

# THE PLAIN TRUTH ABOUT LEGAL TRUTH

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## I. INTRODUCTION

In one of his ballads the country/western singer Johnny Cash croons, “The lonely voice of youth cries ‘what is truth?’”<sup>1</sup> In this first and most general panel, we are bid to confront a variation of the youth’s general question and the implications of various answers to it. Such “what is . . .?” questions are notoriously fuzzy in the answers they invite. For example, Erich Segal’s answer to the question, “what is love?”: “never having to say you’re sorry.”<sup>2</sup> Before launching into defense of some answer to such questions, we ought to pay attention to the question itself. As H.L.A. Hart noted in the introductory chapter of *The Concept of Law*,<sup>3</sup> the first thing to do with questions

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1. JOHNNY CASH, *What is Truth?* (CBS Records 1970).

2. LOVE STORY (Paramount 1970).

3. H.L.A. HART, *THE CONCEPT OF LAW* 1 (1961).

such as, “what is law?” (or “what is truth?”) is to get clear what the question is asking. In this introductory section I shall offer three clarifications of the question about truth’s nature.

First, I wish to put aside the normative issue that will no doubt dominate the discussions in later panels. This is the issue of the extent to which legal decision-makers (judge or juries) should seek to find “the truth” in disputed legal cases. For example, other normative desiderata such as efficiency in adjudication, protection of various relationships in the privilege doctrines of evidence law, and restraints on police behavior by the exclusionary rules are plainly competitors with factual truth-seeking as the goal of legal dispute resolution. Ours, however, is a distinct and prior question: *can* legal decision-makers meaningfully be enjoined to seek the truth? What is it that such injunctions command judges and jurors to find if they are enjoined to find the truth? Do such truths of law and of legally relevant fact exist to be found?

My second clarification has to do with the bearers of truths in law cases: *what* is properly said to be true or false? We should not be concerned here with philosophical conundrums about the nature of truth bearers (the candidates being beliefs, sentences, statements, assertions, propositions, and the like).<sup>4</sup> We should simply stipulate a concern with propositions as truth bearers, and move on. Rather, the main item to clarify here is the *kinds* of propositions whose truth or falsity is of interest to lawyers. Consider the following five possibilities:<sup>5</sup>

(1) Factual propositions. In the recent film, *A Few Good Men*, a lawyer tells a witness “I want the truth,” whereupon the witness responds, “you can’t handle the truth.”<sup>6</sup> The characters are referring to the truths of certain propositions of fact relevant to the case. These are probably the most obvious kinds of statements whose truth or falsity is of interest to lawyers.

(2) General legal propositions. Equally as involved in decisions of disputed legal cases as propositions of fact, are general propositions of law. A general proposition of law is one contained in a universally quantified statement such as, “all non-holographic wills require two witnesses in order to be valid.”

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4. For a discussion of these possibilities and the issues surrounding these candidates see WILLIAM P. ALSTON, *A REALIST CONCEPTION OF TRUTH* 9-22 (1996).

5. This is an old schema with me. See Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 156-57 (1981); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 283 (1985).

6. *A FEW GOOD MEN* (Columbia TriStar 1992).

(3) Interpretive propositions. Because general propositions of law are about a general class of cases but no one particular case, we need interpretive premises in order to connect the particular facts of a given case to general propositions of law. Such premises connect factual predicates to legal ones, so that one can connect, for example, factual propositions about the written name of a particular person on a particular document, to legal propositions about subscriptions, signatures, witnesses, and valid wills.

(4) Propositions of value. Some theories of law and of interpretation would reduce items (2) and (3) above to propositions of fact. Rejecting such legal positivist and legal formalist theories, as I do, requires a fourth kind of proposition, that of value. In various ways, propositions of value are partly truth determinative of both general propositions of law (2) and of interpretive propositions (3). Such propositions of value are thus relevant to our concern about the kinds of propositions whose truth or falsity is determinative of the outcome of disputed legal cases.

(5) Propositions of logic. Contrary to much of the overblown and misdirected rhetoric of the American Legal Realists and their intellectual descendents, a decision in a disputed legal case involves logical deductions. The premises are matters of fact, law, and interpretation, and the conclusion is the proposition describing the decision in the case. What justifies the decision as following from these kinds of propositions is logic, or, more specifically, the rules of inference of modern logic. If “p” is true, and if “p implies q” is true, then “q” must be true as well. This rule of inference, which the Stoics named *modus ponens*, states a necessary kind of truth, logical truth. No one can plausibly urge judges or juries to be illogical in their decisions, so propositions of logic like *modus ponens* join the other four kinds of propositions as necessarily involved in the decision of disputed legal cases.

Since propositions of these five kinds are all involved in deciding disputed legal cases, each is of interest as a bearer of truth-value when we consider truth in law. A way to mark this interest in all five of these kinds of propositions is by focusing on a sixth kind of proposition as the bearer of truth-values:

(6) Singular legal propositions.<sup>8</sup> A singular legal proposition is one that is neither semantically general nor universally quantified. Its

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7. As H.L.A. Hart pointed out, the Legal Realist’s assault on “logic” was really an assault on something else, usually literalist interpretation. Hart *supra* note 3, at 132-37. For more extensive discussion, see NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 18-38 (1978).

8. For more on singular (versus general) legal propositions, see Michael Moore, *Law as Justice*, 18 *SOC’L PHIL. & POL’Y* 115 (2001), reprinted in *NATURAL LAW AND MODERN MORAL PHILOSOPHY* 115-17, 125-37 (E.F. Paul, et al. eds., 2001).

terms do not refer to a class of particulars nor does it purport to predicate a property of all members of that class. Rather, a singular legal proposition predicates a legal property about one particular item referred to by a proper name or a definite description. Consider the following examples: "this will is valid" and "the defendant is guilty of murder." Such singular legal propositions may be either dispositive, as in the latter example, or evidential, as in the former example. In either case, they are the vehicles for expressing either all or part of a judge's or jury's decision in a particular case.

