7

THE CHALLENGE OF LEGAL REALISM

7.1 Do Rules and Precedents Decide Cases?

But is it all a sham? We have spent six chapters exploring the fundamental devices of legal reasoning, but does legal reasoning genuinely decide cases? Even if as a theoretical matter we can understand the methods of legal argument and legal reasoning, and even if we can identify real examples of their use in actual cases, how representative are those examples? In other words, how much does legal reasoning actually matter in most of the arguments that lawyers make, and how often (and how much) does legal reasoning make a difference in the real decisions of real judges?

These are the principal questions posed by the skeptical perspective commonly known as Legal Realism, or, acknowledging the standpoint and location of its principal founders, American Legal Realism.[1] Although we can find traces of related ideas in the German *Freirechtsschule*

1. The common label also serves to distinguish American Legal Realism from Scandinavian Legal Realism, the latter being a mid-twentieth-century school of legal theory led by scholars such as Alf Ross, Karl Olivecrona, Axel Hägerström, and A. Vilhelm Lundstedt, which embodied the view that all the important features of law could be described through use of the empirical social sciences. For useful overviews and critiques, see Michael Martin, *Scandinavian and American Legal Realism* (1997); Gregory S. Alexander, "Comparing the Two Legal Realisms—American and Scandinavian," 50 *Am. J. Comp. L.* 131 (2002); Jes Bjarup, "The Philosophy of Scandinavian Legal Realism," 18 *Ratio Juris* 1 (2005); H. L. A. Hart, "Scandinavian Realism," 17 *Camb. L.J.* 233 (1959). The Scandinavian Realists paid little attention to the characteristics of legal reasoning and legal argument, however, and thus their perspective is largely unconnected with the focus of this book.

(Free Law School) in the late nineteenth and early twentieth centuries[2] and in the contemporaneous work of the French theorist François Geny,[3] American Legal Realism has its most important roots in the extrajudicial writings of Justice Oliver Wendell Holmes. When Holmes said, famously, that "the life of the law has not been logic; it has been experience,"[4] he posed a concrete and potentially radical challenge to the then conventional wisdom about the way in which the common law develops. When Holmes wrote, and even more so earlier, most lawyers, judges, and commentators understood common-law change to be a process of discovery rather than creation.[5] For them, the development of law not only involved locating the law that was there all along rather than making new law, but could also be characterized as a largely logical and deductive march from one case to the next.[6] But Holmes was not convinced. Although he certainly subscribed to the then conventional view that legal doctrine typically determined legal outcomes, and although he believed as well that uniquely legal categories were genuinely important in predicting legal consequences,[7] he had concluded that changes in legal doctrine were largely a function of an experience-based and empirical determination by judges who, when changing the law, were undoubtedly making policy choices dictated neither by logic nor by preexisting law.

Viewed in hindsight, Holmes's views seem scarcely remarkable, let alone radical. Nowadays it would be hard to find very many dissenters from the view that when judges change the law, they base their decisions on a mix of policy and principle that can hardly be thought of as a deductive or logical exercise. In thus anticipating what most legal insiders and

2. See Herman Kantorowicz, *The Definition of Law* (Arthur Goodhart ed., 1958) (1917); Albert S. Foulkes, "On the German Free Law School (Freirechtsschule)," 55 *Archiv für Rechts- und Sozialphilosophie* 367 (1969).

3. See François Geny, *Science of Legal Method* (4 vols., 1914–1924).

4. Oliver W. Holmes, Jr., *The Common Law* 1 (1881).

5. "There is, in fact, no such thing as judge-made law, for the judges do not make the law, although they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable." Willis v. Baddeley, 2 Q.B. 324, 326 (C.A. 1892). "The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been the law." R. W. M. Dias, Jurisprudence 151 (5th ed., 1985).

6. E.g., Eugene Wambaugh, *The Study of Cases* (2d ed., 1894); John M. Zane, "German Legal Philosophy," 16 *Mich. L. Rev.* 287 (1918).

