their participation is governed by the overarching aim of achieving reasonable common formation of judgment on the basis of the reasons and argument publicly offered.

It is worth noting that whereas the foundation of naturalistic objectivity is empirical facts, the foundation of objectivity as Publicity is non-empirical reason, and it would be fair to describe Publicity as rationalistic or reason-based.

For a legal judgment to be independent, the first structuring feature of objectivity, it must transcend the subjectivity of the person engaged in the activity of judging (the “judging

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58 By “judgments,” Postema means “claims, assertions, and assessments.” Postema, supra note 1 at 105.
59 Id. at 105-108.
60 Id. at 105-108.
61 Id. at 118.
subject”). It must not be the product of improper factors like bias, idiosyncrasy or ideology. Rather, it should be the product of proper, normatively relevant reasons.

For a legal judgment to be capable of being assessed for correctness, the second structuring feature of objectivity, there must be standards for assessing a judgment’s correctness, and these standards cannot simply be a judging subject’s belief or opinion. The structuring feature of “correctness” has three implications. First, it implies the possibility of mistake. Standards that can justify can also condemn. Second, judgments must be conclusions of a process of deliberative reasoning. By justifying a judgment based on standards of correctness, interlocutors must exchange reasons for their judgments and deliberate over the correctness of a judgment. Third, because discourse is conducted by reference to standards, both agreement and disagreement are intelligible (as opposed to mere mute assertions of opposition). Standards for assessing correctness allows one judging subject to explain that his judgment satisfies the standard and another judging subject to explain why it does not. This can be contrasted with a disagreement without reference to standards, in which there is no possibility of deliberative reasoning, but only unintelligible opposition. Relatedly, reasoning by reference to standards may create a path for moving from disagreement to agreement (and vice versa).

Before moving on, it is worth noting the heavy lifting done by “reasons” and “standards” in Publicity. Both are the key to their respective structuring features. Both must not equal the

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62 Id. at 105.
63 Id. at 106.
64 Id.
65 Id. at 107.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
solely subjective beliefs or opinions of the judging subject. Both must be publicly accessible. It is likely that whether we can endorse objectivity as Publicity depends on whether proper reasons and standards of correctness can carry their allotted burdens. Given their importance to Publicity, one wants to know some things about these “reasons” and “standards.” For example, who says which reasons are “proper” or “normatively relevant”? And one may be disappointed to learn that Publicity does very little to answer such questions. However, I briefly suggest an analogy that may explain why Publicity says little about the content of its reasons and standards. Publicity is more like procedural law than substantive law. Publicity itself does not specify the substance, content or nature of its reasons and standards. Instead, its job is to insist that reasons and standards rule the day. This article attempts to demonstrate that this insistence on a certain procedure or method turns out to be enough to assess whether law is objective.

Returning now to the structuring features of objectivity, the third structuring feature is intersubjective invariance, meaning that there exists the possibility of different judging subjects confirming a given judgment based on standards of correctness and proper reasons. In other words, different judging subjects applying the same standards to the same facts should come to the same conclusions. Intersubjective invariance acts like a test for determining whether a judgment is based on proper reasons and standards of correctness. Assuming that intersubjective invariance were achieved, it would be unlikely the judgment is a product of mere subjectivity. It would demonstrate that at least one criterion of proper reasons and standards of correctness was present, namely, that the reasons and standards supporting the judgment transcend the judging subject. It is not a perfect test because it is possible that all judging subjects are systematically biased, merely sharing the same improper biases or ideologies or idiosyncracies. The judging

71 *Id.* at 108-09.
subjects may all agree not because their judgments are objective, but because they have become a “hegemonic convention.” However, intersubjective invariance is a necessary feature of objectivity because its absence would support too compellingly the charge that a judgment was merely subjective. If no one could even theoretically agree about their judgments, it seems dubious that the proper reasons and standards of correctness are functioning. If reason is functioning correctly, intersubjective invariance should be possible. Intersubjective invariance provides us with assurances that our judgments are not merely subjective but are based on reasons and standards independent of and external to ourselves.

Since intersubjective invariance is a structuring feature of objectivity, it may not seem to follow that Postema’s version of Publicity does not require actual agreement among judging subjects. Postema states that agreement among judging subjects, rather than being a precondition to or expected result of objective deliberation, is a “regulative ideal.” Later in this article, I will argue that Publicity requires some amount of actual agreement: either a preponderance of agreement or increasing agreement over a reasonable amount of time. But for now I will focus on describing the “regulative ideal” of agreement. The regulative ideal’s purpose is to influence the deliberative process toward objectivity by imposing discipline and constraints on the process and its participants. Generally, the deliberative process has two standards:

(1) Participants in the deliberative process conduct their deliberation only with normatively relevant reasons and arguments in view and assess the merits of the

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72 Leiter, supra note 1, at 85.
73 Postema, supra note 1, at 121.
74 Id.
75 Id.
76 Id.
arguments only by normatively relevant standards; and (2) their participation is
governed by the overarching aim of achieving reasonable common formation of
judgment on the basis of the reasons and arguments publicly offered.77

These standards discipline the process’ participants to argue reasonably and to offer their
arguments and reasons to each other.78 The goal is to justify one’s judgments to others in terms
one believes all can recognize and affirm.79 The participant must discipline himself not to offer
arbitrary, idiosyncratic or prejudiced reasons for his judgment because, given the regulative ideal
of agreement, he can have no expectation that other participants in the process will find it
persuasive or could come to share that reason.80

Agreement as a regulative ideal, as opposed to an expected outcome of objective
deliberation, may also be better understood once we have considered the role of disagreement in
objectivity. Objectivity’s goal is “strong deliberative consensus” based on a full and open public
articulation and assessment of all relevant reasons and arguments.81 This goal requires
objectivity to provide opportunities for disagreement or any consensus achieved would not be the
result of full, public, reasoned deliberation. Such a consensus could instead be the product of the
exclusion from the process of members of the community or minority arguments.82 However, if
deliberative discourse values and respects disagreement, it demonstrates that the process is
properly open to interlocutors and arguments. “Divergence . . . signals that the techniques of

77 Id. at 118.
78 Id. at 117.
79 Id. at 119.
80 See Id.
81 Id. at 122.
82 Id.
reason and argumentative insight are playing a vigorous role in the law.”  

Opportunities for public disagreement are essential to a deliberative process’ claim to objectivity.

Disagreement may also promote objectivity by exposing certain reasons and arguments as biased, prejudiced, exclusionary or unreasonable. Disagreement in the deliberative process encourages the idea that the process can be self-correcting. Objectivity as Publicity does not guarantee that improper reasons or standards will never prevail in deliberative discourse, but the opportunity for disagreement and dissent creates the possibility that such improper reasons or standards can be challenged, discarded, and corrected.

The regulative ideal of agreement also has the important quality of requiring that agreement be achieved by reason and not force. Publicity requires that reasons for a judgment must be those that could be accepted by all. Such acceptance is an important component of legitimacy, the very reason for seeking legal objectivity.

Publicity is a reason-based conception of objectivity. Unlike naturalism, Publicity does not eliminate but incorporates non-empirical, normative discourse. But this requires Publicity to explain how a judgment can be objective if it cannot be verified by reference to empirical facts, a question that will be considered at length in Part IV of this article.

Finally, whereas naturalism is primarily an ontology (reality is empirical fact) that is closely related to an epistemology of empirical science, Publicity is an epistemology that is not

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83 Id., at 124 (citing Christopher Kutz, JUST DISAGREEMENT: INDETERMINACY AND RATIONALITY IN THE RULE OF LAW, 103 YALE L. J. 997, 1028-29 (1994)).
84 Id. at 122.
85 Id. at 125.
86 Id. at 123.
87 Gerald J. Postema, Public Practical Reason: Political Practice, THEORY AND PRACTICE 345, 357 (Ian Shapiro & Judith Wagner DeCrew, eds.1995).
committed to a particular ontology. Publicity is way of knowing whether a legitimating objectivity can be ascribed to legal judgments.

