I. Introduction

Law is not only about hard cases. There are easy ones as well, and understanding law requires awareness of not only 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 the conventional devices of legal decision-making. These devices includes, most obviously, the straightforward application of plain statutory or regulatory language, but encompass as well the many ways in which lawyers use what is commonly known as “black-letter law.”

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2 Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985).
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, causal effect on decisions, and consequent accuracy in explaining and predicting legal outcomes. But if Realism’s skepticism

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3 How to understand Legal Realism and its legacy is contested terrain. Some see Realism as focused not principally on legal indeterminacy, but instead on the contingency and non-neutrality of law and its baselines. E.g., Barbara H. Fried, The Progressive Assault on Laissez-Faire: Robert Hale and the First Law and Economics Movement (1998); Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy 169-212 (1992); Joseph William Singer, Legal Realism Now, 76 Cal. L. Rev. 467, 475-95 (1988) (reviewing Laura Kalman, Legal Realism at Yale: 1927-1960 (1986)). Others understand it as the ancestor of modern methodologically sophisticated empirical legal studies. See Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw. U. L. Rev. 251 (1997); Thomas J. Miles & Cass R. Sunstein, The New Legal Realism, 75 U. Chi. L. Rev. 831 (2008); Symposium, Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior, 97 Nw. U. L. Rev. 1075 (2003); Daniel A. Farber, Toward a New Legal Realism, 68 U. Chi. L. Rev. 279 (2001) (book review). And still others find in Legal Realism the foundations for pretty much the entire law and society research agenda. E.g., Arthur F. McEvoy, A New Realism for Legal Studies, 2005 Wis. L. Rev. 433; Sally Engle Merry, New Legal Realism and the Ethnography of Transnational Law, 31 Law & Soc. Inquiry 975 (2006); Victoria Nourse & Gregory Shaffer, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, 25 Cornell L. Rev. 61 (2009). Such non-standard 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 (see Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy 15-118 (2007); Edwin Patterson, Jurisprudence: Men and Ideas of the Law 537-56 (1953); Andrew Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 Phil. & Pub. Affairs 205 (1986); Hanoch Dagan, The Realist Conception of Law, 56 U. Tor. L.J. 607 (2007); G. Edward White, The Inevitability of Critical Legal Studies, 36 Stan. L. Rev. 649, 651 (1984)) conception of Legal Realism’s core claims includes among Realism’s major figures Thurman Arnold, Felix Cohen, Walter Wheeler Cook, Jerome Frank, Karl Llewellyn, Herman Oliphant, Hessel Yntema, and Underhill Moore, and is an understanding represented, more recently, in some of the scholarship of Duncan Kennedy (see Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging, 36 J. Legal Ed. 518 (1986)) and Mark Tushnet (see Mark Tushnet, The New Constitutional Order 120 (2003)) (“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
about the constraints of formal law applies not to the everyday operation of law but only to the
sliver of legal events represented by litigated cases. Legal Realism’s challenges can be kept at
bay. Realism may remain a valuable corrective to the view that most appellate cases have a
legally right answer, but not as a claim that undermines the routine determinacy of law.5

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.6 For many Realists,
the crux 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.7 Judges do follow rules,

faithfully deploy that principle along with others equally available in the doctrinal universe to
reach whatever result the judge thought socially desirable."

4 See text accompanying notes 21-24, infra.

5 See Part III, infra.

6 Karl N. Llewellyn, A Realistic Jurisprudence – The Next Step, 30 Colum. L. Rev. 431, 444-57
(1930). See also Karl N. Llewellyn, The Theory of Rules 63-76 (Frederick Schauer ed., University
of Chicago Press, 2011) (1938) (discussing the relative unimportance of the “propositional
form” of legal rules); Karl N. Llewellyn, Some Realism about Realism, 44 Harv. L. Rev. 1222, 1222
(1931) (suggesting that “some rules [are] mere paper”). Llewellyn’s views on paper and
working rules are featured in John M. Breen, Statutory Interpretation and the Lessons of

7 See William Twining, Karl Llewellyn and the Realist Movement 30 (1973) (quoting letter from
Arthur Corbin observing that actual legal rules differed from the rules “in print”). See also
Nathan Isaac, Some Thoughts Suggested by the Restatements, Particularly of Contracts, Agency,
and Trusts, 8 Am. L. Sch. Rev. 424, 428 (1936)(referring to “dry rules”). And the distinction
between paper and real rules was captured earlier in Roscoe Pound’s enduring distinction
between law in the books and law in action. Roscoe Pound, Law in Books and Law in Action, 44
Am. L. Rev. 12 (1910).
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 has long been acknowledged, but the effect of the distinction upon the supposed marginalization of Legal Realism has remained unnoticed. The Realists stressed the difference between paper and real rules, but when the paper rules do not describe the actual rules judges use in making decisions, the divergence between paper and real rules will influence which cases are easy and which hard. Consequently, even if the indeterminacy claims of Realism are limited to the comparatively small domain of litigated cases, the distinction between paper and real rules will determine the makeup of that domain. The gap between paper and real rules accordingly calls into question the traditional view about how law operates in its routine and non-litigated aspect as well as in its less routine litigated one, making it impossible to marginalize Realism’s contentions. The distinction between paper and real rules, by applying throughout law and not merely to a small subset of it, reveals the

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9 See notes 6-7, supra.
Realist challenge to be more foundational, more radical, and – importantly -- less tamed. The challenge as so understood may still fail as an empirical matter, or may succeed only partially, or only in some domains and not in others. But the force of the challenge and its success are two different issues. My goal here is principally to address the former, because the persistent and potentially erroneous marginalization of the Realist challenge has made it impossible to evaluate Realism in its most favorable and least caricatured light.

