LEGAL REALISM AND LEGAL REALITY

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This Article critically reexamines the relationship between Legal Orthodoxy and American Legal Realism. Legal Orthodoxy is a familiar jurisprudential perspective according to which judges do not make law, the law is complete or gapless, and the answers to legal questions are determinable through autonomous inquiry. Legal Orthodoxy featured prominently in the legal thought of Christopher Columbus Langdell and Joseph Henry Beale, and the Realist critique

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of the Langdellian conception of legal science and education is widely viewed as a decisive refutation of Legal Orthodoxy.

Contrary to this conventional wisdom, I argue that the Realist critique of Langdellianism only justifies a limited and modest departure from Legal Orthodoxy. While this may seem to deal a blow to the Realist agenda for legal science, legal education, and adjudication, I argue that it does not. In fact, the Realists could have justified the major planks of their agenda without challenging most aspects of Legal Orthodoxy. In explaining why this is so, I introduce an outlook I call Epistemic Legal Realism, a form of genuine Legal Realism that denies that judges make law, accepts that the law is complete or gapless, and acknowledges that the answers to all legal questions might be determinable.

The dialectical significance of this conclusion cuts two ways. On the one hand, it offers some support to scholars who want to push legal thought in a more Orthodox direction. On the other hand, it suggests there is fairly little room to oppose the substance of Legal Realism on jurisprudential or legal-philosophical grounds.

INTRODUCTION

This Article critically reexamines the relationship between Legal Orthodoxy—a perspective captured briefly, if imperfectly, in the slogan "The law is out there, and we can find it"—and American Legal Realism. Legal Orthodoxy is a position in legal metaphysics and legal epistemology. As such, Legal Orthodoxy and its negation, Legal Anti-Orthodoxy, are stances in jurisprudence or legal philosophy.[1] They do not, however, constitute or imply anything like

1. *See* BRIAN LEITER, NATURALIZING JURISPRUDENCE 84 (2007) (suggesting that "jurisprudence—as the study of philosophical problems about law—[is] most helpfully thought of" as being mainly concerned with epistemological and ontological questions about the law); Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 PHIL. COMPASS 457, 457–58 (2013) (using the terms "meta-legal theories" and "jurisprudential theories" to refer to theories that take positions on issues including "the metaphysics, epistemology, semantics, [and] psychology . . . implicated by our legal thoughts and practices"); *see also* David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Theory*, 128 ETHICS 37, 37–47 (2017). However, Legal Orthodoxy and Anti-Orthodoxy are not necessarily stances in *general* jurisprudence because they can be (and often are) claims about *particular* legal systems. *See* Plunkett & Shapiro, *supra*, at 44–45.

complete accounts of law's nature.[2] Legal Orthodoxy and Anti-Orthodoxy are better conceived as akin to domain-specific forms of philosophical realism and anti-realism, respectively. Just as a range of positions in the philosophy of mathematics, science, color, and metaethics are compatible with various forms of realism (or anti-realism) about their respective subject matters, Legal Orthodoxy and Legal Anti-Orthodoxy are each compatible with a wide range of broader legal-philosophical theories.

Legal Orthodoxy and Anti-Orthodoxy have played an important role in legal intellectual history and in particular the history of modern American legal thought.[3] For contemporary American lawyers, the most iconic opponents of Legal Orthodoxy are the American Legal Realists, whose strikingly non-traditional take on legal science, legal education, and adjudication represented "quite justifiably, the major intellectual event in 20th century American legal practice and scholarship."[4] The American Realists famously rejected Legal Orthodoxy and are widely seen as having mounted a largely irrefutable critique of it.[5] Thus, although the Realists were lawyers rather than philosophers, their assault on more traditional approaches to law and adjudication has had, and continues to have, an effect on the jurisprudential premises of modern legal discourse and thought.[6]

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2. For discussion of what is involved in developing theories about the nature of law, see SCOTT J. SHAPIRO, LEGALITY 1–12 (2011); Mark Greenberg, *How to Explain Things with Force*, 129 HARV. L. REV. 1932, 1944–45 (2016) (reviewing FREDERICK SCHAUER, THE FORCE OF LAW (2015)). For doubts about the viability of this sort of project, at least as it is most commonly pursued, see LEITER, *supra* note 1, at 175–79; Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. LEGAL STUD. 663, 669–70 (2011) [hereinafter Leiter, *Demarcation*]; Frederick Schauer, *On the Nature of the Nature of Law*, 98 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 457, 467 (2012).

3. I follow Thomas Grey in using the phrase "modern American legal thought" to refer to American legal thought since 1870. *See* Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 494 (1996) (book review).

4. LEITER, *supra* note 1, at 1.

5. *See, e.g.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE 1–3 (2010) (describing this as "the standard chronicle within legal circles" and citing sources).

6. Several major Realist texts are still regularly assigned in American law schools, notably Karl Llewellyn's book *The Bramble Bush* and his famous article about statutory construction. *See generally* KARL N. LLEWELLYN, THE BRAMBLE BUSH (Oxford Univ. Press 2008) (1930) [hereinafter LLEWELLYN, BRAMBLE BUSH]; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or*

The argument of this Article is, in its bare essentials, straightforward. Legal Orthodoxy has both metaphysical and epistemic components: it involves both views about the nature and sources of the law (legal metaphysics) and views about our relationship *to* the law as students or scientists *of* law (legal epistemology). We can therefore disaggregate Legal Orthodoxy into two components: Metaphysical Legal Orthodoxy and Epistemic Legal Orthodoxy. According to Metaphysical Legal Orthodoxy, judges discover but do not make law; moreover, the law is complete in the sense that it has no "gaps"—every legal question, however difficult, has a right answer. According to Epistemic Legal Orthodoxy, the answers to legal questions are always or almost always discoverable through relatively autonomous methods of inquiry. Both aspects of Legal Orthodoxy featured prominently in the traditional outlook on law the Realists were most keen to attack: the outlook which undergirded Christopher Columbus Langdell's influential conception of legal science and education, which was also closely associated with Joseph Henry Beale.

The American Legal Realists famously attacked the Langdellian approach to legal science, legal education, and adjudication. Their critique of Langdellianism was based on accessible, lawyerly arguments, the power of which stemmed from perspicuous insights into the way traditional forms of legal reasoning could be deployed to construct equally good arguments in favor of incompatible legal conclusions. In brief, their most important strategy for attacking Langdellianism was to emphasize the prevalence of legal indeterminacy.[7] The Realists' savaging of Langdellianism was not, however, destruction for destruction's sake: it paved the way for a new Realist perspective on legal science, legal education, and adjudication. This view was *realistic* in a sense entirely different from the one at stake in the divide between philosophical realism and anti-realism.[8] It reflected the kind of realism associated with

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Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395 (1950) [hereinafter Llewellyn, *Canons*].

7. *Cf.* Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1981 (2015) ("Realists like Llewellyn had argued that the 'law' was indeterminate largely by appealing to familiar methods of legal and judicial reasoning[] and showing how these methods often conflicted . . . .").

8. The terminological irony of the Realists' philosophical anti-realism has been intermittently commented upon at least since the heyday of the movement. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 93–94 (1995); JEROME FRANK, LAW AND THE MODERN MIND, at xx–xxi (Routledge 2017) (1930); Roscoe Pound, *The*

thinkers like Thucydides, Machiavelli, and Hobbes—a realism that attempts to portray things the way they really are, even if the resulting picture departs from the way we want things to be.[9] The Realists thought this new, realistic perspective would serve practicing attorneys and judges much better than the traditional Langdellian outlook did.

The Realists' indeterminacy-based critique of Langdellianism is often understood to show that Legal Orthodoxy fails in a relatively comprehensive way, and the Realists themselves seem to have thought as much. I argue, however, that the Realists provided sufficient grounds only for a limited and modest departure from Legal Orthodoxy. To be more specific, the Realists' indeterminacy-based critique leaves Metaphysical Legal Orthodoxy untouched and, as far as Epistemic Legal Orthodoxy goes, all the Realist critique really shows is that the answers to many legal questions remain unknowable to lawyers with more or less normal cognitive capacities, legal training, experience, and resources.

It may seem as if this constitutes at least a partial blow to the Realist proposal for changing the way we think about legal science, legal education, and adjudication. In fact, it does not. It turns out that the Realists could still have justified the major planks of their agenda even if they had explicitly declined to challenge Metaphysical Legal Orthodoxy and focused solely on undermining the strong form of Epistemic Legal Orthodoxy that lay at the heart of traditional Langdellian legal science. In explaining why this is so, I introduce an outlook I call Epistemic Legal Realism, a form of *genuine Legal Realism* that denies that judges make law, accepts that the law is complete or "gapless," and even acknowledges the possibility that the answers to all legal questions might be determinable. The upshot of my claims about the rational force of the Realists' indeterminacy-based critique is that the Realists gave Orthodox-inclined thinkers sufficient grounds only to embrace Epistemic Legal Realism—but that that is all the Realists really *needed* to do.

The dialectical significance of this result cuts two ways. On the one hand, the argument offers some support to scholars who want to push contemporary legal thought in a more Orthodox direction: it

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Call for a Realist Jurisprudence, 44 HARV. L. REV. 697, 697 (1931); *see also* Brian Leiter, *In Praise of Realism (and Against "Nonsense" Jurisprudence)*, 100 GEO. L.J. 865, 868 (2012).

9. *See* Leiter, *supra* note 8, at 867–71; Pound, *supra* note 8.

suggests that legal thinkers who embrace substantially Anti-Orthodox views primarily on the basis of the Realists' indeterminacy-based critique have reason to revisit their commitments. On the other hand, it suggests there is fairly little room to oppose the substance of Legal Realism on jurisprudential grounds. Even if judges do not make law, even if there are right answers to hard cases, and even if those answers might be knowable by inquirers with the right talents and training, the basic message of Legal Realism remains secure for practical purposes.

This may make it seem as if the debate over Legal Orthodoxy has little pragmatic significance. How could debates over Legal Orthodoxy matter if they do not lessen the practical import of the Legal Realist critique? This inference, however, is too hasty. I thus conclude by offering some (avowedly preliminary) Realist-flavored thoughts on why the stances we take vis-à-vis Legal Orthodoxy still have substantial practical consequences.

I. DEFINING AND DISAGGREGATING LEGAL ORTHODOXY

I have said that the slogan "The law is out there, and we can find it" provides a short summary of Legal Orthodoxy, and I have also said that Legal Orthodoxy can be conceived as akin to a domain-specific form of philosophical realism—namely, philosophical realism about law. Neither of these descriptions, however, is very illuminating. The notion that "The law is out there, and we can find it" is vague and at least partly metaphorical. As for the comparison to philosophical realism, two considerations limit the usefulness of this description. First, philosophical realism itself is hard to define. Second, Legal Orthodoxy is only *akin* to philosophical realism about law, for it involves commitments well beyond those commonly deemed constitutive of philosophical realism in other domains. Thus, I will begin by defining Legal Orthodoxy and further describing its various elements.

For purposes of this Article, I define Legal Orthodoxy as the union of Metaphysical Legal Orthodoxy and Epistemic Legal Orthodoxy. Metaphysical Legal Orthodoxy is in turn defined as the union of: (1) the view that judges discover the law but do not make law; and (2) the view that the law is complete. Finally, Epistemic Legal Orthodoxy is defined as the union of: (1) the view that the answers to legal questions are determinable; and (2) the view that legal inquiry is autonomous.

Thus, the whole apparatus is defined hierarchically as follows:

I. Legal Orthodoxy

1. Metaphysical Legal Orthodoxy

A. Judges discover the law; they do not make law.

B. The law is complete.

2. Epistemic Legal Orthodoxy

C. The answers to legal questions are determinable.

D. Legal inquiry is autonomous.

As a further shorthand, I will refer to the four basic elements of Legal Orthodoxy as "Orthodoxy A," "Orthodoxy B," "Orthodoxy C," and "Orthodoxy D," according to their labels in the diagram above. Thus, for example, Orthodoxy A is the view that judges discover but do not make law, and Metaphysical Legal Orthodoxy is the union of Orthodoxy A and Orthodoxy B. Finally, I define Legal Anti-Orthodoxy as the rejection of Legal Orthodoxy, Metaphysical Legal Anti-Orthodoxy as the rejection of Metaphysical Legal Orthodoxy, and so on. Legal Orthodoxy is thus the conjunction of four elements: Orthodoxies A, B, C, and D. The individual elements may sound familiar, but they are not self-explanatory, so it is worth explicating them in some detail.

Orthodoxy A, the view that judges discover but do not make law, is no doubt the most familiar-sounding element of Legal Orthodoxy. It would be impossible to list all the lawyers, judges, and scholars who have taken stances on this proposition.[10] Despite the topic's familiarity, however, it is important to think carefully about what the Orthodox view that judges do not make law really amounts to. We should highlight an initial distinction between three very different claims about judicial lawmaking: (1) judges *do not* make law; (2) judges *cannot* make law; and (3) judges *should not* make law. I am not aware of anyone who has advanced the first claim except as a trivial consequence of the second, so we can set it aside. The second and third claims seem to be of primary interest, and they tend to go together. They are nonetheless separable, so it is

10. *See* Zechariah Chafee, Jr., *Do Judges Make or Discover Law?*, 91 PROC. AM. PHIL. SOC'Y 405, 405–06 (1947) (discussing examples of those who adhere to Orthodoxy A).

important to clarify that what is really essential to Orthodoxy A is the claim that judges *cannot* make law, that is, that they lack the power to do so. This is a claim about what is *possible* (or, more precisely, impossible) but does not have to be a claim about what is possible *in all legal systems*. Most people who have denied that judges can make law have done so with a particular legal system or range of legal systems in mind—such as those of England and the United States—and their claims are best understood as restricted to what judges in the relevant legal system(s) can do.

The next question is what kind of "lawmaking" is at issue. At the outset, no one would deny that judges can take actions that alter legal rights, legal obligations, and so on. Judges—and indeed, ordinary citizens—do this all the time. A sentencing judge acting within statutorily authorized discretion imposes supervised-release conditions; a court certifies a class or issues a judgment ordering the defendant to pay damages; a merchant and a buyer agree to a sale. All of these actions alter legal rights and obligations and thus alter the content of the law in at least a certain very capacious sense.[11] It is therefore unsurprising that people sometimes refer to acts like this as instances of "lawmaking."[12] It is not a misuse of language to do so. Still, this is clearly not the sort of "lawmaking" people have in mind when they argue over whether judges make law.

The historically important dispute, it seems, is about the significance of precedent,[13] notably about how past judicial decisions and/or opinions affect the law.[14] It is probably easiest to understand the issue through concrete examples rather than abstract formulae. Suppose the Supreme Court takes a case dealing with racial segregation (*Plessy v. Ferguson*) and concludes that the Fourteenth Amendment permits states to mandate "equal but separate"

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11. *See* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1295 (2014) (defining "the content of the law" as the set of all "legal obligations, powers, and so on [that exist] in a given jurisdiction at a given time").

12. *See, e.g.*, A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 42 (Liberty Fund 8th ed. 1982) (1915) (referring to corporations as "subordinate law-making bod[ies]"); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017) (referring to contracting as a kind of lawmaking).

13. *Cf.* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 561 (2019).

14. *Cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987) ("[I]t remains difficult to isolate how much of the effect of a past decision is attributable to what a past court has *done* rather than to what it has *said*.").

facilities for different races.[15] Decades later, the Court takes another case implicating the same issue (*Brown v. Board of Education*) and decides the opposite, at least "in the field of public education."[16] Has the Court made law? In other words, was this kind of segregation legally permissible in the time between *Plessy* and *Brown* but legally forbidden after *Brown*, and if so, is this to be explained by the fact that the Court decided *Brown* the way it did? This seems to be the sort of thing that is typically at stake in debates over whether judges make law.[17] It is easy to imagine analogous cases involving statutory law or common law rather than constitutional claims, but the *Brown* example suffices to provide a template.[18]

Orthodoxy B, the view that the law is complete, also requires some explication. Metaphorically speaking, the idea here is that the law is "gapless."[19] More formally, we could say that Orthodoxy B is commitment to *legal bivalence*, where legal bivalence is the view that every legal proposition is either true or false. Consider, for example, a version of H. L. A. Hart's famous "vehicles in the park" hypothetical.[20] A defendant is accused of violating an Illinois statute

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15. 163 U.S. 537, 540, 544, 551–52 (1896).

16. 347 U.S. 483, 495 (1954).

17. For example, this is the type of scenario Beale had in mind when he claimed, as against John Chipman Gray, that judges do not make law, and it is also what Jerome Frank had in mind when he later sided with Gray against Beale. *Compare* JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS 148–49 (1916) (discussing Michigan decisions on exemplary damages), *with* FRANK, *supra* note 8, at 49–50 (discussing Supreme Court holdings on the constitutionality of a statute).

18. Note, however, that supposed cases of judicial lawmaking usually do not involve overruling a previous decision. My use of *Plessy* and *Brown* as an example is not meant to suggest otherwise. Cases where an important precedent is overruled tend to be the most dramatic and stark and thus serve as particularly useful (and therefore popular) examples. *See supra* note 17. But the real *sine qua non* of the cases in question—the cases whose proper characterization proponents and opponents of Orthodoxy A would dispute—is not a past decision being overruled. Rather, the *sine qua non* appears to be the issuance of a decision and/or opinion that: (1) has precedential force; yet (2) involves more than a clearly correct application and/or statement of the law as it existed prior to the decision. Thus, for example, *Griswold v. Connecticut* would probably be described by most opponents of Orthodoxy A as a case of judicial lawmaking, even though it did not overrule past decisions. 381 U.S. 479 (1965).

19. *Cf.* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 7 (1983) (defining "gaps" as "factual situations to which no existing norms apply").

20. *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

that forbids taking vehicles into public parks.[21] The undisputed facts of the case are that the defendant took a bicycle into the park.[22] The case hinges on whether it is illegal to take a bicycle into a public park in Illinois. This may be a hard case in any number of senses.[23] For example, reasonable and informed people might disagree about whether it is illegal to take bicycles into public parks in Illinois. Judges might have a terrible time deciding a case that hinged on this issue. Orthodoxy B is not *per se* a stance on whether there are hard cases or how common they are. But if Orthodoxy B is right, then if the judges write an opinion claiming it is legally permissible to take bicycles into public parks in Illinois, that claim is true or false—and it was true or false the day before the opinion was written.[24]

We can now move on to the elements of Epistemic Legal Orthodoxy. We begin with Orthodoxy C, the view that the answers to legal questions are determinable. "Legal questions" here refers to questions about what the content of the law is: about what is legally permitted, what is legally forbidden, what the legal consequences of certain actions are, etc. "Determinable" here means "capable of being definitely ascertained."[25] Thus, Orthodoxy C is a claim about *knowledge* and our ability to obtain it. It's also a possibility claim: it is a claim about what we can possibly learn. But what kind of possibility is on the table?[26] And who are "we," anyway? These are fair questions, and they reveal one way in which Orthodoxy C might facially be interpreted in stronger and weaker ways.[27] In the abstract, however, Orthodoxy C would be satisfied in at least a

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21. *Cf. id.*

22. *Cf. id.*

23. The term "hard" has been defined in various slightly different ways in the literature on "hard cases." *See, e.g.*, BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 63 (1993); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 83 (1977); SHAPIRO, *supra* note 2, at 234–35; Connie S. Rosati, *Some Puzzles About the Objectivity of Law*, 23 LAW & PHIL. 273, 279–80 (2004).