There is a strong relationship between Publicity and John Rawl’s rendering in *Political Liberalism* of six essential elements of a conception of objectivity, and Postema acknowledges relying on Rawls to some degree.\(^{88}\) The first essential element of a conception of objectivity, says Rawls, is that it “must establish a public framework of thought sufficient for the concept of judgment to apply and for conclusions to be reached on the basis of reasons and evidence after discussion and due reflection.”\(^{89}\) Similarly, Publicity requires that judgments be capable of being assessed by publicly accessible standards of correctness and that deliberation and judgment be based only on normatively relevant reasons and standards. Rawls’ second essential is that “a conception of objectivity must specify a concept of a correct judgment … (for example) … (that it is) supported by the preponderance of (correctly specified) reasons …”\(^{90}\) For Publicity, a judgment is correct if it is “maximally supported by arguments” and “the balance of reasons that support them.”\(^{91}\) The third essential Rawls cites is that “a conception of objectivity must specify an order of reasons” that agents are to act upon and which may override agents’ private reasons for action.\(^{92}\) Publicity embraces this essential by requiring that judging subjects only conduct deliberative discourse and make judgment based on normatively relevant reasons. The fourth essential element for Rawls is that “a conception of objectivity must distinguish the objective

\(^{88}\) Postema, *supra* note 1, at n. 26, 42.  
\(^{90}\) *Id.* at 111 (parenthetical statements added).  
\(^{91}\) Postema, *supra* note 1, at 117.  
\(^{92}\) RAWLS, *supra* note 89, at 111.
point of view … from the point of view of any particular agent.”93 This is precisely what Publicity does by requiring that judgments be independent, that is that they transcend the subjectivity of the judging subject. Rawls’ fifth essential element is that it “has an account of agreement in judgment among reasonable agents” for example that it sees “reasonable persons as able to learn and master the concepts and principles of practical reason as well as the principles of right and justice that issue from the procedure of construction.”94 Publicity must be understood to assume such capabilities; otherwise requiring judging subjects to reason by reference to standards of correctness and normatively relevant reasons would be futile. Rawls’ sixth and final requirement “for objectivity is that we should be able to explain the failure of our judgments to converge ….”95 Publicity provides a rich account of disagreement in public deliberative discourse. It expects disagreement, and not as a bug but as a feature of a system serious about obtaining strong deliberative consensus, which requires granting standing in deliberations to all competent members of the community as well as the inclusion of minority arguments. Publicity also imagines that disagreement may lead to correction of previous error, an implicit but unequivocal recognition of not only what Rawls calls “the burdens of judgment: the difficulties of surveying and assessing all the evidence, or else the delicate balance of competing reasons on opposite sides of the issue, either of which leads us to expect that reasonable persons may differ”96 but also the possibility that, at times, certain legal judgments may fail to be objective and require correction. This sixth essential, this requirement of an explanation of disagreement, however, does point to why I argue that Publicity as described by Postema should

93 Id. at 111.
94 Id.
95 Id. at121.
96 Id.
be modified to require some degree of actual agreement. I will explain this more fully below, but in short, too much disagreement can only “arise from a lack of reasonableness, or rationality, or conscientiousness”\textsuperscript{97} defects, which if present, would be fatal to objectivity conceived of as Publicity.

Rawls said that these essentials were requirements of any conception of objectivity, whether the domain were morality, politics or science. The virtue of considering Publicity specifically, as opposed to objectivity more generally as described by Rawls, is that Publicity is a conception of objectivity specifically tailored to law. It could be said that Rawls described a general idea applicable to any domain of discourse, which Postema has applied specifically to law. As such, Postema’s explication of Publicity is rich and detailed with regard to legal objectivity in a way Rawls’ survey of the elements required of any conception of objectivity did not attempt to be.\textsuperscript{98} Yet, despite its sophistication, Postema’s discussion of Publicity rarely has been discussed in secondary literature, and so I give it focused attention now.

III. WHY NOT NATURALISTIC OBJECTIVITY?

Legal objectivity should not be defined in naturalistic terms. First, the success of science is not a good reason to prefer empirical science over non-empirical reason. Second, normative discourse is an ineliminable feature of law, and naturalism’s attempts to eliminate or separate it are futile and unhelpful. Third, scientific epistemology has limited relevance to law. Fourth, a naturalistic conception of legal objectivity has no ability to assess legitimacy and thus is the wrong conception of objectivity for assessing law’s legitimacy.

\textsuperscript{97}Id.
\textsuperscript{98}Lawrence B. Solum has noted that Rawls concept of political objectivity “is barely explored in Political Liberalism.” Lawrence B. Solum, \textit{Situating Political Liberalism}, 69 CHI.-KENT L. REV. 549, 567 (1994).
A. The Significance of Science’s Success

For the purpose of assessing whether law’s use of coercive force is legitimate, I am asking whether legal objectivity should be defined in terms of naturalism or Publicity. The primary argument in favor of a naturalistic approach to law and legal objectivity over a reason-based approach, Posner and Leiter argue, is that empirical science has been more successful than non-empirical reason. 99

This is a pragmatic argument and should be distinguished from a metaphysical one 100 on which Posner and Leiter claim not to rely: the claim that science provides philosophically certain knowledge. 101 The pragmatic approach “dislikes metaphysics” 102 because metaphysics makes no difference in the real world. Posner writes, “There are no conceptual entities; the meaning of an idea lies not in its definition, its Form, its relation to other ideas, but rather in its consequences in the world of fact.” 103 Posner argues that we should not be asking questions about conceptual entities that are inconsequential in the real world; instead we should consider “[w]hat practical, palpable, observable difference does it make to us?” 104 This same pragmatism can be seen in Leiter’s definition of “fact”: a “fact” must make a causal difference in the course of our

99 No concerted effort to define “success” is made by either Posner or Leiter, but examples of such success are given and consist primarily of technological advances.

100 Posner similarly notes that such a pragmatic epistemology “dislikes metaphysics” (because they make no practical difference) and “is uninterested in creating an adequate philosophical foundation for its thought and action . . . .” See POSNER, supra note 8, at 28.

101 That scientific epistemology is our best guide to knowledge “is, to be sure, no a priori truth . . . .” LEITER, Hart/Dworkin Debate, supra note 8, at 180. While Posner’s and Leiter’s arguments do not require accepting that science provides certain knowledge, it does seem to require assuming that other modes of inquiry, such as intuition or a priori reasoning, do not lead to certain knowledge.

102 See POSNER, supra note 8, at 28.

103 Id. at 16.

104 See POSNER, supra note 4, at 74.
experience. “[T]he only possible criteria for the acceptance of epistemic norms—norms about what to believe—are pragmatic,” Leiter writes, “[W]e must simply accept the epistemic norms that work for us (that help us predict sensory experience, that allow us to manipulate and control the environment successfully, that enable us to ‘cope’).

So, the turn to empirical science and away from non-empirical reason follows for Posner and Leiter because while science has “worked for us,” non-empirical methods have not: “A scientific epistemology deserves to be privileged over a rationalistic one is because of ‘the tremendous success such an epistemology has enjoyed to date. To simply push the scientific epistemology aside opens the ontological floodgates to a whole pre-Enlightenment conception of the world that we seem to do better without.”

“[T]he philosophical track record of all forms of a priori analysis, conceptual or intuitive, is not especially encouraging.” “Science—not moral insight—has made us more civilized . . .”

“[S]cience,” argues Leiter, “and the norms of a scientific epistemology . . . are the highest tribunal not for any a priori reasons, but because . . . science has . . . ‘delivered the goods’: it sends the planes into the sky, eradicates certain cancerous growths, makes possible the storage of millions of pages of data on a tiny chip, and the like.” Describing this “scientific epistemology,” Leiter says “[w]ith respect to questions about what there is and what we can know, we have nothing better to go on than successful scientific theory.” Posner argues

105 Leiter, Objectivity, Morality, and Adjudication, supra note 1, at 67, 78–79.
106 LEITER, Rethinking Legal Realism, supra note 4, at 15, 50.
107 Leiter, Objectivity, Morality, and Adjudication, supra note 1, at 82–83.
109 POSNER, supra note 4, at 56.
110 Leiter, Objectivity, Morality, and Adjudication, supra note 1, at 71.
111 LEITER, Hart/Dworkin Debate, supra note 4, at 180.
similarly.\textsuperscript{112} He concedes that science’s epistemological foundations are uncertain but argues that science should be privileged epistemologically because of its practical successes. “Although every bit of what we now believe about the nature of the universe may eventually be overthrown, in the meantime science reveals hidden mysteries, predicts successfully, and works technological wonders.”\textsuperscript{113} Meanwhile, in the backwater world of pure reason, Posner claims there are no “useful ‘inventions’ embodying moral theory . . . ”\textsuperscript{114} So, the chief reason for privileging a scientific or naturalistic epistemology, and correspondingly to define legal objectivity in terms of empirical science, is because science is successful.

This argument seems plausible at first. The successes of science are obvious and dramatic, and no one wants to return to the Dark Ages. But it turns out to be impossible to argue that science has been successful while rationalism or other forms of a priori analysis have not. Notice how the claim “science is successful” is fraught with normative implications. To claim that science is “successful” or that it “works” is a normative evaluation. In what way is science successful? Leiter notes that science eradicates some cancer. Why is that a success? It is a success because it preserves human life, which we value. But the value of human life cannot be identified by empirical science. The value of human life emerges from non-empirical, rationalistic, normative discourses like morality, theology, and philosophy. Without such normative discourse, the claim that “science is successful” is unintelligible. Yet it is precisely such normative discourse that is eliminated in Posner and Leiter’s naturalism. It is tellingly

\textsuperscript{112} It should be noted, however, that Posner recognizes “[t]he role of scientific inquiry in law is also limited . . . partly . . . because of . . . the value rightly placed on the stability, certainty, and predictability of legal obligations.” POSNER, supra note 8 at 455. He also notes that ethical and practical constraints limit science’s application to law. Id. at 62, 455, 460. He goes so far as to suggest that imbuing the law with scientific methodology might be unjustified. Id.

\textsuperscript{113} Id. at 66 (internal quotations omitted).