7. Oliver Wendell Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457, 475 (1897).

commentators now take to be commonplace, Holmes, like Roscoe Pound and Judge Cardozo shortly thereafter,[8] was ahead of his time. In other ways, however, his views about legal reasoning remained steadfastly conventional. He believed that legal doctrine, as doctrine, was the principal determinant of legal outcomes, and it is this belief, more than any other, that has served to frame Holmes as more a forebear of Realism than a Realist himself.[9] Recourse to knowledge of the empirical facts about the world may have been necessary to change the common law, Holmes recognized, but the common law itself had elements of stability as well as change. And for Holmes, this stability was chiefly a function of legal doctrine as more or less conventionally understood. Unlike the Realists who admired and succeeded him, Holmes subscribed wholeheartedly to the belief that the relative specific legal principles contained in the language of reported judicial opinions were the principal determinants of how judges decided cases and how lawyers argued them. When Holmes insisted that the most important standpoint from which to view law was that of the "bad man,"[10] the one who was interested exclusively in what the law could do for him and, more specifically, what the law could do *to* him, Holmes was arguing that the essence of law was the *prediction* of judicial reaction to some set of factual circumstances. For Holmes, the

8. See Benjamin Cardozo, *The Nature of the Judicial Process* (1921); Roscoe Pound, "Mechanical Jurisprudence," 8 *Colum. L. Rev.* 605 (1908). Both Cardozo and Pound also decried the excess reliance on logic in law and urged, following Holmes, recognition of the importance of public policy in the wise development of the law.

9. Holmes did believe that "[g]eneral propositions do not decide concrete cases," Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), but he believed as well that propositions sufficiently concrete to decide cases were mostly *legal* propositions, and not propositions of policy, philosophy, or psychology.

10. "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences, of which such knowledge enables him to predict not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." "The Path of the Law," 10 *Harv. L. Rev.* at 459. The phrase has generated voluminous commentary. See, e.g., Sanford Levinson & J. M. Balkin, "The 'Bad Man,' the Good, and the Self-Reliant," 78 *B.U.L. Rev.* 885 (1998); William Twining, "Other People's Power: The Bad Man and English Positivism," *1897–1997,* 63 *Brook. L. Rev.* 189 (1997); William Twining, "The Bad Man Revisited," 58 *Cornell L. Rev.* 275 (1973).

focus of legal analysis must be on what the "courts are likely to do in fact."[11]

Holmes was ahead of his time in focusing on prediction and in seeming to recognize the logical possibility that what the "courts are likely to do in fact" would differ from what the formal doctrine might suggest, but he was not very far ahead. When it came to delineating the factors that the good lawyer would use to predict what judges would do, Holmes was very much the traditionalist in believing that legal doctrine remained foremost among those factors. Indeed, the very reason that Holmes made sport of the apocryphal Vermont justice of the peace who believed that "churn" was a legally relevant category was that for Holmes the legally relevant categories—the ones that would enable the "master of the law" accurately to predict what judges would actually do—were things like dangerous instrumentality, bailment, felony murder, mutual mistake, assumption of the risk, and business affected with a public interest.[12] These were the classifications of the law, these were the relatively concrete boxes into which sophisticated lawyers could place the events of the world, and these were the categories that would enable good lawyers to do exactly what Holmes and the bad man wanted them to do—predict future legal reactions to the full span of human behavior.

But what if it turned out that legal categories and legal doctrines were not especially effective predictors of judicial decision-making? What if factors other than legal doctrine played the major role in determining what judges would in reality actually do? These questions frame the challenge that lies at the core of Legal Realism, and it is a challenge that departs substantially from Holmes's rather conventional view about the role of legal doctrine in predicting legal outcomes. To see Legal Realism at its fullest, therefore, we must take our leave from Holmes and look instead, at least initially, at a group of commentators who flourished primarily in the 1930s, almost exclusively in the United States.

The most visible of these early Realists was Jerome Frank, who in 1930 was a prominent New York lawyer and later became a distinguished federal judge. Frank was preceded in his Realist pronouncements by a number of others, but he quickly became among Realism's

11. "The Path of the Law," 10 *Harv. L. Rev.* at 461.

12. *Id.* at 474–75. The full tale is quoted above, at p. 48. For a fuller analysis of the story and its connections with Holmes's thought, see Frederick Schauer, "Prediction and Particularity," 78 *B.U. L. Rev.* 773 (1998).

most prominent voices. His key claim, echoing one that had been made a year earlier on the pages of the *Cornell Law Journal* by a Texas judge named Joseph Hutcheson,[13] was that judges did not initially or primarily look to the law in order to determine how to decide a case.[14] The then conventional view was that judges determined what the facts were and then consulted the statutes, cases, and other legal materials to find out what response the law dictated for those facts or that situation. But for Hutcheson and Frank, this standard picture reversed the order of things. Rather than first looking to the law and then deciding how to rule, Hutcheson and Frank maintained that judges first decided—or intuited; hence Hutcheson's reference to the judicial "hunch"—how they wanted to rule and only then consulted the law. Like a lawyer who starts with her client's position and then searches for legal support to buttress it, Hutcheson and Frank believed that judges started, after determining the facts, with a view of the correct outcome and then looked for cases and statutes and other legal materials to provide an after-the-fact justification—a rationalization—for what they had already decided.

