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Lawmaking for Legal Realists

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Abstract

This article provides a concise analysis of lawmaking, inspired by what I perceive to be the realist conception of law. Legal realism, as I reconstruct it, stands for the proposition that law is a going institution (or set of institutions) distinguished by the difficult accommodation of three constitutive, yet irresolvable, tensions between power and reason, science and craft, and tradition and progress. Unlike some caricatures of legal realism, this understanding of legal realism explains why the original legal realists invested time and energy in various arenas of lawmaking, shaping and reshaping the various rules and standards that are to govern society. This sustained effort reflects a mature position regarding the rule of law whereby, notwithstanding the malleability of legal doctrine as such, the social practice of law implies stable expectations as to the content of the law at any given time and place. Redrawing the line between promulgation and application along these conventionalist lines paves the way for a realist account of lawmaking. This account is likely to rely on contextual and pragmatic analyses of the pertinent issues at hand. Thus, it implies that, rather than opting for either bright-line rules or vague standards, legal realists would recommend using both precise rules and informative standards founded on the regulative principles of the doctrines at hand, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Legal realists would likewise avoid binary institutional choices and, in many contexts, appreciate the comparative advantages of both legislatures and courts—in terms of both expected performance and legitimacy—as potential contributors to the development of the law.

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LAWMAKING FOR LEGAL REALISTS

A. INTRODUCTION

Although much, indeed most, of what the original American legal realists said about law focused on adjudication, an important part of their contribution to American law was through their participation in other forms of lawmaking, both in legislative work, such as Karl Llewellyn's role in the drafting of the Uniform Commercial Code and their participation in various New Deal regulatory agencies.² One way of reconstructing the realist conception of lawmaking is thus to explore the characteristics of their products in these capacities, or their scattered scholarly treatments of these matters.³ The approach in this article is different. My account is not intended as a piece of intellectual history but as an attempt to provide a concise analysis of lawmaking that is inspired by what I perceive to be the realist conception of law. For better or for worse, this approach means that the realist account of lawmaking offered in these pages may diverge from some realist pronouncements on legislation or from some features of the legal realists' legislative products (or possibly even from both).

In my understanding of legal realism, its core claim is that law is a going institution (or set of institutions) distinguished by the difficult accommodation of three constitutive, yet irresolvable, tensions between power and reason, science and craft, and tradition and progress. This conception of law, which is articulated in some detail in my book *Realism Renewed*,⁴ and summarized in section B below, raises three important questions for a corresponding account of lawmaking. The first and most fundamental question—*what?*—challenges the intelligibility of a realist account of lawmaking. The realist conception of law relies on a radical critique of doctrinal determinacy. On its face, then, it is unclear whether legal realists can offer the reliable distinction between promulgation and application that seems to be a precondition for a viable account of lawmaking. Assuming, as I maintain in section C below, that legal realists can overcome this challenge without domesticating their claim of doctrinal indeterminacy, I hope to show in sections D and E that the realist conception of law helps to provide quite compelling and subtle answers to two further significant questions: (i) *How?*—should legal norms take the form of bright line rules or of vague standards? (ii) *Who?*—should lawmaking be the domain of legislatures, of courts, or of both? Section F consolidates the answers to these three

² R. Kreitner, 'Biographing Legal Realism' (2010) 35 *Law & Social Inquiry* 765.

³ See, e. g., respectively, Z.B. Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules' (1987) 100 *Harvard Law Review* 465; K.N. Llewellyn, 'Why We Need the Uniform Commercial Code' (1957) 10 *University of Florida Law Review* 367.

⁴ H. Dagan, *Realism Renewed: Essays on American Legal Realism and Private Law Theory* (Oxford University Press, New York 2013).

questions—what? how? who?—offering a preliminary statement of the realist account of lawmaking.

B. LEGAL REALISM

The starting point of the realist conception of law⁵ is its non-positivism. Although H. L. A. Hart's response to the realist claim of doctrinal indeterminacy is frequently presented as decisive, it is rather beside the point. Through his distinction between core and penumbra in any given norm, Hart effectively addressed the problem of rule indeterminacy,⁶ but the realist claim that pure doctrinalism is a conceptual impossibility is not based on the indeterminacy of discrete rules. For legal realists, the profound and inescapable reason for doctrinal indeterminacy is the availability of multiple and potentially applicable doctrinal sources. More precisely, the irreducible choice among rules competing to control the case (all of which can be expanded or contracted), together with the many potential ways of interpreting or elaborating any legal concept, imply that legal doctrine is always open to multiple readings and the judicial task is not one of static application.

The realist claim concerning an inevitable gap between doctrinal materials and judicial outcomes evokes two major concerns. First, what can explain past judicial behavior and predict its future course? Second, and even more significantly, how can law constrain judgments made by unelected judges? How, in other words, can the distinction between law and politics be maintained despite the collapse of law's autonomy in its positivist rendition? The legitimacy prong of the realist challenge is particularly formidable because, as legal realists show, it is bolstered by the insidious tendency of legal doctrinalism to obscure contestable value judgments made by judges and entrench lawyers' claim to an impenetrable professionalism.

Legal realists answer this challenge by insisting on a view of law as a set of ongoing institutions distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: between power and reason, science and craft, and tradition and progress. (I deliberately chose a softer term such as "tension" rather than stronger ones such as contradiction. The relationships I discuss are not contradictory. But although the terms in these pairs are not antonyms, they do refer to alternative allegiances and to

⁵ The following paragraphs rely on chapter 2 of Dagan, *Realism Renewed*, supra, n. 4. This chapter uses texts by legal realists in order to demonstrate how major claims attributed to legal realism fit a particular understanding of law. My claim, however, is not the discovery of legal realism's true essence. My reading of legal realist literature is unashamedly influenced by my own convictions about law, though I do not pretend to have invented the ideas I present.

