American Legal Realism: Sound and Fury Signifying Nothing?

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According to jurisprudential lore the American Legal Realists had a lasting effect on legal scholarship, when they exposed the limits of legal formalism and opened up legal research to the social sciences and humanities. In the last decades of the 20th century this legacy was the focus of much bitter controversy between the self-appointed heirs to Realism of the Critical Legal Studies (CLS) movement and their mainstream colleagues in the legal academy. Together with the CLS critique, this heated controversy now largely seems to have faded away. So was this discord over Legal Realism all “sound and fury signifying nothing”? Was Richard Rorty right when he concluded in 1990 that Legal Realism — and the Pragmatist notions on which it was premised, — had become banal, because its central ideas had become truisms and are now the unspoken assumptions of everybody in the legal field.¹ This is certainly a conclusion that has been repeated by many legal scholars, since. In a recent book Brian Tamanaha has gone even further. According to him we are not only ‘all Realists, now,” but in many ways we were always all Realists, already. Tamanaha argues that much of the controversy attending Legal Realism was overblown and that the Legal Realists, their radical reputation notwithstanding, were voicing concerns which were, and are, fairly commonplace among lawyers and legal scholars. Hence, Tamanaha wants us to move beyond the fruitless Formalist-Realist-divide and to embrace the moderate consensus of “balanced realism” that has been the mainstay of American law all along.²

Yet, for all the talk about the banality of the Realist insights, Legal Realism remains a body of theory that legal scholars return to, to argue for their respective transformative programs. Many legal scholars still believe the

² Tamanaha 2010.
core insights of Realism have still not been fully incorporated. The New Realism Project, for instance, has called for a more rigorous application of the type of interdisciplinary socio-legal research first advocated by the Realists. Brian Leiter has returned to the Realists to argue for a naturalized jurisprudence. Much in the spirit of Legal Realism, the late Philip Selznick in his last book called for a 'Humanist Science' of law. And, Steven Winter has expanded the Realist program to a new discipline altogether. If the Legal Realists were alive today, he argues, they would probably embrace cognitive science.

This paper will question the notion that Legal Realism has largely become banal. It will argue that there is still a debate over the legacy of Legal Realism, but this debate is on a very different set of themes. The focus is no longer on the political, substantive issues that dominated the CLS controversies over Legal Realism, but primarily on the methodological themes that Legal Realism raised and that are still topical. This shift in focus should be welcomed. It centers attention on the right issues. What is still important and relevant about Legal Realism today, I have argued elsewhere, is not its substantive critique of the hidden politics of law, but its broader “sensibility” and “way of looking at problems.” Legal Realism supplies a Pragmatist vision of what legal scholarship can be, that is still relevant for a contemporary understanding of law.

This article will try to shed some light on the new contours of the debate on Legal Realism. It will try to sketch the new fault lines that have opened up. These exist not only between the adherents and the skeptics of Legal Realism, about the relevance, or irrelevance, of Realist ideas for present day scholarship. There is also evidence of a new fracture dividing contemporary proponents of Legal Realism between what I will call methodological naturalists, who restrict their reception primarily to the scientific program of Realism, and substantive naturalists, who believe that an embrace of this scientific program also entails a commitment to certain substantive positions.

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3 Leiter 2007.
4 Selznick 2008.
5 Winter 2001, p. 42.
These intramural rival positions among the present-day advocates of Realism can be traced back to two different interpretations of W.V.O. Quine’s seminal critique of the synthetic/analytic distinction — one by Brian Leiter and the other by Hilary Putnam. According to Brian Leiter, what Quine has shown is that all analytical questions in the end turn on our empirical findings. A purely analytical legal theory is an exercise in futility. Hence, legal theory should be naturalized, it should embrace scientific method and try to focus on the empirical questions that are at issue in legal theory. This involves a species of legal positivism, Leiter believes, from which substantive questions can and should largely be exorcised. According to Putnam, on the other hand, the importance of Quine’s critique of the synthetic/analytic distinction is mainly that it has undermined the fact/value distinction. Once you show that facts are theory-dependent by collapsing the analytic/synthetic distinction, Putnam argues, you can no longer maintain that facts can be neatly separated from values. Hence, such disciplines as social science and law are inextricably and inevitably “entangled” with human values.

