**Legal Realism - Leiter**

* **associated with lots of positions**
* one is a broad claim about legal indeterminacy
	+ claim that indeterminacy leads cts to use non legal considerations to decide cases
* Why is the law indeterminate?
	+ Is it because of vagueness
		- That would mean that the law is determinare in the core areas
		- It would be indeterminate only in the areas of the penumbra of words, where the application of the word is unclear
	+ But the realists also appealed to the availability of competing canons of interpretation
		- this leads to indeterminacy even in core areas
* Nevertheless the legal realists did not believe in global legal indeterminacy
	+ The law narrowed down the justified decisions of courts even if it didn’t tell the court exactly how to decide, given the facts of the case
	+ In addition in some cases they accepted that the law was completely determinate

causal vs explanatory (or rational) indeterminacy

* Rational indeterminacy means that the law fails to justify a particular decision given the facts of the case
* Causal indeterminacy means that the law, even if rationally indeterminate, does not make a difference to the decision that the court makes, because the court ignores or is unaware of the law
* Some realists were interested in causal indeterminacy, but their main point was rational indeterminacy

sociological vs idiosyncracy wings of legal realism

* Can one predict how courts will decide when the law is indeterminate?
* For the sociological weighing one could, because the non-legal considerations that courts look to are predictable
* For the idiosyncracy wing, judges’ decisions are unpredictable

Most realists were in the sociological wing

What about the realists’ goal of reforming the law?

Members of the idiosyncracy wing were less inclined to believe in reformation of the law

But for the sociological wing the goal was to replace legal rules that were indeterminate with rules that appealed to the predictable non legal considerations

For example Llewellyn argued that courts in contract cases were predictably looking to the non-legal consideration of an obligation of good faith and fair dealing

When drafting the UCC he recommended that this non-legal consideration be an explicit legal consideration

now all this fit in with what Cohen says in transcendental nonsense?

* When is there personal jurisdiction over another state corporation? The traditional rule was to look to whether the corporation was present within the forum state
* Is this just an indeterminate legal rule?
* Cohen suggests that it has no meaning, it is simply conclusory
* This idea of a conclusory legal rule is not something one finds in Leiter’s paper
* Cohen recommends that the traditional rule be replaced by the non legal considerations that come into play when courts decide such cases
* These non legal considerations are factual questions about the burdens on the corporation of going to the forum and the burdens of the plaintiff of going to the corporation’s home state
* And moral considerations
* This results in International Shoe

Now legal theory

Notice that for Leiter, legal realism is not a theory of law, but really a theory of adjudication

It is a theory about the relationship between law and the decisions of courts

**empirical rule skepticism vs. conceptual rule skepticism**

Empirical rule skepticism is simply the view that the law does not make much of a difference to courts’ decisions – this is a claim in the theory of adjudication, it is not a theory of law

But conceptual rule skepticism appears to be a theory of law – as Leiter describes it, it is the claim that law consists of the decisions of courts, rather than things like statutes or regulations

* Why would anyone think that statutes are not laws, and that the law is how a particular court would decide when to get your case?

***The argument from judicial supremacy*.**

What is binding on the parties is the judgment in the case – not the law that the court look to
The judgment is binding even if the court misapplied the law

Similar to the idea that the umpire’s decision is binding even if the umpire misapply the rules of baseball

This makes it sound as if the law is the judgment

We’ve examined this argument earlier

response?

-first of all, it simply isn’t true that a judgment is binding no matter how the court decides

If the decision is truly irrational, it will be treated as a nullity by officials
Likewise if an umpire’s decision is truly irrational it will be ignored by the players

But more fundamentally, for the judge herself the law is not her decision

She looks to statutes and regulations in order to decide the case

If she thought the law was how she decides, she would think of herself as a monarch

Likewise the umpire does not think it is out of he says it’s out, he looks to the rules of baseball

We *could* play a game where was out if the umpire said it was out

But that is not baseball

Leiter claims that the realists were not generally conceptual rule skeptics – they spoke about the law as a decision of a court because they were speaking about the law from the perspective of what a lawyer would say to a client

* The client is not interested in what the law actually is, but only in how a court that took the case would likely decide

But he did say that Cohen was a conceptual rule skeptic

Does one see this position (that the law is the concrete decision of a court) in Cohen article?

Green: No –

Will discuss the real theory of law that one sees in cohen’s article next time