Articles

Legal Realism Untamed

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Introduction

Law is not only about hard cases. There are easy ones as well, and understanding law requires awareness not only of litigated and then appealed disputes, but also the routine application of legal rules and doctrine. Upon leaving the courthouse and its domain of difficult controversies, we observe the everyday determinacy of law—the production of clear guidance and uncontested outcomes by straightforward legal language, black-letter law, and the conventional devices of legal reasoning.

One consequence of the existence of easy cases along with hard ones is the alleged marginalization of the skeptical challenges of Legal Realism. Legal Realism is conventionally understood, in part, to question legal doctrine’s determinacy and positive law’s causal effect on judicial decisions.  

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But if Realism’s skepticism about the constraints of positive law applies only to the sliver of legal events that are litigated cases, Legal Realism’s challenges can be kept at bay. Realism may remain a valuable corrective to the view that even most appellate cases have a legally right answer, but not as a claim that undermines the routine determinacy of law.

This marginalization of Legal Realism—its taming, so to speak—turns out, however, to ignore a central Realist theme: the distinction, in Karl Llewellyn’s words, between “paper rules,” on the one hand, and “real rules,” or “working rules,” on the other. For Llewellyn and other Realists, the crux (2003) (collecting empirical studies that examine the relationship between law and society in a Realist framework). And still others find in Legal Realism the foundations for pretty much the entire law and society research agenda. See, e.g., Arthur F. MeEvoy, A New Realism for Legal Studies, 2005 Wis. L. Rev. 433, 443–44 (equating the original Realists’ commitment to facts, objectivity, and scientific method with a similar commitment in the Law and Society movement); Sally Engle Merry, New Legal Realism and the Ethnography of Transnational Law, 31 LAW & SOC. INQUIRY 975, 975–77 (2006) (characterizing traditional Legal Realism and New Legal Realism as the tools through which to analyze law’s effect on society); Victoria Nourse & Gregory Shaffer, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, 95 CORNELL L. REV. 61, 92–93 (2009) (discussing the law and society movement’s focus on empirical research in the context of its Legal Realist origins). Such nonstandard views of Realism are not, however, my concern here. Rather, this Article is located within the widespread view that the main lines of Legal Realism maintain that legal doctrine, whether because of the indeterminacy of individual rules or the availability of multiple ones, is more malleable, less determinate, and less causal of judicial outcomes than the traditional view of law’s constraints supposes. This conventional conception of the core claims of Legal Realism, which is embodied in the work of, inter alia, Thuman Arnold, Felix Cohen, Walter Wheeler Cook, Jerome Frank, Karl Llewellyn, Herman Oliphant, Hessel Yentema, and Underhill Moore, is described and adopted in BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15–118 (2007); EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 537–56 (1953); Andrew Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 PHIL. & PUB. AFF. 205, 208–09 (1986); Hanoch Dagan, The Realist Conception of Law, 57 U. TORONTO L.J. 607, 607–10 (2007); G. Edward White, The Inevitability of Critical Legal Studies, 36 STAN. L. REV. 649, 651 (1984). This understanding of Legal Realism is represented more recently in some of the scholarship of Duncan Kennedy, in Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518, 518 & n.1 (1986), and Mark Tushnet, in MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 120 (2009) (“For the realists, conclusions did not flow from principles: In a mature legal system whose doctrinal space was thickly populated, a judge given a principle articulated in some prior case could faithfully deploy that principle along with others equally available in the doctrinal universe to reach whatever result the judge thought socially desirable.”); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 822 (1983) (observing that the Realists showed that with almost any legal rule a diversity of subsequent uses of that rule could still be consistent with the initial articulation of the rule).

3. See infra notes 20–23 and accompanying text.

4. See infra Part III.

of their challenge to the traditional view of legal determinacy lay in the fact that the paper rules—the language of statutes and black-letter common law rules—were often poor approximations of the actual rules motivating judicial decisions. Judges do follow rules, Llewellyn and most other Realists insisted, but the rules they follow are often not the ones found in standard legal sources.

The distinction between real and paper rules is well known, but the effect of the distinction upon the supposed marginalization of Legal Realism has remained unnoticed. For when the paper rules do not describe the actual rules that judges use in making decisions, the divergence between paper and real rules will influence the distribution between easy and hard cases. Thus, even if the indeterminacy claims of Realism are limited to the domain of litigated cases, the distinction between paper and real rules determines the makeup of that domain, and accordingly pervades the entirety of law. The gap between paper and real rules, therefore, by producing consequences throughout law and not merely to a small subset of it, reveals the Realist challenge to be more foundational, less marginal, and—importantly—less tamed.

The question I address is as fundamental as it is simple: What makes hard cases hard, and easy ones easy? The answer is empirical, varying with time, place, and area of law. But Legal Realism in its untamed version not only directs us to this question, but also suggests that the answer to the empirical question might, in some contexts and in some domains, challenge the standard view of how law works even in its routine and nonlitigated operation.


I. Legal Realism—Some Basics

The perspective variously known as legal realism, Legal Realism, or American Legal Realism\(^8\) is widely understood to pose a substantial challenge to a traditional conception of law and legal (especially judicial) decision making. Of course there are almost as many traditional views about legal decision making as there are viewers, but a prominent one holds that official legal materials such as statutes and reported court cases can generate straightforward, mechanical, or logically entailed\(^9\) applications in the vast majority of instances.\(^10\) And even if the production of legal outcomes is not

8. People tend to believe their own descriptions of most things to be realistic. Consequently, the capitalization of Legal Realism designates a school of thought rather than an attribute. Moreover, the capitalization distinguishes Legal Realism as a school of thought about law from various perspectives characterized as realist in meta ethics, metaphysics, and other branches of philosophy. The distinction is important, because realism in philosophy identifies positions supporting the existence of mind-independent entities, and thus of mind-independent reality. See, e.g., LYNNE RUDDER BAKER, THE METAPHYSICS OF EVERYDAY LIFE: AN ESSAY IN PRACTICAL REALISM (2007) (offering a realist position in metaphysics); Colin McGinn, An A Priori Argument for Realism, 76 J. PHIL. 113, 114 (1979) (same); Peter Railton, Moral Realism, 95 PHIL. REV. 163, 165 (1986) (arguing for a form of moral realism). Insofar as Legal Realism stresses the role of the judge or other legal decision maker in identifying and making law, and thus insofar as Legal Realism questions the existence or importance of judge-independent law, see G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 155 (1976) ("Realism eventually took the step of equating law with the idiosyncratic judgments of judges and other lawmakers . . . ."). Legal Realism is more in contrast to than consistent with most versions of philosophical realism.

9. Note that this is American Legal Realism, as distinguished from the Scandinavian Realism, of, for example, AXEL HÄGERSTRÖM, INQUIRIES INTO THE NATURE OF LAW AND MORALS (Karl Olivecrona ed., C.D. Broad trans., 1953); A. VILHELM LUNDSSTEDT, LEGAL THINKING REVISED: MY VIEWS ON LAW (1956); KARL OLIVECRONA, LAW AS FACT (1939); ALF ROSS, ON LAW AND JUSTICE (1958). More generally, see MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN (1997) and Jes Bjarup, The Philosophy of Scandinavian Legal Realism, 18 RATIO JURIS 1 (2005). On some topics the two Realisms are compatible, but their agendas diverge sufficiently that distinguishing them from each other is more important than seeing them as different branches of the same perspective. See Gregory S. Alexander, Comparing the Two Legal Realisms—American and Scandinavian, 50 AM. J. COMP. L. 131, 132 (2002) (arguing that "Scandinavian and American Legal Realism seem to have been nearly opposite jurisprudential movements").

10. In saying "logically entailed," I refer not to deduction, the process by which particular outcomes are generated by a general rule, but to subsumption, pursuant to which decision makers decide whether a particular act or event is included within a rule. The judge or police officer deciding whether an automobile traveling at eighty miles per hour is violating the sixty-five-mile-per-hour speed limit begins with the particular observation and then assesses whether the particular falls under—is subsumed by—the rule. She does not begin with the rule and then determine which particular outcomes might, in the abstract, be deduced from that rule.

11. "Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . ." C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871). Langdell recognized, however, that the identification of such principles and doctrines was a matter of induction from particular decisions and not deduction from abstract generalities, see C.C. Langdell, Classification of Rights and Wrongs (Part I), 13 HARV. L. REV. 537 (1900); C.C. Langdell, Classification of Rights and Wrongs (Part II), 13 HARV. L. REV. 659 (1900), and thus it is mistaken to accuse him of believing the entirety of legal decision making to be deductive or mechanical.
strictly a matter of syllogistic deduction, a softer version of the traditional view holds that legal outcomes are still the constrained product of legal doctrine and legal materials alone.\textsuperscript{12} This is roughly the position embodied in the writings of William Blackstone,\textsuperscript{13} Edward Coke,\textsuperscript{14} and other celebrants of common law reasoning.\textsuperscript{15} And it can be found more recently in the thinking of Americans such as Eugene Wambaugh\textsuperscript{16} and John Zane.\textsuperscript{17} According to this tradition, judges, employing accepted methods of statutory or case interpretation and thereby discovering the real and immanent law through “artificial reason,”\textsuperscript{18} can identify the decisions mandated by existing