24. Orthodoxy B does not, however, tell us whether the truth of the proposition asserted might have changed as a result of the judges' decision. That question has to do with Orthodoxy A, not Orthodoxy B.

25. *Determinable*, OXFORD ENGLISH DICTIONARY (online ed. 2021).

26. There are many kinds of possibility, including logical possibility, conceptual possibility, metaphysical possibility, physical possibility, and various kinds and degrees of practical possibility.

27. *Cf.* Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 139 (1990) (listing several potential "conception[s] of epistemic determinacy").

comparatively weak form even if the answers to some legal questions were determinable only by those with the superhuman epistemic resources of Dworkin's Hercules—that is, by "lawyer[s] of superhuman skill, learning, patience and acumen."[28]

Finally, there is an additional way in which Orthodoxy C admits of more or less strong interpretations, namely, the range of legal questions to which it applies. On its face, of course, Orthodoxy C is a claim about *all* legal questions; the absolute form of Orthodoxy C admits no exceptions. However, it is certainly possible to take *more* or *less* Orthodox stances on whether the answers to legal questions are determinable, for example, by positing that most (but not all) legal questions have determinable answers, or that some (but not most) do. Indeed, most contemporary lawyers probably take a stance between the extremes of Orthodoxy and Anti-Orthodoxy on this point; though of course, most have no strong position on where *exactly* they fall on the spectrum.[29]

Orthodoxy D, the view that legal inquiry is autonomous—or, more accurately, that it can be autonomous—is a bit harder to give precise content, but the general idea is straightforward. Legal inquiry is here understood as the process by which one comes to know the answers to legal questions, that is, the process of figuring out the content of the law. Autonomy is understood as separability from other domains of inquiry, the idea being that if legal inquiry is autonomous, we can figure out what the law is without recourse to moral philosophy, empirical social science, or the like. None of this is terribly precise, if only because the boundaries between different domains of inquiry are far from rigid. Moreover, autonomy in this sense admits of degrees, and nobody could think that legal inquiry is *purely* autonomous: there is no way, for example, that one could figure out U.S. law without some "extra-legal" skills like English literacy and the ability to draw logical inferences. Still, we can intuitively distinguish more or less autonomous forms of inquiry. If, for example, utilitarianism is correct, then moral inquiry is not very autonomous; one must figure out a great deal about matters within

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28. *See* DWORKIN, *supra* note 23, at 105; *see also* RONALD DWORKIN, LAW'S EMPIRE 265 (1986) ("[Hercules] works so much more quickly . . . that he can explore avenues and ideas [real judges] cannot . . . . He does what they would do if they had a career to devote to a single decision . . . .").

29. In fact, it is unclear what an "exact" stance on this problem would even amount to or how one would try to express it. *Cf.* KENT GREENAWALT, LAW AND OBJECTIVITY 40 (1992).

the scope of the natural and social sciences in order to determine what actions will maximize happiness. By contrast, mathematics is relatively autonomous. In a sense, Orthodoxy D can be understood as a way of strengthening Orthodoxy C: it tells us something about the prerequisites for equipping a person to determine the answers to legal questions.

Now that I have defined Legal Orthodoxy in some detail, it is worth addressing a possible concern about my choice of terminology. Is it potentially misleading to use the name "Legal Orthodoxy" for this nexus of jurisprudential views? After all, it would be hard to argue that Legal Orthodoxy is a truly *orthodox* way of thinking about the law among sophisticated legal thinkers today. The widespread cliché that "we are all realists now"[30] is meant in part to capture the discomfort with Legal Orthodoxy within the modern legal profession. This is a fair concern, so I will briefly explain my choice of terminology.

First, my usage is not particularly original; it is more or less appropriated from Thomas Grey's seminal article on Langdell.[31] Second, the choice is partly driven by a desire to avoid the label "formalism," which carries a great deal of baggage and can be confusing in its own ways.[32] Finally, Legal Orthodoxy is tied in various respects to a venerable set of *political* orthodoxies that retain considerable purchase in American civic culture. Legal Orthodoxy is supported, as Hart put it, by "a long European tradition and a doctrine of the division of powers which," among other things, "dramatizes the distinction between Legislator and

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30. *See* LEITER, *supra* note 1, at 15; STEVEN D. SMITH, LAW'S QUANDARY 156 (2004); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005).

31. Grey defines "orthodoxy" somewhat differently, but my usage is inspired by his. *See* Grey, *supra* note 19, at 2 n.6.

32. To be sure, Legal Orthodoxy is in the neighborhood of what many have in mind when they employ terms like "formalism." *See, e.g.*, SHAPIRO, *supra* note 2, at 240–43; Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 111–12 (2010). But in my view, "formalism" would be a worse terminological choice for purposes of this Article. First, "formalism" is, in practice, "a term of abuse." TAMANAHA, *supra* note 5, at 161; *see also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988). I prefer a term with more neutral connotations. Second, "formalism" is associated with ideas and phenomena that are peripheral to the basic nexus of jurisprudential views I want to pinpoint. These include, for example, a preference for "rules" over "principles" or "standards." *See* Schauer, *supra*.

Judge."[33] This explains why judicial nominees are routinely prodded to state their adherence to Legal Orthodoxy (or at least gesture in the direction of it)[34] and why, as Kent Greenawalt puts it, even a "judge who conceives of herself as legislating rarely says so in an opinion."[35]

There is, therefore, a sense in which Legal Orthodoxy remains genuinely orthodox, even if most informed people do not believe it. Be that as it may, "Legal Orthodoxy" is ultimately a quasi-arbitrary label, and those who find the label infelicitous should feel free to substitute a different one.

II. LEGAL ORTHODOXY IN PRE-REALIST LEGAL THOUGHT

The American Realists were a diverse group with varying scholarly interests, but among the things that substantially united them was a shared hostility to—and a largely shared critique of—an influential status quo in American legal thought, an outlook against which their own preferred approach to legal science, legal education, and adjudication would provide a stark contrast.[36] Admittedly, the Realists had a tendency to attack "caricatured and typically nonspecified targets,"[37] and their habit of identifying those targets with hazy labels like "conceptualism" and "mechanical jurisprudence"[38]—labels that no one had or would self-apply—did not help. But we can get a fairly clear understanding of the kind of view the Realists meant to attack by consulting the writings of the

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33. H. L. A. HART, THE CONCEPT OF LAW 274 (3d ed. 2012).

34. *See* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1614–15 (2015); Leiter, *supra* note 32, at 128; Sachs, *supra* note 13, at 533; Paul Campos, *She's Lying*, DAILY BEAST (July 15, 2009, 6:44 PM), https://www.thedailybeast.com/shes-lying.

35. Kent Greenawalt, *Vagueness and Judicial Responses to Legal Indeterminacy*, 7 LEGAL THEORY 433, 445 (2001); *see also* Grey, *supra* note 19, at 51.

36. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 186 (1993).

37. Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 753 n.17 (2013).

38. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (discussing Realist disdain for "mechanical jurisprudence"); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 477 (1928) (criticizing overly "abstract conceptualistic theories of law").

two most common human foils for Realism: Christopher Columbus Langdell and Joseph Henry Beale.[39]

Langdell was the dean of Harvard Law School from 1870 to 1895.[40] Though he did not leave behind a large corpus of explicitly theoretical writings, his influence on American legal education was enormous: his legacy is still with us in the three-year postgraduate curriculum, the conception of legal scholarship as a career path distinct from practice, and the case method of teaching,[41] all of which were suited to Langdell's particular understanding of the law and its study. Beale, a conflict of laws scholar who joined the Harvard Law faculty under Langdell's deanship,[42] was also a natural target for critics of the overall Langdellian ethos, given his status as "one of the leading figures in the Harvard Law School and in American legal education" in the early twentieth century.[43] He was also known as a "leading exponent of C. C. Langdell's school of . . . jurisprudence"[44]—indeed, "the most self-consciously philosophical exponent" thereof.[45]

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39. *See* FRANK, *supra* note 8, at 53–61 (offering an extended attack on Beale and "Bealism"); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1234 (1931) (highlighting diversity among the Realists by saying "[t]hey differ among themselves well-nigh as much as any of them differs from, say, Langdell"); Yntema, *supra* note 38, at 473–74 (criticizing Beale); *see also* KRONMAN, *supra* note 36 ("What the realists all opposed was the conception of legal science that Langdell had offered . . . ."); Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 276 (Dennis Patterson ed., 1996) (noting that "Christopher Langdell, . . . along with certain followers (like Joseph Beale), was a figure for whom the realists reserved a special antipathy"); Schauer, *supra* note 37; Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2071 (1995) ("The expression 'jurisprudence of conceptions' was, for Pound and the realists, code for Langdell and Beale.").

40. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906, at 2 (2009).

41. *Id.* at 6–7; *see also* Morris R. Cohen, *A Critical Sketch of Legal Philosophy in America*, *in* 2 LAW: A CENTURY OF PROGRESS, 1835–1935, at 266, 292 (Allison Reppy ed., 1937).

42. Samuel Williston, *Joseph Henry Beale: A Biographical Sketch*, 56 HARV. L. REV. 685, 686–87 (1943).

43. Warren J. Samuels, *Joseph Henry Beale's Lectures on Jurisprudence, 1909*, 29 U. MIA. L. REV. 260, 260 (1975).

44. *Id.* at 260–61; *see also* Cohen, *supra* note 41, at 290–91 ("Langdell's point of view is still best represented by Professor Beale . . . . The newer so-called realistic writers on jurisprudence frequently call him a legal fundamentalist.").

45. Grey, *supra* note 19, at 29.

Both Langdell and Beale conceived of the law as a body of *rules*,[46] not in the sense of descriptive generalizations like the "rule" that the Earth orbits the Sun once every 365 days but rather in the sense of prescriptive standards, like the rule that men are to take off their hats in church.[47] But where do these rules come from? Some, of course, are the result of legislation,[48] but Langdell and Beale were more concerned with the rules of the common law. Although Langdell and Beale have been tarred by haphazard polemics intimating that they thought of the common law as an otherworldly and/or rationally perfect body of norms,[49] this is incorrect; in fact, they thought the rules of the common law depended on social practice. Langdell emphasized to students that the rules had developed by "slow degrees,"[50] and his discussion of the consideration doctrine in his summary of contract law makes it clear that he believed a common-law rule could be firmly established even if it was not rationally ideal.[51] As for Beale, his treatise on conflicts explicitly offers a conventionalist account of the common law: "[t]he law of a given time," Beale claimed, "must be taken to be the body of principles which is accepted by the legal profession."[52] Needless to

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46. *See* BEALE, *supra* note 17, at 132; C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii (2d ed. 1879).

47. For discussion of the important difference between descriptive and prescriptive rules, see HART, *supra* note 33, at 9–10; Karl N. Llewellyn, *Legal Tradition and Social Science Method—A Realist's Critique*, *in* ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 89, 98–99 (1931); compare John Dickinson, *The Law Behind Law*, 29 COLUM. L. REV. 113, 133 (1929) (explaining the difference between "jural" and "scientific" laws); John Dickinson, *The Law Behind Law: II*, 29 COLUM. L. REV. 285, 288–90 (1929) ("[J]ural laws are not, like scientific 'laws,' descriptive statements of verifiable relations between persons or things . . . . Rather they are *prescriptions* of specific consequences to be attached by judicial—*i.e.*, human—action to particular relations . . . .").

48. On statutory law, see BEALE, *supra* note 17, at 133–34.

49. *See* FRANK, *supra* note 8, at 60 (accusing Beale of being an "[a]bsolutist" who believes in an "extra-experiential . . . law in the sky, above human experience"); Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (referring to Langdell as "the greatest living legal theologian").

50. LANGDELL, *supra* note 46.

51. C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 60–61 (2d ed. 1880).

52. BEALE, *supra* note 17, at 150. It is important to understand that this is a metaphysical claim about the law, not a semantic claim about the meaning of the word "law." For a discussion of the difference, see SHAPIRO, *supra* note 2, at 7. Indeed, Beale offers a very different "[d]efinition of [l]aw" in his treatise: "[l]aw is the body of general principles and of particular rules in accordance with which civil

say, this view would be hard to square with the idea that the law is unchanging or rationally perfect—Beale made clear he thought it was neither.[53]

This much was common ground for Langdell and Beale. As far as Legal Orthodoxy goes, all four of its elements are either explicitly asserted in, or can fairly be inferred from, the writings of one or the other. Although it seems probable that both Langdell and Beale embraced Legal Orthodoxy in its entirety, they emphasized different aspects of Orthodoxy in their writings.[54] Beale's jurisprudential writings provide a better, more explicit discussion of Metaphysical Legal Orthodoxy, whereas Langdell's comments on legal science and pedagogy are more pertinent to Epistemic Legal Orthodoxy. Thus, in order to understand the role of Legal Orthodoxy in the pre-Realist outlook that Langdell and Beale epitomized, it will be most straightforward to begin with the place of Metaphysical Legal Orthodoxy in Beale's jurisprudence then turn to Epistemic Legal Orthodoxy as it figures in Langdell's writings on legal science and education.

A. Beale on Metaphysical Legal Orthodoxy

Although he is best known as a conflicts scholar, Beale also taught jurisprudence at Harvard,[55] and his *Treatise on the Conflict of Laws* includes a chapter titled "Law and Jurisdiction," which

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rights are created and regulated and wrongs prevented or redressed." BEALE, *supra* note 17, at 132. Note that this definition says nothing about how legal rules come into existence or why the rules are what they are. Thus, Beale did not think the law is *by definition* the body of principles accepted by the legal profession.

53. BEALE, *supra* note 17, at 149. Beale likewise saw no place for natural law in jurisprudence, declaring that "no principle of natural law can be regarded as law . . . until it is established as a principle of some actually living and working system of positive law." *Id.* at 143.

54. It bears emphasis, more generally, that Langdell and Beale were not intellectual clones. Though I believe it is fair to describe them as sharing the same broad outlook on law, that does not mean they thought exactly alike, even on questions of legal metaphysics and epistemology. In this connection, it is worth noting that Beale was surprisingly ambivalent in his eulogy for Langdell in the *Harvard Law Review*. *See* Joseph H. Beale, Jr., *Professor Langdell—His Later Teaching Days*, 20 HARV. L. REV. 9, 9 (1906). Still, Beale elsewhere praised Langdell's basic approach to legal education. *See* Joseph H. Beale, *Juristic Law and Judicial Law*, 37 W. VA. L. REV. 237, 241–42 (1931) [hereinafter Beale, *Juristic Law*].

55. Samuels, *supra* note 43, at 261.

discusses the nature and sources of law.[56] As we will see, Beale endorsed both elements of Metaphysical Legal Orthodoxy.

1. Judicial Lawmaking (Orthodoxy A)

Beale made a point of embracing Orthodoxy A, the view that judges do not make law.[57] He was well aware of the controversy on this topic, acknowledging "the prevailing fashion . . . to assert that under guise of discovering legal propositions the judges of common-law courts make the law which they purport to find."[58] However, he urged "discarding the view that the decision of a court in and of itself makes law," even so far as the common law is concerned.[59]

Beale offered four reasons for taking an Orthodox stance on judicial lawmaking. First, "the function of changing the law has never been committed by the sovereign to the judge"—essentially, an appeal to the traditional understanding of the separation of powers.[60] Second, "if the judge makes the law he declares, then the law did not exist at the commission of the alleged wrong with which he is dealing in the litigation," so "the defendant is held for a wrong which was not a wrong at the time he did it."[61] Here, Beale raised a familiar worry about *ex post facto* laws or retroactive enforcement of rules.[62] Third, "states are constantly overruling their own decisions," so if we assume that "each decision made the law," we must accept the "singular"—and, Beale evidently assumed, absurd—conclusion "that the law [has been] changed in [a jurisdiction] backwards and forwards a dozen times within a few years."[63] Fourth, sometimes multiple "courts hav[e] coordinate jurisdiction to declare the law of a particular state and without a common superior," as when Georgia

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56. BEALE, *supra* note 17, at 114.

57. His student Zechariah Chafee, Jr. accordingly included Beale among historically significant legal thinkers who took the view that judges discover rather than make law. Chafee, *supra* note 10, at 405.

58. *Id.* at 147–48.

59. *Id.* at 148.

60. *Id.*; *cf.* HART, *supra* note 33 and accompanying text. Curiously, Beale's further discussion on the point seems to blur the question of whether judges have the *power* to change the law with the question of whether they have the *right* to do so. On the significance of the distinction, see *supra* text following note 10.

61. BEALE, *supra* note 17, at 148.

62. *Cf.* Rogers v. Tennessee, 532 U.S. 451, 460–62 (2001); Chafee, *supra* note 10, at 417.

63. BEALE, *supra* note 17.

had two supreme courts.[64] If in such a situation the courts disagree on some point, "it would be impossible to find any existing law of [the jurisdiction] made by the courts."[65]

Replies to these arguments exist, of course, but Beale did not discuss them. He did, however, address one major question about the declaratory theory he endorsed: namely, what is the mechanism by which the law changes in the absence of legislation? The basic answer was dictated by his conventionalist posit that the law, or at any rate the unwritten law, is the "body of principles which is accepted by the legal profession."[66] Clearly no single judge, no single court, or even the entire judiciary is coextensive with the legal profession. So even if judges' written opinions accurately reflect the principles the judges *themselves* accept, it certainly does not follow, on this theory, that the law is what judges say it is, either in the strong sense that the law is what it is *because* judges say that is what it is, or even in the weak sense that the law *in fact* coincides with what judges say it is.

But under Beale's theory, could judges' written opinions on the law still end up being self-fulfilling if they were persuasive enough? Suppose some principle P *was not* part of the law at a given time, but that an opinion of the highest court in the jurisdiction subsequently said P *was* part of the law. If the rest of the profession were prepared to give absolute deference to the court's opinion, then P would evidently become law given Beale's underlying conventionalist theory. A principle that had not been law would have become law and the change would be explained—at least causally—by the fact that the court said that principle was law.

Beale recognized that this could be a consequence of his theory. But he simply denied that judges actually exercised ironclad control over the opinions of the wider profession. He granted that "judges

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64. *Id.* at 149.

65. *Id.* This example may seem remote from present-day experience, but analogues of it still exist. For example, the structural similarity to modern debates about departmentalism should be apparent. Karl Llewellyn later acknowledged this objection to Anti-Orthodox views and rejected it. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 455–56 (1930).