⁶ H.L.A. Hart, *The Concept of Law* (Clarendon Press, Oxford 1961) 123, 141-42, 144.

competing states of mind and perspectives. The difficulty of accommodating them is thus similar to that of reconciling incommensurable goods or obligations.)

* * *

Although the realist conception of law finds room for both power and reason, it appreciates the difficulties of their coexistence. The realists' preoccupation with coercion is justified not only by the obvious fact that, unlike other judgments, those prescribed by law's carriers can recruit the state's monopolized power to back up their enforcement. It is also premised on the institutional and discursive means that tend to downplay some dimensions of law's power. These built-in features of law—notably the institutional division of labor between “interpretation specialists” and the actual executors of their judgments, together with our tendency to “thingify” legal constructs and accord them an aura of obviousness and acceptability—render the danger of obscuring law's coerciveness particularly troubling. They explain the realists' wariness of the trap entailed by the romantization of law.

But realists also reject as equally reductive the mirror image of law, which portrays it as sheer power (or interest, or politics). They insist that law is also a forum of reason, and that reason imposes real, albeit elusive, constraints on the choices of legal decision-makers, and thus on the subsequent implementation of state power. Law is never *only* about interest or power politics; it is also an exercise in reason-giving. Furthermore, because so much is at stake when reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful, and serious. Reasons can justify law's coercion only if properly grounded in human values. Realists are thus impatient with attempts to equate normative reasoning with parochial interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshaling the law for morally required social change.

And yet, realists are also wary of the idea that reason can displace interest, or that law can exclude all force except that of the better argument. Because reasoning about law is reasoning about power and interest, the reasons given by law's carriers should always be treated with suspicion. This caution accounts for the realists' endorsement of value pluralism, as well as for their understanding of law's quest for justification as a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences.

Legal realists do not pretend they have solved the mystery of reason or demonstrated how reason can survive in law's coercive environment. Their recognition that coerciveness and reason are doomed to coexist in any credible account of the law is nonetheless significant. Making this tension an inherent characteristic of law means that reductionist theories employing an overly romantic or too cynical conception of law must be rejected. This approach also steers us toward a continuous critical awareness of the

complex interaction between reason and power. It thereby seeks to accentuate the distinct responsibility incumbent on the reasoning of and about power, minimizing the corrupting potential of the self-interested pursuit of power and the perpetuation of what could end up as merely group preferences and interests.

* * *

I turn now to the type of reasons realists invite into the legal discourse and thus introduce law's second constitutive tension.

Realists argue that the forward-looking aspect of legal reasoning relies on both science and craft. Realists recognize the profound differences between, on the one hand, lawyers as social engineers who dispassionately combine empirical knowledge with normative insights, and, on the other, lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication. They nonetheless insist on preserving the difficulty of accommodating science and craft as yet another tension constitutive of law.

Realists insist on the importance of empirical inquiries, such as investigating the hidden regularities of legal doctrine in order to restore law's predictability, or studying the practical consequences of law in order to better direct the evolution of law and further its legitimacy. But my prototype realists reject any pretense that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable, not only when evaluating empirical research but also when simply choosing the facts to be investigated. Moreover, they are always careful not to accept existing normative preferences uncritically. Legal realists insist that neither science nor an ethics that ignores the data of science offers a valid test of law's merits. Legal analysis needs both empirical data and normative judgments.

Because law dramatically affects people's lives, these social facts and human values must always inform the direction of legal evolution. But while legal reasoning necessarily shares this feature with other forms of practical reasoning, the realist conception of law also highlights that legal reasoning is, to some extent, a distinct mode of argumentation and analysis. Hence, realists pay attention to the distinctive institutional characteristics of law and study their potential virtues, while still aware of their possible abuse. The procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions—notably the requirement of a universalizable justification—provide a unique social setting for adjudication. The procedural characteristics establish the accountability of law's carriers to law's subjects, and encourage judges to develop what Felix Cohen terms “a many-perspectived view of the world” or a “synoptic vision” that “can relieve us of the endless anarchy of one-eyed vision.”⁷ Moreover, because the

⁷ F.S. Cohen, 'Field Theory and Judicial Logic' in L. K. Cohen (ed.) *The Legal Conscience: Selected Papers of Felix S. Cohen* (Yale University Press, New Haven 1960) 121, 125–26.

judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments facilitates lawyers' unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category.

* * *

The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, hence my third constitutive tension. Law's inherent dynamism implies that the legal positivist attempt to understand law statically by sheer reference to verifiable facts such as the authoritative commands of a political superior, or the rules identified by a rule of recognition, is hopeless. In the realist conception, law is "a going institution" or, in John Dewey's words, "a social process, not something that can be done or happen at a certain date." As a going institution, law is structured to be an "endless process of testing and retesting"; thus understood, law is a great human laboratory continuously seeking improvement.⁸

This quest "for justice and adjustment" in the legal discourse is invariably constrained by legal tradition. Law's past serves as the starting point for contemporary analysis, and not only because it is an anchor of intelligibility and predictability. Legal realists begin with the existing doctrinal landscape because it may (and often does) incorporate valuable normative choices, even when implicit and sometimes imperfectly executed. In other words, since the adjudicatory process so uniquely combines scientific and normative insights within a legal professionalism premised on institutional constraints and practical wisdom, its past yield of accumulated judicial experience and judgment deserves respect. Although legal realists do not accord every existing rule overwhelming normative authority, they obey Llewellyn's "law of fitness and flavor," in which new cases and new rules cohere with the case law system as a whole. Realists celebrate common law's Grand Style, described by Llewellyn as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice."⁹

⁸ J. Dewey, 'My Philosophy of Law' in *My Philosophy of Law: Credos of Sixteen American Scholars* (F.B. Rothman, Littleton 1987) 73, 77.