\textsuperscript{114} POSNER, supra note 4, at 60.
inconsistent to impugn normative discourse while resting your entire system on the normative claim that science is successful. It resembles the child who kills his parents and pleads for the mercy of the court on account of being an orphan.

Maybe it isn’t chutzpah but dubious metaphysics. Pragmatists may dislike metaphysics, but “[t]he price of having contempt for philosophy is that you make philosophical mistakes.”\textsuperscript{115} Posner and Leiter strenuously avoid claiming to be doing metaphysics or making a priori claims. Attempting to insulate themselves against charges of scientism or verificationism, both Posner and Leiter volunteer that scientific epistemology is not privileged a priori; they are not claiming scientific knowledge is philosophically certain. Posner, for example, denies what would be a metaphysical claim that “the only worthwhile knowledge is scientific knowledge.”\textsuperscript{116} But his best efforts to avoid metaphysics fail \emph{inter alia} because he is not satisfied with giving a descriptive account of law; he also wants to advocate an approach to law.\textsuperscript{117} Posner wants to talk about not just what law \emph{is} but about what law \emph{ought} to be. He notes that “[t]he notion of using the scientific method to guide social reform is quintessentially pragmatic.”\textsuperscript{118} Unfortunately, “…Posner’s elimination of “soft” concepts from ethics leaves something of a (normative) vacuum …”\textsuperscript{119} One cannot “guide social reform” without non-empirical norms (\textit{i.e.,} the value of life, the value of knowledge, etc.), and those norms live in the realm of metaphysics, not empirical science. Posner may dislike metaphysics, but he needs them if he wants to offer any advice. “The problem is that Posner … wants it both ways. He wants both to puncture the philosophical balloon, obviating the need to engage in messy philosophical arguments, and to

\textsuperscript{116} \textit{POSNER, supra} note 4, at 13.
\textsuperscript{117} \textit{Fish, supra} note 1, at 1457–61.
\textsuperscript{118} \textit{POSNER, supra} note 6, at 62.
\textsuperscript{119} \textit{See Luban, supra} note 3 at 1019-20 (parenthetical statement added).
toss off controversial philosophical propositions of his own ….”\textsuperscript{120} And then we have Leiter, who denies the \textit{a priori} of science but embraces the Quinean assumption that science identifies and describes reality.\textsuperscript{121} Who can accept that Leiter is not making \textit{a priori} or metaphysical claims while simultaneously assuming the definition of reality?\textsuperscript{122} Professor Steven Macias has said “I do not think Leiter would deny that he has replaced God or Truth with Science as the ultimate arbiter of many human beliefs and practices.”\textsuperscript{123} Leiter can call his naturalism “not metaphysics” or “not \textit{a priori},” but "it can be very difficult to see the difference between the Quinean naturalistic account and one which sees certain norms as \textit{a priori}.”\textsuperscript{124}

Even if we take Posner and Leiter at face value as not making \textit{a priori} claims, pragmatically ("what practical difference does it make?"), they are still making such claims. Posner and Leiter argue the law should be reformed to account only for empirical facts. The practical difference this makes to us is that non-empirical factors like morals and norms go away. This is the same result we would get if we embraced \textit{a priori} that empirical science defined reality, the very metaphysical claim Posner and Leiter have tried not to make.

All this is to say that the success of science is not a good stand-alone argument for a naturalistic approach to law or legal objectivity or against a reason-based approach. Of course,

\textsuperscript{120} Id. at 1009.
\textsuperscript{121} Leiter, \textit{supra} note 4, at 185.
\textsuperscript{122} “[I]t is only dogmatism to insist that the only reasons that can support a moral conviction are [causal] reasons . . . .” Ronald Dworkin, \textit{Objectivity and Truth: You’d Better Believe It}, 25 PHIL. AND PUB. AFF. 88, 122 (1996). In other words, Leiter can call it what he will, but his Quinean assumption is nothing short of faith-based. Leiter’s position parallels that of the members of the Vienna Circle who implausibly claimed that, though they were promoting a logical positivism or logical empiricism that would \textit{inter alia} eliminate metaphysics, they were not doing philosophy; \textit{Cf.} DAVID OLDROYD, \textsc{The Arch of Knowledge} 231 (Metheun & Co. 1986).
\textsuperscript{123} Steven J. Macias, \textit{Rorty, Pragmatism, and Gaylaw: a Eulogy, a Celebration, a Triumph}, \textsc{Rorty}, 77 UMKC L. REV. 85, 103 (Fall 2008).
science has been successful. But to claim that science has been successful depends on normative discourse. In fact, normative discourse is even more responsible for science’s successes than that. Normative discourse not only enables us to assess whether science is successful, normative discourse is responsible for science’s success.

Leiter claims “[science] sends the planes into the sky.” But it doesn’t. People informed by their normative goals send planes into the sky. People only use science as a means to help build airplanes. Or consider medicine. No one looked into a microscope and empirically discovered that we should use medicine to preserve human life. Rather, someone knew – because of normative discourse – that we should value human life or that we should value knowledge and only then looked into a microscope. We only know that we should preserve human life or value knowledge because of normative discourse, and this normative knowledge directs and defines any successful uses of our scientific knowledge. Non-empirical normative discourse is necessary not only for assessing science’s success; but also for directing projects toward any such success.

This also refutes Posner’s argument that there have been no useful inventions embodying moral theory and Leiter’s claim that the track record of a priori analysis is not particularly encouraging. The successes of science are useful inventions embodying moral theory. Science itself is a useful invention of moral theory. Take an example given by Posner of the success of

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125 A parallel criticism has been made of Posner’s economic analysis of the law. Cf. Bradley, supra note 42, at 1917 (“The criticism of economics in law is not that economic analysis is fanciful, unbelievable, or useless. It is very useful. The criticism is … that economics is radically incomplete, and dangerous without an enveloping, regulating morality and metaphysics.”)
126 Leiter, Objectivity, Morality, and Adjudication, supra note 1, at 71.
127 To put it in Posner’s terms, any success of science is success by “stipulation” not argument or empirical fact. POSNER, supra note 4, at 61 (Posner notes that liberal democracy appears to be a success of moral theory, but is only based on “stipulation, not argument.”).
Posner seems correct that the atom bomb represents a clear progression of knowledge. But who says knowledge is valuable or good? Moral philosophy does, but moral philosophy is precisely the kind of normative discourse Posner and Leiter want their naturalistic programs to eliminate from legal reasoning. Yet it is normative discourse and only normative discourse that directs us to value knowledge. Science can only have been invented in response to the normative belief that knowledge is good and we should have more of it. Science and all its useful inventions are themselves useful inventions of normative discourse.

Now is a good time to address Leiter’s related argument that non-naturalistic reasoning cannot provide the basis for objective judgments. A non-naturalistic conception of objectivity, like Publicity, Leiter argues, “will often be unable to make sense of better and worse ways of reasoning.” Based on the foregoing, we can see that if this is correct, Posner’s and Leiter’s arguments in favor of science must be abandoned as they rely on non-naturalistic reasons like “success” and “value.” But the better use of Leiter’s argument is to show that non-naturalistic reasoning is often able to make sense of better and worse ways of reasoning. Of course, Leiter is right that science has been successful. Of course we’re better off with airplanes and medicine than witches and leprechauns. But notice that this judgment—that science is successful, that science is a better way of reasoning than superstition—is a non-empirical judgment. It appears, then, that non-empirical reason appears to do well enough at making sense of better and worse ways of reasoning, at least when it comes to the examples Leiter picks out.

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128 POSNER, supra note 8, at 66.
130 POSNER, supra note 8, at 26; POSNER, supra note 4, at 78; LEITER, Hart/Dworkin Debate, supra note 4, at 180-81.
131 Leiter, Objectivity, Morality, and Adjudication, supra note 1, at 85.
To summarize, Posner’s and Leiter’s primary argument for privileging scientific epistemology over a reason-based epistemology is that science has been successful but reason has not. This argument is self-refuting. They claim that normative discourse like morality and metaphysics should be eliminated from the law because they are non-empirical and have been unsuccessful. They then claim scientific epistemology should be privileged because science has been successful. But this claim actually validates the very normative discourse they try to dismiss.

The argument that “science is successful” cannot justify privileging empirical science over non-empirical reason as either a general approach to law or as a conception of legal objectivity. Posner’s and Leiter’s primary argument for favoring science over reason fails. We will now consider other reasons why a naturalistic conception of legal objectivity is the wrong one.

B. The Ineliminability of Normative Discourse

Even assuming that normative discourse is somehow problematic or unsuccessful, the naturalistic program is no help. Normative discourse cannot be eliminated from the law. "The complete elimination of normative evaluation is unattractive, not least because it appears to be impossible."132 Any principled pragmatism,133 naturalism or empirical science can only tell us about “means,” not “ends.” It can tell us how to do something, but not whether we should do it. Only normative discourse can tell us what we ought to do; only normative discourse can supply the “ends” that direct our “means.” And law will always require ends or purposes. It will always require normative discourse no matter how “scientific” its means become.

