EVER SINCE W. V. Quine published an essay entitled “Epistemology Naturalized” (Quine, 1969, ch. 3), naturalism has again become an important topic in core areas of philosophy, such as epistemology (e.g., Kornblith, 2002), the philosophy of language (e.g., Devitt and Sterelny, 1999) and the philosophy of mind (e.g., Churchland, 1988); and it has now, much thanks to the writings of Brian Leiter, reached jurisprudence (or legal philosophy). Accordingly, the task of gaining an understanding of the implications of a naturalist approach to the problems of jurisprudence, such as the place (in the jurisprudential landscape) and shape of empirical theories of legal reasoning, the nature of law’s normativity, and the nature and viability of conceptual analysis as a central philosophical tool, is on the agenda of contemporary jurisprudence.

Leiter’s new book *Naturalizing Jurisprudence*, a collection of essays published over the past ten years, deals with these and related issues, except the problem about the normativity of law (Leiter, 2007). The first part of the book concerns the question whether the American Legal Realists (“the Realists”, for short) are best understood as jurisprudential naturalists. The second part is concerned with the more general question of whether, and if so, how, jurisprudence should be naturalized. And the third part treats questions concerning naturalism, morality, and objectivity. Leiter’s central aims, in keeping with this tripartite division of the book, are (i) to offer a reconstructive interpretation of the Realists as prescient naturalists; (ii) to make the case for a naturalized jurisprudence more generally; and (iii) to locate legal and moral norms in a world understood naturalistically.

Leiter’s book is a well-written and substantial contribution to the field of jurisprudence, and I warmly recommend it to anyone with an interest in contemporary jurisprudence, or in the implications of a naturalist approach to philosophy. Leiter’s ability to chart the implications of a naturalist research programme in jurisprudence, and to pinpoint the weak spots in the writings of other philosophers in the process, together with the clarity of his reasoning, is impressive.¹ But in spite of my

¹ Leiter also maintains a philosophy blog (at http://leiterreports.typepad.com) and a blog aimed specifically at legal philosophy (at http://leiterlegalphilosophy.typepad.com), and provides rankings of American law schools (at www.leiterrankings.com) and philosophy departments (The Philosophical Gourmet Report at www.philosophicalgourmet.com). One wonders where he finds the time to do all this.
appreciation of Leiter’s book, I argue in this review (i) that Leiter is too generous in his reconstructive interpretation of the Realists, and point out that, from the standpoint of a naturalized jurisprudence, Scandinavian Legal Realists such as Alf Ross (see, for example, Ross, 1946, 1957, 1959, 1968) and Karl Olivecrona (see, for example, Olivecrona, 1939, 1951, 1957, 1971) are actually more interesting than the (American) Realists. In doing that, I focus on Leiter’s account of different types of naturalism and their relation to one another, and the precise sense in which the Realists are said by Leiter to have naturalized jurisprudence. I also argue (ii) that Leiter’s case for a naturalized jurisprudence cannot be accepted as it stands, because it includes exaggerated and quite implausible claims about conceptual analysis, viz. that it is a doomed enterprise because it is always vulnerable to the demands of empirical theories, and that instead of analysing legal concepts jurisprudents should adopt the legal concepts that figure in successful empirical theories of law and legal institutions in (roughly) the shape they have there. I have very few objections to Leiter’s analysis in the third part of the book, which I find interesting, illuminating, and quite persuasive.

Part I: American Legal Realism and Its Critics

Leiter notes in the introduction that philosophers, even those with an interest in the law, have on the whole paid little or no attention to the writings of the Realists, thinking that they were philosophical dilettantes. In order to explain this (to him) surprising and disappointing state of affairs, Leiter suggests that the Realists were really prescient naturalists, who were not – and could not be – appreciated by those working within the dominant jurisprudential tradition, according to which jurisprudence was a matter of conceptual analysis via appeal to folk intuitions (as expressed, inter alia, in ordinary language) (Leiter, Naturalizing Jurisprudence (hereafter NJ), pp. 1–2).