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\item \textsuperscript{13} 1 William Blackstone, \textit{Commentaries} *69.
\item \textsuperscript{15} See, for example, Matthew Hale, \textit{The History of the Common Law of England} (Charles M. Gray ed., 1971) (1713), although Hale was more receptive than Blackstone or Coke to the influence of nonlegal factors on legal decisions. For a useful explanation of the pertinent views of Blackstone, Coke, and Hale, see Gerald J. Postema, Bentham and the Common Law Tradition 4–13, 19–27 (1986) and Anthony J. Sebok, \textit{Legal Positivism in American Jurisprudence} 23–32 (1998).
\item \textsuperscript{16} Eugene Wambaugh, \textit{The Study of Cases: A Course of Instruction} (2d ed. 1894).
\item \textsuperscript{17} John M. Zane, \textit{German Legal Philosophy}, 16 Mich. L. Rev. 287, 338 (1918) (“Every judicial act resulting in a judgment consists of a pure deduction.”). Neither Zane nor Wambaugh are much remembered, but they genuinely exemplify views about judicial decision making often castigated as “mechanical” or, more commonly but more ambiguously, “formalistic.” As Anthony Sebok observes, much writing in the Realist tradition, from the 1930s to the present, has aimed at caricatured and typically nonspecified targets. Sebok, supra note 15, at 83. And when the targets are named, as with Joseph Beale and to some extent Langdell, their actual views turn out to differ substantially from the ones they are taken to hold or represent. On Beale, see Joseph H. Beale, Jr., \textit{The Development of Jurisprudence During the Past Century}, 18 Harv. L. Rev. 271, 278 (1904) (recognizing the impossibility of complete codification). On Langdell, see supra note 11. Wambaugh and Zane, among others (for example, see Paul E. Treusch, \textit{The Syllogism, in Readings in Jurisprudence} 539 (Jerome Hall ed., 1938)), may now be forgotten, but they are authentic representatives of the class of thinking the Realists sought to challenge. Indeed, even Roscoe Pound’s scorn in Roscoe Pound, \textit{Mechanical Jurisprudence}, 8 Colum. L. Rev. 605 (1908), is not what it seems. He did not deny the possibility of largely deductive application of preexisting legal rules (on which, see Frederick Schauer, \textit{Formalism}, 97 Yale L.J. 509 (1988)), but instead insisted that such application, without regard to social consequences, was undesirable.
\item 18. See supra note 15. On the nature of the Realists’ “target,” see also Wilfred E. Rumble, \textit{American Legal Realism: Skepticism, Reform, and the Judicial Process} 49 (1968). Brian Tamanaha identifies some instances in which Realist insights can be found prior to the rise of Realism, and others in which so-called formalists were aware of the nonmechanical aspects of judging. See Brian Z. Tamanaha, \textit{Beyond the Formalist-Realist Divide: The Role of Politics in Judging} 71–89 (2010) (identifying Realist ideas in legal discourse as early as the 1870s). But as with any distinction, even multiple counterexamples on one or the other side do not
law. Because such decisions are produced, by application of methods widely shared among legal professionals, legal decision making does not require recourse to the judge’s extralegal attitudes or opinions.

The most important of Realism’s multiple facets is its denial of this traditional view. Virtually all Realists take themselves as repudiating the belief that official legal sources and legal doctrine alone produce the uncontroversial—at least among trained legal professionals—outcomes that the traditional view imagines. Rather, most versions of Realism maintain that legal doctrine ordinarily does not determine legal outcomes without the substantial influence of nonlegal supplements, supplements whose existence and application are variable and manipulable. To the extent that this is so, legal outcomes will often then be the product not exclusively or even predominantly of official law, but primarily of something else. What constitutes this something else varies among Realists, with some believing it

undercut the plausibility of a probabilistically accurate distinction. It is sometimes warm in January (in the northern hemisphere) and cold in June, but January is still, in general, colder than June. So too here, and the suggestion that pre-twentieth century views about legal constraints were little different from those advanced by the Realists would make the entire Realist challenge pointless. Perhaps that is so, but to claim that Arnold, Cook, Douglas, Frank, Llewellyn, Oliphant, Sturges, Yntema, and many others were all aiming at a phantom target seems a stretch. Indeed, the very persistence of the Realists’ target, see infra Part IV, makes identifying the difference between Realism and its opponents of continuing importance.

19. See Leiter, supra note 2, at 21–23; Altman, supra note 2, at 206 n.4 (expanding on Realist themes of legal indeterminacy and the role of officials in shaping legal doctrine); Dagan, supra note 2, at 610 (describing Legal Realism’s rejection of “reductionist understandings of law”); Tushnet, supra note 2, at 122; see also Kalman, supra note 2, at 7 (1986) (concluding that Realists shared the belief that “legal rules were not the sole factor in the decisional process”); Brian Leiter, Legal Formalism and Legal Realism: What Is the Issue?, 16 LEGAL THEORY 111, 112 (2010) (stressing that Realism challenges even sophisticated versions of formalist accounts of adjudication); G. Edward White, The American Law Institute and the Triangle of Modernist Jurisprudence, 15 LAW & HIST. REV. 1, 34–35 (1997) (emphasizing the rule-skepticism of the Realists).

20. The malleability and manipulability of legal doctrine is the central theme of, for example, Jerome Frank, LAW AND THE MODERN MIND (1930) [hereinafter, FRANK, LAW AND THE MODERN MIND]; K.N. Llewellyn, The Bramble Bush: On Our Law and Its Study (1951) [hereinafter, Llewellyn, The Bramble Bush]; Dagan, supra note 2, at 614 (referring to “doctrinal multiplicity”); Kennedy, supra note 2, at 558–59 (exploring multiple doctrinal avenues a judge has the freedom to pursue); 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, 395–96 (1950) [hereinafter, Llewellyn, Remarks on the Theory of Appellate Decision] (famously describing the proliferation of canons of statutory construction); Max Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357, 362 (1925) (“[I]judges have recourse to a great many devices. They relate back. They premise. They impute. They take judicial notice. They refuse to take judicial notice. They construe. They charge with knowledge. They impress trusts. And they don’t always do this in the same way. What one judge reaches by presumption, another will, by relation.”); and White, supra note 2, at 651 (“The Realists demonstrated . . . that for every principle there existed a potential counter-principle . . . .”). And on the malleability of determinations of fact, see especially Jerome Frank, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 16 (1949) [hereinafter, FRANK, COURTS ON TRIAL] (“For whenever there is a question of the credibility of witnesses . . . then, unavoidably, the trial judge or jury must make a guess about those guesses.”).
to reside in the ideological or policy preferences of judges,21 others committed to the proposition that it is the judge’s view of the complete array of facts presented by individual cases,22 and still others maintaining that most

21. Although Llewellyn had his particularistic and fact- and case-specific moments (see, e.g., KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 59–61, 121–25, 206–
08 (1969) (discussing “Situation-Sense”); Llewellyn, A Realistic Jurisprudence, supra note 5, at 457 (“What is true of some persons as to some law will not hold of other persons, even as to the same or similar law.”); Dennis M. Patterson, Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittenstein, and the Uniform Commercial Code, 68 TEXAS L. REV. 169, 199 n.190 (1989) (discussing “Llewellyn’s tendency toward particularism”); Ziporah Batshaw Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 HARV. L. REV. 465, 470 (1987) (“The merchant rules are grounded in Llewellyn’s belief that legal rules must relate to the facts and must fit the realities of the transactions they govern.”) (footnote omitted)), be more often stressed the role of the judge in seeking to reach, albeit in small steps, the best solution to a general social problem. See LLEWELLYN, THE THEORY OF RULES, supra note 5, at 87–102 (describing the goals of the “legal order”); TWNING, supra note 6, at 369 (observing that Llewellyn recognized the need for “principles to guide action”); William Twining, Talk About Realism, 60 N.Y.U. L. REV. 329, 347–49 & n.55 (1985) (questioning strongly particularistic understandings of Realism). MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 193–94 (1988), describes the “policy emphasis” and reliance on “policy considerations” of Realism, and conceiving Realism in terms of a judge’s general (rather than case-specific) policy or ideological preferences is highlighted throughout Kennedy, supra note 2, as well. Realism’s focus on policy is also discussed in JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 227 (1983) (“Once it was shown that precedents did not hold all the answers, it was almost taken for granted that judges must act similarly to legislators.”); ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 143–44 (1982) (“[The Realists] maintained that in predicting the law we should take into account the judge’s background, his ideology, and anything else that might bear on the predicted outcome, whether or not it was ‘legal’ in nature.”); E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES 4–6 (2005) (discussing the policy-making role of judges).

22. See, e.g., Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision, 14 CORNELL L.Q. 274, 284 (1929) (describing the fact-based nature of a judge’s initial reaction to a case); Herman Oliphant, A Return to Stare Decisum, 14 A.B.A. J. 71, 75 (1928) (regretting the shift from deciding each case on its facts); see also LEITER, supra note 2, at 21–24, 29–30, 109–11 (focusing on how the Realists sought to locate the facts of particular cases within “situation types”); Brian Leiter, American Legal Realism, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 52–53 (Martin P. Golding & William A. Edmundson eds., 2005) (“In particular, all the Realists endorsed what we may call ‘the Core Claim’ of Realism: in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons.”). It is important to distinguish the Realist attention to facts from the frequent but arguably idiosyncratic Realist focus on the importance of the particular array of facts presented in particular cases. Focusing on “situation types” is not particularistic, because the very idea of a type suggests decisions according to larger categories, or, if you will, rules. Thus, when Leon Green produced the classic Realist casebook—LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (1931)—he organized the book around categories such as “firearms,” “surgical operations,” “trees, noxious growths, fences,” “persons using ways [and] streets,” and, alarmingly, “play, practical jokes, [and] conduct with reference to women.” But although these were not the traditional categories of tort law, they were categories nonetheless, and Green’s point was that a case’s location within the nontraditional category was more explanatory of the outcome than were traditional tort categories such as negligence and strict liability or traditional tort concepts such as causation and foreseeability. Green’s prototypical Realist point was that the actual categories of decision were not the categories of traditional doctrine, but he still insisted that categories had a causal effect on outcomes. By contrast, the true Realist particularists were more skeptical of any categorizations or abstractions, believing that outcomes were produced by a judge’s reactions to the unique array of facts in any particular case. Frank is the paradigmatic particularist, as can be seen in
important in legal decision making are the conscious or subconscious personal predilections, biases, and idiosyncrasies of particular adjudicators. But although the Realists differed about what "really" mattered in judicial decision making, they were all committed to the view that what mattered was something other than, or at least much more than, positive law, legal rules, legal doctrine, and legal reasoning as traditionally conceived. The core of Legal Realism thus challenges the view that traditional legal sources and methods play a substantial role in the cause and explanation of judicial decisions.

