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Recommended Citation

Frederick Schauer and Virginia J. Wise, *Legal Positivism as Legal Information*, 82 Cornell L. Rev. 1080 (1997)
Available at: <http://scholarship.law.cornell.edu/clr/vol82/iss5/7>

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LEGAL POSITIVISM AS LEGAL INFORMATION

Frederick Schauer† & Virginia J. Wise††

INTRODUCTION

Legal positivism refuses to go away. Condemned as morally pernicious¹ and dismissed as philosophically confused,² legal positivism has spent the past fifty years as the repository for a panoply of alleged jurisprudential sins. While some see it as the product of self-deception,³ others insist that legal positivism provides a descriptively inaccurate and normatively unappealing portrait of the legal systems with which we are most familiar.⁴ Still others charge legal positivism with laughable pretensions of objectivity⁵ and reprehensible blindness to legal iniquity.⁶ And through all of this, one senses the most telling complaint of all—that legal positivism and the disputes within which it

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This Article was prepared for the *Cornell Law Review* Symposium, *The Nature and Sources, Formal and Informal, of Law*, March 1–2, 1997. Earlier versions have been presented at faculty workshops at the Boston College Law School, the Harvard Law School, the University of Minnesota Law School, the Seton Hall University School of Law, and the University of Virginia School of Law, where audience comments were of great assistance. In addition, Brian Bix, Cary Coglianese, Duncan Kennedy, John Monahan, and Todd Rakoff provided incisive and helpful written comments on a draft of the article.

¹ See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175 (1975); DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* at ix (1991); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 128–40 (1940); John Dugard, *The Judicial Process, Positivism and Civil Liberty*, 88 S. AFR. L.J. 181, 187 (1971); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 657–59 (1958). A careful overview of such claims is Mark J. Osiel, *Dialogue With Dictators: Judicial Resistance in Argentina and Brazil*, 20 L. & SOC. INQUIRY 481, 491–500 (1995).

² We take this to be one of the running themes of MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960* (1992). In particular, Horwitz explicitly takes positivism (in its legal and non-legal versions) to presuppose a rigid fact-value distinction, *id.* at 183–85, and takes the fact-value distinction to be virtually indefensible. *Id.* at vii–viii.

³ See, e.g., JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 366–402 (1978); James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383, 385–88 (1987); see also Etienne Mureinik, *Law and Morality in South Africa*, 105 S. AFR. L.J. 457, 458 (1988) (arguing that positivism is a delusion because “a legal system is itself a morality”).

⁴ See RONALD DWORKIN, *LAW’S EMPIRE* 33–43 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14–130 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

⁵ See HORWITZ, *supra* note 2, at viii.

⁶ See *supra* note 1; see also Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1397 (1996) (describing

is a combatant are irrelevant to the issues that concern us today. The debates between positivism and natural law, or between positivism and anything else, it is said, are the preoccupation of a small group of philosophically obsessed but socially unaware jurisprudes, many of whom are English and most of whom are dead.

Yet in the face of this opprobrium, legal positivism persists. Unlike Scandinavian Realism,⁷ historicism,⁸ and numerous other legal theories surviving only in the museums of jurisprudential archaeology, legal positivism is still with us. Indeed, it was described not long ago as undergoing something of a renaissance,⁹ and Frank Michelman has still more recently asserted that everyone these days is a positivist.¹⁰ Yet even if it is an overstatement to maintain that legal positivism has moved from irrelevance to ascendancy in the space of just a few years, at the very least, it appears that the announcements of legal positivism's resounding defeat were premature and that even those who continue to reject legal positivism find it increasingly necessary to address its claims.¹¹

So what is going on here? Our claim is that legal positivism's persistence is a function of the way in which legal positivism is the only account of the nature of law that attempts to explain the features that lead us to think of *law* itself as a socially important and analytically useful category. Law schools do different things from public policy schools, let alone business schools and medical schools; what goes on in a court is different from what goes on in a legislature; bar examinations test a knowledge more specialized than that tested by various standardized aptitude examinations; bar associations mark a socially differentiated culture of lawyers; and a remarkably high percentage of the information on which lawyers claim to rely could, until recently, be found in the comparatively small number of volumes published by

the legal process perspective as "rescuing judicial action from the moral aridity of positivism").

⁷ See, e.g., AXEL HÄGERSTRÖM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* (C.D. Broad trans., Karl Olivecrona ed., 1953); A. VILHELM LUNDSTEDT, *LEGAL THINKING REVISED* (1956); KARL OLIVECRONA, *LAW AS FACT* (1939); ALF ROSS, *ON LAW AND JUSTICE* (1959).

⁸ See F.C. VON SAVIGNY, *ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (A. Hayward trans., 2d ed. 1831). On the "historical school" more generally, see R.W.M. DIAS, *JURISPRUDENCE* 375-87 (5th ed. 1985) (describing the origins, tenets, and central figures of historicism).

⁹ See Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 12 n.22 (1993); see also Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995) (setting out a "historical account of the evolution of legal positivism" and seeking to disprove "a set of bad arguments against positivism").

¹⁰ Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1298 (1995) (book review) ("[W]e are all to some degree positivists now.").

¹¹ A good recent example is Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996). Posner's reference to "[t]he plodding positivist," *id.* at 7, provides further support for our sociological claims about the esteem in which positivism is held in the American legal academy.

the West Publishing Company. Alone among legal theories, legal positivism seeks to explain how this differentiation has come to be the case, what our world would look like if it were not, and the extent to which such surface differentiation reflects important underlying differences.

Our goal here is not only to explain and defend the conception of legal positivism we have just announced, but also to expose the dependence of this and most other plausible forms of legal positivism on empirical propositions about the nature of legal information. As claims about the distinctive character of legal reasoning appear increasingly implausible—"thinking like a lawyer" is a phrase heard less and less these days except in the welcoming speeches of law school deans—one of the strongest candidates for the feature that explains law's differentiation is the information set on which legal argumentation and legal decisionmaking relies. Insofar as this information set is structurally differentiated and extensionally divergent from the information set used by other public decisionmakers, the central claim of legal positivism will emerge as both important and true. And to the extent that the information set lawyers and legal officials use overlaps the information set so-called nonlegal decisionmakers employ, differentiation is lessened, and the most important claim of legal positivism becomes commensurately less true.¹²

Under the conception of legal positivism we shall develop and defend, therefore, the truth or falsity of legal positivism has as its most substantial component a claim that is more empirical than conceptual. As one that is contingent and empirical, however, this claim is susceptible to being false at one time and place, even though true at others. This, we shall argue, is the most important consequence of the contemporary transformation in the nature of legal information. As numerous technological, economic, and institutional developments make lawyers' use of so-called "nonlegal" sources more and more prevalent, the informational line between law and nonlaw becomes increasingly tenuous.¹³ As recently as 1970, for example, the overwhelming bulk of the information that lawyers consulted was published by three companies—the West Publishing Company, the

¹² Although our focus in this article is the *law*, much that we say would be consistent with a larger claim that the differentiation of a society's decisionmaking institutions, see NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* 229-54 (1982), is, in general, closely related to the differentiation of the information sets on which different groups of decisionmakers rely.

¹³ As we discuss below, it is also possible that the informational differentiation we believe to be waning is itself a comparatively recent phenomenon. The rise of the national reporter system in the latter part of the nineteenth century made lawyers' overwhelming reliance on a small number of materials much easier, and the world of the law before the reporter system resembled in intriguing ways the post-reporter world that is our primary concern here.

Michie Company, and the Lawyers Co-operative Publishing Company—for whom law publishing in the narrowest sense was their exclusive business.¹⁴ Twenty-five years later, each is part of a publishing conglomerate for whom *law* publishing is merely one component of a much larger informational enterprise. Relatedly, the ability to locate so-called nonlegal information has been transformed, again in the space of but a few decades, from being dependent on the ability and inclination to move physically to a different library in a different building to the dramatically less burdensome ability to enter the name of a different library, while moving nothing but the fingers, for the very same on-line search. Insofar as these and similar developments exert pressure on the informational line between law and nonlaw, the dominance within law of a narrow set of sources is dissipating. And if we are correct in maintaining that this informational line is central to explaining the distinctiveness of law itself, then the consequence is that structural changes in the character of legal information are not just changing the nature of the information available *to* the law, but rather are changing the very nature *of* law itself. Although the claims of legal positivism are increasingly important, it may turn out, ironically, that the descriptive and explanatory claims of legal positivism are at the same time increasingly false.

I

TWO CONCEPTS OF POSITIVISM

So what *is* legal positivism, and what does it claim? A survey of the various forms that legal positivism is alleged to take could fill a book in itself,¹⁵ but two of these forms are most important. We explain them here primarily by showing that the difference between them provides the foundation for our defense of the importance of the second of these forms.

A. Positivism and Natural Law

Historically, positivism has thrived in contraposition to natural law, so to understand the provenance of positivism we must understand the claims to which it has stood opposed. Now natural law itself is hardly unambiguous in the claims it makes, an ambiguity exacer-

¹⁴ For purposes of this introduction only, we ignore the United States Government Printing Office and its state equivalents.