Leiter explains that the Realists did not put forward a theory of law, but a theory of adjudication, while pointing out that it is a mistake to ascribe to them the Received View, according to which judges “exercise unfettered choice in picking a result”, and “make this choice in light of personal or idiosyncratic tastes and values” (ibid., p. 25). What they did assert, he explains, was the Core Claim, viz. that judges respond primarily to the stimulus of the facts – as distinguished from the applicable rules or rules – of the case (ibid., p. 23). On this account, he explains, “Realists advance (1) a descriptive theory about the nature of judicial decision, according to which (2) judicial decisions fall into (sociologically) determined patterns, in which (3) judges reach results based on a (generally shared) response to the underlying facts of the case, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons” (ibid., p. 30). As Leiter sees it, the Core Claim differs from the Received View on two counts: (i) the choice of decision is suffi-
ciently fettered, and (ii) the fetters are sufficiently general “to be both accessible and to admit the sorts of lawful generalizations that make prediction possible” (ibid., p. 26).

I am not going to discuss the accuracy of Leiter’s reconstructive interpretation of the Realists, but will be content to note that Leiter’s generous reading of them will surprise many contemporary jurisprudents. Instead, I am going to focus on Leiter’s ascription to the Realists of two distinct philosophical commitments, viz. naturalism and pragmatism, and give special consideration to the former.

Leiter explains that whereas methodological – as distinguished from ontological (or metaphysical) – naturalism requires that philosophical theories be “continuous with” the sciences, and rejects the notion that there is such a thing as a first philosophy, that is, a philosophy that proceeds a priori, pragmatism requires that a satisfactory theory of adjudication for lawyers be able to predict the outcome of court cases. And, he points out, since one can reliably predict court decisions only if one knows what causes courts to decide as they do, the latter theory (pragmatism) presupposes the former (naturalism) (NJ, pp. 30–31).

But what, exactly, does “continuity with” the sciences mean? Leiter makes a distinction between naturalism that requires results continuity with the sciences and naturalism that requires only methods continuity, and explains that whereas the former requires that philosophical theories be supported by scientific results, the latter requires that philosophical theories emulate the methods of inquiry and styles of explanation of the sciences. He states, inter alia, the following about naturalism that requires “methods continuity”:

Historically, this has been the most important type of naturalism in philosophy, evidenced in writers from Hume to Nietzsche. Hume and Nietzsche, for example, both construct “speculative” theories of human nature – modeled on the most influential scientific paradigms of the day (Newtonian mechanics, in the case of Hume; 19th century physiology, in the case of Nietzsche) – in order to “solve” various philosophical problems. Their speculative theories are “modeled” on the sciences most importantly in that they take over from science the idea that we can understand all phenomena in terms of deterministic causes. Just as we understand the inanimate world by identifying the natural causes that determine them, so too we understand human beliefs, values, and actions by locating their causal determinants in various features of human nature. (ibid., pp. 34–35, footnotes omitted)

Leiter then makes a further distinction between two types of naturalism, which turns on one’s view of the goal of the philosophical enterprise, viz. between replacement naturalism and normative naturalism: “According to Replacement Naturalists, the goal of theorizing is description or explanation; according to Normative Naturalists, the goal is regulation of practice through the promulgation of norms and standards” (NJ, p. 35).

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2 The reader who wants a careful and penetrating discussion of Leiter’s reconstructive interpretation of the Realists may wish to consult Green (forthcoming).
Leiter does not discuss the precise relation between the distinction between naturalism that requires “results continuity” and naturalism that requires “methods continuity,” on the one hand, and the distinction between replacement naturalism and normative naturalism, on the other, but it seems that replacement naturalism as well as normative naturalism may require either “results continuity” or “methods continuity”, or possibly both. This is not surprising, however, given that the former distinction is based on the criterion of methodology, that is, the precise sense in which naturalism requires “continuity with” the sciences, whereas the latter is based on the criterion of the goal of the philosophical enterprise.

