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THE NORMATIVE DEFICIENCY OF AMERICAN LEGAL REALISM: DESCRIPTION WITHOUT JUSTIFICATION

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Abstract

American legal realism fundamentally transformed modern jurisprudence by overthrowing formalist orthodoxy and revealing the indeterminacy of legal rules, the psychological and social factors influencing judicial behavior, and the predictive nature of law. Yet for all its descriptive power, legal realism suffers from a profound normative deficiency: it can tell us what judges do, but it cannot tell us what judges should do. This article argues that realism's core commitments—indeterminacy, the fact-value distinction, skepticism about rules, and the reduction of law to empirical prediction—render it incapable of distinguishing legitimate adjudication from arbitrary power, reasoned deliberation from caprice, or justice from raw preference. After tracing the historical evolution of realism and articulating its normative deficiencies, the article examines failed internal responses from the legal process school, Ronald Dworkin's interpretive theory, and pragmatic neorealism. It concludes that realism cannot be normatively reconstructed from within. Instead, the way forward requires supplementing realist description with external normative anchors—democratic legitimacy, rule-of-law values, fairness, and procedural norms such as reasoned elaboration and like-case treatment—while adopting a limited indeterminacy thesis. By integrating realist insights into a broader, normatively anchored jurisprudence, legal theory can preserve realism's critical edge against formalism without collapsing into cynicism or pure power analysis.

Keywords – Legal realism; legal formalism; judicial discretion; indeterminacy; normativity; adjudication; rule of law; fact-value distinction; Jerome Frank; Karl Llewellyn; Oliver Wendell Holmes Jr.; legal process school; Ronald Dworkin; normative deficiency; jurisprudence

Introduction

Legal realism stands as one of the most influential movements in modern American jurisprudence. Born from the writings of Oliver Wendell Holmes Jr., Roscoe Pound, and later Karl Llewellyn and Jerome Frank, realism rejected the prevailing formalist orthodoxy that law could be understood as a closed logical system.¹¹⁷⁶ Holmes's famous dictum that "the life of the law has not been logic; it has been experience" captured realism's empirical turn.¹¹⁷⁷ Realists

insisted that judges decide cases not primarily by applying abstract rules but by responding to factual contexts, social policies, and their own psychological predispositions. By 1930, the movement had gained institutional footholds at Yale, Columbia, and Chicago law schools, reshaping legal education and scholarship.

Yet for all its descriptive power, legal realism suffers from a profound normative deficiency. It tells us what judges do—how they exercise discretion, how they respond to extra-legal stimuli—but it cannot tell us what judges should do.¹¹⁷⁸ If law is merely a prediction

1176 See Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Jerome Frank, *Law and the Modern Mind* (1930)

1177 See Oliver Wendell Holmes Jr., *The Common Law* 1 (1881).

1178 See H.L.A. Hart, *The Concept of Law* 124-36 (3d ed. 2012)

of what courts will do in fact, as Holmes famously asserted, then there is no room for normative criticism of judicial outcomes.¹¹⁷⁹ A decision based on prejudice or caprice is, from a purely realist perspective, no worse than a decision based on reasoned deliberation, so long as both are equally predictable. This paper argues that legal realism's rejection of formal rules and its reduction of law to empirical behavior leaves it unable to ground any theory of legitimate adjudication.

The paper proceeds in six sections. Section II traces the historical evolution of legal realism and its core descriptive claims. Section III articulates the normative deficiencies inherent in realist thought, focusing on indeterminacy, subjectivity, and the fact-value distinction. Section IV examines attempted responses to these deficiencies, including the work of subsequent realists and critical legal scholars. Section V evaluates whether legal realism can be normatively reconstructed. Section VI concludes with suggestions for integrating realist insights into a broader, normatively anchored jurisprudence.

Historical Evolution of Legal Realism

Legal realism emerged in the first three decades of the twentieth century as a direct reaction to legal formalism—the view that law consists of a complete, consistent, and logically deducible set of rules. Formalists like Christopher Columbus Langdell argued that law could be taught as a science, with students deriving legal principles from appellate cases through inductive reasoning.¹¹⁸⁰ Realists attacked this picture on several fronts.