The question I address is as fundamental as it is simple: What makes hard cases hard, and easy ones easy? The answer is ultimately 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 a traditional view of how law works even in its routine and non-litigated operation. As such, a Realism focused on the distinction between real and paper rules, whatever its empirical merits or demerits, can no longer be dismissed as marginal.

II. Legal Realism – Some Basics

The perspective variously known as legal realism, Legal Realism,10 or American Legal Realism11 is widely understood to pose a substantial challenge to a traditional view of law and

10 Because people tend to believe their own descriptions of most things to be realistic, the capitalization of Legal Realism designates a school of thought rather than an attribute or description. In addition, 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); Colin McGinn, An Apriori Argument for Realism, 76 J. Phil. 113 (1979); Peter Railton, Moral Realism, 95 Phil. Rev. 163 (1986). Insofar as Legal Realism stresses
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\(^{12}\) applications in the vast majority of instances.\(^{13}\) And even if the production of legal outcomes is not 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 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, it stands in tension with most versions of philosophical realism.

\(^{11}\) Note that this is *American* Legal Realism, as distinguished from the Scandinavian Realism of Alf Ross (On Law and Justice (1958)), Axel Hägerström (Inquiries into the Nature of Law and Morals (C.D. Broad, trans., K. Olivecrona, ed., 1953), Karl Olivecrona (Law as Fact (1939)), and A. Vilhelm Lundstedt (Legal Thinking Revised: My Views on Law (1956)). See generally Michael Martin, Scandinavian and American Legal Realism (1997); Jens Bjarup, *The Philosophy of Scandinavian Realism*, 18 Ratio Juris 1 (2005). On some topics the two Realisms are compatible, but their agendas diverge sufficiently that distinguishing them 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 (2002).

\(^{12}\) 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 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 miles 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.

\(^{13}\) “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 [.].” Christopher Columbus 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*, 13 Harv. L. Rev. 537 (pt. I), 659 (pt. II) (1900), and thus it is a mistake to accuse him of believing the entirety of legal decision-making to be deductive or mechanical.
and legal materials alone.\textsuperscript{14} This is roughly the position embodied in the writings of Blackstone,\textsuperscript{15} Coke,\textsuperscript{16} and other celebrants of common law reasoning.\textsuperscript{17} And it can be found more recently in the thinking of Americans such as Eugene Wambaugh\textsuperscript{18} and John Zane.\textsuperscript{19}

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\textsuperscript{15} 1 William Blackstone, Commentaries on the Law of England *69 (1767).


\textsuperscript{17} E.g., Matthew Hale, The History of the Common Law of England (Charles M. Gray ed., University of Chicago Press, 1971) (1713), although Hale was more receptive than Blackstone or Coke to the influence of non-legal factors on legal decisions. The views of Blackstone, Coke, Hale, and others on this point are usefully explained in Gerald J. Postema, Bentham and the Common Law Tradition 4-13, 19-27 (1986), and Anthony J. Sebok, Legal Positivism in American Jurisprudence 23-32 (1998).

\textsuperscript{18} Eugene Wambaugh, The Study of Cases (2d ed., 1894).

\textsuperscript{19} John M. Zane, German Legal Philosophy, 16 Mich. L. Rev. 287, 338 (1918) (“Every judicial act resulting in a judgment consists of pure deduction.”). Neither Zane nor Wambaugh, supra note 18, are household names these days, 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 non-specified targets. Sebok, supra note 17, at 83. And when the targets are named, as with Joseph Beale and to some extent Langdell, their actual views often turn out to differ substantially from the ones they are taken to hold. On Beale, see Joseph Beale, The Development of Jurisprudence During the Past Century, 18 Harv. L. Rev. 271 (1904) (recognizing the impossibility of complete codification). On Langdell, see note 13, supra. Wambaugh and Zane, among others (see Paul E. Treusch, The Syllogism, in Readings in Jurisprudence 539 (Jerome Hall ed., 1938)), may be less well-known than other figures of their era, but they are authentic representatives of the class of thinking the Realists sought to challenge. Indeed, even the object of Roscoe Pound’s scorn in Mechanical
According to this tradition, judges, employing accepted methods of legal interpretation can discover the real and immanent law through “artificial reason,”20 and can thus identify the outcomes mandated by existing law. Because such methods are widely shared among legal professionals, it was said, legal decision-making does not require recourse to the extra-legal views of any particular judge.

