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METHODOLOGICAL VERSUS NATURALISTIC LEGAL OBJECTIVITY

KENNETH K. CHING*

INTRODUCTION

Han Solo and Luke Skywalker are having a debate. Aboard the Millennium Falcon, they have made a timely jump into hyperspace and narrowly escaped being obliterated by Imperial Cruisers.¹ Luke is with Obi-Wan Kenobi in the Falcon's hold area, and Obi-Wan is teaching Luke how to defend himself against a robot's laser beams using only a lightsaber and the Force. Han enters and sees the exercise. The robot blasts Luke in the leg. Han erupts with laughter.

Han: Hokey religions and ancient weapons are no match for a good blaster at your side, kid.

Luke: You don't believe in the Force, do you?

Han: Kid, I've flown from one side of this galaxy to the other. I've seen a lot of strange stuff, but I've never seen anything to make me believe there's one all-powerful force controlling everything. There's no mystical energy field that controls my destiny. It's all a lot of simple tricks and nonsense.

Luke, undeterred, tries again, this time with a blaster helmet covering his eyes. The robot fires. Luke, trusting the Force, reacts. Incredibly, he deflects the laser. Han is unimpressed: "I call it luck."

Han and Luke's timeless debate about the seen versus the unseen bears on law's legitimacy and objectivity. Law's legitimacy depends, in part, on its objectivity.² If law is not objective but is biased, subjective, arbitrary or

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1. STAR WARS EPISODE IV: A NEW HOPE (20th Century Fox 1977).

2. See, e.g., Gerald J. Postema, *Objectivity Fit for Law*, in OBJECTIVITY IN LAW AND MORALS 99, 115 (Brian Leiter ed., 2001); cf. Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1462 (1990) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)) ("Law emerges because people desire predictability,

irrational, its subjects should deem law's use of coercive force illegitimate. So, it is important to ask whether law is objective. But before we can ask whether law is objective, we need to define legal objectivity. My goal in this Article is to accomplish that task by assessing and developing two competing conceptions of legal objectivity, one based on the works of Judge Richard Posner and Dr. Brian Leiter, and another based on work by Dr. Gerald Postema.

Han Solo would be with Posner and Leiter. In 1990, Posner, in *The Problems of Jurisprudence*,³ forcefully argued that legal objectivity could not be meaningfully founded on practical or legal reason, and this argument was continued in his other works *Overcoming Law*⁴ and *The Problematics of Moral and Legal Theory*,⁵ published in 1995 and 1999, respectively. In these books, Posner held that the best model for legal objectivity was empirical science, and he might as well have argued, like Han, that everything else was “tricks and nonsense.” In the same vein, Dr. Brian Leiter's 2007 book *Naturalizing Jurisprudence* argued that legal objectivity should be sought through the methods of empirical science, not through a priori reasoning. Leiter would likely warmly approve of Han's assessment: “Hokey religions and ancient weapons are no match for a good blaster”

Leiter edited a book in 2001, *Objectivity in Law and Morals*, which contained an article “Objectivity Fit for Law,” by Postema. Postema described a conception of legal objectivity called “publicity” that was based on public deliberative reasoning.⁶ Publicity is a methodological approach to legal objectivity, which holds that by creating legal judgments through a process of public, deliberative reasoning these judgments become “objects.” This kind of reason-based objectivity is rejected by Posner and Leiter in favor of an objectivity based on the methods of empirical science. *Objectivity in Law and Morals* gave occasion for a short debate between Leiter and Postema. Leiter claimed that Publicity provided no way of telling between better and worse ways of reasoning, and Postema argued that the relevance of empirical science to legal objectivity was in doubt.⁷ But that conversation was truncated and underdeveloped, and it was never specifically revisited. In this Article, I seek to continue and expand on that conversation by assessing two conceptions of legal objectivity.

stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures.”).

3. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

4. RICHARD A. POSNER, *OVERCOMING LAW* (1995).

5. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

6. Postema, *supra* note 2, at 117.

7. Postema, *supra* note 2, at 134.

The first conception of legal objectivity to be considered is based on the works of Posner and Leiter and is a naturalistic conception. Naturalism assesses law's objectivity based on the extent to which legal judgments correspond to empirical facts. It is the Han Solo, 'blasters over hokey religions' theory of legal objectivity. The second conception we will consider is what Postema has called Publicity. Publicity assesses law's objectivity based on whether legal judgments are products of public reason.⁸ It is a reason-driven conception. It is the Luke Skywalker, 'trust the Force' conception of legal objectivity. There are other conceptions of legal objectivity that are not considered in this Article, for example, a conception that assesses law's objectivity based on whether legal judgments conform to an objective, ontologically real order—a natural law or moral realist type of objectivity.⁹ I have chosen only to consider naturalistic legal objectivity and Publicity for several reasons. First, I wanted to develop the unfinished conversation between Postema and Leiter about these two conceptions as being opposed to one another. Second, Postema's conception of objectivity has been virtually ignored in secondary literature, and I wanted to specifically draw attention to this conception of objectivity. And third, I did not want to distract from these goals by also assessing other controversial conceptions.

This Article makes several contributions to the conversation started by Postema and Leiter. It offers a revised version of Publicity. Postema's version includes a "regulative ideal" of agreement among those who participate in deliberative discourse, but it expressly does not require any actual agreement among those participants.¹⁰ I argue the contrary: Publicity does require some degree of actual agreement; why and how much I will explain below. Further, this Article offers new arguments for preferring Publicity over Naturalism. The

8. There is a strong relationship between Publicity and John Rawls's rendering in *Political Liberalism* of six essential elements of a conception of objectivity, and Postema acknowledges relying on Rawls to some degree. Postema, *supra* note 2, at n.26; see JOHN RAWLS, *POLITICAL LIBERALISM* 110–12 (1993). The virtue of considering Publicity specifically, as opposed to objectivity more generally as described by Rawls, is that Publicity is a conception of objectivity directly tailored to law. It could be said that Rawls described a general idea applicable to any domain of discourse, which Postema has applied specifically to law. As such, Postema's explication of Publicity is rich and detailed with regard to legal objectivity in a way Rawls's survey of the elements required of any conception of objectivity did not attempt to be. See Lawrence B. Solum, *Introduction: Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 567 (1994) (Solum has noted that Rawls's concept of political objectivity "is barely explored in *Political Liberalism*.").

9. See, e.g., Christopher Wolfe, *Natural Law*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 581, 581 (Kermit L. Hall et al. eds., 1992) (describing natural law as claiming "there is a certain order in nature that provides norms for human conduct."); see also DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 22 (Cambridge University Press 1989) (describing a naturalistic moral realism).

10. Postema, *supra* note 2, at 119.

first is that the best argument for Naturalism, that science has been more successful than reason, is actually a better argument for Publicity. A second is that the best argument against Publicity, the contingency of reason, is actually an argument for Publicity's ability to assess legal objectivity. Also, this Article describes an appropriate role for empirical science in a rationalistic approach to law like Publicity.

Part I of this Article describes a naturalistic approach to law and legal objectivity. Part II of this Article describes a conception of legal objectivity based on public reason, Publicity. I revise Postema's version of Publicity by arguing that for a legal judgment to be objective, judging subjects must come to some degree of actual agreement. Part III of this Article argues that Naturalism is the wrong approach to legal objectivity for at least four reasons: (1) the lack of good reason to privilege scientific epistemology over a reason-based, rationalistic epistemology; (2) Naturalism's inability to account for normative discourse; (3) scientific epistemology's lack of relevance to law's legitimacy; and (4) the inability of a naturalistic conception of objectivity to assess law's legitimacy. Part IV of this Article argues that Publicity is an appropriate conception of objectivity for inquiring into law's legitimacy because Publicity can assess law's legitimacy and can account for normative discourse, while also being able to incorporate the "successes of science" into its framework and adequately address concerns about the contingency of a reason-based epistemology.

I. NATURALISTIC LEGAL OBJECTIVITY

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

As I discuss a naturalistic approach to law and legal objectivity, I will use terms that have close relationships to one another: Naturalism, empirical science, and pragmatism. Pragmatism will be used to describe an overarching philosophy with Naturalism as its ontology, empirical science as its epistemology, and consequentialism as its ethics.¹¹ While this description may be oversimplified, it is sufficiently accurate for the purposes of this Article. Naturalism, as ontology, defines what exists ("facts") as that which is mind independent and makes a causal difference to the course of our experience.

11. David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme By Holmes)*, 48 STAN. L. REV. 1001, 1007 (1996) ("For Posner, pragmatism means being a consequentialist in ethics and a moderate skeptic in epistemology.").

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

Naturalism assumes that reality is identified and described by the empirical sciences.¹² Blasters are real; the findings of hokey religions are not. Naturalistic objectivity is concerned only with “empirical”¹³ or “observable” or “physically existing” facts.¹⁴ A fact is naturalistically objective if it (1) is mind independent and (2) makes a causal difference to the course of our experience.¹⁵ Recall Han’s reasons for disbelieving in the Force: “I’ve flown from one side of this galaxy to the other . . . but I’ve never seen anything to make me believe” Seeing, is believing. Naturalistic legal objectivity is based on the identification of deterministic causes and effects of legal phenomena while minimizing or eliminating from legal decision-making non-empirical factors like morality, theology, human volition, agency, intuition, mind, free will, and most normative discourse.¹⁶ “There’s no mystical energy field that controls my destiny,” says Han. Naturalism is primarily an ontology, telling us what does and does not exist. Empirical facts exist; other phenomena do not. In short, reality is determined by science, and anything that cannot be observed empirically is eliminated by a naturalistic ontology.¹⁷ In Han’s words, “It’s all a lot of simple tricks and nonsense.”

The naturalistic approach to law and legal objectivity is based on the methods and results of empirical science.¹⁸ A naturalistic approach to law leads to a program of identifying “an explanatory unification of legal phenomena

12. BRIAN LEITER, *Postscript to Part II: Science and Methodology in Legal Theory*, in NATURALIZING JURISPRUDENCE 183 (2007); cf. POSNER, *supra* note 5, at 13 (While Posner does equate the “real” with the “physically existing,” he is careful to note that he is not claiming that the only worthwhile knowledge is scientific knowledge, lest he be accused of “scientism.”).

13. LEITER, *supra* note 12, at 185.

14. POSNER, *supra* note 5, at 13.

15. Leiter, *Objectivity, Morality, and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66, 67 (Brian Leiter ed., 2001).

16. See BRIAN LEITER, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in NATURALIZING JURISPRUDENCE 121, 135 (2007) (hereinafter LEITER, *Legal Realism*); BRIAN LEITER, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, in NATURALIZING JURISPRUDENCE 153, 180 (2007) (hereinafter LEITER, *Hart/Dworkin Debate*) (citing Jaakko Hintikka, *The Emperor’s New Intuitions*, in 96 JOURNAL OF PHILOSOPHY 127, 143 (1999)); LEITER, *supra* note 14, at 185; cf. POSNER, *supra* note 3, at 26.

17. LEITER, *supra* note 12, at 185 (citing the Quinean assumption “that it is within science itself, and not in some prior philosophy, that reality is to be identified and described.”).