My focus will be on the sense in which singular legal propositions can be true or false. The central role of such propositions in the decision of disputed legal cases and, consequently, the implications for central jurisprudential concerns stemming from the nature of the truth of such propositions, justify this focus. Since the truth-value of such singular legal propositions is fully determined by the truth-value of propositions of fact, general law, interpretation, value, and logic, what we say about the nature of truth of singular legal propositions will have many implications for, and presuppositions about, the nature of truth for these other five kinds of propositions. An exploration of the nature of truth plausibly attributable to singular propositions of law is quite enough for one day, however, and I will leave the implications for the other five for another day.<sup>10</sup>

9. The dispositive evidential distinction is Hohfeld's. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 9 (1923).

10. The following chart may be of interest in giving more familiar names to the three general positions in metaphysics about these six areas of discourse:

<i>Metaphysical Position:</i>	<b>Category of Discourse:</b>					
	<b>Truth</b>	<b>Logic</b>	<b>Law</b>	<b>Meaning</b>	<b>Fact</b>	<b>Value</b>
<i>Philosophical Realism</i>	Realist (classical, correspondence)	Realist	Natural Law	Realist (casual, essentialist)	Realist	Moral Realist
<i>Philosophical Constructivism</i>	Constructivist (instrumentalist, coherence)	Conventionalist (intuitionist)	Legal Positivist	Critical (logical positivist) or criteriological or paradigm case theory	Logical positivism (phenomenalism, instrumentalism) or cognitive relativism	Moral Relativist
<i>Philosophical Skepticism</i>	Skeptical		Legal Realist (critical legal studies)	Contextualism (functionalism)	Skeptical	Skeptic (error theory or older non-cognitivist)

One can be somewhat eclectic in one's selection. For example, a popular combination is constructivism about the truth of singular propositions of law, itself a result of realism

My third clarification is to separate existential questions about truth from mind-independence questions about truth. Put rather crudely, the existential question about truth asks whether truth exists. More exactly, with respect to some kind of propositions, such as singular propositions of law that will occupy us in this paper, is their nature such that they can have a truth-value? This question does not ask whether certain of such propositions are true; rather, it asks whether truth-values are meaningfully assigned to such singular propositions of law. The second question, that of mind-independence, concerns the nature of truth. More exactly it asks, when certain propositions are true, does their truth result from their correspondence to some underlying facts, facts whose nature and reality in no way depend on the beliefs, conventions, or mind-sets of humanity? Or does their truth result, instead, from their relations to mind-dependent items like beliefs, social conventions and mind-sets of humanity? Is the truth (of singular legal propositions), in other words, a real property of those propositions, or is it merely an artificial property, one to be constructed out of relations (of coherence, consistency, fit, and the like) to existing human beliefs and conventions? The older names for these two possible theories are the correspondence (or more generally, “realist” or “classical”) and the coherence (or more generally, “epistemic,” “idealist,” “constructivist,” and “instrumentalist”) theories of truth.<sup>11</sup>

We need to separate the existential question from the mind-independence question because the concerns that bear on each differ. The reasons why one might suppose a certain sort of proposition lacks truth-values typically differ from the reasons tempting one to a coherence view about the nature of truth. Clarity thus demands that we separate the consideration of these issues.<sup>12</sup>

If we do ask these two questions separately, we can see that there are three major positions possible on this issue. There is, first of all, the position of the philosophical realist about some area of discourse.

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about logic and fact, constructivism about law (general propositions of law) and meaning, and skepticism about moral value. Still, a realist about the truth of singular propositions of law needs to be a realist about law, fact, meaning, and morals.

11. ‘Coherence’ and ‘correspondence’ have been the most common labels at least since Brand Blanshard’s classic discussion. See BRAND BLANSHARD, *THE NATURE OF THOUGHT* (1939).

12. This way of mapping the intellectual terrain cuts across all fields of discourse. See Michael Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871 (1989) [hereinafter *The Interpretive Turn*], reprinted in MICHAEL MOORE, *EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE* 342-54 (2000) [hereinafter *EDUCATING ONESELF IN PUBLIC*].

The realist affirms that the propositions in question have a truth value, that that value is “true” for the propositions in question, and that such truth is independent of human beliefs or conventions. One opponent of the realist is the skeptic. The skeptic answers the first question negatively, denying either that the propositions in question have any truth-values, or that such propositions are ever true. Such skeptics thus never reach the second question. The other opponent of the realist is the constructivist. Like the realist, the constructivist affirms both that the propositions in question have a truth-value and that some of them are true; however, the constructivist denies that such truth is independent of human beliefs or conventions.

There are then two debates we shall wish to examine: that between the realist and the skeptic and that between the realist and the constructivist. I shall organize this essay around those two debates. First, however, there is something of a sidebar debate that merits brief attention. This is the debate occasioned by those who would dismiss the debate between realists, skeptics, and constructivists.

My fellow naturalist-realist about moral qualities, Nick Sturgeon, relates how one day he discovered that his graduate teaching assistant was dividing the discussions of Sturgeon’s moral realist lectures into two possible responses: “oh yeah?”, and, “so what?”.<sup>13</sup> The first response engages the debate in question, going into the truth of the matter. The second is the cold water response: it questions whether any position in such debates matters in any way that we should care about. The second response asks, in other words, for a justification of why one should care about the issues among the realist, the skeptic, and the constructivist. As there is a kind of priority to the cold-water response, I shall spend a bit of time on it before moving on to the main show.

## II. WHY WE SHOULD CARE ABOUT ISSUES CONCERNING THE TRUTH OF SINGULAR LEGAL PROPOSITIONS

Few things are more satisfying in intellectual life than rising above the debates of others and showing that the proper “resolution” of such debates is not to engage in them. Traditional, neutrality-based liberalism, for example, attempt this feat in political theory with regularity. The strategy rarely succeeds. Usually those who pretend to rise above long-standing debates between well-versed opponents

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13. Nicholas Sturgeon, *What Difference Does It Make Whether Moral Realism Is True?*, 24 S.J. PHIL. 115, 115 (Supplement 1986).

proceed by implicitly taking sides in such debates. This is certainly true in political theory, when “neutral” liberal arguments about homosexuality, abortion, etc., can hardly hang onto their neutrality as they argue for non-prohibition of such practices.<sup>14</sup> It is also true in metaphysics. As I have sought to show in detail elsewhere,<sup>15</sup> those pragmatists, hermeneuts, Wittgensteinians, or redundancy theorists, who pretend to dismiss the debate about truth are either closet skeptics or closet constructivists, however much they deny it. Consequently, I shall not revisit their philosophically-based attempts to dismiss any inquiry into legal truth.