133 I acknowledge the phrase “principled pragmatism” may be oxymoronic.
One might say Leiter has never argued norms could be completely eliminated from law; in fact, he’s said the opposite. He too has said norms are ineliminable. The problem is that the norms Leiter calls ineliminable aren’t the ones that matter. “Norms and the ‘internal point of view’ are ineliminable features of the causal structure of the social world,” Leiter writes, “but, for naturalists, causality is still the benchmark of reality, and so no responsible naturalized jurisprudence can eliminate the normative aspects of law and legal systems.”\textsuperscript{134} One might breeze through this statement and be misled into thinking that Leiter is reserving some role in law for normative discourse. He isn’t. Leiter’s way of responsibly accounting for norms\textsuperscript{135} is by locating them within causal mental states.\textsuperscript{136} So, for example, a judge may subscribe to a certain ideology or value, and it is an empirical fact that the judge subscribes to this value.\textsuperscript{137} The empirical fact that the judge has such a “mental state” may in fact make a causal difference in the course of our experience by causing the judge to decide cases in certain ways.\textsuperscript{138} Thus, the reality of the value or ideology or norm of the judge can be identified by a naturalistic epistemology, and it is in this way that naturalism has a place for norms. Posner similarly describes morality as “facts about people’s attitudes, much like “mental externalities.”\textsuperscript{139}

This is unresponsive to the argument that naturalism eliminates normative discourse from law. Identifying norms with mental states or facts about people’s attitudes is merely descriptive (which Posner acknowledges\textsuperscript{140}). This may be useful for Leiter’s purported descriptive project of

\begin{footnotesize}
\begin{enumerate}
\item[134] LEITER, \textit{Introduction: From Legal Realism to Naturalized Jurisprudence}, supra note 4, at 4.
\item[135] LEITER, \textit{supra} note 4, at 187.
\item[136] \textit{Id.}
\item[137] \textit{Id.}
\item[138] \textit{Id.}
\item[139] Bradley, \textit{supra} note 42 at 1913.
\item[140] RICHARD A. POSNER, \textit{OVERCOMING LAW} 36 (Harvard University Press 1995) (“The statement that it is wrong to torture children … is merely a descriptive statement about our morality, not a normative statement ….”), (see Overcoming Posner 1913).
\end{enumerate}
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answering what he considers “the central jurisprudential question—what is law?” But it gives no help in answering the question “What should law be?” That is the prescriptive, normative question. And it is the answers to that question—the normative answers—that are eliminated by Leiter’s naturalism and “rendered invisible” by Posner’s scientific approach.

This discussion hearkens back to H.L.A. Hart’s criticism of the external predictive theory of law of which Posner and Leiter are proponents:

One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these (the internal and the external) points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.

A naturalistic account like Leiter’s or Posner’s tends to define out of existence normative discourse, which does not do justice to law which necessarily includes normative discourse.

Further, there are great tensions between Leiter’s primary descriptive project of asking and answering “What is law?” while also engaging in the prescriptive project of telling us why law should be naturalized or what law should be. Leiter notes that his naturalization project

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141 LEITER, supra note 4, at 189.
142 Cf. Redmayne, supra note 124, at 854 (noting that naturalism robs evidence scholarship of its normative content).
143 “That scientific accounts of social phenomena have room, in principle, for Hermeneutic Concepts does not show, of course, that they make room for the kinds of Hermeneutic Concepts to which conceptual jurisprudents are attached.” LEITER, supra note 4, at 187; see Bradley, supra note 42 at 1903.
probably makes no difference to questions about the norms of a democratic society.\textsuperscript{145} How can Leiter hold that science defines reality, leading to the elimination of many concepts to which legal thinkers are attached, and yet claim that this position makes no difference to intelligible questions about the norms of a democratic society? Perhaps Leiter is an external but not internal skeptic about democratic norms?\textsuperscript{146} That is, maybe as a participant in our democratic society, Leiter believes questions about democratic norms are perfectly intelligible, but as a legal philosopher he believes democratic norms do not exist from the point of view of science? It seems hard to wear both those hats, that is, believing democratic norms aren’t real but still taking normative discourse about them seriously, not as mental states, but as they are discussed internal to the practice of democracy as evaluative claims. It’s like an atheist trying to take prayer seriously, and not as a sociological phenomenon but as a petition made to God. If Leiter wants to engage in a truly naturalistic descriptive project, which should lead to a skepticism about values “all the way down,”\textsuperscript{147} he should, in principle, exclude himself from any prescriptive projects.

We have seen that mental states are an insufficient way of accounting for the ineliminability of norms in law, and now we will consider the role of norms in Posner’s pragmatic program. Posner has explained in some detail how his pragmatic program would work, including where norms fit in, but this explanation demonstrates why normative discourse in law is inescapable. He describes a hypothetical scenario: \textsuperscript{148} A bankruptcy statute is enacted. Its purpose is to decrease the number of bankruptcies. It can then be empirically tested whether

\textsuperscript{145} See Leiter, Why Quine Is not a Postmodernist, supra note 4, at 137, 146. This seems to be a tacit admission of Dworkin’s argument that any successful or intelligible argument that evaluative propositions are neither nor false must be internal to the evaluative domain rather than Archimedean about it. Dworkin, supra note 122, at 89.

\textsuperscript{146} Dworkin, supra note 122, at 93.

\textsuperscript{147} Id. at 122.

\textsuperscript{148} Posner, supra note 8, at 122.
the statute has served its purpose by simply looking at whether the number of bankruptcies do, in empirical fact, decrease. If the statute fails to achieve its goal, it would be repealed. Such a law would be a method of social engineering, and it would be “susceptible of objective evaluation . . .”\(^{149}\) It would be hard to think of a clearer example of a pragmatic legal program or a pragmatic conception of legal objectivity. But this example simply demonstrates the impossibility of eliminating normative discourse from law. The norm in this scheme is that bankruptcies should be decreased, and this norm is not empirically discoverable.\(^{150}\) So, even a model example of a pragmatic law depends for its intelligibility on normative discourse. Of course, Posner grants norms a role in his program, and those norms come from social consensus. But if normative discourse is fundamentally problematic, Posner’s pragmatic program has done nothing to help.

Oddly, this example also suggests that the pragmatic program has no application to litigation and provides no help to a judge. In Posner’s scenario, the statute is in effect. For concreteness’ sake, let’s say the law is that “no one shall declare bankruptcy more than once every ten years.” Its goal is to reduce bankruptcies. At some juncture, the legislature or some law-making body will revisit the law to see whether bankruptcies have decreased. If not, the law will be repealed. But in a given case, a party couldn’t argue the law should be repealed nor could a judge repeal it. The issue in a given case would be whether the law applied, not whether the law should be repealed. Further, simply knowing that the law’s purpose was to decrease bankruptcies wouldn’t help the parties or the judge either. Assume a creditor argued that, under

\(^{149}\) *Id.*

\(^{150}\) One might claim that it is an empirical fact that bankruptcies are bad for creditors, but then it must be explained why creditors’ rights should be promoted. One might then claim that it is an empirical fact that promoting creditors’ rights promotes stability in the economy, but again one has to justify that value. The empirical search for a norm is one of infinite regress unless it is willing to land on some non-empirical bedrock.
the one-bankruptcy-per-ten-years rule, a debtor shouldn’t be allowed to declare bankruptcy because, although the debtor had not declared bankruptcy in the previous ten years, the law’s goal was to reduce bankruptcies and allowing the debtor to declare bankruptcy would contravene the law’s purpose. This would render the law meaningless, effectively making the law’s purpose the law itself. This process and result are not at all what Posner is describing. Knowing the goal of the law, even a goal that can be empirically tested, is no help to litigants or judges because a judge must apply the law, not the law’s purpose. The only way this pragmatic program could help the judge is if the goal of the law were the law and judges were authorized to make rulings to effectuate the goal. Posner is not suggesting such a radical program. Posner’s pragmatic program offers no help in the process of judicial decision making, and commenters have lamented Posner’s failure to describe how a judge might actually go about judging pragmatically. As Rakowski notes, “[P]ragmatism carries no firm implications for judging…”

Recall that Posner and Leiter want normative discourse separated from positive legal discourse, if not eliminated altogether, because science has been successful and normative discourse has not. Assuming that is true, separating the normative from the positive is of little value. Since the elimination of normative discourse from law is impossible, the question becomes “Where does law get its norms?” The answer is that norms come from social consensus, probably through democratic institutions like legislatures. But if normative discourse is problematic, why is this desirable? Leiter applauds science’s ability to eliminate from our world

151 See Levinson, supra note 47, at 1247; see also Rakowski, supra note 45, at 1690–91; cf. Luban, supra note 3, at 1020 (“Posner recognizes that his own nonphilosophical theory provides no recipe for better judging.”)
152 See Rakowski, supra note 45, at 1690.
153 Cf. POSNER, supra note 8, at 62–63, 69.
leprechauns and gods and ethers and theology and morality, and he worries about allowing pre-enlightenment entities into our legal discourse. Yet if the normative discourse is carried on at the legislature or through some other democratic process, the leprechauns live on. How does it matter if they live in the legislature or the voting booth instead of the courthouse? The alleged failings of normative discourse will not be improved by having voters or legislators conduct it instead of judges. Posner’s argument could be put in Holmesian terms: we live, largely, by majority rule; thus the people via the legislatures should set the goals, and lawyers and judges should be the social engineers who figure out how to facilitate those goals. That seems coherent enough. But if this is the pragmatic answer, in no way does it eliminate non-empirical norms or diminish the problems of normative discourse. Normative discourse is ineliminable from law, and a naturalistic program solves none of its alleged problems.