The most important of Legal Realism’s multiple facets is its denial of this traditional view. Virtually all Realists take themselves to be repudiating the belief that official legal sources and legal doctrine alone produce the uncontroversial – at least among trained legal professionals --

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20 See note 16, supra. On the nature of the Realists’ “target,” see also Wilfrid Rumble, American Legal Realism: Skepticism, Reform, and the Judicial Process 49 (1968). Brian Tamanaha identifies a number of instances in which Realist insights can be found prior to the rise of Realism, and many in which so-called formalists were aware of the non-mechanical aspects of judging. Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (2009). But as with any distinction, even multiple counter-examples on one or the other side do not 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 Part IV, infra, makes identifying the difference between Realism and its opponents of continuing importance.
outcomes that the traditional view imagines.\textsuperscript{21} Rather, most versions of Realism maintain that legal doctrine ordinarily does not determine legal outcomes without the substantial influence of non-legal supplements, supplements whose existence and application are both variable and manipulable.\textsuperscript{22} To the extent that this is so, legal outcomes will often then be the product not predominantly of official law, but primarily of something else. What constitutes this something else varies among Realists, with some believing it to reside in the ideological or policy preferences of judges,\textsuperscript{23} others committed to the proposition that it is the judge’s view of the

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\textsuperscript{23}Although Llewellyn had his particularistic and fact- and case-specific moments (\textit{see} Karl Llewellyn, \textit{The Common Law Tradition: Deciding Appeals} 59-61, 121-25, 206-08 (1960); Llewellyn, \textit{A Realistic Jurisprudence}, \textit{supra} note 6, at 457-58; Dennis M. Patterson, \textit{Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code}, 68 Texas L. Rev. 169, 199 n.190 (1989); Zipporah Batshaw Wiseman, \textit{The Limits of Vision: Karl Llewellyn and the Merchant Rules}, 100 Harv. L. Rev. 465, 470 (1987)), he 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, \textit{The Theory of Rules}, \textit{supra} note 6, at 87-102 (describing the goals of the “legal order”); Twining, \textit{supra} note 7, at 369 (observing that Llewellyn recognized the need for “principles to guide action”); William Twining, \textit{Talk about}
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complete array of facts presented by individual cases, and still others maintaining that most important in legal decision-making are the conscious or subconscious personal predilections.


See Leiter, supra note 3, at 21-24, 29-30, 109-110 (focusing on how the Realists sought to locate the facts of particular cases within “situation types”); Joseph Hutcheson, The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision, 14 Cornell L.Q. 274 (1929); Brian Leiter, 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); Herman Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71 (1928). 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. A focus 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 and fences,” “traffic and transportation,” and, alarmingly, “play, practical jokes, and conduct with reference to women.” But these were all categories, and Green’s point was that a case’s location within such a 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 Realist point was that the actual categories of decision were not the categories of traditional doctrine, but they were categories nonetheless, categories with 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 Frank, supra note 22; Jerome Frank, Say It with Music, 61 Harv. L. Rev. 921 (1948); Jerome Frank, Are Judges Human?, Part I: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings, 80 U. Pa. L. Rev. 17, 47 (1931); Jerome Frank, Are Judges Human Human?, Part II: As Through a Class Darkly, 80 U. Pa. L. Rev. 233, 242 (1931). Realism as a whole is characterized as particularistic in Bruce Ackerman, Reconstructing American Law 18-19 (1984), and in William W. Fisher III, The Development of Modern American Legal Theory and Judicial Interpretation of the Bill of Rights, in A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law, 1791 and 1991, at 266 (Michael J. Lacey & Knud Haakonssen eds., 1991). And see also W.W. Cook, The Logical and
biases, and idiosyncrasies of particular adjudicators. But although the Realists differed about what “really” mattered in judicial decision-making, they were uniformly committed to the view that what mattered was something much more than, legal rules, doctrine, and reasoning as traditionally conceived.

III. Realism Tamed

The Realism with which I am concerned is thus a contention about law’s (legal) indeterminacy and consequent malleability. And it is a contention about the insufficiency of legal rules and doctrine 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 decision-making and guidance by law. Because there are easy cases and

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Legal Bases of the Conflict of Laws vii (1942), urging smaller rather than larger categories of analysis so as best to capture the diversity of human experience and conduct.


26 Most influential is Hart, The Concept of Law, supra note 8, at 135-47. Hart’s maintained that the Realists were “disappointed absolutist[s],” id. at 137, 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 3, at 207; Benjamin Nathan Cardozo, Jurisprudence, 55 N.Y. State Bar Ass’n Rptr. 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 in Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 Duke L.J. 1895 (2009); Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. Rev. 462, 496-97 (1987). On Cardozo, see also Marcia Speziale, The Experimental Logic of Benjamin Nathan Cardozo, 77 Ky. L. Rev. 821 (1989). And see also Robert W. Gordon, Lawyers, Scholars, and the “Middle Ground,” 91 Mich. L. Rev.
straightforward applications of law, it is said, and because such cases and applications rarely wind up in court, the determinate 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

2075, 2077-78 (1993) (describing but not endorsing the view that theory and policy are relevant only in the ten percent of cases that are genuinely difficult).