⁹ K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, Boston 1960) 36, 38, 190–91, 217, 222–23; K.N. Llewellyn, M. Alsandi (tr.) and P. Gewirtz (ed.), *The Case Law System in America* (University of Chicago Press, Chicago 1989) 25, 77; K.N. Llewellyn, 'Law and the Social Sciences' in *Jurisprudence: Realism in Theory and in Practice* (University of Chicago Press, Chicago 1962) 357, 361–62; K.N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355, 1385.

Integrating power into their conception of law, however, pushes realists to be wary of implying that the pace of legal change should always be restrained or that legal normativity is exhausted by the subset of moral principles that are embedded in past legal, political, and particularly adjudicative practices. Although realists, like many legal theorists, pay particular attention to adjudication, they opt for a “style of jurisprudence” that goes beyond adjudication to consider the numerous other arenas “replete with lawmaking, law applying, law interpreting, and law developing functions.”¹⁰

* * *

Insofar as most descendants of legal realism are concerned, then, the statement “we are all realists now” is a seriously misleading cliché because, rather than carrying the realist legacy forward, they have torn it apart. The disintegration of legal theory has robbed the realist conception of law of its most promising lessons. Contemporary accounts of law do enhance our understanding of law’s characteristics, but the current debates between law-as-power and law-as-reason, law-as-science and law-as-craft, or law-as-tradition and law-as-progress are futile and harmful. From the perspective of legal realism, all these one-dimensional accounts of law are hopelessly deficient. Law can properly be understood only if we regain the realist appreciation of law’s most distinctive feature: the uneasy but inevitable accommodation of power and reason, science and craft, and tradition and progress.

C. WHAT? BETWEEN PROMULGATION AND APPLICATION

While legal realists were involved in all forms of lawmaking, as noted, a realist account of lawmaking must face a preliminary challenge of intelligibility, given the prevalent identification of legal realism with nominalism.¹¹ If legal realism indeed stands for an ad hoc approach of case-by-case adjudication, then lawmaking seems meaningless, turning a realist account of lawmaking into an oxymoron. This putative conclusion is particularly unfortunate because obscuring the distinction between promulgation and application is not only intellectually disappointing but also normatively devastating, since it presents legal realism as opposed to both aspects of the rule of law: the requirement that law be capable of guiding its subjects’ behavior, and the prescription that law not confer on officials the right to exercise unconstrained power.¹² By contravening the injunction to prescribe fixed and pre-announced legal norms ad hocism defies law’s ability to provide

¹⁰ Kreitner, ‘Biographing,’ *supra*, n. 2, 580.

¹¹ See, e.g., R. Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) 15-16; M. Horwitz, *The Transformation of American Law, 1870-1960* (Harvard University Press, Cambridge MA 1992) 202.

¹² My account of the rule of law in sections C and D below draws on H. Dagan, ‘Private Law Pluralism and the Rule of Law.’

effective guidance and undermines its predictability, thereby infringing on people's ability to form reliable expectations and autonomously plan for the future.¹³ Case-by-case adjudication similarly threatens the conception of the rule of law as constraint because it implies that adjudicators face no restricting framework of public norms, thereby paving the way for judges' preferences, ideology, or individual sense of right and wrong.¹⁴ Such unrestrained power is objectionable both because of its potential devastating impositions and because it renders us mere objects, dominated by the power-wielder.¹⁵

On its face, this harsh conclusion seems inevitable. To be sure, the realist claim of doctrinal indeterminacy has often been domesticated. Even Frederick Schauer, who recently elaborated on the consequences of taking the realist distinction between real rules and paper rules seriously, ends up concluding that the significance of this claim can only be evaluated empirically.¹⁶ But Schauer fails to address the main source of doctrinal indeterminacy as per the legal realists, namely, that legal doctrine is always open to multiple readings given the irreducible choice among the many potentially applicable doctrinal sources competing to control any given case, all of which can be expanded, contracted, or variously interpreted or elaborated. Thus, Llewellyn claims that "all legal systems" are patchworks of contradictory premises covered by "ill-disguised inconsistency," because we find in all of them that "a variety of strands, only partly consistent with one another, exist side by side."¹⁷ Any given legal doctrine, including the one guiding the lawyers' interpretative activity (the canons of interpretation),¹⁸ suggests "at least two opposite tendencies" at every point. In (almost) every case, then, opposite doctrinal sources need to be accommodated: a rule and a (frequently vague) exception, or a seemingly precise rule and a vague standard (such as good faith or reasonableness) that is also potentially applicable. The availability of such a multiplicity of sources on any given legal question results in profound and irreducible doctrinal indeterminacy.¹⁹ Similarly, the idea of inevitable entailments from legal concepts is also false because, as shown by comparative law and legal history, the formalist quest for conceptual

¹³ See J. Raz, 'The Rule of Law and Its Virtues' in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 210, 213, 218, 220, 222.

¹⁴ See J. Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 6, 31.

¹⁵ See M. Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?' in J.E. Fleming (ed.), *NOMOS L: Getting to the Rule of Law* (New York University Press, New York 2011) 64, 79-80.