This article will fall apart into three sections. First, I will sketch the different ways in which Quine’s attack on the synthetic/analytic has been reconstructed by Leiter and Putnam and the importance of these different interpretations for the way legal scholarship is conceived. Secondly, I will discuss a number of current “Realistic” approaches to legal scholarship and their merits. Finally, I will argue that the approaches that are in line with Putnam’s vision of a substantive naturalism hold more promise than the ones that embrace the type of methodological naturalism Leiter argues for.

1. Two Ways About Quine

Central to contemporary notions of Legal Realism is what Brian Leiter has termed the “naturalistic turn” in philosophy. At the end of the 20th century Anglophone philosophy largely embraced a naturalistic framework with respect to its broad methodological outlook. The central figure associated with this naturalistic turn is W.V.O. Quine. It seems fair to say that Quine’s seminal

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6 De Been 2008, p. x.
critique of the analytic/synthetic distinction has been accepted by a majority of philosophers. Yet, there are two authoritative interpretations abroad in legal theory, two rival notions of what Quine’s work means for legal scholarship. These two rival notions of the naturalistic turn — one by Brian Leiter and the other by Hilary Putnam — inspire very different views on what legal scholarship should be.

1.1 Brian Leiter and Methodological Naturalism

Leiter, to begin with, argues that Quine’s famous critique of the synthetic/analytic distinction has convinced many philosophers to give up the notion of philosophy “as a purely a priori discipline”. The consequence of this, according to Leiter, is primarily that there is no longer a separate realm of analytic truths for philosophers and legal theorists to investigate and explain:

The collapse of the analytic/synthetic distinction — the distinction between “true in virtue of meaning” versus “true in virtue of fact” — has ramifications for philosophy. For on the Positivist picture, the “analytic” side of the divide was the business of philosophy, while the “synthetic” side was the business of empirical science. But if Quine is right, then there is nothing there on the “philosophy” side of the divide: there are no “truths in virtue of meaning” for philosophers to analyze and explicate. The only truths are empirical truths, and thus all questions are scientific questions. Philosophy, then, gets “naturalized,” i.e. it gets subsumed into science.  

There was no foundational work for philosophers to do, Quine argued, because all claims of conceptual analysis always remained revisable as a result of a posteriori theory construction in light of the empirical evidence. With his seminal critique Quine basically managed to naturalize philosophy. After the naturalistic turn, Leiter contends, philosophy basically became “a discipline whose methods and answers must be continuous with (perhaps supplanting by) scientific inquiry.” Hence, the importance of Quine’s critique of

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7 Leiter 2007, p. 144.
8 Leiter 2007, p. 138.
the analytic/synthtetic distinction is primarily the subversion of the idea that disciplines like philosophy or legal theory can still proceed with focusing purely on analytic truths. There is nothing that such pure conceptual analysis can add to our knowledge of the world, Quine showed, other than descriptions of the way words are used by a certain group in a certain time. Even though, this Quinean insight has had a profound influence and is widely accepted in contemporary philosophy, legal philosophy is still committed to the type of “lexicographic” philosophy that preceded the naturalistic turn. Legal philosophy, Leiter contends, still “proceeds via conceptual analysis and intuition–pumping as though nothing had transpired in philosophy in the last forty years.”

With this analysis Leiter basically turns the prevailing view of 20th century legal theory on its head. Most legal scholars treat Legal Realism as a crass and superficial legal theory from the past that embraced the mistaken notion that legal rules could be reduced to the predictable behavior patterns of “what the courts did in fact”. For most Legal scholars Hart exposed the shortcomings of this Realist approach, convincingly, by pointing out that lawyers and judges were not predicting legal behavior on the basis of regular behavior patterns, but were purposefully applying the rules and making moves in the going social practice of law. In other words, according to the self-image of many legal theorists, in 1961 legal theory moved beyond the old-fashioned and unsophisticated behaviorism of the Realists and reoriented itself on the profound and newfangled Wittgensteinian insights characteristic of the linguistic turn.