I also shall ignore a meta-issue amongst metaphysicians, namely, the issue of how best to carry on debates in metaphysics. I refer to those such as Dummett<sup>16</sup> and Putnam,<sup>17</sup> who regard the realism, anti-realism debate for any realm of discourse as best focusing on theories of truth, versus those such as Devitt<sup>18</sup> and myself,<sup>19</sup> who think that ontology is the best place to locate the gist of the realism, anti-realism debate. For present purposes, this meta-issue doesn't matter. Even if one adopts Devitt's position that truth is the tail wagged by the big dog of ontology, that would simply demand translation of truth concerns into ontological ones. In this paper, I intend to deal with truth in what I shall call the broad sense: a realist position about the truth of certain propositions requires (and is required by) a realist position about the entities and qualities referred to by the terms of such propositions<sup>20</sup> and *mutatis mutandis* for skepticism and constructivism. The present question, then, is whether issues of truth in that broad sense matter, not whether truth in some narrower sense (freed of implications for ontology) would matter.

In the broad sense of truth, then, the issue of whether or not singular legal propositions have truth-values matters because of the issue's implications for ideals that matter to us. These are the ideals of democracy and the rule of law, the realization of which depends on

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14. See e.g., Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

15. See Moore, *The Interpretive Turn*, *supra* note 12.

16. MICHAEL DUMMETT, *TRUTH AND OTHER ENIGMAS*, at x-li, 1-24, 145-65, 215-47 (1978).

17. HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* (1981).

18. MICHAEL DEVITT, *REALISM AND TRUTH* 34-46 (1984).

19. See Moore, *The Interpretive Turn*, *supra* note 12.

20. Here I gloss over the nice distinctions Alston draws between the generic notion of a realist theory of truth and the specific filling out of that notion by the correspondence theory of truth. See ALSTON, *supra* note 4.

how judges decide disputed legal cases.

Consider two hypothetical judges, both made famous by the analogous baseball umpires. The motto of the first judge is, "I call them like I see them." The motto of the second judge is: "they ain't nothing until I call them." The skeptic about the truth of singular propositions of law is in the position of the second judge. Such propositions may in some sense be made true by judicial pronouncements in cases, but they have no truth-value antecedent to the judge giving them one by her decision.

As two generations of skeptics in America, the Legal Realists and the Critical Legal Studies types, should have convinced us, the skeptical view of judging has serious implications for both democracy and the rule of law. If singular legal propositions have no truth-value antecedent to judicial decision, judges cannot be obligated to discover such truths, nor can they in fact be doing so. Rather, they are free to make it up as they go along, without possibility of mistake. Such unrestricted judicial freedom is compatible neither with the idea that we are governed by decisions of the majority of us, as expressed by our elected representatives,<sup>21</sup> nor with the idea that ours is a government of laws and not of men, in Aristotle's ancient formulation of the virtues of the rule of law.<sup>22</sup>

To soften the blow to our democratic and legalist ideals, the skeptic cannot avail himself of the palliative of saying that judges are bound by something, just not by the antecedent truth of singular legal propositions. For even if such an apologetic skeptic avoids talking of truth in some narrow sense of truth, in my broad sense he is still talking about truth. He may call it a "grounded," "well-supported," "authoritative," "epistemically warranted," or "powerfully argued" proposition that describes the favored outcome in some case. Nonetheless, these are simply labels (of a constructivist kind) for the truth of singular propositions of law. The issue raised by the true skeptic is not whether we can avoid using the words "true" or "false." The true skeptic denies that there are any such truths, not merely that we can avoid using the usual labels. True skepticism raises an issue of large consequence to our ideals of law and of self-governance.

The second issue that organizes this paper, that of mind-

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21. For a good discussion of the challenge to democracy posed by the Legal Realists jurisprudential skepticism, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* (1973).

22. For a familiar list of those attributes, see LON L. FULLER, *THE MORALITY OF LAW* 33-91 (1964).

independence, also is dismissed as mattering little or not at all to anything we should care about. The cold-water throwers here do not deny the importance of singular legal propositions having truth-value; rather, the denial is of any utility to having any *theory* about the nature of such truth. On this view, truth is a property that some singular legal propositions possess but seeking the nature of such property is denied to have any utility for us. Theories of truth are to be consigned to the dustbin of pejoratively academic pursuits, the angels-dancing-on-the-head-of-pins sort of thing.

Although abstract theories such as those about the nature of truth are admittedly rather far removed from practical concerns, the implications of such theories for practical affairs are more attenuated only by degree—they are not altogether absent.

There are two main implications from the theory of the truth of singular legal propositions that are relevant to the practice of law. One implication has to do with the notion of changing the law.<sup>23</sup> When a court overrules a common law precedent, overturns a statute's ordinary language interpretation, or opens up a judgment in a case by writ of *coram nobis*, has the law changed or has only the leading opinion about what the law is changed? If the truth of legal propositions is a matter of construction from existing conventions and beliefs, presumably to change those conventions and beliefs is to change the law. Not so on the realist view of legal truth. If the truth-values of legal propositions are determined by those propositions' correspondence with matters independent of certain conventions or beliefs, a change in the latter does not necessarily betoken a change in the law.

A second implication is one having to do with the completeness in the logician's sense of systems of law, making theories of truth interesting to us. Very roughly, the realist theory of truth makes plausible the view that the law is truly a "seamless web" in the sense that there are determinate truth-values for all possible judgments in all possible legal cases. The thesis that there is a right answer to every possible legal case is usually termed "the right answer thesis" in jurisprudence.<sup>24</sup> By contrast, and equally roughly, the constructivist

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23. The implications of the realism/constructivism debate for the issue of when a court has changed the law are explored in MOORE, EDUCATING ONESELF IN PUBLIC, *supra* note 12, at 100-01.

24. The right answer thesis is usually associated with the jurisprudence of Ronald Dworkin. See RONALD DWORKIN, A MATTER OF PRINCIPLE (1985). For a discussion of the thesis in relation to the constructivism/realism issue, see M.B.E. Smith, *Rights, Right Answers, and the Constructive Model of Morality*, SOCIAL THEORY AND PRACTICE 409-26

theory of truth runs out of right answers as fast as it runs out of beliefs and conventions from which legal truths are constructed. As J.L. Austin once quipped, “fact is richer than diction.”<sup>25</sup> This means that the variations in cases almost certainly will outstrip the ability of “diction” (which is the speech and thoughts of persons dealing with cases they have seen or imagined) to resolve them.