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 which are not settled prior to litigation or judgment emerge as a non-random 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 think 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 underrepresents the easy cases and overrepresents 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 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 to be some likelihood of prevailing, 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 literature treats the dispute as the starting point of the legal process, in fact selection takes hold even earlier. When the law is clear, disputes do not typically arise, for the very fact of a dispute is 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 non-preposterous reference to a legal or other
norm would the conflict of preferences even ripen into a “dispute” in the first place.

The lesson of to be drawn from the selection effect is now apparent. Litigation and appeal
disproportionately select for events in which the law is indeterminate, or in which there are
opposing defensible accounts of the facts, and consequently drawing conclusions about law in
general from this unrepresentative class of legal events – the hard cases -- exaggerates law’s
indeterminacy. Because Realism’s claim is based on the skewed class of litigated cases, so the
longstanding response goes, 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 only about hard cases is supported by the writings
of some Realists themselves. Llewellyn stressed even early on that his views about the
malleability of legal rules were applicable only to the “cases[s] doubtful enough to make
litigation respectable.”28 And Max Radin emphasized that his contributions to Realism were to
be understood as located in the context solely of “marginal cases.”29

Insofar as Llewellyn and Radin are reliable representatives, there emerges little
difference between the Realists’ actual views and what H.L.A. Hart in *The Concept of Law*

28 Llewellyn, *Some Realism about Realism, supra* note 6, at 1239. A similar qualification is
offered in Llewellyn, *The Bramble Bush, supra* note 22, 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”).

(locating Realist perspectives within the universe of hard cases).
intended as a criticism of Realism.³⁰ Hart, misreading the Realists³¹ as insisting that law 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 they had recognized the ubiquity of plain rule-generated outcomes, Hart argued, ³² they would not have made the claims Hart understood them as making about law and legal rules in general.

Thus a widespread view, held by Hart and the Realists alike, is that law has a straightforward operation in most non-litigated instances of legal application, but that in litigated disputes, especially in appellate cases,³³ legal determinacy often disappears. Hart and the Realists may have 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 terminology³⁴ -- Hart and others believed that judges exercise legislature-like discretion,³⁵

³⁰ Hart, The Concept of Law, supra note 8, at 135-47.
³¹ Which he did in multiple ways. See Leiter, Naturalizing Jurisprudence, supra note 3, at 17-18, 59-60.
³² See note 26, supra.
³³ And most 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 Frederick Schauer, The Supreme Court, 2005 Term, Foreword: The Court’s Agenda – and the Nation’s, 120 Harv. L. Rev. 4 (2006). 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 supporting our predilections.” William O. Douglas, The Court Years 8 (1980).
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 uncontested and unlitigated aspect remained largely untouched by properly-understood Realist claims.

Any understanding that renders Realism compatible with Hart’s attack on it leaves much of the traditional picture untouched, and thus seems far from the common portrayal of Realism as radical. Thus we can label this non-radical and non-threatening conception Tamed.

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36 Frank, supra note 22; Frank, Are Judges Human, supra note 24.


**Realism.** Tamed Realism, which appears often in the literature,\(^{39}\) might instead be called bounded, peripheral, or interstitial Realism, each highlighting the way in which Realism seems most plausible when relegated to the indeterminate edges of law. If Realism is restricted to a narrow subset – appellate cases, or even litigated cases – of the full set of legal events, it becomes less threatening to a traditional picture of how law in its entirety operates.

**IV. The Challenge of (Even) Tamed Realism**

Understanding the Realist challenge in this tamed way hardly makes it unimportant. After all, the view that judicial decision-making is substantially constrained or determined by law,\(^{40}\) even in litigated or appealed cases, is widespread,\(^{41}\) and has been for centuries.\(^{42}\)

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\(^{39}\)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 determinacy of law); Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481, 485 (1995) (accepting the existence of easy cases, and agreeing with Andrei Marmor, *Interpretation and Legal Theory* 126 (1992), 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”); *id.* (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”); 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).

\(^{40}\)Of course if the very notion of law, and what counts as law, is understood broadly enough, then the contention that non-legal factors play a role in legal decision-making becomes almost impossible. If the domain of law includes a host of considerations of morality, policy, politics, and much else, then the claim that legal decision-making typically involves non-legal factors becomes uninterestingly false precisely because what the Realists understood as non-law has been redefined as law. But if, with the Realists and many others (*see, e.g.*, Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 Legal Theory 127 (2000) (defending so-called 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,
Although every dispute differs at least slightly from all that have preceded it, 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.43 Despite the demise of the belief that judicial decision-making is typically mechanical,44 the view persists that even non-mechanical judicial decisions are based overwhelmingly on the law.45 When standard works on see Frederick Schauer, The Limited Domain of the Law, 90 Va. L. Rev. 1909 (2004), 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.