Nor does Leiter have anything to say about the relation between ontological (or metaphysical) and methodological naturalism, though this is not really surprising in light of the fact that he pays almost no attention to the former type of naturalism. Nevertheless, it would have been interesting to get Leiter’s view on this topic. For example, should one accept methodological naturalism if, or perhaps only if, one accepts ontological naturalism, or vice versa? My own view is that it is more natural to conceive of ontological naturalism as independent of methodological naturalism, and of methodological naturalism as dependent on ontological naturalism, in the sense that one should accept methodological naturalism only if one accepts ontological naturalism. The reason, of course, is that it would not make sense to aim at emulating the methods of inquiry and styles of explanation employed in the sciences, unless one also believed that the world is such that this approach is likely to be successful, that is, that everything that exists is composed of natural entities, and that these entities determine the properties of that which exists.

At any rate, Leiter is primarily interested in replacement naturalism, because he believes that this was the type of naturalism that the Realists embraced. He sees an important analogy between Quine’s well-known line of argumentation in “Epistemology Naturalized” (mentioned above) and the line of argumentation adopted by the Realists in their critique of traditional theories of adjudication. He points out that Quine’s argument for replacement naturalism proceeds in two steps – first, a critique of epistemological foundationalism à la Rudolf Carnap, and then replacement of such foundationalism with a descriptive/explanatory account of the evidence-theory relation – and argues that the Realists reasoned in a similar way concerning theories of adjudication. First, they argued against adjudicative foundationalism by saying that under these theories, the class of legal reasons does not unequivocally determine an outcome in the case at bar, and then they argued in favour of replacement of such “sterile” (because indeterminate) theories by descriptive/explanatory accounts of adjudication. Leiter states the following:

As Underhill Moore [a Realist] puts it in the beginning of one of his articles: “This study lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field.” Notice how this echoes Quine’s idea that “Epistemology . . . simply falls into place as a chapter of psychology . . .” Jurisprudence – or, more precisely, the theory of adjudici-
cation – is “naturalized” because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology). Moreover, it does so for essentially Quinean reasons: because the foundational account of adjudication is a failure – a consequence of accepting the Realists’ famous claim that the law is indeterminate. (ibid., p. 40, footnotes omitted)

One may, however, wonder what, exactly, Leiter has in mind when he maintains that the Realists rejected adjudicative foundationalism. As he himself points out elsewhere in the book (when he objects to Dennis Patterson’s use of the term “foundationalist” in Patterson’s (1996) book Law and Truth), “merely seeking a justification for a practice is not, in itself, ‘foundational’ in the sense to which Quine objects. A foundationalist justification is one with a very particular structure: one that aims to show that a unique outcome can be justified out of constituent elements that rest ultimately on some foundational beliefs (i.e., ones that enjoy a non-inferential warrant)” (NJ, p. 151). Did the theories of adjudication that the Realists rejected really have such a foundationalist structure? Since Leiter does not tell us a lot about those theories, it is difficult to say. I would, however, be surprised if it turned out that they were foundationalist in the relevant sense.

In any case, Leiter rightly points out that on this analysis, the Realists did not naturalize jurisprudence, but only the theory of adjudication, and that therefore there is on their analysis still some room for conventional philosophizing, such as conceptual analysis, in the field of jurisprudence (ibid., pp. 45–46). He mentions as an example that the argument adduced by the Realists in support of their claim of legal indeterminacy depends on a “Hard Positivism” understanding of the concept of law, in that, for the Realists, only statutes and precedents counted as sources of law, and points out that such an understanding of the concept of law cannot be the result of a naturalist analysis (ibid., p. 45; see also ibid., pp. 71–73). This is an important, and, it seems, well-supported claim, which clearly indicates the limit of the attempt by the Realists to naturalize jurisprudence.