The qualifications here are numerous. For the realist theory of truth to imply completeness, one would have to think that the truth-makers for singular legal propositions must consist of more than historical fact and linguistic convention; that the non-historical, non-conventional legal truth maker is a morality that enters into the truth conditions of every singular legal proposition; and that morality itself is continuous in the sense that morality does not run out of right answers in tough moral dilemmas. For the constructivist theory of truth to imply incompleteness, a complete axiomitized system must not be possible for law, no matter how rich in rules the system of law may be, even though completeness is possible for the propositional calculus of modern logic. Closure, or default, rules that yield determinate answers when there otherwise are no answers either must not exist in our legal systems, or when they do exist, such as the rule of lenity in criminal law, they must not yield determinate answers in all cases. Despite the number of these qualifications, I find all of them quite plausible.<sup>26</sup> For others also so inclined, the general implication stands: the thesis that right answers exist, not just in some but in all legal cases, is possible for a realist but not for a constructivist about the truth of singular legal propositions.

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(1980); Mark Temin, *Toward an Account of the Truth of the Propositions of Law*, 49 U. CIN. L. REV. 341 (1980); Michael Moore, *Metaphysics, Epistemology, and Legal Theory*, 60 S. CAL. L. REV. 453 (1987), reprinted in *EDUCATING ONESELF IN PUBLIC*, supra note 12, at 247.

25. J.L. Austin, *A Plea for Excuses*, in 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1, 21 (1956).

26. I argue for the dependence on legal truth on moral truth in *The Semantics of Judging*, supra note 5; *Natural Law Theory of Interpretation*, supra note 5; *Law as Justice*, supra note 8; Michael Moore, *Precedent, Induction, and Ethical Generalization*, in *PRECEDENT IN LAW* (Laurence Goldstein ed., 1987); Michael Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY* (Robert P. George ed., 1992); Michael Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989). I argue for a gapless and a realist metaethics in Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982); Michael Moore, *Moral Reality Revisited*, 90 MICHIGAN LAW REVIEW 2424 (1992). Joseph Raz briefly explores the inability of closure rules to close the gaps in formal rules. See JOSEPH RAZ, *AUTHORITY OF LAW* 73-74 (1979); on this, see also *Moral Reality Revisited*, supra, at 2465.

### III. SKEPTICISM ABOUT TRUTH IN LAW: ITS CAUSE AND CURE

It is rather more difficult to be a true skeptic about truth (in my broad sense) than many would-be skeptics realize. A surprisingly large number of people are attracted by the radical chic of skepticism but cannot stomach the implications of a true skepticism. I shall, thus, begin with three pseudo-skepticisms about the truth of singular legal propositions before moving on to discuss the real thing.

#### *A. Three Pseudo-Skepticisms About the Truth of Singular Legal Propositions*

One might be a skeptic about the predicate, “is true,” being applicable to a certain class of propositions because of ontological doubts. Early in his academic career, for example, H.L.A. Hart urged that propositions of law, singular and general, lacked truth-values,<sup>27</sup> in part because there were no counterparts in the world of fact with which legal propositions could correspond.<sup>28</sup> More generally, for those who have taken the post-modern turn, because facts as such have no independent existence, no propositions can be true in the sense of corresponding to such facts.

Yet this skepticism is obviously misplaced. Ontological doubts about the existence of a class of facts provide a legitimate basis for doubting that the correspondence theory of truth can be used to give the meaning of “is true” to propositions purporting to be about such facts. Many of us, for example, have ontological doubts about the existence of unicorns and of literary characters, doubts not at all allayed by Meinongian idea that there can be objects that are real but do not exist,<sup>29</sup> then one has good cause to doubt that propositions about unicorns or literary characters can be true in the same way that propositions of physics can be true. The obvious alternative to realism about the propositions of myths or fictions, however, is not skepticism but constructivism. So long as one thinks that “unicorns have one horn” ought to be accepted, and that “unicorns are always black” ought not, then in some sense the first proposition is true and the second, false. If the sense of “true” and “false” here cannot be correspondence truth, then it must be some version of constructivist

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27. H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 171 (1949).

28. H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954).

29. Alexius Meinong, *The Theory of Objects*, in REALISM AND THE BACKGROUND OF PHENOMENOLOGY 76 (Roderick M. Chisholm ed., 1960).

truth.

Equally misplaced is skepticism based on epistemological doubts. It is a fact that much of what we claim to know in some sense exceeds the evidence we have with which to justify our knowledge. Induction is the most obvious example, where the samples observed never add up to the particulars covered by the generalizations we inductively establish from such samples. Mental states of persons evidenced by the behavior of such persons, physical objects evidenced by their phenomenal properties, and causal relations between classes of events evidenced by the regular concurrence of those kinds of events, are further examples showing how generic is this problem. Let us call this problem—that there is a gap between what we claim to know is true and what evidence there is as the basis for such knowledge—the “gap” problem.

The frequent gap between evidence and things evidenced by that evidence leads some to skepticism about truth. Such purported skepticism can be either local or global. H.L.A. Hart, again, partly justified his skepticism about the truth of singular legal propositions by his insight that such propositions are affirmed or denied by judges based solely on evidence, arguments, and time for consideration allowed by the procedures governing trials. These artificial constraints on inquiry, Hart thought, debarred one from talking of truth or falsity of law.<sup>30</sup> Hart’s was a local skepticism because he thought judges and juries here differed from scientists, the latter facing no such artificial constraints on their time or verification procedures. By contrast, the global version of this skepticism perceives correctly that trials at law differ only quantitatively from “trials,” or experimentation, in physical science. All knowledge, such would-be skeptics urge, is based on limited evidence, namely, what is available to us here and now, limited arguments, namely, the ones we can think of, and limited time due to finite human lives.<sup>31</sup> So if Hart’s were a good basis for skepticism about the truth of singular legal propositions, it would be an equally good basis for a like skepticism about all propositions.

As it turns out, the gap between evidence and things evidenced is a lousy basis for skepticism about anything. Despite the limited

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30. Hart, *supra* note 27.

31. The “historical situatedness” of the human knower seems to be Stanley Fish’s favored mode of expressing the gap idea, which for him generates an existential nausea about all claims to knowledge about anything. See, e.g., Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L. J. 1773 (1987).

evidence, judges rightly affirm propositions such as “the contract is valid,” and deny their negation, in cases in which there is offer, acceptance, consideration, and no available defense. Despite the limited evidence, available to them like everyone else, post-modernist academics rightly affirm propositions such as “Bernoulli’s principle will keep passenger airplanes in the air only so long as those planes have wings,” and deny their negation when such academics board airplanes to conferences such as this one. In this sense, therefore, some propositions are true, and others false, despite the limited evidence available to us with which to justify belief in such propositions.