¹⁶ See F. Schauer, 'Legal Realism Untamed' <<http://ssrn.com/abstract=2064837>> accessed 6 July 2012.

¹⁷ Llewellyn, *Case Law*, supra, n. 9, 45.

¹⁸ See K.N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 *Vanderbilt Law Review* 395.

¹⁹ See Llewellyn, *Case Law*, supra, n. 9, 51.

essentialism is doomed to fail: the elaboration of any legal concept can choose from a broad menu of possible alternatives.²⁰

Fortunately, although a small minority among realists endorses case-by-case adjudication,²¹ most realists take a very different position.²² They realize that law's use of categories, concepts, and rules is unavoidable, even desirable,²³ and that many legal reasoners should in most cases simply follow rules, which is why realists took pains to improve legal rules.²⁴ Indeed, unlike their image in some caricatures of legal realism, most realists did not challenge the felt predictability of the doctrine at a given time and place. While persuasively insisting that legal doctrine, *qua* doctrine, cannot constrain decision makers, they recognized that the convergence of lawyers' background understandings generates a significant measure of stability. Hence, rather than threatening the rule of law, legal realism merely insists that law's stability and predictability do not inhere in the doctrine as such and rest instead on the broader social practice of law.²⁵ They argue, as Schauer succinctly summarizes, that "to locate the real core of legal rules we need to look beyond the propositional form to what the relevant legal actors and institutions are doing in actual practice."²⁶

Llewellyn thus claimed that, although adjudication is necessarily creative, cases are decided with "a desire to move in accordance with the material as well as within it . . . to reveal the latent rather than to impose new form, much less to obtrude an outside will."

²⁰ F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809, 820-21, 827-29. See also H. Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, Cambridge 2004) 221-24, 315-16; H. Dagan, *Property: Values and Institutions* (Oxford University Press, New York 2011) Part One.

²¹ See, e.g., F. Rodell, *Woe Unto You, Lawyers!* (Reynold & Hitchcock, New York 1940) 169-74, 201-202.

²² See, e.g., A. Altman, 'The Legacy of Legal Realism' (1986) 10 *Legal Studies Forum* 167, 171-72; T.D. Rakoff, 'The Implied Terms of Contract: Of "Default Rules" and "Situation Sense,"' in J. Beatson & D. Friedmann (eds.) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford 1995) 191, 216.

²³ See, e.g., Llewellyn, 'A Realistic Jurisprudence,' *supra*, n. 9, 3, 27. See also, e.g., W.W. Cook, 'Scientific Method and the Law', in W.W. Fisher III et al. (eds.) *American Legal Realism* (Oxford University Press, New York 1993) 242, 246.

²⁴ See A. Schwartz, 'Karl Llewellyn and the Origins of Contracts Theory,' in J.S. Kraus & S.D. Walt (eds.), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, New York 2000) 12, 17, 22-25.

²⁵ See F. Schauer, 'Editor's Introduction' in F. Schauer (ed.), K.N. Llewellyn, *The Theory of Rules* (University of Chicago Press, Chicago 2011) 1, 5, 7-8, 18, 20-24. See also, e.g., L. Alexander & E. Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke University Press, Durham NC 2001) 32-34; M.J. Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781, 803.

²⁶ Schauer, 'Editor's Introduction,' *supra*, n. 25, 8.

The case law *system* imposes “a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration.” The instant outcome and rule must “fit the flavor of the whole”; it must “think with the feel of the body of our law” and “go with the grain rather than across or against it.” Legal realists begin with the existing doctrinal landscape because it may and often does incorporate valuable normative choices, even if implicit and sometimes imperfectly executed. They nonetheless recognize that the existing doctrinal environment always leaves interpretive leeway. Furthermore, they believe that law’s potential dynamism, as long as properly cautious and not too frequent, is laudable because it represents our perennial quest “for better and best law” and, therefore, our judges’ “duty to justice and adjustment,” thus implying an “on-going production and improvement of rules.”²⁷

Legal realism, then, stands for a restatement of the distinction between promulgation and application in a way that shifts the focus from legal doctrine to the social practice of law and to the prevalent understandings of the legal community. The realist claim of radical doctrinal indeterminacy implies a wide breadth of *potential* judicial choice but does not—and indeed should not—mean that judges use, should use, or should even consider using this potential in every case. Quite the contrary. Legal realists, as noted, are aware of the fallibility of law bearers, as well as committed to the use of law for the furtherance of human values. Hence, they must respect and further the two faces of the rule of law as, respectively, constraint and guidance. They therefore can, and indeed should, distance themselves from the dubious nominalist approach of open-ended discretionary decision-making. Legal realism neither endorses, nor should it imply, focusing on the equities of the particular case or the particular parties. Rather, given that the values underlying our legal doctrines are indeed the normative infrastructure of law, legal realism requires that *some* legal actors, notably legislators and judges of appellate courts, *occasionally* use new social developments and new cases as, respectively, triggers for an ongoing refinement of the law, namely: as opportunities for revisiting the normative viability of existing doctrines *qua* doctrines and re-examining the adequacy of the legal categorization that organizes these doctrines.