Leiter’s claim, then, is that the Realists were prescient naturalists. And while I feel that Leiter is too generous to them, I am not saying that he is wrong in calling them naturalists. I wish, however, to point out that there is a more interesting study object readily available if one is looking for naturalism in twentieth-century jurisprudence, viz. the legal philosophy of the Scandinavian Realists Ross and Olivecrona, mentioned above.3 Building on the naturalist philosophy of the Uppsala philosopher Axel Hägerström,4 the Scandinavians took the view (i) that there is one

3 To be sure, Leiter is aware of the Scandinavians, but dismisses them without discussing their views, on the ground that they were too inspired by logical positivism, and points out that the Scandinavian research programme was already demolished by H. L. A. Hart in a review of On Law and Justice in the 1950s. See NJ, p. 4. Needless to say, I do not agree with Leiter’s assessment of the Scandinavians.
4 The reader who wants a fuller understanding of Hägerström’s naturalism may want to consult Schmidt, ed. (1929).
(and only one) all-encompassing spatio-temporal framework (metaphysical or ontological naturalism), and (ii) that all scientific statements are subject to experimental test (methodological naturalism). Ross put it as follows:

The underlying thought in jurisprudential realism is the desire to understand the cognition of law in conformity with the ideas of the nature, problems and method of science as worked out by modern, empiristic philosophy. Several philosophical trends – logical empiricism, the Uppsala philosophy, the Cambridge school, and others – find common ground in the rejection of metaphysics, speculative cognition based on a priori apprehension by reason. There is only one world and one cognition. All science is ultimately concerned with the same body of facts, and all scientific statements about reality – that is, those which are not purely logical-mathematical – are subject to experimental test. (Ross, 1959, p. 67)

As a result of their naturalism, the Scandinavians rejected any attempt to locate the law in what Hans Kelsen (1984, pp. 7–10) used to refer to as the world of the ought; and Olivecrona (1971, ch. 1) also rejected the view that there are legal relations that can be described in terms of rights and duties. Instead, Olivecrona argued that legal rules, which he conceived of as a type of imperatives, are psychologically effective, and that in this way they are part of (what he called) the chain of cause and effect (ibid., pp. 21–22).

Given Leiter’s claim about the limitations of the method of conceptual analysis within a naturalist framework (see below), it is also interesting to note that the Scandinavians certainly practised conceptual analysis, albeit in many cases conceptual analysis of a rather negative kind.

Part II: Ways of Naturalizing Jurisprudence

In the fourth essay, “Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis”, Leiter argues that jurisprudents should give up conceptual analysis, and adopt instead the legal concepts that are employed in successful empirical theories about law and legal institutions in (roughly) the shape they have in those theories.

Leiter maintains that it follows from Quine’s refutation of the distinction between analytical and synthetic sentences that the claims of conceptual analysis are always vulnerable to the demands of empirical theories (NJ, pp. 133–134). How so? As I see it, he might simply mean (i) that conceptual analysis cannot be immune from empirical findings on the ground that it aims to establish analytical truths about the concept in question, because there are no analytical truths. Or he might mean (ii) that conceptual analysis involves appeal to a priori intuitions – against which the conceptual analyst tests the proposed analysis – and that Quine’s analysis implies that there can be no such thing as a priori knowledge, because a

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5 See Quine (1953). As Quine puts it, “[a]ny statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system” (ibid., p. 43).
priori knowledge would be knowledge precisely about analytical truths. Which interpretation is better? I am not sure: whereas the first is attractive because it is straightforward, the second is so because it connects Leiter’s rejection of conceptual analysis with the naturalism endorsed by Leiter.