66. BEALE, *supra* note 17, at 150. Whether this posit was confined to the common law is not completely clear from the text of Beale's treatise. On its face, it seems to be a statement about law in general. But it appears in a discussion otherwise confined to the common or unwritten law and seems more intuitively plausible as a theory of the common law than of statutory or constitutional law.

have a preponderating share in fixing the opinion of the profession"[67] but insisted that they are "not the sole element" and pointed to law professors and practicing attorneys as alternative, non-judicial influences on overall professional opinion.[68] The basic picture seems to be as follows. Judges' decisions and opinions *do* have an effect on the views of the profession more broadly—indeed, a large one—and thus an effect on the law,[69] one that certainly extends beyond the limited power of altering the legal rights and duties of specific parties to specific lawsuits.[70] But legal scholarship can also influence professional opinion, and so can "the argument[s] of practicing lawyers."[71] So, of course, could sources external to the profession. Obviously, the relative causal influence of these different factors will vary in different times and places, as Beale himself explicitly emphasized.[72] But regardless of the details, on Beale's theory a claim about the law in the opinion of a court—even the highest court in the jurisdiction—would not be self-fulfilling if the wider legal profession disagreed with it. And this, he thought, was not an uncommon occurrence.[73]

Of course, Beale's view does face some problems. On its face, the claim that "[t]he law of a given time must be taken to be the body of

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67. *Id.* at 150. Beale's acknowledgment that judges have played a "preponderating" role in fixing professional opinion suffices to explain his willingness at times to casually refer to the common law as a body of "judge-made law." *See* Beale, *Juristic Law*, *supra* note 54, at 241; *see also* Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 277, 279 (1905).

68. BEALE, *supra* note 17, at 150; *see also* Beale, *Juristic Law*, *supra* note 54, at 242–43. Beale may have tended to overstate the influence of law faculties, which would be unsurprising given his evident desire for them to be influential. *See* Joseph H. Beale, *The Necessity for a Study of Legal System*, *in* PROCEEDINGS OF THE FOURTEENTH ANNUAL MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 31, 34–35 (1914).

69. *Cf.* Beale, *Juristic Law*, *supra* note 54, at 240 (referring to English common law as "a law that in its origin and throughout its history has been developed by the courts, not so much because [the] judges made the law by their decisions as because they led the thought and fixed the reasoning of the profession.").

70. For further discussion of this limited power, see generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1808 (2008).

71. BEALE, *supra* note 17, at 150.

72. *Id.*

73. *See id.* at 147 ("[W]e in the United States have almost reached the condition of affairs which prevails in France, Germany and Italy; where rules of law are accepted as fixed by precedent only when there is a great and practically unanimous body of decision behind them.").

principles which is accepted by the legal profession" suggests that a principle is part of the law if and only if the profession accepts that it is part of the law. So understood, Beale's theory—even if limited to the common law—is jarringly incompatible with everyday legal reasoning, discourse, and argumentation.[74] Note, for example, the awkward position in which it puts legal dissenters—people whose legal opinions differ from that of the profession in general. An influential critic, such as a respected judge or law professor, might be able to change prevailing legal opinion (and hence the law itself) by convincing others of some legal principle that they had not formerly accepted. The difficulty, however, is that the usual way for a dissenter to do this is to convince the rest of the profession that they are wrong about what the law is, typically on the basis of arguments other than appeals to prevailing opinion. If Beale is right, however, a dissenter *cannot* be right about what the law is: his or her criticism will necessarily involve uttering falsehoods and getting others to believe those falsehoods (and typically for bad reasons, no less).[75] One suspects that Beale would not have accepted this error-theoretic[76] account of legal disagreement, given that he thought law was a progressive science.[77] For it seems that under a literal interpretation of his theory, a legal scientist can effect substantial progress only by failing *qua* scientist of law.[78]

Perhaps, then, we should not interpret Beale's apparently austere conventionalism in such absolute and literal terms. Beale himself went on to say that it "is *generally* true that the unwritten law changes with the change of professional opinion about it,"[79] which suggests a slightly less rigid understanding of the relationship between law and professional opinion. And in any event, it would be more philosophically charitable to assume that Beale did not *quite*

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74. Note, however, that this claim cannot be attacked as an incorrect *definition* of "law." It is not a semantic claim. *See supra* note 52. One might argue that it depends for its plausibility on faulty or idiosyncratic semantic *presuppositions*, but that would be a subtler critique.

75. Hartian positivists face a form of this problem as well, albeit one more limited in scope. *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1222–24 (2009).

76. *See id.* at 1225–26 (discussing error theories); *see also* Matthew X. Etchemendy, *New Directions in Legal Expressivism*, 22 LEGAL THEORY 1, 9 (2016).

77. *See* BEALE, *supra* note 17, at 149.

78. Beale may have been unaware of this conundrum, but Alf Ross later explored it in considerable depth. ALF ROSS, ON LAW AND JUSTICE 46–50 (1959).

79. BEALE, *supra* note 17, at 150 (emphasis added).

mean that the law in all cases just is what professional opinion says it is. All Beale really needed to posit was that the law is *somehow* fundamentally dependent on professional opinion, even if the law does not just perfectly match professional opinion about it. That would not begin to approach a complete theory of law, of course, but it would allow him to retain his basic account of how the law changes over time even without legislation—namely, because professional opinion evolves—despite his claim that a judicial decision in and of itself does not make law.[80]

2. Law's Completeness (Orthodoxy B)

Beale also embraced Orthodoxy B, the view that the law is complete. He phrased his point in terms of "universality" rather than "completeness,"[81] but the basic idea is the same. "It is unthinkable in a civilized country that any act should fall outside of the domain of law," he asserted. "If law be regarded as a command, then every act done must either be permitted or forbidden. If law be regarded as a right-producing principle, then every act must in accordance with the law change or not change existing rights."[82] Here, we have a clear assertion of legal bivalence,[83] that is, Orthodoxy B. Beale's

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80. For a contemporary argument for the tenability of adhering to Orthodoxy A while still: (1) remaining within a broadly positivistic jurisprudential framework; and (2) accounting for evolution of the common law over time, see Sachs, *supra* note 13, at 536–48. Sachs's argument on this score bears considerable resemblance to Beale's.

81. BEALE, *supra* note 17, at 154.

82. *Id.*

83. Technically Beale stops a hair's breadth short of explicitly endorsing what I am calling legal bivalence—the view that every legal proposition is either true or false. What he says is that every act is either (legally) permitted or (legally) forbidden. Because "legally forbidden" just means "not legally permitted" (or so it would seem; at any rate, it is very unlikely Beale would have denied this), it follows that every act is either legally permitted or not legally permitted. Beale does not go on to say that for any act, the proposition that that act is legally permitted is either *true* or *false*. There is, however, no reason to suppose he would not have accepted the disquotational principle that for any proposition P, 'P' is true if and only if P. *Cf.* TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 67 & n.29 (2000). A comparatively exotic philosophical move like this would be quite uncharacteristic for Beale. Finally, Beale addresses only propositions about the legal permissibility (or non-permissibility) of acts. Again, however, there is no reason to suppose Beale would have thought that bivalence failed for other legal propositions, such as propositions about legal ownership of property.

treatise does not really explain why the failure of Orthodoxy B should be "unthinkable,"[84] at least in a civilized country, but Beale was, in any event, committed to the proposition that legal bivalence holds in the United States and other societies with mature legal systems.

Can Beale's basic conventionalist theory of law be reconciled with a commitment to Orthodoxy B? One might worry that it could not. Recall his conventionalist posit that law depends on the opinion of the legal profession. The term "legal profession" is qualitatively vague, as Beale himself seems to have realized.[85] (Do law students count? Law school graduates who never practiced? Retired lawyers? And what constitutes the opinion of a whole profession when the profession has many members?) Here, problems of quantitative vagueness can arise.[86] Surely it cannot be that every member of the legal profession must accept some legal proposition P in order for the profession itself to accept P. The suggestion that the relevant cut-off point is when an absolute majority of the profession accepts P also seems undermotivated. The structure of the sorites problem is apparent: P cannot be true if no legal professional accepts P; P must be true if all legal professionals accept P. However, it never seems plausible that one lawyer's incremental acceptance of P should make the difference.[87]

The precise relevance of such vagueness-related problems to Beale's theory is not, of course, immediately apparent, at least if we charitably assume (as suggested above) that Beale would not really have maintained the simplistic view that a principle is part of the law if and only if the legal profession accepts it. Still, one might suspect that such vagueness-related problems would come up *somehow* for Beale, even if he endorsed a suppler conventionalist theory of law. Beale, however, could avoid such problems by

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84. BEALE, *supra* note 17, at 154.

85. *Id.* at 150 (referring to "the legal profession, whatever that profession may be").

86. On the distinction between qualitative and quantitative vagueness, see Geert Keil & Ralf Poscher, *Vagueness and Law: Philosophical and Legal Perspectives*, *in* VAGUENESS AND LAW 1, 3–4 (Geert Keil & Ralf Poscher eds., 2016).

87. The famous sorites paradox or "paradox of the heap" goes as follows: "Does one grain of wheat make a heap? Do two grains of wheat make a heap? . . . Do ten thousand . . . ? . . . If you admit that one grain does not make a heap, and are unwilling to make a fuss about the addition of any single grain, you are eventually forced to admit that ten thousand grains do not make a heap." TIMOTHY WILLIAMSON, VAGUENESS 8 (1994); *see also* ENDICOTT, *supra* note 83, at 33–36.

endorsing an epistemic theory of vagueness. The basic idea would be that there *are* "sharp boundaries" between legal professionals and the rest, and a sharp threshold level of consensus above which some proposition or principle becomes professional opinion, but that these are unknown to us.[88] Embracing such a theory would provide Beale a coherent and tidy way of avoiding vagueness-related objections to his assertion of legal bivalence. The merits of the epistemic theory of vagueness are *far* beyond the scope of this Article,[89] but the theory has able modern defenders and cannot simply be brushed off as a manifest absurdity. Indeed, debates over the proper theory of vagueness are extremely difficult and touch on some of the deepest problems in metaphysics, logic, and the philosophy of language.[90] Unsurprisingly, Beale himself did not discuss such problems; if he was aware of them at all, it is not apparent.

B. Langdell on Epistemic Legal Orthodoxy

Langdell is most famous for introducing the case method of instruction that came to dominate American legal education and for the conception of legal science upon which his educational reforms were based. He was, however, "mainly a doctrinal writer rather than a philosopher,"[91] and so his views on Epistemic Legal Orthodoxy must be inferred from sources like casebook prefaces, transcripts of speeches, and doctrinal summaries. We should, therefore, be wary of reading too much into Langdell's scattered comments on the subject. Even so, there are good reasons to believe Langdell endorsed both elements of Epistemic Legal Orthodoxy.[92]

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88. Keil & Poscher, *supra* note 86, at 1.

89. For arguments in favor of approaches to vagueness along these lines, see WILLIAMSON, *supra* note 87, at 185–247; Paul Horwich, *The Nature of Vagueness*, 57 PHIL. & PHENOMENOLOGICAL RSCH. 929 (1997). For an argument against Williamson's approach to vagueness, see ENDICOTT, *supra* note 83, at 99–136.

90. I discuss the general topic of vagueness at greater length in Part IV.A.1 below. *See infra* notes 163–168 and accompanying text.

91. Grey, *supra* note 19, at 3.

92. Beale, for his part, said in his treatise that "wrong [judicial] decisions are . . . uncommon." BEALE, *supra* note 17, at 135. This indicates a fairly strong form of Orthodoxy C: it is hard to know why he would feel justified in making this claim unless he thought the answers to legal questions were generally determinable.

1. Determinability of Answers to Legal Questions (Orthodoxy C)

With regard to Langdell's views on Orthodoxy C—the view that the answers to legal questions are determinable—perhaps the best source is the preface to his casebook on contracts.[93] After stating that "[l]aw, considered as a science, consists of certain principles or doctrines," Langdell declared that "such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer."[94] The words "constant" and "certainty" are particularly significant. To say that a true lawyer must learn to apply legal rules with constant *facility* does not straightforwardly bear on the question of how often one will be able to determine the answers to legal questions, any more than the claim that a true scientist must learn to employ the methods of empirical science with "constant facility" bears on the question of how often one will be able to determine the answers to natural-scientific questions. To say that a true lawyer must learn to apply the rules with *constant certainty* to the admittedly "tangled" facts of human life does, however, suggest that a lawyer of excellent talents and training will be able to determine the answers at least to the overwhelming majority of legal questions. Langdell did not, admittedly, say this as directly as we might like. But if there is an unforced way of interpreting Langdell's words that does not involve at least a fairly strong commitment to the idea that the answers to legal questions are determinable, it is not immediately apparent.

It remains important, however, not to overstate Langdell's position. Langdell nowhere said it was *easy* to become a "true lawyer."[95] To be sure, Langdell did reassure students that "the number of fundamental legal doctrines is much less than is commonly supposed,"[96] suggesting that careful doctrinal classification and arrangement could make the task of learning the law less intimidating than it might seem at first.[97] But it is one thing to reassure nervous students that learning the law is a manageable task, and quite another to assert that it is easy for anyone to become a master lawyer. For one thing, such a view would be hard to square with Langdell's firm insistence on the inadequacy

93. *See* LANGDELL, *supra* note 46, at vii–ix.
94. *Id.* at viii.
95. *Id.*
96. *Id.*
97. *Id.* at ix.

of the apprenticeship model and the need for a lengthy course of post-graduate legal training in a university environment.[98] On a more biographical note, Langdell's willingness to change his own views on the law shows that he thought even doctrinal masters like himself sometimes erred.[99] It is important to distinguish Langdell's apparent commitment to Orthodoxy C from the different view—which Langdell would, by all indications, have rejected—that law is an easy subject or that good lawyers never make mistakes.

2. Autonomy of Legal Inquiry (Orthodoxy D)

Langdell did, however, take a strong stance on what skills and sources one needed in order to gain reliable legal knowledge, which brings us to Orthodoxy D, the thesis that legal inquiry is autonomous. Langdell insisted that law is a science and famously declared that "the library is the proper workshop of [law] professors and students alike" and "to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."[100] The basic idea was that the primary way to learn the law is to study reported decisions of courts, just like the primary way to learn about biology is to examine living things. Langdell went further, however, embracing the view that "printed books are the ultimate sources of all legal knowledge" and denying that "printed books can only be used to the best advantage in connection with other means."[101]

This is clearly some kind of autonomy claim, and a fairly strong one. Granted, Langdell thought a background of general skills—"good academic training, especially in the study of languages"—was "a necessary qualification for the successful study of law."[102] Still, Langdell did not think one needed to practice law in order to learn the law, and the "printed books" he had in mind consisted of case reporters and the like, not texts on social science, ethics, or other disciplines dealing with subjects far afield from traditional, narrowly "legal" sources.[103] Thus, we can attribute Orthodoxy D to Langdell.

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98. C. C. Langdell, *Harvard Celebration Speeches: Professor Langdell*, 3 LAW Q. REV. 123, 124 (1887).

99. *See* KIMBALL, *supra* note 40, at 149, 157, 159–60; William Schofield, *Christopher Columbus Langdell*, 46 AM. L. REG. 273, 276–77 (1907).

100. Langdell, *supra* note 98.

101. *Id.*

102. *Id.*

103. *Id.*

III. THE REALIST CHALLENGE TO LEGAL ORTHODOXY

Langdell and Beale were not fringe figures. Without making any controversial (and hard-to-verify) claims about how widespread Legal Orthodoxy was during their time,[104] we can at least say this much: when Langdell and Beale authored the texts cited above, highly-esteemed members of the profession could espouse Legal Orthodoxy without inviting universal mockery.[105] The fact of the matter is, however, that people of similar professional stature rarely talk that way anymore, at least not outside judicial confirmation hearings. This decisive shift owes much to the American Legal Realists' critique of the approach to law, adjudication, and legal education that Langdell epitomized and helped spread.[106]

To be sure, the cliché that "we are all realists now" masks a more complex reality. American Legal Realism's fortunes ebbed as the horrors unleashed by Hitler and Stalin made it seem urgently necessary to defend the ideals of liberal democracy and the rule of law, which the Realists' stridently Anti-Orthodox themes appeared to call into question.[107] What's more, the constructive aspects of the American Realist project did not altogether pan out, at least not to the extent proponents might have hoped. Still, the Realist critique of traditional legal thought left a lasting impression. Today, most sophisticated American lawyers and legal scholars accept the Realists' critique of Langdellianism in at least a mild to moderate form, and there is a widespread sense that the kind of Orthodox views Langdell and Beale held are untenable in a post-Realist world. But why and how did the Realists attack Langdellianism? The broad story is familiar, but it will be important for our purposes to recount it in some detail.

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104. *See* TAMANAHA, *supra* note 5, at 13–63 (contesting the idea of a "formalist age" in American legal thought).

105. *Cf.* Leiter, *supra* note 32, at 117 (noting, contra Tamanaha, that "it would still make perfectly good sense to call the late nineteenth century the 'formalist age' if it turns out that a larger proportion of leading scholars and jurists said 'realist-sounding' things in the 1920s and 1930s than in the 1870s and 1880s").

106. Of course, the Realists' intellectual forebears, like Oliver Wendell Holmes, Jr. and John Chipman Gray, anticipated aspects of Realist thought. Questions about the kinds and degree of difference between the Realists and their predecessors, and the proper allocation of intellectual credit among them, are beyond the scope of this Article.

107. *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 159–78 (1973).

A. The Realist Agenda

In order to understand the Realist critique of Langdellianism and its somewhat complicated relationship to Legal Orthodoxy, it is important to begin by saying something about the Realists' overall outlook and motivations. The American Legal Realists were not legal philosophers;[108] their basic scholarly concerns were lawyerly. We can easily illustrate the point by contrasting the American Legal Realists with the Scandinavian legal thinkers with whom they share the "Realist" label. Scandinavian Legal Realists like Alf Ross and Karl Olivecrona were centrally interested in prototypical analytic-philosophical questions about law, such as the analysis of legal concepts,[109] inquiry into the function of legal discourse,[110] and the problem of finding a place for law within a naturalistic ontology.[111] The American Realists, however, showed scant interest in such questions. They occasionally spoke explicitly about the nature of law or the definition of the word "law," but their discussions of these matters tended to include caveats about the futility of getting ensnared in semantic disputes.[112] If they had any serious interest in conceptual analysis or metaphysics, they did a very good job of hiding it.

Instead, the American Legal Realists had an overriding interest in tackling the practical problems faced by legal professionals, especially practicing attorneys and judges.[113] Thus, Felix Cohen provided what is perhaps the best short summary of American Realism's central theoretical ambitions when he said: "[f]undamentally there are only two significant questions in the field of law. One is, 'How do courts actually decide cases of a given kind?'

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108. Felix Cohen is an arguable exception. *See* Torben Spaak, *Naturalism in Scandinavian and American Realism: Similarities and Differences*, *in* DE LEGE, UPPSALA–MINNESOTA COLLOQUIUM: LAW, CULTURE, AND VALUES 33, 34 (Mattias Dahlberg ed., 2009); Michael Steven Green, *Leiter on the Legal Realists*, 30 LAW & PHIL. 381, 382 n.6 (2011) (reviewing LEITER, *supra* note 1).

109. *See* Spaak, *supra* note 108, at 34–35; ROSS, *supra* note 78, at 6–9, 42, 73–75.

110. *See* KARL OLIVECRONA, LAW AS FACT 253–54 (2d ed. 1971); ROSS, *supra* note 78, at 6–9, 46–49.

111. *See* OLIVECRONA, *supra* note 110, at vii.

112. *See* Cohen, *supra* note 38, at 835; Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1014 (1928); Llewellyn, *supra* note 65, at 431–33.

113. *See* LEITER, *supra* note 1, at 31, 90.