II. Realism Tamed

Realism is thus a claim about law's (legal) indeterminacy and about the insufficiency of formal or positive law to explain judicial decision making. But a common rejoinder is that Realism confuses how law operates at its indeterminate edges with the overall character of legal guidance. Because there are easy cases and straightforward applications of law, it is said, and because such cases and applications rarely wind up in court, the determinate


24. Most influential is HART, supra note 7, at 135–47. Hart maintained that the Realists were "disappointed absolutist[s]," id. at 139, whose identification of uncertainty in the area of law's "open texture" led them to overlook the fact that "the life of the law consists to a very large extent in the guidance both of officials and private individuals." Id. at 135. Similar claims can be found in Altman, supra note 2, at 207; Benjamin Nathan Cardozo, Jurisprudence, 55 N.Y. STATE BAR ASS'N RPRTR. 263, 290 (1932); Paul N. Cox, An Interpretation and (Partial) Defense of Legal Formalism, 36 IND. L. REV. 57, 71 (2003); Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 DUKE L.J. 1895, 1914–16 (2009); Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. CHI. L. REV. 462, 496–97 (1987). On Cardozo's views, see also Marcia J. Speziale, The Experimental Logic of Benjamin Nathan Cardozo, 77 KY. L.J. 821 passim (1989). And see also Robert W. Gordon, Lawyers, Scholars, and the "Middle Ground," 91 MICH. L. REV. 2075, 2077–78 (1993) (describing but not endorsing the view that theory and policy are relevant only in the 10% of cases that are genuinely difficult).
and predictable side of law is invisible to those who equate law with the field of litigated disputes, or, even worse, of reported appellate decisions.

The invisibility of the routine operation of clear law is largely a function of what is nowadays labeled the "selection effect." The basic idea is uncomplicated: If the law (and the predicted outcome in court) applicable to a dispute is clear, then one side will expect to win and the other to lose. Under such conditions, the rational expected loser will settle or otherwise refrain from litigation in order to avoid a costly but futile courtroom battle.

The corollary of the reluctance of expected losers to litigate is that disputes that are not settled prior to litigation or judgment emerge as a nonrandom and unrepresentative sample of legal events. Rather, the disputes that wind up in court are disproportionately those in which two opposing parties holding mutually exclusive positions each believe that litigation is worthwhile. And normally this will be the case only when the law or the facts are unclear. Because the field of litigated cases thus systematically

25. The scholarship on the selection effect is vast, the canonical modern source being George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984). The Priest–Klein hypothesis about the nature of the disputes that are settled or litigated has spawned a substantial literature, much of it focused on challenging or supporting Priest and Klein's claim that the selection effect will incline towards a 50% win rate for plaintiffs in the cases that do not settle and thus wind up being tried to judgment. See generally Lucian Arye Bebchuk, Litigation and Settlement under Imperfect Information, 15 RAND J. ECON. 404 (1984) (exploring the effect of information asymmetries on the 50% hypothesis); Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. LEGAL STUD. 337 (1990) (offering ways of testing the 50% hypothesis); Keith N. Hylton, Asymmetric Information and the Selection of Disputes for Litigation, 22 J. LEGAL STUD. 187 (1993) (arguing that variations in win-rate percentages can be explained by "the informational requirements of the relevant legal standard"); Daniel Kessler et al., Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. LEGAL STUD. 233 (1996) (reconciling the selection hypothesis with observed plaintiff win rates of less than 50%); George L. Priest, Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes, 14 J. LEGAL STUD. 215 (1985) (defending the 50% hypothesis); Richard L. Revesz, Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts, 29 J. LEGAL STUD. 685, 707–08 (2000) (discussing the Priest–Klein hypothesis in the context of panel composition); Steven Shavell, Any Frequency of Plaintiff Victory at Trial Is Possible, 25 J. LEGAL STUD. 493, 493 (1996) (concluding "it does not seem appropriate to regard 50 percent plaintiff victories as a central tendency, either in theory or in fact"); Joel Waldfogel, The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory, 103 J. POL. ECON. 229 (1995) (finding support for the 50% hypothesis in the relationship between trial rates and plaintiff win rates); Donald Wittman, Is the Selection of Cases for Trial Biased?, 14 J. LEGAL STUD. 185 (1985) (proposing "a different modeling of the distribution of litigant estimates of outcomes that leads to contrary conclusions about the litigation process"). That question is theoretically and empirically important, but for purposes of this Article all we need is the core insight that the cases that go to trial are a nonrandom and disproportionately indeterminate sample of legal events. On this basic point, useful analyses include Richard A. Posner, Economic Analysis of Law § 21 (3d ed. 1986); Jonathan P. Kastellec & Jeffrey R. Lax, Case Selection and the Study of Judicial Politics, 5 J. EMPIRICAL LEGAL STUD. 407 (2008); Leandra Lederman, Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle, 49 CASE W. RES. L. REV. 315 (1999); Frederick Schauer, Judging in a Corner of the Law, 61 S. CAL. L. REV. 1717 (1988); Ahmed E. Taha, Judge Shopping: Testing Whether Judges' Political Orientations Affect Case Filings, 78 U. CIN. L. REV. 1007 (2010).
under-represents the easy cases and over-represents the hard ones, generalizing about all applications of law from the unrepresentative set of litigated cases is a serious error.

The selection effect operates throughout the litigation process. Expected losers prior to trial will disproportionately settle or succumb rather than litigate, and thus lawsuits will ordinarily be filed and then tried to judgment only when both parties believe they have chances to win. Similarly, losers at trial will typically not appeal unless they believe there is some likelihood of prevailing on appeal, and the field of appellate decisions thus selects for difficult cases at the edges of law even more than the field of cases tried to verdict. Indeed, although the selection-effect literature treats the dispute as the starting point of the legal process, in fact selection takes hold even earlier. When the law is clear, a dispute will typically not even arise, and the very fact of a dispute is itself law-dependent. Because I would prefer to pay my taxes later than April 15 (or not at all), the Internal Revenue Service and I have opposing preferences. But the law is so clear (at least in my case) that it would not occur to me that I had a “dispute” with the IRS. Only when parties with opposing preferences can each make a nonpreposterous reference to a legal or other norm would the conflict of preferences even ripen into a “dispute” in the first place.

Because litigation and appeal disproportionately select for events in which the law is indeterminate, or in which there are opposing defensible accounts of the facts, drawing conclusions about law in general from this unrepresentative class of hard cases exaggerates law’s indeterminacy, so it is said. If Realism’s claim is based on the class of litigated cases, it is either not a claim about all or most of law, or, if it is such a claim, then it is a mistaken one.

Interestingly, the view that Realism is about hard cases and not law in general is supported by the writings of some of the Realists themselves. Llewellyn, for example, stressed early on that his views about the malleability of legal rules were applicable only to the “case[s] doubtful enough to make litigation respectable.” And Max Radin emphasized that his contributions to Realism were to be understood as located in the context solely of “marginal cases.”

Such statements reveal there to be little difference between the Realists’ actual views and what H.L.A. Hart in The Concept of Law intended as a criticism of Realism. Hart, misreading the Realists as insisting that law

26. Llewellyn, Some Realism About Realism, supra note 5, at 1239. A similar qualification is offered in LLEWELLYN, THE BRAMBLE BUSH, supra note 20, at 58 (observing that litigated cases bear the same relationship to the underlying pool of disputes “as does homicidal mania or sleeping sickness, to our normal life”).


28. HART, supra note 7, at 135-47.
was pervasively indeterminate and that legal rules were routinely unable to straightforwardly generate legal results, accused them of being narrowly focused only on hard appellate cases. If the Realists had recognized the ubiquity of plain rule-generated outcomes, Hart argued, they would not have made the claims he understood them as making about law and legal rules in general.

Thus a widespread view, interestingly held by Hart and the Realists alike, is that law has a straightforward operation in most nonlitigated instances of legal application, but that in litigated disputes, especially in appellate cases, legal determinacy often disappears. Hart and the Realists disagreed about the size of this domain of indeterminacy, but they agreed about its existence. And in this domain—the penumbra and not the core, in Hart's terminology—Hart and others believed that judges exercise legislature-like discretion. Llewellyn thought that judges seek to further the internal goals of the legal system and external policy goals, and Jerome Frank and other Realists opined that psychological or other personal factors are at work. But in focusing on judges and litigated cases, all seemed to believe that the routine operation of law in its uncontroverted and unlitigated aspect remained largely untouched by properly understood Realist claims.

29. Which he did in multiple ways. See LEITER, supra note 2, at 17–18 (explaining that Hart "misread the Realists as answering philosophical questions of conceptual analysis" when in fact the Realists were "not explicitly concerned with analyzing the 'concept' of law as it figures in everyday usage"); id. at 59–60 (arguing that "[a]lone by (wrongly) construing the Realist theory of adjudication as a conceptual theory of law could Hart make it seem that Positivism and Realism are opposed doctrines").

30. See supra note 24.

31. And especially in the Supreme Court, where the ideological valence of the issues and the miniscule number of cases actually decided presents the selection effect at its acme. See generally Frederick Schauer, The Court's Agenda—and the Nation's, 120 HARV. L. REV. 4 (2006) (analyzing the Supreme Court's decisional agenda). This extreme manifestation of the selection effect is implicit in Chief Justice Charles Evans Hughes's comment to Justice William O. Douglas that "you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975, at 8 (1980).


