

Realism Today: On Dagan's Quest Beyond Cynicism and Romanticism in Law

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Abstract This paper explores the contribution by the contemporary legal realist Hanoch Dagan. Dagan's brand of realism defines law on the basis of its institutions or social practices, not of its norms or rules. The paper first provides a critical overview of this realist theory of law: It is not synonymous with the predictive theory of law, with Leiter's theory of judges, or Frank's "breakfast theory". By focusing on the role of judges and the methodology of legal reasoning, we discover that the core difference between realism and positivism lies in the claim that law is affected by a strong form of indeterminacy, stemming from the plurality of legal sources, not from the open texture of legal language as expressed in rules; and we are also able to distinguish this form of realism from contemporary movements in legal theory, such as critical legal studies and law & economics. The normative dimension of realism is also addressed: This theory of law develops a specific concept of justice, on the ground of a cognitivist theory of value.

Keywords Realism · Positivism · Arbitrariness · Discretion · Meta-ethics · Theory of justice

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1 Realismus Redivivus

Hanoch Dagan has taken on an impressive task that many less courageous scholars would have shun—to defend the scientific relevance and interest for contemporary scholarship of a legal theory is often relegated to the museum of legal thought: Legal realism (LR) and, in doing so, the aim is to show that legal theory is an exciting and attractive discipline in its own right. The vast majority of legal theorists today hold that the contemporary benefits of studying legal realism are rather marginal so most scholars would gladly dodge any of these two undertakings.

In *Reconstructing American Legal Realism and Rethinking Private Law Theory* [1], Dagan sets out to do nothing less than “revive” realism and the theorizing about law in general. So he offers a new and better characterization of LR, defends this “realist big picture of law”, and advocates for greater interest in jurisprudence.¹ Let us see how he manages to take on these formidable challenges.

Dagan’s starting point is that “contemporary accounts of law do enhance our understanding of law’s characteristics, but the current debates between law-as-power and law-as-reason, law-as-science and law-as-craft, or law-as-tradition and law-as-progress are futile and harmful” [1, 8]. He aims to offer a theory of law that overcomes these simplistic outlooks, thus instilling new life into legal theory as a discipline. In order to reconstruct the realist position, in chapter one, he purposefully invents a “prototype realist” by cooking together what he finds most attractive in the realist literature. His conclusion, at odds with a diffused understanding, is that “we are not all realists now” [1, 77].

This new characterization of LR is unsurprisingly based on the principle of interpretative charity. “This book – Dagan admits from the very beginning – presents a charitable reading and a contemporary rendition of the legacy of American legal realism. It thus provides an appealing alternative to the current prevailing perspectives on law” [1, 12]. But a charitable reading is, of course, also a selective reading; so the focus is on some authors, particularly Oliver Wendell Holmes, Benjamin Cardozo, Karl Llewellyn, and Felix Cohen, to the detriment of others, like Jerome Frank and Thurman Arnold. This selective reading is, roughly speaking, in line with Brian Leiter’s laments over the Frankification of realism a few years ago. This venture into realist literature implies a methodological choice that Dagan is well aware of: “The reading of legal realist literature suggested here is unashamedly influenced by my own convictions about law, though I do not pretend

¹ See esp. chapters 1, 2 and 4. The book includes incursions into other aspects as well. Dagan calls for a “pluralistic turn in private law theory” and dedicates chapters 5–9 to private law, where he offers specific policy suggestions in relation to marital property, monetary remedies for breach of entitlements and the right of entry; and investigates the gaps between the content of rights and the judicial response to their infringement, and the constitutive role of remedies that introduces significant subtlety into the domain of rights. His “structurally pluralistic and moderately perfectionistic understanding of private law” that he claims to be not only “descriptively but also normatively superior” (see chapters 7 and 8), can be summed up in three key points: Private law is characterized by multiplicity; dynamism and disavowal of neutrality and because of these constitutive features it obeys the spirit of rule of law. The application of Dagan’s realist theory of law to his field of expertise, namely private law, is interesting but it largely draws its value from Dagan’s brand of realism and I shall therefore dedicate this paper to the latter.

to have invented the ideas I present” [1, 4]. In this sense, we might speak of a Daganian brand of realism that this paper sets out to outline and discuss.

In my view, the methodological choice is wise, but I do not believe Dagan made it because of the reasons I would favour. In fact, Dagan’s reconstruction of LR is almost exclusively focused on American legal realism, as the title of the book correctly mirrors. This focus is however excessively narrow. LR is really a much more broad and interesting phenomena than merely the US-based theorizing. There is obviously Scandinavian Legal Realism, that I have discussed elsewhere [2] and [3] and that most Americans simply ignore. The Scandinavian brand often shares outlooks and opinions on specific matters with its American counterpart, but not always. The Scandinavian brand is furthermore philosophically and meta-ethically much more refined and not so adjudication-fixated, as many common law-influenced theories of law tend to be. LR then encompasses a series of contemporary European theorists, as the realist legal schools in Genoa and in Paris bear witness of. To be honest, LR also encompasses a series of other, lesser known projects in legal theorizing originating in Eastern Europe of which however my ignorance is such that I need perhaps restrict the scope of my point. At any rate, given the plurality of directions within the LR-movement that by no means can be restricted to the Roosevelt era, it is warranted to decouple the realist theory of law (under the assumption, of course, that there is one) from its incarnation in any given theorist. Here, Dagan seems to have opted for this smart solution. There is, in fact, something about realism that just cannot be pigeonholed into other theories of law. If LR is to offer a viable alternative to such broad and multi-faceted theoretical endeavours as natural law and positivism, or even to less longstanding traditions of thought such as the Law and Economics-movement (L&E) or the Critical Legal Studies-movement (CLS), the theory of law that LR vehicles needs to be taken seriously, in its own right. Dagan thus sets out to defend the “realist big picture of law” that is different from both natural law and positivism. This means that LR stands for nothing less than a third way.² “Legal realism is unique and important for its jurisprudential insights. LR also stands for a specific conception of law irreducible to any other” [1, 14].

Yet, Dagan has no intention of presenting an essentialist understanding of the role of legal theory; in this sense, “legal realists are likely to view most jurisprudential debates as arguments – notably normative arguments – between competing conceptions of law rather than as claims about the one and only possible concept of law” [1, 14], thus opting for a specific methodology concerning what it means to theorize law in the first place, that stresses discourse analysis over conceptual analysis. This also reverberates on the part played by legal theory, no matter which substantive theory of law one prefers. Legal theory, on this account, has an irreplaceable task to perform: To examine “the coercive normative institutions of society” and study “the traditions of these institutions and the typical crafts of their members” [1, 14].

