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*Erratum*

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ERRATUM TO: IMPLICATIONS OF INDETERMINACY:  
NATURALISM IN EPISTEMOLOGY AND THE PHILOSOPHY  
OF LAW II

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Owing to technical failures, this article was originally published with typographical errors. The correct text is below.

**ABSTRACT.** In a circulated but heretofore unpublished 2001 paper, I argued that Leiter's analogy to Quine's 'naturalization of epistemology' does not do the philosophical work Leiter suggests. I revisit the issues in this new essay. I first show that Leiter's replies to my arguments fail. Most significantly, if – contrary to the genuinely naturalistic reading of Quine that I advanced – Quine is understood as claiming that we have no vantage point from which to address whether belief in scientific theories is ever justified, it would not help Leiter's parallel. Given Leiter's way of drawing the parallel, the analogous position in the legal case would be not the Legal Realists' indeterminacy thesis, but the very different position that we have no vantage point from which to address whether legal decisions can ever be justified. I then go on to address the more important question of whether the indeterminacy thesis, if true, would support any replacement of important legal philosophical questions with empirical ones. Although Ronald Dworkin has argued against the indeterminacy thesis, if he were wrong on this issue, it would not in any way suggest that the questions with which Dworkin is centrally

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concerned cannot fruitfully be addressed. The indeterminacy thesis is a bone of contention in an ordinary philosophical debate between its proponents and Dworkin. Of course, if the determinacy thesis were true, no one should try to show that it is false, but this triviality lends no support to the kind of replacement proposal that Leiter proposes. I conclude with some general reflections on naturalism and philosophical methodology.

## I. INTRODUCTION

Quine's famous paper 'Epistemology Naturalized' (EN) apparently proposes replacing epistemology with psychology. In a series of papers and a recent book (1997, 1998, 2001, 2007a), Brian Leiter argues that the American Legal Realists (the Legal Realists) are fruitfully understood as making an analogous argument for replacing part of legal philosophy with the empirical study of how judges make decisions. In a circulated but heretofore unpublished 2001 paper, 'Naturalism in Epistemology and the Philosophy of Law' (hereafter *Naturalism I*), I argued that the analogy does not do the philosophical work Leiter suggests.<sup>1</sup> I have agreed to publish *Naturalism I* in this Special Issue of *Law and Philosophy*. As much time has gone by, I revisit the issues in this new essay.

I want to begin by noting that Leiter's choice of a model for his replacement proposal is puzzling for several reasons. First, Quine's arguments are notoriously inadequate to support a proposal to abandon normative epistemological questions.<sup>2</sup> Second, normative epistemology has flourished since EN.<sup>3</sup> In light of this work, it is hard to take seriously a suggestion that normative epistemology cannot be fruitfully pursued. (Of course there are thinkers who find all philosophical work sterile, but specific replacement proposals

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<sup>1</sup> The original title of the conference paper was 'Unnatural Proposal: Indeterminacy as a Motivation for the Naturalization of Legal Philosophy', but I use here the title under which it is now being published.

<sup>2</sup> See, e.g., Kim (1994), Putnam (1983). See also my discussion in *Naturalism I*, section III.

<sup>3</sup> For one collection of recent work, see the two-part special issue of *The Journal of Philosophy*, 'Epistemic Norms' (Collins and Peacocke 2008). Many more examples can be found by consulting recent issues of philosophy journals that publish work in epistemology.

such as Quine's and Leiter's are superfluous for such thinkers, and I assume throughout that they are not the relevant audience.) In fact, as others have noted, despite what he says in EN, Quine continued to work on normative epistemological issues and denied that he ever intended to suggest that such issues should be abandoned.<sup>4</sup> Third, though there has been much talk of 'naturalistic epistemology', what goes by that name tends to be mainstream philosophical work that is informed by and engaged with empirical science, but is centrally concerned with normative issues such as the nature of epistemic justification. As Kim (1994, p. 48) points out in his well-known response to EN, contemporary 'epistemological naturalism' has more in common with Cartesian foundationalism than with what Quine ostensibly proposes in EN.<sup>5</sup>

Finally, although philosophers can certainly benefit from empirical findings about the way in which we form beliefs, such empirical findings themselves do not address the philosophical concerns of epistemology. In general, naturalism in philosophy has led to discussion of how to understand the place of normativity within a naturalistic outlook. For example, are normative properties natural properties? Such questions are not addressed by the natural sciences.

Turning to law, I see no basis for abandoning philosophical questions about the relation between the determinants of the content of the law – the *grounds of law* – and the content of the law. Projects addressing such questions are flourishing.<sup>6</sup> And, as I argue in the original paper and

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<sup>4</sup> In Quine and Ullian (1970/1978), published shortly after EN, the co-authors make the point that the foundationalist project of deriving the truths of nature by self-evident steps from self-evident truths together with observation is hopeless. They react as follows (p. 65): 'It is now recognized that deduction from self-evident truths and observation is not the sole avenue to truth or even to reasonable belief. They then go on to sketch five norms or 'virtues' for evaluating hypotheses. Quine (1990, p. 19) is explicit that his repudiation of 'the Cartesian dream of a foundation for scientific certainty firmer than scientific method itself' does not involve a rejection of 'the normative element, so characteristic of epistemology'. He goes on to briefly describe some normative concerns of naturalized epistemology and refers to Quine and Ullian (1970/1978). Putnam (1983, p. 244) notes that, in conversation, 'Quine has repeatedly said that he didn't mean to 'rule out the normative''.

<sup>5</sup> Consider, for example, the essays in Kornblith (1994). Leiter (2007a, p. 35) himself distinguishes 'Replacement Naturalism' from 'Normative Naturalism' and recognizes that the latter, which is fully concerned with normative questions, 'has dominated philosophical research in the area'. Leiter characterizes normative naturalism as having the goal of 'regulation of practice through promulgation of norms or standards' (p. 35). In my view, the work in question is better understood as having the goal of *understanding* justification and other epistemic notions, but for present purposes what matters is that the dominant work in naturalized epistemology concerns normative questions.