In itself, this claim is not a very radical idea either. Hutcheson referred to the initial determination by the judge as a "hunch," and simply describing it as a hunch, or as "intuitive," is not inconsistent with legal doctrine playing a substantial, even if less conscious, role in determining the judge's initial reaction. A hunch or an intuition, after all, might well be a legally informed hunch or an intuition based on knowledge of the law. Baseball umpires, for example, rarely engage in very much conscious thinking before calling a pitch a ball or a strike, but they nevertheless make their quick judgments on the basis of having internalized the rules about what makes some pitches balls and others strikes. The chess master who can play thirty games simultaneously against thirty different opponents does not have much time for contemplation, but his seemingly instinctive moves are still the moves of a chess expert. Similarly, a judge might have so internalized the rules of law that even though she had a quick hunch or intuition about how the case ought to be decided, it would be a hunch born of a deep knowledge of legal rules and legal doctrine. And there is nothing particularly radical or skeptical about that position.

13. Joseph C. Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," 14 *Cornell L.J.* 274 (1929).

14. Jerome Frank, *Law and the Modern Mind* (1930).

But Hutcheson and Frank went further than this. Hutcheson, and to a much greater extent Frank, believed that the initial judgment—the hunch—was based less on cases, statutes, and legal principles than on a host of other factors that the law officially refused to recognize but that Frank especially thought actually played a large role. Frank is frequently caricatured as having believed that judicial decisions were a matter of "what the judge had for breakfast,"[15] but his claim is in reality far more sophisticated and nuanced. For Frank, the personal attributes of the judge did matter, and Frank would not have denied that the judge being in a bad mood because of poor ventilation in the courtroom on a hot day or even because of a bad breakfast could have an effect on legal outcomes. But the "what the judge had for breakfast" caricature is unfair to Frank, because he believed that a large number of other less frivolous but still nonlegal factors typically determined judicial decisions. These might include, for example, the judge's political preferences, his views about litigants of certain races or religions or appearances, his views about the lawyers, his overall sense of which outcome would be fairer under the circumstances, and, perhaps most of all, the makeup of his personality.[16] But although Frank believed that far more than what the judge had for breakfast determined legal outcomes, he believed as well that most of what determined legal outcomes consisted of factors that legal doctrine

15. It is not entirely clear whether Frank ever said anything like this at all. At times he said things that might have been so understood. See Jerome Frank, *Courts on Trial* 161–62 (1949); Jerome Frank, "Are Judges Human?," 80 *U. Penn. L. Rev.* 17, 24 (1931). It has also been claimed that Frank once made the breakfast remark as an offhand oral quip. Morton J. Horwitz, *The Transformation of American Law* 1870–1960, at 176 (1992). But it is more likely that Frank, because of his views, is saddled with having said something actually said in jest by Roscoe Pound (see Charles M. Yablon, "Justifying the Judge's Hunch: An Essay on Discretion," 41 *Hastings L.J.* 231, 236 n.16 [1990]) or by Supreme Court Justice Owen J. Roberts sometime in the late 1930s (see Richard D. Friedman, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *U Pa. L. Rev.* 1891, 1896 n.11 [1994]). Nevertheless, the remark has taken on a life of its own as a common caricature of the Realist view about the sources of judicial decision. See Alex Kozinski, "What I Ate for Breakfast and Other Mysteries of Judicial Decision Making," 26 *Loy. L.A.L. Rev.* 993 (1993).

16. In thinking that the judge's personality and psychological makeup had something or much to do with his or her decisions, Frank was preceded by Theodore Schroeder, "The Psychologic Study of Judicial Opinion," 6 *Cal. L. Rev.* 89 (1918).

did not recognize. He also believed that most of these factors were highly particular, relating to aspects of this case on this occasion. In ways that seem remarkably modern at times, Frank doubted the ability of people, including but not limited to judges, to make decisions based on rules or principles or general categories, but believed instead that judges would base their decisions primarily on a host of factors peculiar to the particular case, many of which were technically legally irrelevant but which he believed might nevertheless actually be causally significant in determining (and thus predicting) legal outcomes.