¹⁵ In 1968, Robert Summers identified twelve different positions commonly labelled as “legal positivism,” leading him to conclude that “[i]t would be best, in legal philosophy anyhow, to drop the term ‘positivist’, for it is now radically ambiguous and dominantly pejorative.” ROBERT S. SUMMERS, *Legal Philosophy Today—An Introduction*, in *ESSAYS IN LEGAL PHILOSOPHY* 1, 15-16 (1968). This proposition was echoed more recently in Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 1, 24 (Robert P. George ed., 1996).

bated by the fact that natural law is often understood simply as an account of the ontology of morality, and largely unconcerned with explaining the character of *law* in a narrower sense. For many theorists, "natural law" is a useful label for the cluster of objectivist metaethical claims often marching under the banner of "moral realism."¹⁶ Natural law in this sense draws its name from the noncontingent and lawlike moral imperatives it describes, but makes few assertions about the character of the social institutions we think of as the legal system.

When understood as an account of the nature of law, however, the most prevalent version of natural law is a claim about the existence of a moral criterion as a conceptually necessary feature of law in all possible legal systems in all possible worlds. Although the historical origins of this conception of natural law are themselves contested, a plausible candidate for the "beginning" is Cicero's argument in *De Legibus*.¹⁷ To be sure, Cicero recognizes that there are legal institutions that sometimes behave in immoral ways. Yet to call such institutions and their products *law*, he argues, is a mistake, for it is an *a priori* feature of law, and not a contingent empirical fact about law, that it satisfy certain criteria of substantive morality.¹⁸ Failing that, the institutions we might call "law" are not really law at all, bearing the same relationship to real law that decoys bear to real ducks. To maintain that a substantively immoral law is a law is thus to make a conceptual mistake, and not simply an empirical one.

Although there is some debate about whether this version of natural law is fairly attached to Thomas Aquinas,¹⁹ preeminent among natural law theorists, there can be no debate that others have followed in Cicero's footsteps. Saint Augustine argued that the justness of a law was necessary for its lawness.²⁰ William Blackstone, in conjunction with his claim that common-law decisionmaking was a process of law-discovery and not law-creation, insisted that immoral law was for that

¹⁶ Lloyd L. Weinreb, *Natural Law and Rights*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 278, 280 (Robert P. George ed., 1992).

¹⁷ CICERO, *DE REPUBLICA DE LEGIBUS*, 508-13 (Clinton Walker Keyes trans., 1928).

¹⁸ Thus, Cicero argued that "laws of personal exception," that is, laws that "penalized particular individuals," were "unjust" and therefore not laws at all. *Id.* at 511, 513.

For this reason Lucius Cotta, a man of great talent and the highest wisdom, was all the more surely correct in his opinion with reference to [Cicero's own banishment case]—that no legal action at all had really been taken against me. . . . From this he concluded that I need no law to repeal what had never been legally enacted against me.

Id. at 513 (footnote omitted).

¹⁹ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 25-29 (1980) (challenging the contentions of Joseph Raz and Hans Kelsen that Aquinas and other central figures in the natural law tradition believed that an immoral law was no law at all).

²⁰ AUGUSTINE, *ON FREE CHOICE OF THE WILL* (Thomas Williams trans., Hackett Publishing Co. 1993).

reason deficient law, awaiting to be perfected *as law* for the very reason of its moral deficiency.²¹ And in Lon Fuller's procedural version of natural law,²² law was again *defined*, essentially and not contingently, by those features of procedural justice that Fuller believed to be instrumentally conducive to substantive morality. Yet for all of its procedural cast, and for all of the admitted empirical contingency of Fuller's claims about the relationship between procedural justice and substantive justice, Fuller still maintains that certain features of what he thinks of as morality are essential components of law, and thus essential features of the very idea of law itself.²³

Yet the claim that morality, whether substantive or procedural, is one of the truth conditions for legality in all possible legal systems in all possible worlds is falsified simply by the showing that morality is not a criterion of legality in some (possible) legal system.²⁴ Thus, even if it turns out that morality *is* a criterion of legality in some legal system (such as that of the United States), this fact is insufficient to establish the conceptual and noncontingent claims that lie at the core of natural law theory. To theorists such as Jules Coleman,²⁵ David Lyons,²⁶ Philip Soper,²⁷ and Wil Waluchow,²⁸ for example, and to their most important forebear in this regard, Hans Kelsen,²⁹ legal positivism exists in its denial of this core natural law claim, and thus finds itself defined as the claim that morality is not a necessary (or noncontingent, essential, or *a priori*) component of the very idea of law. To whatever extent some (or even all existing) legal systems may have chosen (posited) to incorporate criteria of morality into their criteria

²¹ According to Blackstone, "this law of nature, being coe[qu]al with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." 1 WILLIAM BLACKSTONE, COMMENTARIES *41.

²² LON L. FULLER, THE MORALITY OF LAW 96-106 (William Cary Jones rev. ed. 1969).

²³ See *id.* at 33-94.

²⁴ See JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW 3-27 (1988); Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 715-17 (1991).

²⁵ See *supra* note 24.

²⁶ David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 417 (1977) (reviewing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977)).

²⁷ E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 511 (1977).

²⁸ W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 80 (1994).

²⁹ This theme pervades much of Kelsen's writings. To Kelsen, a central feature of law was its empowerment of legal officials to establish norms. Because the idea of law itself does not impose a material (as opposed to formal) constraint on what norms duly empowered officials might create, it is fair to assume that Kelsen was the precursor of the view that the (contingent) creation of an undifferentiated normative domain, if authorized under the *Grundnorm*, would be compatible with a legal positivist picture of law. For one of Kelsen's last statements of the view that undergirds the foregoing, see Hans Kelsen, *The Function of a Constitution* (Iain Stewart trans.), in *ESSAYS ON KELSEN* 109 (Richard Tur & William Twining eds., 1986).

of legality, however undesirable it is that there should be immoral laws, and however desirable it is that officials should take the correction of (or resistance to) immoral laws as part of their role, to refer to immoral law is, under this version of legal positivism, not a conceptual mistake. To phrase it differently, law and morality remain conceptually distinct, which is all that this version of legal positivism maintains.

Such a conception of legal positivism might very well have been developed for moral reasons,³⁰ and a common goal shared by some modern positivists (including one of us³¹) is to attempt, at the conceptual level, to unravel the idea that there is something necessarily or intrinsically good about law, apart from the good that some laws and some legal systems might do or have done at certain times or places. For those who share this (moral) goal, it is important to insist that the concept of law not be understood as doing more moral work than is historically, empirically, or logically justified.³²

Yet, as with any concept that rides upon its negation, this version of legal positivism is only as important as the concept to which it stands opposed. Consequently, the value of this picture of legal positivism depends on the plausibility of the version of natural law with which it is juxtaposed, but it is not clear that this standard has been satisfied. Although claims about the intrinsic desirability of law are hardly absent from modern legal theory, one searches almost in vain for the claim that the phrase "immoral law" is oxymoronic, or for the conjoined claims that (a) there is a transcultural morality and that (b) one of the components of this transcultural morality is the essential

³⁰ See Neil MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 VAL. U. L. REV. 1, 11 (1985).

³¹ Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993); Frederick Schauer, *Fuller's Internal Point of View*, 13 L. & PHIL. 285 (1994); Frederick Schauer, *Critical Notice*, 24 CAN. J. PHIL. 495 (1994) (reviewing ROGER SHINER, *NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT* (1992)); Frederick Schauer, *Positivism Through Thick and Thin* (October 10, 1996) (unpublished manuscript, on file with authors).

³² For a similar perspective, see DAVID LYONS, *MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE, AND POLITICAL RESPONSIBILITY* (1993).

If this volume has a dominant theme, it is a *lack* of reverence for the law. . . .

. . . .

My sense of law's fallibility was confirmed by some knowledge of its record. Far more often than not, law has served oppressive, unjust, inhumane social arrangements.

. . . When I first encountered legal theory, I thought that the tradition called "legal positivism" embodied a fitting lack of reverence for the law.

Id. at ix. Lyons goes on to wonder about the legal positivist tradition because parts of the tradition have believed that there is at least a presumptive moral obligation to obey the law, whereas other parts of the tradition have believed that moral factors should not be part of the act of legal interpretation. *Id.* at x-xii. Neither, however, are essential components of the idea that law and morality are conceptually separate. See Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

moral goodness of law, properly so called.³³ If legal positivism is solely a conceptual claim about the conceptual separation of law and morality, then the virtual disappearance of the claim to which it stands opposed has made this version of legal positivism true but trivial. When legal positivism is understood as the ability to claim the existence of immoral human law in a nonmetaphorical sense, the contemporary obviousness of this claim appears sufficient to justify the charge that legal positivism particularly, and the natural law/positivism debate more generally, are not worth worrying about. If this is all there is to it, the legal positivists have won, and it is time for them to move on to other endeavors.