<sup>6</sup> For some haphazardly chosen recent examples, see Greenberg (2011a, forthcoming), Marmor (2011), and other essays in Marmor and Soames (2011), Raz (2009), Shapiro (2010), Soames (2009). See also the essays in Adler and Himma (2009), Coleman (2001), Hershovitz (2006).

elaborate below, the Legal Realists' indeterminacy thesis does not suggest otherwise. Indeed, it cannot, because the thesis depends on the success of a particular philosophical answer to such questions. Just as the psychological study of belief formation does not itself yield an understanding of justification, the empirical study of judicial decision-making, while possibly of great relevance to philosophers, does not itself address the questions that philosophers seek to answer. If one is interested primarily in prediction, perhaps sociology or political science is the way to go. But prediction of judicial behavior is not a significant philosophical concern. As I will argue, the relevant legal philosophers are centrally concerned with understanding the way in which the grounds of law determine the content of the law.<sup>7</sup>

In writing my original paper, in a concessive spirit and in light of my – widely shared – view that Quine had not made a good case that normative questions in epistemology should be abandoned or replaced, I decided to set aside, for the most part, the merits of Quine's replacement proposal. Rather than belaboring the deficiencies of that proposal, I focused on Leiter's analogy itself, which struck me as intriguing yet wrongheaded. For example, I was intrigued by the idea of working out the analogue in philosophy of law to Cartesian foundationalism in epistemology. Why, for instance, should we think that the claim that the law is indeterminate is the analogue in the philosophy of law to the failure of Cartesian foundationalism in epistemology? In examining the epistemological side of the analogy, I focused on what a genuinely naturalistic Quine would have proposed rather than what Quine intended, thus sidestepping the notorious exegetical problems presented by the glaring mismatch between Quine's arguments and his (apparent) proposal.<sup>8</sup>

Given the serious problems with Quine's replacement proposal, even if the analogy were successful, it would be far from clear that it would support any kind of replacement proposal. For this reason, the

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<sup>7</sup> For discussion and elaboration of this way of characterizing central philosophical questions about the nature of law, see Greenberg (2004, 2011a).

<sup>8</sup> To save words, I will generally omit the qualification 'apparent'. As it happens, Johnsen (2005) has subsequently offered an exegesis of EN that is substantially similar to my account. On my account, a genuinely naturalistic Quine would reject the foundationalist attempt to specify the standards of justification to which scientific theories should be held and instead would seek a philosophical account of the standards of justification internal to scientific practice. A naturalist would not abandon the possibility that scientific theories can be justified. On Johnsen's account: 'so far is [Quine] from proposing to abandon the normative that he is proposing instead to discover the norms that govern theorizing by discovering the norms that we conform to in our theorizing' (2005, p. 88).

more important question is whether, on the merits (i.e., setting aside the analogy), the Legal Realists' indeterminacy thesis warrants any kind of replacement of philosophical questions with empirical ones. I therefore take this opportunity to address the issue squarely. I first reply to Leiter's response to my original paper, and then set aside the analogy and turn to the question of whether the indeterminacy thesis, if true, would support any replacement of philosophical questions with empirical ones. I conclude with some general remarks about naturalism and philosophical methodology.

## II. LEITER'S REPLIES

Leiter (pp. 112–117) makes three main points in response to *Naturalism I*.<sup>9</sup> First, he suggests that my characterization of Quine's argument as a *reductio ad absurdum* is incorrect. Second, he disputes my claim that the Legal Realists' indeterminacy thesis is an indictment of legal reasoning and my related claim about the lack of parallel between that thesis and Quine's basis for rejecting Cartesian foundationalism. Finally, he suggests that my characterization of the appropriate naturalistic lesson of the failure of foundationalism in epistemology is misleading because of 'an important ambiguity in the notion of 'justification'' (p. 116). I will take these points in turn.

Leiter's (p. 114) suggestion that I have mischaracterized Quine's argument as a *reductio* is based on his reading of an introductory passage in *Naturalism I*. In this passage (2011c, p. 4), I preview my argument that, because the indeterminacy thesis holds that one judicial decision cannot be justified over others, the appropriate parallel – on the epistemological side – to the indeterminacy thesis would be the thesis that we cannot be justified in believing one scientific theory over other competing ones. But, I argue, that thesis is not one that a naturalist should hold. The lesson of the failure of Cartesian foundationalism should be understood not as the thesis that evidence cannot justify belief in scientific theories, but as the thesis that the foundationalist project of providing a foundation for science from outside of science is misguided. What Quine should be

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<sup>9</sup> All page references to Leiter are to his 2007 book unless otherwise specified. As I discuss in note 14, his book includes a fourth response, which he has more recently abandoned.

understood to reject is not the possibility of justified belief in scientific theories, but rather the foundationalist's understanding of what kind of justification scientific theories require. I characterize this reaction to the acknowledgment that we cannot derive scientific theories by self-evident steps from certain foundations as 'in effect' a *reductio* of the foundationalist project.<sup>10</sup>

Leiter (p. 114) claims that my characterization reveals a misunderstanding of Quine because, on the standard account of Quine's argument, there is no mention of a *reductio*. Instead, Leiter says, Quine argues against foundationalism by showing that its premises are false.

Leiter simply misunderstands my point here. I do not suggest that Quine argues by *reductio* that it is impossible to carry out the foundationalist project of establishing scientific theories as certain. (Indeed, Quine is not really concerned to argue for this impossibility – as he recognizes (1969, pp. 71–72, 75), it has been widely understood since at least Hume.) The question that I was addressing in the passage Leiter quotes is *what conclusion to draw from this impossibility*.

In describing Quine's argument as 'in effect' a *reductio*, I was merely making the point that, from the recognition that our beliefs in scientific theories cannot be logically deduced from sense data, Quine does not conclude that those beliefs are not justified. Instead, he rejects the foundationalist program including its ideal of justification.<sup>11</sup>

After sketching his analogy, Leiter turns to his second response (p. 114): 'There is certainly neither an 'indictment of science'... nor an indictment of law, and I did not claim otherwise.... There is, however, an indictment of the philosophical practice'. I do not, of course, suggest that the failure of foundationalism involves any indictment of science. On the contrary, my point is that, given the way in which Leiter has set up the parallel, the true analogue of the indeterminacy thesis is the thesis that there is no justification for

<sup>10</sup> See also *Naturalism I* (pp. 431, 441–442, 445–447).