Leiter, however, argues that in philosophy the linguisticsitic turn has since been followed by a naturalistic turn. Hence, the Austin/Hart linguisticsitic approach to legal theory is starting to look dated, whereas Legal Realism is starting to look more current with its anticipation of the naturalistic direction that philosophy took at the end of the 20th century. Hence, Leiter believes that legal scholars should stop treating Legal Realism as “a discredited historical antique.” Rather, they should recognize that the Realists “were not bad legal philosophers, but rather prescient ones, philosophical naturalists before their

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10 Leiter 2007, p. 80.
time.” 11 This naturalism can be recognized primarily in what Leiter has termed the “core claim” of Legal Realism, namely that “in deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons (the latter figuring primarily as ways of providing post-hoc rationales for decisions reached on other grounds).” 12 The Realists realized that the answers to the questions of legal theory should not be sought in conceptual analysis, but in an empirical understanding of what the courts did. This judicial decision-making was not informed by esoteric theorizing, but by what Karl Lewellyn famously called “situation sense,” the implicit rules of thumb, the practical, workaday understanding of what certain fact situations required. This “situation sense” is an empirical, social phenomena and amenable to scientific study.

Although Quine is often associated with Pragmatism and credited with a profound critique of Logical Positivism, as the next section on Putnam will illustrate, Leiter stresses the profound continuity between Quine and Logical Postivism: “Like the logical positivists […] Quine remains committed to the primacy of science (especially physical science) in constructing our best theory of the world.” 13 This continuity with Logical Positivism is also something that Leiter recognizes in the work of the Legal Realists. Although, Legal Realism is often connected with Pragmatism, Leiter believes the marks of Logical Positivism are all over it. Thus, it should come as a surprise to nobody that the Realists wanted to develop a “science of law,” for instance, because the period from the mid-19th to the mid-20th century “marked the heyday of philosophical ‘Positivism’” and were the high point of “the view that natural science is the paradigm of all genuine knowledge.” 14

This embrace of a positivistic scientific outlook could have combined with any number of approaches to legal scholarship, but among the Realists the Logical Positivism verged into Legal Positivism. The Realists, Leiter argues, did not want to replace formalistic explanations in which legal decisions followed mechanically from the formal rules with idiosyncratic explanations in which law was “what the judge had for breakfast” — still a

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11 Leiter 2007, p. 57.
common caricature of Legal Realism. Rather, the Realists wanted to replace the theoretical, formal rules that judges cited as reasons for their decisions, but did a poor job explaining the outcome of cases, with the real rules that genuinely did explain and predict outcomes and that were part of the know-how of every practicing lawyer. Hence, what the Realists were trying to do was not to prove that law was unpredictable and that rules did not matter, but that the current rules fell short and a set of better rules could be formulated which would make legal decisions even more predictable.

Clearly, according to Leiter, Legal Realism, in his Quinean understanding, is naturalistic and pragmatic only in a very limited sense. For Leiter naturalism in philosophy, and in Legal Realism, is primarily “a methodological view to the effect that philosophical theorizing should be continuous with empirical inquiry in the sciences.” It is a naturalism that seeks to describe the world in the language of science, not a naturalism that seeks to derive any substantive conclusions from our scientific knowledge about what that world is like. There are no transgressions from “Is” to “Ought”. Legal Realism, as Leiter understands it, is also Pragmatist in only a limited sense. As Pragmatism is committed to consequentialism it is entirely possible for a pragmatist to embrace a positivistic conception of science as the method that will serve humanity best and produce the best results, or for a pragmatic legal scholar to embrace legal positivism as the perspective that will result in the best administration of justice. This does not mean that naturalism and pragmatism are essentially meaningless, however. Leiter notes “there is nothing banal about this pragmatism” because it leads to the conclusion that “the dominant approach to theory of adjudication in the Anglo-American world is based on a mistake.”