In addition to being saddled with the "what the judge had for breakfast" caricature, Frank is also often dismissed these days because his first and most important book, *Law and the Modern Mind,* is infused with the consequences of his recent psychoanalysis. Indeed, a more telling caricature of Frank than one based on the view that law was what the judge had for breakfast would have been one based on the opinion that legal judgments were determined by the judge's relationship to his mother,[17] for Frank's crude and largely uncritical indoctrination into psychiatry and psychoanalysis led him to place far more weight on the judge's personality and psychic makeup than on a panoply of other factors that might also influence the judge's prelegal views about how a case ought to be decided.[18] But the more than occasional rhetorical excesses and psychological silliness in Frank's work should not blind us to the importance and arguable soundness of his major insight, the one he shared with

17. Or father, for in *Law and the Modern Mind* Frank accused those who continued to believe in the sanctity of legal doctrine of seeing law as a "father figure."

18. It is worth noting that Frank's belief that judicial opinions were highly particular and his belief that the judge's personality made a big difference are two separate claims. One could believe that personality mattered but that personalities came in types, and that personality types would react to the same factual situations in the same way. Someone might believe, for example, that judges who are short in stature would routinely side with the underdog in litigation, and if that was the case, the judge who behaved in this way would be a judge whose decisions were driven by the judge's personality but whose decisions were systematic and thus highly predictable. Indeed, much the same could even be said about the view, even if Frank did not hold it, that judicial decisions are determined by what the judge had for breakfast. If some judge were to decide for the plaintiff more often when he had oatmeal for breakfast than when he had eggs, what the judge had for breakfast could be a component of the ability to predict judicial decisions, showing again that the existence of extralegal determinants such as breakfast are fully compatible with predictability.

Hutcheson. By insisting that the outcome preceded the law rather than vice versa, Frank offered an account of judging with which few sitting judges, then and now, would disagree.[19] There might be disagreement about the motivations for the outcome, and there will certainly be disagreements about the extent to which legal doctrine disciplines and constrains these prelegal or extralegal determinations of the judge's preferred outcome, but in arguing that a judge's prelegal or extralegal view of the desired result preceded a result-independent consultation of the law, Frank, along with Hutcheson, can rightfully claim to have established the basic framework of the Realist position.[20]

At about the same time that Frank was insisting that judging was based not very much on legal doctrine and a great deal on various legally irrelevant characteristics of the judge and the litigants, his contemporary Karl Llewellyn was describing legal rules as "pretty playthings." In *The Bramble Bush,* a book initially targeted to first-year students at Columbia Law School,[21] Llewellyn sided with Frank in believing that formal legal rules—the "paper rules," as Llewellyn called them—had little effect on what judges actually *did,* but Llewellyn was far less of a particularist than Frank or Hutcheson. Judges might very well be applying general rules, he believed, but rarely were they the rules that one could find in a lawbook. A judge might, for example, believe that in cases involving mining companies the mining company should win just because it was a mining company, whether the case was brought by the company seeking an injunction against a miners' union or was brought against the com-

19. As Chief Justice Charles Evans Hughes is reported by Justice William O. Douglas to have said, "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." William O. Douglas, *The Court Years: 1939–1975,* at 8 (1974).

20. The most powerful defense of this view comes not from any Realist but from a legal philosopher who was also trained in law: Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (1961). In distinguishing between the logic of decision and the logic of justification, Wasserstrom recognized that even the most legally persuasive of judicial opinions did not purport to explain chronologically or historically how the judge came to the conclusion she did, but instead offered the best legal justification for a decision that might well have been reached for other reasons.

21. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930). The 1960 edition contains an illuminating and clarifying foreword by Llewellyn, one that largely recants the "pretty playthings" observation.

pany by an adjacent landowner claiming nuisance or damage to property.[22] If the judge in both cases believed that the mining company should prevail just because it was a mining company, the judge would be applying a rule—the mining company should win—and it would be a rule that transcended, in theory, the particular facts of particular cases. It might even be a rule based on carefully thought-out moral or political or policy grounds. But it would not be a rule found in the cases or in the statutes.

Thus, although some commentators claim that the Realists are characterized by their attention to the facts of a case rather than to legal rules,[23] this way of looking at Realism is based on a false dichotomy. Even the Realists' opponents thought it important to pay close attention to the facts of a case, because otherwise there would be no way to decide which legal rule would determine the outcome. Someone believing that the outcome dictated by a statute was the outcome that a judge would invariably reach would still accept that judges would have to be concerned with the facts of the case in order to come to a decision. The real dispute is thus not between those who think judges look at facts and those who think judges look at rules, but between those who think that judges look to formal legal rules to determine both which facts are legally relevant and what outcome is indicated by those facts, on the one hand, and those who think that judges look to rules, norms, and factors other than the ones in the lawbooks to determine which facts are relevant and what should be done on the basis of those facts, on the other hand.