<sup>11</sup> The claim that scientific theories are never justified is not one that most philosophers would even consider drawing from the recognition that scientific theories cannot be logically deduced from sense experience. In the original paper, I bother to address that claim only because, given the way Leiter sets up the analogy, it is the analogue of the indeterminacy thesis. Quine certainly does not explicitly consider the claim, presumably because he thinks it is so obvious that it is not the conclusion to draw. Instead, he rejects the whole philosophical project, including its ideal of justification. Kornblith's (1994) account describes Quine as reacting to the failure of foundationalism by rejecting not only the foundationalists' ideal of justification, but also by rejecting the questions that the foundationalists were asking. This rejection of the question counts as a *reductio* in the informal sense in which I am using the term.

believing one scientific theory rather than another.<sup>12</sup> That thesis is not the appropriate naturalistic understanding of the failure of foundationalism, for it would be an indictment of science. Correspondingly, I will argue immediately below, the Legal Realists' indeterminacy thesis is an indictment of law. In sum, given Leiter's parallel, he is wrong that the Legal Realists' indeterminacy thesis is the analogue of (the appropriate naturalistic understanding of) the failure of foundationalism. (See *Naturalism I*, Figs. 1 and 2.)

In exploring my argument, Leiter notes that I had suggested that the proper analogy to the rejection of foundationalism would be the conclusion that the argument for the indeterminacy thesis rests on external standards of justification more demanding than those *internal* to law. My point was not that the Legal Realists took themselves to be relying on standards external to law, but that the analogue of the conclusion that the foundationalists' standards of justification are the wrong standards by which to evaluate scientific theories would be the conclusion that the Legal Realists' standards are the wrong standards by which to evaluate whether the grounds of law determine a right answer to a legal question.

Leiter goes on to explain that the Legal Realists' arguments in fact rely on 'the very ways in which lawyers and judges actually handle precedents and statutory materials' (p. 115). Here, Leiter seemingly concedes my point that the Legal Realists' arguments are not parallel to the Quinean critique of foundationalism. Quine did not claim that science fails to live up to its own standards. But, according to Leiter, the Legal Realists did show that law does not live up to its internal standards:

The Realist arguments show... that legal reasoning does not always live up to the foundationalist ideal it sets itself. This is an ideal legal reasoning sets itself precisely in the sense that... courts defend their judgments as required by the applicable legal reasons, not as a non-legal choice among two or more legally defensive [sic] outcomes (p. 115).

He continues: 'The standards of justification exploited by the Legal Realists... are precisely those internal to legal reasoning' (p. 115).

These claims certainly suggest an indictment of our current legal practice. If they are correct, judges in a substantial proportion of litigated cases are either systematically confused or deliberately

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<sup>12</sup> Except as otherwise noted, I will assume Leiter's way of drawing the analogy throughout, and will generally not keep reiterating this qualification.

deceiving the public. And, to put it in Leiter's words, the law fails to live up to the ideal that 'legal reasoning sets itself'. How could it not be an indictment of law that it fails to live up to its own standards?

After these apparent concessions, Leiter tries to avoid the conclusion that they undermine his analogy (p. 115):

Appellate decisions do, indeed, lack one kind of justification, the kind that would be supplied if the legal reasoning were rationally determinate. But – *and this is key* – this is not, for the Legal Realists, an indictment of adjudication, since they do not... think such determinacy is necessary for adjudication to be a defensible and justified practice.

First, this response concedes the point made above: the Legal Realists (purport to) show that legal reasoning fails to live up to its own standards. By contrast, there is no suggestion that Quine shows that science fails to live up to its own standards. This disanalogy is critical because, on the reading of Quine developed in *Naturalism I*, what Quine rejects is precisely the attempt to provide an external foundation for science; there is no analogue in the case of the Legal Realists.

Second, even if the lack of 'rational determinacy' is not a bad thing in itself, Leiter's response misses the point that it is an indictment of adjudication that it sets itself a standard of rational determinacy that it fails to live up to. Perhaps there would be nothing wrong with a legal system in which judges did not claim to justify legal decisions on legal grounds. But, given that judges in our legal system claim that their decisions are legally required, it would be an indictment of our legal system if those claims cannot be true. It is surely not a good thing if judges are systematically confused or deceitful.

Third, my sense is that the Legal Realists were critical of legal reasoning and legal education. But I defer to Leiter's much more informed judgment. (I suspect that the Legal Realists would at least have agreed that legal reasoning's failing to meet its own standards is not a good thing.) More importantly, it is not clear why the Legal Realists' point of view should be the relevant one in judging the analogy. By Leiter's own account, legal reasoning fails to meet the standard it sets itself (and the standard in question – deciding cases according to law – is one that many of us accept).<sup>13</sup>

<sup>13</sup> Just to be clear, all of this is on Leiter's assumption that the Legal Realists' account of the content of the law is correct. My own view is that the Legal Realists established no indictment of legal reasoning; rather, the Legal Realists' account is inadequate and implies much more indeterminacy than in fact obtains. See section III.

Leiter goes on to suggest that my argument for the disanalogy gains plausibility from an ambiguity in the notion of justification:

The failed foundationalist program would have *justified* science in the sense of vindicating its special epistemic standing in *epistemic terms*. The standards of justification ‘internal to science’ do no more than set the standards of evidence and inference for accepting or rejecting particular scientific hypotheses and theories – in this regard they are just like the legal reasons whose indeterminacy the Realists diagnose.<sup>14</sup>

In the first place, I agree with the parallel Leiter draws in the quoted passage between the standards internal to science and ‘the legal reasons whose indeterminacy the Realists diagnose’. But this parallel supports my argument. Precisely *because* the standards of justification internal to science are, in the relevant respect, just like the legal reasons whose indeterminacy the Legal Realists (purport to) diagnose, the analogy doesn’t hold up. Quine in no way impugns the way scientists use evidence to support scientific theories, but the Legal Realists precisely impugn the way in which judges use legal reasons to support legal decisions. (Matters are slightly confusing because we are taking up the Legal Realists’ point of view here. To clarify: the Legal Realists *took themselves* to be relying on standards internal to law, and that is an important way in which their indeterminacy thesis is not parallel to the failure of foundationalism. At the same time, I believe that the Legal Realists’ account of the way in which the determinants of legal content determine the content of the

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<sup>14</sup> p. 116 (first full paragraph). After making the point quoted in the text about the Legal Realists’ not thinking that the indeterminacy of legal reasoning is an indictment of adjudication, Leiter steps back and suggests in one paragraph that where I went wrong was by running together legal justification with moral justification (pp. 115–116). Leiter now tells me (personal communication) that he no longer thinks that this suggestion was correct. I agree with him that I did not confuse legal and moral justification. Given his disavowal of the suggestion, I will address it only in this footnote.