Yet perhaps a conception of legal positivism that allows its proponents to declare victory so easily is simply too thin or too epiphenomenal to be important. For in insisting on the importance of the conceptual separation of law and morality, most of the modern versions of legal positivism remain open to the possibility of the coextensiveness in practice of the domain of the legal with other domains of practical reason. Now, it may be true that coextensiveness in this sense would qualify as legal positivism if seen as a human choice rather than a conceptual necessity. Nevertheless, an account of law that fails to distinguish a legal system that is coextensive with the moral system in which it exists from a legal system pervaded by immoral norms is an account that does not appear to be doing much important work. A far more useful version of legal positivism, therefore, yet one that still retains the focus on the *sources* of law that is the hallmark of legal positivism, is one that focuses precisely on the existence (or not) of coextensiveness as an important distinction among legal systems and legal theories. The Ciceronian version of natural law may have dropped out of the debate because of its implausibility, but the original claim of legal positivism—that the nature of law is contingent on human decision and not morally or conceptually necessary—remains important even after the demise of Ciceronian natural law. This is so precisely because the positivist claim enables us to focus on the extent to which law does (or should) partake of the differentiated character that some contemporary positivists properly insist is conceptually compatible with the idea of law. But if few people these days deny this conceptual compatibility, the important question becomes not whether law can exist in this differentiated fashion, but instead whether it actually does, and whether it is or would be a good thing that it do so.

³³ Insofar as there is a contemporary carrier of this torch, it is probably Michael S. Moore. *E.g.*, Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188 (Robert P. George ed., 1992); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

B. Positivism as Limited Domain

If law and morality are conceptually distinct, it would be open for a society to recognize as its legal universe some set of grounds for legal decision that is not coextensive with that society's moral universe. It is the fact and not the logical possibility of this coextensivity—the truth or not of the claim that law is a *limited domain*—that gives us our alternative, and much more important, conception of legal positivism. So although some positivists have argued that the differentiation of normative domains is a necessary feature of all possible legal systems,³⁴ the more useful variant of the question explores not what might be the case for all possible legal systems, but rather the extent to which differentiation is a feature of some particular legal system.

After H.L.A. Hart, we think of the idea of differentiation in terms of a *rule of recognition*, for it is the rule of recognition that makes it possible for the legal system to recognize as valid law only a subset of what a society might recognize as valid (in a more attenuated sense of that term) social norms.³⁵ Yet Hart's reference to "rule" is misleading, because it suggests some set of criteria of recognition capable of formulation in rule-like fashion. In saddling the crucial idea of social recognition with the less plausible (in this context) feature of rule-ness, Hart's way of characterizing the nature of law's provenance appears an unfaithful depiction of the facts of legal life. In the not so distant past, for example, it was considered unacceptable for an English appellate court to cite to a living secondary authority.³⁶ Coke, Blackstone, Maitland, and Holdsworth were all acceptable and citable sources of law, but that was not merely because they had important things to say—it was also because they were dead. But then in 1945, in *Hannah v. Peel*,³⁷ and in 1946, in *Minister of Pensions v. Chennell*,³⁸ English appeals courts relied on the writings of Arthur Goodhart, who was at the time very much alive as the Professor of Jurisprudence at Oxford.³⁹ In doing so, the courts did not so much *change a rule*, except in an attenuated sense. Rather, they engaged in a previously less acceptable form of behavior, and, in so doing, put in force a gradual series of events that over the course of the next forty years produced a significant change in English *practice*.⁴⁰ The development of the norm that

³⁴ See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 51-52 (1979).

³⁵ H.L.A. HART, *THE CONCEPT OF LAW* 92-107 (1961).

³⁶ See *Union Bank v. Munster*, 37 Ch. D. 51, 54 (1887); see also S.H. BAILEY & M.J. GUNN, *SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM* 401 (1991) (explaining that the purpose of the convention was to guard against the possibility that someone cited as authority for a proposition of law "might change his or her mind").

³⁷ [1945] 1 K.B. 509 (Birkett, J.).

³⁸ [1947] 1 K.B. 250 (1946) (Denning, J.).

³⁹ *Chennell* [1947] 1 K.B. at 253; *Hannah* [1945] 1 K.B. at 511.

⁴⁰ See 26 HALSBURY'S LAWS OF ENGLAND ¶ 587, at 309 (4th ed. 1979).

living commentators are citable sources of law is best seen not in rule-like terms, but in terms of a change in practices.⁴¹ What Hart referred to as a rule of recognition, therefore, is better seen as a cluster of practices employed by legal insiders that, when taken together and acknowledged as legitimate by the larger society within which the legal insiders function, constitute a society's practices of legal recognition or, simply, its law.⁴²

One possibility, of course, is that, like English judicial practice prior to recognizing the authority of Goodhart, the recognitional practices of a legal system will refuse to recognize as law—and therefore as valid grounds for legal decision—certain sources that in other decisionmaking domains in that society would be well accepted. That something was done by a widely-respected former President, for example, is in many domains a good argument in its favor, but in an appellate court it would sound odd if a lawyer relied on Harry Truman as authority.⁴³ Insofar as sources accepted in the larger society are less accepted or not accepted in the legal domain, legal decisionmakers will almost inevitably find themselves reaching decisions other than the ones they would have reached were their sources of guidance not so constricted. Thus, if the practices of legal recognition are other than congruent with the practices of social recognition, legal decisionmakers will at times refuse to make use of sources that other social decisionmakers would feel free to use, and so will at times reach decisions other than the decisions that would be reached in other decisionmaking domains.

This idea of a limited domain of law, and thus of legal positivism as maintaining that law exists as a limited domain, is not only our conception of legal positivism, and the conception other legal theorists have implicitly adopted,⁴⁴ but it is the conception of legal positivism adopted by legal positivism's most prominent contemporary opponent, Ronald Dworkin. Consider, for example, Dworkin's use

⁴¹ On legal recognition as a practice rather than a rule, see Brian Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 8 (William Twining ed., 1986).

⁴² Implicit in the statement in the text is that law is a "practice" in the Wittgensteinian sense. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 182-86 (1991); STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 141-230 (1994); Dennis M. Patterson, *Law's Practice*, 90 *COLUM. L. REV.* 575 (1990) (reviewing KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (1989)). Nothing in this claim, however, is inconsistent with the possibility (the practice) of evaluating, describing, and criticizing law from a perspective external to law's practice. It is one thing to say that everything is a practice, but that incontrovertible observation leaves totally open the question of the specification of the domain within which we are to identify those practices.

⁴³ Some, we suspect, will resist this example. Yet for those who resist the example (or any similar one), it would be worthwhile to think about whether the example would have been resisted fifty years ago.

⁴⁴ See, e.g., Posner, *supra* note 11.

first of *Riggs v. Palmer*⁴⁵ and then of *Henningsen v. Bloomfield Motors, Inc.*⁴⁶ Although Dworkin is unnecessarily obscure in explaining why these cases are important to him, it is nevertheless true that the two cases are perfectly selected to make his point.

Take *Riggs*. Its importance lies precisely in the fact that under the Statute of Wills, as it existed and as New York courts interpreted it prior to 1896, this was not a hard case, but, doctrinally, quite an easy one. Elmer had been named as beneficiary in a properly executed will, and the testator had died.⁴⁷ According to the New York version of the Statute of Wills, Elmer was to inherit, and no existent legal rule, whether in a case or in a statute, said otherwise, even for cases like this in which the beneficiary had been the cause of the testator's death.⁴⁸ The case's importance, for Dworkin, thus lies in the fact that if law is limited to the domain of legal rules set forth in statutes and cases, and if the domain of law recognized by the rule of recognition is limited to the legal rules found in cases and statutes, then Elmer ought to inherit.⁴⁹

Of course Elmer did not inherit, because the New York Court of Appeals held that even the clear indications of pedigreed legal rules must give way to overriding legal principles.⁵⁰ Dworkin's point, therefore, is that the "model of rules" set forth by positivism is an erroneous account of the nature of law.⁵¹ His point is a good one, however, if and only if positivism is understood as explaining the nature of law in terms of a rule of recognition that recognizes only the rules found in cases and statutes. If positivism is committed to the idea of such a rule of recognition, then Dworkin is correct in maintaining that the claims of legal positivism are false.

As numerous commentators have noted, however, it is hardly inconsistent with the central claims of legal positivism that there could be a rule of recognition that recognized as law, and recognized as appropriate data for judicial decision, the domain of legal *principles*, such as the principle of "No one shall be permitted to profit by his own fraud"⁵² that produced the result in *Riggs*.⁵³ If the limited domain of law includes legal principles as well as the legal rules one

⁴⁵ 22 N.E. 188 (N.Y. 1889).

⁴⁶ 161 A.2d 69 (N.J. 1960); see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 4, at 22-45.

⁴⁷ See *Riggs*, 22 N.E. at 188.

⁴⁸ See *id.* at 189-90.

⁴⁹ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 4, at 23.

⁵⁰ *Riggs*, 22 N.E. at 190-91.

⁵¹ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 4, at 14-45.

⁵² *Riggs*, 22 N.E. at 190.