Thus, in order to determine how judges were actually deciding cases, Llewellyn urged empirical research aimed at identifying what Holmes called the "true basis for prophecy."[24] What were the rules and principles

22. One of the early Realists was William O. Douglas, then a young commissioner of the newly created Securities and Exchange Commission, subsequently a professor at Columbia Law School, and from 1939 until shortly before his death in 1975 an Associate Justice of the Supreme Court of the United States. Douglas had a particular interest in tax cases, and the claim that in tax cases Douglas in his later years almost always sided with the taxpayer against the Internal Revenue Service (see Bernard Wolfman et al., *Dissent without Opinion: The Behavior of Justice William O. Douglas in Tax Cases* [1975]) regardless of the actually applicable statutes, regulations, and previous cases is a vivid example of just this kind of Realist claim.

23. E.g., Brian Leiter, "Positivism, Formalism, Realism," 99 *Colum. L. Rev.* 1138, 1148 (1999); Brian Leiter, "Legal Realism," *in A Companion to the Philosophy of Law and Legal Theory* 261 (Dennis Patterson ed., 1996).

24. "The Path of the Law," 10 *Harv. L. Rev.* at 475.

that judges actually employed? Were they rules like "the mining company should win" or "the taxpayer should win," or instead were they principle-based or policy-focused rules of substantially greater sophistication, such as "maximize efficiency" or "make the decision that will produce the best long-run economic consequences" or "decide for the less- well-off party in all civil cases unless doing so would reward inappropriate conduct"? In determining whether rules such as these rather than the formal rules contained in the law books were actually producing judicial outcomes, Llewellyn urged empirical research that would reveal the real rules of the legal system and not just the "paper rules" that masqueraded as rules but in fact had little effect on legal outcomes. Among those who took up Llewellyn's call was Underhill Moore, another early Realist and a professor at Yale Law School. Moore set out to engage in the kind of empirical research that Llewellyn had urged, and thus he sought to determine, among other things, whether parking enforcement in New Haven, Connecticut, was based primarily on the official legal parking rules or instead on factors such as time of day, type of car, street, and the like.[25] Moore's methods now strike some commentators as crude, but social science in the 1930s was less well developed than it is today. The controlled field experiments that Moore employed were unsophisticated by late-twentieth-century and twenty-first-century standards, but in focusing on isolating and identifying the actual variables in the application of law, Moore well understood the basic principles of social science research.[26] In applying those basic principles, Moore recognized that which factors actually influenced legal outcomes could not be determined simply by a formal recitation of the legal doctrine. Only if that doctrine made a large difference in determining outcomes was it worth taking seriously, and with his fellow Realists, Moore recognized not only that this was an empirical question, but also that there was at least some empirical evidence supporting the view that legal doctrine played considerably less of a role than the traditional picture supposed.

25. Underhill Moore & Charles C. Callahan, "Law and Learning Theory: A Study in Legal Control," 43 *Yale L.J.* 1 (1943). See John Henry Schlegel, "American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore," 29 *Buff. L. Rev.* 195, 264–303 (1980). See also John Henry Schlegel, "American Legal Realism and Empirical Social Science: From the Yale Experience," 28 *Buff. L. Rev.* 459 (1979).

26. See Donald O. Green & Alan S. Gerber, "The Underprovision of Experiments in Political Science," 59 *Annals* 94 (2003).

As seen through the eyes of Llewellyn, Moore, and contemporaries such as Herman Oliphant, Hessel Yntema, Max Radin, Felix Cohen, Thurman Arnold, Joseph Bingham, Walter Wheeler Cook, Wesley Sturges, and Leon Green, Legal Realism is thus far more than the vulgar "what the judge had for breakfast" caricature and far more than the unsophisticated empiricism that may have marked some of their methods. At the core of the Realist claim is the view that judicial decisions are predictable but that the key to prediction of legal outcomes lies neither in the consultation of formal legal authorities nor in the internal understanding or self-reports of judges themselves. Rather, predicting legal outcomes is best accomplished through the enterprise of discovering through systematic empirical (and external) study just what makes a difference in deciding cases.[27] Frank thought that it was the personal attributes of the judge and the particular context of the particular case that made the biggest difference, while Llewellyn and most of the other Realists thought it was the application of general but nonlegal norms, but these differences should not distract us from understanding the basic claim. In looking at law externally, the Realists believed that we could discover how law actually worked and that we could treat the relationship between legal doctrine and legal outcomes as a relationship that could and should be subject to rigorous empirical testing. The Realists believed this relationship to be a weak one, but even more important was their belief that the hypothesized existence of such a relationship should be tested rather than simply taken on faith.