First, they argued that appellate cases rarely turn on clear rules; instead, rules are often vague, contradictory, or subject to exceptions. Karl Llewellyn famously demonstrated that for every canon of statutory interpretation, there existed an opposing canon, making judicial outcomes radically underdetermined by the

text.¹¹⁸¹ Second, realists pointed to the psychological and social factors influencing judges. Jerome Frank, a psychoanalytically inclined realist, argued that judicial decisions are shaped by the judge's personality, childhood experiences, and unconscious biases.¹¹⁸² Third, realists emphasized the importance of what courts actually do rather than what legal doctrines say. Law, for the realist, is not a set of commands or principles but a prediction of judicial behavior.

The movement peaked in the 1930s, influencing New Deal legal reforms and administrative law. However, by the 1950s, realism faced sustained criticism from Lon Fuller, H.L.A. Hart, and others who argued that realism's descriptive focus came at the cost of normative coherence.¹¹⁸³ Fuller charged that realism threatened the rule of law by reducing law to mere power. Hart conceded that rules had an "open texture" but insisted that most cases fall within a clear core of settled meaning, where formalism works.¹¹⁸⁴

Despite these critiques, legal realism never disappeared. It re-emerged in the 1970s as critical legal studies, which adopted realism's indeterminacy thesis while adding Marxist and post-structuralist elements.¹¹⁸⁵ Today, realist assumptions underpin much empirical legal studies, behavioral law and economics, and judicial politics scholarship. Yet the normative deficiency identified by Fuller and Hart remains unresolved.

Core Descriptive Claims of Legal Realism

Before examining normative deficiencies, it is necessary to summarize legal realism's core descriptive claims, all of which bear on the present inquiry.

Indeterminacy: Legal rules do not uniquely determine outcomes in hard cases. Because

1179 See Holmes, *supra* note 1, at 461

1180 See Christopher C. Langdell, *A Selection of Cases on the Law of Contracts vi-viii* (1871) (describing law as a science).

1181 See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

1182 See Holmes, *supra* note 1, at 458.

1183 See Lon L. Fuller, *The Law in Quest of Itself* 51-62 (1940); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

1184 See Hart, *supra* note 3, at 128-29.

1185 See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983);

rules conflict, contain exceptions, and require interpretation, judges exercise significant discretion.¹¹⁸⁶

Judicial Behavior as Empirical Fact: Deciding a case involves not just legal reasoning but also the judge's values, background, intuitions, and even physical states. Realists called for empirical study of judicial behavior.

Law as Prediction: For the realist, "law" means what courts will do, not what rules say. A right is merely a prediction that a court will enforce a claim.¹¹⁸⁷

Skepticism About Rules: Rules are not operative causes of decisions but post hoc justifications. Llewellyn distinguished between "paper rules" (what statutes say) and "real rules" (what courts do).

Social Instrumentalism: Law should be evaluated by its social consequences, not by its logical elegance. Realists favored pragmatic, policy-oriented adjudication.

These claims are descriptively powerful. They explain why judges disagree in hard cases, why legal doctrines evolve, and why extra-legal factors correlate with judicial outcomes. But they also generate the normative deficiency: if rules do not constrain, and if judicial behavior is merely empirical, then no standard remains for criticizing judicial decisions as unjust, arbitrary, or irrational.

Normative Deficiencies of Legal Realism

The central normative deficiency is this: legal realism cannot distinguish between good and bad adjudication. Consider three realists' answers to the question, "What should a judge do in a hard case?"

Answer 1 (Purely Predictive): A judge should do whatever she predicts higher courts will do. But this collapses into infinite regress and offers no guidance for appellate judges themselves.

Answer 2 (Psychological): A judge should follow her intuition. But if intuition is merely subjective,

then no basis exists for preferring one intuition over another.