33. HART, supra note 7, at 125–32; see also BELL, supra note 21, at 226–30 (describing the "interstitial legislator" model); HANS Kelsen, Pure Theory of Law 348–56 (Max Knight trans., 1967) (arguing that "every law-applying act is only partly determined by law"); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 180–209 (1979) (arguing that judges rely on their own moral judgments to decide "unregulated" disputes).

34. FRANK, COURTS ON TRIAL, supra note 20, at 146–57; Frank, Are Judges Human II, supra note 22, 241–42.

35. See EDWARD STEVENS ROBINSON, LAW AND THE LAWYERS 167–91 (1935) (arguing that the concepts of jurisprudence must be assessed under the lens of psychological and sociological analyses); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 29–30 (1955) (discussing the contributions of the Justices as individuals); SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 52–53 (2005) (identifying Thurman Arnold's contributions to the Realist movement); Schroeder, supra note 23 (applying modern analytic psychology to understand judicial opinions).
Any understanding that renders Realism compatible with Hart's attack on it, and that leaves so much of the traditional picture untouched, seems so far from the common radical and threatening portrayal of Realism that we can label it "Tamed Realism". Tamed Realism, prominent in the literature, might instead be described as bounded, peripheral, or interstitial, each term highlighting that Realist claims are most plausible when relegated to the indeterminate edges of law, and become less so with respect to all legal rules in all applications. I characterize this understanding of Realism as "tamed" in order to situate it with respect to the common belief that Realism threatens the traditional picture of law. But if Realism is restricted to a narrow subset—appellate cases, or even litigated cases—of the complete set of legal events, it becomes less threatening to a traditional picture of how law in its entirety operates.

III. The Challenge of (Even) Tamed Realism

Understanding the Realist challenge as tamed or bounded hardly makes it unimportant. After all, the view that judicial decision making is substantially determined by positive law traditionally conceived, even in


37. See FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 137-38 (2009) (limiting the Realist challenge to hard cases); Ken Kress, Legal Indeterminacy, 77 CALIF. L. REV. 283, 296-97 (1989) (identifying the difference between indeterminacy in appellate cases and the normal indeterminacy of law); Brian Leiter, Explaining Theoretical Disagreement, 76 U. CHI. L. REV. 1215, 1226-27 (2009) (criticizing Ronald Dworkin for failing to recognize that most applications of law do not involve disagreement); Brian Leiter, Legal Indeterminacy, in 1 LEGAL THEORY 481, 485 (1995) [hereinafter, Leiter, Legal Indeterminacy] (accepting the existence of easy cases, agreeing with Andrei Marmor, that easy cases are those in which "the facts . . . [of the case] fit the core of the pertinent concept-words of the rule in question [with the result that] the application of the rule is obvious and unproblematic" (quoting ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 126 (1992)), and maintaining that easy cases are those in which legal interpretation operates by the "plain meaning of the words" of a legal rule, and in which the "standard instances picked out by the concept the words stand for are uncontroversial").

38. Of course if the very notion of law, and what counts as law, is understood broadly enough, then the contention that nonlegal factors play a role in legal decision making becomes almost
litigated or appealed cases, is widespread, and has been for centuries. Although every dispute differs at least slightly from its predecessors, and although applying even precise statutory language to a new situation requires some degree of interpretation, the traditional view supposes that the techniques of legal reasoning point to correct outcomes even in cases that wind up in appellate courts. Even with the demise of the belief that judicial decision making is typically mechanical, a persistent view, one dominant prior to the Realists, is that even nonmechanical judicial decisions are based overwhelmingly on the law. Even now, standard works on legal reasoning focus on appellate cases, the implicit message being that even for these cases some answers and methods are legally better than others:

impossible. \textit{Leiter, supra} note 2, at 11. When the domain of law is defined to include not only positive law traditionally conceived, but also a host of moral, policy, and political factors, then the claim that legal decision making typically involves nonlegal factors becomes uninterestingly false precisely because what the Realists understood as nonlaw has been redefined as law. But if, with the Realists and others (see, e.g., Scott J. Shapiro, \textit{Law, Morality, and the Guidance of Conduct}, 6 \textit{Legal Theory} 127 (2000) (defending exclusive positivism)), we understand law as a domain of sources and inputs substantially narrower than those otherwise accepted within the society for, say, moral or policy decisions (on the contours of that domain, see Frederick Schauer, \textit{The Limited Domain of the Law}, 90 VA. L. REV. 1909, 1910 (2004) [hereinafter, Schauer, \textit{The Limited Domain of the Law}]), then the extent to which judges make decisions only or presumptively on the basis of such material becomes a question about which it is possible to engage in serious empirical inquiry, and about which the Realists and the “traditionalists” are in genuine disagreement.


40. BLACKSTONE, supra note 13; COKE, supra note 14; WAMBAUGH, supra note 16; Zane, \textit{supra} note 17. Indeed, the Realists’ targets understood Realism as a genuine challenge. \textit{See SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW} 154 (1929) (defending deductive reasoning as a part of legal decisions); George K. Gardner, \textit{An Inquiry into the Principles of the Law of Contracts}, 46 HARV. L. REV. 1, 41 (1932) (supporting the use of precedent for resolving legal disputes despite the uncertainties that it creates).


42. \textit{See PATTERSON, supra} note 2, at 181–82 (describing the rejection of a mechanical approach by Cardozo, Holmes, and Kantorowicz).

43. \textit{See supra} notes 39–41.


\textit{The jurist was to find universal principles by analysis of the actual law. He had nothing to do with creative activity. His work was to be that of orderly logical
The traditional view of legal decision making in cases not explicitly governed by existing law reaches its pinnacle in Ronald Dworkin’s sophisticated version. In denying that judges exercise discretion in any conventional sense of that word, and in maintaining that judging is a search for the “right answer” to any legal controversy, Dworkin, although acknowledging disagreement in practice, nevertheless offers an argument compatible with the traditional view that law governs even those events about which it seems, on the surface, to be silent. Or, put differently, law controls the hard cases as well as the easy ones. More pervasively, the traditional view is seen in the ubiquitous practice, especially in the United States, of accusing judges who have reached disagreeable results in appellate cases of having made technical legal errors or “mistakes” rather than of having the wrong substantive views.

development of the principles reached by analysis of what he found already given in the law... [T]he jurist was [to exercise] a... restricted function so far as he could work with materials afforded exclusively by the law itself.

ROScoe POunD, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 53–54 (1922).

45. RONALD DWORKIN, LAW’S EMPIRE (1986); Ronald Dworkin, No Right Answer?, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 55 (P.M.S. Hacker & Joseph Raz eds., 1977) [hereinafter Dworkin, No Right Answer].


48. DWORKIN, JUSTICE IN ROBES, supra note 47, at 42–43.

Once we recognize the persistence of the belief that seemingly unregulated cases have legally right answers, the identification of which is the normal diet of legal reasoning, we can appreciate the challenge of even Tamed Realism. When François Gény celebrated the judge as a creative lawmaker in cases where the civil code did not indicate an outcome, he departed from his civilian predecessors who believed that substantially constrained logical or linguistic operations enabled interpreters of the code to identify uniquely correct results even when the code did not explicitly cover a particular situation. Similarly, the Freirechtsschule (Free Law School) of Hermann Kantorowicz, Eugen Ehrlich, and their allies argued not that the law was anything that judges wanted it to be, but that decision making within legal gaps was “free” of law, thereby allowing judges to exercise discretion and create law on the basis of nonlegal factors. We think of Gény and the Freirechtsschule as precursors to American Realism precisely because their claims about gaps, discretion, and judicial lawmaker within the gaps seemed heretical when made, however much such claims seem mild and conventional today. And so too with the most prominent of Realism’s forerunners, Oliver Wendell Holmes, whose assertion that “the life of the law has not been logic; it has been experience” is best interpreted as insisting that the common law necessarily draws on nonlegal empirical factors when preexisting law is silent.

The Realists and their precursors thus believed that legal gaps were to be filled by judges acting as lawmakers. That this view is now held by critics of Realism as well as Realists may make it seem trivially true, but the appearance is deceiving. Recognizing judicial discretion exercised on substantially nonlegal grounds within law’s gaps may seem tame today, but it

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Opinion, VOLOKH CONSPIRACY (July 5, 2012, 5:14 PM), www.volokh.com/2012/07/05/the-unprecedented-uniqueness-of-chief-justice-roberts-opinion/.

50. FRANÇOIS GENY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (Jaro Mayda trans., 2d ed. 1963) (1919); François Gény, Judicial Freedom of Decision, Its Necessity and Method, in SCIENCE OF LEGAL METHOD (Ernest Bruncken & Layton B. Register trans., 1917); see JARO MAYDA, FRANÇOIS GENY AND MODERN JURISPRUDENCE 6 (1978) (noting that, for Gény, when statutes and formal doctrine fail to provide an answer, “the judge must freely search for a rule on which to base his decision”).


53. See Herget & Wallace, supra note 52, at 413–17 (describing the free law movement’s belief that judicial recognition was the source of law).

was a substantial challenge previously, and remains far from universal even now.

IV. Realism Untamed

At the heart of Tamed Realism lie two related premises. One is that there are easy cases. The other is that easy cases are easy by virtue of the facts straightforwardly falling under the plain (whether ordinary or technical) meaning of the language of a legal rule. Thus, Andrei Marmor sees easy cases as those in which the “concept-words” of a legal rule fit some set of facts in an “obvious” and “unproblematic” way, and Brian Leiter understands them as ones in which the “plain meaning of the words” of a legal rule produces an outcome. Others have made similar claims. And Hart, when first offering his “No Vehicles in the Park” example, took the conventional meaning of “vehicle” and “park” as the starting point for determining which events clearly fell under the rule.