42 See Blackstone, supra note 15; Coke, supra note 16; Wambaugh, supra note 18; Zane, supra note 19. Indeed, the Realists’ targets understood Realism as a genuine challenge. See Samuel Williston, Some Modern Tendencies in Law 154 (1929); George K. Gardner, An Inquiry into the Principles of the Law of Contracts, 46 Harv. L. Rev. 1, 41 (1932).


44 See Patterson, supra note 3, at 181-82 (describing the rejection of a mechanical approach by Cardozo, Holmes, and Kantorowicz).

45 See sources cited in notes 41-43, supra.
legal reasoning focus on appellate cases, the implicit message is that even for these cases some answers and methods are legally better than others.46

This traditional view of legal decision-making in cases not explicitly governed by existing law reaches its pinnacle in Ronald Dworkin’s sophisticated version of the traditional view.47 In denying that judges exercise discretion in any conventional sense of that word,48 and in maintaining that judging is a search for the “right answer” to any legal controversy,49 Dworkin, although acknowledging disagreement in actual practice,50 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 substantively disagreeable results in

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46 See, e.g., Steven J. Burton, An Introduction to Law and Legal Reasoning (1985); Brian L. Porto, The Craft of Legal Reasoning (1998); Glanville Williams, Learning the Law (A.T.H. Smith ed., 15th ed., 2012). Earlier, Roscoe Pound had characterized the traditional view as follows: “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 development of the principles reached by analysis of what he found already given in the law . . . The jurist was [to exercise] a . . . restricted function so far as he could work with materials afforded exclusively by the law itself.” Roscoe Pound, Introduction to the Philosophy of Law 53-54 (1922).


49 Ronald Dworkin, Justice in Robes 41-43 (2006); Ronald Dworkin, A Matter of Principle 119-45 (2005); Dworkin, No Right Answer, supra note 47.

50 Dworkin, Justice in Robes, supra note 49, at 42-43.
appellate cases of making technical legal errors or “mistakes” rather than simply of having the wrong substantive views.51

Once we recognize the persistence of the belief that seemingly unregulated cases have a legally right answer, the identification of which is the normal diet of legal reasoning even in contested cases, we can see why even Tamed Realism represents a substantial challenge. When François Gény celebrated the judge as a creative law maker 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 non-legal factors. We think of Gény and the Freirechtsschule as precursors to American Realism precisely because their claims about gaps, discretion, and judicial law-making 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 non-legal empirical factors when pre-existing law is silent.


55 See Herget & Wallace, supra note 54, at 413-17.

56 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).
The Realists and their precursors thus believed that there were legal gaps to be filled by judges acting as law-makers. That this view is now held by critics of Realism as well as Realists may make it appear trivially true, but the appearance is deceiving. Legal Realism as the forthright recognition of judicial discretion to be exercised on substantially non-legal grounds within law’s gaps may seem tame, but it was a substantial challenge previously, and remains far from universal even now. Tamed Realism may be tamed, but it is hardly inconsequential.

V. Realism Untamed

At the heart of Tamed Realism lie two distinct but 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\(^\text{57}\)) 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,\(^\text{58}\) and Brian Leiter understands them as

\(^{57}\)This is not the occasion to explore the topic 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, and thus broadly shared 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,” and “interrogatory” are no part of ordinary language. On the relationship between ordinary and technical language in general, see Charles E. Caton, \textit{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, \textit{Excursions into the Nature of Legal Language}, 37 Cleve St. L. Rev. 271 (1989).

\(^{58}\)Marmor, \textit{supra} note 39, at 126.
ones in which the “plain meaning of the words” of a legal rule produces an outcome.\textsuperscript{59} Others have made similar claims.\textsuperscript{60} And Hart, when first offering his “No Vehicles in the Park” example,\textsuperscript{61} 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 non-legal factors play a major role. Thus in constitutional law,\textsuperscript{62} a domain in which the non-

\textsuperscript{59} Leiter, \textit{supra} note 39, at 485.


\textsuperscript{61} Hart, \textit{supra} note 34, 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, \textit{Introduction}, in \textit{Essays in Jurisprudence and Philosophy} 1, 7-8 (1983). At the same time, however, he re-emphasized that the core of a legal rule could, again contingently, be entirely a function of the “settled conventions of language.” \textit{Id.} Hart’s example is analyzed at length in Frederick Schauer, \textit{A Critical Guide to Vehicles in the Park}, 83 N.Y.U. L. Rev. 1109 (2008).

\textsuperscript{62} See Schauer, \textit{supra} note 2.
legal 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

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63 That non-legal factors (see note 40, supra, 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 ideology in explaining Justices’ votes); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002) (analyzing role of ideology 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 Segal & Albert Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 Am. Pol. Sci. Rev. 562 (1989) (same). 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”).

64 “No person shall be elected to the office of 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 President more than once.” U.S. Const. amend. XXII, §1.