⁵³ See, e.g., NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 229-74 (1978); Richard Tur, *Positivism, Principles, and Rules*, in PERSPECTIVES IN JURISPRUDENCE 42 (Elspeth Atwooll ed., 1977).

finds in cases and statutes, then Dworkin's understanding of positivism as limited domain may be correct, but he has not, on the basis of *Riggs* alone, established that it is mistaken.

Enter *Henningsen*. Again, the applicable legal doctrine appeared to make *Henningsen* an easy case—*Henningsen* signed a waiver of warranty, and, at the time he did so, the legal rules existing in New Jersey made that waiver conclusive.⁵⁴ Moreover, unlike the “No one shall be permitted to profit by his own fraud” principle that decided *Riggs*, there was no *legal* principle that would have allowed the court to refuse to apply the “waivers of warranty are binding” rule. Still, the court did not apply that rule, setting it aside in favor of an unconscionability/inequality of bargaining power principle that at the time had no legal provenance in New Jersey law.⁵⁵ In doing so, the court did something that the New York Court of Appeals did not do in *Riggs*—it reached outside the limited domain of the law in order to set aside a rule that existed within that domain. *Henningsen*, therefore, represents a much stronger challenge to the conception of law as limited domain. For if law is a limited domain, then what the *Henningsen* court did must have been illegitimate. Yet if what the *Henningsen* court did was both legitimate and common, then to Dworkin this indicates that the picture of law as a limited domain is false.⁵⁶ If all socially (and not just legally) recognized principles are available to legal decisionmakers, and are available to defeat the effect of a crisp legal rule found in the cases, then the rule of recognition legal decisionmakers actually employ does not distinguish legal and nonlegal materials, and the limited domain conception of the domain of the legal, although conceptually imaginable, turns out to be empirically false.

Now, if legal positivism is not committed to the claim of extensional divergence between the domain of law and the domain of morality, then neither *Riggs* nor *Henningsen* is sufficient to establish the unsoundness of a positivist account of the nature of law. If all that legal positivism claims is that it is conceptually possible for law and morality to be distinct, then demonstrating that there is one legal system in which they are not distinct no more establishes the falsity of legal positivism than demonstrating that there are red cars establishes the falsity of the claim that cars are not necessarily red.

It is thus apparent that the positivism that Dworkin takes as his target—the limited domain conception of positivism—is different from the conception of positivism that focuses on the conceptual separation of law and morality, although the former presupposes the

⁵⁴ *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 73-75 (N.J. 1960).

⁵⁵ *Id.* at 95.

⁵⁶ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 4, at 28-45.

truth of the latter. If law and morality were not conceptually distinct, then the domains of the two could not possibly be incongruent. Although the limited domain conception of positivism is, in this sense, derivative or secondary, it is the only conception that puts forward an explanation of the socially differentiated features of law. When viewed as a philosophical claim about the conceptual separation of law and morality, neither legal positivism nor any of its negations offers any explanation or denial of what appears to be the political and social distinctiveness of the legal system as we know it. If both the existence and the nonexistence of this distinctiveness are compatible with the conceptual version of legal positivism, and if the version of natural law to which it stands opposed has few, if any, contemporary proponents, then the conceptual version of legal positivism is in need of an interesting question to which it provides an answer.

If, by contrast, we turn to the empirical version of positivism we describe as the limited domain thesis, or the differentiation thesis, then legal positivism seeks to explain, by recourse to the central positivist idea of a rule or practice of recognition, the phenomenon of law's seeming social, political, and normative differentiation. Now, it may turn out that this seeming differentiation is an illusion, which is what Dworkin maintains with reference to normative differentiation.⁵⁷ In addition, it may be that even if there is normative differentiation, the traditional positivist explanations for it are unsatisfactory. It is still difficult to maintain, however, that the empirical limited domain conception of positivism is irrelevant to the debates that concern us today. For as long as legal argument at least sounds different from political argument, as long as legal decisionmaking is structured differently from other forms of policymaking, and as long as the training and acculturation of lawyers diverges from that of other public decisionmakers, then the claim of law as a limited normative domain cannot easily be dismissed.

When legal positivism is seen as a claim about a limited domain—as a claim about the extensional divergence of the domain of law from other normative domains—it is somewhat misleading to think of *morality* as exhausting the domain of the nonlegal. Let us assume first that morality is not just a synonym for rationality, but is instead a subset of the full set of factors, some of them nonmoral, that might be used in making a public or private decision. If this is so, then the negation of the claim that law is a limited domain is the claim that legal decisionmaking looks not like moral decisionmaking, but like the decisionmaking that takes place in other public spheres.⁵⁸ Such

⁵⁷ See *supra* notes 44-56 and accompanying text.

⁵⁸ It is tempting to think of *legislation* as the obvious contrast, but legislation hardly exhausts the domain of the nonlegal, and the political context of legislation is not as pres-

decisionmaking certainly partakes of the moral, but is not exhausted by it, at least if we describe as “nonmoral” those empirical, political, and implementational factors that are often lumped together under the heading of “policy.” Consequently, it is plausible to take the negation of the limited domain conception of legal positivism not as morality *strictu sensu*, but rather as the larger conception of policymaking or public decisionmaking of which morality is a large but not the only part. If it turns out, therefore, that legal decisionmaking is differentiated from this larger form of decisionmaking—if there are norms, facts, and values that are relevant to policymaking but not relevant to law, and vice versa—then legal positivism in the limited domain sense will emerge as true, with the idea of the rule of recognition serving as the philosophical explanation of what is in fact the case. Alternatively, if it turns out, as both Melvin Eisenberg⁵⁹ and Richard Posner⁶⁰ have argued, that there are no norms, facts, and values relevant to policymaking that are not relevant to law, then the central claim of legal positivism will be false.

C. Sources

It is the central and persistent claim of legal positivism that the criteria for the existence of law—collectively, the rule of recognition—are source-based.⁶¹ Unlike the content-based criteria supporting the claims of natural law, law to the legal positivist is a function of where it comes from and not of what it says.⁶²

Having sketched two different versions of legal positivism, however, it is now possible to locate within each a claim about the nature of legal sources. Under the first conception of positivism—positivism as a rejection of the natural law claim about the conditions for legality in all possible legal systems in all possible worlds—the idea of a legal source is more figurative than literal, and largely a construct designed

ent in other nonjudicial institutions. The purest model of an unlimited domain is something like Solomonic wisdom, or the decisionmaking processes of the Islami *q'adi*, each of which may, in theory, use all of the norms then recognized in the society within which they operate. Perhaps this model is most closely approximated not by legislatures, but by certain executive or administrative policymakers within the area of their discretion, as when, for example, a state highway official is trying to set the speed limit on a winding rural road.

⁵⁹ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 14-26 (1988).

⁶⁰ RICHARD A. POSNER, *OVERCOMING LAW* 1-29 (1995) [hereinafter POSNER, *OVERCOMING LAW*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 220-28 (1991) [hereinafter POSNER, *PROBLEMS OF JURISPRUDENCE*].

⁶¹ This feature of positivism is stressed most prominently in the work of Joseph Raz. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970); Joseph Raz, *Legal Principles and the Limits of Law*, in RONALD DWORKIN AND *CONTEMPORARY JURISPRUDENCE* 73 (Marshall Cohen ed., 1983).

⁶² See THEODORE M. BENDITT, *LAW AS RULE AND PRINCIPLE: PROBLEMS OF LEGAL PHILOSOPHY* 8-10 (1978); Richard Tur, *Criminal Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW*, *supra* note 41, at 199-221.

to capture the idea of contingent human and social choice as the essential feature of lawness. If, for example, a society were to empower its legal decisionmakers to make decisions on the basis of their best all-things-considered moral or policy judgments, then the social decision to so empower its decisions would be the relevant social source, even though what emerged from that source was a domain of the legal that was indistinguishable from a larger moral or policy domain. Under this conception of a source, the source is at its core a decision. By locating the source of law in a social decision about what is to count as law rather than in source-independent and decision-independent substantive moral values, this version of legal positivism can lay its claim both to reject a strong version of natural law and, simultaneously, to be a source-based view of law.

Yet as we have argued, the limited domain conception of legal positivism, the conception we believe to be uniquely capable of posing the contemporarily important questions about the nature of law, is one that is concerned with the question whether the domain of legal decision is extensionally divergent from either the domain of policy decision or the domain of moral decision. With this as the question, however, the issue of the sources of law persists, but now in a much more literal sense. If it is the case that legal decisionmakers are "getting" the law from a limited number of sources—books published by the West Publishing Company, to take our running (and misleading) caricature as an example—then the idea of law as a limited domain will be true in the most literal of senses. If, by contrast, the domain of sources of law turns out to be coextensive with the domain of sources of decisionmaking generally used within a political culture, then the empirical claims of a limited domain conception of legal positivism will turn out to be false.