Tamed Realism is premised on the assumption that such straightforward applications of legal rules are rarely contested in court, leaving a vast number of often invisible but easy and routine applications of law existing alongside the more visible hard and litigated cases in which nonlegal factors play a

55. This is not the occasion for extended analysis of legal technical meaning, but it is worth emphasizing that plain meaning is not necessarily ordinary meaning. There can be technical meanings widely understood in a specialized domain by members of a linguistic (sub)community. In that case the meanings would be plain, albeit technical. “Meson” has a plain meaning for physicists, and “gesso” for painters, although such terms do not appear in ordinary language. And the same holds true for law, where the plain meanings of “habeas corpus,” “quantum meruit,” “tying arrangement,” “courtesy,” and “interrogatory” are no part of ordinary language. On the relationship between ordinary and technical language in general, see Charles E. Caton, Introduction, in PHILOSOPHY AND ORDINARY LANGUAGE v, vii–xi (Charles E. Caton ed., 1963). On technical legal language and its relation to ordinary language, see Mary Jane Morrison, Excursions into the Nature of Legal Language, 37 CLEV. ST. L. REV. 271 (1989).

56. MARMOR, supra note 37, at 126.

57. Leiter, Legal Indeterminacy, supra note 37, at 485.


59. Hart, Positivism, supra note 32, at 607. Hart subsequently acknowledged that the core of a legal rule might, contingently, be based, in part, on a rule’s purpose as well as its literal meaning. H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 1, 7–8 (1983). At the same time, however, he reemphasized that the core of a legal rule could, again contingently, be entirely a function of the “settled conventions of language.” Id. Hart’s example is analyzed at length in Frederick Schauer, A Critical Guide to Vehicles in the Park, 83 N.Y.U. L. REV. 1109 (2008).
major role. Thus in constitutional law, a domain in which the nonlegal dimensions of contested cases are especially apparent, numerous constitutionally determined outcomes remain unlitigated precisely because the words of a constitutional provision are so clear as to make litigation futile. The plain language of the Twenty-Second Amendment, for example, prohibits a President from serving a third term, and the precise words of Article I bar twenty-eight-year-olds from serving in the Senate. That litigation under such provisions would be pointless, however, does not render them irrelevant. Without them, well-qualified (or at least as qualified as anyone else) twenty-eight-year-olds might well be elected to and serve in the Senate, and popular Presidents could, as with Franklin Roosevelt prior to the adoption of the Twenty-Second Amendment, serve third (and fourth) terms. Law in its determinate and unlitigated application might thus be efficacious in producing outcomes different from those that would have existed without the rule, or with a different rule.

Undergirding this picture of law in its nonlitigated everyday application is the premise that the easiness of easy cases—or, more accurately, the easy application of the law—is typically determined by the meaning of the language of the pertinent legal rule, and that the indications of the meaning are ordinarily followed by judges. The consequence is the hypothesis that most disputes or events clearly falling under a rule’s language are ones in

60. Schauer, Easy Cases, supra note 1, at 404.
61. That nonlegal factors (see supra note 38, however, for important clarification) play the predominant role in Supreme Court constitutional litigation is the chief contribution of the so-called attitudinal perspective on Supreme Court decision making. See, e.g., Saul Brenner & Harold Spaeth, Stare Indecisis: The Alteration of Precedent on the U.S. Supreme Court, 1946-1992 (1995) (finding precedent less important than ideological attitudes in explaining Justices’ votes); see also Lee Epstein & William M. Landes, Was There Ever Such a Thing as Judicial Self-Restraint?, 100 Calif. L. Rev. 557, 559 (2012) (concluding that “Justices appointed since the 1960s were and remain ideological in their approach to the constitutionality of federal laws”). See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002) (analyzing the role of nonlegal attitudes in Supreme Court decision making); William Mishler & Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective, 58 J. Pol. 169 (1996) (same); Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 Am. Pol. Sci. Rev. 561 (1989) (same).
62. “No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.” U.S. Const. amend. XXII, § 1.
63. “No person shall be a Senator who shall not have attained to the Age of thirty Years, . . .” Id. art. I, § 3, cl. 3.
64. That is, the law would exclude otherwise societally eligible outcomes and mandate ineligible ones. On whether law would be efficacious in doing so, compare Frederick Schauer, Easy Cases, supra note 1 (stating that the Constitution’s precise language in some matters will forestall “litigation with respect even to matters of great moment”), with Mark V. Tushnet, A Note on the Revival of Textualism in Constitutional Theory, 58 S. Cal. L. Rev. 683, 687–89 (1985) (noting the dependence of seemingly plain meaning on contingent social agreement); Tushnet, Following the Rules Laid Down, supra note 2, at 822–24 (same).
which one party, with little hope of prevailing, would rarely pursue litigation. The selection effect is thus parasitic on the existence of easy cases. Tamed Realism’s relegation of legal indeterminacy to the litigated fringe of law presupposes a core of easy cases whose easiness is determined by the straightforward interpretation of conventional legal materials by the equally straightforward application of standard methods of legal reasoning.

But now consider Llewellyn’s distinction between paper rules and real rules, a distinction first offered in 1930, and subsequently elaborated several years later. In drawing the distinction, Llewellyn distanced himself from the particularism of Jerome Frank, Joseph Hutcheson, and other Realists, making clear he believed there to be legal rules. Moreover, such rules were not simply ex post descriptions of categories of legal outcomes. Llewellyn fully recognized the distinction between descriptive and prescriptive rules, and understood the idea of internalized prescriptive and guiding rules, exactly the idea that Hart mistakenly accused him and other Realists of failing to comprehend. What Llewellyn and others denied, however, was the identity between the real rules, the prescriptive rules actually internalized by judges and used in making decisions, and the paper rules, the rules in “propositional form,” which happened to be written down in law books.

65. See supra note 25 and accompanying text.
66. Leiter, Legal Indeterminacy, supra note 37, at 488.
67. Llewellyn, A Realistic Jurisprudence, supra note 5, at 444–57.
68. LLEWELLYN, THE THEORY OF RULES, supra note 5, at 63–76. The exact period when Llewellyn produced the manuscript is uncertain.
69. Frank, supra note 20, passim. See generally Charles L. Barzun, Jerome Frank and the Modern Mind, 58 BUFF. L. REV. 1127, 1129 (2010) (offering an interpretation of Frank’s version of Legal Realism that focuses on “particular human characteristics” of judges as the basis for analysis of legal progress).
70. Hutcheson, supra note 22, at 276–77.
71. See Grant Gilmore, The Ages of American Law 80–81 (1977) (describing the particularism of Wesley Sturges); see also Herman Oliphant, Mutuality of Obligation in Bilateral Contracts at Law, 28 COLUM. L. REV. 997, 999–1000 (1928) (complaining about the excess breadth of most statements of law).
73. On the distinction, see Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991).
75. Hart, supra note 7, at 137–47.
77. Llewellyn, The Theory of Rules, supra note 5, at 63.
78. On the distinction, see also Stephenson, supra note 27, at 198–99.
Before turning to judicial examples, consider, as an aid to grasping the basic idea, the typical interstate highway speed limit. The official limit is often 65 miles per hour, which is what is posted on signs, located in codified highway rules and regulations, and sometimes even set forth in a statute. Sixty-five miles per hour is the relevant paper rule. Yet although 65 is the paper rule, it is common knowledge that the real rule is often 74.79 Police rarely ticket drivers unless they are exceeding 74,80 and judges, in the unlikely event a driver summoned to court for driving at greater than 65 but less than 75, might, although more debatably, find a way to acquit or dismiss.81 Insofar as both police officers and judges actually so behave, the real rule is a speed limit of 74 and not 65. And this divergence between the paper rule of 65 and the real rule of 74 is exactly what the Realists were at pains to stress.

Note that 74 miles per hour in the example is a genuine prescriptive and guiding rule, providing a reason, albeit not necessarily a conclusive one, for decision pursuant to it. Some police officers and some judges could believe that sound public policy permitted driving up to but not above 74, believing that the posted limits are too low, that speed is not a major contributor to highway accidents, that losses in safety from faster driving are not worth losses in efficiency from slower driving, or that it is useful to enforce a limit containing a substantial margin of error. But whatever the reason, they might well internalize, exactly in Hart’s sense, the “speed limit 74” rule, albeit with

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81. Of course some judges might enforce 65 even if police officers routinely applied 74. Police officers might not ordinarily ticket anyone driving under 75, but if they happened to do so, judges might still convict anyone proved to be driving over 65. On the other hand, judges, aware of the 74-miles-per-hour real rule (note that Schiltz, supra note 79, is a judge), might instead find a way to acquit drivers proved to be driving at greater than 65 but less than 75. More broadly, therefore, the real rule for a police officer might well not be the real rule for a judge. Or the real rule for a judge might be closer to the paper rule than it is for a police officer. It is thus a mistake to assume that the distinction between paper and real rules operates in the same way for all officials, but, as the Realists stressed, it is also a mistake to assume, without empirical investigation, that the real rules that even judges used could be identified simply by identifying the formal legal doctrine or the “announced” rules. See Llewellyn, A Realistic Jurisprudence, supra note 5, at 444 (describing the difference between accepted rules and the practice of decision in judges’ actual behavior).
opinions couched in different terms and relying, often disingenuously, on different reasons.\textsuperscript{82}

The important feature of the internalization and application of a real rule at variance with the paper one is that there are still easy cases. If the real rule internalized and applied by judges is as described, then a driver driving at 67 presents an easy case because 67 is plainly less than 74. And because 67 is plainly less than 74, then the “speed limit 74” rule straightforwardly prescribes and predicts the outcome whenever a police officer or judge uses that and not the paper rule. But “speed limit 74” is nowhere to be found in the official law, which is exactly what Llewellyn and others sought to highlight.\textsuperscript{83}

When “speed limit 74” is the real rule, however, and when “speed limit 74” generates easy cases, the selection effect still obtains. Drivers will drive at 67 with impunity, and police officers will not stop them for doing so, even though the written law has been broken. Drivers will know that the real “speed limit 74” rule gives them chances the paper rule does not. And police officers will systematically refrain from ticketing drivers even when enforcement actions would be sound based on the paper rule because they know their chances of succeeding before a judge in a contested case would be small. The cases winding up in court will then still disproportionately be the hard cases, whether because they are on the edges of the rule, as with someone driving 73.9 or 74.1, or because other factors (erratic driving, say, or a child in the car) are present, or because someone caught exceeding the real speed limit had a good and possibly legally cognizable reason for doing so.