D. HOW? BETWEEN RULES AND STANDARDS

Having dealt with the challenge of intelligibility, I turn now to the question of form: does a realist account of lawmaking support bright-line rules or vague standards? Consider Llewellyn’s Uniform Commercial Code and its attendant celebration of “the round-edged statutes prevalent in the common law world” (in private law matters) as “a necessary

²⁷ Llewellyn, *Common Law*, supra, n. 9, 36, 38, 190-91, 217, 222-23; Llewellyn, ‘The Normative,’ supra, n. 9, 1385.

accommodation to a complex and unpredictable world.”²⁸ Students of the U.C.C. may be tempted to provide a quick and ready answer to our question, stating that legal realists will invariably prefer standards to rules. And yet, this answer would be mistaken because the form of the U.C.C. seems to reflect Llewellyn’s conviction that a commercial code should use vague language in order to induce judges, who should be the prime authors of our private law, to develop and adapt its rules to the changing circumstances.²⁹ Hence, even if we accept this sweeping division of labor—a topic that is at the focus of section E—the choice between rules and standards insofar as the ultimate lawmakers are concerned remains open.

A realist position on this question need not yield the same answer throughout the legal terrain. As on many other issues, realists tend to opt for answers that focus on narrow categories in order to examine more closely the implications of the pertinent normative concerns. Two major classes of such concerns are relevant to the issue of legal form. One class of considerations relates to the consequences of using a clearer or vaguer norm concerning the values substantively implicated in the issue at hand, a line of analysis that exceeds the scope of this article. Note, however, that the leading utility-oriented account abides by the contextualist approach of legal realism. This approach states that, in order to minimize the aggregate costs of promulgation and application, the more frequently a norm is likely to be applied, the more we should tilt towards its entrenchment by way of a clear rule, and vice-versa.³⁰

In addition to such substantive concerns, legal realists who appreciate the importance of both the guidance and the constraint aspects of the rule of law are likely to make the rule of law a significant consideration of their account of the proper form of law. Thus, they would hesitate to adopt open-ended standards allowing judges to consult law’s underlying commitments in each case they must settle. Instead, they would often appreciate that, by translating “the implications of normative values into concrete prescriptions,” rules become “sufficiently determinate” so as to be followed by their applicators “without first resolving the very normative questions [they] are designed to settle” or “considering whether the local outcome of the rule conforms to the values [they are] supposed to advance.”³¹ This virtue of “the rule of rules”³² makes rules responsive to

²⁸ Schauer, ‘Editor’s Introduction,’ *supra*, n. 25, 7-8.

²⁹ See K.N. Llewellyn, ‘The Needed Federal Sales Act’ (1940) 26 *Virginia Law Review* 558, 561-64; Schwartz, *Origins of Contract Theory*, *supra*, n. 24, 17-18.

³⁰ See L. Kaplow, ‘Rules Versus Standards: An Economic Analysis’ (1992) 42 *Duke Law Journal* 557.

³¹ E. Sherwin, ‘Rule-Oriented Realism’ (2005) 103 *Michigan Law Review* 1578, 1589-91.

³² See Alexander & Sherwin, *Rule of Rules*, *supra*, n. 25.

the constraint aspect of the rule of law.³³ It also implies that the law provides “a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes,” thus affording people “maximally effective guides to behavior.”³⁴

The fact that legal realism often conforms to the prescriptions of rule-based decision-making should not be surprising, given the affinity of legal realism and the common law tradition.³⁵ As Michael Loban concluded after surveying the codification debate in England, while common law rules were shown to be different from legislated ones— “[t]hey were more flexible and had to be interpreted not according to a verbal formula, but according to the broader case law context from which they had emerged”—advocates of codification had successfully demonstrated that “the common law was not a mass of undigested chaos but that it contained rules which could be identified and articulated.”³⁶ By the same token, because legal realism rejects nominalism and merely insists that law’s underlying values should be engaged in a few deliberative moments, it can be, to a significant extent, rule-based. This reason also explains why legal realism does not imply rule-sensitive particularism, allowing judges to depart from rules whenever the outcome of a particular case so requires, while taking into account both substantive values and the value of preserving the rule’s integrity.³⁷ Furthermore, given legal realism’s appreciation of the rule of law, it is not only capable of setting (conventional) bright-line rules but is in fact, if properly interpreted, inclined to do so whenever using such rules is indeed justified.

But the rule of law does not always prescribe the use of bright-line rules. Justice Antonin Scalia’s announcement of the putative marriage between rules and the rule of law was slightly hasty.³⁸ At times, commitment to the rule of law implies allowing, or even preferring the social practice of a legal topic to be formed around a vague but informative standard. There are two sides to this proposition. On the one hand, a complex set of rules may not serve as an adequate guide for action, especially where its niceties are detached from any reasonable understanding of the regulative principle that can plausibly govern the pertinent area of the law. Because regulating a wide range of conduct is complex, technical non-intuitive complexity may undermine the guidance

³³ See F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, Oxford 1991).

³⁴ R.H. Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse” (1997) 97 *Columbia Law Review* 1, 14-15.

³⁵ See Llewellyn, *Common Law*, supra, n. 9.

³⁶ M. Lobban, ‘Legal Theory and Judge Made Law in England, 1850-1920’ (2011) 40 *Quaderni Fiorentini* 553, 580.

³⁷ See Sherwin, ‘Rule-Oriented Realism,’ supra, n. 31, 1591-94.