So the overall goal is not just to set the historical record straight. The “purpose is to present a useful interpretation of legal realism, drawing from realist texts a vision

² Enrico Pattaro is among the scholars who have claimed that realism constitutes a third way, as early as the seventies: [4] and [5].

of law that is currently relevant – indeed, valuable” [1, 3]. This means that there are really two goals: A descriptive and a normative goal. The first aim is therefore to provide an attractive characterization of LR as a third way, not identical neither to normative theories of natural law, nor to positivism in any of its versions. I shall examine his defence of LR as a theory of law in Sect. 2, dedicated to Daganian Realism (DR), and especially the claim that realism is not a sub-species of positivism. But it is equally important to understand the normative goal that I will focus on in Sect. 3. The problem of mainstream jurisprudence that Dagan basically identifies in some version of positivism, or what he calls “legal doctrinalism,” is that there is an “insidious tendency of legal doctrinalism to obscure contestable value judgments made by judges” [1, 5]. Here LR is preferable not as a *theory of law* (because more truthful than alternatives theories), but as an *ideal of legal culture* (because it is more worthy of praise than alternative ideals). From this latter perspective, it seems, positivism’s claim to tame the concept of law is a mere cover up: “By falsely presenting (often intuitive) value judgments made by judges as inevitable entailments of predetermined rules and concepts,” it “obscures these choices, shielding them from empirical and normative scrutiny and securing the unjustified claim of lawyers to an impenetrable professionalism” [1, 22]. In sum, it “bars the way to an open inquiry of the normative desirability of alternative judicial decisions” [1, 23].

But what would we discover if the veil were lifted? To put it in Dewey’s terms, we would witness the “alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down” [1, 185].³ Nothing less than the “social power” of lawyers is at stake. The conservatism implicit in law would not merely be about the often recognized effect of precedent, especially in common law, that for some is a stabilizing factor and for others an instrument of status quo, usually depending on where one’s political preferences fall. Contrarily to natural law and positivism, LR lays emphasis on “built-in features of law” [1, 5] that makes lawyers prone to romanticize law—notably (a) the institutional division of labour between “interpretation specialists” and the actual executors of their judgments, (b) our tendency to “thingify” legal constructs and accord them an aura of obviousness and acceptability. Dagan’s realism is an effort to shed light on such features and thus call for an innovative inquiry in legal theory—both in terms of a theory of law and as an ideal for legal culture.

2 Dagan’s Realism: What It Is and What It Is Not

The brand of LR that Dagan sets out to save is first described in the following terms: “Legal realism stands for the conception of law as a set of institutions typified by three constitutive tensions, namely: Between power and reason, science and craft, and tradition and progress” [1, 1]. In order to grasp the novelty, a good way to start is to look at the foes, i.e. showing what this theory is *not*.

³ Dagan’s citation of Dewey is from [6].

2.1 Realism and Its Judges

First, LR is not synonymous with “the infamous predictive theory of law” [1, 14]. Echoing Holmes’s dictum that “the prophecies of what the courts will do are what I mean by the law”, the predictive theory of law is riddled with flaws [1, 27ff.]. As Hart already noticed, the predictive theory obscures the fact that “the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility” [7, 84 and 90]. In other words, Dagan’s realism admits a substantial difference between experienced-based technical rules of the hypothetical kind (if x , then y) and norms, properly so-called, that can be said to be obligatory, not merely necessary so as to avoid a negative consequence. Hereby we can distinguish between rule-bound behaviour that can be observed from the “external point of view”, taking no motivational aspects into account and norm-following behaviour that requires an appreciation of an “internal point of view” that do consider motives, not merely results or outputs. It is from this distinction that normativity of law seems to stem. Law would thus provide us, under determinate circumstances, with reasons for actions. I believe Dagan is right not to equate LR to the predictive theory of law that, first of all, is not a common feature in all realists, and second, obscures key aspects of law, as its authoritative character, incomprehensible for those who exclude motivational and intentional aspects from the explanation of the obedience to law.

Secondly, LR is not synonymous with the “social engineering theory of judges” so Dagan goes against the characterization offered recently by Leiter who claims that legal realism is essentially about understanding that “in deciding cases, judges respond primarily to the stimulus of the facts” [8, 267 and 269] and the reasons why Dagan rejects this equation between law and naturalized empirical social science is that facts, as we shall see in next section, do not speak for themselves and thus require a theory of relevance that Dagan do not cast as value-neutral; facts require “a criterion of importance” that, in Cohen’s terms, “presupposes a criterion of values” [9, 809 and 820–21 and 827–29].

Thirdly, and most importantly, LR is not synonymous with the “breakfast theory of law-making” according to which judges exercise unfettered discretion (or better, arbitrary rule), following the whims of individuals, as Frank suggested they would based on what they ate for breakfast. In a hypothetical dialogue opposing Jerome Frank to Felix Cohen, the latter makes the kill: Law, in fact, “cannot be explained in terms of the atomic idiosyncrasies of personal prejudices of individuals” so law, Dagan claims through the word of Cohen, “is not a map of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls.” So, for realists like Cardozo, “the eccentricities of judges balance one another” [1, 25]. It is thus nothing paradoxical in speaking of “rule-orientated realism” [1, ch. 9].

In Dagan’s view, “realist literature suggests two types of devices for constraining the discretion of those who direct the evolution of law: Science, or, more precisely, scientific insights, both empirical and normative; and craft, or, more precisely, certain conventional features of adjudication, notably its contextual focus and its

dialogic character” [1, 44]. As far as science is concerned, it basically amounts to a requirement of taking in good-quality information (on the role of normative insights, see Sect. 3). More interesting is the claim that the required “judicial ethos” [1, 81], i.e. an ideal of legal culture, can be found, at least to a certain extent, embedded in the procedural aspects of the legal craft. This is what Dagan refers to as “institutional virtues” [1, 51], i.e. the path-dependency that is established by a dual set of constraints. In fact, Daganian realists argue that the procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions—notably the requirement of a universalizable justification—provide a unique social setting. These features establish the accountability of law’s carriers to law’s subjects, and encourage judges to develop what Cohen terms “a many-perspectived view of the world” or a “synoptic vision” that “can relieve us of the endless anarchy of one-eyed vision” [1, 7]. Discretion is thus limited because of the pluri-perspectiveness that judges may gain because of certain procedural constraints, linked to the legal process as such, as well as to the requirements of the craft or profession. This suggests a specific view of the role of judges as well as an idea about what methodology we ought to follow in legal reasoning.

As far as methodology is concerned, Dagan advances that a sound form of legal reasoning cannot depart from legal tradition, yet should not bow to it either. Sound methodology of legal reasoning, or what he refers to as “juristic method”, would thus require three different steps that I quickly sketch:

A first step is to establish the state of the art in doctrine, which requires hermeneutical respect for tradition. In this sense, common law’s love of precedent corresponds to the “past yield of accumulated experience and judgments deserves respect” [1, 8]. So “legal realists begin with the existing doctrinal landscape because it may (and often does) incorporate valuable—although implicit and sometimes imperfectly executed—normative choices” [1, 62].