In locating this literal sense of sources within a limited domain conception of positivism, we do not suggest, our example of books published by the West Publishing Company notwithstanding, that the relevant informational unit is the book, in whatever form a "book" might take. For example, the "reporters" published by the West Publishing Company draw a clear distinction between materials issued by courts and materials, such as the headnotes and the keynumbers, prepared by the West staff. If it turns out that only the former and not the latter are included in the normative domain used by legal decisionmakers, then that domain will be even more limited.⁶³ Alterna-

⁶³ Consider the following familiar boilerplate:

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.
See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

This language, which is appended to every Supreme Court case that goes to "full" decision, is obviously designed to express the view that the summary is not law. But what is it to say

tively, if it turns out that legal decisionmakers base their decisions on materials found beyond the domain of books published by the West Publishing Company, then the domain of the law will be even larger.

Still, the focus on sources illuminates the fact that a source-based conception of law is necessarily *informational*. In making their decisions, legal decisionmakers rely on information about the existence of norms, and information about the existence of facts. If it turns out that the information set upon which legal decisionmakers rely is coextensive with the information set upon which other policymakers or decisionmakers rely, then this will tell us something of great importance about the nature of law. This discovery would not be sufficient to establish by itself the nondifferentiation or nondistinctiveness of law. It could be the case, after all, that legal decisionmakers, because of their training or skills or differentiated acculturation, or because of procedural differences in their decisionmaking mechanisms, drew different inferences from the same information set used by others, or because of their distinctive methods of reasoning manipulated the same information set in different ways, leading at times to different outcomes. Yet if lawyers do not think or reason differently from others, or if the procedures they employ make little difference to the outcomes they reach, then the lack of extensional divergence in information sets would be sufficient to establish the essential similarity between legal and nonlegal decisionmaking. And even if lawyers do think or reason differently from others—if they do or would process the same information set in a different way—their use of the same information set would be indicative of a substantial overlap between the legal and the nonlegal. Conversely, if it turns out that legal decisionmakers rely for their information on a truncated domain of information, we will have gone a long way towards explaining, even after the decline of claims of “thinking like a lawyer,”⁶⁴ what it is that makes law distinct, and what it is that makes the legal positivist claims of a limited domain of law not only highly plausible, but in fact correct.

Although the claim that law is source-defined and information-dependent is so conventional as to verge on the trite, we find it intriguing that examinations of legal information have so far been unconcerned with information as defining the boundaries of law, and, therefore, law itself. Even those scholars who have claimed that new

that it is not law? Similar questions arise in the context of unpublished opinions for which the issuing court prohibits subsequent citation. See generally William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) (presenting “an empirical assessment of the workings of the publication plans of the eleven United States Courts of Appeals during the 1978-79 Reporting Year” and analyzing the effects of such plans).

⁶⁴ Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

forms of information retrieval have transformed the nature of law turn out to be concerned almost exclusively with the categorization, recategorization, and accessibility of *legal* information, as conventionally understood, and with neither the very idea of the legal, nor the possibility that the very idea of the legal is itself an empirical claim whose truth is both contingent and information-dependent.⁶⁵ Having established, we believe, that, as a theoretical matter, the most useful conception of law is a claim of limited domain, and having established as well that the limited domain conception of law is, at least in part, an information-dependent conception, we now want to suggest that the central question of legal positivism has become less philosophical, and is in important ways a testable empirical hypothesis. Actually testing that hypothesis, however, must be left for another occasion.

II

LIMITED DOMAIN AS EMPIRICAL HYPOTHESIS: AMERICAN LEGAL THEORY AND LAW AS AN UNLIMITED DOMAIN

One function of the foregoing analysis, we believe, is a reorientation of the terrain of debate in contemporary legal theory. Under our conception of what is claimed by legal positivism, legal positivism's opponent is no longer natural law. Rather, it is the confluence of four different strands of twentieth century American legal theory—American Legal Realism, Ronald Dworkin's attack on the idea of "settled law,"⁶⁶ Critical Legal Studies, and so-called legal pragmatism. In one way or another, each of these perspectives seeks to deny that law is a limited domain, and each insists that the boundaries between law and nonlaw are either permeable or nonexistent. Under our reorientation, therefore, a central question of legal theory—perhaps *the* central question of legal theory—is the question of the truth of claims about law's differentiation. For this question, Dworkin, the pragmatists, the Realists, and Critical Legal Studies scholars all share a concern with challenging the differentiation of law, and thus all share a commitment to a position the denial of which is central to legal positivism.

Consider first some important strands of Legal Realism and Critical Legal Studies. Significant branches of each maintain that legal decisionmaking is substantially congruent with decisionmaking *simpliciter*, and that legal justification, which attempts to make legal deci-

⁶⁵ See, e.g., M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995); M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* (1989); Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615 (1995); Eugene Volokh, *Technology and the Future of Law*, 47 STAN. L. REV. 1375 (1995) (reviewing M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995)).

⁶⁶ See *supra* text accompanying notes 44-56.

sionmaking look more different from nonlegal decisionmaking than it in fact is, is best seen as a form of stylized and *post hoc* rationalization.⁶⁷ Under this account of legal decisionmaking, the inputs into such decisionmaking are not so different from the inputs into other forms of social or public decisionmaking, even though the official explanation of legal decisions may look different because of the social necessity of justifying judicial and other legal decisions in terms of law-looking sources such as cases or statutes.

This claim thus offers a twofold attack on the limited domain conception of law. First, it argues that what legal decisionmakers actually draw on in making their decisions is little different from what other decisionmakers draw on. Although Jerome Frank, for example, did not offer us a psychologized account of legislative or executive decisionmaking in the way he offered such an account of judicial decisionmaking,⁶⁸ it is plausible to assume that his account of how executives and legislators made decisions would not have been much different from his account of how judges made their decisions. Because Frank believed that deep-seated psychological drives about particular decisions were the overwhelming force behind judicial decisions, it is likely he believed much the same thing outside of the judicial realm. Put differently, by offering an account of the motivation behind legal decisionmaking that explicitly denied the importance of sources unique to the legal system, he was, in effect, denying the idea of legal decisionmaking as limited domain. Even when put in terms of policy rather than psychological motivations, as it was by other Realists,⁶⁹ or in terms of ideology, as is common within Critical Legal Studies,⁷⁰ the same structural feature recurs—the claim is that the sources on which judges actually rely, the real inputs into their decisions, are sources not unique to the legal system.

The second prong of the Realist attack is on the description of the available set of justificatory sources. Recognizing that social expectations require judges and other legal decisionmakers to justify their decisions in reference to law-looking sources, the Realists and their descendants have maintained that the stock of legal sources—cases, statutes, and the like—is sufficiently large that there exists law-like justifications to support virtually any result reached on grounds

⁶⁷ See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 3-47 (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518 (1986); Herman Oliphant, *Stare Decisis—Continued*, 14 *A.B.A. J.* 159 (1928).

⁶⁸ FRANK, *supra* note 67.

⁶⁹ See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (Univ. of Okla. Press 1985).

⁷⁰ See Kennedy, *supra* note 67, at 547-59.

that are not distinctively legal. The domain of legal justifications, therefore, is essentially unlimited in terms of its substance, and thus could provide the visible props for a domain of legal decisions that largely tracks the domain of nonlegal decisions.⁷¹

When recast in this way, the accounts of legal decisionmaking offered by some of the Realists and by some strands of Critical Legal Studies are only misleadingly described as claims of *indeterminacy*. More accurately, the claim is not that legal decisions can be anything at all, which is what the word “indeterminate” appears to suggest. Rather, it is that the determinants of legal decision are not substantially different from the determinants of other decisions, and (perhaps) that those who make legal decisions would likely reach the same outcomes even if the technical legal doctrines were otherwise, and even if those decisionmakers were situated in different and nonlegal institutions.

When the Realist/Critical Legal Studies account is understood in this way, the overlap with the Dworkinian picture of legal decisionmaking is apparent. Just as a central feature of American Legal Realism is at least a partial denial of the law/non-law distinction, so too is Dworkin concerned, as we have seen, with challenging the view that legal principles constitute a useful subset of the larger set of all principles that undergird a society’s political institutions. If positivism is a claim of limited domain, then what unites Dworkin, Realism, and Critical Legal Studies is their insistence on the factual falsity and normative undesirability of the limited domain account.

More recently, most versions of American legal pragmatism can be seen as making the same claim. Richard Posner, perhaps most prominently, has explicitly denied the understanding of law as an “autonomous discipline.”⁷² In addition, in his insistence on empirical investigation of hypotheses whose answers lawyers have traditionally sought in the law reports,⁷³ he has attempted both to broaden the methodological aspirations of lawyers, and at the same time to broaden the range of sources within which they seek to find answers to their questions. In this endeavor, he has numerous compatriots,⁷⁴ for a characteristic feature of modern American legal pragmatism is that for most of its practitioners the word “legal” is little more than a description of the arena—courts—in which certain decisions are

⁷¹ The *locus classicus* for this claim is Karl Llewellyn’s description of the canons of statutory construction. 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).

⁷² Posner, *supra* note 64, at 761, 766-77.

⁷³ POSNER, *OVERCOMING LAW*, *supra* note 60, at 81-108, 229-36; POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 60, at 220-28.