Either way, Leiter then argues that there is really only one possibility left for jurisprudents: to adopt the legal concepts – the concept of law, the concept of a legal norm, the concept of a legal right, etc. – that are employed in successful empirical theories about law and legal institutions *in (roughly) the shape they have in those theories:*

If a proposed conceptual analysis is to be preferred to others, it must be because it earns its place by facilitating successful *a posteriori* theories of law and legal institutions [. . .] In other words, what would ultimately vindicate the conceptual arguments for Hard Positivism is not simply the assertion that they account for the “real” concept of law, but that the concept of law they best explicate is the one that figures in the most fruitful *a posteriori* research programs, i.e., the ones that give us the best going account of how the world works. (*NJ*, p. 134)

Leiter certainly raises important – and difficult – issues. I do not find his line of reasoning convincing, however. To begin with, I am not convinced that Quine was right to reject the distinction between analytical and synthetic sentences. For I think that P. F. Strawson, Paul Grice, John Searle and others were right to point out that it certainly seems that philosophers are able to apply the distinction to both old and new cases, and that this indicates that the distinction can be made, after all (Grice and Strawson, 1956; Searle, 1969, pp. 4–12; but see Harman, 1999, p. 142). If this is so, the results of conceptual analysis may actually be immune from empirical findings, and we may even have *a priori* knowledge about analytical truths.

But even if Quine were right, we might continue with conceptual analysis if we were to adopt a more relaxed understanding of it, which does not involve appeal to *a priori* intuitions.⁶ For example, we might follow Frank Jackson, who defends “modest” conceptual analysis, which aims to determine not what the world is like, but “what to say in less fundamental terms given an account of the world stated in more fundamental terms” (Jackson, 1998, p. 44; see also Coleman, 2001, p. 179), and who recommends that, if necessary, we carry out opinion polls to become clear about what people think about the application of the relevant concept (Jackson, 1998, pp. 36–37).

Alternatively, we might go in for explication or rational reconstruction of concepts. To explicate (or rationally reconstruct) a concept, *C*, amounts to transforming *C*, which we may call the *explicandum*, into a concept that is more exact, which we

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⁶ The results of conceptual analysis would of course still be vulnerable to empirical findings (interpretation (i) above), but I believe this would be a minor problem from a practical point of view.
may call the *explicatum*, while retaining its intuitive content, in order to make it more functional for a certain purpose (Carnap, 1950, pp. 3–5). This involves starting out from the (abstract or concrete) objects that are commonly thought to fall under C, and proceeding to provide an explication of C that fits most, though not necessarily all, of those objects. To explicate a concept, then, involves changing the *extension* of the term that expresses the concept, in order to make the concept more functional for a given purpose, which means that an explication is partly prescriptive. As a result, an explication will not be true or false, but rather useful or not useful for a certain purpose.

But one might object to this line of reasoning, as Leiter in fact does, that if legal philosophers were to analyse concepts in a more relaxed manner, or to give up conceptual analysis in favour of explicating concepts, they would no longer be in the business of establishing *analytical* truths about the concepts in question, but only “strictly ethnographic and local” truths (*NJ*, p. 177). And, as Leiter sees it, conceptual analysis would then “become hard to distinguish from banal descriptive sociology of the Gallup-poll variety” (ibid.).

I am not sure that this would be a serious problem, however. Surely even conceptual analysis of the “strictly ethnographic and local” kind may be valuable. The interesting question, as I see it, is just how general (or local) the proposed analysis is. The more people who are polled about the application of the concept in question, the more general – and in that sense the better – the analysis will be. Against this background, I find Hilary Kornblith’s characterization of conceptual analysis on the model of an investigation of natural kinds appealing and a possible model for the analysis of legal concepts, even though the latter clearly concern artificial, not natural, kinds:

The examples that prompt our intuitions are merely obvious cases of the phenomenon under study. That they are obvious, and thus uncontroversial, is shown by the wide agreement that these examples command. This may give the resulting judgments the appearance of a priority, especially in light of the hypothetical manner in which the examples are typically presented. But on the account I favor, these judgments are no more a priori than the rock collector’s judgment that if he were to find a rock meeting certain conditions, it would (or would not) count as a sample of a given kind. All such judgments, however obvious, are a posteriori, and we may view the appeal to intuition in philosophical cases in a similar manner. (Kornblith, 2002, p. 12, footnotes omitted)