The other is, 'How ought they to decide cases of a given kind?'"[114] The basic idea behind this rather stark proclamation is that the significant questions in the field of law are those that are practically important for lawyers and judges. The practical importance of Cohen's second question for judges is self-explanatory: if judges do not decide cases as they should, they are *ipso facto* doing a less than ideal job. And Cohen's first question reflects the common Realist theme that the most important skill for practicing attorneys is the ability to predict how courts will act in different situations.[115] The

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114. Cohen, *supra* note 38, at 824; *cf.* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE 13 (1998) (quoting and endorsing Cohen's formulation as a relatively accurate summary of "the two parts of the affirmative Realist project"). Concern with Cohen's first question was almost universal among the core Realists. Cohen's emphasis on the second, normative question is somewhat more idiosyncratic: among the Realists, Cohen showed an unusually strong interest in systematic normative inquiry and theorizing, writing an entire book on ethics and metaethics. *See generally* FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933) [hereinafter COHEN, ETHICAL SYSTEMS]. Indeed, Cohen was well aware that he was a bit of an outlier in this respect. *See* Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 35 (1934). Many Realists were wary of systematic normative theorizing because they felt it could not be scientific or objective. Karl Llewellyn, for example, expressed the opinion that normative judgments, while unavoidable, were ultimately subjective. *See* Llewellyn, *supra* note 47, at 100. (This attitude is a common, though not universal, correlate of the scientific naturalism that informed so many aspects of Realist thought. *See* PURCELL, *supra* note 107, at 91–92.) What's more, a number of Realists embraced, or at least flirted with, the idea that judges were, for the most part, already deciding cases roughly as they should, the basic idea being that even if judges' opinions provided little more than rationalizations for decisions reached on other grounds, the *outcomes* judges settled upon were generally good. *See* Leiter, *supra* note 39, at 276–78. If true, that would not negate the theoretical importance of Cohen's second question, but it would render it largely unnecessary to offer normative advice to judges: the governing philosophy here would be "if it ain't broke, don't fix it." (A possible exception might be enjoining judges to "do explicitly (and perhaps more carefully)" what they are more or less already doing. *Id.* at 277.) Still, the Realists certainly had normative opinions. Many were involved in law reform efforts. *See* Edmund Ursin, *The Missing Normative Dimension in Brian Leiter's "Reconstructed" Legal Realism*, 49 SAN DIEGO L. REV. 1, 4–5 (2012). And it would be wrong to view Realism *tout court* as nothing but "nihilistic behavioral science gone berserk." FRIED, *supra*, at 14.

115. *See* LLEWELLYN, BRAMBLE BUSH, *supra* note 6, at 3–8; Walter Wheeler Cook, *Scientific Method and the Law*, 13 AM. BAR ASS'N J. 303, 308 (1927); Jerome Frank, *What Courts Do in Fact, Part One*, 26 ILL. L. REV. 645, 646 (1932); Underhill Moore & Theodore S. Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 703 (1929); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 AM. BAR ASS'N J. 357, 362 (1925). Although the Realists

Realists reasoned that lawyers are hired to achieve practical outcomes, not to expound on doctrine in the abstract.[116] Most importantly, they are paid to help clients plan their business in the shadow of state action and to navigate the court system if and when litigation occurs. Predicting how courts will act in different circumstances is crucial to both.[117] Although one could quibble with this brutally pragmatic take on the practice of law, it is hard to disagree that it captures a major part of what lawyers do and should care about.[118]

In sum, the Realists were interested in issues of immediate importance to the profession, most notably questions about how courts (and other legal institutions) do and should act. Any interest they had in more rarefied legal-philosophical matters is best understood as incidental. Unsurprisingly, therefore, their main objection to Langdellian legal science was that it often led to incorrect, incomplete, and/or confused answers to the practical questions of concern to legal professionals, especially questions about how courts do and should act.

B. Langdellian Legal Science and Real-world Legal Practice

In order to understand why the Realists thought Langdellian legal science and education were so inadequate to equip lawyers and judges with the practical knowledge they needed, it is necessary first to see why one might think Langdellian legal science *could* provide the keys to both the predictive question of how courts will act and the normative question of how courts should act. As discussed in Part II, Langdell thought that the law is a body of prescriptive rules that can be learned through a process of largely inductive reasoning based on the careful study of written sources, notably law reporters and the like. Setting aside some of the more particular aspects of

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tended to speak mainly about prediction of judicial action, they recognized that it was also important for lawyers to predict the actions of other institutional actors, like administrative agencies. *See* Llewellyn, *supra* note 65; Moore & Hope, *supra*.

116. *See* FRANK, *supra* note 8, 60–61; Llewellyn, *supra* note 65, at 446 n.12. This theme is of course traceable back to Holmes, whom the Realists considered a sort of early prophet. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

117. *See, e.g.*, Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 581 (1993).

118. Beale, in fact, explicitly alluded to the importance of being able to predict judicial action. BEALE, *supra* note 17, at 155.

Langdell's approach to legal inquiry,[119] the basic method of study he proposed should be intuitively familiar to people who have been through the modern case-based first-year legal curriculum. It was, in broad outline, the application of the methods Karl Llewellyn aptly called "traditional legal techniques."[120] We can call this the "Langdellian method" for short. Thus, a crucial premise of Langdellianism was the following:

> *Langdellian Epistemology*: The law can be learned via the Langdellian method.

In itself, Langdellian Epistemology establishes nothing about how courts either will or should act. But suppose we add the following additional posits:

> *Descriptive Judicial Fidelity:* Judges always act in accordance with the law.
>
> *Normative Judicial Fidelity:* Judges should always act in accordance with the law.
>
> *Judicial Non-Discretion:* The law instructs judges how to act in all relevant circumstances.[121]

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119. The peculiarities of Langdell's style of legal reasoning have arguably been the subject of considerable exaggeration. *See* KIMBALL, *supra* note 40, at 108–29.

120. Llewellyn, *supra* note 39, at 1239.

121. The law is here understood as a set of prescriptive rules. *See* sources cited *supra* notes 46–47 and accompanying text. *Acting in accordance* with a set of rules means not acting contrary to any of the rules in that set. (Acting contrary to a rule means doing something forbidden by that rule, or equivalently, violating that rule.) A set of rules *instructs* one to act a certain way if and only if failing to act in that way would be contrary to at least one of the rules in that set. Suppose, for example, I walk into an ice cream parlor. If I were to rob the cashier, I would violate both moral and legal rules and so fail to act in accordance with morality and with law. Morality and law thus both instruct me not to rob the cashier. Note that sets of rules often permit (and so do not forbid) a range of different actions.

Descriptive Judicial Fidelity and Normative Judicial Fidelity are claims about the relationship between judges' actions and the law: to wit, that the former *are* in accordance with the latter (Descriptive Judicial Fidelity) and that the former *should* be in accordance with the latter (Normative Judicial Fidelity). Though it does not really affect the logic of the arguments in this Article, it is worth noting that Descriptive Judicial Fidelity and Normative Judicial Fidelity are meant to cover only judges' actions *qua* judges: they concern whether judges do and/or should *judge* in accordance with the law—not, for example, whether they do and/or should jaywalk. Judicial Non-Discretion, by contrast, is a claim about the content of the law itself.

If both Descriptive Judicial Fidelity and Judicial Non-Discretion held, then a lawyer with perfect knowledge of the law would be able to predict judicial action in all relevant circumstances. And if Normative Judicial Fidelity and Judicial Non-Discretion held, then a judge with perfect knowledge of the law would know how he or she should act in all relevant circumstances. So, if all of these posits plus Langdellian Epistemology held, then we would know at least *one* way to figure out how courts both do and should act: the Langdellian method. Granted, we could not be sure *a priori* that there was no better alternative; a quicker or more reliable approach might be discoverable. But the burden would be on critics to prove it.

Of course, nobody thinks Descriptive Judicial Fidelity, Normative Judicial Fidelity, and Judicial Non-Discretion perfectly describe reality. All three are, at best, idealizations. Descriptive Judicial Fidelity is an idealization if only because judges are sometimes corrupt or incompetent. As for Normative Judicial Fidelity, almost everyone would agree that there are *some* situations in which it makes sense for judges not to act in accordance with the law. And as for Judicial Non-Discretion, there are clearly cases where important judicial decisions are not fully guided by law: to give one modern example, consider the range of discretion conferred on federal sentencing courts by the United States Code.[122]

Because Descriptive Judicial Fidelity and Judicial Non-Discretion are idealizations, learning the law and assuming judges will act in accordance with it cannot be a perfect way to predict judicial action. This approach will sometimes yield incorrect predictions (due to failures of Descriptive Judicial Fidelity), and it sometimes cannot yield complete predictions (due to failures of Judicial Non-Discretion). Similarly, because Normative Judicial Fidelity and Judicial Non-Discretion are idealizations, learning the law and assuming one should always follow it cannot be a perfect method for judges who always want to do what they should. This approach, too, will sometimes yield incorrect instructions (due to failures of Normative Judicial Fidelity), and it sometimes cannot yield complete instructions (due to failures of Judicial Non-Discretion).

Formally, Judicial Non-Discretion is meant to convey that for any relevant potential judicial action X, either doing X or failing to do X (but not both) would be contrary to the law. Here, "relevant" means substantially important to the professional concerns of judges or lawyers.

122. *See, e.g.*, 18 U.S.C. § 3553 (2018); *cf.* RONALD DWORKIN, A MATTER OF PRINCIPLE 122 (1985).

But for all that, a model is not useless just because it is imperfect. If reality came *sufficiently close* to the ideal represented by the combination of Descriptive Judicial Fidelity, Normative Judicial Fidelity, and Judicial Non-Discretion, then learning the law and assuming judges will act in accordance with it would still be a fairly reliable and complete method of figuring out how judges will act. Similarly, learning the law and always acting in accordance with it would still be a fairly reliable and complete approach for judges seeking to decide cases the way they should. Finally, if Langdellian Epistemology were sufficiently close to the truth, then the Langdellian method would provide a reliable, autonomous, and manageable way to learn the law. Under such circumstances, therefore, Langdellian legal science and legal education would be quite practical by the standards the Realists embraced.

C. The Realist Critique

The Realists thought the combination of premises described above—Langdellian Epistemology, Descriptive Judicial Fidelity, Normative Judicial Fidelity, and Judicial Non-Discretion—badly misdescribed reality. But where exactly did the Realists think these premises went wrong, and what evidence did they offer?

In truth, the Realists did not attack exclusively on one front. Jerome Frank, for example, derided the idea that "crooked" judges are descriptively abnormal and expressed frustration that "little or nothing is said in the classroom or text-books about dishonest judges."[123] To him, this was akin to "an engineering school where the students learned little or nothing about friction or wind pressure."[124] This criticism is most naturally glossed as an attack on Descriptive Judicial Fidelity—crooked judges are usually not paid to act in accordance with the law. But observations about the lack of honesty or, for that matter, technical skill[125] among judges were not the Realists' main theme. And small wonder, for such attacks would not *alone* drive a stake into the heart of Langdellianism.[126] For one

123. Jerome Frank, *Are Judges Human? Part One*, 80 U. PA. L. REV. 17, 34 (1931).

124. *Id.*

125. *See id.* at 35 ("And what of the honest stupid judge who misunderstands the rules which any well-trained law student believes to be clear, settled, and easily comprehensible?").

126. *Cf.* LEITER, *supra* note 1, at 9–10.

thing, judicial corruption and/or technical incompetence could only undermine Langdellian legal science as a guide to the external prediction of judicial action, not as a normative guide to judicial action. Perhaps more importantly, however, a staunch Langdellian could agree that dishonest and technically incompetent judges are a problem but simply reply that the solution is to secure a more professional judiciary, one selected for both honesty and sound training in the Langdellian method itself. Indeed, this would be the Langdellian response *par excellence*.[127]

The Realists' primary line of attack came from a very different angle. It was based, as Brian Leiter puts it, on the availability of alternative and conflicting "*interpretive methods*: e.g., conflicting ways of reading statutes, or of construing precedents."[128] Thus, a common-law precedent could be read in a variety of ways—some broad, some narrow.[129] A *set* of common-law precedents could, moreover, be read to yield a variety of different rules or principles.[130] Similar problems arose in the context of statutory interpretation; Karl Llewellyn's famous paper on canons of construction is the classic text here.[131] The outcome of a case could, and very often did, hinge on which interpretive method was employed.[132] This could occur even with relatively straightforward interpretive tasks, like figuring out the extension of a single vague term or concept.[133] But it also occurred in cases presenting more complex or subtle interpretive problems, such as figuring out the *ratio decidendi* of a common-law case, or sorting the legally relevant from the legally irrelevant facts in various precedents.[134]

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127. Langdell himself was quite shaken by his brushes with judicial corruption during his time as a practitioner and spent the rest of his life pushing for a more professional bench and bar. *See* KIMBALL, *supra* note 40, at 42–43.

128. LEITER, *supra* note 1, at 20; *see also id.* at 74.

129. *See* LLEWELLYN, BRAMBLE BUSH, *supra* note 6, at 68–71; Herman Oliphant, *A Return to Stare Decisis*, 14 AM. BAR ASS'N J. 71, 72–73 (1928).

130. *See* Herman Oliphant & Abram Hewitt, *Introduction*, *in* JACQUES RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES, at ix, xix–xx (Herman Green trans., 1929).

131. Llewellyn, *Canons*, *supra* note 6; *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 879–81 (1930) (describing the availability of "strict" and "liberal" approaches to statutory interpretation).

132. *See* Llewellyn, *Canons*, *supra* note 6, at 395–96, 399.

133. *See* Radin, *supra* note 115, at 358 (discussing the problem of determining whether "the taking of food in a restaurant" is a "sale").

134. LLEWELLYN, BRAMBLE BUSH, *supra* note 6, at 45–46.

The Realists often described the upshot of their observations about conflicting interpretive methods in terms of judicial freedom or the exercise of judicial will. Various Realists referred to the ability, and the necessity, for judges to "choose," "select," or exercise "discretion" in determining the outcome of a case.[135] A defender of Langdellian legal science could, however, be forgiven for not immediately seeing the practical relevance of the fact that judges enjoy the freedom to select different interpretive methods, or more generally to choose the outcome of cases. In itself, the observation that every case involves a choice is banal. True, judges can choose between different interpretive methods, just as they can choose whether to accept bribes or decide cases by throwing dice. But teachers who grade arithmetic tests have similar choices; they could choose to interpret "+" to stand for "addition on Tuesdays; else, subtraction." Yet no one doubts the usefulness of a traditional education in arithmetical rules for figuring out how arithmetic tests both will and should be graded.

What the Realists emphasized, however, was not just the bare fact that judges have a choice of different (and potentially conflicting) interpretive methods, but rather that judges have a choice of different interpretive methods even within certain rational constraints. For example, when Walter Wheeler Cook spoke of judges having a "choice" in "new cases," he said that the judge is "free *so far as compelling logical reasons are concerned* to choose which way to decide the case."[136] Llewellyn put it this way: "[i]f deduction [alone] does not solve cases, but only shows the effect of a given premise, and *if* there is available a competing but *equally authoritative* premise that leads to a different conclusion—then there is a choice in the case."[137] And Max Radin spoke of "select[ing]" an interpretation where "[*g*]*ood reasons* are advanced for doing so and *equally good* ones could have been advanced for the opposite."[138] All of these formulations are about rational constraint or lack thereof.[139] Unfortunately, they are otherwise all somewhat different,

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135. *See* Cook, *supra* note 115 ("choose"); Llewellyn, *supra* note 65, at 447 n.12 ("discretion"); Oliphant, *supra* note 129, at 73 ("choose"; "choice"); Radin, *supra* note 115, at 358 ("select[ion]").

136. Cook, *supra* note 115 (emphasis added).

137. Llewellyn, *supra* note 39, at 1252 (emphasis added).

138. Radin, *supra* note 115, at 358 (emphasis added).

139. A similar formulation can be found in Justice Cardozo's *The Nature of the Judicial Process*. BENAJMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 165 (1921).

and the Realists were not always clear or consistent in spelling out precisely what kind of rational freedom they thought judges often enjoyed.

Nonetheless, it seems pretty clear what the Realists generally had in mind: they were pointing to the prevalence of what are now known as "hard cases."[140] At a first pass, we can describe these as cases where equally good arguments can be made—or equivalently, in Radin's terms, equally good reasons can be advanced[141]—for or against the dispositive legal proposition(s) at issue. Now, the basic problem of hard cases is familiar to all lawyers,[142] and it is impossible to ignore once one has spent enough time reading appellate cases.[143] Thus, no serious person flat-out *denies* that there are hard cases. Part of what makes the Realist critique so powerful is precisely the fact that it rests on such a familiar and arresting phenomenon.[144]

Difficulties arise, however, as we begin to describe the phenomenon of hard cases in more theoretically laden terms.[145] It is, I think, safe to say that what makes a hard case hard is that the answer to at least one outcome-determinative legal question is in some sense *indeterminate*. Hence, we can follow Leiter (and others) in saying that the Realists' core critique of Langdellianism was based on the problem of *legal indeterminacy*.[146] Things start to get trickier when we ask the following question: which of the premises that, taken together, would justify Langdellianism by the Realists' own pragmatic criteria—Langdellian Epistemology, Descriptive

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140. *See* DWORKIN, *supra* note 23, at 81. The term "hard cases" has been glossed in a variety of ways; though, I think most efforts to explicate the term are attempts to get at the same basic phenomenon. *See supra* note 23.

141. Radin, *supra* note 115, at 358.

142. *Cf.* Leiter, *supra* note 39, at 267.

143. For a list of real-world examples, see SHAPIRO, *supra* note 2, at 235–37.

144. To say the Realist critique rests on a familiar phenomenon is not to say their point was banal or "tame." *Cf.* Schauer, *supra* note 37, at 758–60. What made the Realists' critique threatening and apparently radical was the suggestion that legal indeterminacy is not a rare phenomenon but instead prevalent enough to seriously undermine the practical usefulness of traditional approaches to legal science and education.

145. *Cf.* Horwich, *supra* note 89, at 929 (noting, in a discussion of vagueness, that "we must take pains to begin with an accurate superficial description of the phenomenon to be explained," because otherwise "there is a danger of importing incorrect theoretical presuppositions into the initial characterization").

146. *See* LEITER, *supra* note 1, at 19–20; Leiter, *supra* note 39, at 265; *see also* SHAPIRO, *supra* note 2, at 259–60; Schauer, *supra* note 37, at 749 n.2, 756.

Judicial Fidelity, Normative Judicial Fidelity, and Judicial Non-Discretion—might be undermined by the widespread existence of hard cases?