The second step would be to examine the legal categories and here Dagan explicitly calls for narrow categorization in law [1, 55]. Law-carriers need to be aware of the “wide breadth of *potential* judicial choice” [1, 54], which derives from indeterminacy of law (more on this below). This is why, methodologically, Dagan is a believer in the strength of taxonomy [1, ch. 6]. So categories like “property” are just too big to handle. The criterion we should use to establish the proper category is “some significantly seen type of life-situation” [1, 56], each covering relatively few human situations. Narrow categorization, however, does not amount to admitting more leeway for equity, or what Dagan calls “rule-sensitive particularism” [1, 55], i.e. departing from rules whenever the outcome of the particular case at hand so requires. Narrow categorization helps to produce, in Oliphant’s words, “the discrimination necessary for intimacy of treatment,” holding lawyers and judges close to “the actual transactions before them” and thus encouraging them to shape law “close and contemporary” to the human problems they deal with.

The third and final step would of course be making sound judgments. These two aforementioned steps would lead judges to “open, deeply introspective and thoughtful, inquisitive of new ideas, and responsive to reason” [1, 81]. This also implies that Dagan, setting aside idiosyncrasies of justices as an explanatory framework for the workings of (common) law, favours a specific conception of the

rule of law: “Legal realism merely insists that law’s stability and predictability do not inhere in the doctrine as such and rests instead on the broader social practice of law” [1, 26], an aspect explored in chapter 9.

This broadly outlined methodology for judges sounds all very well—indeed too well. A problem for this characterization is to understand against which competing theory it is directed. If we understand it to be a normative ideal, Dagan’s characterization seems to conform to a safe middle ground no one would seriously object to. Could the competing theory be the civil law tradition of the judge as *bouche de la loi*, which is indeed a normative ideal of what judges should do, not a scientific description of what they do? Hardly. Because Dagan lends descriptive virtues to his characterization of judges. He does not believe judges “apply” the law, no matter whether they should. This is due to the discretion judges have in considering certain facts as relevant to the case. In fact, Dagan, like Llewellyn, thinks that the question of whether judges find the law or make it, is “meaningless” since they “do both at once” [1, 61].

By assuming this position, however, he directs his thesis on the role of judges in adjudication against the account that stresses judges’ militancy. On this account, judges *de facto* do *politics of law* even though they cannot be held accountable towards the public, because of the structure of the unique social setting in which they operate. Dagan doubts such accounts and holds the militancy of judges to be descriptively out of place, because judges are constrained by professionalism and procedure: They are trying, to use Posner’s phrase, to do a good job. For Dagan, the ethos of the legal profession in general, and the judicial office in particular, generates real constraints that produce some “reasonable regularity” and thus effectively dispel the fear of “free discretion” [1, 50]: “Nothing in the realist legacy supports judicial hyperactivity vis-à-vis legislatures or prior courts, or denies the virtue of translating broad statutory mandates into a set of specified judge-made rules” [1, 27]—*pace* Schauer [10, 1909 and 1939–41]. Quoting Stanley Fish, lawyers are not only possessed *of* but possessed *by* the “knowledge of the ropes”—a statement that echoes Hägerström’s dictum “we are slaves to law” [11, 235].

But do note that advocates of the “militant judge”-account refer to this same professional deference for procedures in order to make their point. In fact, a common claim is that the path-dependency created by procedural requirements in the adjudication process, allowing hearing of only the two parties involved, push judges to interpret legal categories in a biased way that leaves the great part of the public involved without voice. On this account, judges are militant because they define what is to be considered e.g. “rape” but do so after hearing two parties. This is the claim commonly made by political constitutionalists who suggest that law-making, on the basis of hearing only two stances on an issue with broader bearing than the conflict at hand (which is necessary for a ruling to constitute a valuable precedent), is not “objective”, “many-perspectived”, unbiased, impartial, etc. but quite the opposite. The issue here is that “all those affected by the decision” are not being heard, because the circle of those affected—because of the precedent—is broader than the two parties involved. So while Dagan concludes that “these virtues make adjudication a unique public forum with potential for inclusiveness” [1, 53],

Waldron, Bellamy, Griffith and alike might object that inclusiveness requires more than hearing two parties.

To alleviate their solitude, Dagan's judges need to "account to the public, to the general law-consumer" on a regular basis and in detail [1, 53]; judges are situated in an institutional environment that "presses upon the office holder a demand to be selfless" [1, 52] where "the two most important features of that environment are the adversarial process and the judicial opinion" because "the legal drama is structured as a competition in reason giving" and this would make courts, in Llewellyn's words, "the most appropriate body of unelected officials to review other governmental agencies (torn between politics, favouritism, enthusiasm, specialized expertness, woodenness, lop-sidedness, ambition and vision [12, 308–310])."

The way however discretion is constrained in Dagan's version of LR (reason-giving, adjudication procedure, consideration by peers) is not really sufficient to definitely erase the breakfast-eating judge reminiscent of Frank. None of the strategies adduced to limit discretion can cancel out choices of what counts as relevant facts in a case that are dictated by political preferences, favouritism, enthusiasm, specialized expertness, woodenness, lopsidedness, ambition and (wrong-headed) vision.

2.2 Realism and Positivism

Dagan also insists that LR cannot be understood as a variant of positivism, or what he calls indifferently legal doctrinalism and/or formalism, of which he gives a rather broad characterization so as to encompass the many different variants of the positivist tradition. The major reason for claiming that realism is not a sub-species of positivism is that the first looks at legal institutions as embedded in society, while the second theory equates law to rules, commands, authoritative statements or similar utterances given some claim to correctness. The reason why one should prefer realism over positivism is thus because of the "fallacy of the formalist algorithm" [1, 28]: Its underestimation of the scope of indeterminacy. A key tenet of Dagan's brand of LR concerns indeterminacy. Indeterminate are not merely rules, but also the sources of law and perhaps also the very finding of legal material as relevant in a given case.

The main claim concerning indeterminacy is that the multiplicity of legal sources renders the formalist pretence of doctrinal determinacy "an insidious falsity" [1, 15]: "Realism views legal doctrine as hopelessly indeterminate not (or, at least, not primarily) because of the indeterminacy of discrete doctrinal sources but mainly because of their multiplicity" [1, 18]. The criticism is directed against Hart and his analysis of the indeterminacy challenge in hard and easy cases. "Hart effectively addressed the problem of rule indeterminacy, but the realist claim that pure doctrinalism is a conceptual impossibility is not based on the indeterminacy of discrete rules. For legal realists, the profound and inescapable reason for indeterminacy is the availability of multiple, potentially applicable doctrinal sources" [1, 19]. This means that Hart's famous remarks are "rather beside the point" [1, 4 and 18–19] because Hart did not focus on sources but on rules, while the realists understood that the deep indeterminacy depends on the plurality of legal

sources, not on the open texture of legal language as expressed in rules. Dagan concludes that therefore “the indeterminacy of discrete doctrinal sources is not a serious threat to the formalist project [...and that] fully appreciating the magnitude and depth of doctrinal indeterminacy (...) requires that we not look merely at one given rule. Rather, the main source of doctrinal indeterminacy is the multiplicity of doctrinal materials potentially applicable at each juncture in any given case” [1, 19].