7.2 Does Doctrine Constrain Even If It Does Not Direct?

Let us recapitulate the structure of the central Legal Realist claim. According to the Realists, judges typically make decisions on the basis of something other than, or in addition to, existing legal doctrine. This nonlegal reason for a decision could be a nonlegal hunch, a judgment based on personal characteristics of the litigants or judge, an all-things-considered judgment about who as a matter of fairness ought to win the case, or a policy judgment about which ruling would have the best conse-

27. See William Twining, *Karl Llewellyn and the Realist Movement* (1973); Karl N. Llewellyn, "Some Realism about Realism—Responding to Dean Pound," 44 *Harv. L. Rev.* 1222 (1931); Karl N. Llewellyn, "A Realistic Jurisprudence: The Next Step," 30 *Colum. L. Rev.* 431 (1930).

quences. But rarely would a legal outcome be determined by the application of the existing stock of cases, statutes, and other legal authorities. When Llewellyn quipped that "[i]f rules were results there would be little need for lawyers," he was suggesting that the most important parts of law involve the differences between what a rule appears to *say* and the outcome actually produced by a court.

The Realists understood, however, that judges could not, professionally or culturally, explain their prelegal or extralegal judgments in terms of hunches, personal characteristics, abstract appeals to justice, or even straightforward policy analyses. Even if the Realists would have preferred it to be otherwise, they knew that the norms of the legal system required judges to justify their rulings in traditional legal terms, whatever the actual motivation for those rulings might have been. A professionally acceptable legal judgment would thus have to be couched in the language of cases, statutes, regulations, legal rules, legal principles, and accepted legal secondary authorities—in other words, in the language of the traditional sources of law.

Because the Realists recognized that decisions made on nonlegal grounds needed to be justified in traditional legal terms, it was a keystone of the Realist position that such traditional legal justifications were almost always available to justify outcomes reached for other reasons, regardless of what those outcomes might be. If it were otherwise—if most outcomes reached on nonlegal grounds could not be justified by reference to traditional legal sources—then the Realist claim would be trivial. Even the traditionalists against whom the Realists reacted acknowledged that judges would often want to reach results that the doctrine would not support. So for the Realist challenge to be a genuine challenge, it needed to insist that legal doctrine was not nearly as constraining as the traditionalists believed, and that doctrinal justifications for virtually any outcome that a judge wanted to reach for virtually any reason could be supported by traditional legal sources.

The Realist position thus rests on the claim that there are cases, statutes, maxims, principles, canons, authorities, or statements in learned legal treatises available to justify decisions in favor of *both* parties in all or at least most litigated cases. If a decision for the plaintiff can be justified by reference to standard legal sources, and if a decision for the defendant can also be justified by reference to standard (albeit different) legal sources, then the law is not actually resolving the dispute. And this was precisely what the Realists maintained, although they recognized that the

question was an empirical one: just how often are there legal rules, principles, and sources available to justify both of two mutually exclusive outcomes? The Realists believed that roughly equivalent respectable legal authority on both sides of most litigated questions was the overwhelming characteristic of legal decision-making—but were they correct in so believing?

In considering this question, we can start with Llewellyn's classic 1950 article on the canons of statutory interpretation.[28] These canons, to which we will return in Chapter 8, purport to instruct judges and other legal interpreters in how to interpret vague or ambiguous statutes. The rule of lenity, for example, is a canon requiring that vague or ambiguous criminal statutes be interpreted in favor of the defendant. But in examining the canons, Llewellyn came to the conclusion that for every canon of interpretation that said one thing, there was a "dueling" canon that said just the opposite. One canon, for example, provides that extrinsic aids to interpretation, such as legislative history, are irrelevant when the language of the statute is clear on its face. But another canon dictates that even the plain language of a statute should not be applied literally if such an application would produce a result divergent from what the legislature intended. Similarly, the canon known by the Latin *in pari materia* mandates that statutes dealing with the same subject be interpreted so as to be consistent with each other, but another provides that later statutes supersede earlier ones. And so on. The beauty and charm of Llewellyn's article is captured not just by these examples but by the way in which for almost every canon of statutory construction he located and listed, there was another that appeared to point in just the opposite direction. Llewellyn called this the "thrust" and "parry" of dueling canons, and he employed this language of fencing to demonstrate that the availability of traditional legal support for mutually exclusive legal outcomes was a ubiquitous feature of law. And thus he concluded that the presence of legal authority on both sides of most contested legal questions meant that the actual decision—the tiebreaker, if you will—was to be found in something other than the law as traditionally understood.

28. Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed," 3 *Vand. L. Rev.* 395 (1950), and in revised form in Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521–35 (1960).