My concern throughout the paper, like that of Leiter, was with legal justification. So, to focus on the passage he quotes in the now disavowed paragraph, the reason that the epistemological parallel to the legal indeterminacy thesis would be the conclusion that scientific theories could not be justified is that the epistemological parallel to the claim that legal reasons do not justify legal decisions is the claim that the evidence does not warrant belief in scientific theories.

Leiter also seems to get the dialectic wrong in the disavowed paragraph. He suggests that ‘Greenberg’s charge of imposing external standards of justification’ is not fair to the Legal Realists. But I do not charge the Legal Realists with imposing external standards of justification. I claim that they impugn law on standards *internal* to law and, for that reason, I charge Leiter with getting the analogy wrong. In other words, my charge is that *in order for the analogy with Quine’s rejection of foundationalism to be apt*, it would have to be the case that the Legal Realists reject a philosophical program that tries to vindicate legal decisions on the basis of standards external to law.

law is wrong, so, contrary to what they believed, their standards are not the standards internal to law.)

Setting aside the way in which the parallel Leiter draws seems to support my argument, I take it that Leiter's basic idea in the passage is that it would be misleading to think that Quine is engaged in the same kind of project as the foundationalist. The kind of justification that is internal to science, which Quine does not impugn, is of a completely different kind from what the foundationalists sought – indeed, Leiter suggests that this internal justification is not genuine epistemic justification at all.<sup>15</sup> Leiter points out that Quine does not regard the internal standards of scientific justification as providing an alternative to the foundationalist program, but rather thinks that we have 'no vantage point on the kind of question about justification the foundationalist was asking' (p. 116). Leiter elaborates that Quine 'thinks we can get no purchase on the question about the epistemic foundations of science, since we owe all our epistemic standards to our most successful epistemic practice, science' (p. 117).<sup>16</sup>

It is certainly true that Quine gives the impression in EN that he is rejecting all normative questions about the relation between evidence and theory, indeed all epistemological questions.<sup>17</sup> I have raised doubts about this reading of Quine above and in *Naturalism I*,

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<sup>15</sup> 'Quine does not think science supplies the *epistemic* justification for itself that foundationalism failed to; it just means that Quine thinks we can get no purchase on the question about the epistemic foundations of science' (p. 117).

<sup>16</sup> It is unclear in the passage under discussion whether Leiter is maintaining that Quine rejects the property of being epistemically justified (or the notion of epistemic justification) and thus the possibility that any beliefs can be justified or merely thinks that philosophers cannot have anything useful to say about it. In the original paper, I explain that I did not take Leiter to be interpreting Quine as rejecting the possibility that beliefs can be justified – *epistemically* justified, of course. See *Naturalism I*, note 13. Rather, I took his interpretation to be that there was nothing fruitful for philosophers to say about such justification. But, fortunately, it does not matter for our purposes. As I argue in *Naturalism I* (2011c, pp. 441–445, 446–447) the Legal Realists cannot maintain their indeterminacy thesis while taking either of the analogous positions about the relation between the determinants and the content of the law. See also the final paragraph of this section.

<sup>17</sup> In support of his suggestion that Quine rejects epistemic justification or at least the possibility of an account of epistemic justification, Leiter points out that if Quine's main complaint concerned a philosophical misunderstanding of the appropriate standards of epistemic justification or the imposition of inappropriate standards, Quine would not have provided adequate grounds for a replacement of epistemological questions with empirical ones (p. 117). Leiter's implicit suggestion is that I must misunderstand Quine's arguments because those arguments, as I understand them, do not begin to justify Quine's proposal. First, given the widespread recognition of the mismatch between Quine's arguments and his replacement proposal, it is puzzling for Leiter to suggest that my understanding of Quine must be wrong on the ground that, on that understanding, Quine's arguments would not be adequate to warrant replacement. Second, on my account of Quine, he does not propose abandoning all philosophical questions in epistemology in favor of empirical ones. Third, as I argue in *Naturalism I*, and in the text below, even if we understand Quine as rejecting epistemic justification or the possibility of an account of epistemic justification, it does not help Leiter's analogy.

but, for the sake of argument, let us set aside the possibility of an epistemological project of understanding the standards of justification internal to science, ignore Quine's own continuing engagement with epistemological questions, and grant Leiter's claim that 'Quine thinks we have no vantage point on the kind of question about justification the foundationalist was asking' (p. 116).

I still do not see how this claim helps Leiter's case. As I argued in the original paper, the Legal Realists' argument relies on their being able to answer the question of whether legal reasoning meets the relevant standards – which Leiter calls 'foundationalist' (see note 24 below). Far from arguing that we have no purchase on the question of whether legal reasons meet the standards, the Legal Realists argue for a negative answer to the question. It is true that, if the Legal Realists are correct, there must be something wrong not only with the arguments that judges and lawyers make in particular cases, but also with the arguments of legal philosophers who try to explain how the law can be determinate. Obviously, however, the problem with those philosophical arguments cannot be that the question of whether the law meets the standards cannot be answered. For, as I have emphasized, the Legal Realists' argument depends on their answering the question in the negative.<sup>18</sup>

### III. DOES THE INDETERMINACY THESIS SUPPORT REPLACEMENT OF PHILOSOPHICAL QUESTIONS?

Given the difficulties with Quine's arguments, perhaps the most important question is not the aptness of the analogy, but whether the Legal Realists' indeterminacy thesis, if true, would warrant the kind of replacement proposal that Leiter makes. I will now argue on the merits that the Legal Realists' indeterminacy thesis provides no reason for abandoning or replacing any significant class of legal philosophical questions.