18. *Id.* at 184.

with the other phenomena constituting the natural world”¹⁹ Thus, Naturalism incorporates the sciences into law, including anthropology, sociology, psychology, and economics.²⁰ Naturalism looks to “social scientific literature on law and legal institutions to see what concept of law figures in the most powerful explanatory and predictive models of legal phenomena such as judicial behavior.”²¹ A naturalistic approach to law may also consider other empirical data like public opinion and customs from around the world.²² Thus, a naturalistic legal objectivity would assess law’s objectivity by asking, “To what extent are legal judgments based on empirical facts?”

The incorporation of science into law should lead to “fruitful *a posteriori* research programs”²³ and “useful ‘inventions.’”²⁴ The scientific method is based largely on the use of controlled or natural experiments.²⁵ The incorporation of science into law is meant to allow us to predict,²⁶ understand, and perhaps even control our physical and social environment by yielding knowledge.²⁷ In a naturalistic approach to law, legal theories should generate predictions that are empirically refutable, and then such theories would be tested by comparing a theory’s predictions with observable results.²⁸ For example, a naturalistic approach to law should lead to judicial decisions being determinate and replicable.²⁹ As with natural science, it is sometimes impossible, impractical, or unethical to obtain observable results of a theory.³⁰ In such a case, through indirect evidence or inference, a theory may be indirectly, and often reliably, verified.³¹

A naturalistic approach to law is about “means,” not “ends.”³² It is like Han Solo, who Princess Leia describes as “quite a mercenary” when she learns he is only helping her for the money.³³ Naturalism prefers “means” because

19. See LEITER, *Legal Realism*, *supra* note 16, at 135.

20. *Id.* at 134; POSNER, *supra* note 3, at 63 (giving special emphasis to the role of economics in understanding and reforming law).

21. LEITER, *supra* note 12, at 184.

22. POSNER, *supra* note 5, at 251–52.

23. See LEITER, *Legal Realism*, *supra* note 16, at 134.

24. See POSNER, *supra* note 5, at 60; *see also* POSNER, *supra* note 3, at 62 (noting that an example of a “useful invention” might be pretrial conferences, which may foster settlement by reducing uncertainty about trial outcomes).

25. POSNER, *supra* note 3, at 61.

26. POSNER, *supra* note 3, at 26. The scientific approach to law owes much to Justice Oliver Wendell Holmes, Jr.’s prediction theory of the law. *Id.*

27. See POSNER, *supra* note 5, at 14.

28. See *id.* at 13.

29. See POSNER, *supra* note 3, at 7, 125.

30. See POSNER, *supra* note 5, at 13; *see also* POSNER, *supra* note 3, at 62.

31. See POSNER, *supra* note 5, at 13.

32. See *id.* at 60.

33. STAR WARS EPISODE IV: A NEW HOPE, *supra* note 1.

they are debatable in that they depend on factual assertions such as “this law led to a decrease in bankruptcies and interest rates.” But “ends,” or purposes or morals, are not debatable because they depend on non-empirical claims about values, such as “the number of bankruptcies should decrease.”³⁴ Posner gives an example of an argument for free speech:³⁵ free speech leads to intellectual progress.³⁶ Posner claims that whether free speech leads to intellectual progress is an appropriately debatable question about means because it can be refuted or confirmed by facts.³⁷ But, he notes, there are no empirical facts about whether we should value intellectual progress; therefore, such a question cannot be fruitfully debated.³⁸ A naturalistic approach to law concerns itself only with the debatable means, not the non-debatable ends. Debates about means (i.e., whether free speech had led to intellectual progress) could be naturalistically objective since they can be assessed by empirical facts, but a debate about whether intellectual progress *should* be valued could not be naturalistically objective because there is no scientific way to determine what should be valued.

Similarly, naturalistic objectivity is focused on “effects” and “results,” not “concepts.”³⁹ “Effects” (like “means”) are empirical facts, but concepts are not. Posner gives the example of the doctrine of hypothetical jurisdiction (now rejected by the U.S. Supreme Court⁴⁰):

[I]f there are two possible grounds for dismissing a suit filed in federal court, one being that it is not within the court’s jurisdiction and the other that the suit has no merit, and if the jurisdictional ground is unclear but the lack of merit is clear, the court can dismiss the suit on the merits without deciding whether there is jurisdiction.⁴¹

Posner notes that this doctrine is conceptually illogical because a decision on the merits presupposes the concept of jurisdiction.⁴² However, the pragmatic approach (which is closely related to Naturalism⁴³) to this question would utilize this doctrine because of its effects: (1) dismissing a case on its merits will not enlarge federal judicial power, which is the point of jurisdiction in the

34. POSNER, *supra* note 5, at 63.

35. *See id.* at 67.

36. *See id.*

37. *See id.*

38. *Id.*

39. *See id.* at 242.

40. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–94 (1998).

41. POSNER, *supra* note 5, at 243.

42. *Id.*

43. Simply put, pragmatism asks: “What practical difference does it make to us?” The incorporation of naturalism into pragmatism can be seen in that naturalism similarly requires that for phenomena to be considered a fact, it must “make a practical difference to us” by making a causal difference in the course of our experience.

first place—keeping powerful courts within their bounds; (2) in a case that clearly is without merit, the result will be the same for the litigants regardless of which court decides the question; and (3) determining a question that makes no practical difference wastes resources.⁴⁴ Pragmatism requires us to consider the results and effects a decision will have when we answer a legal question. Posner illustrates a contrary, non-pragmatic, conceptual approach by pointing to Justice Scalia’s rejection of hypothetical jurisdiction: “[F]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”⁴⁵ Notice that this analysis is entirely formal and conceptual. It is driven by the idea of jurisdiction and makes no reference to the effects of the Court’s decision.⁴⁶ Such a judgment is not naturalistically objective because there is no empirical fact about what “jurisdiction” is. And because there is no empirical “fact” about what jurisdiction is, “jurisdiction” cannot be objectively debated or understood: no one can empirically observe jurisdiction and state whether it is present in a given case. But effects and results can be observed, and the naturalistic approach to law is result-oriented and avoids conceptual formalism.⁴⁷

This naturalistic approach makes law a practical instrument that is used to achieve definite social ends.⁴⁸ In this way, law would resemble engineering, and the lawyer the social engineer who does not choose goals for society, but rather makes goals feasible.⁴⁹ Put differently, a naturalistic approach to law must separate the positive inquiry from the normative (whether dismissing the case will enlarge federal judicial power versus whether it *should* do so).⁵⁰

Although a naturalistic approach to law is about means not ends, “norms” still necessarily play a part in legal analysis. “No type of instrumental reasoning can be put to human use without some normative choice, or at least without positing some end or goal.”⁵¹ In order to know whether means are

44. POSNER, *supra* note 5, at 244.

45. *Id.* at 243–44 (quoting *Steel Co.*, 523 U.S. at 101–02).

46. *See id.* at 243–44.

47. *See id.*

48. *See* POSNER, *supra* note 3, at 14 (discussing Jeremy Bentham as the originator, in a limited but important respect, of Posner’s pragmatic concept of law).

49. *See id.* at 63. The sanitized echo of Holmes’s famous statement is unmistakable: “if my fellow citizens want to go to Hell I will help them. It’s my job.” Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 248 (Mark DeWolfe Howe ed., 1953).

50. *See* POSNER, *supra* note 5, at 243–44.

51. Gerard V. Bradley, *Overcoming Posner*, 94 MICH. L. REV. 1898, 1900 (1996).

successful, we must know toward what end those means were directed.⁵² Posner gives the example of a bankruptcy statute, the goal of which might be to reduce the number of bankruptcies and lower interest rates; whether this goal was satisfied could be known empirically.⁵³ Although a naturalistic approach to law separates the normative inquiry (whether there should be fewer bankruptcies and lower interest rates) from the positive, empirical one (whether the new statute accomplishes this goal), the naturalistic approach still requires a practical goal. Otherwise, the naturalistic project of measuring whether the law is advancing the goal becomes unintelligible.

It is uncontroversial that a naturalistic or pragmatic legal program needs norms. But scholars question from where such norms can originate. Pragmatic insights to law “in no way dictate which politically contestable theory of adjudication or which set of moral values a judge should adopt or allow to influence her decisions,” Dr. Eric Rakowski has noted.⁵⁴ With Leia, we might wonder whether the Han Solo approach “really cares about anything . . . or anyone.”⁵⁵ Pragmatic norms cannot come from rationalistic evaluative schemes because naturalistic ontology denies the existence of non-empirically verifiable entities like “moral values.”⁵⁶ Thus, Dr. Sanford Levinson has described Posner’s approach as being in the spirit of Critical Legal Studies, reducing all legal problems to ethical or political problems.⁵⁷ Professor Gerard V. Bradley argues that Posner ultimately only allows norms to be supplied by economics, though Bradley also says that Posner looks to evaluative concepts such as “progress,” “better,” and “consequences.”⁵⁸ Most accurately, for the pragmatist, laws’ norms are supplied by society’s majority interests.⁵⁹

52. See POSNER, *supra* note 3, at 122; cf. Bradley, *supra* note 51, at 1908 (“We have heard Posner say that economic . . . analysis needs posited ends to get going But Posner’s pragmatism . . . does not generate ends and goals . . .”).

53. POSNER, *supra* note 3, at 122.

54. Eric Rakowski, *Posner’s Pragmatism*, 104 HARV. L. REV. 1681, 1690 (1991).

55. STAR WARS EPISODE IV: A NEW HOPE, *supra* note 1.

56. Except to the extent “moral values” are mental states or attitudes, which may have empirically verifiable causal effects. For example, a judge may believe in morality, and that belief may affect his judgments. But morality itself, as something free standing apart from people’s attitudes or minds, is denied ontological status by naturalism. See LEITER, *supra* note 12, at 187.

57. See Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner, The Problems of Jurisprudence*, 91 COLUM. L. REV. 1221, 1240–41 (1991). I understand Levinson’s point to be that for both Posner and CLS, legal problems are not decided by abstract legal principles. Instead, they are ultimately decided by political considerations, such as majority rule.

58. Bradley, *supra* note 51, at 1903–04.

59. See POSNER, *supra* note 5, at 63.

“According to Posner, pragmatism . . . relies on social consensus both as a way of deciding cases and as a source of legitimacy for judicial decisions.”⁶⁰

Naturalism requires that for law to be objective, it must concern itself with only empirical facts. This conception has a tense relationship with normative discourse, since in many instances norms are not empirical facts and are effectively eliminated from a naturalistic reality.⁶¹ Yet norms are necessary for the naturalistic project to be intelligible, and so naturalists look to social consensus to provide legal norms. But normative evaluation does not play a role in naturalistic legal objectivity. Instead, Naturalism deems legal judgments objective to the extent they are reducible to empirical facts. Correspondingly, to the extent legal judgments incorporate non-empirical norms, the naturalistic conception of objectivity should deem law non-objective.