There is no way of answering this question that is neutral vis-à-vis significant jurisprudential controversies. It is also at least *somewhat* hazardous to attribute a perfectly clear or stable answer to the Realists themselves. Their frequent use of the word "law" in plainly revisionary ways makes the exegetical problem harder,[147] as

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147. The Realists often advocated so-called predictive definitions of the word "law" resembling Oliver Wendell Holmes's famous remark that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," Holmes, *supra* note 116, at 461. *See* COHEN, ETHICAL SYSTEMS, *supra* note 114, at 11–14; FRANK, *supra* note 8, at 50–51; LLEWELLYN, BRAMBLE BUSH, *supra* note 6, at 5; Cohen, *supra* note 38, at 835–36; Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 465 (1924). This might seem quite relevant to an inquiry into the relationship between Legal Realism and Legal Orthodoxy as well as for understanding the Realist critique of Langdellianism. In fact, however, it is largely a red herring. To be sure, if the law really were just what judges do (or some such), this would doom Legal Orthodoxy: if nothing else, Orthodoxy A would be false, for judges plainly make their own decisions. The relevance of this to the practical merits of Langdellianism would, however, be obscure. Although it would render Descriptive Judicial Fidelity, Normative Judicial Fidelity, and Judicial Non-Discretion vacuous or incoherent, defenders of Langdellianism could just rephrase those premises (as well as Langdellian Epistemology) by replacing "law" with some other term, like "paper rules." *See* Llewellyn, *supra* note 65, at 448. If the rephrased premises held, Langdellianism's practical merits would still be assured. In any event, there are two reasons to think the Realists' talk of predictive definitions of "law" did not represent forays into jurisprudence in the ordinary sense. The first reason is that any attempt to analyze the concept of law along these lines would fail. The most obvious problem with such an analysis—that judges trying to figure out the law are not trying to predict their own actions—has been noted repeatedly since at least 1931. *See* SMITH, *supra* note 30, at 49; John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 843–44 (1931); H. L. A. Hart, *Scandinavian Realism*, 1959 CAMBRIDGE L.J. 233, 237; Leiter, *supra* note 39, at 263; Sachs, *supra* note 13, at 555. Interpretive charity thus militates against interpreting the Realists as having adopted such implausible jurisprudential views. *See* LEITER, *supra* note 1, at 70. The second reason is that the Realists do not appear to have much cared whether they were accurately reporting the meaning of the word "law" in ordinary usage. As noted above, their writings are laden with disclaimers about the futility of trying to state a correct definition of "law." *See* sources cited *supra* note 112. Some of the Realists seem to have underestimated the gulf between ordinary usage and their proposed definitions. *See* COHEN, ETHICAL SYSTEMS, *supra* note 114, at 12; Cook, *supra*, at 475–76. But their stated rationales for adopting predictive definitions of "law" tended to be pragmatic: that is, they thought that it would be *good* or *useful* to use the word

does their general lack of concern for anything resembling legal philosophy in the normal sense.[148] Nonetheless, it is common to gloss the jurisprudential upshot of the Realists' indeterminacy-based critique as follows. The prevalence of hard cases invalidates the claim that the law is complete;[149] such cases hinge on legal questions to which there is no right answer, not just in the weak sense that we lack epistemic access to the right answer, but in the deeper sense that there is no right answer at all. Orthodoxy B thus fails. And when faced with such cases, judges can—and, if they are to decide the case, must—make new law. Orthodoxy A thus fails. Let us call this the Standard Interpretation of the Realists' indeterminacy-based critique. Although I have offered a note of caution about attributing clear and firm jurisprudential stances like this to the Realists themselves, there is a good basis for the Standard Interpretation in the Realist corpus: it is heavily suggested by the Realists' frequent remarks about the necessity for judges to make "choices,"[150] as well as their mantras about judicial "lawmaking" and/or the need for judges to "legislate."[151] Exegetical caution aside, the Standard Interpretation is the one that tracks the way the Realists actually tended to talk.[152]

"law" the way they proposed. *See* Cohen, *supra* note 38, at 835–38; Frank, *supra* note 123, at 17.

148. *Cf.* Leiter, *supra* note 39, at 268 ("[I]t is a deficiency of realist jurisprudence that it has no explicit theory" on "the criteria of legality[.]").

149. For example, Scott Shapiro, in discussing a variant of the "vehicles in the park" case, says that a "riding lawn mower . . . is neither a vehicle nor not a vehicle." SHAPIRO, *supra* note 2, at 249. He further states that "[i]n many instances, the best explanation for why lawyers do not know the law is that there is no law to know"; thus, "uncertainty on how to proceed in these cases . . . will not reflect their ignorance of the law; it concerns their doubts about how the law ought to be developed or how a court will eventually rule." *Id.* at 256.

150. *See supra* note 135; *see also* Llewellyn, *Canons*, *supra* note 6, at 395 ("One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.").

151. *See* FRANK, *supra* note 8, at 35–45; Joseph W. Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 17 (1912) (referring to "[t]he old superstitions that law necessarily pre-exists . . . and that judges have no power to make the law"); Cook, *supra* note 115 ("The logical situation confronting the judge in a new case being what it is, it is obvious that he must legislate . . . ."); Llewellyn, *supra* note 65, at 447 n.12 (referring to the "field of discretion and judicial law-making"); Llewellyn, *supra* note 39, at 1235–36 (listing "[t]he conception of . . . judicial creation of law" as a "common point[] of departure" for the Realists).

152. *See, e.g.*, TAMANAHA, *supra* note 5, at 82 ("The realists asserted that cases arise that are not addressed by existing legislation or case law—there are gaps in the

If the Standard Interpretation correctly describes the jurisprudential upshot of hard cases, then we can spell out exactly *why* the prevalence of hard cases would undermine Langdellian legal science, as either a predictive *or* normative guide to judicial action. Even if Langdellian Epistemology held, the Langdellian method would provide only knowledge of the law. But there are many situations in which the law simply does not provide judges with instructions for what to do: Judicial Non-Discretion fails systematically in proportion to the prevalence of hard cases. Thus, even if Descriptive Judicial Fidelity substantially held, and even if one had perfect knowledge of the law—whether gained via the Langdellian method or otherwise—one very often could not predict how judges would act. Trying to predict judges' actions on the basis of even a perfect knowledge of the law would, in such cases, be a bit like trying to predict what clothes a chess grandmaster will wear to a match on the basis of: (1) knowledge of chess strategy; and (2) the hypothesis that the grandmaster will always act in accordance with perfect chess strategy. Clearly, this will not work. As for the Langdellian method's merits as a source of knowledge about how judges *should* act, a similar problem arises. Even if Normative Judicial Fidelity substantially held, and even if one had perfect knowledge of the law, one very often could not, on this basis alone, figure out how judges should act. Trying to do so would be a bit like a chess grandmaster trying to figure out what one *should* wear to a match by consulting chess strategy.

On the Standard Interpretation, then, the existence of widespread legal indeterminacy of the sort the Realists pointed out would be a devastating problem for Langdellianism. Unlike attacking Descriptive Judicial Fidelity by pointing to judicial corruption, the indeterminacy-based critique does not leave Langdellian legal science intact *qua* normative guide to judges; it hits on both the predictive and normative fronts. Nor could one simply reply that the solution is to make sure judges are more honest or to give judges and/or lawyers better training in the law. The problem is not rooted in either dishonesty *or* inadequate

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law—and in these situations judges try to work out the right outcome, making new law in the process."); Schauer, *supra* note 37, at 763 ("The Realists and their precursors . . . believed that legal gaps were to be filled by judges acting as lawmakers."). Justice Cardozo also famously endorsed the Standard Interpretation's jurisprudential gloss on what happens in hard cases. *See* CARDOZO, *supra* note 139, at 165–66.

knowledge of law; it would remain even if all judges were honest and (legally) error-free.

Of course, one could always fight back by simply denying that hard cases are as prevalent as the Realists made them out to be.[153] It is unclear at best how to adjudicate competing claims about how often hard cases come up, so I will leave the matter aside for now.[154] Alternatively, one could concede the prevalence of indeterminacy but argue that the solution is to change the law so as to make indeterminacy less common. The Realists, it is important to note, did *not* base their critique on claims about the degree of indeterminacy that conceptually or metaphysically *must* arise in any legal system, and they did not deny that indeterminacy could be lessened through law reform. But if the Realists were right about how prevalent legal indeterminacy is *now*, then an attempt to reduce indeterminacy sufficiently to save the Langdellian project would most likely require extensive changes to the law. Such reform would come at a heavy price, not just because of the various transitional costs, but because it would likely involve securing greater determinacy at the expense of other desirable features of a legal system, like the ability to nimbly accommodate changing social needs.[155] Thus, if the Realists were right about the prevalence of hard cases, and if the Standard

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153. Just how widespread the Realists thought the relevant kind of legal indeterminacy was is a tricky question. They were not always clear on this point, and their opinions apparently varied. *See* FRANK, *supra* note 8, at 162 ("[*T*]*he unique circumstances of almost any case make it an 'unprovided case' where no well-established rule 'authoritatively' compels a given result*[.]"); Cook, *supra* note 115 (limiting discussion of indeterminacy to "new" cases); Llewellyn, *supra* note 39, at 1239 (referring to conflicting premises available in "any case doubtful enough to make litigation respectable"); Oliphant & Hewitt, *supra* note 130, at xi (distinguishing between cases "all but wholly identical with some previous case . . . already decided," "whose outcome is thus clearly predestined by some statute or prior decision," and "case[s] presenting some features of real novelty"). Leiter, however, has made a persuasive case that the Realists' views on this score have been exaggerated. *See* LEITER, *supra* note 1, at 19–20, 77–78. Suffice it to say that in order for their indeterminacy-based critique to have practical bite against Langdellian legal science, the Realists had to have thought legal indeterminacy was *fairly* common: a few "freak" cases would not pose a severe practical threat to Langdellianism for reasons discussed in Part III.B. That said, they did not have to make, let alone prove, wild claims that there are no (or almost no) "easy" cases for their critique to have devastating implications for Langdellianism.

154. I discuss the issue further in Part IV.A below.

155. Jerome Frank was particularly insistent on this point. *See* FRANK, *supra* note 8, at 5–11, 149, 200–07.

Interpretation provides a correct characterization of the jurisprudential upshot of hard cases, then Langdellianism is shaken to its core.

IV. LEGAL ORTHODOXY AND LEGAL REALISM: A RE-EVALUATION

But what if the Standard Interpretation does not really tell us what is going on in hard cases? Note that we have not discussed any actual arguments for the Standard Interpretation. That is not an accident. The Realists may have *accepted* the Standard Interpretation, but they did not *argue* for it. This should come as no surprise given the discussion in Part III.A above. The Realists were not legal philosophers, and any distinctively jurisprudential posits they accepted were generally presupposed rather than argued for.[156] Of course, none of this is to say there are not arguments for the Standard Interpretation. There certainly are, and some may even be decisive. But what concerns us is the relationship between the *Realist critique itself* and Legal Orthodoxy, not how the Realist critique might be combined with other arguments to justify Anti-Orthodox conclusions.

In this Part, I argue that the Realist critique has only a modest bearing on the merits of Legal Orthodoxy. That is not to say there is no relationship at all; it would be an exaggeration to say Legal Realism and Legal Orthodoxy can be fully reconciled. As we will see, however, the Realist critique does not offer persuasive reasons to reject Metaphysical Legal Orthodoxy. All the Realist critique justifies on its own is the adoption of a limited and cautious departure from Epistemic Legal Orthodoxy, resulting in a view I call Modest Epistemic Anti-Orthodoxy.

This may seem like a bad result for proponents of Legal Realism. In fact, it is not. As I will go on to argue, all the most important elements of the American Legal Realist agenda for legal science, legal education, and adjudication can be justified solely on the basis of Modest Epistemic Anti-Orthodoxy plus a few other plausible background premises. Thus, the Realists may not have provided good reasons for thinking that judges make law or that the law is not complete, but they did provide good reasons for their views about: (1) the practical failures and limitations of Langdellianism; and (2) how

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156. *See* Leiter, *supra* note 39, at 268; *see also* LEITER, *supra* note 1, at 71–72 (arguing that the Realists "*presuppose[d]* an account [of the concept of law] with distinct affinities to that developed by the Legal Positivists" (emphasis added)).

lawyers, legal scholars, and judges should proceed in light of those failures and limitations. In the course of showing this, I will introduce and explicate a view I call Epistemic Legal Realism: in brief, a *genuine form of Legal Realism* that denies that judges make law, accepts that the law is complete, and even acknowledges the possibility that the answers to all legal questions might be knowable by inquirers with the right talents and training. The upshot of the argument in this Part is that the Realists only gave otherwise Orthodox-inclined thinkers sufficient grounds to embrace Epistemic Legal Realism—but that that is all the Realists really *needed* to do.

A. Hard Cases, Indeterminacy, and Legal Orthodoxy

Recall that the core Realist critique of Langdellianism consisted of pointing out that cases often arise in which equally good arguments can be mustered on behalf of both sides of the dispositive legal question(s).[157] It is worth pausing to ask the following question: just what was the Realists' actual *evidence* that such cases not only exist, but are relatively common? As it happens, all they really did was describe actual or hypothetical cases, sketch the arguments on both sides in more or less detail, and ultimately trust readers to perceive that the available arguments for neither side were clearly better. Because the Realists pointed to cases that exemplified dialectical patterns or archetypes that arise fairly often in actual litigation, this would in turn license the conclusion that courts commonly face cases in which neither side would have clearly superior arguments. But this indeterminacy-based critique could not get traction if readers simply examined each example and always said, "I don't see your point, *that* side has the clearly better argument," or, "Well, I can't tell from your sketchy description which side would have the better argument, but in any *real* case the arguments for one side or another would be clearly better."

This is not meant as a criticism of the Realists, for in truth it was all they *could* do. Consider an analogy to ordinary, garden-variety (non-legal) vagueness. "Bald" is a canonical vague predicate; there are cases, we want to say, where it is not clearly more apt to describe a person as bald than as not bald. If there were people whose job it was to determine whether particular individuals were bald—baldness judges, in effect—they would face a lot of "hard cases" where the arguments for the proposition that a given

157. *See supra* notes 135–138 and accompanying text.

individual is bald are not clearly better than the arguments to the contrary. But how would a group of iconoclastic Baldness Realists go about convincing a skeptical or oblivious audience of this? What could they possibly do except point to real or hypothetical examples, sketch the arguments on both sides in more or less detail—for instance, "He has almost no hair left"; "Yes, but he still has one patch of thick hair"—and trust their audience to agree that there are a lot of irresolvable borderline cases of baldness? Of course, some readers *might* just shrug their shoulders and say that if *they* were ever called upon to judge whether a specific person were bald, they could render a clearly correct verdict one way or the other. This would almost certainly mark the end of productive dialogue.

For present purposes, then, I think we must simply grant the Realists that there are many hard cases. The question then becomes: what are the implications of this for the merits of Legal Orthodoxy? More particularly, if one were otherwise inclined to endorse Legal Orthodoxy, how much would one have to concede to Anti-Orthodoxy in order to accommodate the prevalence of cases like this?

1. Metaphysical Legal Orthodoxy Preserved

The logical place to begin is Orthodoxy B, the claim that the law is complete or, equivalently, that legal bivalence holds. Does the prevalence of cases in which neither side has clearly better arguments show that Orthodoxy B fails? Not on its own. Suppose Plaintiff sues Defendant for battery, claiming Defendant punched Plaintiff, and after all the evidence is in, it is unclear whether Defendant actually punched Plaintiff, because the evidence cuts both ways. There are, in short, equally good arguments to be made on both sides. That does not give us any reason to doubt that the proposition that Defendant punched Plaintiff is either true or false. True, we lack rational warrant either to believe that Defendant punched Plaintiff or to believe that Defendant did not punch Plaintiff, but that is not because there is "no right answer"; it is just that we are in no position to know the answer. It is not even as if nobody *could* be in a position to know the answer; our lack of rational warrant for coming down on either side is entirely relative to our contingent epistemic circumstances. We could be in a position to know the truth of the matter if things were different—say, if video evidence were available. And there might even be people out there who do know the truth. (Defendant is a likely candidate.) *We* are simply not, *as things stand*, in a position to know the right

answer.[158] There is a kind of indeterminacy here,[159] but it is only epistemic indeterminacy,[160] and indeed only relative epistemic indeterminacy.[161] Why think there is ever anything more than this involved in hard legal cases?

One important difference between the case described above and the kind of cases the Realists had in mind is this. In the case described above, we would of course agree that as things stand, and relative to our less-than-ideal epistemic circumstances, we are in no position to know whether Defendant punched Plaintiff. But we have a pretty clear sense of the circumstances in which we, or someone else, *would* be in a position to know. If we had a surveillance tape of the incident, we would probably be in a position to know. Defendant is almost certainly in a position to know. Clearly, the Realists did not have cases quite like this in mind, or at least not *just* cases like this. They had in mind cases where we are, as Paul Horwich puts it describing the basic phenomenology of indeterminacy, "confident that no further scrutiny will resolve the matter."[162] You have a legal education; you are sure you looked at all the relevant statutes, precedents, etc.; you have considered all the arguments you can fathom; you cannot think of anything that would put you in a better position to know; and still, the arguments for one side do not seem clearly better than the arguments for the other side. The existence of cases like *that* is what the Realists wanted to highlight.

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158. I have not specified who "we" are in this scenario. Not much hinges on it, but presumably "we" are the judge or jury.

159. Sometimes "indeterminate" is used in a somewhat technical sense that would limit indeterminacy to situations where there is "no right answer" or where bivalence fails. This is fine so long as we recognize that the word "indeterminate" in common usage does not demand (although it does permit) this precisification. *See Indeterminate*, OXFORD ENGLISH DICTIONARY (online ed. 2021) (defining "indeterminate" to include, *inter alia*, things "[n]ot *fixed* in . . . character," but also things "of *uncertain* . . . character" (emphasis added)).

160. *See* Greenawalt, *supra* note 35, at 436 (drawing a distinction between metaphysical and epistemic indeterminacy); Kress, *supra* note 27, at 138–39 (similar); Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481, 485 n.17, 490 n.32 (1995) (similar).

161. *See* Roy Sorensen, *Vagueness Has No Function in Law*, 7 LEGAL THEORY 387, 393–95, 397 (2001) (discussing relative and absolute indeterminacy).

162. Horwich, *supra* note 89, at 930; *cf.* Nikola Kompa, *The Role of Vagueness and Context Sensitivity in Legal Interpretation*, *in* VAGUENESS AND LAW, *supra* note 86, at 205, 206 & n.2 (offering a similar formulation of the basic phenomenology of vagueness or borderline cases).

But does the existence of such cases establish that Orthodoxy B is false? I believe the answer is no. A comparison to the general philosophical literature on vagueness will once again be useful.[163] As noted above, "bald" is a vague term. Everyone readily acknowledges that there are "borderline" cases of baldness. It is widely agreed that this includes borderline cases that involve more than just highly contingent relative epistemic indeterminacy. A case where one lacks rational warrant either to conclude that an individual is bald or to conclude that he or she is not bald is not a "borderline" case in any sense that directly concerns philosophers of vagueness if, for example, the problem is just that poor lighting prevents one from seeing how much hair the individual has. Our confidence that it would be a forlorn venture to try to resolve the indeterminacy in many borderline cases is part of the pre-theoretic data upon which the entire vagueness literature is premised.