1.2 Hilary Putnam and Substantive Naturalism

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14 Leiter 2007, p. 92.
15 The a-typical work of Jerome Frank is mainly responsible for this widespread misconception about Legal Realism. Leiter speaks of the Frankification of Legal Realism.
16 Leiter 2007, p. 34.
17 Leiter 2007, p. 53.
In his book *The Collapse of the Fact/Value Dichotomy* (2002) Hilary Putnam also returns to the critique of the analytic/synthetic distinction of his former teacher W.V.O. Quine. Putnam, however, draws very different conclusions from Quine’s critique. According to Putnam, the significance of Quine’s attack on the analytic/synthetic distinction is primarily that it undermined the fact/value dichotomy. Since the collapse of the analytic/synthetic distinction also dragged down the fact/value dichotomy, Quine’s critique basically undermined the two central pillars on which the whole edifice of positivist science was based. Putnam, in other words, draws on the same Quinean insights as Leiter, to argue against the very conception of science that Leiter believes follow from these insights.

To understand Putnam’s point, it is important to sketch briefly what work the analytic/synthetic and fact/value distinctions did in the Positivist conception of science. The Logical Positivists were primarily interested in developing a pure and objective scientific language in which true statements could be made about the empirical world. This scientific language should be as factual as possible and avoid any form of subjectivity or metaphysical woolliness. Hence the Positivists tried to restrict their scientific language to either synthetic terms that referred to conditions and facts in the real world, or analytic terms that described the elementary and unambiguous relationships between these empirical facts. If the scientific terms referred to clear and objective facts and their clear and unambiguous relationships, then empirical phenomena could be described in an objective and scientific fashion.

To ensure the objectivity of our scientific statements they had to be carefully insulated against our subjective preferences. This is where the fact/value distinction was crucial. This distinction helped to keep science free from mere preferences and value judgments. Qualifications like “good,” or “honest” or “just” did not refer to anything concrete in empirical reality, but merely expressed our attitude towards certain empirical states of affairs. In a Positivistic conception of science there was no place for such expressions of attitude. Hence, the Positivists basically defined these areas of academic research out of the narrow boundaries of science. Ethical questions of right and wrong, esthetic judgments, political reason, or judicial prudence did not
refer to anything concrete in empirical reality, but merely expressed our attitude towards a given state of affairs.

In the course of the 20th century both these foundations of positivism fell apart. The first to crumble was the analytic/synthetic distinction. According to the Positivists scientific theories and statements, however complex, could always be broken apart into their constituent parts of, on the one hand, elementary, uncomplicated, sensory observations of empirical phenomena and, on the other, unambiguous, logical relationships between these empirical phenomena. The great success of relativity theory and quantum mechanics at the beginning of the 20th century, however, turned out to be a little bit of an embarrassment for this conception of science. Relativity theory and quantum mechanics simply assumed the existence of a number of elementary particles — electrons, protons, neutrons — without being able to observe these particles in any direct way. They were theoretically assumed to exist, and could only be proven indirectly through the success of the theory as a whole. Hence, what was fact and what was theory, what was an analytic and what was a synthetic statement, could not be neatly separated. Facts were theory-laden or even pure theoretical constructions. Fact and theory were completely entangled.18

This collapse of the synthetic/analytic distinction, according to Putnam, resulted in undermining the fact/value distinction. What caused problems for the fact/value distinction was primarily the loss of the notion of pure, unencumbered, naked facts, a notion that the collapse of the synthetic/analytic distinction made implausible. If it was no longer possible to separate facts from theories, if there was no longer a realm of pure, observable phenomena untouched by our different conceptions of the world, then how could we still believe facts can be neatly separated from our values? If we can no longer separate the facts neatly from our conception of the world, then neither can we separate them neatly from our substantive projects and objectives.19