Posner’s and Leiter’s thought bear a strong relationship to that of Oliver Wendell Holmes, Jr., Roscoe Pound, and Benjamin Cardozo “in seeing law as an instrument for the conscious pursuit of social welfare, an instrument whose master term was policy rather than principle, whose master institution was the legislature rather than the courts, and whose servants should devote themselves to social engineering rather than doctrinal geometry.”⁶² Like these legal realists, Posner and Leiter characterize law as “instrumental problem solving rather than detached speculation”—as a “means to an end” meant to promote social welfare.⁶³ They seem to agree with these earlier thinkers in locating legal legitimacy in democratic consensus.⁶⁴ Fulfilling Holmes’s prophecy that the lawyer of the future “is the man of statistics and the master of economics,”⁶⁵ Posner and Leiter urge “lawyers to become ‘social engineers,’ systematically investigating social problems, familiarizing themselves with the available methods of reform, and testing whether these had the intended effects.”⁶⁶ Thus, Posner and Leiter are situated neatly in line with thinkers like Holmes, Pound, and Cardozo.

II. LEGAL OBJECTIVITY AS PUBLICITY

An alternative to Naturalism is what Gerald Postema has called objectivity as Publicity. In general, objectivity has three main structuring features: (1)

60. Lee Epstein, Jack Knight, & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 951 (2003).

61. Except when they exist as empirically-verifiable mental states. LEITER, *supra* note 12, at 187.

62. Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 498 (1996).

63. *Id.*

64. *Id.* at 498–99.

65. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

66. *See* Grey, *supra* note 62, at 499.

judgments⁶⁷ must be independent; (2) judgments must be capable of being assessed for correctness; and (3) judgments must be intersubjectively invariant.⁶⁸ These structuring features of objectivity apply to any domain, not just law.⁶⁹ When these general features of objectivity are applied specifically to legal discourse, legal objectivity requires that:

(1) Participants in the deliberative process conduct their deliberation only with normatively relevant reasons and arguments in view and assess the merits of the arguments only by normatively relevant standards; and (2) their participation is governed by the overarching aim of achieving reasonable common formation of judgment on the basis of the reasons and argument publicly offered.⁷⁰

It is worth noting that whereas the foundation of naturalistic objectivity is empirical facts, the foundation of objectivity as Publicity is non-empirical reason, and it would be fair to describe Publicity as rationalistic or reason-based. Publicity relies on invisible reason to bind the legal universe together as Luke Skywalker trusts the Force to bind the galaxy.

For a legal judgment to be independent, the first structuring feature of objectivity, it must transcend the subjectivity of the person engaged in the activity of judging (the “judging subject”).⁷¹ It must not be the product of improper factors like bias, idiosyncrasy, or ideology.⁷² Rather, it should be the product of proper, normatively relevant reasons.⁷³

For a legal judgment to be capable of being assessed for correctness, the second structuring feature of objectivity, there must be standards for assessing a judgment’s correctness, and these standards cannot simply be a judging subject’s belief or opinion.⁷⁴ The structuring feature of “correctness” has three implications. First, it implies the possibility of mistake.⁷⁵ Standards that can justify can also condemn. Second, judgments must be conclusions of a process of deliberative reasoning.⁷⁶ By justifying a judgment based on standards of correctness, interlocutors must exchange reasons for their judgments and deliberate over the correctness of a judgment. Third, because discourse is conducted by reference to standards, both agreement and disagreement are

67. By “judgments,” Postema means “claims, assertions, and assessments.” Postema, *supra* note 2, at 105.

68. *Id.* at 107–08.

69. *Id.* at 105.

70. *Id.* at 118.

71. *Id.* at 105.

72. Postema, *supra* note 2, at 106.

73. *Id.*

74. *Id.* at 107.

75. *Id.*

76. *Id.*

intelligible (as opposed to mere mute assertions of opposition).⁷⁷ Standards for assessing correctness allow one judging subject to *explain* that his judgment satisfies the standard *and* another judging subject to *explain* why it does not. This can be contrasted with a disagreement without reference to standards, in which there is no possibility of deliberative reasoning but only unintelligible opposition. Relatedly, reasoning by reference to standards may create a path for moving from disagreement to agreement (and vice versa).⁷⁸

Before moving on, it is worth noting the heavy lifting done by “reasons” and “standards” in Publicity. Both are the key to their respective structuring features. Both must not equal the solely subjective beliefs or opinions of the judging subject. Both must be publicly accessible. It is likely that whether we can endorse objectivity as Publicity depends on whether proper reasons and standards of correctness can carry their allotted burdens. Given their importance to Publicity, one wants to know some things about these “reasons” and “standards.” For example, who says which reasons are “proper” or “normatively relevant”? And one may be disappointed to learn that Publicity does very little to answer such questions. However, I briefly suggest an analogy that may explain why Publicity says little about the content of its reasons and standards. Publicity is more like procedural law than substantive law. Publicity itself does not specify the substance, content, or nature of its reasons and standards. Instead, its job is to insist that judgments are created through a process of deliberating based on reasons and standards. This Article attempts to demonstrate that this procedure or method is enough to assess whether law is objective.

Returning now to the structuring features of objectivity, the third feature is intersubjective invariance, meaning that there exists the possibility of different judging subjects confirming or disconfirming a given judgment based on standards of correctness and proper reasons.⁷⁹ Intersubjective invariance acts like a test for whether a judgment is based on proper reasons and standards of correctness. “The important general point to record here is that it must be possible for other [judges] to assess a judgment, and confirm or disconfirm it, if it is to count, even at the limit, as objective in principle.”⁸⁰ Notice something interesting here. A judgment could be objective even when other people look at it and “disconfirm it.”⁸¹ How is this so?

Consider the analogy of the math teacher who requires her students to “show their work.” When she assigns her students math problems, she does not

77. Postema, *supra* note 2, at 107.

78. *Id.* at 107–08.

79. *Id.* at 108–09.

80. *Id.*

81. *Id.* at 112 (“One can make an incorrect objective judgment and one’s judgment can be correct, while failing standards of objectivity . . .”).

want them to state only their answers to the problems. She wants them to show the steps they took to arrive at their answers. If the students do so, the teacher is able to “confirm or disconfirm” their answers objectively. Because the students have shown their work and because their reasoning is subject to mathematical “standards of correctness,” the students’ answers can be deemed objective *even if they are wrong*. Intersubjective invariance requires a similar process. It requires judges to justify their legal judgments based on proper reasons and standards of correctness and to offer their judgments to others, publicly. This allows others to objectively confirm or disconfirm such judgments.

This highlights that the conception of objectivity being applied here is *methodological*. This conception of objectivity is about *process*. Objectivity in this sense arises from arriving at judgments through a public, deliberative process. If we subject our judgments to this process, they become “objects,” things that other people can observe and confirm or disconfirm.⁸²

Assuming that intersubjective invariance were achieved, it would be unlikely the judgment is a product of mere subjectivity. It would demonstrate that the reasons and standards justifying the judgment transcend the judging subject. It is not a perfect test because it is possible that all judging subjects are systematically biased, merely sharing the same improper biases or ideologies or idiosyncrasies. The judging subjects may all agree not because their judgments are objective, but because they have become a “hegemonic convention.”⁸³ However, intersubjective invariance is a necessary feature of objectivity because its absence would support too compellingly the charge that a judgment was merely subjective. If no one could even theoretically confirm or disconfirm his or her judgments, it seems dubious that the proper reasons and standards of correctness are functioning or even functional. If reason is functioning correctly, intersubjective invariance should be possible. Other judges must be able to meaningfully evaluate a given legal judgment. Intersubjective invariance provides us with assurances that judgments are not merely subjective but are based on reasons and standards independent of and external to ourselves.⁸⁴

Because intersubjective invariance is a structuring feature of objectivity, it may not seem to follow that Postema’s version of Publicity does not require *actual* agreement among judging subjects.⁸⁵ (Note that intersubjective invariance is different than agreement.) Postema states that agreement among

82. Postema, *supra* note 2, at 124 (“Clashes in public over the proper and reasonable understanding of past decisions . . . are signs that the products of the system can claim the right to be taken seriously as products of a credible structure of public practical deliberation.”).

83. Leiter, *supra* note 15, at 86.

84. Postema, *supra* note 2, at 121.

85. *Id.* at 120–21.

judging subjects, rather than being a precondition to or expected result of objective deliberation, is a “regulative ideal.”⁸⁶ Later in this Article, I will argue that Publicity requires some degree of actual agreement: either a preponderance of agreement or increasing agreement over a reasonable amount of time.⁸⁷ But for now, I will focus on describing the “regulative ideal” of agreement.

The regulative ideal’s purpose is to influence the deliberative process toward objectivity by imposing discipline and constraints on the process and its participants.⁸⁸ Again, the deliberative process has two standards:

- (1) Participants in the deliberative process conduct their deliberation only with normatively relevant reasons and arguments in view and assess the merits of the arguments only by normatively relevant standards; and (2) their participation is governed by the overarching aim of achieving reasonable common formation of judgment on the basis of the reasons and arguments publicly offered.⁸⁹

These standards discipline the process’s participants to argue reasonably and to offer their arguments and reasons *to each other*.⁹⁰ The goal is to justify one’s judgments to others in terms one believes all can recognize and affirm.⁹¹ Thus, the participants must discipline themselves not to offer arbitrary, idiosyncratic, or prejudiced reasons for their judgments because, given the regulative ideal of agreement, they can have no expectation that other participants in the process will find them persuasive or could come to share such reasons.⁹²

Agreement as a regulative ideal, as opposed to an expected outcome of objective deliberation, may also be better understood once we have considered the role of disagreement in objectivity. Objectivity’s goal is “strong deliberative consensus . . . based on a full and open public articulation and assessment of all relevant reasons and arguments.”⁹³ This goal requires objectivity to provide opportunities for disagreement or any consensus achieved would not be the result of full, public, reasoned deliberation. Such a consensus could instead be the product of the exclusion from the process of members of the community or minority arguments.⁹⁴ However, if deliberative discourse values and respects disagreement, it demonstrates that the process is properly open to interlocutors and arguments. “*Divergence* . . . signals that the

86. *Id.* at 121.

87. *See infra* Part IV.A.

88. Postema, *supra* note 2, at 121.

89. *Id.* at 118.

90. *Id.* at 117.

91. *Id.* at 119.

92. *Id.*

93. Postema, *supra* note 2, at 122.

94. *Id.*

techniques of reason and argumentative insight are playing a vigorous role in the law."⁹⁵ Opportunities for public disagreement are essential to a deliberative process's claim to objectivity.⁹⁶

Disagreement may also promote objectivity by exposing certain reasons and arguments as biased, prejudiced, exclusionary, or unreasonable.⁹⁷ Disagreement in the deliberative process encourages the idea that the process can be self-correcting.⁹⁸ Objectivity as Publicity does not guarantee that improper reasons or standards will never prevail in deliberative discourse, but the opportunity for disagreement and dissent creates the possibility that such improper reasons or standards can be challenged, discarded, and corrected.

The regulative ideal of agreement also has the important quality of requiring that agreement be achieved by reason and not force.⁹⁹ Publicity requires that reasons for a judgment must be those that could be accepted by all. Such acceptance is an important component of legitimacy, the very reason for seeking legal objectivity.

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

Finally, whereas Naturalism is primarily an ontology (reality is empirical fact) that is closely related to an epistemology of empirical science, Publicity is a methodology that is not committed to a particular ontology. Publicity is a process for creating legal "objects." It is based on adherence to this process that Publicity assesses whether a legitimating objectivity can be ascribed to legal judgments. Having described the naturalistic and methodological conceptions of legal objectivity, this Article now turns to evaluating these conceptions' merits.