Yet whether this means we should not accept bivalence in borderline cases remains a hotly contested issue. Some refuse to assert bivalence in borderline cases of baldness and other vague predicates;[164] some say it is indeterminate whether bivalence holds in such cases;[165] others adopt epistemic theories of vagueness that preserve bivalence, characterizing borderline cases of baldness as cases where we simply do not know whether a person is bald.[166] Among epistemicists, a further question arises whether we are justified in concluding that at least some borderline cases are cases of absolute epistemic indeterminacy or whether we should at least leave open the possibility that only relative indeterminacy is at work.[167] The literature is massive and difficult, and it touches on some of the deepest problems in the philosophy of language, logic, and metaphysics. My point is not to advance a position on these issues but only to note that they are not decided simply by observing the existence—and, indeed, pervasiveness—of borderline cases of

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163. The relevance of the vagueness literature is not accidental. *See* Stephen Schiffer, *A Little Help from Your Friends?*, 7 LEGAL THEORY 421, 422 (2001) ("[T]o be vague is to admit of borderline cases: The concept of a bald man is vague because there might be a borderline case of a bald man—there might, that is, be a man who is neither determinately, or definitely, bald nor determinately, or definitely, not bald. Thus, the question of how we are to explicate the concept of vagueness reduces to the question of how we are to explicate the concept of indeterminacy.").

164. *See* ENDICOTT, *supra* note 83, at 135.

165. *See* Schiffer, *supra* note 163, at 430.

166. *See* sources cited *supra* note 89.

167. *See* Sorensen, *supra* note 161, at 395.

baldness, tallness, richness, loudness, and so on. The existence of such cases is accepted by all participants in debates about vagueness; the problem is figuring out the right theory of what is going on.[168]

Why would it be any different in the case of legal indeterminacy? The idea that one might adopt an epistemic account of the indeterminacy in hard legal cases is not new: Ronald Dworkin endorsed a view along these lines.[169] In brief, one can accept that the law is complete or "gapless" while still conceding that we often lack rational warrant to take a stand either way on legal questions, and also conceding that one is at a loss to specify anything we might do to fix the situation in many such cases. If this does not suffice to capture the basic phenomenology of the hard cases to which the Realists pointed, it is at least unobvious what is missing. It seems, therefore, that one can adopt an epistemic theory of legal indeterminacy while still acknowledging the basic phenomenon the Realists illustrated with their arguments about competing, apparently equally "authoritative" interpretive methods. This would leave Orthodoxy B intact.

It must be granted, of course, that the mere fact that one can *consistently* endorse Orthodoxy B while still acknowledging widespread legal indeterminacy of the sort the Realists pointed out does not provide *positive grounds* for endorsing Orthodoxy B. It is perhaps worth mentioning in passing that acceptance of Orthodoxy B does have the advantage of allowing us to straightforwardly apply classical logic and semantics to legal reasoning and discourse,[170] which is nothing to sniff at. But in the end, it is not the purpose of this Article to offer a positive argument for Orthodoxy B or for Metaphysical Legal Orthodoxy more broadly. My purpose is simply to motivate the conclusion that Metaphysical Legal Orthodoxy is *tenable* even in the face of the Realists' indeterminacy-based critique of Langdellianism. This conclusion, though philosophically modest, holds no small significance given the almost unreflective ease with

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168. *See* Schiffer, *supra* note 163.

169. *See* Ronald Dworkin, *On Gaps in the Law*, *in* CONTROVERSIES ABOUT LAW'S ONTOLOGY 84, 84 (Paul Amselek & Neil MacCormick eds., 1991).

170. This is the most commonly cited advantage of epistemic theories of vagueness. *See* WILLIAMSON, *supra* note 87, at 186; *see also* ENDICOTT, *supra* note 83, at 99; Rosanna Keefe & Peter Smith, *Introduction: Theories of Vagueness*, *in* VAGUENESS: A READER 1, 17–18 (Rosanna Keefe & Peter Smith eds., 1997). For a short general discussion of the theoretical benefits and costs of endorsing bivalence, see generally W. V. Quine, *What Price Bivalence?*, 78 J. PHIL. 90 (1981).

which many—arguably including the American Legal Realists themselves—seem to have drawn an inference directly from the phenomenology of hard cases to the falsity of Orthodoxy B, without appeal to fully considered intermediate premises.

A sophisticated opponent of Orthodoxy B might, however, suggest that the very ease with which so many people draw the aforementioned inference constitutes a kind of *prima facie* case for the propriety of doing so. Must not defenders of Orthodoxy B come to grips with the plain fact that many people *do* naturally conclude that if there are hard cases, we cannot reasonably maintain a commitment to legal bivalence? On its face, this might seem like nothing more than a flatfooted appeal to social proof or perhaps a sort of collectivized version of the infamous "incredulous stare"[171] argument. After all, the sheer *tendency* of many people to lose confidence in the existence of right answers in the face of persistent and apparently irremediable indeterminacy is just a psychological pattern, the justifiability of which is obviously open to debate. Ultimately the question is whether people *should* make this kind of inference—either in general, or as applied specifically to the legal context—not whether they *do* tend to make it. But the psychological pattern itself might nonetheless be a sign or product of something relevant to the debate over the merits of Orthodoxy B. Perhaps, for example, it reflects a less-than-fully conscious pragmatic judgment that it is pointless, perhaps even deleterious, to insist on bivalence in contexts where it seems hopelessly unrealistic to strive for the rational resolution of doubt or disagreement by means of further inquiry or discussion.[172] Might not a pragmatic judgment of just this kind be appropriate in the context of hard legal cases?

As it happens, I am rather sympathetic to this general line of thought. Be that as it may, it suffices for present purposes to offer three brief observations. First, it remains to be shown whether and in what sense it is pointless or deleterious to insist on legal bivalence even in hard cases. Second, there is still (at least apparently) a gap between: (1) the claim that it is in some sense pointless or deleterious to make some assertion; and (2) the claim that that assertion is false. Third, it is equally open, *ex ante*, to argue that it is pointless or deleterious *not* to insist on legal bivalence in hard cases. Exploring these issues in more detail would take us far beyond the

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171. *Cf.* DAVID LEWIS, ON THE PLURALITY OF WORLDS 133–35 (1986).

172. *See generally* HUW PRICE, FACTS AND THE FUNCTION OF TRUTH 117–95 (1988).

scope of this Article. But the path from the Realist critique of Langdellianism to the conclusion that adherents of Orthodoxy B are mistaken is by no means obvious or inexorable: it is no trivial matter to justify additional premises that would suffice to cover the distance.

What about Orthodoxy A, the view that judges do not make law? If we accept Orthodoxy B, we eliminate *one* potential reason to suppose that judges can and do make law, namely that they sometimes face cases in which there is no right answer to the dispositive legal question(s) and must "fill the gap" with new law of their own making. If Orthodoxy B holds, this never occurs: the law has no "gaps," so judges never need to "fill" them. We can allow that sometimes judges have to make various decisions where the outcome is not dictated by law (as, for example, in choosing a precise criminal sentence within some range of statutorily conferred discretion), but indeterminacy of the sort the Realists pointed out has nothing to do with this comparatively banal species of discretion. And any other reason to accept that judges make law would apparently be unrelated to the Realists' arguments.

To be clear, endorsing Orthodoxy B does not excuse us from the burden of offering *some* characterization of the effect of precedent. The reason it is typically thought that judges must make law if the law has gaps, after all, is that: (1) judges must sometimes decide cases "in the gaps"; and (2) their decisions in such cases will have precedential effect. Although the first condition is never satisfied if Orthodoxy B is true, judges will still sometimes decide *contrary* to law in contexts where their decisions have precedential effect. And how does one describe those situations, if not as instances of judicial lawmaking?

The answer is quite simple, and not at all novel. One simply distinguishes between precedent and law.[173] Judges make precedent, but they do not make law—or at least, as Beale somewhat more precisely put it, a court's decision does not *in and of itself* make law.[174] This does not lead to any particular view about how much

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173. *See* Sachs, *supra* note 13, at 561–63; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 858–63 (2015) [hereinafter Sachs, *Originalism*]; *see also* Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2280–81 (2014); *cf.* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 937 (2013).

174. *See supra* Part II.A.1.

weight courts should, or legally must, accord to precedent. As Stephen Sachs has observed, there are many mechanisms by which courts are required to act *as if* the law were different than it really is; an excellent example is the procedural doctrine of issue preclusion or collateral estoppel.[175] The doctrine of *stare decisis*, both in its vertical and horizontal forms, can be characterized as one such mechanism. So, an adherent of Metaphysical Legal Orthodoxy might, for example, describe what happened in *Plessy* and *Brown* as follows: *Plessy* incorrectly stated the law, and set a precedent that not only caused, but may well have legally required, some courts to issue further decisions on the basis of counterfactual assumptions about the law's actual content. *Brown* fixed the problem, and now the lower courts are relieved of the unenviable duty to act as if *Plessy* correctly stated the law.[176]

Once again, this response might get things wrong as a jurisprudential matter: it might rely on an incorrect theory of law's nature, or at any rate an incorrect account of what *our* legal system is like. And once again, that is beyond the scope of this Article. What matters for present purposes is that this account of the relationship between precedent and law is completely compatible with the Realists' observations about the prevalence of legal indeterminacy.

2. Epistemic Legal Orthodoxy (Modestly) Weakened

So much for Metaphysical Legal Orthodoxy. What about Epistemic Legal Orthodoxy? Let us begin with Orthodoxy C, the claim that the answers to legal questions are determinable. Suppose

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175. *See* Sachs, *Originalism*, *supra* note 173, at 858–60.

176. Constitutional cases are simpler than common-law cases; Beale's rejection of the view that judges make law "even where it is confined to the common law" is harder to maintain—and certainly harder to relate to—in today's world. *See* BEALE, *supra* note 17, at 148. That does not mean what Beale said was wrong the day he wrote it, when the prevailing understanding of the common law may have been different. But it has become so normal to think of the common law as essentially a set of rules modifiable in a more-or-less legislative fashion by the judiciary that Beale himself might, if he could see the way attitudes have evolved, feel forced to give up on Orthodoxy A so far as the common law is concerned. *See, e.g.*, RICHARD A. POSNER, DIVERGENT PATHS 95–96 (2016) ("No one doubts that common law . . . is legislative in character, the judges being the legislators . . . ."); SMITH, *supra* note 30, at 54 (observing that the claim that "precedents . . . themselves *are* the law . . . seems most secure in the area of common law," and that "indeed, common law decisions today are routinely described as 'judge-made law'"); TAMANAHA, *supra* note 5, at 175; Nelson, *supra* note 173, at 930.

we join the Realists in accepting the existence of cases where: (1) we are in no position to know the answer to some dispositive legal question; and (2) we cannot concretely specify any way we (or, in all likelihood, anyone) could be in a position to know the answer. As we have seen, this is apparently consistent with Orthodoxy B. Is it consistent with Orthodoxy C, the claim that the answers to legal questions are determinable?

At least if we put an undemanding gloss on the claim that the answers to legal questions are determinable, so that Orthodoxy C would be true so long as the answers to all legal questions were at least determinable by a figure like Dworkin's Hercules, then it is by no means clear that the Realists' arguments justify concluding that Orthodoxy C is false. To be sure, we often find ourselves faced with legal questions we cannot answer even after we have tried every method of inquiry we can fathom. But we obviously lack the superhuman abilities of beings like Hercules, so it would be hazardous for us to infer much about the epistemic capacities of Herculean inquirers from the fact that *we* are often confounded by hard legal questions. One worries that this would be like a chimpanzee opining on the outer bounds of human knowledge. The flip side is that it is unclear why we would be justified in actually *endorsing* Orthodoxy C. (How could *we* know that Hercules would not be just as stumped as we are?) Perhaps, then, the safest attitude toward Orthodoxy C in light of the Realists' observations about the prevalence of hard cases is simply agnosticism: maybe the answers to all legal questions are determinable, maybe not.

For similar reasons, the Realist critique seems to rob us of any particular grounds to endorse Orthodoxy D. If there is some autonomous method by which we can reliably determine the answers to all or virtually all legal questions, we have not discovered it. Induction from past experience suggests the odds are poor that any such method exists. But again, perhaps the safest attitude here is agnosticism (at least absent the resolution of jurisprudential matters beyond the scope of the Realist critique itself). We have tried the Langdellian method and it seems to have failed to deliver, but perhaps there is some alternative out there that we have not yet discovered.

What the Realist critique does seem to demonstrate, however, is what I will call Modest Epistemic Anti-Orthodoxy. According to Modest Epistemic Anti-Orthodoxy, the answers to many legal questions remain indeterminate *at least* relative to the epistemic capacities of normal, real-world lawyers and judges—that is to say,

the epistemic capacities of more or less normal (non-Herculean) humans with more or less normal experience and education. Moreover, questions at least this hard arise not infrequently in litigation, especially at the appellate level. In itself, this is a fairly modest departure from Legal Orthodoxy. (Hence the name.) As we will see, however, it is all the Realists really needed for their purposes.

B. Epistemic Legal Realism

I propose to use the name *Epistemic Legal Realism* to refer to the following stance:

1. Acceptance of Metaphysical Legal Orthodoxy;

2. Acceptance of Modest Epistemic Anti-Orthodoxy;

3. Acceptance of the major planks of the American Legal Realists' critical and constructive platform vis-à-vis legal science, legal education, and adjudication.

I call this Epistemic Legal Realism for the following reasons. First, the Epistemic Legal Realist *is* a genuine Legal Realist in the most important sense: namely, in accepting the major planks of the American Legal Realists' critical and constructive platform vis-à-vis legal science, legal education, and adjudication. Second, the Epistemic Legal Realist, as an adherent of Metaphysical Legal Orthodoxy, justifies these Realist views solely on the basis of: (1) Modest Epistemic Anti-Orthodoxy; and (2) other plausible background premises.

In this Section, I will explain how Modest Epistemic Anti-Orthodoxy, along with a few other plausible background premises, justifies the major planks of the American Legal Realists' critical and constructive platform vis-à-vis legal science, legal education, and adjudication. On the critical front, Modest Epistemic Anti-Orthodoxy justifies the conclusion that Langdellianism fails both as a source of predictive knowledge for lawyers and as a source of normative knowledge for judges. On the constructive front, Modest Epistemic Anti-Orthodoxy justifies characteristic Realist answers to questions about how lawyers, legal scholars, and judges should proceed in light of the failures and limitations of Langdellianism. Thus, insofar as the Realists' indeterminacy-based critique justifies

Modest Epistemic Anti-Orthodoxy, it also provides grounds for the major planks of the American Legal Realists' critical and constructive platform, even though its implications for Legal Orthodoxy as a whole are modest. In other words, the Realists' indeterminacy-based critique gives otherwise Orthodox-inclined legal thinkers grounds at least to endorse Epistemic Legal Realism.

1. The Practical Inadequacy of Langdellianism

The claim that Langdellianism was inadequate for the practical tasks facing lawyers and judges was certainly a major plank of the American Legal Realist platform: this set the stage for the greater part of the Realists' constructive agenda, showing the *need* for an alternative to the more-or-less Langdellian conception of legal science and legal education to which the Realists' ideas stood in such stark contrast. Recall that the Realists thought the important questions in law were those that mattered *practically* to legal professionals, notably questions about how courts will and should act. In Part III.B, I explained why one might think that Langdellianism could provide a good platform for equipping legal professionals to answer these questions. Briefly, it would make sense to think this if Langdellian Epistemology, Descriptive Judicial Fidelity, Normative Judicial Fidelity, and Judicial Non-Discretion held for most practical purposes. The Realists thought these premises did *not* hold for most practical purposes, mainly due to the prevalence of legal indeterminacy. Under the Standard Interpretation of the Realists' indeterminacy-based critique, the jurisprudential lesson is that many cases lack right answers; Langdellianism thus fails because Judicial Non-Discretion fails rather systematically.

Modest Epistemic Anti-Orthodoxy, however, also suffices to demonstrate that Langdellianism fails in precisely the same *practical* ways, and to precisely the same extent. The only difference is what jurisprudential gloss we place on the situation. Modest Epistemic Anti-Orthodoxy implies the existence of widespread legal indeterminacy of at least a relative, epistemic sort—specifically, widespread legal indeterminacy relative to the epistemic capabilities of normal, real-world lawyers and judges with normal, real-world levels of experience and formal education.[177] Thus, even if all judges and lawyers were honest, committed to following the law, as

177. *See supra* Part IV.A.2.

intelligent as the best real-world law students, and well trained in what Llewellyn called "the traditional legal techniques," they would often encounter cases that hinge on legal questions whose answers they are not in a position to know. (This would be especially common at the appellate level.)[178] In such cases, both judges and lawyers will lack rational warrant for believing a particular set of answers to the dispositive legal questions at stake. Of course, they might mistakenly *think* they have such warrant, and judges customarily write opinions claiming to have rational warrant for particular answers—indeed, purporting to supply the grounds for those answers—even in hard cases.[179] But they will not, in fact, be rationally warranted in believing one answer or another to the dispositive legal question(s) in such cases.

What are the consequences of this? Consider the following analogy. Imagine a game show in which a prize is placed randomly behind one of three doors. There are two players. Player One receives the prize if he or she picks the door with the prize behind it. Player Two receives a different prize if he or she can correctly predict which door Player One will select. (Player Two can win even if Player One does not pick the door with the prize.) No coordination between players is possible.

Consider Player One's situation. The host has in effect asked Player One the question, "What door is the prize behind?" The prize is awarded if Player One answers correctly. Player One wants to win: he or she has the overriding aim of choosing the door with the prize. (For example, he or she has not been bribed by a third party to pick a certain door.) Thus, Player One wants to give the right answer to the host's question. Now, there clearly *is* a right answer; the situation involves no metaphysical indeterminacy. Additionally, it is not as if no one could be, or even is, in a position to know the right answer: this is not a case of absolute epistemic indeterminacy. But *Player One* faces a problem of practically irresolvable epistemic indeterminacy. Indeed, any normal person in this position would. So far as Player One's goal of winning the game is concerned, he or she might as well pick randomly.

Now consider Player Two's situation. Again, the host has in effect asked Player Two a question: "What door will Player One pick?" Once again, the prize is awarded if Player Two answers correctly, and once again, Player Two wants to win. Here, too, there

178. *Cf.* FREDERICK SCHAUER, THINKING LIKE A LAWYER 22–23 (2009).

179. *See* Llewellyn, *supra* note 39, at 1238–39.

may well be a right answer, indeed a right answer that one could theoretically be in a position to know. Whether that is so depends on somewhat more exotic questions about freedom of the will and so on, but it is at least plausible that Player One is just a complex, deterministic physical system whose behavior is in principle predictable. Perhaps an expert neuroscientist with the right tools could be in a position to know what door Player One will pick. Player Two might also have informal background knowledge about Player One that allows him or her to venture a prediction that is better than a random guess. For example, maybe Player Two knows that Player One is fond of the number three.

But what will *not* help Player Two is to try to determine the right answer to *Player One's* question, assume Player One will give the right answer, and pick on that basis. There are two problems with this method, either of which *alone* sinks it. First, Player Two is in no position to know which door the prize is behind. Second, Player Two has no reason to suppose Player One will pick the right door anyway, given the apparent rough parity between the two players' epistemic circumstances. If Player Two had no other way of trying to predict Player One's choice except via this simple rational-actor model, he or she also might as well give a random answer.