Leiter mainly draws the conclusion from Quine’s attack on the analytic/synthetic distinction, that there is no longer any room for a fact-free

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19 Putnam 2002, p. 29-30
sphere of conceptual speculation in which philosophy and legal theory can proceed unhindered by, and out of reach of, empirical science. Putnam does not deny this consequence of Quine’s philosophy — indeed, Putnam is every bit as committed to science as Leiter — but clearly for him it is only one of the consequences to be drawn from the collapse of the analytic/synthetic distinction. Quine did not only bring about a naturalization of philosophy and legal theory, he also opened the doors of social science and law for the human values tangled up in many of their central concepts.

Maybe Putnam’s summary of the Pragmatic position in *Pragmatism: An Open Question*, can clarify his differences with Leiter. In *Pragmatism* Putnam condenses classical Pragmatic epistemology to four principles. The first two of these are essentially the ones that are at stake in Leiter’s analysis of the analytic/synthetic distinction: “1. Knowledge of facts presupposes knowledge of theories,” and “2. Knowledge of theories presupposes knowledge of facts.” In short, there is an interpenetration of theories and facts, the one cannot be separated from the other. The upshot of this is clear: scientists can no longer claim they are merely recording and describing the facts and philosophers can no longer claim they are simply clearing up conceptual questions. Leiter basically leaves it at that. Putnam, however, argues that once you accept 1 and 2, then this should lead you to also accept another 2 principles: namely: “3. Knowledge of facts presupposes knowledge of values,” and “4. Knowledge of values presupposes knowledge of facts.” Quine claimed, famously, that our knowledge is a grey cloth consisting of the black threads of fact and the white threads of our theoretical conventions. Putnam adds that if you accept this view, you should also accept that the texture of our knowledge is colored red by our values.

2. Methodological and Substantive Naturalism in Contemporary Legal Theory

2.1 Methodological Naturalists

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There are a number of approaches that fall within the limited conception of “methodological” naturalism advocated by Leiter. Leiter himself has provided some vague outlines of a naturalized jurisprudence. For all his sweeping criticism of the dominant direction of Anglo-American legal theory, however, his proposals are surprisingly moderate and tame. Naturalized jurisprudence mainly involves the type of armchair reflection on the realities of the administration of justice that many Legal Realist — untrained in the social sciences — ended up reverting to. Indeed, Leiter seems to have little appetite for the project of the New Legal Realists, who are primarily intent on making real the social science ambitions that the Legal Realist themselves struggled to put into practice. The costs and difficulties of social science research were prohibitive for most of the Legal Realists. In the information age, improved statistics, easy-to-use computer programs and a wide availability of data have put empirical studies of law within the grasp of legal scholars. Hence, the vision of a social scientific study of law — which remained a distant ideal for the original realists — is something that no longer involves negotiating insurmountable obstacles. New Legal Realism is primarily interested in exploring the new possibilities this affords for socio-legal study without any preset substantive notions about how this can transform law. A final application of the limited, methodological naturalism can be found in the work of Richard Posner. Posner has been a self-declared Pragmatist for a long time, but in recent years has developed into something resembling methodological naturalism. Indeed there are many parallels between Leiter’s notion of a naturalized jurisprudence and Posner’s conception of pragmatism as the unavowed ethos of American law.

*Brian Leiter*

In *Naturalizing Jurisprudence* Leiter argues that if anything was wrong with the empirical studies the Legal Realists engaged in, it was not so much their basic conception of what legal research should be — i.e. an empirical discipline focused on the “real” behavior of legal officials, — but rather their lack of skill and know-how in putting that conception into practice. Nevertheless, when it comes down to it, Leiter seems rather taken by the armchair analysis many
Realists engaged in when it came to inquiry into the empirical realities of the administration of justice. The type of empirical evidence gained from professional experience that the Legal Realists mostly relied on for their analysis connects with the practical knowledge that lawyers apply successfully in their daily business:

To anyone who has litigated, the answer seems plain enough: lawyers work with some degree of informal psychological, political and cultural knowledge about judges and courts that constitutes what we might call a ‘folk’ social scientific theory of adjudication. The success of this folk theory — which is, after all, largely coextensive with the talents of lawyers (i.e. their ability to advise clients what to do, when to go on trial, when to settle, etc.) — constitutes the core of a naturalized jurisprudence."²²

These insights drawn from practical practitioners’ experience should not be understood as information that undermines the positivist notion of law as an authoritative system of rules. Rather, this information showed the real rules that legal officials applied. It constitutes a naturalistic understanding of law as the system of rules that can be empirically observed in legal practice. They are what the legal officials actually do about disputes, to use Karl Llewellyn’s famous definition. Hence, Leiter claims: “The American Legal Realists, as I read them, are tacit legal positivists: they presuppose views about the criteria of legality that have affinities with positivist accounts of law in the sense that they employ primarily pedigree tests of legal validity."²³

Even though Leiter seems quite reserved about much of the actual research the Legal Realist approach inspired, he also seems reluctant to embrace an approach that would integrate and apply social science methodology in legal research more rigorously and consistently. When Leiter considers the ambition of the New Realism Project to develop a more rigorous interdisciplinary approach to the empirical study of law, for instance, he seems to reject any attempt to develop the modest use of “folk” science characteristic of Legal Realism into a more systematic research methodology. The approach employed by the Legal Realist, he contends, has “essentially nothing” to do

²² Leiter 2007, p. 55.
²³ Leiter 2007, p. 121.
with the New Legal Realism Project. The Realists were interested in what the courts do in fact, of course, but “their approach to the facts about what the courts do almost entirely eschewed social scientific inquiry, and for good reasons.” The few Realists who were serious about doing more rigorous social science were signal failures. Leiter suggests that the insulation of most Legal Realists from actual social science method might actually have been a boon. It explains, in part, why Realism was “so influential in American law: you didn’t need social science training to do this kind of analysis, you just needed to be a sensitive and skeptical reader of court opinions, something good lawyers are, well, good at.”

New Legal Realism

The New Realism Project is a rather loose and eclectic platform to explore ways to do empirical studies into law. The website dedicated to the project states: “NLR research […] involves sophisticated linking of empiricism and theory, guided by best practices within the social sciences. Like the "old" legal realists, we seek to bring the best of current social science and legal scholarship to bear on important policy issues of our day — but with the benefit of several generations of new knowledge.” The New Realism Project is a big-tent initiative that seeks to embrace a wide variety of quantitative and qualitative approaches to empirical legal study. The focus of the project is not so much on framing a distinct approach to socio-legal study, as on mediating between the different disciplinary approaches it seeks to bring together. “The issue of translation between law and social science is a core issue for New Legal Realism,” write Erlanger et.al. in the Symposium issue of the Wisonsin Law Review that launched the New Legal Realism Project: “Our goal is to create translations of social science that will be useful even to legal academics and lawyers who do not wish to perform empirical research themselves, while also encouraging translations of legal issues that will help social scientists gain a more sophisticated understanding of how law is

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25 http://newlegalrealism.org/about.html
understood ‘from the inside’ by those with legal training.”

Indeed, the value of New Legal Realism, Mark Suchman and Elizabeth Mertz suggest, may lie precisely in its efforts to bridge the worlds of social scientists and legal scholars “in an inclusive and mutually respectful way.”

This heavy focus on methodological questions is not bereft of any social significance. New Legal Realism seeks to prevent failures in attempts to apply social science to "real world" problems: “NLR focuses on developing a systematic framework for translating between law and social science. This is especially important as law turns increasingly to social science for guidance in dealing with crucial legal and policy issues. Sloppy or inaccurate interdisciplinary translation on these issues can have serious social effects.”

Richard Posner

For Posner, Pragmatism involves a redirection of law towards “a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”

“pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance--and thus the best normative as well as positive theory of the judicial role.”