Llewellyn's claim was less extreme than it may appear.[29] As early as 1930, in *The Bramble Bush,* Llewellyn was at pains to limit his claims to the class of cases that were worth fighting over. Anticipating important law and economics insights about the so-called selection effect that were not to come until some fifty years later,[30] Llewellyn recognized that the straightforward cases in which the law is all on one side rarely generate litigation. Indeed, they rarely generate legal disputes at all. Many Americans would prefer to pay their taxes on a date somewhat later than the April 15 deadline, but the implausibility of finding legal support for that position means that the question whether "April 15" in the Internal Revenue Code means April 15 will rarely be disputed, even more rarely be litigated, and more rarely yet wind up in an appellate court. Similarly, in the normal course of things, bills get paid, police officers obtain warrants, contracts are honored, and insurance companies whose insureds cause accidents make payments to the victims. Law abounds with such straightforward applications—we can call them "easy cases"—and the set of cases that winds up in court, and even more the smaller set that winds up in an appellate court, consists pretty much only of those cases in which both sides think that they have a colorable enough legal argument that it is worth spending time and money to go to court and then, for the losing party, worth the time and money of pursuing an appeal. Because the vast majority of applications of law are not ones in which parties holding mutually exclusive positions both reasonably think they might win, the ones that are exist overwhelmingly at the fuzzy edges of the law, and even more so for the yet smaller set that represents the universe of appellate cases decided on the merits and with full opinions.

29. Whether Llewellyn was actually right about the canons is not entirely clear. See Michael Sinclair, "'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' One to Seven," 50 *N.Y.L. Sch. L. Rev.* 919 (2006); Michael Sinclair, "'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' Eight to Twelve," 51 *N.Y.L. Sch. L. Rev.* 1002 (2007).

30. See Richard A. Posner, *Economic Analysis of Law* §21 (3d ed., 1986); George L. Priest & Banjamin Klein, "The Selection of Disputes for Litigation," 13 *J. Legal Stud.* 1 (1984). See also Samuel P. Jordan, "Early Panel Announcement, Settlement, and Adjudication," 2007 *B.Y.U.L. Rev.* 55 (2007); Leandra Lederman, "Which Cases Go to Trial?: An Empirical Study of Predictions of Failure to Settle," 49 *Case West. Res. L. Rev.* 315 (1998). And see the more extensive discussion in section 2.2, *supra.*

Llewellyn recognized the selection phenomenon, and the consequent unrepresentativeness of the appellate cases that were his concern. His claim is best understood, therefore, as a claim about the decision of hard appellate cases and not so much as a claim about the general indeterminacy of law. And much the same applies to Legal Realism generally. For the unrepresentative set of legal events that constitute the population of appellate cases, however, Llewellyn and the other Realists insisted that the judge was typically far less constrained by formal law than the traditional picture had it, and was far less constrained than judges in their opinions pretended to be. The extent of constraint, however, would be largely a function of the extent to which there was *not* a plausible legal argument available to justify either outcome. Llewellyn's "thrust and parry" is thus not merely about the canons of statutory construction and not merely about statutory construction. It is, for Llewellyn, an example of the overwhelming fact about law in hard cases that there is usually a respectable and defensible legal justification available for a wide range of possible outcomes (but decidedly not for all possible outcomes)[31] in the cases that wind up in appellate courts. As a result, he argued, the formal rules of law not only rarely dictated results, but also exercised little constraint on outcomes selected on the basis of other considerations.

7.3 An Empirical Claim

The basic Realist position about judicial decision-making is thus a two-part hypothesis. The first part is the claim that most judges have a preferred outcome—whether preferred on the basis of litigant characteristics, judge characteristics, conceptions of justice, ideology, or assessments of wise policy—that precedes consultation of the formal law. Judges, that is, typically sense an outcome first and look for a legal justification afterward. The second component of the hypothesis is the claim that in looking for a legal justification for an outcome selected on other grounds, judges in complex, messy common-law systems will rarely (but not never) be disappointed. There may occasionally be a preferred outcome that just "won't write," but these will be rare, and more often than not the experience of judging, the Realists claimed, is the experience not of being frus-

31. Thus, Llewellyn made plain that in his view the range of *defensible* legal justifications was often quite limited. *The Bramble Bush,* at 73.

trated but rather of finding some plausible legal justification for a nonlegally selected outcome.