In effect, this thought experiment provides an analogy—admittedly stylized—for the situation of judges and lawyers when courts face practically irresolvable epistemic indeterminacy. (Judges are like Player One; lawyers are like Player Two; trying to figure out the answer to the dispositive legal question is like trying to figure out what door the prize is behind.) Modest Epistemic Anti-Orthodoxy assures that normal, real-world lawyers and judges often face such circumstances. Thus, if one accepts Metaphysical Legal Orthodoxy but also Modest Epistemic Anti-Orthodoxy, the failure of Langdellianism is most naturally chalked up, in the first instance, to the failure of Langdellian Epistemology. There *are* right answers in hard cases, but contra Langdellian Epistemology, normal humans deploying the traditional methods of legal inquiry at the heart of the Langdellian method are not in a position to know them. Furthermore, one who accepts Metaphysical Legal Orthodoxy but also Modest Epistemic Anti-Orthodoxy should be gravely skeptical of Descriptive Judicial Fidelity. We have no reason to suppose judges have some special insight into the law that others lack; it's *possible* they always or almost always act in accordance with the law, but it would be an unfathomably improbable coincidence given what we know about their general epistemic capacities.

As a result, "figure out the law and follow it" is a poor maxim for judges who want to decide as they should in hard cases, if only because they often are in no position to figure out the law. Similarly, "figure out the law and assume judges will follow it" is a poor heuristic for lawyers trying to predict how judges will act in hard cases, if only because lawyers cannot always trust either themselves or the judges to figure out the law. Of course, just as under the Standard Interpretation of the Realists' indeterminacy-based critique, the situation could be fixed by changing the law in such a way as to reduce legal indeterminacy. But, as discussed in Part III.C, this is a tall order, and potentially a very costly one.

2. A New Science of Adjudication

The Realists did not simply proclaim the failure of Langdellianism without proposing a replacement. At least with regard to the task of predicting judicial action, they had an idea, albeit a fairly sketchy one, for an alternative to Langdellian legal science. In brief, the Realists proposed an empirical study of adjudication, drawing on the resources of fields like economics, psychology, anthropology, and statistics,[180] that would lead to better models for predicting how judges would decide cases. This would, in their view, bring the "backwater" field of law into the modern world.[181] They did not all agree on how successful the resulting models were likely to be,[182] but insofar as progress was to be made, this was how to do it.

Now, it must be admitted that Modest Epistemic Anti-Orthodoxy does not by itself imply that a project of this kind is worth the effort. But insofar as Modest Epistemic Anti-Orthodoxy implies the basic Realist stance on the extent of the failure of Langdellian legal science *qua* guide to prediction of judicial decisions, it at least motivates the search for different and better predictive models. If social-scientific approaches of the sort the Realists proposed can help

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180. *See* PURCELL, *supra* note 107, at 86–87; *see also* AMERICAN LEGAL REALISM 234 (William W. Fisher III et al. eds., 1993).

181. *See* Cohen, *supra* note 38, at 830; Llewellyn, *supra* note 47, at 89; Oliphant & Hewitt, *supra* note 130, at ix–x; Yntema, *supra* note 38, at 474 (castigating Beale's approach to law as "unscientific" and "medieval").

182. Frank was more pessimistic than many other Realists. For useful discussion, see LEITER, *supra* note 1, at 25–30.

remedy the inadequacies of Langdellian legal science—which seems *prima facie* plausible—then they are worth pursuing.

Note that this, too, has an equivalent in the game-show analogy. Player Two cannot rely on a simple rational-actor model based on figuring out the right door and assuming Player One will choose it. Thus, if Player Two wants to do better than chance, he or she must look to alternative sources of predictive knowledge about how Player One is likely to act. As discussed above, this might include informal knowledge about Player One's personality—for example, "I know Player One has a superstitious fondness for the number three, so I'll guess door three." This kind of informal guesswork is analogous to a lawyer saying, "The law is unclear, but this judge is conservative, so he'll lean toward corporate defendants." In effect, observations like these are the rudimentary germs of psychological or "attitudinal" models of judicial decision.[183] Such rudimentary proto-theorizing is unlikely to be very reliable, but it is better than nothing. The Realist proposal for a new, naturalistic science of law was, in essence, a call to make a systematic empirical science out of this style of approach.[184] Rough equivalents in the game-show analogy might include conducting rigorous statistical analyses of how players with certain traits (gender, religion, nationality, etc.) have tended to choose in the past, or perhaps even calling in a neuroscientist to scan Player One's brain.

Of course, there are many ways one could go about developing social-scientific models of judicial action, and it is only to be expected that different people with broad sympathies for the Realist program would differ on what kinds of hypotheses and approaches are most promising. The Realists themselves differed considerably on these points. To what extent are judicial opinions best understood as "rationalizations" that are not "either a *description* of the process of decision, or an *explanation* of how the decision was reached"?[185] Are judges' decisions often caused by highly idiosyncratic psychological traits, like tendencies to react favorably or unfavorably toward "blonde women, or men with beards, or Southerners . . . or plumbers,

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183. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

184. *See* LEITER, *supra* note 1, at 54–55.

185. Llewellyn, *supra* note 39, at 1239; *see also* FRANK, *supra* note 8, at 108–12; Green, *supra* note 112, at 1021–22; Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 279 (1929); Yntema, *supra* note 38, at 479–80.

or ministers, or college graduates"?[186] The Realists did not all agree on these points,[187] and there is no reason to suppose Epistemic Legal Realists would show any less variation. But a general attraction to the Realists' basic proposal for a new, empirical predictive science of adjudication is justifiable on the basis of: (1) Modest Epistemic Anti-Orthodoxy; plus (2) the plausible background hypothesis that the best way to develop better predictive models of human (including judicial) action is through the methods of observation and testing that have proven so successful in the natural sciences.[188]

3. The Role of Policy in Judicial Decisionmaking

The basic Realist proposal for how to remedy Langdellian legal science's failures as a reliable guide to predicting judicial action is clear: pursue a naturalistic, empirical science of adjudication. By contrast, there is not an equally clear "basic Realist proposal" for how to improve upon Langdellian legal science's failures as a *normative* guide to judicial action. Most of the Realists, Felix Cohen excepted, were not much inclined toward systematic normative theorizing of the sort this would likely require.[189] Even so, one highly general (but nonetheless provocative) claim about how judges should decide cases features prominently in the Realist literature. This is the claim that judges should often decide cases based on considerations of "policy"—that is, the good or bad social consequences of deciding one way rather than another.

The Realists are, of course, famous for their views on the role of policy judgment in judicial decisionmaking. Sometimes they simply advanced descriptive claims about the conscious or unconscious role of judges' policy judgments in determining how cases are actually decided.[190] Such purely descriptive claims about the role of policy in

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186. FRANK, *supra* note 8, at 115.

187. *See, e.g.*, Cohen, *supra* note 38, at 843 (castigating Frank and others for overemphasizing the role of idiosyncratic personality traits as causal determinants of decisions); Llewellyn, *supra* note 39, at 1239 (chiding unnamed figures for "over-enthusiasm" in treating written opinions as explanatorily worthless rationalizations); *see also* LEITER, *supra* note 1, at 28–29 (contrasting "Frank's 'Idiosyncracy Wing' of Realism" with the more mainstream "'Sociological Wing' of Realism").

188. *Cf.* LEITER, *supra* note 1, at 18.

189. *See supra* note 114.

190. *See, e.g.*, FRANK, *supra* note 8, at 112; Oliphant, *supra* note 129, at 159 (explaining decisions about the enforceability of non-compete clauses as the product

adjudication could be of use in developing better predictive models of judicial action,[191] and insofar as such claims might represent an implicit challenge to Descriptive Judicial Fidelity, they could also provide another avenue of attack on Langdellianism's *bona fides* as a reliable guide to predicting judicial action.[192] Descriptive claims like this do not, however, straightforwardly bear on the question of how judges *should* decide cases.

But the Realists also made normative claims about the role of policy considerations in judicial decisionmaking. In particular, they frequently claimed that judges in some sense *had* to decide cases on the basis of policy—not in the strict sense that there was literally no alternative (clearly there are alternatives, like rolling dice), but in the sense that there was no *better* alternative. As Cook put it, "[a]n *intelligent* choice" between possible outcomes in a "new" case "*can* be made only" on the basis of policy considerations.[193] Llewellyn put the point even more felicitously when he said that the "choice" left to a judge in a case where "equally authoritative premise[s] . . . lead[] to . . . different conclusion[s] . . . *can* be *justified* only as a question of policy."[194]

Did the Realists think *every* judicial decision should be made on the basis of a policy judgment? They might well have endorsed this conclusion insofar as it is a claim about the *ultimate* justificatory grounds of judicial decision.[195] The Realists seem to have adopted a consequentialist and vaguely utilitarian approach to the evaluation of government action in general. (Though with the exception of Felix

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of intuitions about economic policy); *see also* Leiter, *supra* note 39, at 270 ("It is what judges think would be 'right' or 'fair' on the facts of the case . . . that generally determines the course of decision according to the realist.").

191. *See generally* SEGAL & SPAETH, *supra* note 183 (developing a predictive model of Supreme Court decisionmaking based on proxies for Justices' policy views).

192. This is one way of interpreting the force of Frank's memorable claim that even "the honest judge . . . is often . . . *'bribed' . . . unconsciously by his own prejudices*," which was meant as an attack on the usefulness of traditional doctrinal instruction to equip lawyers to predict judicial action. Frank, *supra* note 123, at 35.

193. Cook, *supra* note 115 (emphasis added); *see also* Cook, *supra* note 147, at 486–87.

194. Llewellyn, *supra* note 39, at 1252 (second emphasis added).

195. It is clear that Felix Cohen, at least, would emphatically embrace this conclusion: he was keen to point out that judicial decisions, being actions rather than beliefs, could be finally justified only on the basis of an ethical theory. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 214–15 (1931). And he separately endorsed utilitarianism. COHEN, ETHICAL SYSTEMS, *supra* note 114, at 185–220, 227–29 (endorsing ethical "hedonism").

Cohen,[196] they never systematically defended it.) It follows trivially from this that all judicial decisions can ultimately be justified only by reference to what the Realists loosely called considerations of policy. On its own, however, this claim is not very exciting or unusual: it involves nothing over and above a specific application of a very general (and hardly uncommon) stance in normative ethics. Thus, even if it can fairly be described as a Realist stance, it cannot by any stretch be called *distinctively* Realist. Moreover, traditionalists like Langdell and Beale could simply accept the argument so far as it goes, but reply that judges' best bet for securing optimal social consequences is to decide according to the law in almost all cases. (The soundness of Normative Judicial Fidelity from a utilitarian standpoint is by no means beyond question, but the Realists did not offer detailed reasons to seriously doubt it.)

A more interesting and distinctive point emerges when we combine the Realists' background hypotheses about the ultimate justificatory grounds of judicial decision with their claims about the prevalence of legal indeterminacy. The idea here would be that because of legal indeterminacy, judges strictly *cannot* just adopt "always decide according to the law" as a workable maxim of action in all cases. Because "ought" implies "can," this allows us to sideline the broader (and probably interminable) normative-ethical question of whether it would be best for judges to do so even if they could. That at least some of the Realists intended to make this more interesting point is evident from the fact that Cook's and Llewellyn's claims about the need to justify decisions on the basis of policy judgment come on the heels of their respective discussions of legal indeterminacy.[197] Under the Standard Interpretation, the

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196. *See generally* COHEN, ETHICAL SYSTEMS, *supra* note 114.

197. *See* Cook, *supra* note 147, at 486 ("The actual process involved in settling *a situation of doubt*—a new case, if we are dealing with law—involves a comparison of the data of the new situation with the facts of a large number of prior situations . . . . This comparison, if carried on intelligently, necessarily involves a consideration of . . . policy." (emphasis added)); Llewellyn, *supra* note 39, at 1252.

Some remarks by Cohen and Cook suggest a more radical claim than this. First, Cohen expressly attacked the notion that "'public policy' . . . [is] relevant to the decision of a case only when precedents and statutes fail and the function of the judge becomes 'legislative.'" Cohen, *supra* note 195, at 214. Thus, he clearly disagreed that policy considerations were relevant *only* where judges faced legal indeterminacy. But here he was just making the general point that judicial decisions, like *all* actions, are ultimately to be evaluated by ethical criteria, on which see *supra*

reasoning here would be as follows: in some cases, it is impossible to just decide according to the law because there is no right answer to at least one dispositive legal question. In such cases, if judges *think* there exists a single outcome that is in accordance with the law, they are wrong. Though judges could certainly decide hard cases on the basis of random caprice, personal interest, or confused, oblivious, or circular doctrinal reasoning, these options are not normatively justifiable: they are clearly *bad* ways to decide. What *is* normatively justifiable is to try to decide in the way liable to maximize good social consequences.

As it happens, a functionally identical stance can be justified on the basis of Modest Epistemic Anti-Orthodoxy. To be sure, if we accept Metaphysical Legal Orthodoxy, it is *not* actually impossible to "just decide according to the law" in hard cases. That is to say, there is a legally correct and a legally incorrect outcome in hard cases, for the dispositive legal questions do have right answers. Be that as it may, "just decide according to the law" is a vacuous maxim for

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notes 195–196 and accompanying text. As he explained, "[e]ven if any sense could be found in the characterization of a decision as true or false . . . , such truth or falsity could not determine what decision, in any case, ought to be given." Cohen, *supra* note 195, at 215; *see also* Cohen, *supra* note 38, at 840. This is most naturally glossed as the simple observation that Normative Judicial Fidelity is not self-evidently true—a fair point, but not especially provocative, for reasons already discussed.

Second, both Cohen and Cook apparently endorsed the claim that policy considerations (normatively) must always play a role in the process of deciding whether a particular decision could be reconciled with precedent. Both of them correctly observed that, in a strict logical sense, *any* future decision will be consistent with *all* past decisions because the facts of every case are logically non-identical. Cohen, *supra* note 195, at 215–17; Cook, *supra* note 147, at 487; *see also* Oliphant & Hewitt, *supra* note 130, at xix. From this, Cohen and Cook concluded that we must apply ethical or policy judgment in order to infer from a body of precedent a rule capable of covering a future case. Cohen, *supra* note 195, at 215–17; Cook, *supra* note 147, at 487. Unfortunately, this is a non sequitur. Consider by analogy an attempt to infer rules of chess from a body of past observations of chess players' moves. All past chess moves are logically consistent with an infinite range of rules, such as "bishops can only move diagonally, unless it's June 20, 1931, and the player's name is Felix S. Cohen; then bishops can move straight." It does not follow that when trying to infer rules of chess from a body of "chess precedents," we must consider the *ethical* or *policy* merits of different candidate rules (for example, whether the world would be a better place if one rule or another governed the movement of bishops). There are no doubt subtler ways in which broadly normative reasoning is required in situations like this, but Cohen and Cook appear to have gotten ahead of themselves in describing the process as inevitably requiring ethical or policy judgment in a straightforward sense.

agents who face practically irresolvable epistemic barriers to reliably *locating* the right answers to the dispositive legal questions. Under Modest Epistemic Anti-Orthodoxy combined with Metaphysical Legal Orthodoxy, this describes the circumstances of normal, real-world judges confronted with hard cases. Again, the game-show analogy is instructive: it is entirely *possible* for Player One to "just pick the door with the prize behind it," but it would be absurd to *advise* Player One to do so. This would be like advising a craps player to always roll sevens: it certainly specifies an outcome worth hoping for, but it is practically useless as a guiding principle for action.

At this point, however, the analogy between the game show and adjudication diverges in an important way. In the game show, it is in fact quite justifiable for Player One to choose randomly, or by some capricious whim. That is because the only question that hangs in the balance is whether Player One will go home with the prize. In adjudication, the situation is not so simple. Even if a judge might as well decide a case on the basis of a coin toss *so far as the goal of reaching the legally correct outcome is concerned*, there are other considerations that might normatively justify one decision over another. Expected social consequences are an obvious candidate. It is rather as if the game show were modified so that a $100 "side prize" were assured if Player One chose door one, but not door two or door three. *Even if* the main prize is worth vastly more than $100, it would be unreasonable for Player One not to choose door one. Door one is as likely as the others to be the door with the prize behind it, and an extra $100 is thrown in for good measure. With this modification, our advice for Player One looks remarkably Llewellyn-esque: "You face a choice, and it *can* be justified only on the basis of the side prize."

Thus, *if* it seems that one outcome in a hard case has clearly better social consequences than another, it looks quite plausible for an adherent of Modest Epistemic Anti-Orthodoxy to offer the characteristic Legal Realist advice to judges in such cases: pick the outcome with the best expected social consequences. This depends, of course, on undefended consequentialist and quasi-utilitarian background premises that are not entailed by Modest Epistemic Anti-Orthodoxy, but the broader point is that in hard cases, the goal of trying to decide according to law should simply fall by the wayside for purposes of determining what decision to render.

A second-order problem arises, of course, if the question of which decision will maximize good social consequences is likewise

epistemically indeterminate. The occurrence of such "doubly hard" cases could be limited, though surely not eliminated, by implementing another classic Realist proposal, namely the introduction of some training in allied social-science fields (economics, anthropology, and the like) into the law school curriculum, plus the publication of more robust research on "the human effects of law" upon which judges might draw.[198] For residual doubly hard cases, however, there might be no better approach for judges than to "resort to the judgment aleatory by the use of [their] 'little, small dice,'" notwithstanding the fact that "the . . . modern view of the obligation of a judge in the decision of causes" would disapprove.[199] One certainly hopes that this could be kept to a very strict minimum, but given even Modest Epistemic Anti-Orthodoxy, it seems hard to guarantee that there might not be some cases where there is no better alternative in practice.

4. A New Way Out?

So far, it appears that Modest Epistemic Anti-Orthodoxy, combined with a few plausible background assumptions, justifies the major planks of the American Legal Realist platform. One might, however, argue that this appearance is deceiving on the following grounds. On the Standard Interpretation of the Realists' indeterminacy-based critique, it is *literally impossible* for a judge, even a Herculean one, to "just decide according to the law" in hard cases. That is because there is, so to speak, no law to follow—or, more precisely, not enough law to allow one to *just* decide the case according to it. Modest Epistemic Anti-Orthodoxy, however, does not license this conclusion. It only licenses the conclusion that normal human lawyers and judges with the familiar kinds of legal education and experience cannot reliably find the answers to hard legal questions, and so cannot reliably determine the legally correct outcomes in many cases. To be sure, this shows that Langdellianism is fundamentally flawed; we have *tried* training all lawyers and judges in the "traditional legal techniques" at the heart of the Langdellian method, and still they are often in no position to know the answers to the legal questions on which real cases hinge.

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198. Walter Wheeler Cook, *Legal Logic (Part III of* Law and the Modern Mind: *A Symposium)*, 31 COLUM. L. REV. 108, 109 n.31 (1931); *see also* Llewellyn, *supra* note 39, at 1248–50; Oliphant, *supra* note 129, at 159–61.

199. Hutcheson, *supra* note 185, at 274.

Langdellian Epistemology is significantly undermined, and the whole Langdellian project is undermined in turn.

But what if there were some other approach to legal inquiry that allowed people to reliably determine the answers to all (or nearly all) legal questions? What if we just need to find more richly articulated meta-principles for clearly resolving legal questions whose answers are indeterminate relative to the impoverished epistemic capabilities of people who know only "traditional legal techniques"? If we could find such a method, we could train lawyers and judges in it. No longer would there be widespread legal indeterminacy relative to the epistemic capabilities of the bulk of legal professionals. If the judiciary were then staffed with judges who were both honestly committed to following the law and adept in this new and improved method of legal inquiry, Descriptive Judicial Fidelity would substantially hold. Practicing attorneys, also trained in the new method, could reliably predict what judges would do by figuring out what the law is and assuming judges will act in accordance with it. There would be no need to resort to naturalistic, social-science-inspired models to remedy the failures of Langdellianism. Nor would there be a need for judges to fall back on their own relatively unconstrained policy judgments as a second-best solution for resolving cases in the face of legal indeterminacy. The basic Langdellian dream of a profession trained in a reliable and determinate science of prescriptive legal rules would live on.