C. The Limited Relevance of Science to Law

Another problem with a naturalistic program has been widely noticed: scientific epistemology has limited relevance to law. As we’ve seen above, naturalistic science self-consciously only applies itself to empirical phenomena, but law necessarily contains non-empirical phenomena. Trying to apply scientific epistemology to law is like trying to ascertain a painting’s beauty with a stethoscope. Jules Coleman has said “there is absolutely no reason to believe that the facts that interest us as philosophers and social theorists are the facts that social and natural scientific theories are interested in addressing or are designed to address.” Ronald Dworkin has argued that “[s]ince morality and the other evaluative domains make no causal

154 Holmes wrote that “the first requirement of a sound body of law … (is) that it should correspond with the actual feelings and demands of the community, whether right or wrong.” OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36 (M. Howe ed. 1963).
claims, however, such (scientific, naturalistic) tests can play no role in any plausible test for them."\textsuperscript{156} And Postema has put it that no one has shown “the relevance of the notion of objectivity associated with this (naturalistic) epistemology to other areas of experience, judgment, reasoning, and discourse. Some argument must be given for thinking that the validity of this conception of objectivity can be generalized.”\textsuperscript{157}

Leiter does not so much offer arguments for the relevance of science to law as make unjustified assumptions. He simply assumes that science defines reality.\textsuperscript{158} But it’s just this assumption that needs to be supported by argument. It would be just as good to assume \textit{ipse dixit} that religion defines reality. And when pressed for an argument supporting his crucial assumption, he turns to the one we’ve already seen fail, that “science is successful.”\textsuperscript{159} Naturalists have given us no reasons to think scientific epistemology is relevant to the normative aspects of law. Norms cannot be eliminated from law. Norms, as entities, are not empirically verifiable or observable. Science, being self-consciously empirical, has no way of telling us anything about norms and, thus, has limited relevance to important elements of law.

D. Naturalistic Objectivity Is Not Probative of Law’s Legitimacy

Recall that we are seeking a conception of objectivity that is probative of law’s legitimacy. And one of the considerable flaws in a naturalistic conception of objectivity is that it has no such tendency. The reasons for this can be summarized as (1) a naturalistic approach to law cannot bridge the is-ought divide, and (2) identifying law with force, as naturalism does, tends to delegitimize law.

\textsuperscript{156} Dworkin, \textit{supra} note 122, at 120.  
\textsuperscript{157} Postema, \textit{supra} note 1, at 134.  
\textsuperscript{158} \textsc{Leiter}, \textit{Postscript to Part II, supra} note 4, at 185.  
\textsuperscript{159} \textsc{Leiter}, \textit{Objectivity, Morality, and Adjudication, supra} note 1, at 77.
Naturalism can be descriptive, but it cannot be prescriptive. Perhaps such an approach can tell us what law is, but it cannot tell us what law should be. It may be possible to perfect the predictive theory of law so that it would always be known exactly how courts would decide legal disputes. And, in a sense, law could be deemed objective in that there would be no dispute about the answers to legal questions. It would be descriptively objective. Such knowledge would be beneficial in many ways, but it would not legitimate law. It is easy to imagine a perfectly predictable legal system (defendants always win) the predictability of which in no sense legitimated the use of coercive force. It may be that the naturalistic conception of objectivity is the right conception for some descriptive project, but it is wrong conception for the project of asking about law’s legitimacy.

In addition to being unable to help test the law’s legitimacy, the naturalistic conception of law actually tends to delegitimize law by identifying the law solely with coercive force. Recall that Holmes, who Posner closely follows, in *The Path of the Law*, says the study of law is the study of “the prediction of the incidence of the public force through the instrumentality of the courts.” “[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court . . . .” Or as Posner puts it succinctly, “The *ultima ratio* of law is indeed force.”

The naturalist likes identifying law with force because force makes a causal difference in the course of our experience. We can know when a court makes a ruling; such legal phenomena

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160 Levinson, *supra* note 47, at 1223. Posner’s *The Problems of Jurisprudence* has been described as “a call to its readers to re-enter the particular path of the law marked out by Holmes.” *Id.* at 1228.
162 *Id.* at 458.
can be identified by the methods of empirical science. But if law were to be identified with non-
empirical entities like normative discourse or reason or morality or the “vaguer sanctions of
conscience,” then a scientific epistemology couldn’t account for law. Thus, if we want a
scientific account of law, it is convenient to reduce law to force.

Again, this may be fine for some purposes, but it has a deleterious effect on law’s
legitimacy. “Force is a physical power,” said Rousseau. “To yield to force is an act of necessity,
not of will; it is at best an act of prudence. In what sense can it be a moral duty? . . . [T]he duty
of obedience is owed only to legitimate powers.” When we ask whether law is legitimate, we
are asking whether there is a good explanation for the use of coercive force. The use of coercive
force without normative sanction—without reason—would not be accepted as legitimate. The
identification of law with force provides no way of distinguishing good laws from bad, justice
from injustice. As such, a naturalistic conception of law and legal objectivity relies on a
definition of law that itself suggests, or is at least compatible with, a rejection of law’s
legitimacy.

The is-ought gap argument is old. So are the criticisms of identifying law with force. But
these arguments still provide good reasons for rejecting the naturalistic conception of law and
legal objectivity, at least to the extent we are concerned with law’s legitimacy. Naturalists might
not deny that naturalism is no help in probing law’s legitimacy. “…Posner does not blink at the
recognition that his theory of law offers relatively little reason for anyone to accept the moral
authority of judicial commands,” Levinson has observed. And Rakowski has written that
“(Posner) suggests, without speaking directly to the problems that prompt concern for

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164 Holmes, supra note 161, at 459.
166 Levinson, supra note 47, at1238 (June 1991).
objectivity, that the ‘pragmatic’ approach to judging he lauds need not worry about legitimacy …

\(^{167}\) Some have described Posner as finding legitimacy in consensus,\(^ {168}\) but this approach is akin to and suffers from all the same flaws as identifying law with force. The question of legitimacy is not about why the majority who agree with the law should accept and obey it, but why the minority who disagree should do so. “[T]he point of law is to enable us to act in the face of disagreement,” Jeremy Waldron has argued.\(^ {169}\) The brute fact of consensus tells us nothing about law’s legitimacy. And naturalistic objectivity, for those inquiring about law’s legitimacy, has to be rejected.

**IV. Why Publicity?**

Unlike naturalism, the conception of legal objectivity as Publicity is probative of law’s legitimacy. Publicity also provide a better account of law, both descriptively and prescriptively, based on its explicit incorporation of normative discourse. And though there may be an element of circularity or contingency in a reason-based system like Publicity, such a quality actually improves the likelihood of achieving objectivity.

**A. Objectivity as Publicity is Probative of Law’s Legitimacy**

I have argued that a naturalistic conception of objectivity cannot help us inquire about law’s legitimacy and, in fact, by identifying law as force actually corrodes any claim to legitimacy. In other words, a naturalistic conception of objectivity is the wrong conception of objectivity for those interested in asking about law’s legitimacy. I will now argue that objectivity

\(^{167}\) Rakowski, *supra* note 45, at 1683.


\(^{169}\) JEREMY WALDRON, LAW AND DISAGREEMENT 7 (Oxford University Press 1999).
as Publicity, however, can do this job, and I will do so by describing the ways in which Publicity can tell us whether certain expectations\textsuperscript{170} of legitimate government are satisfied by legal judgments.

We expect to be governed democratically. If I say “You can’t do that,” you might answer “Says who?” There is a big difference between the answers “Says me” and “Says the People of the United States.” The former answer is less likely than the latter to convince you that you should comply with the demand. And not just because I can’t force you to comply; it’s possible I can. The important difference is that the former answer suggests the reason you should comply is private, but the latter answer suggests that the reason you should comply is public. People expect to be governed by democratic laws, and just as strongly they expect not to be governed by private citizens. People are more likely to ascribe legitimacy to democratic laws than private fiats. And Publicity can test for this democratic norm by requiring that legal judgments be independent, that the reasons for legal judgments transcend the judging subject.

If a legal judgment is based on reasons that transcend the judging subject, it provides assurances that legal judgment, and the corresponding application of government force, is not based on the factors peculiar to the judge but which may not be accepted or shared by others. If a legal judgment is independent, then it can be considered a public judgment because the reasons for that judgment are not isolated to a few individuals. But a judgment based on subjective factors that do not transcend a judging subject would be a private judgment because the reasons for the judgment would only be endorsed by the subjective judge, not accepted or endorsed by others.