In a nutshell, for Dagan’s realists there are no easy cases. This is a claim that is common among other realists as well. Riccardo Guastini, to name a contemporary theorist, has made this claim on different occasions; and it can be traced back to Axel Hägerström and other Scandinavian realists as well. But Dagan seems to draw more sweeping conclusions from it than previous scholars. This form of indeterminacy, in fact, explains why Dagan asserts: “My prototype realists reject any pretence that knowledge of these important social facts can be a substitute for political morality” [1, 6]. Law is not a matter merely for experts, but “choosing the facts to be investigated” [1, 7] is a normative question as well: Dagan implicitly calls for a theory of relevance, which is largely absent in today’s theorizing about law. This is most welcome since relevance is an understudied field, even though Dagan’s account still leaves a lot of work to be done.

This aspect becomes prominent in Dagan’s discussion of realism’s admission of the plurality of sources, which, as far as I understand, is the strong form of indeterminacy that characterizes realism and that does not amount to the basic assumption of legal pluralism since the plurality of sources do not require the existence of distinct but overlapping legal orders, but may occur within a unique legal order, generating e.g. legal antinomies.

If, indeed, “the authoritative tradition speaks with a forked tongue” as Llewellyn holds, for legal realism, “the choice among doctrinal rules competing to control the case is the major (and inescapable) source of doctrinal indeterminacy or, more precisely, of doctrinal under-determinacy” [1, 20]. What Dagan seems to imply is that the very judgment concerning the relevance of a source, or legal material, is indeterminate. This is a much more serious threat to formalism than Hart’s admission of rule indeterminacy or any admission that there are vague standards in e.g. reasonableness or good faith. As Llewellyn explains, in distinguishing between “*ratio decidendi* and *obiter dictum*, judges can rely either on the rule stated by the previous court or on the legally relevant facts (or on both)” [1, 21]. This indeterminacy hits the very legally *relevant facts*: “Not each and every fact stated by the court is legally significant: Some are discarded (...). Moreover, the relevant facts are not treated as such, but are rather classified in categories that are deemed significant. But neither the selection of the pertinent facts nor their classification into categories is a self-evident or logically necessary undertaking. In all these ways, judges have significant discretion as to the question of how wide, or how narrow, the *ratio decidendi* of the case should be – that is, what should its scope be vis-à-vis other rules” [1, 21]. It is the *very framing of the relevance* of certain facts that amounts to an arbitrary or discretionary exercise. Thus, his conclusion that the multiplicity of doctrinal sources is the main reason for Justice Holmes’ famous dictum, “you can give any conclusion a logical form.” [1, 22].

With the premise that we need more research on legal relevance, I would still like to suggest that the fact that a choice is made in considering a determinate factual aspect of a situation, or a person, as *being relevant* for activating a given legal category, like conferring a right or imposing a duty for instance, does not necessarily entail that the choice is arbitrary, even though it may lie within the discretion of the law-maker to perform this choice. In other words, not any selection is discriminatory and not any choice amounts to discrimination. So it is still possible that the judgement of relevance is not after all a normative judgement as Dagan is suggesting, but it might be a perfectly sound judgement of *reason*. Consider for instance what personal characteristics a person needs to have in order to enjoy an entitlement such as, say, voting rights. There are good reasons for claiming that age is a relevant criterion, but eye colour is not. Because it is possible to make an argument about age as a proxy for full legal capacity required to make sense of the exercise of franchise, while no such argument is available for eye colour. There is no connection between political capacity and being, say, fair-eyed. So being fair-eyed is not a reasonable access criterion for franchise. But this is so, independently of any esthetical, moral or broadly normative assumption. In order to make this point, no specific normative or moral reasoning is required and ordinary, epistemologically sound reasoning is sufficient. The reasoning involved perhaps even boils down to calculating the consequences following from a premise. This can be done, without investigating one's normative preferences or what one ate for breakfast.

Be it as it may, but yet another difference between LR and positivism needs to be emphasized: Their respective relation to other scientific endeavours. Dagan's view of legal theory is interesting. In his version of LR, legal theory enjoys what we can call relative autonomy in relation to other sciences. This implies that Dagan considers the positivist view of legal theory as an independent discipline (or the Kelsenian project of purifying legal science) bound to fail. Chapter 4, co-written with Roy Kreitner, focuses of this realist view of the role of legal theory or jurisprudence. Here, philosophy of law is, to speak with Bobbio, a philosophy of law for lawyers, not for philosophers: "Legal theory focuses on the work of society's coercive normative institutions. It studies the traditions of these institutions and the craft typifying their members while at the same time continuously challenging their outputs by demonstrating their contingency and testing their desirability (...). But at its best, legal theory is more than a sophisticated synthesis of relevant insights from these friendly neighbours because of its pointed attention to the classic jurisprudential questions regarding the nature of law, notably the relationship between law's normativity and its coerciveness and the implications of its institutional and structural characteristics" [1, 85].

So good legal theory is not secluded from insights from other branches of sciences. It is what Roscoe Pound called "team work". Now, this claim is in line with a much broader call for trans- and interdisciplinarity *en vogue* today. But to me it seems that this claim fits well with institutionalism more generally: *Ubi societas, ubi ius*. This means that comparative law, history of law, sociological and economical analysis as well as attention to policies are all welcome. This seems to depend on the fact that what legal theory investigates, from Dagan's perspective,

notably through discourse analysis, are the varying conceptions of law and justice, rather than the one and only concept of law.

This means that Dagan has an agenda for legal theory that diverges from a certain mainstream interpretation of normativism. After the developments in late twentieth century legal theory, that have largely been influenced by transdisciplinarity and methodological syncretism, purifying the concept of law seems to lead nowhere and does not seem to present a viable scientific program any longer. A stronger methodology in legal theory then would be to work on ideal types *à la* Weber that can acknowledge and incorporate data from neighbouring disciplines. But this scenario, according to Dagan, presents us with a dilemma: “A recurring thought seems to be that there are two alternatives: Adopt an external academic discipline (e.g. economics, sociology, psychology, or philosophy) or relinquish academic or scientific pretensions and delve more deeply into practical professionalism” [1, 101]. For Dagan, both alternatives should be rejected: Law schools should not be structured as a set of miniature graduate departments in various disciplines [1, 87] because law in general, including law as craft (i.e. input from professionals), and legal theory more specifically have something special to offer, making it meaningful to seek to establish law “as an autonomous discipline” that is “embedded in the social sciences and the humanities” [1, 98]. So, a “theoretical lesson intrinsic to law that is important for legal theory could also be potentially enriching to these neighbouring disciplines” [1, 83]. One contribution of lawyers to other SSH disciplines is the casuistic that law has maintained but that ethics, politics, economics and sociology have largely forgotten. Law, with its immense baggage of cases and subtle differences between them, is in fact “close and contemporary” to the human problems they deal with. This makes for “one distinct comparative advantage of lawyers (as opposed to, say, economists and political philosophers) in producing legal norms: Their unmediated access to actual human situations and problems in contemporary life” [1, 91].