Answer 3 (Policy-Oriented): A judge should decide based on social policy consequences. But which policies? Realism offers no substantive theory of the good. Utilitarianism, welfarism, or rights-based theories lie outside realism's descriptive framework.

Thus, realism suffers from what might be called the critical deficit: it can critique formalism's false claims of certainty, but it cannot affirmatively justify any particular decision as correct or legitimate.¹¹⁸⁸ This deficit manifests in several specific deficiencies.

Indeterminacy Without Constraint

If rules are radically indeterminate, as some realists suggested, then judges are unconstrained. But unconstrained discretion is indistinguishable from arbitrary power. A judge who decides based on race or bribery is, on a purely realist account, merely exercising discretion like any other. Realists sometimes responded that professional norms, institutional roles, and peer pressure constrain judges. But these constraints are contingent and empirical, not normative. If a judge violates professional norms, realism can describe that violation but cannot condemn it.

Subjectivity and the Fact-Value Distinction

Realism inherits a strong fact-value distinction from logical positivism, which dominated philosophy during realism's formative years. Facts are empirically verifiable; values are expressions of emotion. Realists claimed to be describing facts about judicial behavior. Normative questions—what judges ought to do—were relegated to the realm of subjective preference.¹¹⁸⁹ This leaves realism silent on whether a judge ought to follow precedent, treat like cases alike, or respect constitutional rights. A judge who abandons all precedent is, descriptively, a different type of decision-maker,

1186 See Frank, *supra* note 1, at 100-15
1187 See Holmes, *supra* note 1, at 458.

1188 See Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 45-68 (2007)
1189 See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

but realism cannot explain why that judge's behavior is worse.

The Collapse into Cynicism or Power Analysis

A persistent criticism of realism is that it leads to cynicism: if law is just what judges do, then "legal justice" is an illusion. Critical legal studies (CLS) radicalized this insight, arguing that law is simply ideology—a mask for class domination or social power. But CLS, like realism, struggles to provide a normative foothold. If all law is power, then the critic's own normative claims are also just power moves. The result is a form of relativism that undermines any reformist project.

The Problem of Legal Guidance

For citizens and lawyers, law functions as a guide to behavior. If legal realism is correct that rules do not constrain judicial outcomes, then citizens cannot predict their legal obligations with confidence. More fundamentally, realism undermines the rule-of-law ideal that law should be stable, public, and prospective. Lon Fuller argued that realism's descriptive posture ignores the internal point of view—the participant's experience of law as providing reasons for action. Realism, by reducing law to external predictions, cannot account for the normative force that law claims over its subjects.

Attempted Responses to Normative Deficiencies

Several thinkers have attempted to remedy realism's normative gaps. This section evaluates three prominent responses.

Legal Process School

In the 1950s and 1960s, Hart and Sacks argued that even if rules are indeterminate, legal reasoning is constrained by institutional roles, procedural norms, and the principle of "reasoned elaboration." Judges should not decide based on raw intuition but should articulate reasons that can be tested, criticized, and applied consistently. This response retains realism's rejection of formalism but adds a

procedural normativity: judges must justify their decisions in terms of generalizable principles. However, the legal process school never fully resolved how to choose among competing principles. It also assumed a shared consensus on institutional values that no longer exists.

Ronald Dworkin's Interpretive Theory

Dworkin mounted the most sophisticated normative response to realism. He conceded that rules are indeterminate but argued that law also includes principles, policies, and the background justifications of the legal system. For Dworkin, judges decide hard cases by constructing the best interpretive account of existing legal materials—an account that fits past decisions and justifies them under the most coherent set of moral principles. Dworkin's "Herculean judge" is normatively constrained by integrity and fairness. This response gives realism's indeterminacy thesis a normative answer: judges must decide based on constructive interpretation, not subjective preference. However, critics argue that Dworkin's theory remains too rationalist and does not fully account for the psychological and social factors realists emphasized.