\textsuperscript{170} Admittedly, such expectations are shared only by those committed to western liberalism. “(Rawlsian) contractualism … do(es) little more than articulate the moral intuitions of contemporary western liberalism. The arguments of contractualism have little traction in a debate with the mandates of an illiberal ideology such as racism.” C. Scott Pryor, \textit{Principled Pluralism and Contract Remedies}, 40 McGeorge L. Rev. 723, 7339 (2009).
the public. It would not be the product of a public, democratic process, and we would call it illegitimate because we expect not to be forcefully imposed upon by private entities. But we do expect and accept being governed by the public; this is the democratic norm. Publicity’s requirement that a judgment be based on reasons that transcend the judging subject provides assurances that force is being imposed democratically and publicly.

We also expect to be governed impartially. That a judgment is democratic is insufficient to assure its legitimacy because a democratic majority may act incorrectly in that they have not acted impartially. Not all incorrectness of judgment suggests illegitimacy or impartiality. For example, if a basketball referee misses a call but is not actually trying to “fix” the game, we do not consider his judgment illegitimate or impartial. But a certain kind of incorrectness of judgment does imply illegitimacy such as when a judgment, though democratic, is like that of a private citizen writ large. Such a judgment may be independent in that the reasons supporting it transcend the judging subject since a democratic majority affirms such reasons, but it still may be biased, prejudiced, partial or unfair. Thus, Publicity requires that legal judgments be based on “proper reasons” and “standards of correctness” and that improper factors like bias, idiosyncrasy or ideology be excluded. If a judgment is based on proper reasons and standards of correctness, we can be assured that the judgment is impartial.

We expect to be governed rationally. When we ask about law’s legitimacy, we are often asking if there is a good explanation for the use of coercive force. We expect to be governed

\[171\text{ Cf. Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 Wm. & Mary L. Rev. 1773, 1783 (April 2007) (State action may be justified when based on “justified, yet erroneous reasoning.”)}\]
reasonably; we expect not to be coerced unreasonably or arbitrarily.\textsuperscript{172} Rule by force alone is 
implies non-rationality,\textsuperscript{173} a condition that prevents the ascription of legitimacy. But we affirm 
being governed by reason (who could maintain that though the law is reasonable, he refuses to 
accept it?). We expect to be able to understand why we are being coerced both in theory and in 
fact. We cannot ascribe legitimacy to laws that we cannot comprehend. So we expect to be told 
the good reasons that we are being coerced. Publicity requires that the reasons for judgments 
refer to “standards of correctness,” thereby assuring us that there are, in theory, good, 
comprehensible reasons for the use of force. But Publicity also requires that such reasons be 
given publicly and that they be distinct from the mere opinion of the judging subject so that we 
have access to such reasons and can understand them not just in theory but in fact. If standards of 
correctness are available and judging subjects must publicly give reasons why a judgment 
satisfies those standards, then the \textit{ultima ratio} of law is not force, but publicly accessible reason.

We expect incorrect legal judgments to be corrected. The inability to admit a mistake is 
an implicit repudiation of objectivity, a rejection of any measuring stick other than one’s own 
subjective opinion. By requiring that judgments be based on publicly given reasons, moreover, 
by allowing for standards of correctness, proper reasons, and determinations of normative 
relevance themselves to be changed, Publicity creates the possibility of determining that any 
legal judgment is in error. Law thus concedes that it may be wrong in any given instance, a 
strong sign of objectivity and a bulwark (if an imperfect one) against the tyranny of the majority.

\textsuperscript{172} We want “deliberative forces [to] prevail over the arbitrary.”’’ Whitney v. California, 274 
U.S. 357, 372 (1927) (Brandeis, J., concurring).
\textsuperscript{173} POSNER, \textit{supra} note 8, at 83.
All of the foregoing expectations will be disappointed if we are denied an opportunity to participate in the deliberative discourse. We expect a reasonable opportunity to make our case; we expect the opportunity to be heard. If we are excluded from the deliberations, it will be cold comfort to be told that judgments were made based on proper reasons and standards of correctness. Therefore, Publicity requires that all competent members of the community have standing and that argument not be prematurely closed.

We also expect judging subjects to come to some amount of actual agreement. I am now suggesting a modification to Postema’s conception of Publicity. Postema argues that while strong deliberative agreement is the regulative ideal of Publicity, actual agreement is not a required or expected result. I suggest that public deliberative discourse must achieve some actual agreement in order to legitimate its legal judgments and that this requirement arises from the third structuring features of objectivity, intersubjective invariance.

Recall that intersubjective invariance acts like a test for whether a judgment is based on proper reasons and standards of correctness. Now imagine we engaged in public deliberative discourse, but no actual agreement were achieved. What could explain this? There are various answers but all with the same theme: a failure of reason. Perhaps judging subjects refused to base their judgments on non-subjective factors. In this scenario, reasons that transcend a judging subject might be available, but judges are unable (consciously or unconsciously) to break away from the gravitational pull of subjectivity. Or perhaps judging subjects were willing to base their judgments on proper reasons and standards of correctness, but no such reasons exist. Or perhaps proper reasons exist, but judges cannot locate them because of their own epistemological

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174 “The right to participate is in a sense ‘the right of rights’ in Rawl’s theory, for it is the direct descendant, in political practice, of the principle of popular sovereignty underlying the whole contractarian approach in political philosophy.” WALDRON, supra note 169, at 156.
limitations. Or they exist and judges can locate them, but they are too general to help decide particular cases. Perhaps actual agreement may not be achieved because the deliberative process was prematurely terminated, but why would that have occurred? Perhaps because one interest group got the result it wanted and then prevented that result from being challenged. Perhaps deliberation was ended because of unreasonable haste. Perhaps there were insufficient resources to allow for reasonable deliberation. There are many reasons why public deliberation may fail to yield any agreement, but all of them point to the inability to properly reason. Whatever the etiology, it appears that failure to achieve some actual agreement calls into serious question law’s legitimacy because it suggests a critical failure of reason, the animating force of Publicity.

What kind of actual agreement must be achieved by public deliberation if law is to be legitimated? I suggest Publicity requires either (1) a preponderance of agreement or (2) increasing agreement over a reasonable period of time. A preponderance of agreement based on public deliberative discourse would mean that most of those subjected to law could affirm most legal judgments. Most of law’s subject would be compelled to ascribe legitimacy to law because they agreed with most legal judgments. In a democratic society, we can accept being sometimes found in the minority. As Jeremy Waldron has written, “The authority of law rests on the fact that there is a recognizable need for us to act in concert on various issues or to co-ordinate our behavior in various areas with reference to a common framework, and that this need is not obviated by the fact that we disagree among ourselves as to what our common course of action or our common framework ought to be.”175 We realize that in a democratic government,

175 Id. at 7.
sometimes we won’t get our way and that doesn’t make law illegitimate. A preponderance of agreement is consistent with the democratic norm of majority rule.\textsuperscript{176}

In the absence of a preponderance of agreement, I believe we would still ascribe legitimacy to law as long as agreement increased over a reasonable amount of time.\textsuperscript{177} Such a result would suggest that, despite widespread disagreement, Publicity’s methods were working and moving the political community toward a preponderance of agreement. Publicity allots a significant place for disagreement, dissent, and even for agreement to be displaced by disagreement. At various junctures, deliberative discourse may lead to an increase in disagreement such as when new facts are discovered or new reasons are recognized as normatively relevant. When this occurs, the deliberative process should be granted a reasonable time to attempt to achieve legitimating agreement. No one expects strong deliberative consensus to occur overnight. The process should take forever, because if it took forever to achieve agreement, legitimacy would be a pipedream. But a preponderance of agreement may be lost for a time, but if within a reasonable time agreement once again increases, we have assurances that the injection of new facts and reasons into the discourse has not disabled the possibility of legal objectivity. Of course, if agreement must increase over time, at some juncture a preponderance of agreement must be reached, though not permanently retained.

Modifying Publicity to require some degree of actual agreement locates Publicity in between a conception of objectivity that requires unanimous agreement and one that requires

\textsuperscript{176} “The majority must be able to bind the minority; that is why we bother to count the votes.” Stephen L. Carter, \textit{Religious Resistance to the Kantian Sovereign}, NOMOS XXXVII 288, 297 (1995).

\textsuperscript{177} Minority but increasing agreement might be more legitimating than a static but slight preponderance of agreement since the former implies that deliberative discourse is moving law’s subjects toward consensus, while the latter would raise vexing questions about why no further agreement was achievable.
only hypothetical agreement. Dr. Heidi Li Feldman has attributed the requirement of unanimous agreement to Jurgen Habermas and the requirement of only hypothetical agreement to John Rawls.\(^{178}\) “According to Habemas,” Feldman writes, “… the major condition a judgment must meet to qualify for objectivity: (is that) everybody affected by the judgment must be able to accept the anticipated consequences of its general observance.”\(^{179}\) Moreover, such unanimous agreement must arise from an actual, not hypothetical, process of argumentation in which everyone affected by the legal judgment must be admitted as participants to the process of argumentation.\(^{180}\) Feldman describes this requirement as wildly unrealistic. She then notes that Rawls’s conception of objectivity eliminates these requirements of an actual dialogue and unanimous agreement, making a Rawlsian conception more practical but less attractive.\(^{181}\) “On the Rawlsian conception, “[a] single individual’s judgment, formed in total isolation from others, could be objective, if others would (largely) agree with it.””\(^{182}\) While this is, for obvious reasons, more feasible than obtaining universal acceptance of a judgment after an actual dialogue that included everyone affected by the judgment, it is unsatisfactory because no single individual is likely to be aware of and sensitive to all the normatively relevant reasons for a judgment and lone individuals are unlikely to make decisions independently and based on proper reasons.\(^{183}\) Requiring “some degree of actual agreement”\(^{184}\) is more likely to ensure that judgments are based on normatively relevant reasons and that participation in legal discourse is governed by the overarching aim of achieving reasonable common formation of judgment on the basis of the


\(^{179}\) \textit{Id.} at 1220 (parenthetical statement added).