³⁸ See A. Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 *University of Chicago Law Review* 1175.

value of rules and may not necessarily constrain the discretion of law-appliers.³⁹ On the other hand, if properly calibrated, standards may in fact generate predictable outcomes and thus serve as both a guide and a constraint. Standards may be action-guiding insofar as their addressees (or their lawyers) can take them on board, make for themselves the evaluative judgment that they require, and thus monitor and modify their behavior accordingly.⁴⁰ Standards can thus be guidance-friendly and constraining-friendly where broad social agreement prevails on the pertinent issue.⁴¹ Even in those cases lacking such normative consensus, which are probably more prevalent in contemporary society, standards as appeals to people's practical reasoning would not lose their guidance and constraining capacity if, but only if, their addressees can figure out the intended content of the pertinent legal doctrine and thus predict its future unfolding and realm of application. Realist lawmakers announcing standards, then, should articulate them with an eye to their possible use as a source of predictability. Standards that refine the regulative principle that actually governs a specific area of law and point to its intended content and realm of application are generally unobjectionable, and may well be welcomed.⁴² By contrast, open-ended references to justice, fairness, good faith, or reasonableness, as they are interpreted by the presiding law-applier given the specific circumstances of the case at hand, cannot provide proper predictability and should be criticized as an invitation to discretionary ad hoc adjudication, which is an affront to the rule of law.⁴³

E. WHO? BETWEEN LEGISLATURES AND COURTS

The various aspects of the realist conception of law can be restated as a proposition that law is a set of coercive normative institutions. This condensed restatement emphasizes the inherent tension between power and reason. It likewise highlights the fact that, in law, this tension is always situated institutionally. This institutional perspective implies that realists should expand their view to the whole range of institutions through which law is created, applied, or otherwise becomes effective. It also means that legal realists must

³⁹ See R.A. Posner, *The Problems of Jurisprudence* (Harvard University Press, Cambridge MA 1990) 48; T. Endicott, 'The Value of Vagueness,' in A. Marmor & S. Soames (eds.) *Philosophical Foundations of Language in the Law* (Oxford University Press, New York 2011) 14, 23, 28, 30.

⁴⁰ See J. Waldron, 'Vagueness and the Guidance of Action', in Marmor and Soames, *Philosophical Foundations of Language in the Law*, supra, n. 39, 58, 65-66, 69.

⁴¹ See L.L. Fuller, *The Morality of Law* (Revised edn., New York University Press, New York 1964) 50, 92; Fallon, *The Rule of Law*, supra, n. 34, 49-50; J. Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 *Cambridge Law Journal* 502, 513, 515-17.

⁴² See Llewellyn, *Common Law*, supra, n. 29, 368-69, 378-79; Dagan, *Rule of Law*, supra, n. 12.

⁴³ See Dagan, *Law and Ethics*, supra, n. 20, 12-18.

always be attentive to the question of institutional choice, since the drama of law's dynamism can (and does) occur through these different institutions, which provide different mechanisms of legal evolution with differing mixtures of science and craft. Here, as elsewhere, legal realists tend to distance themselves from binary choices and opt instead for a more careful and pragmatic *comparative* analysis of the pertinent institutions. I cannot offer in this brief article a full account along these lines. Yet, I hope that an outline of one such institutional choice—the choice between legislatures and courts in private law matters, which was also particularly important to the original realists—can help to illustrate the legal realist approach to this quandary. Given the realists' persistent commitment to improve the law so that it serves society better, as well as their concern with the inherent coercive nature of law, a legal realist institutional inquiry should look at the relevant features of the judiciary vis-à-vis those of the legislature in terms of both expected performance and legitimacy.⁴⁴

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Focusing on the functional perspective that investigates the expected performance of lawmaking by these two different institutions, we can easily see why legal realists reach contextual conclusions that justify, even within the limited realm of private law, differing degrees of judicial deference to the legislative prerogative of lawmaking according to the distinct features of the issue at hand.

To begin with, consider the following types of cases in which judicial caution is particularly in place given three familiar limitations of judicial competence:

(i) At least in its conventional rendition, adjudication does not involve the creation of complex and elaborate regulatory schemes, which may at times be required in order to create or modify a private law institution (as, for example, in the formal registration of property rights or the creation of complicated insurance schemes).⁴⁵

⁴⁴ The following pages draw on H. Dagan, 'Judges and Property' in S. Balganesch (ed.) *Intellectual Property and the Common Law* (Cambridge University Press, New York 2013) *. My analysis is admittedly partial, since it is not informed by any empirical (and thus necessarily contingent) information on either institution. See A. Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, Cambridge MA 2006) 10. But the idealized pictures of lawmaking I refer to are nonetheless important because they serve as benchmarks, which enter the actors' utility function both directly and *via* the impact of the social and professional groups they seek to please. See, respectively, R.A. Posner, *How Judges Think* (Harvard University Press, Cambridge MA 2008) 11-12, 60-61, 371; L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, Princeton 2006) 16-21, 90, 106.

⁴⁵ See T.W. Merrill, 'Faithful Agent, Integrative, and Welfarist Interpretation' (2011) 14 *Lewis & Clark Law Review* 1565, 1578.

(ii) Contexts requiring specialized knowledge and expertise, such as innovative technologies or complex market ramifications, may justify judicial deference to governmental agencies equipped with such technical expertise.⁴⁶

(iii) Some private law developments, such as the annulment of an existing property institution, generate widespread excessive redistribution so that their retroactive application, as common law is usually applied, is inappropriate.⁴⁷ Certain cases are obviously exceptions, as when people's reliance on the pre-existing distribution was illegitimate (think of slave-owners) and thus unworthy of legal protection.⁴⁸ In others, however, the fact that legislatures can and typically do apply their norms prospectively, and can moreover provide explicit or implicit compensation or set up other ameliorating means for the transition period, such as grandfather clauses, may count as significant reasons for judicial caution.

Cases that fall within these categories (or parallel ones I may have failed to mention) typically justify judicial passivity. But in other contexts there are usually conflicting concerns that point to the comparative advantages of both legislatures and courts, and may thus explain and justify the fact that much of our private law is in fact shaped and developed through both legislation and adjudication.