Pragmatic Neorealism

More recently, scholars like Brian Leiter have defended a "naturalized" or "scientific" realism that abandons normative ambitions altogether. Leiter argues that realism is best understood as a descriptive, empirical research program. Normative questions should be left to moral and political philosophy, not jurisprudence. This response accepts the normative deficiency but treats it as irrelevant to realism's core project. The problem, however, is that realists cannot then criticize formalist judges for being wrong, nor can they justify their own preference for policy-oriented over rule-bound adjudication. Descriptive realism may be consistent, but it is normatively impotent.

Can Legal Realism Be Normatively Reconstructed?

This paper argues that legal realism cannot be normatively reconstructed from within. Its core commitments—indeterminacy, prediction, skepticism about rules—are descriptive, not normative. Any attempt to derive an “ought” from these “is” premises commits the naturalistic fallacy. However, realism’s insights can be integrated into a broader normative jurisprudence.

A possible synthesis would adopt three principles:

1.Descriptive Modesty: Accept that realism correctly describes judicial behavior in hard cases, but deny that all cases are hard. Most routine cases are settled by clear rules, where formalism works.

2.External Normative Anchors: Supplement realist description with external normative commitments drawn from democratic theory, human rights, or rule-of-law values. For example, a judge’s discretion should be guided by the principle that like cases be treated alike (formal justice) and that decisions respect democratic legitimacy.

3.Institutional Constraint: Recognize that judicial discretion operates within institutional frameworks—appellate review, professional discipline, public accountability—that provide non-rule-based but real constraints. These constraints are not merely empirical; they embody norms of accountability and reason-giving.

Such a synthesis would preserve realism’s critical power against formalism while avoiding its normative collapse. The judge remains aware of indeterminacy but does not abandon the effort to justify decisions under publicly defensible norms.

Research Problem Revisited and Hypothesis

The research problem asked whether legal realism can provide a normative theory of adjudication without collapsing into

subjectivism or pure power analysis. The evidence suggests it cannot. Realism’s descriptive premises block the derivation of normative conclusions. The hypothesis—that a reconstructed realism, borrowing from institutional and pragmatic theories, may offer partial remedies—finds support in the legal process school and Dworkinian interpretation, but both remain controversial.

Evidence Supporting the Hypothesis

•**Indeterminacy Studies:** Empirical research confirms that judicial decisions in appellate courts correlate with judges’ ideological commitments, party of appointing president, and other non-legal factors. However, the same studies show that most trial-level decisions are rule-determined, supporting a limited indeterminacy thesis.

•**Philosophical Critique:** The naturalistic fallacy remains a powerful objection to any attempt to derive norms from facts. Realists who claim that judges should follow policy have smuggled in an external normative premise (e.g., utilitarianism).

•**Comparative Jurisprudence:** Civil law systems, which rely less on precedent and more on code interpretation, exhibit similar patterns of judicial discretion, suggesting indeterminacy is not unique to common law. Yet these systems maintain robust normative commitments to legal certainty and legitimate expectation.

•**Institutional Design:** Administrative agencies, which realists admired for their pragmatic flexibility, are now constrained by notice-and-comment procedures, judicial review, and transparency requirements—institutional norms that realists ignored.

Proposed Reforms to Legal Realism

Rather than abandoning realism, legal theory should adopt the following reforms to integrate realist insights within a normatively defensible framework:

1.Adopt Limited Indeterminacy: Reject radical indeterminacy (the claim that all cases are

unconstrained). Accept that most legal questions have clear answers; indeterminacy arises only at the margins.

2. **Articulate External Normative Commitments:**

Realists should explicitly adopt a normative theory—for example, democratic legitimacy, welfare maximization, or fairness—to guide judicial discretion. Realism cannot generate these norms internally.

3. **Revive Legal Process Principles:** Even in hard cases, judges must give reasoned justifications, treat similar facts similarly, and respect institutional hierarchy. These are procedural norms that constrain discretion without requiring formalism.

4. **Empirical Study of Normative Constraints:**

Study not just what judges do, but what judges believe they ought to do. Judicial role morality—the internalized sense of duty to follow law—is an empirical fact that also carries normative weight for participants.