One might, however, object that conceptual analysis of the local kind is self-refuting, in the sense that it presupposes precisely what it claims does not exist, viz. a *universal* concept of law. For if one believes, as one surely must believe, that there is, or could be, more than one local concept of law, one needs to be able to explain what makes them concepts of *law*, rather than concepts of something else. And if one reasons that they qualify as concepts of *law* on the ground that they share...
certain important features, one should probably conclude that precisely those features are definitive of the universal concept of law. So there appears, after all, to be a universal concept of law.

Of course, one might argue in response to this objection that the features in question are definitive not of the universal concept of law, but of our (local) concept of law (see Raz, 2005, p. 332), and that therefore modest conceptual analysis is not self-refuting, after all. But, one wonders, doesn’t this response lead straight to ontological relativism, according to which an entity, \( X \), qualifies as a concept of law, say, only given a certain starting point (a certain concept of law), \( Y \), and no such starting point, \( Y_1 - Y_n \), is privileged as the one true starting point? I do not think so. For we may conceive of the various starting points (the various local concepts of law) as conceptions of an underlying concept (the alleged universal concept of law), in the sense that they are interpretations of this concept, or, if you will, attempts to “spell it out”. And since these conceptions are clearly located on a different plane than the concept, the former do not compete with the latter. Hence, the existence of such a concept – as distinguished from the conceptions – does not undermine the claim that there are a number of local concepts and no universal concept.

Let me end this review by pointing out that if modest conceptual analysis is indeed a defensible enterprise, we should firmly reject Leiter’s claim that jurisprudents should give up conceptual analysis and adopt the legal concepts that are employed in successful empirical theories about law and legal institutions in (roughly) the shape they have in those theories. First, the concept of law (or the concept of a legal right, etc.) that may be employed in, say, an empirical theory of adjudication is likely to be too one-sided to be of much use outside that particular theory. For example, the concept of law employed in such a theory may not have been formed in awareness of the normative aspect of law. Second, two successful theories may employ different and incompatible concepts of law (or concepts of a legal right, etc.). Then what? Third, one may wonder whether one can determine whether the theory is successful at all without taking a stand on the (implicit) determination of the central concepts employed in the theory. Could one, for example, determine whether a theory is successful that asserts that people with a “genetic condition” tend to be discriminated against by insurance companies.

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7 To be sure, there may be cases where the concepts in question (or the objects that fall under them) will be linked by nothing more than so-called family resemblance. If so, the objection will not hold. On family resemblance, see Wittgenstein (1968), sections 65–67.

8 For the distinction between concepts and conceptions, see Rawls (1971, p. 5); Dworkin (1978, pp. 134–136). For a line of reasoning that nicely illustrates the distinction between concept and conceptions, Swedish-speaking readers may wish to consult Ingemar Hedenius’s ideal-type analysis of the concept of ownership. See Hedenius (1977). I would like to thank Jan Österberg for pointing out that the distinction between concept and conceptions may be useful in this context and Lennart Åqvist for suggesting that I read Hedenius’s article.
without taking into account the import of the concept of discrimination that is employed in that theory? I do not think so. Fourth, one may wonder, more generally, whether empirical theory construction about law and legal institutions can even get off the ground without prior conceptual work. For example, how will the empirical theorist determine whether he is confronted with a court or a legislature, say, rather than with some other type of institution, or with a legal, as distinguished from a moral, norm, unless he makes use of a concept of a court, a concept of a legislature, or a concept of a legal norm that is independent of the empirical theory that he is defending?9

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9 This objection to the imperialistic claims made by some advocates of sociological or empirical theories of law and legal institutions has been raised before. See, e.g., Kelsen (1945, p. 175); Coleman (2001, pp. 213–214).


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