III. WHY NOT NATURALISTIC OBJECTIVITY?

Legal objectivity should not be defined in naturalistic terms. First, the success of science is not a good reason to prefer empirical science over non-empirical reason. Second, normative discourse is an ineliminable feature of law, and Naturalism's attempts to eliminate or separate it are futile and unhelpful. Third, scientific epistemology has limited relevance to law. Fourth,

95. *Id.* at 124 (quoting Christopher Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1028–29 (1994)).

96. Postema, *supra* note 2, at 122.

97. *Id.* at 125.

98. *Id.* at 123.

99. Gerald J. Postema, *Public Practical Reason: Political Practice*, in *THEORY AND PRACTICE* 345, 357 (Ian Shapiro & Judith Wagner DeCew eds., 1995).

a naturalistic conception of legal objectivity has no ability to assess legitimacy and is the wrong conception of objectivity for assessing law's legitimacy.

A. *The Significance of Science's Success*

For the purpose of assessing whether law's use of coercive force is legitimate, this Article asks whether legal objectivity should be defined in terms of Naturalism or Publicity. The primary argument in favor of a naturalistic approach to law and legal objectivity over a reason-based approach, Posner and Leiter argue, is that empirical science has been more successful than non-empirical reason.¹⁰⁰ "Hokey religions and ancient weapons are no match for a good blaster at your side"¹⁰¹

This is a pragmatic argument and should be distinguished from a metaphysical one¹⁰² on which Posner and Leiter claim not to rely: they do not claim that science provides philosophically certain knowledge.¹⁰³ The pragmatic approach "dislikes metaphysics"¹⁰⁴ because metaphysics makes no difference in the real world. "There's no mystical energy field that controls my destiny," as Han Solo might say. Posner writes, "There are no conceptual entities; the meaning of an idea lies not in its definition, its Form, its relation to other ideas, but rather in its consequences in the world of fact."¹⁰⁵ Posner argues that we should not be asking questions about conceptual entities that are inconsequential in the real world; instead we should consider "[w]hat practical, palpable, observable difference does it make to us?"¹⁰⁶ This same pragmatism can be seen in Leiter's definition of "fact": a "fact" must make a causal difference in the course of our experience.¹⁰⁷ As Leiter notes, "[T]he only possible criteria for the acceptance of *epistemic norms*—norms about what to believe—are pragmatic: we must simply accept the epistemic norms that work

100. For Posner and Leiter, "success" seems to primarily refer to technological advances. *See* LEITER, *supra* note 15, at 71 ("[Science] sends the planes into the sky, eradicates certain cancerous growths, makes possible the storage of millions of pages of data on a tiny chip."); POSNER, *supra* note 3, at 66–67 (discussing the "atom bomb.")

101. STAR WARS EPISODE IV: A NEW HOPE, *supra* note 1.

102. Posner similarly notes that such a pragmatic epistemology "dislikes metaphysics" (because it makes no practical difference) and "is uninterested in creating an adequate philosophical foundation for its thought and action" POSNER, *supra* note 3, at 28.

103. That scientific epistemology is our best guide to knowledge "is, to be sure, no *a priori* truth . . ." LEITER, *Hart/Dworkin Debate*, *supra* note 16, at 180. While Posner's and Leiter's arguments do not require accepting that science provides certain knowledge, it does seem to require assuming that other modes of inquiry, such as intuition or *a priori* reasoning, do not lead to certain knowledge.

104. *See* POSNER, *supra* note 3, at 28.

105. *Id.* at 16.

106. POSNER, *supra* note 5, at 254.

107. LEITER, *supra* note 15, at 67, 78–79.

for us (that help us predict sensory experience, that allow us to manipulate and control the environment successfully, that enable us to ‘cope’).”¹⁰⁸

So, the turn to empirical science and away from non-empirical reason follows for Posner and Leiter because while science has “worked for us,” non-empirical methods have not: a scientific epistemology deserves to be privileged over a rationalistic one because of “the tremendous success such an epistemology has enjoyed to date. To simply push the scientific epistemology aside opens the ontological floodgates to a whole pre-Enlightenment conception of the world that we seem to do better without.”¹⁰⁹ “[T]he philosophical track record of all forms of *a priori* analysis, conceptual or intuitive, is not especially encouraging.”¹¹⁰ “Science—not moral insight—has made us more civilized”¹¹¹

As Leiter argues:

[S]cience . . . , and the norms of a scientific epistemology . . . are the highest tribunal *not* for any *a priori* reasons, but because . . . science has . . . “delivered the goods”: it sends the planes into the sky, eradicates certain cancerous growths, makes possible the storage of millions of pages of data on a tiny chip, and the like.¹¹²

Describing this scientific epistemology, Leiter says that “[w]ith respect to questions about *what there is* and *what we can know*, we have nothing better to go on than successful scientific theory.”¹¹³ Posner argues similarly.¹¹⁴ He concedes that science’s epistemological foundations are uncertain but argues that science should be privileged epistemologically because of its practical successes. “Although every bit of what we now believe about the nature of the universe may eventually be overthrown, in the meantime ‘science reveals hidden mysteries, predicts successfully, and works technological wonders.’”¹¹⁵ Meanwhile, in the backwater world of pure reason, Posner claims there are no “useful ‘inventions’ embodying moral theory.”¹¹⁶ So, the chief reason for

108. LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE 15, 50 (Brian Leiter ed., 2007).

109. LEITER, *supra* note 15, at 82–83.

110. LEITER, *Hart/Dworkin Debate*, *supra* note 16, at 180.

111. POSNER, *supra* note 5, at 56.

112. LEITER, *supra* note 15, at 71.

113. LEITER, *Hart/Dworkin Debate*, *supra* note 16, at 180.

114. It should be noted, however, that Posner recognizes “[t]he role of scientific inquiry in law is also limited, partly because of . . . the value rightly placed on the stability, certainty, and predictability of legal obligations.” POSNER, *supra* note 3, at 455. He also notes that ethical and practical constraints limit science’s application to law. *Id.* at, 455, 460. He goes so far as to suggest that imbuing the law with scientific methodology might be unjustified. *Id.* at 460.

115. POSNER, *supra* note 3, at 66 (quoting W.V.O. Quine, *Natural Kinds*, in NATURALIZING EPISTEMOLOGY 31, 43 (Hilary Kornblith ed., 1985).

116. POSNER, *supra* note 5, at 60.

privileging a scientific or naturalistic epistemology, and correspondingly to define legal objectivity in terms of empirical science, is because science is successful.

This argument seems plausible at first. The successes of science are obvious and dramatic, and few people want to return to the Dark Ages. But it turns out to be impossible to argue that science has been successful while rationalism or other forms of a priori analysis have not. Notice how the claim “science is successful” is fraught with normative implications. To claim that science is “successful” or that it “works” is a normative evaluation. In what way is science successful? Leiter notes that science eradicates some cancer. Why is that a success? It is a success because it preserves human life, which we value. But the value of human life cannot be identified by empirical science. The value of human life emerges from non-empirical, normative discourses like morality, theology, and philosophy. Without such normative discourse, the claim that “science is successful” is unintelligible. Yet it is precisely such normative discourse that is eliminated in Posner and Leiter’s Naturalism. It is tellingly inconsistent to impugn normative discourse while resting your entire system on the normative claim that science is successful. It resembles the child who kills his parents and pleads for the mercy of the court on account of being an orphan.

Maybe it isn’t chutzpah but dubious metaphysics. Pragmatists may dislike metaphysics, but “[t]he price of having contempt for philosophy is that you make philosophical mistakes.”¹¹⁷ Posner and Leiter strenuously avoid claiming to be doing metaphysics or making a priori claims. Attempting to insulate themselves against charges of scientism or verificationism, both Posner and Leiter volunteer that scientific epistemology is not privileged a priori; they are not claiming scientific knowledge is philosophically certain.¹¹⁸ Posner, for example, denies what would be a metaphysical claim that “the only worthwhile knowledge is scientific knowledge”¹¹⁹ But his best efforts to avoid metaphysics fail, among other reasons, because he is not satisfied with giving a descriptive account of law; he also wants to advocate an approach to law.¹²⁰ Posner wants to talk about not just what law *is* but about what law *ought* to be. He notes that “[t]he notion of using the scientific method to guide social reform is quintessentially pragmatic.”¹²¹ Unfortunately, “Posner’s elimination of ‘soft’ concepts from ethics leaves something of a [normative] vacuum.”¹²² One cannot guide social reform without non-empirical norms (*i.e.*, the value of

117. JOHN R. SEARLE, *THE MYSTERY OF CONSCIOUSNESS* 60, 62 (1995).

118. LEITER, *supra* note 15, at 77.

119. POSNER, *supra* note 5, at 13.

120. Fish, *supra* note 2, at 1457–61.

121. POSNER, *supra* note 3, at 62.

122. Luban, *supra* note 11, at 1019.

life, the value of knowledge, etc.), and those norms live in the realm of metaphysics, not empirical science. Posner may dislike metaphysics, but he needs it if he wants to offer any advice. “The problem is that Posner . . . wants it both ways. He wants both to puncture the philosophical balloon, obviating the need to engage in messy philosophical arguments, and to toss off controversial philosophical propositions of his own . . .”¹²³ And then we have Leiter, who denies the a priori of science but embraces the Quinean assumption that science identifies and describes reality.¹²⁴ Who can accept that Leiter is not making a priori or metaphysical claims while simultaneously assuming the definition of reality?¹²⁵ Professor Steven Macias has said, “I do not think Leiter would deny that he has replaced God or Truth with Science as the ultimate arbiter of many human beliefs and practices.”¹²⁶ Leiter can call his naturalism not metaphysics or not a priori, but “it can be very difficult to see the difference between the Quinean naturalistic account and one which sees certain norms as *a priori*.”¹²⁷

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

All this is to say that the success of science is not a good stand-alone argument for a naturalistic approach to law or legal objectivity or against a reason-based approach. Of course, science has been successful. But to claim that science has been successful depends on normative discourse.¹²⁸ Normative

123. *Id.* at 1009.

124. Leiter, *supra* note 12, at 185.

125. In other words, Leiter can call it what he will, but his Quinean assumption is nothing short of faith-based. Leiter’s position parallels that of the members of the Vienna Circle who implausibly claimed that, though they were promoting a logical positivism or logical empiricism that would, *inter alia*, eliminate metaphysics, they were not doing philosophy. See DAVID OLDROYD, *THE ARCH OF KNOWLEDGE: AN INTRODUCTORY STUDY OF THE HISTORY OF THE PHILOSOPHY AND METHODOLOGY OF SCIENCE* 231 (1986). “[I]t is only dogmatism to insist that the only reasons that can support a moral conviction are [causal] reasons . . .” Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *PHIL. AND PUB. AFF.* 87, 122 (1996).

126. Steven J. Macias, *Rorty, Pragmatism, and Gaylaw: A Eulogy, a Celebration, and a Triumph*, 77 *UMKCL. REV.* 85, 104 (2008).

127. Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 *MICH. ST. L. REV.* 849, 858 (2003).

128. A parallel criticism has been made of Posner’s economic analysis of the law. *Cf.* Bradley, *supra* note 53, at 1917 (“The criticism of economics in law is *not* that economic analysis is fanciful, unbelievable, or useless. It *is* very useful. The criticism is . . . that economics is

discourse not only enables us to assess whether science is successful; it is responsible for science's success.

Leiter claims "science . . . sends the planes into the sky . . ." ¹²⁹ But it doesn't. People informed by their normative goals send planes into the sky. People only *use* science as a *means* to help build airplanes. Or consider medicine. No one looked into a microscope and empirically discovered that we *should* use medicine to preserve human life. Rather, someone *believed*—because of normative discourse—that we should value human life or that we should value knowledge and only then looked into a microscope. We only believe that we should preserve human life or value knowledge because of normative discourse, and this normative knowledge directs and defines any successful uses of our scientific knowledge. ¹³⁰ Non-empirical normative discourse is necessary not only for assessing science's success, but also for directing scientific projects toward any such success.

This also refutes Posner's argument that there have been no useful inventions embodying moral theory and Leiter's claim that the track record of a priori analysis is not particularly encouraging. The successes of science *are* useful inventions embodying moral theory. Science itself is a useful invention of moral theory. Take an example given by Posner of the success of science: the atom bomb. ¹³¹ Posner seems correct that the atom bomb represents a clear progression of knowledge. But who says knowledge is valuable or good? Moral philosophy does, ¹³² but moral philosophy is precisely the kind of normative discourse Posner and Leiter want their naturalistic programs to eliminate from legal reasoning. ¹³³ Yet it is normative discourse and only normative discourse that directs us to value knowledge. Scientific enterprises are only pursued because of the normative beliefs that knowledge is good and that we should have more of it. Science and all its useful inventions are themselves useful inventions of normative discourse.

Now is a good time to address Leiter's related argument that non-naturalistic reasoning cannot provide the basis for objective judgments. A non-naturalistic conception of objectivity, like Publicity, Leiter argues, "will often be unable to make sense of better and worse ways of reasoning." ¹³⁴ Based on

radically incomplete, and dangerous without an enveloping, regulating morality and metaphysics.").

129. LEITER, *supra* note 15, at 71.

130. To put it in Posner's terms, any success of science is success by "stipulation" and not argument or empirical fact. POSNER, *supra* note 5, at 61 (Posner notes that liberal democracy appears to be a success of moral theory, but is only based on "stipulation, not argument.").

131. POSNER, *supra* note 3, at 66–67.

132. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 87 (1980).

133. POSNER, *supra* note 3, at 26; POSNER, *supra* note 5, at 78; LEITER, *Hart/Dworkin Debate*, *supra* note 16, at 180–81.

134. LEITER, *supra* note 15, at 85.

the foregoing, we can see that if this is correct, Posner's and Leiter's arguments in favor of science must be abandoned as they rely on non-naturalistic reasons like "success" and "value." However, a better response to Leiter's argument is to argue that non-naturalistic reasoning is often able to make sense of better and worse ways of reasoning. Of course, Leiter is right that science has been successful. Of course we're better off with airplanes and medicine than witches and leprechauns. But notice that this judgment—that science is successful, that science is a better way of reasoning than superstition—is a non-empirical judgment. It appears, then, that non-empirical reason is able to make sense of better and worse ways of reasoning, at least when it comes to the examples Leiter picks out.

To summarize, Posner and Leiter's primary argument for privileging scientific epistemology over a reason-based epistemology is that science has been successful but reason has not. This argument is self-refuting. They claim that normative discourse like morality and metaphysics should be eliminated from the law because they are non-empirical and have been unsuccessful. They then claim scientific epistemology should be privileged because science has been successful. But this claim actually validates the very normative discourse they try to dismiss.

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

B. *The Ineliminability of Normative Discourse*

Even assuming that normative discourse is problematic or unsuccessful, the naturalistic program is no help. Normative discourse cannot be eliminated from the law. "The complete elimination of normative evaluation is unattractive, not least because it appears to be impossible."¹³⁵ Any principled pragmatism,¹³⁶ Naturalism, or empirical science can only tell us about "means," not "ends." It can tell us how to do something, but not whether we should do it. Only normative discourse can tell us what we ought to do; only normative discourse can supply the "ends" that direct our "means." And law will always require ends or purposes. It will always require normative discourse no matter how "scientific" its means become.

One might say Leiter has never argued norms could be completely eliminated from law; in fact, he has said the opposite. He too has said norms are ineliminable. The problem is that the norms Leiter calls ineliminable aren't

135. Redmayne, *supra* note 129, at 859.

136. Admittedly, the phrase "principled pragmatism" may be oxymoronic.

the ones that matter. “Norms and the ‘internal point of view’ are ineliminable features of the causal structure of the social world,” Leiter writes, “but, for naturalists, causality is still the benchmark of reality, and so no responsible naturalized jurisprudence can eliminate the normative aspects of law and legal systems.”¹³⁷ One might breeze through this statement and be misled into thinking that Leiter is reserving some role in law for normative discourse. He isn’t. Leiter’s way of “responsibly” accounting for norms¹³⁸ is by locating them within causal mental states.¹³⁹ So, for example, a judge may subscribe to a certain ideology or value, and it is an empirical fact that the judge subscribes to this value.¹⁴⁰ The empirical fact that the judge has such a “mental state” may make a causal difference in the course of our experience by causing the judge to decide cases in certain ways.¹⁴¹ Thus, the reality of the value or ideology or norm of the judge can be identified by a naturalistic epistemology, and it is in this way that Naturalism has a place for norms. Posner similarly describes morality as “facts about people’s attitudes, much like ‘mental externalities.’”¹⁴²

This is unresponsive to the argument that Naturalism eliminates normative discourse from law. Identifying norms with mental states or facts about people’s attitudes is merely descriptive (which Posner acknowledges).¹⁴³ This may seem useful for Leiter’s purported descriptive project of answering what he considers “the central jurisprudential question—what is law?”¹⁴⁴ But it gives no help in answering the question “What should law be?” That is the prescriptive, normative question. And it is the answers to that question—the normative answers—that are eliminated¹⁴⁵ by Leiter’s Naturalism and “rendered invisible” by Posner’s scientific approach.¹⁴⁶

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

One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these [the internal

137. LEITER, *supra* note 69, at 4.

138. LEITER, *supra* note 12, at 187.

139. *Id.*

140. *Id.*

141. *Id.*

142. Bradley, *supra* note 51, at 1913.

143. RICHARD A. POSNER, *OVERCOMING LAW* 36 (1995) (“The statement that it is wrong to torture children . . . is merely a descriptive statement about our morality, not a normative statement . . .”); see Bradley, *supra* note 51, at 1913.

144. LEITER, *supra* note 12, at 189.

145. *Cf.* Redmayne, *supra* note 127, at 854 (noting that naturalism robs evidence scholarship of its normative content).

146. See Bradley, *supra* note 51, at 1904; LEITER, *supra* note 12, at 187 (“That scientific accounts of social phenomena have room, in principle, for Hermeneutic Concepts does not show, of course, that they make room for the kinds of Hermeneutic Concepts to which conceptual jurisprudents are attached.”).

and the external] points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.¹⁴⁷

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

Further, there are great tensions between Leiter's primary descriptive project of asking and answering "What is law?" while also engaging in the prescriptive project of telling us why law should be naturalized or what law should be. Leiter notes that his naturalization project probably makes no difference to questions about the norms of a democratic society.¹⁴⁸ How can Leiter hold that science defines reality, leading to the elimination of many concepts to which legal thinkers are attached, and yet claim that this position makes no difference to intelligible questions about the norms of a democratic society? Perhaps Leiter is an external but not internal skeptic about democratic norms?¹⁴⁹ That is, maybe as a participant in our democratic society, Leiter believes questions about democratic norms are perfectly intelligible, but as a legal philosopher he believes democratic norms do not exist from the scientific point of view? It seems hard to wear both those hats, that is, believing democratic norms are not real but still taking normative discourse about them seriously, not as mental states, but as they are discussed within the practice of democracy as evaluative claims. It is like an atheist trying to take prayer seriously, and not as a sociological phenomenon, but as a petition made to God. If Leiter wants to engage in a truly naturalistic descriptive project, which should lead to a skepticism about values "all the way down,"¹⁵⁰ he should, in principle, exclude himself from any prescriptive projects.

We have seen that mental states are an insufficient way of accounting for the ineliminability of norms in law, and now we will consider the role of norms in Posner's pragmatic program. Posner has explained in some detail how his pragmatic program would work, including where norms fit in, but this explanation demonstrates why normative discourse in law is inescapable. He describes a hypothetical scenario:¹⁵¹ a bankruptcy statute is enacted. Its purpose is to decrease the number of bankruptcies. It can then be empirically

147. H.L.A. HART, *THE CONCEPT OF LAW* 91 (2d ed. 1994).

148. See BRIAN LEITER, *Why Quine is not a Postmodernist*, in *NATURALIZING JURISPRUDENCE* 146 (Brian Leiter, ed., 2007). This seems to be a tacit admission of Dworkin's argument that any successful or intelligible argument that evaluative propositions are neither true nor false must be internal to the evaluative domain rather than Archimedean about it; Dworkin, *supra* note 125, at 89.

149. See Dworkin, *supra* note 125, at 92–93.

150. *Id.* at 89.

151. POSNER, *supra* note 3, at 122.

tested whether the statute has served its purpose by simply looking at whether the number of bankruptcies do, in empirical fact, decrease. If the statute fails to achieve its goal, it would be repealed. Such a law would be a method of social engineering, and it would be “susceptible of objective evaluation”¹⁵² It would be hard to think of a clearer example of a pragmatic legal program or a pragmatic conception of legal objectivity. But this example simply demonstrates the impossibility of eliminating normative discourse from law. The norm in this scheme is that bankruptcies should be decreased, and this norm is not empirically discoverable.¹⁵³ So, even a model of a pragmatic law depends for its intelligibility on normative discourse. Of course, Posner grants norms a role in his program, and those norms come from social consensus.¹⁵⁴ But if normative discourse is fundamentally problematic, Posner’s pragmatic program has done nothing to help. If normative discourse is fundamentally flawed, why should we feel better about society doing it instead of judges?

Oddly, this example also suggests that the pragmatic program has no application to litigation and provides no help to a judge. In Posner’s scenario, the statute is in effect. For the sake of concreteness, let’s say the law is that “no one shall declare bankruptcy more than once every ten years.” Its goal is to reduce bankruptcies. At some juncture, the legislature or some law-making body will revisit the law to see whether bankruptcies have decreased. If not, the law will be repealed. So a legislature may take this pragmatic approach, but it is no help to a judge or litigant. In a given case, a party could not argue the law should be repealed nor could a judge repeal it. The issue in any given case would be whether the law applied, not whether the law should be repealed. Knowing that the law’s purpose was to decrease bankruptcies wouldn’t help the parties or the judge. Assume a creditor argued as follows. Under the rule, a debtor shouldn’t be allowed to declare bankruptcy even though the debtor had not declared bankruptcy in the previous ten years. The reason for this, the creditor argues, is because the law’s goal was to reduce bankruptcies, and allowing the debtor to declare bankruptcy would contravene the law’s purpose. This would render the law meaningless, effectively making the law’s purpose the law itself. This process and result are not at all what Posner is describing. Knowing the goal of the law (even a goal that can be empirically tested) is no help to litigants or judges because a judge must apply the law, not the law’s purpose. The only way this pragmatic program could help the judge is if the

152. *Id.*

153. One might claim that it is an empirical fact that bankruptcies are bad for creditors, but then it must be explained why creditors’ rights should be promoted. One might then claim that it is an empirical fact that promoting creditors’ rights promotes stability in the economy, but again one has to justify that value. The empirical search for a norm is one of infinite regress unless it is willing to land on some non-empirical bedrock.