Leiter is clear that the indeterminacy thesis is that law is indeterminate only with respect to a substantial class of litigated cases – for example, most cases that are litigated at the appellate level.<sup>19</sup> Let us suppose for purposes of argument that this thesis is true.

<sup>18</sup> See *Naturalism I*, section IV.

<sup>19</sup> At a couple of points in his book, Leiter characterizes the scope of the indeterminacy thesis by referring to cases litigated at the appellate level. At one point, he suggests that the relevant class might be 'most cases actually litigated' (p. 39). Elsewhere, Leiter (2007b) has emphasized the extent to which in most ordinary disputes, there is widespread agreement about what the law is – and, presumably, determinate legal standards.

The proposal is that the indeterminacy thesis warrants replacing what Leiter calls ‘the theory of adjudication’ with sociological inquiry into the causes of judicial decisions. Leiter’s use of the term ‘theory of adjudication’ is unusual in several ways. First, and most importantly, he excludes all considerations bearing on the decision of cases other than what the law is. Especially in constitutional law, the theory of adjudication is distinguished from the theory of the content of the law because there are many considerations that legal theorists take to bear on how judges should decide cases other than the content of the law. For example, there are well-known arguments that judges should in some situations not fully enforce constitutional standards. Differently, perhaps judges should not, on moral grounds, enforce extremely unjust legal standards. Although Leiter writes in terms of ‘the decision of cases’, he apparently excludes considerations bearing on judicial decisions other than what the law is.<sup>20</sup> Given the restriction to what is legally required, it seems that the reference to how judges should decide cases is superfluous, and Leiter’s proposal concerns the theory of how the grounds of law (constitutively) determine the content of the law – specifically, the legal outcome of particular cases.<sup>21</sup>

Now, the question of the relation of the determinants or grounds of legal content to the content of the law is a central question in philosophy of law.<sup>22</sup> It is perhaps the central project of what is sometimes called ‘general jurisprudence’. To take one illustration, several philosophers have recently argued for what I call the *communication theory* – that a statute, Constitution, or other authoritative legal text’s

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<sup>20</sup> See, e.g., pp. 39, 42. I say ‘apparently’ because Leiter says that the class of legal reasons includes, ‘roughly speaking... those reasons a court may properly give in justifying its decision’ (p. 9). This general characterization sounds as if it would include, for example, reasons for underenforcing constitutional standards. However, Leiter goes on to give a more precise specification of the class of legal reasons that pretty clearly does not include such considerations (p. 9). And it is implicit in his discussion throughout that he is concerned exclusively with outcomes of cases that are required by applicable legal standards.

<sup>21</sup> See *Naturalism I*, section IV.A. As I point out there, Leiter also is not concerned with the epistemic justification of judges’ beliefs about what the law is. A decision is ‘justified’ in his sense just in case it is legally required. In other words, by his talk of ‘legally justified’ legal decisions, Leiter means simply ones that decide cases in accordance with the law. I follow his use of ‘legally justified’ in this paper. It is worth noting that the relation between the grounds of law and the content of the law is not a *justificatory* relation at all. It may be that Leiter prefers to write in terms of the ‘justification’ of judges’ decisions (rather than in terms of what is legally required) because that formulation is more suggestive of the analogy to the justification of belief.

<sup>22</sup> For references, see note 7 above.

contribution to the content of the law is the communicative content of the utterance of the statute (or other authoritative legal text).<sup>23</sup>

In addition, many projects in ‘specific jurisprudence’ – i.e., the study of philosophical issues arising in specific areas of law – have implications for the content of the law and, therefore, for the legally correct resolution of particular cases. For example, work on the proper understanding of the insanity defense in criminal law or of the unconscionability doctrine in contract may have implications for the legally correct resolution of particular cases. In sum, much work in legal philosophy concerns the relation between the grounds of law and the content of the law and perhaps even more has implications for the legally correct resolution of particular cases.

Leiter, however, restricts the ‘theory of adjudication’ further. In his usage, the theory of adjudication is not the project of trying to understand the relation between the grounds of law and the content of the law. Rather, it is the project of trying to show that every legal case has a determinate legal outcome.<sup>24</sup> It bears highlighting that, despite his emphasis elsewhere on the distinction between how judges should decide cases and what the law is, Leiter is here excluding from the purview of the ‘theory of adjudication’ all considerations bearing on the decision of cases other than what the law is.

Finally, Leiter suggests that the reason why the theory of adjudication tries to show that there is a determinate legal outcome in every case is that its ultimate goal is to predict how judges will decide cases and to give guidance to judges and lawyers (pp. 41–42). For example, Leiter argues that if there is no unique right answer, an account of the relation between determinants of content and the content of the law is fruitless and not ‘worth having’ because it

<sup>23</sup> For example, Alexander (1995), Alexander and Prakash (2004), Boudreau et al. (2007), Campos (1992, 1993a, b), Fish (2005), Knapp and Michaels (1982, 1983, 2005), Marmor (2008, 2011), Neale (2009), and Soames (2009). The communication theory is not a complete account of the content of the law, but this complication does not affect the present argument. I criticize the communication theory in Greenberg (2011b).

<sup>24</sup> It is the ‘foundational program of justifying some one legal outcome on the basis of the applicable legal reasons’ (pp. 40, 41). Leiter calls such a view a *foundational* theory of adjudication, and he defines ‘foundationalism’ in law as the view that the legal reasons justify a unique decision (p. 39). (I avoid using ‘foundational’ in this way throughout because it is so different from ordinary philosophical usage that it is likely to mislead.) He considers the possibility that the theory of adjudication might include theories that allow that there is more than one judicial decision that can be justified on the basis of the grounds of law, but he dismisses such theories as not worth having (because they would not give guidance to lawyers or judges) (p. 42). Presumably for this reason, Leiter generally uses ‘theory of adjudication’ as synonymous with ‘foundational theory of adjudication’.

would not give guidance to judges and would not enable lawyers to predict judicial decisions (pp. 41–42).<sup>25</sup>

I now show that, given this characterization of the theory of adjudication, no work in contemporary legal philosophy falls within the target zone of Leiter's replacement proposal. I begin with Ronald Dworkin, as he is the one philosopher of law associated with the thesis that there is a legally correct resolution to most or all cases.