This scheme might be useful to sum up the differences between realism and positivism according to Dagan:

	Realism	Positivism (or formalism)
Epistemology	Law: conception(s) of justice	Law: concept of law
Ontology	Law: social practice; set of institutions	Law: set of rules and principles
Normativity	Lawyers should address social goals and human values	Lawyers should apply the rules, not legislate
Adjudication	Only hard cases Plurality of sources	Admits easy cases: rule can be sufficiently clear, notwithstanding the open texture of legal language/indeterminacy Fixed theory of sources
Relation to other sciences	Relative dependency	Autonomy
Rhetoric	“Dynamic conception of law”	“Mechanical conception of law”

2.3 LR and Contemporary Schools in Legal Theory: CLS and L&E

Against the often made claim that Critical Legal Studies (CLS) is a development of realist ideas, Dagan affirms that “unlike many critical scholars, realists deny that law merely secures the existing structures of power” because “struggles for power in law always involve persuasion about the common good” [1, 36]. Realists are thus “impatient with attempts to equate reason giving with parochial interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshalling the law for morally required social change” [1, 6]. There seems to be two basic reasons for this. The first is pertinent to the type of justification prevailingly admitted into legal discourse, and the second to the type of power exercised by law’s carriers.

In the first place, law is “a forum of reason, and that reason imposes real – albeit elusive – constraints on the choices of legal decision makers, and thus on the subsequent implementation of state power. Law is never *only* about interest or power politics; it is also an exercise in reason giving” [1, 5]. This is, however, insufficient to exhaust the possibilities that make CLS a contender of the legacy. Consider that reason-giving per se is not sufficient to turn reasons given into good reasons. Dagan even admits that legal actors, on the LR account, are required to “constantly challenge smug legal truisms, including the portrayal of adjudication as a purely public-regarding institutional service” [1, 53]. That law requires reason-giving does not exclude that it might be a vehicle for power, as the practice of lying officials prove [13, 1091].

In the second place, the power of law has a specific character that goes beyond coercion, even though coercion remains an essential element that Dagan is not willing to underestimate. He realizes that coercion and normativity form a mutually exclusive dichotomy in motivating obedience: “Power cannot simply be appended to norms without affecting them, because backing imperatives with coercion detracts from the normative force that an authority’s utterances might otherwise have had. Coercion is designed to bring about the commanded behaviour independently of the agent’s own values and desires. Thus, coercion undermines the legal norm’s normative appeal, invalidating any possible reason for deference and voluntary obedience (be it gratitude, identification, or trust). Power, or the threat of inflicting power, does not append itself to normativity but, rather, displaces it” [1, 35]. However, it is not this form of power that defines the specificity of legal power. Indeed, coercion is the very essence of *political* power (in modern terms, the power of the State) and at most something law shares with politics.

So if we are looking for a criterion to distinguish law from politics, coercion will not do. Therefore Dagan speaks of law’s power as a “figurative, and thus less transparent, ways of wielding power” [1, 32] so as to stress that the very construction of legal categories are not neutral and thus require justification. Law’s power is thus first and foremost the form of social power that Max Weber described as ideological power and that Dagan sometimes calls “symbolical.” Features of law that enable the transformation of law’s ideological power into the state’s political power (and thus mask the exercise of coercion by law’s carriers) are for instance the

institutional division of labour between “interpretation specialists” (i.e. judges) and the executors of their judgments (i.e. police officers), and the belief in “one right answer” that, for Dagan, actually “downplays the legal actor’s choices” [1, 33]—a claim that turns, so to speak, Dworkin on his head.

The grip of law’s ideological power is especially strong with respect to private law, which structures our daily interactions and tends to blend into our natural environment (...). Cohen’s critique about the “thingification” of property illustrates this well. “The vicious circle inherent in this reasoning is plain,” Cohen explains. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a device depends upon the extent to which it will be legally protected. (...) What courts actually do in these cases is to establish “inequality in the commercial exploitation of language,” thus creating and distributing “a new source of economic wealth or power” [1, 33]. For Dagan, the most important contribution of legal realism to private law discourse is *not* in criticizing *laissez-faire* economics as many often claim, equating LR with political progressivism. Rather, the realist lesson is “the critique of the way doctrinalism tends to absolve private law from normative justification” [1, 34].

Dagan’s view on the type of power that law uses, and which backs it up, is not, as far as I can see, in anyway incompatible with power as a *dispositif* of disciplinary entrenchment *à la* Foucault, often used in the CLS-movement. If he aims to sever LR from CLS, further conceptual work on distinguishing law’s authority from the state’s power is needed.

Another school of contemporary jurisprudence that LR is often conflated with is the law and economics movement (L&E). It is often claimed that realism is the source behind L&E. Holmes is thus quoted saying “the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics” [14, 184]. But for Dagan, “unlike many lawyer economists, [realists] do not see law as a set of (explicit or implicit) transactions among factions, each trying to maximize its share” [1, 36]. In chapter 3, Dagan looks at “central actors of the legal drama – the subjects of law and the carriers of law” [1, 9], showing the plurality and complexity of motivational schemes that point to why we should abandon the law and economics-approach. Its basic error is a too narrow framing of rationality, defined as the maximization of an agent’s self-interest. In fact, there is no such thing in economics as an irrational preference (or a rational one, for that matter): Preferences just are. So the reason why LR is not an undeveloped version of L&E is because of the differing legal anthropologies of these two movements:

Dagan’s brand of realism develops a legal anthropology that is to a large extent grounded on an appreciation of the limits of the bad man or *homo economicus* perspective prevalent in L&E, where rationality equals to maximizing of self-interest. Conversely, for Dagan, who takes on board Yochai Benkler’s view of our diverse motivational-behavioural profiles [15, 304],⁴ law “oftentimes seeks to

⁴ “Almost one-third indeed behave as predicted by selfish *homo economicus*. But more than half act cooperatively. Many are active reciprocators—respond kindly and cooperatively to cooperating others, and punish, even at a cost to themselves, those who behave uncooperatively. Others cooperate unconditionally, because they are true altruists or solidarists, or because they simply prefer to cooperate and do not measure what others are doing.”

transcend it and anticipate socially responsible, communitarian, and even altruistic behaviour” [1, 72]. Consider contract law e.g. as a trust-enhancer. Or “realize, for example, that a regime of private property seemingly epitomizing private law in its assumption of self-interested subjects is in fact a type of commons, which means that property law inevitably relies on (some) people’s voluntary constraint and cooperation for overcoming the collective action problems inherent in its creation and maintenance” [1, 73]. Dagan justly observes the curious fact that “legal theory’s portrayal of law’s carriers is a mirror image of law’s portrayal of the average citizens. Much of legal theory, mostly from its jurisprudential side, conceives of law’s carriers as selfless” [1, 74]. Both are exaggerated. Citizens cooperate and judges have identities.