65 “No person shall be a Senator who shall not have attained to the Age of thirty Years, . . .” U.S. Const. art. 1, §3, cl. 3.
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 non-litigated application is the premise that the easiness of easy cases is typically determined by the meaning of the language of the pertinent legal rule, and that the outcome the meaning points to is ordinarily followed by judges. The consequence is the hypothesis that most disputes clearly falling under a rule’s language are ones in which one party would have little hope of prevailing and 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 iconic distinction between paper and real rules, a distinction he offered in 1931, and then developed further several years later. In drawing the distinction, Llewellyn distanced himself from the particularism of Frank, Hutcheson, and

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66 That is, the law would exclude otherwise socially (or politically) likely or at least eligible outcomes, and might mandate otherwise unlikely or ineligible outcomes. On whether law would be efficacious in doing so, compare Frederick Schauer, Easy Cases, supra note 2, with Mark V. Tushnet, A Note on the Revival of Textualism in Constitutional Theory, 58 S. Cal. L. Rev. 683 (1985); Tushnet, Following the Rules Laid Down, supra note 3.

67 Karl N. Llewellyn, A Realistic Jurisprudence, supra note 6, at 444-57.

68 Karl N. Llewellyn, The Theory of Rules, supra note 6, at 63-76. The exact period when Llewellyn produced the manuscript is uncertain.

some other Realists,\textsuperscript{71} making clear he believed there to be legal rules.\textsuperscript{72} Moreover, these rules were not simply ex post descriptions of categories of legal outcomes. Llewellyn fully recognized the distinction between descriptive and prescriptive rules,\textsuperscript{73} and plainly understood the idea of internalized prescriptive and guiding rules,\textsuperscript{74} the exact idea that Hart mistakenly accused Llewellyn and other Realists of failing to comprehend.\textsuperscript{75} What Llewellyn and others\textsuperscript{76} 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,”\textsuperscript{77} which happened to be written down in law books.\textsuperscript{78}

\textsuperscript{70} Hutcheson, \textit{supra} note 24.

\textsuperscript{71} \textit{See} Grant Gilmore, The Ages of American Law 80-81 (1977) (describing the particularism of Wesley Sturges). \textit{See also} Herman Oliphant, \textit{Mutuality of Obligation in Bilateral Contracts at Law} (part 2), 28 Colum. L. Rev. 997, 999-1000 (1928) (complaining about the excess breadth of most statements of law).

\textsuperscript{72} Llewellyn, The Theory of Rules, \textit{supra} note 6.

\textsuperscript{73} On the distinction, see Frederick Schauer, \textit{Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life} (1991).


\textsuperscript{75} Hart, \textit{supra} note 8, at 137-47.


\textsuperscript{77} Llewellyn, \textit{supra} note 6, at 63.
Consider the simple example of the typical interstate highway speed limit. Commonly, the official limit is sixty-five (“65”) miles per hour, that being the limit posted on signs, located in codified highway rules and regulations, and sometimes even set forth in a statute. 65 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 seventy-four (“74”). The police rarely stop and ticket drivers unless they are exceeding 74 miles per hour, and judges, in the unlikely event a driver was brought before them for driving at greater than 65 but less than 75, might, although more debatably, find a way to acquit or dismiss. Insofar as both police officers and judges actually so behave, the real rule is a speed

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74 On the distinction, see also Stephenson, supra note 29, at 198-99.


81 Of course some judges might enforce 65 even if police officers routinely applied 74. Police officers may 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 81, 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
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.

It is important 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 well believe that sound public policy permitted driving up to but not above 74 miles per hour. They might think that the posted speed 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, some police officers and some judges might well internalize, exactly in Hart’s sense, the “speed limit 74” rule, applying this and not some other rule to the behavior coming before them. Police officers would apprehend and cite only those drivers violating the real rule. And judges would render judgment in accordance with the “speed limit 74” rule, albeit with opinions couched in different terms and relying, even if disingenuously, on different reasons.82

The important feature of this scenario – 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

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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 Section VI, infra.
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 although “speed limit 74” is thus a real rule, it is not a rule that can be located in the official law. And that is precisely the distinction between real and paper rules that Llewellyn and others sought to highlight.

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 that wind 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 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 accepts that mostly hard cases wind up in court, but challenges the traditional understanding of what makes an easy case easy, and thus challenges the full breadth of the traditional picture of legal decision-making.

The distinction between paper and real rules thus prevents the Realist challenge from being marginalized as interstitial or peripheral. The challenge is no longer limited to the class of cases in which the standard implements in the lawyer’s toolkit do not straightforwardly indicate an outcome. Rather, it as a claim about the impotence of paper rules in generating legal outcomes. Insofar as the claim is empirically sound, it is about all of law, and not just the law to be applied when paper rules are indeterminate. The challenge goes to the very idea of written down law as the source of legal determinacy, and is thus Realism in its far less tamed dimension. Untamed Realism is not the claim that there is no legal determinacy, but instead that legal determinacy is substantially a product of something other than the conventional legal meaning of official rules.83

The speed limit example, although focused on enforcement practices rather than on judicial decisions or judicial behavior, is hardly unrepresentative, even with respect to judges. Consider the rules of evidence. Although numerous formal rules of evidence govern trials in American courts, American evidence law cannot accurately be described without recognizing that judges, when acting as fact-finders in the absence of a jury, routinely and openly discard

83 On the point that Realism is best seen as a matter of degree, see Stephenson, supra note 29.
many of the rules.\textsuperscript{84} Here it is judges who make rule-guided decisions, but guided by rules that depart from the formal or official 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 non-use of the paper rules of evidence.