Here is a thumbnail sketch of Dworkin's (1986) mature theory of law. Dworkin begins from the claim that 'theoretical disagreement' – disagreement about the grounds of law – is pervasive. An example is the disagreement between originalists and non-originalists in constitutional law. Dworkin argues that the existence of theoretical disagreement is best explained by the hypothesis that the concept of law is 'an interpretive concept'. In a nutshell, an interpretive concept is one such that whether the concept applies depends on the best interpretation of the practice in which the concept is embedded. Dworkin offers an elaborate account of what makes an interpretation better than another. He then argues that the best interpretation of our legal practice is the account he calls 'law as integrity'.

According to this account, the content of the law is the set of principles that would best justify the past decisions of the legal system (such as the ratification of a constitution, the enactment of statutes, the decision of cases by courts, the issuance of reports by legislative committees, and so on).<sup>26</sup> Therefore, whether a case has a unique legally correct resolution on Dworkin's theory depends on what set of principles would best justify the relevant decisions.

Because of Dworkin's view about the nature of morality, he thinks that it is very likely that most cases have a unique legally correct resolution. Very roughly, because he thinks that morality is

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<sup>25</sup> Similarly, he equates the cases in which a philosophical account of the content of the law is successful with cases in which 'legal reasons are satisfactory predictors of legal outcomes' (p. 41). Among other problems with this way of thinking, the existence of a unique legally correct decision does not guarantee successful prediction of the legal outcome because judges may fail to reach that decision. And, with respect to giving guidance to judges, that there is no legally correct outcome in a particular case would provide important guidance to judges; it would be highly useful for a judge to know that he or she need not look for the legally correct outcome but can turn to the grounds for decision appropriate when there is no binding legal standard.

<sup>26</sup> As I have explained elsewhere, contrary to a common reading of Dworkin, the dimension of fit is best understood as one aspect of justification, rather than a distinct, non-normative dimension. See Greenberg (2004, pp. 195–197, nn. 46–47). Also, on Dworkin's view, there is necessarily some vagueness in the initial specification of the legal practices because which practices are the relevant ones is ultimately itself the outcome of interpretation (1986, pp. 90–93; see also pp. 65–76).

complex and holistic, he thinks that it will be rare that the considerations on one side and the considerations on the other will be exactly balanced, though of course in practice it may often be impossible to know which side has the better support.

This sketch of Dworkin's theory makes clear that it is not within the target zone for Leiter's replacement proposal. First, predicting how judges will decide cases is no part of Dworkin's project. Like other philosophers, he seeks understanding – in his case of the nature of law, the conditions of legality, and the relation between law and morality – rather than prediction.

Second, demonstrating the right-answer thesis is not central to Dworkin's project. At a general level, the thesis he is most concerned to establish is that law depends in a particular way on morality. More specifically, the project has two main parts: (1) to show that the concept of law is an interpretive concept (and to establish Dworkin's account of interpretive concepts); (2) to show that the best interpretation of our legal practice is Dworkin's 'law as integrity' account, as opposed, for example, to the conventionalist and pragmatist interpretations that he develops. Although Dworkin defends the right-answer thesis, he is clear that it is a downstream consequence of his overall theory of law *in conjunction with* his view about morality and, indeed, that most of his arguments could succeed consistent with the falsity of the right-answer thesis.<sup>27</sup>

No other work in contemporary philosophy of law is accurately characterized as an attempt to show that every case has a unique legally correct outcome. Indeed, I am not aware of any contemporary philosopher of law other than Dworkin who has even endorsed the right-answer thesis – let alone taking its defense to be a primary goal. Again, work in philosophy of law is primarily concerned with *understanding* the way in which the grounds of law determine the content of the law.<sup>28</sup> Claims about to what extent and in which cases

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<sup>27</sup> In his leading statement of his view, *Law's Empire*, the right-answer thesis is not treated as an important part of his positive view and is addressed only briefly (1986, pp. 266–271, 273–274). (See also Dworkin 1991, pp. 359, 365–368; 2006, pp. 41–43.) His main point there is not to argue for the thesis, but to clarify what must be done in order to dispute it. In earlier work (1977), Dworkin emphasized the right-answer thesis. It is clear from the context, however, that he highlighted the thesis because Hart – and probably many others – seemingly took for granted that if there was uncertainty about the content of the law, there could be no determinate right answer. And of course the provocative nature of the right-answer thesis attracted attention. But it has always been evident that one could accept Dworkin's account of law and yet reject the right-answer thesis because of one's position on the nature of morality.

<sup>28</sup> Or, in the case of philosophical work on particular areas of substantive law, understanding legal notions and doctrines. I set aside such philosophical work since Leiter's argument seems even less relevant to it than to work in general jurisprudence.

the law is determinate are downstream consequences of an account of the relation between the grounds of law and the content of the law (*an account of the content of the law*, for short). And, as with Dworkin, no significant work in contemporary philosophy of law is concerned with predicting judicial decisions.

Suppose we set aside Leiter's narrow characterization of the 'theory of adjudication', and simply ask how the indeterminacy thesis would affect the *actual* projects of philosophers of law. We can begin again with Dworkin. In the first place, the general project in which Dworkin (and many other philosophers of law) are engaged – that of giving an account of the content of the law – is obviously not shown to be sterile, confused, or otherwise bankrupt by the indeterminacy thesis. Indeed, the indeterminacy thesis rests on the Legal Realists' own account of the content of the law.

Now it is true that if the indeterminacy thesis is correct, then not all of Dworkin's arguments are successful. It is not at all obvious, however, what should be rejected. As mentioned above, since Dworkin's argument for the right-answer thesis depends not only on his account of law but also on his view about morality, Dworkin's account of law – including his argument that law is an interpretive concept and his 'law as integrity' theory – could be correct, consistent with the indeterminacy thesis. It could be, for example, that morality simply does not settle as many questions as Dworkin believes that it does.