\(^{180}\) \textit{Id.}

\(^{181}\) \textit{Id.} at 1222-24.

\(^{182}\) \textit{Id.} at 1223.

\(^{183}\) \textit{Id.} at 1224.

\(^{184}\) \textit{Id.}
reasons and argument publicly offered. Thus, by arguing that objectivity as Publicity requires some degree of actual agreement among judging subjects, I locate Publicity, in this regard, in between Rawlsian and Habermasian conceptions of objectivity.

Whether law is legitimate is one of the most important questions we can ask about it. A naturalistic conception of objectivity is unhelpful in answering this question. But Publicity is probative of law’s legitimacy. This is a strong reason why Publicity is an appropriate conception of objectivity for those concerned with law’s legitimacy.

B. A Better Account

Publicity also offers a better account of law, both descriptively and prescriptively, than naturalism because it accounts for and accommodates normative discourse. We have seen that naturalistic objectivity cannot account for normative discourse, but Publicity does account for normative discourse in the law by embracing normatively relevant reason. Since normative discourse cannot be eliminated from law, that Publicity can account for it while naturalism cannot provides an important reason to favor Publicity over naturalism.

Interestingly, while naturalism cannot account for normative discourse, Publicity does not suffer from the defect of being unable to incorporate empirical science. Though the successes of normative discourse are lost on naturalism, the successes of science are not lost on Publicity. Again, science is one of the successes of non-empirical reason. Publicity can, should, and would utilize empirical science in circumstances where science is normatively relevant to legal discourse. Publicity allows us to have our normative discourse and science too. One of Posner’s

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185 Publicity helps us answer whether law is objective. There are other important questions that are relevant to law’s legitimacy: is it just? Does it have desirable consequences? Publicity does not try to answer those questions. It only seeks to answer one particular important question about law: is it objective.
abiding criticisms of legal thought is its lack of receptivity to science and the “actualities of social life,” a flaw that appeared even in Posner’s forerunner, Justice Holmes. Assuming the validity of the argument that legal thought fails to avail itself sufficiently of science, such an argument is perfectly at home in Publicity’s scheme. Publicity always deems it appropriate to argue for the recognition of new normatively relevant reasons or modified criteria of objectivity, for example, that legal judgments should incorporate more science. So to the extent that Posner is motivated by his desire to see more science in law, Publicity can accommodate him as well as naturalism, while also accommodating the necessary normative discourse. Publicity is a more capacious concept of objectivity than naturalism.

Recall Hart’s criticism of the predictive theory of law, that it eliminated the internal perspective. Hart saw this as a considerable failure because a good account should not eliminate features of the phenomenon it is studying, but rather do justice to all features. A parallel complaint can be lodged against naturalism’s elimination of non-empirical norms. Naturalism does not do law justice when it attempts to eliminate non-empirical norms. We should not eliminate phenomena we “dislike” like a crooked CPA cooking the books. And Publicity, unlike naturalism, doesn’t take this convenient shortcut. As a reason-based epistemology, it is able to account for non-empirical norms. But it also accounts for other phenomena that it might find easier to ignore. For example, disagreement in normative discourse is problematic for Publicity because it raises the question of whether a reason-based system is functional. But Publicity doesn’t try to eliminate disagreement; it accounts for it by describing the important role for disagreement in objective, deliberative discourse. A good account should do justice to the phenomena it’s describing. Publicity does this for law; naturalism does not.

186 Cf. Levinson, supra note 47, at 1241-42.
187 Supra note 144 and accompanying text.
Further, because of Publicity’s explicit incorporation of normative discourse into its account, it can offer a program for law and not just a description, unlike naturalism. The scientific account of law can only be descriptive, and it cannot supply any goals or ends or norms, which are necessary for a legal program to function. But Publicity accepts normative discourse into its account, allowing it to describe as well as prescribe law. For example, the reason for a given judgment might be that “due process” was satisfied. If in one case the law accepts that due process is a normatively relevant reason a judgment, it follows that in other cases law should provide due process. The “is-ought” gap from which naturalism suffers does not afflict Publicity because Publicity is not merely a descriptive conception and the “ought” is an accepted part of the law.

Publicity is a more successful account of law than naturalism both descriptively and prescriptively. Publicity succeeds where naturalism fails by accounting for normative discourse, and without losing the capacity to value empirical science. Moreover, where naturalism is blind and impotent, Publicity is able to account for and generate the norms necessary to law.

C. But Isn’t Reason Culturally Contingent?

Can a method of practical reason like Publicity\(^ {188}\) provide a legitimating objectivity if reason itself is depends on culture? Posner and Leiter think not. Such objectivity depends on neither correspondence with reality nor scientific epistemology, but on cultural, social, and political homogeneity.\(^ {189}\) What looks like objectivity is really just everyone in the room agreeing like so many Red Sox fans at Fenway Park.

\(^{188}\) Publicity is a “reason-guided” approach whereas Naturalism is a “world-guided” approach. Publicity is a type of practical reason. Postema, supra note 1, at 124, 133.

\(^{189}\) POSNER, supra note 8, at 30-32.
If reason’s objectivity rests on the shifting sands of culture, Leiter has some concerns about Publicity. It has no way of distinguishing between good and bad reason.\textsuperscript{190} Publicity says that the correctness of a judgment is based on arguments and reasons.\textsuperscript{191} But these arguments and reasons, while appearing objective to a homogenous culture, may be merely subjective. Without relying on empirical facts, Leiter says, Publicity has no way of distinguishing objective truth from cultural agreement, from a “hegemonic convention.”\textsuperscript{192} (I will only now briefly mention that resting legitimacy on social consensus, as pragmatism does, cannot be spared from this same criticism.)

Leiter has given us the vivid example of a hegemonic convention that supported the proposition that chocolate is a better flavor of ice cream than vanilla.\textsuperscript{193} The Chocolate Convention might be able to give arguments and reasons for its position: chocolate is creamier than vanilla; chocolate grips the palate and washes away other flavors; vanilla is fleeting.\textsuperscript{194} To the Convention, these arguments and reasons would appear objective because, when recited, everyone in the Convention would find them persuasive.\textsuperscript{195} But they wouldn’t be objective; they would only appear that way. The problem for Publicity’s conception of objectivity is that it has no way of debunking the Chocolate Convention but rather must declare the Chocolate Convention objectively correct.

Fortunately, Publicity is not so blinkered and has a host of safeguards against the evils of the Convention. Publicity regards judgments, arguments, and reasons as “defeasible and open to

\textsuperscript{190} Leiter, \textit{Objectivity, Morality, and Adjudication}, supra note 1, at 85.
\textsuperscript{191} Postema, \textit{supra} note 1, at 117.
\textsuperscript{192} Leiter, \textit{Objectivity, Morality, and Adjudication}, supra note 1, at 86-87.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
criticism from other participants.” 196 “The parameters of objectivity are themselves contestable. . . .” 197 Participants in deliberative reasoning must be willing to “reconsider their views and arguments” and “to admit error.” 198 Deliberations must open “to all competent members of the relevant community” and provide a fair opportunity to participate. 199 And deliberations should continue until strong deliberative consensus is reached. 200

Now let’s see if these safeguards can save us from the Chocolate Convention. To satisfy Publicity, the reasons given for the superiority of chocolate over vanilla must be considered defeasible. They are not set in stone, and they are subject to criticism. If a champion for vanilla arises, she must get a fair hearing for her argument. Moreover, if the reasons and arguments for vanilla outweigh those for chocolate, the Convention must be genuinely prepared to admit it was wrong and change its mind. We might worry that given the long history and sway of the Convention, the deck is stacked against vanilla even if it can get a fair hearing for a strong argument. After all, the two-factor test for the superiority of ice cream is familiar: (1) “how creamy is it?” and (2) “does it grip the palate?” If the test itself is biased in favor of chocolate’s normativity, does vanilla have any chance? It does. Since the parameters of objectivity themselves are contestable, the vanilla advocate need not hopelessly argue that vanilla is creamier than chocolate. Publicity insists that the vanilla advocate be allowed to argue that creaminess and palate-grip should not even be the standards by which ice cream is judged: “Dessert should be light,” she can argue. “It should be refreshing. It should be vanilla.”