If the gap between evidence and things evidenced seems like an insurmountable problem for the would-be skeptic, the better move is to bridge the gap via the constructivist theory of truth; that is close the gap by stipulating that the truth of a proposition is simply the evidence verifying it, the other beliefs cohering with it, the warrants one has for believing it, etc.<sup>32</sup> Then there is no gap because the truth of a proposition requires no more by way of evidence than the evidence available to sustain it.

The third popular pseudo-skepticism stems from certain supposed insights about language and its usage in certain contexts. I refer to the non-cognitivist analyses of various speech acts, including first person mental state avowals such as “I am in pain,”<sup>33</sup> evaluations such as “bull fighting is wrong,”<sup>34</sup> and legal judgments in particular cases such as “this defendant is guilty of murder.”<sup>35</sup> The non-cognitivist first argues that such acts of speech are the performance of certain

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32. Examples of such bridging of the gap abound in many fields. David Hume’s regularity account of causation is of this kind, reducing the truth conditions for singular causal statements to the truth conditions for causal laws (together with spatio-temporal location statements), and then reducing causal laws to regularities in the concurrence of classes of events. The phenomenalist reduction of physical objects to constructions out of sense data, and the logical behaviourist reductions of mental states to dispositions to certain behaviours, is also of this kind. In each case, the constructivist closes the gap between evidence and things evidenced by stipulating that the things in question are in reality mere constructions of the evidence. For discussions of such constructivist answers to the skeptic in law, psychology, and ethics, see Michael Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW & PHIL. (forthcoming 2003).

33. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 8<sup>th</sup> ed. 1964) (discussing well known ‘signaling’ analysis of first person mental state statements). The signal theory of first person mental state avowals is discussed briefly in Stuart Hampshire and H.L.A. Hart, *Decision, Intention and Certainty*, 67 MIND 1 (1958).

34. Classic noncognitivist analyses of ethical utterances include ALFRED J. AYER, *LANGUAGE, TRUTH AND LOGIC* (1936); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944); and RICHARD M. HARE, *THE LANGUAGE OF MORALS* (1952).

35. Hart, *supra* note 27.

actions. In the examples given, the speaker is signaling or expressing his pain; expressing his distaste for bull fighting and prescribing that others feel similarly about bull fighting; or ascribing responsibility to a defendant for a killing, respectively. Second, the non-cognitivist infers that, because these statements are being used to do these kinds of actions, such statements cannot also be asserting a proposition about the world. Just as “ouch,” “ugh” and “go to jail” are used to do things of a non-assertorial kind, so too are the seemingly descriptive statements like the earlier examples. Third, if statements are not being used to assert a proposition, there is no question of truth or falsity attaching to such statements.

The older non-cognitivists were true skeptics about truths of psychology, ethics, and law. Most non-cognitivists today, however, have softened their views to the point that non-cognitivism has become but another pseudo-skepticism. Such non-cognitivists concede that there are conditions of appropriate utterance for non-assertorial speech acts.<sup>36</sup> One appropriately utters “ouch” or “I am in pain”, for example, only when one is in pain; one appropriately utters, “bullfighting is wrong” or “bullfighting, ugh,” only when feeling that bullfighting is wrong would be appropriate; one appropriately utters, “the defendant is guilty” or “go to jail” as a judge only when the defendant is, in fact and law, guilty. Some of such softening non-cognitivists even concede that one can freely predicate truth and falsity of such statements, so long as one realizes that such predications are internal to human practices of various kinds.<sup>37</sup>

Such softened non-cognitivism is not a true skepticism. The supposed “conditions of appropriate utterance” and the supposed “truths internal to a practice” can and should be cashed out in terms of constructivist truth. So long as one finds systematic bases for accepting and rejecting propositions in psychology, ethics, and law, one is finding truth and falsity, however much one wishes to call it something else.

### *B. Five More Genuine Skepticisms About the Truth of Singular Legal Propositions*

The true skeptic about some field of discourse is the person who sees no basis for accepting or rejecting certain propositions within

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36. *E.g.*, ALAN GIBBARD, *WISE CHOICES, APT FEELINGS* (1990).

37. *E.g.*, SIMON BLACKBURN, *SPREADING THE WORD* (1984); SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* (1993).

that discourse. About singular legal propositions such a skeptic will see no more authoritative, systemic basis for accepting “this contract is valid” than for accepting its negation in any given case. We have seen two generations of true skeptics in law, the badly misnamed Legal Realists of the 1920s and 30s, and the Critical Legal Studies followers of the 1970s and 80s. These groups jointly generated five arguments for their common skeptical conclusion about truth in law.

One is the familiar language-based argument that the general words used in laws are too indeterminate in their meanings to decide cases. Most often the frailties of meaning adverted to here were the vagueness and ambiguity inherent in all natural languages.<sup>38</sup> Nonetheless, these well-recognized frailties of meaning are not nearly extensive enough to support a thoroughgoing skepticism about law. Although “bore,” used in “our mothers bore us,” is ambiguous, the use of the word “bore” still rules out many possibilities meant by the sentence, such as that our mothers hate us. Similarly, although “bald” in “many men are bald” is vague, the use of the word “bald” rules out many possibilities meant by the sentence, such as that many men are fat.

A more radical linguistic base for skepticism in law may be found in the “contextualist” approach to language of some Legal Realists. A contextualist believes that words have no meaning and that it is only the context of utterance that allows a listener to understand a speaker.<sup>39</sup> To use one of Lon Fuller’s examples, absent a context, the word “improvement” is as devoid of meaning as the symbol “x.”<sup>40</sup> This contextualism is clearly false. Words must possess meaning *sans* context in order for us to communicate in any given context. Otherwise, one could communicate this last thought by writing, a la Fuller, “xyz!”<sup>41</sup>

One move open to the skeptic to circumvent the force of these rejoinders to his language-based argument is to leave natural languages for the artificial language of the law. Here, some Legal Realists urged a “functionalist” approach. “Ownership,” for example, is taken to be an artificial legal concept whose sole meaning is to be

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38. I explore vagueness, ambiguity, and other frailties of meaning in *The Semantics of Judging*, *supra* note 5 at 181-202.

39. I discuss the extreme contextualism of Felix Cohen, Roger Traynor, and Arthur Corbin in *A Natural Law Theory of Interpretation*, *supra* note 5 at 304-07.

40. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 665 (1958).