Consider also the regulation of securities offerings under the Securities Act of 1933.\textsuperscript{85} According to the Act, the issuer 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.\textsuperscript{86} 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\textsuperscript{87} 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 non-indemnification of directors for wrongdoing, for example.\textsuperscript{88} 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.

SEC acceleration practice is an example 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 non-enforcement of a paper rule. Examples abound, as with speed limits, and often with taxation. In \textit{Dickman v. C.I.R.},\textsuperscript{89} 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,\textsuperscript{90} the exemption operating to eliminate the paper rule and substitute a real rule of non-taxability. Even more pervasively, the widespread non-

\textsuperscript{87} See 17 C.F.R. §230.461 (2012).


\textsuperscript{90} 465 U.S. at 339-43.
enforcement of state sales and use taxes on most interstate consumer transactions has much the same effect.91

As with real speed limits, these real rules generate easy cases. A lawyer in a non-jury 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 of 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 culpable 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 support the conclusion that the gap between paper and real rules is potentially a pervasive phenomenon throughout the law,92 influencing which cases are hard


92 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 Umpires, 10 J. Sport & Exercise Psych. 75 (1988); David W. Rainey et al., Normative Rules among Umpires: The “Phantom Tag” at Second Base, 16 J. Sport Behavior 147 (1993).
and which easy. Insofar as the gap exists, and especially insofar, as with the evidence example, 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 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,93 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,94 is understanding the idea of a paper rule to encompass the entire array of accepted conventional methods of legal reasoning and interpretation. This expanded notion of a paper rule could

93 For this possibility, albeit with respect to a single Supreme Court Justice rather than an entire court, see Bernard Wolfman, Jonathan I.F. Silver, & Marjorie A. Silver, Dissent without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases (1975).

94 At least on the assumption that the United States is an especially non-formal legal environment. See Patrick S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law (1987).
include, for example, references to a rule’s purpose\textsuperscript{95} or legislative history,\textsuperscript{96} application of accepted canons of statutory interpretation,\textsuperscript{97} and conventional techniques for identifying the holdings in previously decided cases.\textsuperscript{98} Yet even when the idea of a paper rule is 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,\textsuperscript{99} 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 that 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.


\textsuperscript{96} See James J. Brudney, Below the Surface: Comparing Legislative History Use By the House of Lords and the Supreme Court, 85 Wash. U.L. Rev. 1 (2007); David S. Law & David Zaring, Law versus Ideology: The Supreme Court and the Use of Legislative History, 51 Wm. & Mary L. Rev. 1653 (2010).

\textsuperscript{97} See Caleb Nelson, Statutory Interpretation (2011); Norman J. Singer & J.D. Shambie Singer, Sutherland’s Statutes and Statutory Construction (7\textsuperscript{th} ed., 2007).


\textsuperscript{99} See note 93, supra.
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, then 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 or formal 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 non-litigation. 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.

VI. 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 manner does not say whether it actually succeeds. As the Realists themselves
acknowledged – indeed, insisted – their contentions, including those about the gap between 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 non-legal 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 which the spirit of Realism urges us to pursue.

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Initially, it is important to recognize that departures from paper rules, even when based on non-legal reasons, still require the law-like public justifications that the Realists tended to call “rationalizations.” Perhaps the 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 typically must be a justification couched in something resembling law on which the divergence between paper and real rule is based. As long as consumers of legal outcomes – lawyers, the public, the political world, academic commentators, etc. – appear to demand that legal outcomes be determined by publicly available legal reasons, even a judge deciding on the basis of non-legal reasons must offer reasons seemingly based on the law.

When such reasons are employed to justify a gap between paper rules (or paper law) and real rules, we can think of them as escape routes -- the avenues by which legal decision-makers explain in law-like terms the departures for non-legal 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


102 On the distinction between the logic of decision and the logic of justification, see Richard A. Wasserstrom, The Judicial Decision 26-31 (1960).

103 See Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” One to Seven, 50 N.Y.L.S. Rev. 919 (2006); Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s
escape routes. If some principle of statutory interpretation could justify virtually any result reached for reasons other than the indications of the statute actually being interpreted,\(^\text{105}\) then judges inclined to depart from the paper rule for non-legal 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*\(^\text{106}\) in order to disallow Elmer Palmer the inheritance which the plain words of the Statute of Wills appeared to allow,\(^\text{107}\) 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 fact-specific departure from the most immediately applicable rule.\(^\text{108}\) Similarly, insofar as

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\(^{105}\) 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, 443 U.S. at 201, while the dissenting opinions of Chief Justice Burger (443 U.S. at 216-17, 229 & n. 9) and Justice Rehnquist (443 U.S. at 253-54) 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.