Of course, that Dworkin's 'law as integrity' theory is consistent with the indeterminacy thesis does not answer the question of which part of Dworkin's argument should be rejected if the indeterminacy thesis were true. But it is highly artificial simply to ask what the impact on Dworkin's overall projects would be if the indeterminacy thesis were true. In order seriously to evaluate the implications of the indeterminacy thesis for Dworkin's arguments, we would have to look at the Legal Realists' *arguments* for the indeterminacy thesis and assess where, if at all, they show that Dworkin goes wrong.

But the Legal Realists' arguments do not raise serious questions about Dworkin's work. Since the Legal Realists in question predated Dworkin's entrance on the scene, they obviously did not explicitly address his arguments. What matters, however, is that, as a substantive matter, the argument that Leiter attributes to the Legal

Realists does not begin to raise a serious challenge to Dworkin's work. According to Leiter, the Legal Realists' main argument for the indeterminacy thesis is that different interpretive methods that are accepted as legitimate in legal practice yield different outcomes in particular cases (p. 20).<sup>29</sup>

This observation presents no objection to Dworkin's theory. To begin with, it is well accepted *within our legal practice* itself that interpretive methods that are established and widely regarded as legitimate may nonetheless be legally mistaken. To take just one example, think of Justice Scalia's well-known attacks on the interpretive methods used by his colleagues on the Supreme Court and by many other judges. More importantly, Dworkin's theory has an account of why interpretive methods that are accepted as legitimate may nonetheless be legally incorrect. In arguing against Dworkin's theory, it therefore begs the question to assume that any established interpretive method is legally correct. Compare: that textualist reasoning would reach different legal outcomes from intentionalist reasoning can hardly be used to criticize an intentionalist account of law that purports to show that textualist reasoning is based on a confusion.

In fact, that conflicting interpretive methods are established in the practice is an aspect of the theoretical disagreement from which Dworkin begins his argument. Thus, the observation that Leiter takes to be the Legal Realists' main argument is part of the data for which Dworkin offers a sophisticated philosophical explanation. The Legal Realists themselves therefore have not given us substantial reason to question Dworkin's arguments, including his argument for the right-answer thesis.

Setting aside the Legal Realists' arguments, the important point is that a philosophical argument for the indeterminacy thesis is not the right kind of argument to warrant abandoning Dworkin's philosophical project (or replacing it with an empirical project, to the extent we could make sense of such a substitution as a replacement). An argument for the indeterminacy thesis depends on an account of the content of law that, in conjunction with other plausible premises, has that thesis as a consequence. Given such an account, we would

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<sup>29</sup> Leiter (p. 20) describes the Legal Realists as pointing out that there are 'conflicting... legitimate interpretive methods'. The Legal Realists obviously did not mount a serious argument that all accepted methods of interpretation are legitimate, but implicitly assumed so. See also Leiter (2001, pp. 296–297).

have to evaluate whether Dworkin's account of law or the competing account was more plausible. A debate between, on the one hand, an account of law that implies the indeterminacy thesis and, on the other hand, Dworkin's account of law is a garden-variety, substantive philosophical debate. Even if the competing account gets the better of the debate, there is nothing to suggest that the questions that Dworkin is asking should be abandoned or replaced with empirical inquiry. Of course, to the extent that it is established that one of Dworkin's theses is false, no one should argue for that thesis! But this trivial observation is hardly grounds for the replacement of philosophical questions with empirical ones.

The same kinds of points apply to the work of other philosophers of law. Although philosophers other than Dworkin have not generally tried to claim that there is a determinate legal outcome in every case, their accounts of law could certainly have consequences that are inconsistent with the Legal Realists' indeterminacy thesis. Thus, one could argue against a particular account of the content of the law by showing that the law is indeterminate in cases in which the account, given plausible additional assumptions, implies that the law is determinate. For example, if the communication theory, in conjunction with plausible assumptions about the intentions of legislatures, implies that the law is determinate in many appellate cases, then, to the extent that we have reason to believe the indeterminacy thesis, we have reason to doubt the communication theory.

Conversely, to the extent that the communication theory leads to conclusions inconsistent with the indeterminacy thesis, the arguments for the communication theory can be used to challenge the Legal Realists' account of law. And of course there is always the possibility of rejecting auxiliary premises that are needed to reach the inconsistency. In order to evaluate the debate, we would need to look at the competing accounts and the arguments for them, which is no part of my present project. The present point is that what we have described is an ordinary philosophical debate between two accounts of the content of the law – nothing that would suggest that the question that such accounts seek to answer cannot be answered.

The suggestion that the indeterminacy thesis shows that certain philosophical questions are confused or otherwise cannot be answered is all the more puzzling in light of the indeterminacy

thesis's limited scope. Leiter is explicit that his replacement proposal covers only the range of cases in which there is indeterminacy (p. 41). 'The Realist does not call for 'naturalizing' the theory of adjudication in that range of cases where legal reasons are satisfactory predictors of legal outcomes'. But it is not as if there are two different philosophical questions: (1) how do the determinants of the content of the law relate to the content of the law in cases where the law is determinate?; and (2) how do the determinants of the content of the law relate to the content of the law in cases where the law is indeterminate? Rather, that the law is determinate in some cases and indeterminate in others is a consequence of the correct account of the content of the law. For comparison, consider how puzzling it would be to claim that the philosophical question of what constitutes a person cannot fruitfully be answered for creatures that are not persons! That a creature is not a person is a consequence of the correct account of what constitutes a person. At any rate, the partial nature of the indeterminacy thesis rules out any claim that the very notion of legal justification is confused or cannot be fruitfully explored in philosophical work.

We can summarize our discussion in the form of a dilemma for Leiter's proposal. On the one hand, we can understand the project that is to be replaced in the way that Leiter characterizes it – as the project of showing that there is a unique legal answer to every legal issue. In that case, however, the project is not one that legal philosophers are engaged in. Even Dworkin's project is not fairly described in this way. Moreover, if the project to be replaced were characterized as the attempt to demonstrate the right-answer thesis, then the replacement proposal would be trivial. Leiter intends a nontrivial replacement proposal, not the banality that one should not try to establish a false thesis.

On the other hand, we can take the project that is to be replaced as the project that philosophers of law are in fact engaged in – that of giving an account of the way in which the content of the law is determined. But the conclusion that there is no right answer in certain cases does not support abandoning, in these cases or any others, the attempt to understand the relation between the grounds and the content of the law. On the contrary, the conclusion that

there is no right answer in the cases in question depends on a successful philosophical understanding of that relation.