But how does Dagan flesh out his own legal anthropology? His position in the field of legal theory, setting his ideas a part from a large part of contemporary scholarship, is—at a deeper level—anchored in a specific understanding of human beings as symbolic agents in the legal landscape, or as I would prefer to call these insights, a specific form of legal anthropology. Indeed, his quest is rooted in a normative thesis of how we relate to fellow-humans: “Given the diversity of acceptable human goods from which autonomous individuals should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks enabling people to organize their lives [...]. Law should facilitate (within limits) the coexistence of various social spheres embodying different modes of valuation. The pluralism of private law should not, however, be confused with value neutrality. Although careful not to impose a specific conception of the good life on the citizenry and happy to introduce and facilitate diverse forms of human interaction and human flourishing, private law is far from being value-neutral” [1, 12].

3 Realism and Its Normative Ideals: Law’s Embeddedness

So what is law in Dagan’s brand of realism? “Law is conceived as a dynamic institution, or set of institutions” [1, 3] making LR rather similar to institutionalism, i.e. the legal theory that holds that law is not basically constituted by neither commands, norms or authoritative statements that provide reasons for action. Do note that the adjective “dynamic” is not a literary ornament but an essential feature. In fact, for Dagan, “law is profoundly dynamic” [1, 7]. While “legal positivists attempt to understand law statically” as a set of norms, commands or what have you, realists appreciate that legal theory is a discipline in time and conceptual definitions must therefore focus on the fact that law is “a going institution” or, in John Dewey’s words, “a social process, not something that can be done or happen at a certain date.” Law is cast as an “endless process of testing and retesting”. A truthful definition of law therefore needs to centre on the process, the law-making, rather than on the outcome or result (the norm, the ruling etc.). The defining element in Dagan’s conception of law is that it corresponds to a “social practice” relying on “conventional rules” [1, 16 note].

Two observations need to be made concerning Dagan's characterization of LR. The first is that there seems to be a very strong resemblance between Dagan's band of LR and (neo)-institutionalism. This legal theory considers that the concept of institutions (*istitutiones*) is the foundational concept of law. To understand life in common we need to focus on society's basic institutions (e.g. family). Law, in this tradition, encompasses more than the black letter rules and the implicit or unarticulated principles these may refer to. Being foremost a social practice, legal systems are set in a broader system of *mores*, or social customs, habits, routines, styles of government, etc. without reference to which law does not develop meaningful categories, and without which one may not fully explain the individual's behaviour in legal matters. Whether in the version of Maurice Hauriou or Santi Romano, or in the contemporary neo-institutionalist version of Neil McCormick and Ota Weinberger that claims that law is made of institutional facts, it seems that the whole idea of the relative path-dependency in legal reasoning and procedural matters that Dagan underlines in LR is closely related to institutionalism. Dagan's realism, to me, appears to be compatible with Santi Romano's intuition that "law, before being (a set of) norms and before concerning a relationship or a set of relationships in society, is an organisation, a structure" [16, 28]. In fact, law is a social technology for designing and structuring human relationships. However, Dagan seems unaware of this potential ally in legal theory. This circumstance is regrettable because a closer comparison between the claims of LR and institutionalism would probably be more illuminating than the distinction between LR and normativism, positivism, etc.

The second observation concerns the relationship between law and society. A valuable insight that Dagan builds on is that rules are necessarily rooted in the life of a polity. This is an issue that has preoccupied many constitutionalists, since no laws can effectively rule society if these are not adapted to the way of life in a given community. To give just one example, Roman law's institution of classical dictatorship was limited to 6 months—a reasonable and well-pondered limit given that Romans only took up arms for 6 months and needed to go back to farming during the other half of the year for subsistence purposes. A dictator in place for less than 6 months might not have had the time necessary for conducting the war or crushing the rebellion at hand; a dictator in place for more would risk mutiny if troupes were not allowed to cultivate their lands. Therefore dictatorship did not constitute a serious threat to subverting the "mixed constitution" of the Republic. At least until Sully did not prolong his dictatorship, neglecting the 6 months limit, with the help of professional soldiers who were not in need, like Cincinnatus, of letting his weapons fall to the ground as he picked up the plough.

Dagan's examples of the rootedness of legal norms in society are, however, not taken from constitutional law, an otherwise rich field for scholars testing the adequacy of legal rules for a given social setting. In order to understand how law as an institution or "practice" is related to social habits Dagan makes the example of division of marital property in divorce cases in American private law. "To understand spouses' claims for 50 percent of the marital estate as expressing the ideal view of marriage as an egalitarian liberal community is to recognize the decisive place of social values in shaping this important doctrine of private law" [1,

117]. But “if men and women entered and left marriage equally able to earn an income in the market, the rule of equal property division would be perfectly consistent with the vision of egalitarian marriage. But although equal division sends a message of equal entitlement and partially neutralizes men’s greater market power vis-à-vis the resources of the marital community, it falls short of adequately addressing this challenge” [1, 118]. So for Dagan what we should look for is a way to “offer an inevitably imprecise remedial response mitigating the devastating consequences of gender inequality for marriage without imposing its entire burden on spouses (mostly, men)” [1, 119], which is the case of the role of the recent practice of rehabilitative alimony, “giving women the tools to overcome their market disadvantages. Its purpose is merely to cover the education or training of spouses with a smaller income to enable them to support themselves better after divorce”, and thus avoiding “a prohibitive exit tax on men, undermining not only the autonomy of spouses but also the community as a whole, constituted as it is of voluntary attachments” [1, 119].

This example illustrates well Dagan’s way of arguing: There is something wrong with a rule that presupposes that marriage is voluntary, and thus an egalitarian liberal community, but that pays no attention to fact that the social setting which the rule is supposed to govern is marked by important gender inequality. What is wrong is that the rule will have consequences at odds with the presupposition. Such a consequence is e.g. involuntary maintenance of marriage due to high exit costs. A better overall solution, if marriage is to stay a liberal equalitarian construct based on voluntary association, would be to address the inequities of context by, e.g. giving the weaker party access to requalification on the labour market. Such a solution can however be contemplated only if we are willing to test, in reflexive equilibrium, the insights about the presupposition we have (marriage as voluntary association) against the consequences in this specific social setting. Such a way to go about, however, differs radically from the way we reason in normativism, positivism, and natural law.