The lesson of this example is that even when real rules diverge from paper rules, there will still be easy cases, and the selection effect will still exclude them from litigation. But the easiness of the easy cases will no longer be determined by the conventional legal meaning of published legal rules, as tamed Realism maintains, but instead by the plain understanding of a rule not located in standard legal sources. Untamed Realism, by stressing the distinction between paper and real rules, accepts that easy cases differ from hard ones, and that mostly hard cases wind up in court, but challenges the traditional understanding of what makes an easy case easy and consequently unlitigated.

As transformed, the Realist challenge is no longer limited to the class of cases in which the language of the law or the traditional devices of legal analysis—the standard implements in the lawyer’s toolkit—do not

\textsuperscript{82} That the reasons supplied by judges in justifying their decisions are typically not the reasons that produced those decisions is a central Realist tenet. See \textit{supra} Part I.

\textsuperscript{83} See, \textit{e.g.}, Llewellyn, \textit{A Realistic Jurisprudence}, supra note 5, at 448 (“‘Paper rules’ are what have been treated, traditionally, as rules of law: the accepted \textit{doctrine} of the time and place—what the books there say ‘the law’ is. The ‘real rules’ and rights—‘what the courts will do in a given case, and nothing more pretentious’—are then predictions.”).
straightforwardly indicate an outcome. Rather, it is a claim about the impotence of paper rules (and traditional techniques of legal reasoning) in generating legal outcomes. Insofar as the claim is empirically sound, it is thus about all of law, and not just the law to be applied when paper rules are indeterminate. The challenge is now to the very idea of positive or formal law as the source of legal determinacy, and is thus Realism in its far less interstitial and thus far less tamed dimension. Untamed Realism does not claim that there is no legal determinacy, but instead that legal determinacy is often a product of something other than the conventional legal meaning of official rules.\(^8\) Or, to put it differently, the Realist claim about the gap between paper and real rules is not about indeterminacy, but about what we might call \textit{dislocated determinacy}.

The speed limit example presents dislocated determinacy crisply, but Realism was focused on judges. So consider the rules of evidence. Although many formal evidentiary rules govern trials in American courts, American evidence law cannot accurately be described without recognizing that judges, when acting as fact finders without a jury, routinely discard many of the official rules of evidence.\(^5\) The judges make rule-guided decisions, but they are guided by rules at odds with the formal paper rules. In acting in this way, the judges are applying a genuinely internalized rule. Not only do they believe that proceeding largely without the formal rules of evidence is what they ought to do, but a judge who rigidly enforced the rules in a bench trial might also be subject to criticism for failing to apply the widely accepted but unwritten real rule mandating the nonuse of the paper rules of evidence.

Dislocated determinacy appears even more sharply when a \textit{single} real rule of decision diverges from the paper rule. Consider the research by Bernard Wolfman and his collaborators on the votes of Justice William O. Douglas (hime\textit{self} a pioneer Realist) in federal income tax cases.\(^6\) Whatever the actual indications of the Internal Revenue Code or its associated rulings and interpretations, Wolfman argued, Douglas actually applied a \textquoteleft taxpayer wins\textquoteright rule, and thus, for him, \textquoteleft taxpayer wins\textquoteright was the real rule actually applied (and, arguably, genuinely internalized) in making decisions.

As in the speed limit example, instances of paper rule–real rule divergence multiply when we examine enforcement practices as well as

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\(^8\) On the point that Realism is best seen as a matter of degree, see Stephenson, \textit{supra} note 27, at 197–98.


judicial decisions. According to the Securities Act of 1933, for example, issuers of securities must file a registration statement with the Securities and Exchange Commission prior to selling securities to the public. The registration then becomes effective—the securities can be sold—twenty days after the Commission has found the representations in the registration statement sufficient to provide adequate information to prospective investors. Because of continuous price fluctuations in the financial markets, however, offerings are highly time- and price-sensitive. In practice, therefore, securities must be offered very shortly after a price-dependent underwriting agreement, an agreement that is itself part of the required registration materials, is finalized. And because a registrant forced to wait twenty days after Commission approval is consequently doomed to an unsuccessful offering, the discretionary power of the Commission to "accelerate" the twenty-day waiting period is in practice crucial. Knowing the importance of acceleration, the Commission has long used its discretionary acceleration power to impose requirements nowhere to be found in the statute—a commitment to nonindemnification of directors for wrongdoing, for example. And thus there is now substantial divergence between the paper rule as embodied in the statute and the requirements imposed by the relevant enforcement authority.

Somewhat similar is the fact that the promise of New York Times Co. v. Sullivan in freeing the press from much of the risk of libel litigation is undercut by the way in which libel insurers tend to impose upon their insured publications requirements that would seem unnecessary under Sullivan alone. Here the real rule is imposed by private insurer behavior and not by official administration and enforcement, but the gap and its effect on primary behavior still exists.

Libel practice and SEC acceleration practice are examples of paper and real rules diverging by virtue of the real enforcement of what on paper is not a rule at all. More commonly, however, the divergence between paper and real rules comes from the nonenforcement of a paper rule. Examples

88. Id. § 77c.
89. Id. § 77b(a).
93. Note, for example, the fact that libel insurers often ask applicants about the extent of pre-publication legal review. For an example, see NEW ENGLAND NEWSPAPER & PRESS ASS'N, NEWSPAPER PUBLISHER LIABILITY INSURANCE APPLICATION FOR COVERAGE 2 (2008), available at http://issisvs.com/enp/enp_inter_app.pdf at 2.
abound, as with speed limits, and often with taxation. In *Dickman v. Commissioner of Internal Revenue*, 94 for example, the Supreme Court noted the prior de facto exemption of an intra-family interest-free loan from being treated as a taxable gift, 95 the exemption operating to eliminate the paper rule and substitute a real rule of nontaxability. Even more pervasively, the widespread nonenforcement of state sales and use taxes on most interstate consumer transactions has much the same effect. 96

As with real speed limits, all of these real rules generate easy cases. A lawyer in a nonjury trial will often not make a technically valid objection, knowing that if she did so the objection would not only be overruled, but also that she would likely be scolded by the judge for being so silly as to make what, on the basis of the paper rules, was a legitimate objection. A lawyer who, not knowing the rules about SEC acceleration, neglected to comply with the unwritten rules imposed by the Commission as a condition for acceleration could well be found to have committed malpractice. And most people treat their technical obligations to pay sales and use taxes on routine Internet consumer transactions as easy cases of legal permissibility, although the formal law is to the contrary.

These examples suggest the conclusion that the gap between paper and real rules is potentially a pervasive phenomenon throughout the law, 97 influencing which cases are hard and which easy. Insofar as the gap exists,


95. Id. at 342–43.

96. See Christopher Banthin, *Cheap Smokes: State and Federal Responses to Tobacco Tax Evasion over the Internet*, 14 HEALTH MATRIX 325, 335 (2004) (arguing that practical and legal obstacles to enforcement inhibit collection of use taxes on out-of-state purchases); Brian Masterson, Note, *Collecting Sales and Use Tax on Electronic Commerce: E-confusion or E-collection*, 79 N.C. L. REV. 203, 205 & n.11 (2000) ("In the overwhelming majority of instances in which the remote seller does not collect the use tax, the state does not have an enforcement mechanism to recover the use tax from the consumer."); Sam Zprrazilka, Note, *New York’s Amazon Tax Not out of the Forest Yet: The Battle over Affiliate Nexus*, 33 SEATTLE U. L. REV. 527, 531–32 (2010) (observing that lack of consumer awareness of use tax obligations, ineffective state enforcement, and disobedience “result in almost universal noncompliance” with use tax laws).

97. And elsewhere. Those fond of legal examples from sports and games may recognize the exact phenomenon under discussion in the so-called phantom tag in baseball, where umpires genuinely internalize and apply a rule about tagging a runner that differs from the rule on the books. So too with the former distinction between American and National League strike zones, a distinction nowhere to be found in the official rules of baseball. See David W. Rainey & Janet D. Larsen, *Balls, Strikes, and Norms: Rule Violations and Normative Rules Among Baseball Umpires*, 10 J. SPORT & EXERCISE PSYCH. 75, 77, 79 (1988) (stating that umpires routinely called the strike zone more than two inches lower than the definition in the official rules in spite of the fact that 94% of those surveyed knew the official definition); David W. Rainey et al., *Normative Rules Among Umpires: The “Phantom Tag” at Second Base*, 16 J. SPORT BEHAVIOR 147, 152–53 (1993) (describing that, in spite of the official rules, more than half of umpires in the study allowed the phantom tag, whereby a runner is called out at second even when the fielder does not have a foot on base so long as the ball beats the runner to the base); Peter Gammons, *What Ever Happened to the Strike Zone?*, SPORTS ILLUSTRATED, Apr. 6, 1987, at 40–45, available at http://sportsillustrated .cnn.com/vault/article/magazine/MAG1065780/1/index.htm (explaining that differences in chest protector equipment for umpires led to the National League being a “low ball” league as compared to the American League).
and especially insofar, as with the evidence example, as the gap exists for judges, it undercuts not the idea that there are easy cases, but the belief that the rules found in lawbooks are the determinants of easiness. Were it known, for example, that a majority of the judges of some court routinely decided for the taxpayer in tax cases even when the code and regulations pointed in favor of the government, then a lawyer with a taxpayer client might advise a formal challenge to a tax ruling even against the indications of the paper rules. There would still be easy cases under the “taxpayer wins” rule as opposed to the rules contained in the Internal Revenue Code, but some of the cases that would have been easy according to the paper rule would now be at least debatable, the paper rule notwithstanding. As in the previous examples, the distribution between easy and hard cases would come not from the official sources, but from the “taxpayer wins” rule.