Consider the claim that, because legislatures tend to deal with any given private law issue less frequently than courts, their product tends to be more stable, economizing in the citizens' gathering of needed information.⁴⁹ Stability is indeed an important concern that, as noted, is also conducive to the rule of law. Like legislators, realist judges should respect the legal tradition and be attentive to the importance of stable expectations, appreciating virtues of forbearance and temperateness in the development of the law. But restraint is not synonymous with stagnation: expectations can be stable even if the legal doctrine is not frozen in time, as long as it is not revisited too frequently;⁵⁰ indeed, to avoid the risk of romanticizing the law, we must not be overly deferential to existing doctrine. It is hard to generalize concerning the proper frequency of change pertinent to the relevant private law institution, which must also be affected by the pace of other developments, for instance in technology. Given the contingency concerning the optimal frequency of change and the applicability of the injunction to respect legal tradition to

⁴⁶ See N.K. Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, Chicago 1991) 139-40.

⁴⁷ See T.W. Merrill & H.E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1, 64-66.

⁴⁸ See H. Dagan, 'Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions' (2004) 84 *Boston University Law Review* 1139, 1164-74.

⁴⁹ See Merrill & Smith, *Optimal Standardization*, supra, n. 47, 63-64.

⁵⁰ See T.A.O. Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (Oxford University Press, New York 2000) 185, 193.

legislatures as well as to courts, the virtues of legal stability can hardly yield a conclusive choice for our institutional analysis.

Another important virtue of legislative lawmaking is worth mentioning: whereas decisional rules evolve incrementally, resolving questions regarding such issues as their scope and precise effects as they arise in the adjudicated cases, legislation tends to deal comprehensively with the multiple questions evoked by any innovation.⁵¹ At times, comprehensiveness may indeed be crucial for a proper rethinking of private law, which (often implicitly) participates in shaping and reshaping the core categories of interpersonal relationships in our society. And yet, this fact can hardly justify excluding judges from private lawmaking in all contexts. The reason is that the creation and modification of our private law institutions is, or at least should be, triggered by challenges bearing on the desirability of these institutions' normative underpinnings, their responsiveness to their social context, or their effectiveness in promoting their contextually examined normative goals. These challenges can definitely originate in the legislature, but it is possible and perhaps even desirable for them to emerge also via the adjudicatory process. At least in the Grand Style version celebrated by legal realists, adjudication is a perfectly appropriate forum for developing private law along these lines. Indeed, one of the virtues of adjudication mentioned in section B above is the flip-side of legislative comprehensiveness. Rather than a dialogue about principles of abstract justice, a judicial drama is situated in a given human context, which is significant because it leads judges to develop the law while "testing it against life-wisdom," benefitting from "the sense and reason of some significantly seen *type* of life-situation."⁵² This daily and unmediated access to actual human situations and problems in contemporary life serves, as Herman Oliphant observed, as an "alert sense of actuality" that "checks our reveries in theory." It provides judges with "the illumination which only immediacy affords and the judiciousness which reality alone can induce," and it properly encourages them to shape law "close and contemporary" to the human problems with which they deal.⁵³

⁵¹ See Merrill & Smith, *Optimal Standardization*, supra, n. 47, 62-63.

⁵² Llewellyn, 'The Current Recapture of the Grand Tradition' in *Jurisprudence*, supra, n. 9, 215, 217, 219-220. See also G.J. Postema, 'Classical Common Law Jurisprudence (Part I)' (2002) 2 *Oxford University Commonwealth Law Journal* 155, 167, 175, 177-80. Raz's analysis of the phenomenon of distinguishing cases brings home a similar point. See Raz, 'Law and Value in Adjudication' in *The Authority of Law*, supra, n. 13, 180, 183-97.

⁵³ H. Oliphant, 'A Return to Stare Decisis' (1928) 14 *American Bar Association Journal* 71, 73-74, 159. Schauer has argued that the concrete examples that judges face distort rather than illuminate their judgment because they systematically trigger certain cognitive biases. See F. Schauer, 'Do Cases Make Bad Law?' (2006) 73 *University of Chicago Law Review* 883; see also L. Alexander & E. Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, New York 2008) 111-14. But as Jeffrey Rachlinski shows, alongside the cognitive weaknesses of adjudication, courts have several cognitive advantages over legislatures that might facilitate

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The sheer fact that judges, unlike legislators, are often unelected, ostensibly suffices to condemn their significant impact on our private law as illegitimate. Like the question of performance, however, legitimacy should be examined in more nuanced and comparative terms. To be sure, I do not challenge the legitimacy of legislatures taking part in the development of our private law. This simple proposition requires, for example, significant judicial deference in contexts of newly enacted legislation,⁵⁴ and renders legislative responses to judicial activism in other contexts obviously legitimate. But to figure out the proper domain of judicial creation and modification of private law institutions in other contexts, we need to examine potential bases for the legitimacy of judicial lawmaking in private law matters. Without purporting to adequately address legitimacy in a liberal democracy, the following remarks should suffice to support the claim that the legitimate scope of judicial lawmaking in private law is in fact rather broad.⁵⁵

Consider first the notion that state power can be legitimate only if it is a product co-authored by the citizens. To be meaningful, the ideal of co-authoring the normative commitments that (necessarily) serve as the foundation of our private law entitlements must not be axiomatically attached solely to the legislative process.⁵⁶ A commitment to co-authorship requires a more careful comparative account of meaningful participation and deliberation in legislation and in adjudication. This account can look at the participation of citizens (directly or via elected representatives), or focus on the participation of the subset of citizens likely to be affected by the private law development at hand.