⁷⁴ See, e.g., Symposium, *Positive Political Theory and Law, Part I*, 68 S. CAL. L. REV. 1447 (1995); Symposium, *Positive Political Theory and Law, Part II*, 69 S. CAL. L. REV. 431 (1996).

made. What makes pragmatism pragmatic lies precisely in its unwillingness to constrict its field of vision in the service of the narrower perspective that we describe as law as a limited domain.

In identifying a common theme among Legal Realism, Critical Legal Studies, Dworkinian interpretivism, and American Legal Pragmatism, we do not mean to be excessively reductionist. There are important differences among these accounts, differences we do not deny. Yet the existence of differences is not inconsistent with the existence of important similarities, one of which is especially important for us: the denial of the legal positivist claim of law as a limited domain whose practices of recognition set boundaries not congruent with the practices of social or political recognition more generally. Furthermore, with the legal positivist claim understood as both a primary claim of limited domain and a secondary claim about the centrality of information sets to the primary claim, it is now possible to state what we have at times called the differentiation thesis, and which we will now designate as the Limited Domain hypothesis—legal decisionmakers, especially judges and the lawyers who argue before them, draw on an information set in making their decisions that is different from the information set upon which other policymakers or public decisionmakers draw.

When put this way, the hypothesis is less likely to be true or false *simpliciter* as it is to be more or less true. That variability is not one we view as problematic, even though it makes it unlikely that the hypothesis will be plainly true or plainly false. Nevertheless, it does supply us with a standard for viewing legal differentiation, and a conceptual vehicle we can use to imagine ways in which the question of differentiation—the question of law as a Limited Domain—can be tested.

III

TESTING THE LIMITED DOMAIN HYPOTHESIS

As we have suggested above, the claim about law as limited domain is not necessarily informational. We can identify (at least) four possible ways in which law might be nonsuperficially different. That is, we see four different ways in which features of the legal system might produce an extensionally different set of outcomes from the the set produced for the same problems or decisions in other decisionmaking domains.

The first of these forms of differentiation is the claim of differential methods of reasoning—thinking like a lawyer.⁷⁵ One possibility is

⁷⁵ For the classical view, see RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* (3d ed. 1977); RUPERT CROSS, *STATUTORY INTERPRETATION* (1976); see also WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* 232-91 (2d ed. 1982) (discussing the nature of reasoning in interpretation as applied to a particular case).

that lawyers are trained to reason in a way that is different from the way in which good reasoners in nonlaw disciplines and domains reason—for example, by relying heavily on analogy⁷⁶—and that these different methods of reasoning would produce, in some cases, different decisions, even with use of the same information base.⁷⁷ This claim—which we can name *methodological differentiation*—could (and should) be tested empirically. Indeed, for claims such as this, experimental methods might be especially revealing. For example, we can imagine giving groups of lawyers and groups of nonlawyers the same problem,⁷⁸ giving them the same information on which to make a decision, and setting the same procedures for making the decision. We could then see whether the array of lawyers produced results different from the array of nonlawyers, an outcome that would confirm the hypothesis that there is something about how lawyers think that justifies the claim of law as differentiated (and thus in some sense limited) domain. Although there might be factors that would make such testing difficult, mainly the difficulty of controlling the information that the lawyers actually used given that they might have information in their heads that the non-lawyers did not, we still think such a course of inquiry might be useful. Still, we do not pursue that inquiry further here, in part because that is not our agenda, and in part because we harbor some skepticism about the extent to which the idea of *legal reasoning* is sufficiently distinct to produce much difference in outcomes, controlling for all of the other variables that might produce different outcomes.⁷⁹

One of these other variables, the second possibility as a basis for differentiation, is what we can call *procedural differentiation*. The legal

⁷⁶ See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). It is important to note that the claim about the distinctiveness of analogical reasoning from other forms of reasoning might be false (if, for example, reasoning by analogy merely involved nonanalogical reasoning from extant, but unstated, premises), but that, even if true, is distinct from the claim that lawyers are better at it, or use it more often. Thus, the most sophisticated defense of the distinctiveness of reasoning by analogy, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 925-26 (1996), does not claim that this method is unique to, or even concentrated in, the legal system.

⁷⁷ In this context, we assume that “the same information base” means both the same facts and the same norms.

⁷⁸ Ideally, we would want to hold constant every other possible difference between the lawyer group and the non-lawyer group in order to control for differences other than differences in ways of thinking, although we acknowledge that it would be difficult to do so.

⁷⁹ As stated in the text, this is not (necessarily) a skeptical claim about the effect of formal law on an outcome, for “the effect of formal law” is ambiguous as between an informational and a methodological component. If the methods of lawyers and judges make little difference, it is still possible that the date on which they use their undifferentiated methods does make a difference, and that is the hypothesis that drives much of what we say here.

system, at least the part of a legal system that makes its decision in a court,⁸⁰ employs a tightly-controlled decisionmaking environment in which the method and order of presentation, the number of parties (typically two), the style of inquiry (adversarial), and the form of decision (often formal, often written, and usually required to decide for one side or another⁸¹), among many other aspects of adjudication, appear different from the procedures employed in other decision-making environments. It seems plausible to suppose that different procedures might produce different outcomes in some instances, controlling for differences in information, methods of thinking, and the like. Again, we can imagine testing this claim in an experimental setting. We could take two groups of decisionmakers, randomly selected among the larger group in order to control for differences in training and information, and then give the two groups the same problem and the same information base, but set different procedures for making a decision. Were we to conduct such an inquiry, it strikes us as hardly implausible that the differences in procedures would produce, in some cases, different outcomes. As with claims about methodological differentiation, therefore, we do not dismiss the possibility that procedural differentiation would produce outcome differentiation over a large enough set of instances. Although our primary focus on a different source of potential differentiation reflects our own interests and our own hunches, we do not deny the likelihood that procedural differences would make some difference, assuming that we properly controlled for all other variables.

The third possibility is that differences in acculturation between lawyers and nonlawyers might produce differences in outcomes. This claim of *cultural differentiation*—or differential socialization—would be the hardest to test, in part because it would be almost impossible to distinguish cultural differentiation from the factors that might produce or be produced by that differentiation, such as different views about procedures and different methods of thinking. So although we do not reject the possibility of a lawyer “culture” that is different from a nonlawyer culture, and although we encourage rather than discourage empirical investigation of the hypothesis that there *is* cultural differentiation and that it produces outcome differentiation in some number of cases, we suspect that if we controlled for differences in thinking, procedures, and information, what remained would be too

⁸⁰ It is important to stress that our focus on legal differentiation is a focus on the institutions that *might* be part of such a differentiated culture—lawyers, courts, judges, bar examinations, legal publishers, and law schools—and not on institutions—Congress, for example—that plainly make law even though they are not part of the potentially differentiated culture that we call the legal system.

⁸¹ See generally Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (exploring the logic and morality of giving reasons in making legal decisions).

thin to produce much of a difference. Again, this is bald assertion and not empirical investigation, but the plausibility of the assertion (at least to us) explains part of why we focus on the last of our four possibilities.

IV

LAW AS AN INFORMATIONAL ORDER

The last possibility is *informational differentiation*, or law as an *informational order*, as distinct from law as a methodological order, law as a procedural order, and law as a cultural order. As we have stressed, the possibility that law is substantially an informational order might explain a large amount of the idea of law as limited domain, and might connect particularly closely with the source-based focus of legal positivism. One way of framing the question of whether, and to what extent, law is a limited domain is to focus on the question of whether the information set upon which lawyers rely is different from the information set other decisionmakers employ. More simply, what do lawyers and judges know?

Without testing the hypotheses of methodological differentiation, procedural differentiation, and cultural differentiation, the nonexistence of informational differentiation could not negate the claim of law as a limited domain, although the existence of informational differentiation could establish the existence of law as a limited domain even if the other three hypothesized forms of differentiation turned out to be false or inconsequential. However, because we cannot focus on all four forms of possible differentiation simultaneously, we recognize the limitations and inconclusiveness of anything that might be gleaned from investigation of the hypothesis of informational differentiation in isolation. Still, the results of such an investigation might well be highly suggestive of possible conclusions, and, more importantly, *changes* over time in the degree of informational differentiation might indicate changes in the nature of law and the differentiation of the legal system regardless of the degree of differentiation—or lack thereof—with respect to the other factors we identify. Moreover, one strong reason for a focus on the information base of lawyers and judges is that here, arguably more than anywhere else, we are in the midst of dramatic changes with respect to precisely this question. One series of subhypotheses, therefore, is (1) that rapid changes in the technology, the economics, and the institutional structure of the delivery of legal information have wrought substantial changes in the way in which lawyers and judges get their information; (2) that these changes have in turn produced equally substantial changes not only in the quantity but in the very nature of the information base—the sources—on which legal decisionmakers rely; and (3) that these

changes in the nature of legal sources have in turn produced commensurate changes in the nature of law itself.