“the relation between legal pragmatism and legal positivism is intimate”

The similarities between Pragmatism and Logical Positivism, Posner contends, “are more conspicuous than the differences.” There is no necessary connection between philosophical Pragmatism and any substantive legal theory: “a pragmatist committed to judging a legal system by the results the system produced might think that the best results

27 Suchman and Mertz 2010, p. 574-5.
28 http://www.newlegalrealism.org/
would be produced if the judges did not make pragmatic judgments but simply applied rules. He might, by analogy to rule utilitarians, be a ‘rule pragmatist’.”33

Posner’s notion of what judges should do is something closely akin to paying attention to situation sense: “although both the positivist and the pragmatist are interested in the authorities and the facts (broadly construed — I am not talking only or even mainly about the facts developed at the trial through testimony, exhibits, and cross-examination), the positivist starts with and gives more weight to the authorities, while the pragmatist starts with and gives more weight to the facts. This is the most succinct description of pragmatic adjudication that I can come up with.”34

2.1 The Substantive Naturalists

Philip Selznick: Social Evolution

“Friendship, responsibility, leadership, love and justice are not elements of an external ethic brought to the world like Promethean fire. They are generated by mundane needs, practical opportunities and felt satisfactions.”35

Steven Winter: Cognitive Science

Cognitive science is a field that is developing at breathtaking pace. If you expect this scientific discipline, with its extensive use of MRI scanners, computer modeling, only to produce materialistic, reductive models of the mind, you would be wrong. Much of the latest work in cognitive science does not reduce people to sophisticated computers, but understands them as poetic world makers who incessantly breathe meaning and structure into the chaotic reality that surrounds them. As Steven Winter observes there “is

something genuinely glorious about the irrepressibly imaginative, creative, and fecund quality of human rationality.”\(^{36}\)

“The brain is neither a passive recorder of external stimuli nor a mere processor of symbols, but a dynamic associative mechanism whose active correlations shape what we perceive and how we think.”\(^{37}\)

Central to the way cognitive linguistics understands human reasoning is the notion of metaphor. This flies in the face of the conventional understanding of reasoning in legal scholarship. For most legal scholars reasoning is about clear concepts, literal meaning, linear arguments. Metaphors are rhetorical devices that might illuminate, but that are also likely to distort and mislead. The literal and linear conception of language, however, does not fit with what cognitive scientists have discovered about reasoning and language. As Steven Winter has pointed out: “Metaphor is a central modality of human thought without which we cannot even begin to understand the complex regularities of the products of the human mind.”\(^{38}\)

According to Lakoff, from the viewpoint of cognitive science, the sensible way to look at concepts is something along the line of Gallie’s essentially contested concepts. Concepts may have some “agreed on central cases,” but because these cases have a complex structure and because they involve peoples disparate values, people will be forever contesting their meaning. Scholars like H.L.A. Hart, John Rawls and Ronald Dworkin, Lakoff contends, all have “agendas in philosophy and law requiring that concepts be fixed.” Hence, they all took issue with Gallie’s perspective. The typical strategy was to take “the agreed upon central case as the real concept” and to take “the contestations as mere ‘instantiations’ or ‘conceptualizations’ of the concept.” This does not gel with the insights of cognitive science, however. Indeed, Lakoff claims, “from a neural point of view, that makes no sense. Concepts

\(^{37}\) Winter 2001, p. 27.
\(^{38}\) Winter 2001, p. 43.
don’t exist in some abstract philosophical universe, where they can somehow be distinguished from ‘conceptions’ or ‘instantiations’. “\(^{39}\)

“The obsession of law is control. But the relentless rationalism of standard legal thought represents a futile quest to define things and pin them down in the face of a reality that is change and adaptation. What has evolved between our ears is a marvelously dynamic and adaptive mechanism for coping with just that reality. “\(^{40}\)

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Leiter, Brian (2007), *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*,


\(^{39}\) Lakoff 2008, p. 178.

\(^{40}\) Winter 2001, p. 21.