41. See Moore, *Educating Oneself in Public*, *supra* note 12, at 55-57 (attacking Stanley Fish’s brand of contextualism on this basis).

given in terms of the legal consequences attaching to authoritative pronouncements of ownership by a judge. Under such an approach, legal consequences such as the right to possess and control what is owned and the right to exclude others from control or possession are the sum of what is meant by ownership. The statement that a person owns something then is taken to be justifiable only when it is morally desirable to obtain such legal consequences. Let us call this the functionalist basis for skepticism.<sup>42</sup>

Functionalism, in a sense, is not a radical enough basis for a true skepticism about the truth of singular legal propositions. After all, on the functionalist account there is a truth value to such propositions, even if the legal truth maker is a normative fact embodying whether the consequences attached to some legal concept are desirable or not. Under a pure natural law view these moral truth conditions are also the truth conditions for law, and on that basis there could be determinate truth-values to all singular propositions of law prior to judicial decision.

Almost no one, however, is this pure of a natural lawyer, myself included.<sup>43</sup> Conceding that moral facts enter into the truth conditions of every singular proposition of law, yet so do other kinds of facts, such as the facts of history or semantic convention. Under more moderate views of natural law, functionalism would generate significant enough indeterminacy to support a true skepticism about the truth of singular propositions of law.

Functionalism comes in two flavors: a normative proposal as to how judges should judge and as a true description of how judges do judge.<sup>44</sup> However, both branches prove false. Our ideals of democracy and of the rule of law make it undesirable for judges to ignore the ordinary meaning of the words appearing in legal standards in favor of the “functionalist approach.” Justice in particular cases is, of course, a good, but so are the systemic benefits of even-handed, predictable law that is the product of majority will. Good judging is a balance of these goods in every case, not a complete victory for the first (functionalism) any more than for the second (formalism). Most

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42. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

43. Even Aquinas held that human law required promulgations by one in charge of the community, among other things. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, Q 90-97.

44. Brian Leiter has done much in his recent work to advance the descriptive branch of the Legal Realists' functionalist approach. See Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001).

judges appreciate these truths about judging, and do their job accordingly, which is why the descriptive branch of functionalism is also false.

The third argument that Legal Realists make for skepticism is not based on the alleged infirmities in meaning of either natural or artificial legal language, but instead urges that general legal propositions are not to be found in such languages. Rather, our law is significantly judge-made law, and the relevant question is how the truth of a singular proposition of law in one case can be inferred from another singular proposition of law having been held to be true in some earlier case. As Legal Realists are fond of pointing out, every case is like every other case in certain respects, and every case is unlike every other case in certain other respects; so how can there be any antecedent truth value to the singular proposition of law decisive of a case not yet decided?<sup>45</sup>

One answer to this basis for skepticism is given by the fact that our law is now largely statutory, so that the total absence of guidance by general language (true enough of pure common law systems) is now gone. Another answer is that even within a purely common law system, not all likenesses between cases are of equal significance. To truly realize the ideal of equal justice requires judges to ignore similarities of, say, hair color in torts cases and to pay attention to factors like degree of injury of the plaintiff and degree of fault of the defendant. It, of course, requires a moral judgment to defend this choice of relevant similarities, but again, this fact does not render common law systems indeterminate. As long as one's meta-ethics do not make morality indeterminate, and so long as one is enough of a natural lawyer to allow such moral facts to enter into the truth conditions of singular propositions of common law, no skepticism can be grounded here.

A fourth alleged basis for skepticism lies in what H.L.A. Hart called the defeasibility of legal concepts.<sup>46</sup> Common law rules may be overruled; the plain meaning of statutory language may be turned on its head by following the purpose, or "spirit," of the statute; the clear directive of a judgment in a particular case may be subject to reversal by proceeding on a writ *coram nobis* showing serious error in the original judgment.<sup>47</sup>

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45. See, e.g., Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 71-76, 107, 159-63 (1928); FRANK, *supra* note 42.

46. Hart, *supra* note 27.

47. On these three apparent changes in the law, see Moore, *supra* note 8.

This possibility of change makes our knowledge of legal propositions defeasible in the sense that what we were justified in believing to be true at one time we are not justified in believing to be true at another time. Nevertheless, this cannot be the core of the claim justifying skepticism because all of our judgments about everything are defeasible in the sense that more evidence could come along to show us that we must change what we believe to be true. This is no more than an implication of there being a gap between evidence and things evidenced adverted to before, and seen before to be an insufficient basis for skepticism.

Seemingly needed is this claim: the truth of legal propositions itself changes when common law rules are overturned, a statute's plain meaning is turned on its head by a court applying the statute's spirit, or a court's judgment is opened up. To a certain extent, this claim is true.<sup>48</sup> Since court actions are themselves part of the law, overruling, overturning and opening up kinds of court actions can change the law. The truth-values of various singular legal propositions thus can change, thereby being time-sensitive.

Even this claim, however, cannot support skepticism. The claim does mean, as Hart noted, that legal truths are not *timeless* truths.<sup>49</sup> But, of course, legal truths are not "placeless truths" either. The truth of whether a particular will is valid may differ in France as opposed to California. The temporal and spatial locations of law are familiar facts and do nothing to generate indeterminacy. Although "this will is valid" can be true now in California, false tomorrow in California, and false today in France, so long as we have choice of time-place rules, there is no indeterminacy in truth value at any given time and place.

The fifth and final basis for a true skepticism about the truth of singular propositions of law lies in the possibility that equally authoritative general legal propositions may conflict in their implications for singular legal propositions. This is the point made so much of by Critical Legal Studies.<sup>50</sup> If globally true, such claim would justify skepticism here. After all, too much law is as bad as not enough law; both truth-values obtaining for any given singular legal proposition is just as indeterminate as neither truth-value obtaining.

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48. *See id.* at 134-37 (discussing the limited change in law marked by overrulings and other reversals).

49. Hart, *supra* note 27.

50. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3, 258-60 (1987).

The global nature of the Critical Legal Studies conflict claim has typically been purchased on the cheap by the leading Critical Legal Studies scholars. Usually the claim is misstated as a claim about there being fundamental *contradictions* in the law. This would be a quick route to global indeterminacy, because, as we know from logic, anything follows from a contradiction. Critical Legal Studies examples of supposed “contradictions” in the law, however, turn out on inspection to be no such thing.<sup>51</sup> In such examples, there are at best two different principles in tension with one another in the sense that both principles cannot be simultaneously realized on at least some occasions. In the familiar example of liberal political philosophy, often liberty is in tension with equality in this way.