196 Postema, supra note 1, at 120.
197 Id. at 118-19.
198 Id. at 120.
199 Id.
200 Id.
Now if all of this due process, the purported openness to examining the reasons favoring vanilla, the fair hearing and participation, the willingness to admit error, is only illusory, then Publicity’s requirements have not been met. If it turns out that the members of the Chocolate Convention are too set in their ways, spent too much time as children at church chocolate ice cream socials, have too many chocolate investments, really cannot possibly overcome their personal preference for chocolate or imagine a world in which people prefer vanilla, are too timid or enculturated to go against public opinion or conventional wisdom, then their deliberative process won’t satisfy Publicity. But if they can isolate and exclude their subjective beliefs and feelings and experiences and interests, if they are open to changing their minds based on reasoned arguments, if they do give vanilla its day in court, and if their agreement over time moves toward a preponderance, then Publicity is satisfied, and, I suspect, so is our desire for a legitimating objectivity.

It may be true\textsuperscript{201} that Publicity’s reasons are contingent.\textsuperscript{202} Publicity is not committed to the ontological status of its reasons and standards. It is a methodological, not an ontological, approach to objectivity. It is like procedure, rather than substance. And Publicity concedes that its method contains an “element of circularity” since the “criteria of objectivity are fixed by substantive argument within law regarding the boundaries of its domain.”\textsuperscript{203} But this circularity does not threaten a legitimating objectivity because the reasons and arguments and parameters of

\textsuperscript{201} But it may not be. Some argue that reason allows for direct access to the nature of reality. If so, then a reason-driven system might be rooted in an external reality and thus may be necessary, not contingent. I take up no part of that argument here, assuming for the sake of argument that reason is to some degree contingent.

\textsuperscript{202} “The objectivity of a domain does not presuppose that anyone can have either a priori or self-evident or incorrigible understanding of what relevant reasons are like or of the rules of reasoning in this domain. It only presupposes that the thoughts belonging to an objective domain . . . allow for the application of judgments based on reasons . . . whose existence makes such beliefs true.” Joseph Raz, \textit{Notes on Value and Objectivity}, supra note 1, at 199–200.

\textsuperscript{203} Postema, \textit{supra} note 1, at 119.
objectivity in Publicity’s discourse are always defeasible. The Chocolate Convention doesn’t get to fix the rules for all time. Publicity’s judges must always know that they and their previously accepted reasons may be wrong. They must be properly open to revising their judgments if their error is demonstrated. Even if Publicity’s reasoning is circular, those who participate in the discourse can always claim that the circle has been drawn too small or large. They can claim the circle should have different content. Publicity’s circle is “properly open.” Publicity’s contingency is not a bug, but a feature, at least for the purpose of probing legitimacy, because it allows law’s subjects not only to argue reasons but to help create the normatively relevant reasons to be applied in legal judgments. Contingency and circularity do not threaten a legitimating objectivity if our deliberative discourse is submitted to the discipline of Publicity.

While we’re thinking about the Chocolate Convention, let’s consider some more failings of the surprisingly unhelpful naturalism. Contrary to Leiter’s suggestion, Naturalism is not a good way to dispose of the Chocolate Convention. Leiter asks us to “[i]magine there arose a practice of making arguments about the merits of different flavors of ice cream,” and this is an analogy to the practice of law or maybe the practice of normative discourse. Leiter wants us to conclude that “the parties to the Chocolate Convention are talking nonsense (because) there are no objective facts about the ‘tastiness’ of ice cream flavors (because) the ‘tastiness’ of chocolate . . . is merely subjective.” Now note something important. Leiter wants to use naturalism to get

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204 Posner argues similarly when he claims that “there are no techniques for forging consensus on the premises of moral inquiry and the means of deriving and testing moral propositions, moral dilemmas are disputes about ends, whereas fruitful deliberation, the sort of reasoning that moves the ball down the field, is deliberation over means.” Posner, supra note 2, at 63. But how do we know which direction to move the ball down the field? We know based by deliberating about ends, and any “fruitful deliberation about means” presupposes and is determined by fruitfully deliberating about ends.

205 Brian Leiter, Objectivity, Morality, and Adjudication, supra note 1, at 86.

206 Id.
rid of the dogmatic Convention. But it’s not just the Convention that would be talking nonsense. The entire practice of debating the merits of ice cream would be nonsense (and so, by analogy, would the entire practice of law or the entire practice of normative discourse). If the tastiness of chocolate is merely subjective, so is the tastiness of every other flavor. It’s not just the Chocolate Convention that should go; it’s the whole practice of debating ice cream. This isn’t the result Leiter wanted. He wanted to smart bomb the Convention’s dogma and make the world safe for vanilla and even sherbet. But it can’t be done with naturalism. Naturalism isn’t a smart bomb. Naturalism is an ontological A-bomb that would eliminate all of the non-empirical norms that cause, direct, and grant meaning to all human activity, including law. It is a completely unhelpful and, really, a nihilistic approach to law and legal objectivity.

V. Conclusion

This article has sought a conception of objectivity that is probative of law’s legitimacy. We have considered a naturalistic approach to law that would conceive of legal objectivity being a function of the extent to which legal judgments correspond to empirical facts. And we have considered an alternative conception, Publicity, which would measure law’s objectivity by the extent to which legal judgments were the products of reasoned public deliberative discourse.

Some have argued that we should prefer a naturalistic objectivity to rationalistic conceptions of objectivity because empirical science (the epistemology of naturalism) has proven to be more successful than non-empirical forms of discourse. Science has given us immense practical progress; non-empirical reason has given us the Salem witch trials, it is alleged. This argument is self-defeating. It blatantly relies on the non-empirical judgment that “science is successful,” functionally refuting the claim that non-empirical reason is insufficient for
determining better and worse ways of reasoning. Moreover, it turns out that if science is successful, *a fortiori* non-empirical normative discourse is successful because science itself is a success of normative discourse. Scientific enterprises can only arise from and be directed by normative discourse.

Naturalism also turns out to give a poor account of law. Non-empirical normative discourse is essential to law, yet naturalism cannot account for it and actually attempts to eliminate it. This is just bad accounting. Thus, even at the task to which it is best suited—providing a description of law—naturalism fails: “. . . [D]escriptive positivism is almost certainly false . . . partly because many of the rules and standards identified of the rules and standards identified by the best available tests of positive law actually require those who administer them to exercise moral judgment. And it is partly because there are inevitably such gaps in positive law and such indeterminacy in the meanings of legal rules as to make their administration in fact impossible without the exercise of moral judgment.”\(^{207}\) Naturalism fails even worse when trying to cure the law of problematic normative discourse. Normative discourse simply cannot be eliminated from law, and naturalism’s efforts to do so are futile or else nihilistic. All of this stems from the fact that the epistemology of naturalism, empirical science, has only limited relevance to law because law necessarily includes non-empirical elements.

A naturalistic conception of law also is completely unsuited to providing us information about law’s legitimacy. Even if the law could be made completely scientifically objective, such objectivity would in no way legitimate law. There might be projects for which naturalism suggests a helpful conception of objectivity, but the project of testing law’s legitimacy is not one of them.

\(^{207}\) WALDRON, *supra* note 169, at 169.
Publicity, however, is tailored to inquire about law’s legitimacy. It helps us know whether our expectations of democratic rule, impartiality, public rationality, fair hearings, admitting error, and actual societal agreement are being met by law. Publicity is also able to provide a satisfactory account of law, succeeding where naturalism failed, by explicitly incorporating normative discourse, yet without sacrificing empirical fact. And Publicity can answer the objection that a reason-based system cannot be objective because reason is culturally contingent. Since we are seeking an objectivity that legitimates law, the contingency of Publicity’s reasons is a feature not a bug because Publicity allows for law’s subjects to participate in not just the arguing of reasons but the making of the reasons themselves. If legal judgments meet the requirements of Publicity, law’s subjects should be willing to ascribe to it a legitimating objectivity. If not, then they should not. Either way, Publicity is a conception of legal objectivity that is probative of law’s legitimacy.

In this debate between Publicity and naturalism, there is a way to détente. It could be recognized that naturalism and Publicity are fundamentally intended for different projects. The naturalist is seeking to answer the descriptive question “What is law?” while rationalistic Publicity is primarily going about other projects like asking “is law legitimate?” or “what should law be?” Different projects can require different tools. So just as physicists are not expected to exegete Scripture and clergy are not expected to run particle accelerators, so can naturalists prioritize empirical science while rationalists emphasize non-empirical reason.208 There need be no conflict between different people going about different projects using different tools. But there can be no truce as long as naturalists fail to acknowledge the limits of empirical science,

208 “One can imagine this (Posner’s) economics peacefully coexisting with moral philosophy.” Bradley, supra note 42, at 1901.
imperially assuming that reality is identified and defined by empirical science and denying ontological standing to the non-empirical.

A better and more radical solution is also available. Naturalists could recognize the glaring defects in their philosophy. They have no source of legitimate norms. But if they would embrace normative discourse, they could find them. This wouldn’t require them to forsake their love of science. It would allow them to put their love of science and empirical fact to good use. Science has nothing to fear from reason. The rationalist loves science. After all, he invented it. The odds seem low of thinkers like Posner or Leiter embracing rationalistic or moral philosophy or normative discourse or religion, but it would be a major event in the law.

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