In general, participation and deliberation will more likely be found in legislation than in adjudication because lawmaking is legislation's only task, whereas in adjudication it emerges as part of the resolution of discrete disputes.⁵⁷ But the broad or representative

superior lawmaking. See J.J. Rachlinski, 'Bottom-Up versus Top-Down Lawmaking' (2006) 73 *University of Chicago Law Review* 933, 950-61.

⁵⁴ See A. Marmor, 'Legislative Intent and the Authority of Law' in *Interpretation and Legal Theory* (Oxford University Press, New York 1992) 155. See also W.N. Eskridge Jr., *Dynamic Statutory Interpretation* (Harvard University Press, Cambridge MA 1994).

⁵⁵ Note that I do not make a claim for judicial supremacy, as in judicial review. My sole focus is on the legitimacy of judicial lawmaking where legislatures are silent.

⁵⁶ Even if one insists that such an axiom is justified in the discussion of democracy-based legitimacy, it is out of place in the discussion of legitimacy in a democracy. As the text implies, the latter, broader type of legitimacy that concerns me here accommodates differing types of citizens' participation and of decision-makers' accountability.

⁵⁷ Another reason relates to comparative costs: voters "often face a far less expensive road [than litigants] to registering their needs . . . in the political process." Komesar, *Imperfect Alternatives*, supra, n. 46, 127.

participation that might significantly foster collective co-authorship does not seem typical of legislation on many private law matters. Take property: some property doctrines, such as the law of common interest communities, may seem too mundane as a subject for robust public deliberation.⁵⁸ By contrast, when the creation or modification of property institutions provides significant opportunities for rent seeking, as in the repeated extensions of the term and scope of copyright, the legislative process tends to be dominated by interest groups promoting narrow distributive goals,⁵⁹ and thus cannot meaningfully count as collective co-authorship.

The ideal of participation by parties affected by the proposed development of property law is a more realistic expectation. But insofar as this participatory ideal is concerned, adjudication fares quite well and, in some contexts, probably better than legislation. The adjudicatory adversarial process fares well because it invites disagreements on questions of facts, opinion, and law. It thereby creates a forum where the judges' normative and empirical horizons are constantly challenged by the participating parties' conflicting perspectives, which present a microcosm of the social dilemma at hand.⁶⁰ As Neil Komesar shows regarding tort law, adjudication sometimes even provides a qualitatively better forum for the participation of affected parties. One instance are cases showing sharp "distinction between *ex ante* and *ex post* stakes," so that the low *ex ante* probability of harm may obscure an important perspective rendered vivid in the *ex post* litigation triggered by the unfortunate realization of such harm.⁶¹

But legitimacy should perhaps require only accountability by decision makers rather than citizens' participation. Accountability is a more modest standard: it requires neither active participation nor deliberation, and merely insists that decision makers be responsive to citizens' values and preferences. As with participation, the accountability requirement may, in the abstract, appear as the trump card of elected legislators vis-à-vis unelected judges, given that reelection is a powerful guarantee of responsiveness. But my previous observations regarding skewed participation in private law matters immediately, and detrimentally, affects legislators' responsiveness as well. If most or many private law matters are either politically marginal or dominated by interest groups, the legislators' expected responsiveness is likely to be limited. Likewise, an outright dismissal of judges' responsiveness seems exaggerated. As Llewellyn insisted, judges need to "account to the public, to the general law-consumer" in their opinions, on a regular basis and in detail. They must persuade not only their brethren but also the legal community, including

⁵⁸ To pre-empt a possible objection, I may add that the notion that judicial passivity can upset the marginality of these topics within our public discourse does not seem particularly plausible.

⁵⁹ See, generally, J. Litman, *Digital Copyright* (Prometheus Books, Amherst 2001).

⁶⁰ See supra, text accompanying n. 7; M. Steilen, 'The Democratic Common Law' (2011) *The Journal of Jurisprudence* 437.

⁶¹ See Komesar, *Imperfect Alternatives*, supra, n. 47, 135-36.

losing counsel, “that outcome, underpinning, and workmanship are worthy” and that their judgment was formed “in terms of the Whole, *seen whole*.”⁶² While real-life adjudication surely falls short of these ideals, having these standards in place is nonetheless significant because it affects the judges’ utility function and thus informs judicial behavior, as even the tough-minded portrayals of judges as maximizers of their utility function admit.⁶³

F. A REALIST STATEMENT ON LAWMAKING

It is no wonder that the original legal realists invested time and energy in various arenas of lawmaking, shaping and reshaping the various rules and standards that are to govern society. This sustained effort reflects a mature position regarding the rule of law whereby, notwithstanding the malleability of the doctrine as such, the social practice of law implies stable expectations as to the content of the law at any given time and place. Redrawing the line between promulgation and application along these conventionalist lines paves the way for a realist account of lawmaking. This account, which I hope I have begun to articulate in this article, is likely to rely on contextual and pragmatic analyses of the pertinent issues at hand. Rather than opting for either bright-line rules or vague standards, then, legal realists would recommend using both precise rules and informative standards founded on the regulative principles of the doctrines at hand, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Legal realists would likewise avoid binary institutional choices and, in many contexts, appreciate the comparative advantages of legislatures as well as courts in terms of both expected performance and legitimacy, as potential contributors to the development of the law.

⁶² Llewellyn, *Common Law*, supra, n. 9, 48, 132; Llewellyn, ‘American Common Law Tradition,’ supra, n. 9, 309-10.

⁶³ See Posner, *How Judges Think*, supra, n. 44, 11-12, 60-61, 371; Baum, *Judges and Their Audiences*, supra, n. 44, 16-21, 90, 106.