In the above examples, the paper rule was understood in terms of the plain (even if technical) meaning of the language of the rule as published in formal legal sources. Yet although many Realists understood the matter in this way, the distinction between paper and real rules need not be so limited. More plausible, especially now and in the United States, is understanding the idea of a paper rule to encompass the entire array of accepted conventional methods of legal reasoning. This expanded notion of a paper rule could include, for example, references to a rule's purpose or legislative history, application of accepted canons of statutory interpretation, and conventional techniques for identifying the holdings in previously decided cases. Yet even when the idea of a paper rule is understood in terms of the plain (even if technical) meaning of the language of the rule as published in formal legal sources, the gap exists for judges, and the belief that the rules found in lawbooks are the determinants of easiness.

98. In other words, that there was a court a majority of whose judges behaved as Justice Douglas. Wolfman et al., supra note 86.

99. At least on the assumption that the United States is an especially nonformal legal environment. See P.S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law (1987) (maintaining that the American legal system is more substantive than formal).


broadened to include the panoply of respectable methods of legal reasoning, the basic point still holds. If the paper rule is the rule as understood in light of its purpose, say, the paper rule so understood may still diverge from the actual rule as enforced and applied administratively and judicially. Justice Douglas’s “taxpayer wins” rule, 104 for example, still differs from the rule that competent tax practitioners would extract from the available traditional sources of tax law. The example thus does not turn on the non-Realist reading of the tax law being limited to literal reading of the code and regulations. If there were five Justices with views like Douglas’s on the Supreme Court, then there would be many cases the Internal Revenue Service would deem not worth litigating even though the law as best but conventionally understood was on its side, and many cases that taxpayers would litigate even against overwhelming conventional legal odds. Similarly, the disregard of many rules of evidence in bench trials is inconsistent with the purposes and intent behind those rules, but the paper rules are disregarded nonetheless. And as long as such disregard exists, it will play a crucial role in determining which objections at trial are worth making, and which, formal law as best and purposively understood notwithstanding, are treated as futile.

The gap between paper rule and real rule is accordingly not confined to understanding the idea of a paper rule in literal terms. As long as even an expansive understanding of “the law” varies from the rules actually applied, the difference between paper and real rules will determine which cases are easy and which hard, and will thus, by operation of the selection effect, determine which events are disputed, litigated, and appealed, and which are treated as routine and uncontroversial. To the extent that this gap exists in some or many areas of law, therefore, it will play a major role in constituting the fields of litigation and nonlitigation. Insofar as the Realist claim about the insufficiency of the paper rules to determine outcomes is correct, therefore, the Realist challenge ceases to be interstitial or marginal, but applies throughout the operation of law. The challenge as recast is still about the indeterminacy of the set of cases worth litigating, but by being constitutive of that set of cases in the first instance, it questions all and not just the edges of the traditional understanding of law.

V. An Empirical Claim

Because Untamed Realism goes to the core and not merely the penumbra of legal rules, it goes to the core of how we understand law itself. But characterizing the Realist challenge in this way does not address whether the challenge actually succeeds. As the Realists themselves acknowledged—indeed, insisted—their contentions, including those about the gap between

104. WOLFMAN ET AL., supra note 86, at 9, 63.
paper and real rules, were principally empirical. Legal judgments might follow the paper rules, the Realists admitted, but whether and when and how often they did so was to be resolved by empirical inquiry rather than bald assertion or quasi-religious faith in the power of the law. The question then remains about the extent to which the array of cases worth litigating is determined by the plain meaning, when there is one, of the words of legal rules, as the most tamed version of Realism predicts, or by the full array of traditional legal interpretive techniques, as a more expansive version would suppose, or by a much wider set of nonlegal as well as legal considerations, as Untamed Realism posits. However we understand the notion of a paper rule, the extent of the divergence between paper and real rule is an unavoidably empirical question. Untamed Realism hypothesizes that this divergence is frequently substantial, but whether that hypothesis is borne out by the facts remains to be investigated.

Obviously Untamed Realism's hypothesized gap between paper and real rules is a matter of degree not susceptible to a yes or no answer. And of course the answer will vary across time, place, judge, court, legal system, area of substantive law, and much else. Nevertheless, some preliminary generalizations might usefully inform the more systematic empirical analysis that the spirit of Realism urges us to pursue.

Initially, it is important to recognize that departures from paper rules, even when based on nonlegal reasons, still require the law-like public justifications that the Realists tended to call "rationalizations." Perhaps the


106. See Felix S. Cohen, Ethical Systems and Legal Ideals 237 (1933) (observing that "principles enunciated by courts as grounds of decision often represent nothing more objective than a resolution to use sanctified words wherever specified results are dictated by undisclosed determinants"); Frank, Courts on Trial, supra note 20, at 29–30, 100–04 (describing as "rationalization" the process by which judges begin "with the results they desire] to accomplish" and then seek support for these conclusions); Rumble, supra note 18, at 30, 79–83 (discussing Llewellyn's "opinion-skepticism"); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 809–12 (1935) (arguing that "the traditional language of argument and opinion neither explains nor justifies court decisions"); Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. Pa. L. Rev. 907, 910–11 (1933) (urging law students to observe what actually goes on in law offices and courtrooms instead of studying judicial opinions); Hutcheson, supra note 22, at 285 (asserting that "the judge really feels or thinks that a certain result seems desirable, and he then tries to make this decision accomplish that result"); Llewellyn, Some Realism About Realism, supra note 5, at 1238–39 (describing rationalization as "trained lawyers' arguments . . . intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable"); George Wilfred Stumberg, Book Review, 17 Texas L. Rev. 531, 532 (1939) (reviewing Kenneth C. Sears & Henry Weihofen, May's Law of Crimes (4th ed. 2938)) ("[L]egal abstractions are of little use in describing what the courts have done because
police need not provide a formal justification for why the real speed limit is 74 and not 65, but more commonly, especially when a judge departs from a paper rule, there must be a law-sounding justification on which the divergence between paper and real rule is based. As long as consumers of legal outcomes—lawyers, the public, the political world, the media, academic commentators, etc.—appear to demand that legal outcomes be determined by publicly available legal reasons, even a judge deciding on the basis of nonlegal reasons must offer reasons seemingly based on the law. When such reasons are employed to justify a gap between paper rules and real rules, we can call them escape routes—the avenues by which legal decision makers explain in law-like terms the departures for nonlegal reasons from what appear to be the clear indications of a clearly written rule.

Part of Llewellyn’s motivation in offering (perhaps incorrectly) his menu of competing canons of statutory interpretation was to demonstrate the ready availability of just such escape routes. If some principle of statutory interpretation could justify virtually any result reached for reasons other than the indications of the statute being interpreted, judges inclined to depart from the paper rule for nonlegal reasons could do so without appearing to be departing from the law. For example, when the New York Court of Appeals set aside the paper rule in Riggs v. Palmer in order to deny to Elmer Palmer the inheritance which the plain words of the Statute of Wills appeared to allow, it was able to use the “no man may profit from his own wrong” principle to shroud in the language of law a justice-based and

results have usually been first reached by judicial considerations of social consequences and then rationalized in the opinions by abstractions.


110. A prominent example of Llewellyn’s point is United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), in which Justice Brennan’s majority opinion relied for its conclusion that the statute allowed a voluntary affirmative action plan on the venerable principle that legislative intention could override plain meaning. Id. at 201. The dissenting opinions of Chief Justice Burger and Justice Rehnquist relied for their conclusion that the plan was unlawful on the equally venerable principle that plain statutory language foreclosed recourse either to legislative intent or to the spirit or purpose of a law. Id. at 216–17 (Burger, C.J., dissenting); id. at 253–54, 228 n.9, 229 (Rehnquist, J., dissenting).

111. 22 N.E. 188 (N.Y. 1889).

112. It is worth noting that both the majority and the dissent in Riggs agreed that the literal meaning of the words of the statute would have given Elmer his inheritance. Frederick Schauer, Constitutional Invocation, 65 FORDHAM L. REV. 1295, 1306 n.44 (1997) (stating that both the majority and dissenting opinions in Riggs were “clear in their understanding that the Court was taking an action contrary to the literal reading of the law, and not merely within the interstices of that literal reading”).
fact-specific departure from the most immediately applicable rule.\textsuperscript{113} Similarly, insofar as Lon Fuller was—implicitly—sociologically and empirically correct in predicting what an American court might do with his hypothetical cases of the military truck used as a war memorial or the businessman napping (in violation of a “no sleeping in the station” rule) while waiting for a train,\textsuperscript{114} he relied on the legal principle of recourse to the purpose of the law as a way of legally justifying a departure from what the formal law actually said. And whenever a court relies on the principle of desuetude to nullify the force of a statute remaining officially on the books, it uses still another method to apply what looks like law to reach a result other than the one seemingly indicated by the law as it is written down.\textsuperscript{115}

These examples suggest that departures from paper rules are common, and that American law contains ample resources permitting judges to avoid paper rules while still appearing faithfully to be applying the law. This conclusion does not address the question of just how often judges do so, or the extent to which such escape routes are routinely available, but it does suggest that judicial avoidance of the most immediately applicable paper rule is hardly unusual, that there are multiple methods of accomplishing this end, and that the existence of paper rule–real rule gaps is a significant part of the American legal environment.