The truth is that Modest Epistemic Anti-Orthodoxy does not altogether rule out this possibility. There is a sense, then, in which the Epistemic Legal Realist might seem less gloomy than the traditional, more fully Anti-Orthodox Legal Realist. Does this mean that Epistemic Legal Realism is not genuine, full-strength Legal Realism? Not in any very important sense. The Legal Realists, it must be remembered, never claimed that it was *absolutely* impossible to greatly reduce the prevalence of legal indeterminacy. If nothing else, fundamental law reform could achieve this.[200] But this, they noted, would be costly and unrealistic. The Realists thought

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200. *See supra* note 155 and accompanying text. Joseph Singer offers an admittedly extreme example that illustrates the point, namely a "system . . . based on the rule that no one is liable to anyone else for anything and that everyone is free to do whatever she wants without government interference" or, equivalently, a "plaintiff . . . always lose[s]" system. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11 (1984) (cited in Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 286 (1989)).

significant legal indeterminacy was practically ineliminable, not that it was altogether theoretically ineliminable.

Similarly, we can ask: even granting that there are always right answers to hard cases, how realistic is it to hope to eliminate legal indeterminacy by developing and disseminating better methods of legal inquiry? The prospects do not seem good. Note that if one could demonstrate the existence of a new method of legal inquiry N such that: (1) legal determinacy is substantially achieved relative to the epistemic capabilities of individuals who have mastered N; but (2) only Herculean figures, other superhuman entities, or even normal humans of genius-level capabilities could master N, then it would be utterly impractical to train up a sufficiently numerous cadre of lawyers and judges with mastery of N to staff the ranks of the profession. *Ex hypothesi*, the truth of Orthodoxy C would be confirmed, but Epistemic Legal Realism would *still* be largely justified. (The only exception is that those rare judges who had mastered N would not need to fall back on policy judgments even in cases that appeared "hard" to everyone else; they could just always decide hard cases in the legally correct manner.)

In order to *really* vindicate the Langdellian dream, one would need to demonstrate the existence of a new method of legal inquiry N* such that: (1) legal determinacy is substantially achieved relative to the epistemic capabilities of individuals who have mastered N*; and (2) people of basically normal innate cognitive abilities can master N* in a course of study that is practical given the limits of the human lifespan and the resources that can realistically be devoted to legal training. In all likelihood, this method would have to be relatively autonomous, which means that a demonstration of its existence would confirm not just Orthodoxy C but also Orthodoxy D. After all, it is not practical to expect to staff the ranks of the profession with people who have mastered not just a set of fairly autonomous legal-reasoning techniques, but also economics, history, moral philosophy, anthropology, psychology, and so on. While it is perhaps possible that a method like N* will be discovered, it seems extremely unlikely. And even if such a method *were* discovered, what are the odds it would meet with widespread acceptance? One might reasonably worry that it would not, especially if it led to results that were normatively unpalatable to a large share of the profession.

The big picture is that the Realists cared about helping lawyers and judges do a better job in *our* world, the world more or less as we find it. According to Legal Realists of all stripes, people with neo-Benthamite ambitions to substantially eliminate legal

indeterminacy through law reform are welcome to try, so long as their proposals would not otherwise cripple the legal system. According to *Epistemic* Legal Realists, people who want to try to develop new methods of legal inquiry that would substantially eliminate legal indeterminacy are likewise welcome to try. But we should not hold our breath in anticipation that such efforts will succeed. For now, we must accept as a given that fairly widespread legal indeterminacy exists relative to the epistemic capabilities of normal lawyers and judges. Until such time as a neo-Benthamite or neo-Langdellian vision seems imminently realizable, we should adjust our approaches to legal science, legal education, and adjudication so as to do the best with the hand reality has dealt us. Here and now, that means embracing something much akin to Legal Realism.

CONCLUSION AND UPSHOTS

Let us summarize what has come before. The Realists defined themselves largely in opposition to Orthodox figures like Langdell and Beale, and it is often thought that Legal Orthodoxy is untenable in a post-Realist world. It turns out, however, that the Realists did not offer sufficient grounds to depart very much from Legal Orthodoxy. Notably, they did not justify abandoning Metaphysical Legal Orthodoxy; they justified only Modest Epistemic Anti-Orthodoxy. This turns out, however, to have been enough to motivate the better part of their critical and constructive platform: it suffices to demonstrate the considerable practical failures of Langdellianism, to motivate the development of an empirical predictive science of adjudication, and to justify key Realist ideas about the legitimate role of policy in adjudication.

What are the pragmatic upshots of these findings? For one thing, these findings have some dialectical significance given the perception that Legal Orthodoxy and Legal Realism are in deep tension. If the preceding arguments are correct, there is *some* truth to this perception: the Realist critique does, after all, motivate at least Modest Epistemic Anti-Orthodoxy. But the tensions between Legal Orthodoxy and Legal Realism do not run as deep as the Realists themselves seemed to have supposed.

From a dialectical standpoint, this conclusion cuts two ways. On the one hand, it turns out that the Realists gave adherents of "Bealist" views on the nature and sources of law little reason to abandon those views. Given the considerable and ongoing role of

Realist ideas and texts in shaping the tacit jurisprudential premises of modern legal discourse and thought, this suggests that the relatively Anti-Orthodox received wisdom among contemporary lawyers rests on shakier foundations than is often supposed. Of course, this demonstrates nothing about the final merits of Legal Orthodoxy; shaky foundations can be replaced. But it does provide some support for scholars attempting to reinvigorate aspects of Legal Orthodoxy, especially Metaphysical Legal Orthodoxy.

On the other hand, all of the most important elements of the Legal Realists' practical agenda vis-à-vis legal science, legal education, and adjudication can be justified *even if* Legal Orthodoxy remains largely intact. Thus, theorists who believe they can motivate a return to a more Orthodox understanding of the law should not overestimate the bearing of their efforts on the practical merits of Legal Realism. For example, it really does not impact the practical arguments for a Realist approach to adjudication if there are always right answers in hard cases, or if Herculean agents could reliably locate them, as long as it remains beyond the capacities of the great majority of real judges to do so.

There is, however, a further worry that these considerations naturally invite. If it turns out, for example, that the merits of Metaphysical Legal Orthodoxy are for all practical purposes independent of the merits of Legal Realism, who really cares whether Metaphysical Legal Orthodoxy is true? Does anything of consequence hinge on whether we adopt or reject Metaphysical Legal Orthodoxy? Perhaps, in the end, it is all just a "merely verbal" dispute. An adherent of Metaphysical Legal Orthodoxy draws a distinction between law and precedent, and insists that there are right answers to hard legal questions. Perhaps all that sets him or her apart from an adherent of Metaphysical Legal Anti-Orthodoxy is a different use of terms like "law," "precedent," and "right answers." Adherents of Metaphysical Legal Orthodoxy and Anti-Orthodoxy will, for example, disagree on whether *Plessy* and/or *Brown* "made law," but they could agree that lower courts should have treated *Plessy* as binding until the Supreme Court revisited it, and that the Supreme Court should indeed have overruled *Plessy* in *Brown*. And they could agree that we often face legal questions where there is no right answer if "right answer" is defined as "answer for which we

have, or realistically can obtain, rational warrant to believe."[201] Perhaps these just represent different, equally apt conceptual or linguistic frameworks for describing the same phenomena.

A rich philosophical literature has emerged on the question of what it means to say that a dispute is (merely) verbal, as well as related questions about whether, why, and to what extent it is worth pursuing verbal disputes.[202] Some have even addressed these problems specifically as applied to legal concepts and discourse.[203] Addressing these issues in detail is far beyond the scope of this Article, but it is at least not outlandish to think that *some* jurisprudential disagreements might be verbal disputes.[204] I will therefore not take any stance here on the degree to which jurisprudential disputes, including disputes over various elements of Legal Orthodoxy and Anti-Orthodoxy, might in practice boil down to verbal disputes. I will instead try to sidestep the problem by offering some reasons to think the stances we take on Metaphysical Legal Orthodoxy might practically matter *even if* disagreements over Metaphysical Legal Orthodoxy are merely verbal disputes. In support of this view, I will draw on the writings of a familiar group of legal thinkers who could hardly be accused of being insufficiently pragmatic: the American Legal Realists.

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201. *Cf.* ENDICOTT, *supra* note 83, at 68–69 (urging that the claim that "there is no right answer to the question 'is *x* ø?'" not be understood to entail that it is not true that *x* is ø).

202. *See generally* Karen Bennett, *Composition, Colocation, and Metaontology*, *in* METAMETAPHYSICS 38 (David Chalmers et al. eds., 2009); Alexis Burgess & David Plunkett, *Conceptual Ethics I*, 8 PHIL. COMPASS 1091 (2013); Alexis Burgess & David Plunkett, *Conceptual Ethics II*, 8 PHIL. COMPASS 1102 (2013); David J. Chalmers, *Verbal Disputes*, 120 PHIL. REV. 515 (2011); Eli Hirsch, *Physical-Object Ontology, Verbal Disputes, and Common Sense*, 70 PHIL. & PHENOMENOLOGICAL RSCH. 67 (2005).

203. *See* David Plunkett & Tim Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, 19 LEGAL THEORY 242 (2013); David Plunkett & Tim Sundell, *Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response*, *in* PRAGMATISM, LAW, AND LANGUAGE 56 (Graham Hubbs & Douglas Lind eds., 2014).

204. *Compare* SHAPIRO, *supra* note 2, at 23 (arguing that philosophical inquiry into the nature of law is "*not* primarily a linguistic inquiry" or a matter of "mere semantics"), *with* SHAPIRO, *supra* note 2, at 274 (arguing that the specific debate between inclusive and exclusive legal positivism is "essentially" a "'labeling' problem").

The Realists, for all their wariness toward anything resembling conceptual analysis or metaphysics,[205] understood that how we use words like "law" matters—if not rationally, then at least psychologically. Felix Cohen argued that the word "law" is sometimes used in a normative sense ("a rule of civil conduct . . . commanding what is right and prohibiting what is wrong"), sometimes a non-normative sense ("a rule of civil conduct . . . prescribed by the supreme power in a State"), and sometimes in an ambiguous muddle of the two.[206] This, he argued, not only invited confusion, but also rhetorical manipulation.[207] This was part of his rationale for adopting a definition according to which "law" means "a body of rules according to which the courts . . . decide cases."[208] Explicitly articulating and rigorously adhering to such a "purely positive or natural"[209] definition of "law" could head off confusion and rhetorical manipulation.[210]

Jerome Frank also understood that the word "law" has psychological power, and that this power could be harnessed. Although he suggested that it might sometimes be conducive to clarity if we just stopped talking about "law" and simply "discuss[ed] what courts do in fact"[211]—a stance reminiscent of Cohen's in some respects—he elsewhere urged law schools to exploit the psychological power of the word "law" for beneficent ends. Students, he observed, come to law school with the idea that their main job is to learn "the law."[212] Thus, if what lawyers should really care about is what courts do in fact, law schools should define "law" in that way, so that students do not focus on something less important, namely, on what Llewellyn called "paper rules."[213] The underlying premise of Frank's argument is that it is psychologically easier to convince law students to accept a revisionary definition of "law" than to get it into their heads that they should not worry so much about "law."

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205. *See supra* note 112 and accompanying text.

206. Cohen, *supra* note 38, at 838.

207. *Id.*

208. COHEN, ETHICAL SYSTEMS, *supra* note 114, at 11.

209. *Id.* at 14.

210. *Id.*; *see also* Cohen, *supra* note 38, at 839–41.

211. Frank, *supra* note 115, at 645. Leiter has more recently set forth a similar argument about the fruitlessness of debating the boundary between law and morality. Leiter, *Demarcation*, *supra* note 2, at 675–76.

212. Frank, *supra* note 123, at 17.

213. Llewellyn, *supra* note 65, at 448.

Although neither Cohen nor Frank put it this way, the basic mechanism at work here has to do with the fact that people "think in words,"[214] and are primed to make certain inferences if they think something has the status of "law." This is the principal reason why the phenomenon of "persuasive definition"[215] is rhetorically (that is, psychologically) powerful, whatever its ethical status. There is a practical, psychological reason why people fight over the definitions of words like "God,"[216] "racism,"[217] and, yes, "law," rather than just accepting whatever definitions others might like to use.

It is perfectly obvious, for example, why Senator Ted Cruz—a skilled politician, and a well-trained lawyer—was instrumentally wise to insist that the Supreme Court's holding in *King v. Burwell*[218] was not "the law of the land," but rather just "the decision of the Supreme Court, [and] . . . contrary to the law."[219] At the time, Senator Cruz was championing jurisdiction-stripping legislation to limit the federal courts' power to hear cases.[220] It would be impossible for someone with his legal experience not to understand that many lawyers refer to precedent as law. But he surely understood the eulogistic connotations of the word "law," at least in the minds of many voters. Thus, for purposes of motivating popular resistance to the Court, it would have been less effective to say that *King v. Burwell* was law, but bad law. Nor is it surprising that many state officials referred to the Court's decision in *Obergefell v. Hodges*[221] as "the law of the land" in memos explaining that they would implement the rule the Court had articulated in that case.[222] For purposes of convincing potentially skeptical voters that it was best not to defy the Court, it was almost certainly better to say that

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214. *Cf.* CHARLES L. STEVENSON, ETHICS AND LANGUAGE 148 (1944).

215. *See id.* at 206–26; CHARLES L. STEVENSON, FACTS AND VALUES 32–54 (1963) [hereinafter STEVENSON, FACTS AND VALUES].

216. *See* STEVENSON, FACTS AND VALUES, *supra* note 215, at 41–42.

217. *See, e.g.*, Carlos Hoyt Jr., *The Pedagogy of the Meaning of Racism: Reconciling a Discordant Discourse*, 57 SOC. WORK 225, 229 (2012).

218. 576 U.S. 473 (2015).

219. MSNBC, *Ted Cruz Interview: SCOTUS Rulings Were 'Lawless' | Morning Joe*, YOUTUBE (June 30, 2015), https://www.youtube.com/watch?v=lsdLUyJCbUI.

220. Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NAT'L REV. (June 26, 2015, 9:39 PM), http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment.

221. 576 U.S. 644 (2015).

222. *See* Nora Kelly & Brian Resnick, *What Are States with Same-Sex Marriage Bans Doing Now?*, ATLANTIC (June 26, 2015), https://www.theatlantic.com/politics/archive/2015/06/what-are-states-with-same-sex-marriage-bans-doing-now/448503.

Obergefell was "the law of the land" than to say that regardless of what the law was, it was not worth picking a fight with the federal government.

Again, my point in offering these somewhat sketchy observations is not to make any claims about whether the disputes between adherents of Metaphysical Legal Orthodoxy and Metaphysical Legal Anti-Orthodoxy are, in whole or in part, "verbal disputes." Nor is my point to take a firm stance on whether it is worth participating in such disputes, and if so, on what terms they should be conducted. My point is just this. Adherents of Metaphysical Legal Orthodoxy will *say* things like, "*Brown* did not make law; it brought Supreme Court precedent into alignment with law," and, "Even in hard legal cases, there is still a right answer." Adherents of Metaphysical Legal Anti-Orthodoxy will say things like, "*King v. Burwell* is now the law of the land, even if it adopted a dubious reading of the Affordable Care Act," and, "Whatever else might be wrong with the Court's decision in *District of Columbia v. Heller*,[223] it did not get the existing law wrong—there was no legally right answer." They will not just say these things, but also think them, and the fact that they say such things will affect how *others* think. Exactly what practical consequences this might have is largely a matter of speculation, though informed guesses might be ventured. Kent Greenawalt, for example, has suggested that judges who accept Orthodoxy B might be quicker to give up on searching for the right answers to legal questions than those who reject Orthodoxy B.[224] Greenawalt's psychological conjecture is speculative, but not obviously implausible.

One might respond that all of this sounds absurdly irrational. One might object that Senator Cruz and the state officials were just responding strategically to non-lawyers' confusion, ignorance, or non-rational psychological tendencies. Frank proposed that law schools could pull a similar trick on law students, but if such a trick worked, it would only be because students do not always think clearly. As to Greenawalt's speculations about the consequences of putting one or another jurisprudential gloss on legal indeterminacy, it is rather hard to see why a judge *should* give up seeking the right answer to a hard legal question more quickly just because he or she abstractly believes there are metaphysical "gaps" in the law: whether or not there are gaps, the judge should (under conventional

223. 554 U.S. 570 (2008).

224. *See* Greenawalt, *supra* note 35, at 443–44.

normative posits) keep seeking the right answer until he or she is truly justified in concluding that there is nothing more he or she can do to find it.[225]

But the properly Realist response to this is that even if it is irrational, that does not make it irrelevant, or safely ignorable. What gave the Legal Realists their name was their "opposition to 'romanticism', 'fantasying', 'prettifying', and 'wishful thinking'."[226] This specifically included a willingness to take psychological realities seriously regardless of whether they were rational. Even if, for example, the disagreement between Beale and Frank over the tenets of Metaphysical Legal Orthodoxy was merely a verbal dispute—a simple consequence of their using words like "law" in different ways[227]—that does not mean the broader shift from a relatively Orthodox received wisdom to a relatively Anti-Orthodox received wisdom over the last century[228] is as trivial as a shift in vowel pronunciation.

This shift may well stand in a complex, likely bidirectional causal relationship to significant variations in various actors' dispositions toward treating the words and acts of courts with deference.[229] It may also stand in a similar relationship to significant variations in judges' dispositions toward consciously resorting to deciding cases on the basis of open-ended policy judgments. Exploring these ideas in more depth is a task for another day. The lesson for present purposes is that debates over the merits of Legal Orthodoxy—which, as we have seen, are less affected by the Realist critique than one might suppose—are not devoid of practical consequences, even if the case for at least Epistemic Legal Realism is fairly secure.

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225. Indeed, Stephen Schiffer has made precisely this point in reply to Greenawalt. Stephen Schiffer, *Philosophical and Jurisprudential Issues of Vagueness*, *in* VAGUENESS AND LAW, *supra* note 86, at 23, 28–30.

226. Jerome Frank, *Are Judges Human? Part Two*, 80 U. PA. L. REV. 233, 258 n.70 (1931); *see also* BENJAMIN NATHAN CARDOZO, SELECTED WRITINGS 10 (Margaret E. Hall ed., 1947); Pound, *supra* note 8.

227. The suggestion that Frank's disagreements with Beale might have been merely verbal was proffered by Mortimer Adler in a review shortly after *Law and the Modern Mind* was released. Mortimer J. Adler, *Legal Certainty (Part II of* Law and the Modern Mind: *A Symposium)*, 31 COLUM. L. REV. 91, 102–03 (1931).

228. *See supra* note 105 and accompanying text.

229. This could include lawyers', executive officials', and legislators' dispositions toward courts, as well as courts' dispositions toward other courts or toward administrative agencies.