\(^{106}\) 22 N.Y. 188 (N.Y. 1889) (refusing to allow Palmer, who had murdered his grandfather, to inherit under the grandfather’s will).

\(^{107}\) 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. See Frederick Schauer, *Constitutional Invocations*, 65 Fordham L. Rev. 1295, 1306 n.44 (1997).

\(^{108}\) As is well-known, Ronald Dworkin uses the case to argue that the “no man may profit from his own wrong” principle was a pre-existing part of the law, thus making *Riggs* a case involving neither a gap in the law nor an exercise of judicial discretion. Ronald Dworkin, *Taking Rights Seriously* 23-26 (1977). See also Ronald Dworkin, *Law’s Empire* 15-20 (1986). In practice, however, there is little difference between Dworkin’s allegedly anti-Realist position and the
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, 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 that remains officially on the books, it uses still another method to apply what looks like law or a legal rule to reach a result other than the one seemingly indicated by the law as it is written down.

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 in fact 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 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.


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 on the same topic or governing the same acts, it 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,\(^{111}\) 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 turn out, 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.

\(^{111}\) See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (rejecting as unconstitutionally
protectionist Hawaii’s understandable attempt to assist the pineapple wine industry by
exempting it from otherwise applicable taxes).
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,\footnote{See note 3, supra.} 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 and substantially influenced the outcome. For example, although the court in \textit{Riggs v. Palmer} did indeed depart from the most immediately applicable paper rule – the Statute of Wills – in ruling against Elmer Palmer, in fact most courts in most jurisdictions appear often to allow unworthy beneficiaries – even ones who have contributed in some way to the death of the testator – to inherit.\footnote{See Schauer, \textit{The Limited Domain of the Law}, supra note 40, at 1937-38.} 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.\footnote{\textit{E.g.}, United States v. Locke, 471 U.S. 84 (1985) (enforcing the exact literal meaning of a “prior to December 31” filing deadline).} And Supreme Court Justices have been known, because of principles of \textit{stare decisis}, to follow decisions they demonstrably believe mistaken.\footnote{\textit{E.g.}, Ring v. Arizona, 536 U.S. 584, 613 (2002) (Kennedy, J., who had dissented in \textit{Apprendi v. New Jersey}, 530 U.S. 466 (2000), concurring); West Lynn Creamery v. Healy, 512 U.S. 186, 209-10 (1994) (Scalia, J., who rejects the existence of the dormant commerce clause power, concurring); Edwards v. Arizona, 451 U.S. 477 (1981) (White, J., who had dissented in \textit{Miranda v. Arizona}, 384 U.S. 436, 504 (1966), for the Court); Roe v. Wade, 410 U.S. 113, 167-68 (1973) (Stewart, J., who had dissented in \textit{Griswold v. Connecticut}, 381 U.S. 479, 530 (1965), concurring).} These examples too
may be unrepresentative, but they suggest that paper rules at least sometimes have presumptive even if not absolute effect in some jurisdictions on some topics at some times and for certain courts (or judges) and other legal decision-makers. When and where 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 also 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, strongly suggesting that often the real speed limit is the paper speed limit plus nine. Thus the divergence between paper and real rules, even when considerable, may be a function not only of administrative discretion and other non-rule factors, but also of the paper rule itself.

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116 Duncan Kennedy argues, in *Legal Formality*, 2 J. Legal Stud. 351 (1972), that the possibility of an outcome in contravention of the paper rule in any case destroys the entire formality of the system. The reality of such 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 in *Law’s Empire* (1986), 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 more 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 (Melvin Aron Eisenberg, *The Nature of the Common Law* 3 (1988)) contends that easy cases are only those in which a doctrinal proposition is found to be compatible with what he calls a “social proposition,” he may similarly be slighting the weight that is given to doctrinal propositions themselves.
To repeat, the extent to which paper rules are followed or influential is an empirical question which cannot be answered by selected anecdote or non-representative 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.

VII. Conclusion

It is undoubtedly true, as Llewellyn noted more than eighty years ago, that 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 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

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118 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”).
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.\footnote{Thus we assume that Leon Green, see supra note 24, would have taken much issue with Holmes’s conclusion that thinking that “churn” could be a relevant legal category was preposterous, The Path of the Law, 10 Harv. L. Rev. at 474-75, and with Holmes’s lesson from his churn story that it is a mistake to assume that categories such as railroads, telegraphs, or shipping could provide the “true basis for prophecy.” Id. at 475.}

The real Realists would take their leave of Holmes at this juncture, believing that what they called 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.\footnote{Cf. Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).} 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 can be predicted to follow the law, and lawyers and their clients to 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 commentators to marginalize the Realist understanding of law and the Realists’ objections to the traditional picture by alleging that Legal Realism is only about behavior in law’s gaps.

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 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 divergence 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 non-traditional 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.