Conflicts of principle, unlike contradictions, are able to be resolved without abandoning one or other of the conflicting principles. We sometimes resolve them by assigning a lexical priority between principles; more often, we resolve them on a case-by-case basis, weighing one principle as more important in one case, but not generally; at other times, we resolve conflicts by adjusting the content of one or both principles. The Critical Legal Studies point must be that we do not in law have formal means of resolving conflict between principles in any of these ways. Although this point is true, just as with the partial indeterminacy of general language, so here the indeterminacy is only partial. And if one allows moral facts in as a legitimate part of the truth conditions of singular propositions of law, there is not even a partial indeterminacy to be found here.

#### IV. REALISM VERSUS CONSTRUCTIVISM AS TO THE NATURE OF LEGAL TRUTH

##### A. *The Two Theories of Truth Restated*

Both the realist and the constructivist theories of truth agree in rejecting skepticism about truth. Both theories, that is, find it meaningful to assign truth-values to the propositions figuring in an area of discourse like the law. Where such theories diverge is in their accounts of the nature of truth-makers. On the realist theory of truth, some proposition “p” is made true by some mind-independent facts of the matter. In the familiar example, the proposition that snow is white is made true by the fact that there is something called snow and that

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51. Don Herzog, *As Many as Six Impossible Things Before Breakfast?*, 75 CAL. L. REV. 609 (1987).

snow-stuff really is white. On the constructivist theory of truth, such propositions are made true by facts about us as creators, utterers, and audiences of such propositions. The proposition “p” (that snow is white) is true if it coheres better with other propositions that we antecedently believe are true, than does the proposition “not-p.” Alternatively, “p” is true if it coheres better with other propositions that we would believe to be true if we were better informed, had more time, and were more rational. In either the actual or the idealized case, what makes “p” true is not some fact of the matter independent of us but rather some facts dependent on what we either do or would believe.

The distinction between the two theories in terms of “mind-independence” is a little trickier than may appear at first glance. One might saddle the realist with such a strong notion of mind-independence that the realist theory is pretty absurd on its face. Take the statement, “Jones desires pie.” Is the realist forced into asserting that such a proposition is true independently of what Jones desires? If so, realism about the propositions of psychology is impossible on its face. Likewise, consider the proposition that a non-holographic will requires two witnesses to be legally valid. Is the realist forced into defending the pure natural law view that the truth of such a proposition has nothing to do with facts about human conventions, such as statutory voting procedures and votes taken on the Statute of Wills on some occasion? If so, realism about legal propositions is pretty absurd on its face.

The mind-independence condition of realism cannot be construed in this way or we are left in a tournament with a straw man.<sup>52</sup> Realism has to be defined in a way that allows realism about the truths of psychology, law, and social science to be a genuine possibility. What independence means is independence from the minds and conventions of the observer making the statement in question. It cannot mean independence from the minds and conventions of the subjects of the statement.

We should also distinguish theories of truth from theories of justification and of discovery.<sup>53</sup> Both of these latter theories are epistemic theories, not metaphysical theories. A theory of justification tells us when it is rational to believe some proposition to be true; a theory of discovery tells us how to discover that some proposition is

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52. See Moore, *Moral Reality Revisited*, *supra* note 26, at 2434-36.

53. See Moore, *The Interpretive Turn*, *supra* note 12.

true. By contrast, a metaphysical theory of truth aims to tell us what it is for a proposition to be true, not how to discover that it is true and not when we would be rational to believe it to be true.

One needs to draw these distinctions at least *prima facie*. Otherwise, we might think that because justification for our belief in “p” can only be the coherence of “p” with other beliefs of ours, what we mean by the truth of “p” is its coherence with our other beliefs. These are two distinct assertions, however, requiring separate defense. One might be a coherentist about justification and yet a realist about the nature of truth. Alternatively, one might be a coherentist about both justification and truth. Even so, one needs the *prima facie* separation between the two in order to see that a separate defense is needed for each.<sup>54</sup>

There is nothing that requires us to pick one of these theories of truth and apply it to all domains of discourse. One can and should be more flexible than that, because each truth theory has its own intuitively plausible domain of application. Contrast the truths of history with the truths of literary criticism. Consider, by way of example, the question central to Aaron Burr’s trial for treason: was Aaron Burr on the Mississippi River as necessary for him to be part of the Western Conspiracy, as Jefferson claimed, or had Burr left some weeks before, as Burr claimed in his defense? If we are talking about the real Aaron Burr, then it is commonly thought that there is a fact of the matter here with which this truth of history can correspond. Burr either was there, or he wasn’t. The common sense realist intuition is entirely unshaken by the indeterminacy of the historical evidence.<sup>55</sup> If we are talking about a character of fiction, perhaps from Gore Vidal’s novel about a creature of his own imagination also named “Aaron Burr,”<sup>56</sup> any realist intuition about truth evaporates. Although there may be a truth value to propositions about whether the fictional Aaron Burr was or was not on the fictional Mississippi River at a certain time in the novel, the truth value seems entirely dependant on what the novel says or implies about the question. Given that characters of fiction have no existence independent of the text that creates them, any truths that exist seem to depend entirely on those texts.

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54. Brand Blanshard, for example, accepted both the coherence theory of justification and the coherence theory of truth, but separated the two because of the need for separate argument for each. 2 BLANSHARD, *supra* note 11, at 260.

55. That evidence is reviewed in NATHAN SCHACHNER, AARON BURR: A BIOGRAPHY (1937).

56. GORE VIDAL, BURR: A NOVEL (1973).

About singular propositions of law, I doubt that common sense has any firm intuitions. Are such propositions true because they correspond to some “legal reality” or are they true only in the sense that certain human conventions about how enacted statutes are to be construed, for example, say that they are true? This is the question taken up in the next subsection.

### B. *Three Arguments About Legal Truth*

I shall here pick up the three arguments diverted away from the skeptic’s arsenal and placed instead in the arsenal of the constructivist. These are the arguments from ontology, from epistemology, and from linguistics.

The argument from ontology may seem quite conclusive, for talk of legal reality may easily conjure up images of ghostly “objects” that exist only in myth or fiction, like Pegasus. The picture of legal reality that spawns the argument from ontology is a picture of a self-contained legal world in which legal objects such as corporations, legal relations such as ownership or domicile, and legal qualities such as validity and illegality, all exist in the same way that human persons exist in the real world, with their relations to others and their qualities such as greediness - with the enormous *caveat* that the legal world does not exist in the same way as does the natural, physical world.<sup>57</sup>

I have elsewhere called this the dualistic picture of legal reality.<sup>58</sup> Such dualistic ideas rightly put off theorists in law, as well as in ethics and psychology. Cartesian mental entities existing in time but not in space, Moorean non-natural moral properties, and Meinongian objects having a real, albeit fictional, existence, join Von Ihering’s heaven of legal entities as too strange to accept. If realist truth about psychology, ethics, literature, or law demands such ontological commitments, a constructivist theory of truth seems much preferable. After all, the constructivist theory demands no such special realities; its only ontological demands are that there be human beliefs and conventions, the stuff out of which constructivist truths about these items are drawn.