But just how significant? One measure of the soundness of the claims of Untamed Realism is the frequency with which paper rules—the meaning of the language of a legal rule as set forth in a statute, regulation, or case; or the interpretation of well-understood black-letter law by the standard techniques of conventional legal reasoning—vary from the real rules as actually applied. Although the distinction between paper and real rules is conceptually important, and although there can be genuine prescriptive and internalized rules that vary from the paper rules governing the same acts, it

\textsuperscript{113} As is well known, Ronald Dworkin uses the case to argue that the “no man may profit from his own wrong” principle was a preexisting part of the law, thus making Riggs a case involving neither a gap in the law nor an exercise of judicial discretion. RONALD DWORKIN, supra note 47, at 23–26; DWORKIN, supra note 46, at 15–20. In practice, however, there is little difference between Dworkin’s allegedly anti-Realist position and the Realist claim that something other than the most immediately applicable legal rule is commonly available to rationalize a departure from that rule in the interest of the judge’s perception of justice, policy, or the equities of the particular controversy.

\textsuperscript{114} Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 662–65 (1958).

\textsuperscript{115} See Blanchard v. Ogima, 215 So. 2d 902, 905 (La. 1968) (applying the doctrine of desuetude to deny applicability of a vicarious liability provision in the Louisiana Civil Code); Corey R. Chivers, Desuetude, Due Process, and the Scarlet Letter Revisited, 1992 UTAH L. REV. 449, 451 (noting that the doctrine of desuetude voids a statute); Linda Rodgers & William Rodgers, Desuetude as a Defense, 52 IOWA L. REV. 1, 1–5 (1966) (explaining the doctrine of desuetude); see also CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 97 (2005) (urging use of desuetude to void outdated and rarely enforced statutes dealing with sexual behavior). Also relevant in this context is Guido Calabresi’s call for judges to use common law principles to revise what they perceive to be obsolete statutes. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982).
could turn out that what is conceptually possible and occasionally extant is in reality rare in practice—rather like pandas or pineapple wine. There are, of course, pandas, and there really is pineapple wine, but pandas no more characterize the animal kingdom than pineapple wine characterizes the universe of wine. To make too much of pandas and pineapple wine in describing the phenomenon of which they are admittedly part would be substantially misleading.

On the other hand, it may be, for some or many areas of law in some or many legal cultures, that real rules diverge from paper ones to a substantial extent and on numerous occasions. Were that so—and when and where it was so—the divergence between real and paper rules would be an essential part of characterizing and understanding the phenomenon of law, which is exactly the point the Realists pressed.

This is not the occasion to conduct that empirical inquiry. Obviously, much of Realist and post-Realist and Realist-inspired scholarship is focused on just this question, and equally obviously the methods that can be used to address it encompass the full breadth of empirical approaches and methodologies. Yet it is important to note that any properly designed empirical inquiry will include within its compass not only the instances in which something other than the paper rule appeared to produce a legal result, but also the instances in which the paper rule actually influenced the outcome. For example, although the court in Riggs v. Palmer did depart from the applicable paper rule—the Statute of Wills—in ruling against Elmer Palmer, in fact most courts in most jurisdictions often allow unworthy beneficiaries—even ones who have contributed in some way to the death of the testator—to inherit. Similarly, courts sometimes enforce the literal words of statutes even when the literal meaning plainly does not embody the legislative intent and even when the results seem silly. And Supreme Court Justices have been known, because of principles of stare decisis, to follow decisions they demonstrably believe mistaken.

116. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) (rejecting as unconstitutionally protectionist Hawaii’s understandable attempt to assist the pineapple wine industry by exempting it from otherwise applicable taxes).

117. See supra note 2.

118. See Schauer, The Limited Domain of the Law, supra note 38, at 1937–38 (juxtaposing Riggs v. Palmer with “[t]he full history and breadth of ‘murdering heir’ cases” to show that courts typically allowed killers to inherit).

119. E.g., United States v. Locke, 471 U.S. 84, 96 (1985) (enforcing the exact literal meaning of a “prior to December 31” filing deadline).

may be unrepresentative, but they suggest that paper rules at least sometimes have at least presumptive effect in some jurisdictions on some topics at some times and for certain courts (or judges) and other legal decision makers.\textsuperscript{121} When the effect of paper rules might be considerable, therefore, and the gap between paper and real rules minimal or infrequent, the force of the Realist challenge would be diminished.

Not only might paper rules sometimes be outcome determinative, but even in cases of divergence paper rules might influence the content of real rules. Consider again the speed limit. A common real speed limit is 74 when the posted paper speed limit is 65, but a common real speed limit is 69 when the posted limit is 60 and 64 when the posted limit is 55, suggesting that often the real speed limit is the paper limit plus nine. The divergence between paper and real rules, even when considerable, may thus be a function not only of administrative discretion and other nonrule factors, but also of the paper rule itself.

To repeat, the extent to which paper rules are followed or influential is an empirical question not answerable by a selected anecdote or an unrepresentative example. That the law consists of paper rules, the understanding of which produces a mastery of the law, is what the Realists attempted to challenge. But that paper rules have little to do with the law in action is no less an empirical claim, the critical testing of which is fully consistent with the broadest understanding of the Realist program.

VI. Conclusion

As Llewellyn noted more than eighty years ago,\textsuperscript{122} law is far more than the decision of appellate cases. Appellate cases are important, and so is litigation, but the effect of law is felt most clearly in the law-influenced events that never see a court at all. Yet to accept that law is most important in its unlitigated effect is to invite the question about what causes the unusual

\textsuperscript{121} Duncan Kennedy argues that the possibility of an outcome in contravention of the paper rule in any case destroys the formality of the entire system. Duncan Kennedy, Legal Formality, 2 J. Legal Stud. 351, 351–54 (1973). The reality of contravention in one case puts its possibility on the agenda in every case, he argues, thus undercutting the goal of formality of producing results simply and mechanically. Kennedy’s insight is important, but the extent of its value is an empirical and not logical matter. The strength of a presumption in favor of the paper rule will determine the reality of the plausibility of arguing against it, and thus the stronger the presumption the less an outcome against the presumption will undermine the system’s decision-constraining goals. The same argument applies to Ronald Dworkin’s speed limit example. DWORKIN, supra note 46, at 266. Dworkin’s conclusion that what looks like a straightforward application of the paper rule is in fact the product of a decision maker’s capacious consideration of a larger array of rules and principles again ignores the possibility that presumptions may eliminate such consideration in most instances. And when Melvin Eisenberg contends that easy cases are only those in which a doctrinal proposition is found to be compatible with what he calls a “social proposition,” MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 3 (1988), he may similarly be slighting the weight given to doctrinal propositions themselves.

\textsuperscript{122} See supra note 26. The claim is repeated in LLEWELLYN, THE COMMON LAW TRADITION, supra note 21, at 6, 64–68.
cases to be unusual, and, conversely, what makes the usual and thus unlitigated instances of law application usual in the first place. Holmes famously emphasized that lawyers and clients often seek to predict what courts will do, and accordingly often behave in ways that reflect these predictions. And in emphasizing prediction, Holmes initiated a concern with courts based not only on the cases courts decide, but also on the fact that what courts decide influences primary behavior that never sees the inside of a courtroom. Holmes was less a Realist than a precursor of Realism because he believed that legal categories and legal doctrine were the best sources of prediction of judicial behavior, a view premised on the assumption that courts would typically make decisions in accordance with all of the traditional features of formal law. The real Realists would take their leave of Holmes at this juncture, believing that the paper rules were less explanatory of judicial outcomes than even Holmes supposed. But even if the Realists were right and Holmes wrong, the Holmesian focus on prediction survives, alerting us to the way in which routine behavior exists in the shadow of potential judicial or other official action. If that action departs from the formal law, however, then the shadow in which unlitigated behavior exists will not be the shadow of the paper rules, but the shadow of the real rules the courts and other officials actually enforce.

The tamest versions of Realism follow the Holmesian path in assuming that when the formal written law and the paper rules are clear, judges will follow the law, and lawyers and their clients will plan their actions accordingly. If this is so, then recognizing the indeterminacy of decision when the rules are unclear is important, but not much of a challenge either to a traditional picture of how law operates, or to the conventional understanding of the role of rules in that operation. And this is precisely why it has been so easy for so many years for so many commentators to marginalize the Realist understanding of law and the Realists’ objections to the traditional picture. Under this view, Legal Realism is about gaps in the law.

But Legal Realism may not be limited to questions about legal gaps. If judges sometimes or often depart from paper rules even when they are clear, then predicting judicial outcomes can no longer be based on paper rules alone. Sound predictions will then be based on the real rules, and these

123. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897) (stressing the importance of “[t]he prophecies of what the courts will do in fact”).

124. Thus we assume that Leon Green, see supra note 22, would have taken much issue with Holmes’s conclusion that thinking that “chum” could be a relevant legal category was preposterous, and with Holmes’s lesson from his chum story that it is a mistake to assume that categories such as railroads, telegraphs, or shipping could provide the “true basis for prophecy.” Holmes, supra note 123, at 474–75.

predictions will influence the behavior of clients and lawyers. Most importantly, predictions based on real and not paper rules will determine the array of cases that are deemed worth litigating, and the array that never gets to court. The gap between paper and real rules will thus determine the entire landscape of the law. When clear paper rules or applications of standard techniques of legal reasoning are not outcome determinative, the effect will be felt far outside the domain of litigated cases.

If the Realist contention about the relative importance of real rules and the relative unimportance of paper ones is sound, therefore, and when and where it is sound, that contention will have effects on our understanding of law that are by no means limited to the domain of cases worth fighting over. This, in a nutshell, is the untamed version of Legal Realism. Determining whether and when this genuinely nontraditional and destabilizing version of law’s operation is true is an empirical question, the pursuit of which is an important part of future research in the Realist spirit.