154. POSNER, *supra* note 5, at 5.

goal of the law *were the law* and judges were authorized to make rulings to effectuate the goal. Posner is not suggesting such a radical program. Posner's pragmatic program offers no help in the process of judicial decision-making, and commenters have lamented Posner's failure to describe how a judge might actually go about judging pragmatically.¹⁵⁵ As Rakowski notes, "[P]ragmatism carries no firm implications for judging"¹⁵⁶

Recall that Posner and Leiter want normative discourse separated from positive legal discourse, if not eliminated altogether, *because* science has been successful and normative discourse has not.¹⁵⁷ Assuming that is true, separating the normative from the positive is of little value. Since the elimination of normative discourse from law is impossible, the question becomes: Where does law get its norms? The answer is that norms come from social consensus, probably through democratic institutions like legislatures.¹⁵⁸ But if normative discourse is problematic, why is this desirable? Leiter applauds science's ability to eliminate from our world leprechauns and gods and ethers and theology and morality, and he worries about allowing pre-Enlightenment entities into our legal discourse.¹⁵⁹ Yet if the normative discourse is carried on at the legislature or through some other democratic process, the leprechauns live on. How does it matter if they live in the legislature or the voting booth instead of the courthouse? The alleged failings of normative discourse will not be improved by having voters or legislators conduct it instead of judges. Posner's argument could be put in Holmesian terms: we live, largely, by majority rule; thus the people via the legislatures should set the goals, and lawyers and judges should be the social engineers who figure out how to facilitate those goals.¹⁶⁰ That seems coherent. But if this is the pragmatic answer, in no way does it eliminate non-empirical norms or diminish the problems of normative discourse. Normative discourse is ineliminable from law, and a naturalistic program solves none of its alleged problems.

C. *The Limited Relevance of Science to Law*

Another problem with a naturalistic program has been widely noticed: scientific epistemology has limited relevance to law. As we've seen above,

155. See Levinson, *supra* note 57, at 1247; see also Rakowski, *supra* note 56, at 1690–91; cf. Luban, *supra* note 11, at 1020 ("Posner recognizes that his own nonphilosophical theory provides no recipe for better judging.").

156. See Rakowski, *supra* note 54, at 1690.

157. See *supra* Part II.

158. See POSNER, *supra* note 3, at 62–63, 69.

159. LEITER, *supra* note 12, at 184.

160. Holmes wrote that "the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41 (M. Howe ed. 1963).

naturalistic science self-consciously only applies itself to empirical phenomena, but law necessarily contains non-empirical phenomena. Trying to apply scientific epistemology to law is like trying to ascertain a painting's beauty with a microscope. Jules Coleman has said, "[T]here is absolutely no reason to believe that the facts that interest us as philosophers and social theorists are the facts that social and natural scientific theories are interested in addressing or are designed to address."¹⁶¹ Ronald Dworkin has argued that "[s]ince morality and the other evaluative domains make no causal claims, however, such [scientific, naturalistic] tests can play no role in any plausible test for them."¹⁶² And Postema has put it that no one has shown "the relevance of the notion of objectivity associated with this [naturalistic] epistemology to other areas of experience, judgment, reasoning, and discourse. Some argument must be given for thinking that the validity of this conception of objectivity can be generalized."¹⁶³

Leiter does not so much offer arguments for the relevance of science to law as make unjustified assumptions. He simply assumes that science defines reality.¹⁶⁴ But it's just this assumption that needs to be supported by argument. It would be just as good to assume *ipse dixit* that religion defines reality. And when pressed for an argument supporting his crucial assumption, he turns to the one we've already seen fail—that science is successful.¹⁶⁵ Naturalists have given us no reasons to think scientific epistemology is relevant to the normative aspects of law. Norms cannot be eliminated from law. Norms, as entities, are not empirically verifiable or observable. Science, being self-consciously empirical, has no way of telling us anything about norms, and thus has limited relevance to important elements of law.

D. *Naturalistic Objectivity Is Not Probative of Law's Legitimacy*

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

Naturalism can be descriptive, but it cannot be prescriptive. Perhaps such an approach can tell us what law is, but it cannot tell us what law should be. It may be possible to perfect the predictive theory of law so that it would always

161. Jules Coleman, *Methodology*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 350 (J. Coleman & S. Shapiro eds., 2002).

162. Dworkin, *supra* note 127, at 120.

163. Postema, *supra* note 2, at 134.

164. LEITER, *supra* note 12, at 185.

165. Leiter, *supra* note 15, at 77.

be known exactly how courts would decide legal disputes. And, in a sense, law could be deemed objective in that there would be no dispute about the answers to legal questions. It would be descriptively objective. Such knowledge would be beneficial in many ways, but it would not legitimate law. It is easy to imagine a perfectly predictable legal system (defendants always win) the predictability of which in no sense legitimated the use of coercive force. Whether the naturalistic conception of objectivity is the right conception for some descriptive project, it is the wrong conception for the project of inquiring into law's legitimacy.

In addition to being unable to assess law's legitimacy, the naturalistic conception of law actually tends to delegitimize law by identifying the law solely with coercive force. Recall that Holmes, who Posner closely follows,¹⁶⁶ in *The Path of the Law*, says the study of law is the study of "the prediction of the incidence of the public force through the instrumentality of the courts."¹⁶⁷ "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court"¹⁶⁸ Or as Posner puts it succinctly, "The *ultima ratio* of law is indeed force."¹⁶⁹

The naturalist appears to have a preference for identifying law with force because force makes a causal difference in the course of our experience. We can know when a court makes a ruling; such legal phenomena can be identified by the methods of empirical science. But if law were to be identified with non-empirical entities like normative discourse or reason or morality or the "vaguer sanctions of conscience,"¹⁷⁰ then a scientific epistemology couldn't account for law. Thus, if we want a scientific account of law, it is convenient to reduce law to force.

Again, this may be fine for some purposes, but it has a deleterious effect on law's legitimacy. "Force is a physical power," said Rousseau. "To yield to force is an act of necessity, not of will; it is at best an act of prudence. In what sense can it be a moral duty? . . . [T]he duty of obedience is owed only to legitimate powers."¹⁷¹ When we ask whether law is legitimate, we are asking whether there is a good explanation for the use of coercive force. The use of coercive force without normative sanction—without reason—would not be accepted as legitimate. The identification of law with force provides no way of

166. Levinson, *supra* note 57, at 1223. Posner's *The Problems of Jurisprudence* has been described as "a call to its readers to re-enter the particular path of the law marked out by Holmes." *Id.* at 1228.

167. Holmes, *supra* note 67, at 457.

168. *Id.* at 458.

169. Levinson, *supra* note 57, at 1237.

170. Holmes, *supra* note 167, at 459.

171. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 52–53 (Maurice Cranston trans., Penguin Books 1968).

distinguishing good laws from bad, justice from injustice. As such, a naturalistic conception of law and legal objectivity relies on a definition of law that itself suggests, or is at least compatible with, a rejection of law's legitimacy.

The naturalistic fallacy is old.¹⁷² So are the criticisms of identifying law with force.¹⁷³ But these arguments still provide good reasons for rejecting the naturalistic conception of law and legal objectivity, at least to the extent we are concerned with law's legitimacy. Naturalists might not deny that Naturalism is no help in probing law's legitimacy. "Posner does not blink at the recognition that his theory of law offers relatively little reason for anyone to accept the moral authority of judicial commands," Levinson has observed.¹⁷⁴ And Rakowski has written that "[Posner] suggests, without speaking directly to the problems that prompt concern for objectivity, that the 'pragmatic' approach to judging he lauds need not worry about legitimacy"¹⁷⁵ Some have described Posner as finding legitimacy in consensus,¹⁷⁶ but this approach is akin to and suffers from all the same flaws as identifying law with force. The question of legitimacy is not about why the majority who agree with the law should accept and obey it, but why the minority who disagree should do so. "[T]he point of law is to enable us to act *in the face of disagreement*," Jeremy Waldron has argued.¹⁷⁷ The brute fact of consensus tells us nothing about law's legitimacy. And naturalistic objectivity, for those inquiring about law's legitimacy, has to be rejected.

IV. WHY PUBLICITY?

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

172. See Daniel R. Heimbach, *Natural Law in the Public Square*, 2 LIBERTY U. L. REV. 685, 689–96 (2008) (tracing the long development of natural-law philosophies and their conceptions of whether normativity comes simply from observing nature or is located somewhere beyond it).

173. See Matthew Lister, *The Legitimizing Role of Consent in International Law*, 11 CHI. J. INT'L L. 663, 676 (2011) (noting Hume's critique of Locke's natural law theories that they cannot be legitimized by the "mere abstract option to leave" a society).

174. Levinson, *supra* note 57, at 1238.

175. Rakowski, *supra* note 54, at 1683.

176. Epstein, Knight, & Martin, *supra* note 62.

177. JEREMY WALDRON, *LAW AND DISAGREEMENT* 7 (1999).

A. *Objectivity as Publicity Is Probative of Law's Legitimacy*

This Article has argued that a naturalistic conception of objectivity cannot help us inquire about law's legitimacy and, in fact, by identifying law as force actually hinders any claim to legitimacy.¹⁷⁸ Thus, a naturalistic conception of objectivity is the wrong conception of objectivity for those interested in inquiring into law's legitimacy. I will now argue that objectivity as Publicity, however, can do this job, and I will do so by describing the ways in which Publicity can tell us whether certain expectations¹⁷⁹ of legitimate government are satisfied by legal judgments.

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

If a legal judgment is based on reasons that transcend the judging subject, it provides assurances that legal judgment, and the corresponding application of government force, is not based on the factors peculiar to the judge but which may not be accepted or shared by others. If a legal judgment is independent, then it can be considered a public judgment because the reasons for that judgment are not isolated to a few individuals. But a judgment based on subjective factors that do not transcend a judging subject would be a private judgment because the reasons for the judgment would only be endorsed by the subjective judge, not accepted or endorsed by the public. It would not be the product of a public, democratic process, and we would call it illegitimate because we expect not to be forcefully imposed upon by private parties. Yet we do expect and accept being governed by the public; this is the democratic norm. Publicity's requirement that a judgment be based on reasons that

178. *See supra* Part II.

179. Admittedly, such expectations are shared only by those committed to western liberalism. "[Rawlsian] contractualism . . . do[es] little more than articulate the moral intuitions of contemporary western liberalism. The arguments of contractualism have little traction in a debate with the mandates of an illiberal ideology such as racism." C. Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 MCGEORGE L. REV. 723, 739 (2009).

transcend the judging subject provides assurances that force is being imposed democratically and publicly.