For areas such as law, ethics and psychology, however, there is an alternative preferable to constructivist truth. One can be a naturalist about legal qualities and relations, just as one can be a naturalist about

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57. This seems to be the picture of legal reality bequeathed to us by the Legal Realists. See, e.g., Cohen, *supra* note 42, at 820-21.

58. Moore, *supra* note 32.

moral qualities and a physicalist about mental qualities.<sup>59</sup> Legal qualities supervene on both moral qualities and matters of institutional fact, and both moral qualities and institutional facts supervene on natural properties of different kinds. Although showing this to be so is a complicated business, if done, it draws the sting entirely out of the ontological objection to the realist theory of truth being applied to singular legal propositions.

The argument from epistemology focusing on the gap between the truth on a realist account and the evidence available to support such truth must also be given a laughably short discussion.<sup>60</sup> Notice first that the constructivist is as impressed with the gap argument as is the skeptic. Both adopt a standard of epistemic justification that requires our ontological commitments not to exceed our evidence for them. The constructivist avoids skepticism by relaxing his metaphysics: in the constructivist's ontology, what exists is no more than a construction out of the available evidence. He can accept belief in such constructions because there is no gap between them and their evidence.

But what justifies the constructivist and the skeptic in requiring such a strong theory of justification? Rather than relaxing the metaphysics, why not relax the epistemology, the one requiring a complete match between evidence and things evidenced? Under a coherence view of justification, no one belief is sacrosanct, so the realist is entitled to ask for a justification of the strong theory of justification of the constructivist and the skeptic.<sup>61</sup>

The strong theory of justification shared by the skeptic and the constructivist is already skeptical in its orientation. Its motto could be, "don't believe any proposition about which you cannot be certain." This fear of the possibility of error is what motivates: the demand that no generalization "go beyond" (in the sense of generate predictions about) individual cases of which one is certain; the demand that one reach such certainty in individual cases by a source uncontaminated by the pre-perceptual judgments of the observer; and the demand that one can guarantee such certainty in individual cases by some general truth of how particular judgments copy or are glued in some way to

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59. *Id.*

60. For more detailed responses to the gap-based arguments of two leading constructivists about truth—Hilary Putnam and Michael Dummett—see DEVITT, *supra* note 18; ALSTON, *supra* note 4.

61. See GILBERT HARMAN, THOUGHT 24-33, 112-125 (1973)(providing good examples of weakening the notion of justification so that our firm, but far from certain, beliefs can pass muster).

the facts they are about.

The only things in the world about which such certainty is even plausible are our own minds. About our own sensations, desires, and intentions, we are often said to possess both non-inferential modes of knowing, “privileged access,” and freedom from mistake, “incorrigibility.”<sup>62</sup> Yet such claims if made about beliefs about the external world, for example, would be absurd. It thus can come as no surprise that the constructivist ends up denying the mind-independent existence of anything.

Even our own minds, however, fail this stringent a test of justified belief.<sup>63</sup> Better to admit the possibility of propositions that we are justified in believing even though we lack certainty about them. A more relaxed standard of justification is more consistent with how we actually live than is some unrealistic aspiration for certainty.

In addition to being under-motivated by an unrealistic demand for certainty, the constructivist theory of truth also fails to capture aspects of our experience that would be very hard to give up. At bottom, none of us regard our own reactions to the world to be hostage to the reactions, beliefs, and conventions of others in the way the usual versions of constructivist truth require. Constructivists typically render nonsensical our novel and sometimes revolutionary insights, insights that go against the best inference to be drawn from the evidence available.<sup>64</sup> Yet, sometimes we assert what we only suspect to be true because of a hunch we have that the countervailing weight of the evidence including the evidence provided by popular opinion is misleading. Although we admittedly are not rationally justified in making such hunches, sometimes we are right. Only the realist theory of truth admits of this “human all too human” possibility.

The last temptation to constructivism, stemming from linguistics, is the easiest to defuse. The basic problem with non-cognitivist analyses of various speech acts motivating either skepticism or constructivism lies in a faulty analysis of speech acts. Our use of words to do non-assertorial kinds of things such as ascribe responsibility or prescribe behavior does not preclude us, on the same occasions, from asserting

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62. See MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 249-280 (1984) (exploring privileged access, incorrigibility, and transparency about one's own mental states).

63. See *id.* (arguing against such characteristics in order to make sense of unconscious mental states).

64. I explore the idea of revolutionary judgments in the moral case in *Moral Reality Revisited*, *supra* note 26, at 2467-68, and in the legal case, in *Natural Law Theory of Interpretation*, *supra* note 5, at 377-79.

certain propositions to be true.<sup>65</sup> “Jones is a murderer” may often be used to ascribe responsibility to Jones; it also asserts that something is true about the world, that is, Jones intentionally killed someone.

The usage fact seized upon by the non-cognitivist, the existence of non-assertorial speech acts, is thus an insufficient basis on which to motivate a rejection of the realist theory of truth for some domain of discourse. If one had other bases for denying the existence of certain facts with which propositions could correspond, non-cognitivist analyses could be presented as *following from* such skepticism.<sup>66</sup> Yet that demotes non-cognitivism from an argument *for* skepticism or constructivism, and into a mere implication of them.

## V. CONCLUSION

I conclude that there are no good reasons to accept either skepticism or constructivism about the truth of singular legal propositions, while there are good reasons to think that the realist account captures the truth of the matter. One advantage a realist has in such debate is that if he is correct about the nature of truth, then we have discovered something about truth; we haven't simply constructed our own fairytale and sold it as if it were true.

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65. Bill Lycan terms this the “speech act fallacy.” WILLIAM G. LYCAN, JUDGEMENT AND JUSTIFICATION 204 (1988).

66. Non-cognitivism follows from skepticism in the weak sense that a non-cognitivist analysis allows the skeptic to make some sense of the realm of discourse about which he is skeptical; if he were a cognitivist about the discourse in question, he would simply have to write off the entire area of discourse as either senseless or uniformly false.