Moreover, for Dagan, law is grounded on three constitutive tensions: “Law is neither brute power nor pure reason; it is neither only a science nor merely a craft; it is neither exhausted by reference to its past nor adequately grasped by an exclusively future-oriented perspective. Legal realists reject all these reductionist understandings of law (e.g. reducing law to brute power, or reducing it to science), which are in vogue in contemporary jurisprudence. For the realist, law is defined by these three tensions” [1, 3]. Even more to the point is the claim that LR is a preferable theory of law because “only the realist conception captures law’s most distinctive feature: The uncomfortable, but inevitable, accommodation of these constitutive tensions” [1, 15]. “A conception of law purporting to dissolve these tensions obscures at least one of the legal phenomenon’s irreducible characteristics, and is thus hopelessly deficient” [1, 3] and this is why positivism is not up to the challenge: There is, so to speak, too much reason in inclusive positivism and too little of it in exclusive realism. “Coerciveness and reason are doomed to coexist in any credible account of the law” [1, 6].

The two characterizing factors of Dagan’s brand of realism is that law is defined by its institutions and/or social practices, not by its rules or norms and that it

operates in the field generated by these three tensions. Yet, this is only part of the picture because “the realist understanding of law presents an ideal, but it is decidedly not utopian” [1, 28]. Let us now turn to this normative dimension of realism.

4 The Muddy Waters of Normativity

Dagan picks up a specific theory of justice from the LR tradition that is interesting, but that he does not thoroughly develop. LR, in Dagan’s reconstruction, conceptualizes justice as a “perennial quest for improvement in law, functioning as symbol to represent the need of constant criticism and constant adaptation of law to the changing society that it articulates” [1, 39]. He speaks positively about Llewellyn who criticized the confused tradition in which if it is Legal, it is *therefore* Right: “It is mistaken to assume any inherent convergence between law and justice” [1, 31 and 35]. At a first glance it seems that Daganian realism owes much to the natural law tradition that explicitly focuses on the conditions under which law can be said to be just, making the conceptual divergence of law and justice its key tenant, in opposition to nominalist accounts of positive justice *à la* Hobbes.

So law, for Dagan, is connected to justice. However, this connection is not necessary, but potential. For Dagan it is crucial to rehabilitate “law as a viable social institution that can be an instrument of justice” [1, 15]. In other words, law is constitutively *able* to channel “justice”. That law can do so does not imply that it actually or necessarily does. This circumstance confirms that the concept of justice that Dagan uses cannot be justice as nomothetic justice or justice corresponding to law. Therefore he must be using some other concept of justice. But he seems largely unaware of this use of “justice” as something other than “the law” (*nomos*), which is one of the three preeminent senses of the word “just” (*to dikaion*) in Western philosophy ever since Aristotle’s gave his seminal definitions in *Eth. Nic.* book V (the other two meanings of “just” is just as “correct”, *orthòn*, and just as “equal”, the opposite of *pleonexia*).

We already know that justice in LR cannot equal to correctness (see discussion on indeterminacy and positivism above) and we now learn that whatever justice is, it is not the same thing as the law. So law can vehicle justice, but does not always do so. “Injustice” thus cannot be synonymous with “unlawful” (*paranomia*). It must be something else. Here Dagan leaves us stranded. I will suggest, nonetheless, that the idea of justice that LR upholds, if we are to interpret it consistently with Dagan’s theory of law, is probably “justice as equality” according to the traditional Ulpianian formula *suum cuique tribuere*. This would not be surprising, given that this principle of justice is commonly used in private law, which is Dagan’s field of expertise. However, he does not say anything substantial about this. One of the reasons Dagan does not seem to be aware of this substantial theory of justice, present in-between the lines of many realists he discusses, is because of his unhappy flirting with “moral reasoning” that gets him unto muddy (meta-ethical) waters.

Dagan is preoccupied by the risks of severing law from morals. “Because the consequences of severing law from moral reasoning are just as grave as those of

conflating law with morality” [1, 36], Dagan sets out to save the normativity of law or, in a more Razian turn of phrase, the authoritative nature of legal norms. Dagan’s account of the relationship between law and morals, however, is unsuccessful: It is either too vague, or simply unclear. Are we facing a separation of spheres or analytical distinctiveness? This account does not help us in shedding light on the very important claim for Dagan’s brand of realism that justice cannot equate to law’s dictum.

Indeed on several occasions Dagan speaks of law as reason-giving but a specific version of reason-giving. Not just any reason will do in law. It is about “moral reasoning” [1, 36]. He systematically comes back to the point that “legal realists find the use of moral insights indispensable to law” [1, 40]; and “this understanding of law as a forum of reason must rely [on...] our ability to recognize and be influenced by good moral reasons” [1, 39]. However, to me, this seems like a thesis that is open to debate and beside the point since the interesting issue is not how to link law to morals, but how to link law to reason. Because of Dagan’s doubtful engagements in meta-ethics, the two questions seem to overlap.

On the one hand, he insists on the fact that “legal discourse – our public conversation about state-mandated coercion – must be a justificatory discourse, an exercise in reason giving (...). This burden ensures that law’s carriers (and other legal reasoners) are held accountable” [1, 37]. He even speaks of the educative role of public reason that judges embody [1, 75].⁵ But, on the other hand, we discover that not just any kind of reason will do apparently. What makes the soundness of the reasons adduced in legal discourse, in Dagan’s view, is not coherence, correspondence to facts or other epistemic virtues, but legal reasoning “should be oriented toward the human ends served by law” [1, 37]. To those like me, however, who are sceptical about the very possibility of “moral” reasoning as a separate branch of *ratiocinio* and tend to understand the adjective as merely indicating (vaguely) the *object* of the reasoning and not the *type* of reasoning, find this idea hardly convincing. The statement is somewhat mitigated by specifying that this is especially important in law-making in the sense of legislation, but not crucial in applying law in individual cases. But at the core, Dagan maintains “legal institutions and legal doctrines must be evaluated in terms of their effectiveness in promoting their accepted values” [1, 37]. I cannot see why evaluation in terms of effectiveness requires moral reasoning. There is nothing moral about testing effectiveness. It is sufficient to mobilize ordinary consequentialist *Zweckrationalität*, means-to-ends calculus in order to establish whether it is “effective” to, say, kill a fly with an atomic bomb. It will ultimately turn on an analysis of causality. Do we really need moral reasoning for this? If law is a forum for reason-giving, why should we be convinced by moral reasons to pursue a different course of action? Why not be moved by *sound* reasons?