#### IV. CONCLUSION

In this essay, I have revisited Brian Leiter's proposal that part of philosophy of law should be abandoned in favor of empirical investigation – such as psychological and sociological investigation – of the outcomes that judges reach. I argued in *Naturalism I* that the proposed analogy to Quine's naturalization of epistemology does not help Leiter's case. In reply, his main claim is that Quine thinks that questions about epistemic justification (at least with respect to beliefs in scientific theories) cannot be fruitfully addressed. But even if Quine is understood as excluding the possibility of theorizing about epistemic justification, Quine's position is not parallel to the Legal Realists' indeterminacy thesis (given the way in which Leiter has structured the analogy between the domains). The indeterminacy thesis does not support the view that questions about what Leiter calls 'legal justification' – questions about which judicial decisions are legally required and, more fundamentally, about what makes it the case that a particular outcome is legally required – cannot fruitfully be addressed. On the contrary, the Legal Realists' argument for the indeterminacy thesis relies on a particular substantive position on such questions.

My principal concern in this essay is with the implications of the Legal Realists' indeterminacy thesis. The indeterminacy thesis provides no support for abandoning any significant question or project in the philosophy of law. Seeking causal explanations of judicial decisions may be worthwhile, but not because the indeterminacy thesis reveals the bankruptcy of some area of philosophy of law. If the law is indeterminate with respect to a particular case, the outcome of the case cannot be fully explained (or predicted) on the ground that it is legally required. But legal philosophy is not significantly concerned with explaining or predicting the actual outcomes of litigated cases.

Although Ronald Dworkin has argued against the indeterminacy thesis, if he were wrong on this issue, it would not in any way suggest that the questions with which Dworkin is centrally concerned cannot fruitfully be addressed. Rather, the thesis is a consequence of the Legal Realists' competing answers to those

questions. So the indeterminacy thesis is a bone of contention in an ordinary philosophical debate between the Legal Realists and Dworkin. (And in fact the Legal Realists' actual arguments, unsurprisingly, pose no threat to Dworkin's position.) Of course, if the indeterminacy thesis is true, no one should try to show that it is false, but this triviality lends no support to the kind of radical replacement that Leiter proposes. Anyway, it would be wild to suggest that the Legal Realists have spoken the last word on the central question of how the grounds of law determine the content of the law. Their work on that question provides no reason to think either that the question cannot fruitfully be pursued or that it has conclusively been answered.

I end with a few general remarks about naturalism and methodology. It seems likely that a commitment to naturalism does not raise issues that are distinctive with respect to philosophy of law. For example, to the extent that work in the philosophy of law appeals to mental, social, and moral properties (facts, events, and so on), it inherits issues about the status of such properties in a natural scientific worldview that belong more fundamentally to other areas of philosophy and have been much discussed in those areas.

More generally, philosophers of law, like other philosophers, seek to understand the nature or essence of the phenomena they study. In light of this aim, there are important and not well understood questions about philosophical methodology, for example about our knowledge of essence and modality. But, again, these questions are not special to the philosophy of law. Philosophy of law plausibly poses few distinctive methodological concerns.

In general, what impact should naturalism have on ongoing philosophical inquiry? I suggest that we should accept just those naturalistic constraints that are likely to produce explanatory benefits. This position is less bland than it might sound because, I maintain, imposing certain kinds of ostensibly naturalistic restrictions will cut off possibilities of explanation.

The basic reason that naturalism is an attractive doctrine is the extraordinary explanatory success of the natural sciences over the past few hundred years. So, at the broadest level, we should impose naturalistic constraints because it makes sense to copy the most successful explanatory strategy we have. We can distinguish two

motivations that derive from the successes of the natural sciences. First, there is a positive motivation: we should copy the methods of natural science in order to increase the fruitfulness of our investigations. Second, there is a negative one: we should be skeptical of accounts, terms, properties, facts, and so on that cannot be fitted into the picture of the world that the natural sciences offer. These two motivations are related. An explanation that relies on ostensible properties that are not real (in violation of the second idea) is not going to be fruitful. But it will be useful to distinguish them; in practice, given our limited knowledge, they can seem to cut in different directions. For example, as I will suggest, imposing strong naturalistic constraints motivated by scruples about unreduced properties can diminish the fruitfulness of our explanations.

In light of an appropriate modesty about our current knowledge, we should be cautious about constraints imposed for the negative motivation. The history of attempts to impose such constraints is dismal. Logical positivism and its offspring, behaviorism in psychology and philosophy of mind, are obvious examples. As such examples suggest, it is easy to mistake a transient scientific movement for the true scientific methodology or to take an inability to find an explanation as evidence that there is nothing to be explained.

It is important to distinguish our question of what constraints it would be fruitful to impose on ongoing philosophical inquiry from the question of what naturalistic doctrines are true – and from the closely related question of what work needs to be done to show that a given theory, methodology, or explanation is naturalistically kosher. Suppose, for example, that all genuine properties are natural properties and, consequently, that a successful naturalization of a philosophical domain must show that the properties of the domain are, or are reducible to, natural properties. It does not follow that it would be fruitful to observe a requirement that philosophical explanations make reference only to properties that have already been shown to be reducible to natural properties.

Actually carrying through a naturalization program is so difficult that such a requirement would hugely restrict the resources and methods of philosophical work. Parallel reductive requirements are not respected by successful sciences. High-level sciences routinely employ notions of which they cannot provide a reductive account.

A notion can earn its keep by yielding explanatory gain without our having a reduction of it. And a non-reductive account of a phenomenon can produce explanatory benefits in a variety of ways, for example by showing that the phenomenon is an instance of a broader phenomenon with which we are familiar, though for which we cannot (currently) provide a reductive account – a standard kind of explanation in science.<sup>30</sup> Finally, again, we should be wary of placing too much confidence in our current views, for example about what is required to show that a property is naturalistically respectable and about which properties satisfy those requirements.

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<sup>30</sup> For discussion of explanatory benefits of non-reductive accounts, see Greenberg (2005).

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