We also expect to be governed impartially. That a judgment is democratic is insufficient to assure its legitimacy because a democratic majority may act incorrectly if they have not acted impartially. Not all incorrectness of judgment suggests illegitimacy or impartiality.¹⁸⁰ For example, if a basketball referee misses a call but is not actually trying to “fix” the game, we do not consider his judgment illegitimate or impartial. But a certain kind of incorrectness of judgment does imply illegitimacy such as when a judgment, though democratic, is like that of a private citizen writ large. Such a judgment may be independent if the reasons supporting it transcend the judging subject since a democratic majority affirms such reasons, but it still may be biased, prejudiced, partial or unfair. Thus, Publicity requires that legal judgments be based on “proper reasons” and “standards of correctness” and that improper factors like bias, idiosyncrasy or ideology be excluded. If a judgment is based on proper reasons and standards of correctness, we can be assured that the judgment is impartial.

We also expect to be governed rationally. When we ask about law’s legitimacy, we are often asking if there is a good explanation for the use of coercive force. We expect to be governed reasonably; we expect not to be coerced unreasonably or arbitrarily.¹⁸¹ Rule by force alone implies non-rationality,¹⁸² a condition that prevents the ascription of legitimacy. But we affirm being governed by reason (who could maintain that though the law is reasonable, he refuses to accept it?). We expect to be able to understand why we are being coerced both in theory and in fact. We cannot ascribe legitimacy to laws that we cannot comprehend. So we expect to be told good reasons for being coerced. Publicity requires that the reasons for judgments refer to “standards of correctness,” thereby assuring us that there are, in theory, good, comprehensible reasons for the use of force. But Publicity also requires that such reasons be given publicly and that they be distinct from the mere opinion of the judging subject so that we have access to such reasons and can understand them not just in theory but in fact. If standards of correctness are available, and judging subjects must publicly give reasons why a judgment satisfies those standards, then the *ultima ratio* of law is not force, but publicly accessible reason.

180. Cf. Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1782 (2007) (State action may be justified when based on “justified, yet erroneous reasoning.”).

181. We want “deliberative forces [to] prevail over the arbitrary.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

182. Levinson, *supra* note 57, at 1237.

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

All of the foregoing expectations will be disappointed if we are denied an opportunity to participate in the deliberative discourse.¹⁸³ We expect a reasonable opportunity to make our case; we expect the opportunity to be heard. If we are excluded from the deliberations, it will be cold comfort to be told that judgments were made based on proper reasons and standards of correctness. Therefore, Publicity requires that all competent members of the community have standing and that argument not be prematurely closed.

We also expect judging subjects to come to some amount of actual agreement. I am now suggesting a modification to Postema's conception of Publicity. Postema argues that while strong deliberative agreement is the regulative ideal of Publicity, actual agreement is not a required or expected result.¹⁸⁴ I suggest that public deliberative discourse must achieve some actual agreement in order to legitimate its legal judgments and that this requirement arises from the structuring features of objectivity.

Imagine we engaged in public deliberative discourse, but no actual agreement was achieved. What could explain this? There are various answers but all with the same theme: a failure of reason. Perhaps the judging subjects refused to base their judgments on non-subjective factors. In this scenario, reasons that transcend a judging subject might be available, but judges are unable (consciously or unconsciously) to break away from the gravitational pull of subjectivity. Or perhaps judging subjects were willing to base their judgments on proper reasons and standards of correctness, but no such reasons exist. Or perhaps proper reasons exist, but judges cannot locate them because of their own epistemological limitations. Or they exist and judges can locate them, but they are too general to help decide particular cases. Perhaps actual agreement may not be achieved because the deliberative process was prematurely terminated, but why would that have occurred? Perhaps because one interest group got the result it wanted and then prevented that result from being challenged. Perhaps deliberation was ended because of unreasonable

183. "The right to participate is in a sense 'the right of rights' in Rawls's theory, for it is the direct descendant, in political practice, of the principle of popular sovereignty underlying the whole contractarian approach in political philosophy." WALDRON, *supra* note 177, at 156.

184. Postema, *supra* note 2, at 119.

haste. Perhaps there were insufficient resources to allow for reasonable deliberation. There are many reasons why public deliberation may fail to yield any agreement, but all of them point to the inability to properly reason. Whatever the etiology, it appears that failure to achieve some actual agreement calls into serious question law's legitimacy because it suggests a critical failure of reason, the animating force of Publicity.

What kind of actual agreement must be achieved by public deliberation if law is to be legitimated? I suggest Publicity requires either (1) a preponderance of agreement or (2) increasing agreement over a reasonable period of time. A preponderance of agreement based on public deliberative discourse would mean that most of those subjected to law could affirm most legal judgments. Most of law's subject would be compelled to ascribe legitimacy to law because they agreed with most legal judgments. In a democratic society, we can accept being sometimes found in the minority. As Jeremy Waldron has written, "The authority of law rests on the fact that there is a recognizable need for us to act in concert on various issues or to co-ordinate our behaviour in various areas with reference to a common framework, and that this need is not obviated by the fact that we disagree among ourselves as to what our common course of action or our common framework ought to be."¹⁸⁵ We realize that in a democratic government, sometimes we won't get our way and that fact does not make law illegitimate. A preponderance of agreement is consistent with the democratic norm of majority rule.¹⁸⁶

In the absence of a preponderance of agreement, we might still ascribe legitimacy to law as long as agreement increased over a reasonable amount of time.¹⁸⁷ Such a result would suggest that, despite widespread disagreement, Publicity's methods were working and moving the political community toward a preponderance of agreement. Publicity allots a significant place for disagreement, dissent, and even for agreement to be displaced by disagreement. At various junctures, deliberative discourse may lead to an increase in disagreement such as when new facts are discovered or new reasons are recognized as normatively relevant. When this occurs, the deliberative process should be granted a reasonable time to attempt to achieve legitimating agreement. We should not expect strong deliberative consensus to occur overnight. The process should not take forever; otherwise legitimacy

185. WALDRON, *supra* note 179, at 7.

186. "The majority must be able to bind the minority; that is why we bother to count the votes." Stephen L. Carter, *Religious Resistance to the Kantian Sovereign*, NOMOS XXXVII 288, 297 (1995).

187. See Postema, *supra* note 2, at 125. Minority but increasing agreement might be more legitimating than a static but slight preponderance of agreement since the former implies that deliberative discourse is moving law's subjects toward consensus, while the latter would raise vexing questions about why no further agreement was achievable.

would be a pipedream. But a preponderance of agreement may be lost for a time, but if within a reasonable time agreement once again increases, we have assurances that the injection of new facts and reasons into the discourse has not disabled the possibility of legal objectivity. Of course, if agreement must increase over time, at some juncture a preponderance of agreement must be reached, though not permanently retained.

Modifying Publicity to require some degree of actual agreement locates Publicity in between a conception of objectivity that requires unanimous agreement and one that requires only hypothetical agreement. Dr. Heidi Li Feldman has attributed the requirement of unanimous agreement to Jurgen Habermas and the requirement of only hypothetical agreement to John Rawls.¹⁸⁸ “According to Habermas,” Feldman writes, “the major condition a judgment must meet to qualify for objectivity: [is that] everybody affected by the judgment must be able to accept the anticipated consequences of its general observance.”¹⁸⁹ Moreover, such unanimous agreement must arise from an actual, not hypothetical, process of argumentation in which everyone affected by the legal judgment must be admitted as participants to the process of argumentation.¹⁹⁰ Feldman describes this requirement as wildly unrealistic. She then notes that Rawls’s conception of objectivity eliminates these requirements of an actual dialogue and unanimous agreement, making a Rawlsian conception more practical but less attractive.¹⁹¹ “On the Rawlsian conception . . . [a] single individual’s judgment, formed in total isolation from others, could be objective, if others would (largely) agree with it.”¹⁹² While this is, for obvious reasons, more feasible than obtaining universal acceptance of a judgment after an actual dialogue that included everyone affected by the judgment, it is unsatisfactory because no single individual is likely to be aware of and sensitive to all the normatively relevant reasons for a judgment and lone individuals are unlikely to make decisions independently and based on proper reasons.¹⁹³ Requiring “some degree of actual agreement”¹⁹⁴ is more likely to ensure that judgments are based on normatively relevant reasons and that participation in legal discourse is governed by the overarching aim of achieving reasonable common formation of judgment on the basis of the reasons and arguments publicly offered. Thus, by arguing that objectivity as Publicity requires some degree of actual agreement among judging subjects, I

188. Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1218–20 (1994).

189. *Id.* at 1220.

190. *Id.*

191. *Id.* at 1222–23.

192. *Id.* at 1223.

193. Feldman, *supra* note 190, at 1224.

194. *Id.*

place Publicity, in this regard, in between Rawlsian and Habermasian conceptions of objectivity.

Whether law is legitimate is one of the most important questions we can ask. A naturalistic conception of objectivity is unhelpful in answering this question. But Publicity is probative of law's legitimacy.¹⁹⁵ This is a strong reason why Publicity is an appropriate conception of objectivity for those concerned with law's legitimacy.

B. A Better Account

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

Interestingly, while Naturalism cannot account for normative discourse, Publicity does not suffer from the defect of being unable to incorporate empirical science. Though the successes of normative discourse are lost on Naturalism, the successes of science are not lost on Publicity. Luke Skywalker uses a blaster. Again, science is one of the successes of non-empirical reason. Publicity can, should, and would utilize empirical science in circumstances where science is normatively relevant to legal discourse. Publicity allows us to have both normative discourse and science. One of Posner's abiding criticisms of legal thought is its lack of receptivity to science and the "actualities of social life," a flaw that appeared even in Posner's forerunner, Justice Holmes.¹⁹⁶ Assuming the validity of the argument that legal thought fails to avail itself sufficiently of science, such an argument is perfectly at home in Publicity's scheme. Publicity always deems it appropriate to argue for the recognition of new normatively relevant reasons or modified criteria of objectivity, for example, that legal judgments should incorporate more science. So to the extent that Posner is motivated by his desire to see more science in law, Publicity can accommodate him, while also accommodating the necessary normative discourse. Publicity is a more capacious concept of objectivity than Naturalism.

195. Publicity helps us answer whether law is objective. There are other important questions that are relevant to law's legitimacy: Is it just? Does it have desirable consequences? Publicity does not try to answer those questions. It only seeks to answer one particular important question about law: Is it objective?

196. Levinson, *supra* note 57, at 1241.

Recall Hart's criticism of the predictive theory of law, that it eliminated the internal perspective.¹⁹⁷ Hart saw this as a considerable failure because a good account should not eliminate features of the phenomenon it is studying, but rather do justice to all its features. A parallel complaint can be lodged against Naturalism's elimination of non-empirical norms. Naturalism does not do law justice when it attempts to eliminate non-empirical norms. We should not eliminate phenomena we "dislike" like a crooked CPA cooking the books. And Publicity, unlike Naturalism, doesn't take this convenient shortcut. As a reason-based epistemology, it is able to account for non-empirical norms. But it also accounts for other phenomena that it might find easier to ignore. For example, disagreement in normative discourse is problematic for Publicity because it raises the question of whether a reason-based system is functional. But Publicity doesn't try to eliminate disagreement; it accounts for it by describing the important role for disagreement in objective, deliberative discourse. A good account should do justice to the phenomena it's describing. Publicity does this for law; Naturalism does not.

