

The Real Legal Realism

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Karl N. Llewellyn, [The Theory of Rules](#), edited and with an introduction by Frederick Schauer (Univ. of Chicago Press, 2011).

Llewellyn began this book in 1938 in response to mischaracterizations of his views about legal rules. After working on it for two years, he set it aside unfinished. Mouldering for decades among the rest of Llewellyn's papers at the University of Chicago, it has finally been published, with a masterful introduction and set of notes by Fred Schauer. Although the book offers many valuable insights about what this prominent legal realist thought about legal rules, my emphasis here will be on how it might help put to rest two persistent misreadings of the realists.

The first is that the realists believed in global legal indeterminacy—that they thought legal rules can never (or only rarely) give judges sufficient guidance to come to a particular decision. This misreading is evident in H.L.A. Hart's critique of "rule skepticism" in Chapter VII of [The Concept of Law](#). *The Theory of Rules* is a useful corrective, for Llewellyn repeatedly insists that legal rules can, and often do, meaningfully instruct judges about how cases should be decided (e.g., Pp. 40-41, 46-47). What is more, he identifies the likely source of the mistaken view that the law is globally indeterminate—the tendency of legal scholars to concentrate on cases that make it to appellate review. (P. 47.) Here Llewellyn's book supports Brian Leiter's reading of the realists, for Leiter has argued tirelessly that the realists were not global legal indeterminists (e.g., Pp. 19-20 of [Naturalizing Jurisprudence](#)).

That this misreading got started at all might seem puzzling, given that a number of realists explicitly rejected global legal indeterminacy in their published writings in the 1930s (e.g., P. 238 of Felix Cohen's [Ethical Systems and Legal Ideals](#)). But at least one realist, Jerome Frank, certainly sounded like he believed that legal indeterminacy was global. For example, in [Law and the Modern Mind](#) he described judicial discretion as "unavoidable" (P. 399) and occurring "in almost all cases." (P. 398.) The truth is that even Frank probably was not talking about global legal indeterminacy. Read charitably, he had other things in mind. One was judicial supremacy—the fact that a judge's judgment is binding on officials even if the judge misapplied a determinate legal rule. (More on that later.) Another was a judge's or jury's power to make any case conform to a legal rule by coming to an accommodating conclusion about the facts. The third and most interesting was [philosophical anarchism](#): a legal rule, no matter how determinate, does not on its own give a judge a moral reason to adjudicate in conformity with the rule. I believe that philosophical anarchism stands at the heart of the much-misunderstood Freudian theme in *Law and the Modern Mind*. According to Frank, judges who assume that a legal rule somehow *compels* them to issue a particular decision are seeking in the law a father figure who will release them from the adult responsibilities of moral agency.

The second persistent misreading is that the realists held what can be called a *decision* theory of law, according to which the law consists only of the concrete decisions of courts. Here again an example of the misreading is Chapter VII of Hart's *The Concept of Law*. As Hart sees it, the realists wrongly adopted a decision theory because of judicial supremacy. From the fact that an erroneous judgment must be enforced by officials unless overturned on appeal, the realists concluded that a judge cannot make a legal error. Hart argued that this is a mistake. After all, the fact that an umpire's call is binding even if it is in error does not mean that the rules of baseball are whatever the umpire says they are. (Hart's example was cricket, not baseball.)

I think it's clear that *some* realists *sometimes* advocated a decision theory of law. The theory is particularly prominent in *Law and the Modern Mind*. It's worth mentioning, however, that Hart's umpire argument is not quite as strong as it first appears, for it ignores the true extent of judicial supremacy (in the United States at least). It is not just true that a

concrete judgment (for example, that Jones is liable to Smith for \$100,000) must be enforced by officials even if the judge who issued the judgment misapplied the law. In addition, the judge's *interpretation* of the law is often binding upon other officials beyond the case in which the interpretation was made. Umpires do not issue binding interpretations of the rules of baseball.

The merits of the decision theory aside, *The Theory of Rules* provides important evidence that the theory was not an *essential* element of legal realism, for in Llewellyn's book the theory cannot be found. What one *does* find is a *prediction* theory of law (see especially Chapter II). Under the decision theory, the law concerning a certain set of facts is whatever concrete judgment will be issued by the court that adjudicates those facts. Under the prediction theory, by contrast, the law consists of patterns of judicial (and other official) behavior. When one makes a claim about the law one is saying that the requisite patterns are in place. And that amounts to a prediction of official behavior. Two other realists who offered the prediction theory are [Felix Cohen](#) and Walter Wheeler Cook.

Distinguishing between the decision and prediction theories is essential to understanding the realists, for passages that sound like the decision theory can usually be more charitably read as expressing the prediction theory. Consider, for example, Llewellyn's endorsement of John Chipman Gray's claim that courts, not legislatures, make law. (P. 45.) Although this might appear to be an example of the decision theory (and I think *is* an example in Gray's case), all Llewellyn means is that a statute becomes law and has the legal content that it does only through patterns of official behavior: "In the process of becoming a rule, *prevailing* and *authoritative*, any would-be rule is *read* into, and read through the prisms of, the institutional structure of the going lawways and of the existing lawmen...." (P. 44.) This is the prediction theory, not the decision theory.

Indeed, as Schauer notes (P. 59 n.12), the prediction theory, properly understood, looks similar to Hart's own theory of law. For Hart, when a judge says that the U.S. Constitution is law, she presupposes the existence of a practice among officials, which Hart calls a "rule of recognition." This presupposition amounts to a prediction of what officials will say and do.

To be sure, there are some differences between the prediction theory of law and Hart's. One is that Hart thinks a rule of recognition requires more than regularity of official behavior. Certain attitudes—which Hart calls the "internal point of view"—are necessary too. Another is that, for Llewellyn, an item is a "rule of law" if it is a regular determinant of judicial (and other official) decision-making, even if it fails to satisfy the explicit criteria of legality employed by officials. (See Schauer's introduction at P. 21.) Hart, by contrast, privileges the "paper rules" (in *The Theory of Rules* Llewellyn calls them rules in their "propositional form") that are identified by these explicit criteria.

Another possible difference concerns the role that predictions or other factual statements concerning officials can (or should) play in legal justification. For example, in [Transcendental Nonsense and the Functional Approach](#), the image of proper adjudication Felix Cohen offers is one in which a judge first identifies the law in terms of predicted patterns of official conduct and then decides, on the basis of moral considerations, what she ought to do in response. (Pp. 838-42.) Cohen thinks a purely predictive approach to the law can be adopted without explanatory or justificatory loss. For Hart, by contrast, social facts are *presupposed* rather than *described* when an official makes a so-called "internal" statement of law. Indeed, in *The Concept of Law* Hart claims that someone who speaks of a rule of recognition as a set of social facts has ceased to talk about legal validity at all. (Pp. 102-09.)

Interestingly, here Llewellyn appears closer to Hart than to Cohen, for he suggests that a purely predictive approach cannot be consistently maintained by someone engaging in legal justification. (P. 56.) and he offers some tantalizing suggestions why this is so. In the end, legal justification must refer to propositional rules of law, not predictions of official behavior. (P. 59.) Perhaps the most exciting aspect of *The Theory of Rules* is that it shows that the realists, despite advocating a prediction theory of law, disagreed among themselves about the role that predictions can or should play in legal justification.

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