Although there are numerous ways in which the hypothesis of informational differentiation might be tested, all have their limitations, generally the limitations involved in trying to use observable data to assess unobservables such as knowledge. Still, legal decision-making differs from other forms of decisionmaking in that legal decisionmakers are often expected not only to justify their decisions with formal written opinions, but also to include within those opinions reference to the authorities on which the decisionmakers have relied. So, even though Langdell undoubtedly overstated the case in announcing that "printed books are the ultimate sources of all legal knowledge,"⁸² it is still likely true that the books used might provide better *evidence* of what lawyers know than books used in other disciplines would provide evidence of what the practitioners in those fields know. It is also likely true that books (and other information sources) *cited* will provide better evidence, especially if we are looking at trends and not at absolute quantities, of what sources lawyers actually use than citations in other fields would provide evidence of what their practitioners actually used. Although there are always risks of overstating the importance of the most readily accessible sources, the legal traditions of public explanation may provide some route to answering the question of whether what lawyers know and use is different from what other decisionmakers know and use, and whether what lawyers know and use is different from what lawyers have known and used in the past. All of this suggests, therefore, that a careful examination of changes in citation practice over time might be useful in examining the possibility that the degree of law's informational differentiation is different now from what it has been at some point in the past.

It is true, as the Realists and their successors insisted, that explicit reliance on formal legal sources might be consistent with actual reliance on uncited nonlegal sources.⁸³ So the absence of any change in explicit citation practice might still be consistent with change in the degree of actual reliance on nonlegal information. Moreover, the presence of a change in explicit citation practice might not demonstrate a change in the factors that actually drove the decision. It could be, for example, that there has been a change only in public expectations about what legal decisionmakers do, and not a change in what they in fact do. In that case, changes in public justification practice

⁸² C.C. Langdell, Speech, in HARVARD LAW SCH. ASS'N, REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING AT CAMBRIDGE, NOVEMBER 5, 1886, ON THE FIRST DAY OF THE CELEBRATION OF THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 48, 50 (1887).

⁸³ See, e.g., FRANK, *supra* note 67; Hutcheson, *supra* note 67.

might not say anything about changes in decisionmaking practice. Yet despite all of this, there still might be sound reasons for focusing on citation practice. Although it may be true that the absence of change in citation practice would be compatible with the presence of change in the information set on which legal decisionmakers actually rely, the reverse is highly unlikely. That is, if there is a change in citation practice, it would be a strong signal of a change in the actual information on which legal decisionmakers relied, because it is hard (but not impossible) to imagine legal decisionmakers going out of their way to increase their citation of, for example, "nontraditional" sources if those sources made no difference to their reasoning. So given our interest in the possibility of a weakening of the law/nonlaw distinction, and given the Anti-Realist presupposition that such a distinction has existed in the recent past, an increase in the extent of nonlegal citation would confirm such a weakening (and to that extent disconfirm the informational differentiation hypothesis, and, less directly, the Limited Domain hypothesis).⁸⁴

The citation practices of judges, the legal decisionmakers most likely to produce written opinions with citations, may thus be highly illuminating in possibly disconfirming the Limited Domain hypothesis, and consequently supporting the claim of the weakening of the law/nonlaw boundary. Even more likely to be illuminating, however, is the citation practice of lawyers attempting to influence judges. Judges might make their decisions for undisclosed reasons, but an undisclosed argument is unlikely to be effective. As a result, a change in the uses of authority by lawyers, especially in their briefs, could provide even stronger documentation of a change in the argumentative practices so constitutive of law itself. Again, therefore, a movement in lawyers' briefs in the direction of less reliance on materials published by the West Publishing Company and more reliance on other "nonlegal" materials would signal a change in just what it is to make a legal argument.

⁸⁴ Lurking beneath the claims we make here is a much larger range of issues about the value of what in some fields is called "discourse analysis." Much of legal scholarship—too much, we believe—is devoted to the analysis of the discursive practices of judges, and to a lesser extent practicing lawyers, at the expense of investigating the actual effects of legal decisions. Still, discursive practices might be important in two ways. If we see legal discourse as a dependent variable, we might try to determine, first, if there is a change in this variable, and, if so, what has caused it. Our inquiry here is devoted to this question, and to testing the hypothesis that there has been a change in the dependent variable that is citation practice, and that technological change is one of the causes. Alternatively, we might see legal discourse as an independent variable, and try to determine whether changes in the nature of legal discourse have produced changes in other aspects of legal practice. Our inquiry is not devoted to this issue, except to the extent that we speculate that in as discourse-soaked a practice as law, changes in the discourse are highly likely to produce changes in, among other things, the self-understanding of practitioners as to just what it is that they are doing.

In using a citation analysis as one method of testing the hypothesis of changes over time in informational differentiation, it would be necessary to employ a theoretically thin definition of "law." A useful model here is Ruth Gavison's idea of "first stage" law,⁸⁵ by which she means the materials that look legal in the most ordinary sense. Richard Posner's reference to "orthodox legal materials" is similar.⁸⁶ These conceptions start with the idea of law in its most routine and banal sense, and would then take "legal information" to include, for example, cases, statutes, constitutional provisions, law journals (the *Harvard Law Review* and the *Journal of Legal Studies*, but not *Philosophy and Public Affairs* or the *American Economic Review*), and textbooks and treatises that are plainly about legal doctrine (*Corbin on Contracts*, *Prosser on Torts*, *Wigmore on Evidence*, *Loss on Securities Regulation*, but not more general books about welfare policy, child custody, or foreign trade, even though members of the latter set would typically include discussion of legal matters). A conception of first stage law in this sense would also include most government documents, even those that are not explicitly about the legal system, in part because of the governmental source of those documents, and in part because such government documents have traditionally been part of the collection of larger law libraries. Similarly, and in light of related traditional understandings about constitutional and statutory interpretation, first stage law might, for experimental purposes, include material on legislative history as well as standard sources on constitutional history.

With this sense of the legal in hand, we speculate and hypothesize, but do not here test, that there have been recent and substantial changes in the information set upon which lawyers and judges, and also (but less importantly) legal scholars rely. If there have been such changes, and if nonlegal information (that is, information other than that described in the previous paragraph) occupies an increasingly larger subset of the set of information upon which legal professionals rely, then it may well be that the informational aspect of the Limited Domain hypothesis will be to that extent less true, and the idea of a distinct realm of the legal, commensurately weakened. However, if it turns out that nonlegal information is still a very small part of the information set upon which legal professionals rely, then it appears much more likely that law as a limited informational domain, and therefore as a limited domain *simpliciter*, continues to exist, and that

⁸⁵ Ruth Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 740-41 (1991); see also Ruth Gavison, *Comment to Ronald Dworkin, Legal Theory and the Problem of Sense*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 21 (Ruth Gavison ed., 1987) (criticizing Dworkin's "cavalier" dismissal of semantic theories of law).

⁸⁶ Posner, *supra* note 11, at 8-9.

our conception of the legal positivist claim is not only important, but is also true.

One strong reason to believe that the legal informational domain is becoming increasingly less limited is the likelihood that increased availability produces increased use, and thus, that the increased availability to lawyers and judges of nonlegal information has for that reason generated increased reliance on such nonlegal information. These changes in availability do not appear to be significantly reflected in the hard-copy collections of either public, private, or academic law libraries, few of which have changed substantially in the past fifty years with respect to their collections of nonlegal materials. Our informal surveys and personal observations lead us to believe that law libraries have broadened over the years, but only slightly. Most larger law libraries—academic, private, and governmental—if seen only as physical spaces containing hard-copy books and periodicals, have somewhat more in the way of nonlaw materials than in the past, but still remain dominated by books published by the traditional legal publishers and by the Government Printing Office. This domination is especially noticeable in law firm libraries and smaller court libraries, where there appears to have been little recent change, and where the presence of nonlegal materials remains quite small.

When we add the computer to the mix, however, the picture changes dramatically. On-line catalogs have made full university collections, as well as the collections of other universities, far more available to the person physically standing in the law library. This phenomenon, however, has little relevance to practicing lawyers and judges, and it would be a mistake to emphasize it excessively. Much more importantly, there has been a dramatic change in what is available to the typical LEXIS or WESTLAW subscriber in a law firm, a court, or a government agency. Initially, such services merely duplicated, at least in terms of databases, although not in terms of search engines and search strategies, what was available in the hard-copy law library. The earliest versions of WESTLAW, for example, provided only the databases that one could otherwise purchase in hard copy from the West Publishing Company. This has changed dramatically over the past ten years, however, and there has been an accelerating increase in the availability of nonlegal sources through the traditional legal services. These include local and national newspapers, nonlegal periodicals, a much larger range of government documents, transcripts of television and radio programs, nonlegal academic journals, and much more.⁸⁷

⁸⁷ See LEXIS-NEXIS DIRECTORY OF ONLINE SERVICES (Lorraine Gongla-Coppinger ed., 1995); ROSALIE MASSERY SANDERSON, BEYOND LEGAL INFORMATION: SEARCHING DIALOG ON WESTLAW: A GUIDE FOR LAW STUDENTS (1993). The Winter/Spring 1996 edition of the

This increase in the availability of nonlegal information has been assisted by structural and economic changes in the legal information industry. The West Publishing Company is now part of the Thomson publishing conglomerate, which also owns the Lawyers Co-operative Publishing Company (ALR, AmJur, etc.), Bancroft-Whitney, and RIA (the Research Institute of America, which publishes tax materials and which had previously acquired Prentice-Hall). Reed-Elsevier, a Dutch-based and informationally diverse publishing conglomerate, not only owns LEXIS-NEXIS, but also Butterworth's, Michie's, and half of Shepard's Citations. Kluwer, another Dutch-based company, has acquired the legal publishing division of Little, Brown as well as Commerce Clearing House to complement its stable of scientific, technical, and academic publishing enterprises. Furthermore, Times-Mirror, which started as the *Los Angeles Times* but is now much more, includes within its portfolio of enterprises both Matthew Bender and the remaining half of Shepard's Citations. As a consequence of these recent mergers and acquisitions, all of the major American legal publishers are now part of enterprises with a strong financial interest in making their own other materials, mostly nonlegal, available to lawyers and judges, and are now part of enterprises whose methods of information delivery are likely, for reasons including, but not limited to, the economies of scale, to put pressure on possibly economically inefficient barriers between the legal and the nonlegal materials they publish.