No matter if we understand the adjective in moral reasoning as qualifying the object or the kind of reasoning, it is still pretty clear that Dagan unduly gets himself into the muddy waters of meta-ethics. So, if we posit that moral reasoning allows us

⁵ John Rawls argues that the court is “the only branch of government that is visibly on its face the creature of [public] reason and of that reason alone” [17, 235–236].

to understand what is just, or provides us with reasons for action inherently linked to the normativity of law (and not its coerciveness), then it seems that LR is committed to (some variant) of cognitivism. This impression is strengthened by the fact that Dagan explicitly excludes that LR submits to “moral scepticism or relativism” [1, 40].⁶ Now why would it be necessary to commit to cognitivism in some version in order to claim that law is at least partially a reason-giving activity?

Moreover, Dagan asserts that his version of LR is committed to value pluralism. Legal realists perceive human values as “pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative” [1, 39]. Chapter 8 is dedicated to pursuing such a pluralistic vision. Now this complicates matters quite a bit: Were we to commit to cognitivism on an epistemological level, could we still be pluralists on the ontological level as far as values are concerned? Committing to such a strong meta-ethical thesis, in my view, is not necessary for Dagan. He would be better off were he to stay agnostic on (some of) the meta-ethical issues. So finally, it seems that Dagan’s point is merely to make an appeal to a higher awareness among jurists. He quotes Holmes, according to whom jurists should “hesitate where now they are confident, and see that really they are taking sides upon debatable and often burning questions”. But if the point Dagan intends to make is just to call for awareness, why call this “moral reasoning”? Why not speak of “raising awareness” in legal culture? And why mobilize the heavy artillery of meta-ethics in order to remind legal students of their first duty, to be aware of their own ignorance—the Socratic and epistemic duty of all students?

There is yet another problematic aspect linked to the meta-ethical commitments that Dagan makes and it concerns his claim that LR does not consider legal categories or procedures to be “value neutral”. Grounding the claim on a reference to Cohen who concludes that “legal description is blind without the guiding light of a theory of values” [1, 48], Dagan affirms that descriptions of “what Is” should “remain *as largely as possible* uncontaminated” by the observer’s normative commitments [1, 48]. This, in effect, amounts to Weber’s famous thesis of *Wertfreiheit* or value neutrality in social sciences. However, Dagan claims that this is actually a “position on the integration of social data and moral evaluation” and that “legal analysis needs both empirical data and normative judgments” so as to make a future *is* into an *ought* for its time [1, 48]. This second claim, however, of the entanglement of normative and alethic judgments, or overlapping of descriptive and prescriptive, which seems to be reminiscent of Putnam’s claims in *The Collapse of the Fact/Value Dichotomy*, is however a quite different idea. It should not be confused with the epistemic ideal of value neutrality. One issue is, in fact, whether or not science, including legal science, should aim towards the regulative ideal of value neutrality and another issue is whether there can be judgments whose nature

⁶ Relativism and scepticism in meta-ethics are not equivalent to non-cognitivism, nor to expressivism, but on this very general level of analysis, Dagan’s overt admission seems to confirm my impression that his version of LR does not share the perspective that there are no values, that we lack epistemological access to values, that moral statements are not statements of facts, that they reflect attitudes and not beliefs or any such position at odds with cognitivism.

do not fit in the mutually exclusive dichotomy of descriptive/prescriptive statements.

Applying the principle of interpretative charity, perhaps we should conclude that Dagan enters these muddy waters *en passant*. His intention is not really to establish a theory that has meta-ethical scope. If this is true, then, a question arises: Why does not Dagan's brand of realism take normative positivism⁷ [18, 411] more seriously?

Dagan does not discuss normative positivism in his book. The "normativity of law" that he advocates can be interpreted as ascribing ethical value to law as such, or, if one prefers, ascribing moral value to the rule of law [19]. This is a key point in normative positivism. In fact, normative positivism claims that it is a good and desirable thing that the laws have easily identifiable, readily accessible, as far as possible non-controversial social sources. To put it with Raz, "conformity to the rule of law is also a moral virtue" [20, 226]. Dagan's preoccupation with limiting the discretion of judges and the arbitrariness of legal categorization by law-makers more generally is reminiscent of such a position.

The brand of realism that Dagan develops does not seem to be much different from normative positivism's celebration of the rule of law. Along these lines, we also learn that "major similarities are discernible between the realist conception of law and Dworkin's conception of law as integrity (...). The realist conception of law is an important precursor of Dworkin's *Law's Empire* (...) [because] both understand the quest for justice as integral to law rather than merely an external criterion (as it is according to positivism), or as a test for the validity of law (as it is in natural law theory)" [1, 65]. Besides the fact that Dworkin's is a major theory about adjudication and Dagan does not buy the chain-novel idea, Dworkin also presents integrity in both legislation and adjudication as holding inherent political value: "Integrity in legislation requires the legislature to make the law coherent, bearing in mind a set of overarching values" and "integrity in adjudication requires judges to treat the law as expressing and respecting a set of coherent principles" [21, 217]. It is this use of integrity as coherence in law-making that Dagan's realism picks up.

Since Dagan's realism is based on a theory of justice that conceptualizes justice as possibly distinct from the law, his realism has of course no conceptual room for intrinsic "justice" (or praiseworthiness) of a single law or ruling: Because such a possibility would jeopardize the lawyer's *esprit critique* and the possibility to devise alternative and better solutions to a given jurisprudential problem. However, in Dagan's brand of realism, it is possible to speak of the justice or desirability of the legal system as such. With the words of Llewellyn, Dagan holds that although any given specific rule need not be approved, the "content and substance of the norms and activities of the imperative System, as a whole, must be felt by the Entirety [and] concerned to serve that Entirety reasonably well" [1, 35]. In sum, these insights about the appeal of realism to "integrity", "approvability of the system" etc. are indicative of a position that is compatible with normative positivism.

⁷ For our present purposes, let us adopt the definition of Waldron according to which normative legal positivism is "the thesis that [the] separability of law and morality, [the] separability of [the grounds of] legal judgment and [the grounds of] moral judgment, is a good thing, perhaps even indispensable (from a moral, social, or political point of view), and certainly something to be valued and encouraged."

5 Conclusion

Dagan is bold in suggesting legal realism as a middle way. His has interesting insights into the realist literature and makes a convincing case for a revival of interest in this theory of law. He is also right in claiming that we are not all realists now: “Rather than carrying the realist legacy forward, legal scholars of the last decades have torn it apart. The disintegration of legal scholarship during this period robbed the realist conception of law of its most promising lessons” [1, 67]. However, the lack of consideration of institutionalism and normative positivism as possible allies in the legal theory landscape is regrettable. Future venues of research are to be explored in these directions. As to the question of whether realism truly constitutes a third way, alternative to both natural law’s insistence on the necessity to evaluate the adequacy of our laws for the kind of beings that we are, and positivism’s insistence on law as a separate affair from both moral and social norms—no decisive arguments seem readily available.

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