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

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

C. *But Isn't Reason Culturally Contingent?*

Can a method of practical reason like Publicity¹⁹⁸ provide a legitimating objectivity if reason itself depends on culture? Posner and Leiter think not. For them, such objectivity depends on neither correspondence with reality, nor

197. See HART, *supra* note 147, at 90–91 and accompanying text.

198. Publicity is a "reason-guided" approach whereas Naturalism is a "world-guided" approach. Publicity is a type of practical reason. Postema, *supra* note 2, at 124, 133.

scientific epistemology, but on cultural, social, and political homogeneity.¹⁹⁹ What looks like objectivity is really just everyone in the room agreeing like so many Red Sox fans at Fenway Park.

If reason's objectivity rests on the shifting sands of culture, Leiter has concerns about Publicity. It has no way of distinguishing between good and bad reason.²⁰⁰ Publicity says that the correctness of a judgment is based on arguments and reasons.²⁰¹ But these arguments and reasons, while appearing objective to a homogenous culture, may be merely subjective, even if widely accepted. Without relying on empirical facts, Leiter says, Publicity has no way of distinguishing objective truth from cultural agreement, from a "hegemonic convention."²⁰² (I will only now briefly mention that resting legitimacy on social consensus, as pragmatism does, cannot be spared from this same criticism.)

Leiter has given us the example of a hegemonic convention that supports the proposition that chocolate is a better flavor of ice cream than vanilla.²⁰³ The Chocolate Convention might be able to give arguments and reasons for its position: chocolate is creamier than vanilla; chocolate grips the palate and washes away other flavors; vanilla is fleeting.²⁰⁴ To the Convention, these arguments and reasons would appear objective because, when recited, everyone in the Convention would find them persuasive.²⁰⁵ But they wouldn't be objective; they would only appear that way. The problem for Publicity's conception of objectivity is that it has no way of debunking the Chocolate Convention but rather must declare the Chocolate Convention objectively correct.

Fortunately, Publicity is not so blinkered and has a host of safeguards against the evils of the Convention. Publicity regards judgments, arguments, and reasons as "defeasible and open to criticism from other participants."²⁰⁶ "The parameters of objectivity are themselves contestable . . ."²⁰⁷ Participants in deliberative reasoning must be willing to "reconsider their views and arguments" and "to admit error."²⁰⁸ Deliberations must be open "to all competent members of the relevant community" and provide a fair opportunity

199. *See supra* notes 50–63 and accompanying text.

200. Leiter, *supra* note 15, at 85.

201. Postema, *supra* note 2, at 117.

202. Leiter, *supra* note 15, at 86–87.

203. *Id.* at 86.

204. *Id.*

205. *Id.*

206. Postema, *supra* note 2, at 120.

207. *Id.* at 118.

208. *Id.* at 120.

to participate.²⁰⁹ And deliberations should continue until strong deliberative consensus is reached.²¹⁰

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

Now if all of this due process—the purported openness to examining the reasons favoring vanilla, the fair hearing and participation, the willingness to admit error—is only illusory, then Publicity's requirements have not been met. If it turns out that the members of the Chocolate Convention spent too much time as children at chocolate ice cream socials, have too many chocolate investments, cannot overcome their personal preference for chocolate, are too timid or enculturated to go against public opinion, then their deliberative process will not satisfy Publicity. But if they can exclude their subjective beliefs, feelings, experiences, and interests, if they are open to changing their minds based on reasoned arguments, if they give vanilla its day in court, and if their agreement over time moves toward a preponderance, then Publicity is satisfied, and, I suspect, so is our desire for a legitimating objectivity.

It may be true that Publicity's reasons are contingent.²¹¹ Publicity is not committed to the ontological status of its reasons and standards. It is a methodological, not an ontological, approach to objectivity. It is like

209. *Id.*

210. *Id.*

211. "The objectivity of a domain does not presuppose that anyone can have either a priori or self-evident or incorrigible understanding of what relevant reasons are like or of the rules of reasoning in this domain. It only presupposes that the thoughts belonging to an objective domain . . . allow for the application of judgments based on reasons . . . whose existence makes such beliefs true." Joseph Raz, *Notes on Value and Objectivity*, in *OBJECTIVITY IN LAW AND MORALS* 194, 199–200 (Brian Leiter ed., 2001).

procedure, rather than substance. And Publicity concedes that its method contains an “element of circularity” since the “criteria of objectivity are fixed by substantive argument within law regarding the boundaries of its domain.”²¹² But this circularity does not threaten a legitimating objectivity because the reasons, arguments, and parameters of objectivity in publicity’s discourse are defeasible. The Chocolate Convention doesn’t get to fix the rules for all time. Publicity’s judges must always know that they and their previously accepted reasons may be wrong. They must be properly open to revising their judgments if their error is demonstrated. Even if Publicity’s reasoning is circular, those who participate in the discourse can always claim that the circle has been drawn too small or large. They can claim the circle should have different content. Publicity’s circle is “properly open.” Publicity’s contingency is not a bug but a feature, at least for the purpose of investigating legitimacy, because it allows law’s subjects not only to argue reasons but to help create the normatively relevant reasons to be applied in legal judgments. Contingency and circularity do not threaten a legitimating objectivity if our deliberative discourse is submitted to the discipline of Publicity.

Considering the Chocolate Convention also reveals further failings of the surprisingly unhelpful Naturalism. Contrary to Leiter’s suggestion, Naturalism is not a good way to dispose of the Chocolate Convention.²¹³ Leiter asks us to “[i]magine there arose a practice of making arguments about the merits of different flavors of ice cream,”²¹⁴ and this is an analogy to the practice of law or perhaps the practice of normative discourse. Leiter wants us to conclude that “the parties to the Chocolate Convention are talking nonsense [because] there are no *objective* facts about the ‘tastiness’ of ice cream flavors [because] the ‘tastiness’ of chocolate . . . is merely *subjective*.”²¹⁵ Note something important. Leiter wants to use Naturalism to get rid of the dogmatic Convention. But it’s not just the Convention that would be talking nonsense. The entire practice of debating the merits of ice cream would be nonsense, and so, by analogy, would the entire practice of law or the entire practice of normative discourse. If the tastiness of chocolate is merely subjective, so is the tastiness of every other flavor. It’s not just the Chocolate Convention that should go; it’s the whole practice of debating ice cream. This isn’t the result Leiter wanted. He wanted

212. Postema, *supra* note 2, at 119.

213. Posner argues similarly when he claims that “there are no techniques for forging consensus on the premises of moral inquiry and the means of deriving and testing moral propositions, moral dilemmas are disputes about ends, whereas fruitful deliberation, the sort of reasoning that moves the ball down the field, is deliberation over means.” POSNER, *supra* note 5, at 63. But how do we know which direction to move the ball down the field? We know based by deliberating about ends, and any “fruitful deliberation about means” presupposes and is determined by fruitfully deliberating about ends.

214. Leiter, *supra* note 15, at 86.

215. *Id.*

to smart bomb the Convention's dogma and make the world safe for vanilla. But it can't be done with naturalism. Naturalism isn't a smart bomb. Naturalism is an ontological A-bomb that would eliminate all of the non-empirical norms that cause, direct, and give meaning to all human activity, including law. It is an unhelpful and nihilistic approach to law and legal objectivity.

CONCLUSION

This Article has sought a conception of objectivity that is probative of law's legitimacy. We have considered a naturalistic approach to law that conceives of legal objectivity being a function of legal judgments corresponding to empirical facts. And we have considered an alternative conception, Publicity, which would measure law's objectivity based on the extent to which legal judgments were the products of public deliberative reason.

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

Naturalism also turns out to give a poor account of law. Non-empirical normative discourse is essential to law, yet Naturalism cannot account for it and, worse, attempts to eliminate it. This is just bad accounting, as when Han claims Luke's ability to use a lightsaber with his eyes closed is "just luck." Thus, even at the task to which it is best suited—providing a description of law—Naturalism fails:

[D]escriptive positivism is almost certainly false . . . partly because many of the rules and standards identified by the best available tests of positive law actually require those who administer them to exercise moral judgment. And it is partly because there are inevitably such gaps in positive law and such indeterminacy in the meanings of legal rules as to make their administration in fact impossible without the exercise of moral judgment.²¹⁶

216. WALDRON, *supra* note 177, at 166.

Naturalism fails even worse when trying to cure the law of problematic normative discourse. Normative discourse simply cannot be eliminated from law, and Naturalism's efforts to do so are futile or nihilistic. All of this stems from the fact that the epistemology of Naturalism, empirical science, has only limited relevance to law because law necessarily includes non-empirical elements.

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

Publicity, however, is tailored to inquire about law's legitimacy. It helps us know whether our expectations of democratic rule, impartiality, public rationality, fair hearings, admitting error, and strong deliberative consensus are being met by law. Publicity also provides a satisfactory account of law, succeeding where Naturalism failed, by explicitly incorporating normative discourse, yet without sacrificing empirical fact. And Publicity can answer the objection that a reason-based system cannot be objective because reason is culturally contingent. Since we are seeking an objectivity that legitimates law, the contingency of Publicity's reasons is a feature not a bug because Publicity allows for law's subjects to participate in not just the arguing of reasons but the making of the reasons. If legal judgments meet the requirements of Publicity, law's subjects should be willing to ascribe to it a legitimating objectivity. If not, then they should not. Either way, Publicity is a conception of legal objectivity that is probative of law's legitimacy.

In this debate between Publicity and Naturalism, there is a way to détente. It could be recognized that Naturalism and Publicity are fundamentally intended for different projects. The naturalist is seeking to answer the descriptive question "What is law?" while rationalistic Publicity is primarily asking "Is law legitimate?" or "What should law be?" Different projects can require different tools. Physicists are not expected to exegete scripture, and clergy are not expected to run particle accelerators; likewise naturalists can prioritize empirical science while rationalists emphasize non-empirical reason.²¹⁷ There is no need for conflict between different people doing different projects using different tools. But there can be no truce as long as naturalists fail to acknowledge the limits of empirical science, imperially assuming that reality is identified and defined by empirical science and denying ontological standing to the non-empirical.

A better and more radical solution is also available. Naturalists could recognize the glaring defects in their philosophy. They have no source of

217. "One can imagine [Posner's] economics peacefully coexisting with moral philosophy." Bradley, *supra* note 51, at 1901.

legitimate norms. Yet they could find them in normative discourse. This wouldn't require them to forsake their love of science. It would allow them to put their love of science and empirical fact to good use. Han Solo saves the day when he joins the Rebellion and helps Luke destroy the Death Star. Empirically-minded thinkers may very well do the same for law, but only if they embrace normative discourse. Science has nothing to fear from reason. The rationalist loves science. After all, he invented it. The odds seem low of thinkers like Posner or Leiter embracing moral philosophy, normative discourse, or religion, but it would be a major event in the law.