5. **Integrate Fuller’s Internal Morality of Law:** Lon Fuller’s eight principles of legality (generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy, and congruence) provide a procedural normative framework that realism can adopt without abandoning empiricism.

These reforms would transform legal realism from a purely descriptive program into a critical but normatively anchored jurisprudence. Courts would remain sensitive to context and policy but would also respect rule-of-law values.

Case Studies and Practical Implications

Case Study 1: **Brown v. Board of Education (1954)**

Legal realists celebrated *Brown* for overturning the “separate but equal” doctrine in favor of social science evidence and moral reasoning. But realism cannot justify *Brown* normatively. If judges merely exercise discretion, why was *Brown* better than *Plessy*? A normative realist would need to adopt an external commitment to racial equality—a commitment

realism itself cannot provide. The case shows that realism’s descriptive tools are useful for understanding how the Court overcame formalism, but normative justification requires substantive moral theory.

Case Study 2: **Lochner v. New York (1905)**

Realists famously criticized *Lochner* as an example of formalism masking conservative policy preferences. But if *Lochner* was wrong, it was wrong because it violated democratic legitimacy or substantive economic rights—norms realism cannot articulate. Critical legal scholars used realist tools to attack *Lochner*, but their own normative commitments (e.g., to economic equality) came from outside realism.

Practical Implications

• **Judicial Education:** Judges trained only in realist methods lack normative guidance. They should study both empirical judicial behavior and normative jurisprudence (e.g., Dworkin, Fuller, Rawls).

• **Legal Drafting:** Legislators cannot rely on courts to fill gaps normatively if realism is dominant. Statutes must be more detailed, with clear standards for judicial discretion.

• **Litigation Strategy:** Lawyers who understand judicial behavior empirically can predict outcomes better, but predicting is not justifying. Normative argument remains essential in appellate advocacy.

• **Constitutional Interpretation:** Realism’s influence on living constitutionalism allows flexible interpretation but risks judicial overreach. Normative constraints (originalism, textualism, or Dworkinian integrity) become necessary to cabin discretion.

Challenges to Implementing Reforms

1. **Disciplinary Inertia:** Legal scholarship has internalized realism’s descriptive turn. Reviving normative jurisprudence requires overcoming decades of skepticism about normative theory.

2. **Pluralism of Values:** Even if realists adopt external norms, society disagrees on which

norms. Without a shared normative framework, realism's deficiency reappears.

3. Empirical Complexity: Studying judicial role morality is difficult. Judges may not articulate their normative commitments honestly, or may not be aware of them.

4. Institutional Resistance: Courts may resist explicit adoption of external normative theories, preferring to appear as if they are merely applying law.

5. Educational Gaps: Most law schools teach realism descriptively but do not teach its normative deficiencies, leaving students unaware of the problem.

Conclusion

Legal realism revolutionized jurisprudence by exposing the indeterminacy of legal rules and the empirical reality of judicial discretion. Its descriptive contributions are permanent. However, realism suffers from a fatal normative deficiency: it cannot distinguish good judging from bad judging, legitimate discretion from arbitrary power, or legal justice from raw preference. This deficiency is not accidental but flows from realism's core commitments—the fact-value distinction, the predictive theory of law, and skepticism about rules. Attempts to remedy the deficiency from within have failed.

The way forward is not to abandon realism but to supplement it. Realist description must be paired with external normative commitments—democratic legitimacy, rule-of-law values, fairness, or welfare—that provide standards for evaluating judicial behavior. Procedural norms, such as reasoned elaboration and like-case treatment, can constrain discretion without returning to formalism. By adopting limited indeterminacy, articulating external norms, and reviving legal process principles, legal theory can preserve realism's critical edge while avoiding its normative collapse. Future research should explore how specific normative theories (utilitarianism, contractarianism, deliberative democracy) might integrate with realist

premises in different legal domains, from contract law to constitutional adjudication.

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