What all of this means, therefore, is that in many ways it is now "easier" to gain access to nonlegal materials than it was even in the recent past. Bringing up such materials on a screen is easier than trekking over to another library, and purchasing computer access to such materials as part of a package is easier than engaging in separate inquiries into availability and separate contracts for such materials. Even without the Internet, which increases by several orders of magnitude the phenomenon we identify, the computer has dramatically increased the availability and ease of accessibility of nonlegal materials. Nor is there reason to believe that the speed of change is decreasing, and the growing comfort of lawyers in using such materials will likely produce further acceleration. As a consequence of all of this, it is both demonstrable and uncontroversial that nonlegal materials are now far more available to lawyers and judges, at virtually no increase

WESTLAW DATABASE LIST runs to 238 pages of text, not including the index, and has, for example, 265 databases covering nonlegal newspapers and related news sources, 41 databases on public filings, and 826 databases from nonlegal magazines, newsletters, trade publications, and news services, including such decidedly nonlegal databases as *Idaho Farmer*, *Footwear News*, *Baseball Weekly*, *Screen Digest*, *Ward's Auto World*, and transcripts from *Rivera Live* and *Eye to Eye with Connie Chung*. SONDRÁ J. LAMBERT, WESTLAW DATABASE LIST (Winter/Spring 1996 ed.).

in cost (defined expansively, to include time and effort as well as monetary price) than was the case even ten years ago.

Availability, however, does not necessarily translate into use. Yet if there *has* been an increase in use, it seems highly plausible to suppose that increased availability provides a large part of the causal explanation. In fact, at least based on our preliminary examination of Supreme Court citation practices,⁸⁸ there has been a substantial change in levels of use of nonlegal information. However, an inquiry into availability cannot substitute for an inquiry into use, and that is the primary purpose of our investigation of citation practices. Although there have been some studies of court citation practices,⁸⁹ none have focused on nonlegal materials, and only one⁹⁰ has been recent enough to make that a realistic possibility, because it is clear that citation to nonlegal materials was virtually nonexistent for most of the period covered by the existing studies. Yet what an analysis of judicial opinions confirms is that the changes in recent years have been dramatic. For the Supreme Court of the United States, we counted (rather than sampled) citations to nonlegal materials for the 1950, 1960, 1970, 1975, 1980, 1985, 1990, 1991, 1992, 1993, 1994, and 1995 Terms of the Court. This analysis, found below in the Appendix, makes it clear that there was no significant increase in the Court's citation of nonlegal sources from 1950 through 1990, but that, starting in 1991, there has been a substantial and continuing increase in the Court's citation of nonlegal sources. In addition, our preliminary and informal examination indicates that there appear to be similar changes, although at lower levels and with some time lag, in the United States Courts of Appeals, the United States District Courts, the California Supreme Court, and the New York Court of Appeals.

⁸⁸ See Appendix.

⁸⁹ See, e.g., Wes Daniels, "Far Beyond the Law Reports": *Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940, and 1978*, 76 L. LIBR. J. 1 (1983); Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121 (1995); John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954); John Henry Merryman, *Toward A Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977) [hereinafter Merryman, *Toward A Theory of Citations*]; William L. Reynolds, II, *The Court of Appeals of Maryland: Roles, Work and Performance, Part II: Craftsmanship and Decisionmaking*, 38 MD. L. REV. 148 (1978). According to Merryman's studies, citation to nonlegal authority was insignificant through 1970. Merryman, *Toward A Theory of Citations*, *supra*, at 405-15. California will be one of the states analyzed, in part to build on the Merryman studies. This is consistent with the results Daniels, Friedman et al., and Manz obtained. Daniels, *supra*, at 18-20; Friedman et al., *supra*, at 810-17; Manz, *supra*, at 137-46.

⁹⁰ See Manz, *supra* note 89.

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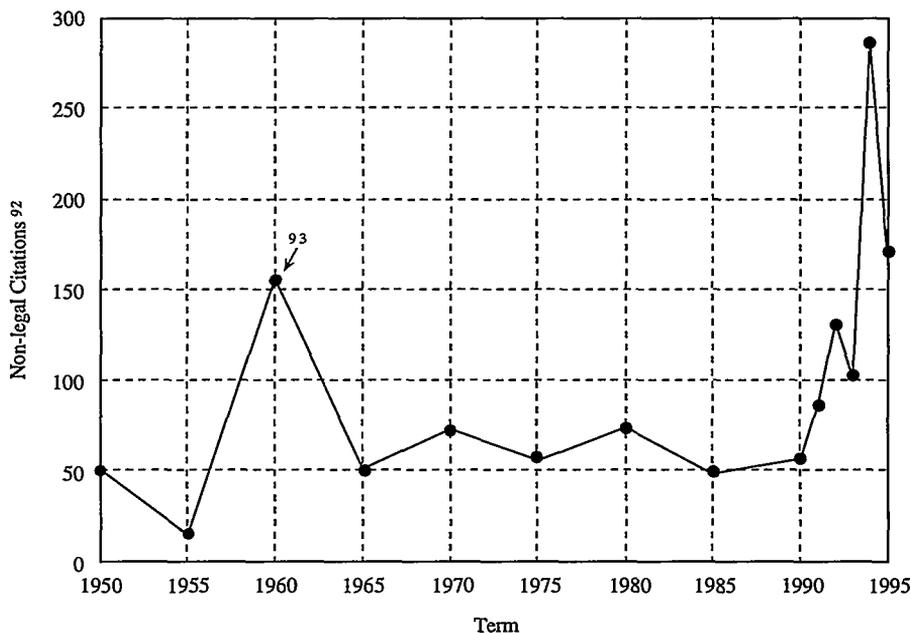
CONCLUSION: THE DELEGALIZATION OF LAW

Although the rate of change in citation of nonlegal materials, both for the Supreme Court and for the lower courts, has been much slower than changes in availability would predict, the preliminary observation appears to confirm a larger trend towards the increasing pervasiveness of nonlegal sources within the universe of information that legal actors use. If this is so, then it might be seen as either a dependent or independent variable. If seen as a dependent variable, then we might hypothesize that changes in the use of nonlegal information have been substantially caused by increased availability, and that the increased availability is itself the causal product of the economic, technological, and institutional changes we have discussed here.

If the increased use of nonlegal information is seen as an independent variable, then questions arise about what this means for the nature and practice of law. Will it produce an even broader manifestation of the phenomenon we might call the *delegalization of law*? If so, what are the implications for the symptoms of law's autonomy, including the content of bar examinations, the curricula of law schools, and the rhetoric of legal argument? Although there are examples in which nonlegal information has influenced specific legal doctrines,⁹¹ we suggest a broader possibility. Informational changes will likely be insufficient to uproot centuries of law as a limited domain, but the forces of informational integration may be sufficiently powerful, and the nature of law sufficiently information- and source-dependent, that changes in the nature of legal information will produce changes in the nature of law. Our goal here has not been to examine the empirical dimensions of this claim, nor to forecast the future. We have tried to recast one of the central and enduring questions of legal theory, and to recast it in a way that provides the conceptual resources for a serious empirical inquiry. That inquiry, however, must wait for another day.

⁹¹ See, e.g., Richard Edelin Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49, 80-101 (1979); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988).

APPENDIX
U.S. Supreme Court Opinions, by Term



⁹² Non-legal citations consisted of secondary materials other than cases, constitutional provisions, legal treatises, law reviews, governmental documents, and standard compilations of legislative and constitutional history. Thus, the set of non-legal citations consists largely of citations to history, political science, economics, and other non-legal academic journals, to newspapers and popular periodicals, to dictionaries and encyclopedias, to books of history, politics, and the like, and occasionally to poetry, plays, and literature. Although the number of pages increased over the relevant period, the trend is roughly the same if non-legal citations are measured per page rather than absolutely.

⁹³ Most of the "spike" is explained by *McGowan v. Maryland*, 366 U.S. 420 (1961). *McGowan* contained 53 citations to secondary materials. Without *McGowan's* influence, the number of citations to non-legal sources for this period would fall from 156 to 103.