Both of these components of the Realist position are ultimately empirical ones, as is the question of what, if not formal law, is the principal determinant of the prelegal or extralegal judicial preferences. And because the claims of Realism are empirical, there is no reason to suppose that the empirical conclusions will be the same for all times, for all places, for all judges, and, perhaps most importantly, for all issues and for all courts. At one extreme of legal indeterminacy, therefore, it is not surprising that we find the Supreme Court of the United States. For some years now, political scientists have used sophisticated techniques of multiple regression to determine what really does influence case outcomes in the Supreme Court. Researchers have examined a range of factors and concluded that ideology, more than personal characteristics of the judge, legal variables of text and precedent, or anything else, is the leading predictor of Supreme Court outcomes.[32] The results produced by these researchers—sometimes call "attitudinalists" because of their research-based conclusions that judicial attitudes make far more difference than the law—should not be surprising. The Supreme Court controls its own docket, and these days typically decides, with full arguments and full opinions, barely more than seventy cases a year, those seventy being selected from the more than nine thousand in which one of the parties has requested Supreme Court review. On occasion the Court will accept and decide a relatively easy case with respect to which a court below has inexplicably blundered or as to which the Supreme Court thinks it important to make a statement, but far more common is a case that has gotten as far as it has

32. See, e.g., Larry Baum, *The Puzzle of Judicial Behavior* (1997); Saul Brenner & Harold J. Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court,* 1946–1992 (1995); Jeffrey J. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2004); Jeffrey J. Segal & Harold J. Spaeth, *Majority Rule or Minority Will: Adherence to Precedent on the United States Supreme Court* (2001); Jeffrey J. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993); Jeffrey J. Segal & Harold J. Spaeth, "The Influence of Stare Decisis on the Votes of Supreme Court Justices," 40 *Amer. Pol. Sci.* 971 (1996). Somewhat more qualified views can be found in Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (1992); Thomas G. Hansford & James G. Spriggs II, *The Politics of Precedent in the U.S. Supreme Court* (2006); Paul J. Wahlbeck, "The Life of the Law: Judicial Politics and Legal Change," *59 J. Politics* 778 (1997).

precisely either because there is no law on the subject or because there are equally good legal arguments on both sides. Moreover, given the nature of what the Supreme Court does, these will largely be cases involving issues about which people, not excluding Supreme Court Justices, have strong prelegal or extralegal views. Few judges care very much about technical issues in the interpretation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), about the application of the Employee Retirement Income Security Act (ERISA), about highly obscure questions in the law of trusts, or about the law of bailments in general, so in such cases it may well be that judges or Justices have no impetus to reach a conclusion prior to consulting the law. But when the issues involved are abortion, affirmative action, pornography, financial assistance to public schools, capital punishment, and the powers of the president with respect to national security, for example, it is close to impossible to imagine a Justice of the Supreme Court having no moral, political, social, or ideological position on the matter. This being so, it is hardly surprising that the Supreme Court's combination of a small, self-selected caseload at the pinnacle of the judicial pyramid and issues on which the Justices likely have strong personal views will produce the domain in which the Realist position is most borne out by serious empirical research.[33]

It would be a mistake to assume, however, that what is true for the Supreme Court is true for other courts and other issues. There has been somewhat less research focused on state courts and lower federal courts than there has been on the Supreme Court, but the body of that research is still considerable. And when we look at the conclusions of that research, we see that legal doctrine appears to play a considerably larger role in judicial decision-making than the more extreme of the Realists supposed.[34] Although the self-reporting of judges probably exaggerates

33. See Richard A. Posner, "The Supreme Court, 2004 Term—Foreword: A Political Court," 119 *Harv. L. Rev.* 31 (2005). Judge Posner's conception of "political," however, although broadly consistent with the Realist perspective at least for the Supreme Court, is not limited to "political" in the partisan or even narrow ideological sense. See Richard A. Posner, *How Judges Think* (2008).

34. Among the studies are Sara C. Benesh, *The U.S. Courts of Appeals and the Law of Confessions* (2002); David E. Klein, *Making Law in the United States Courts of Appeals* (2002); Paul Brace & Melinda Gann Hall, "Studying Courts Comparatively: The View from the American States," 48 *Pol. Res. Q.* 5 (1993); Frank B. Cross, "Decisionmaking in the U.S. Circuit Courts of Appeals," 91 *Calif. L. Rev.* 1457 (2003); Tracey E. George, "Developing a Positive Theory of Deci-

the effect of formal law on their decisions, the admittedly oversimplified conclusion that emerges from the research is that even in lower courts a range of nonlegal factors plays a larger role than the traditional model supposes, but that legal factors explain considerably more of lower court than of Supreme Court decision-making. And although little of the existing research breaks down the question in just this way, it would be plausible to hypothesize that Realist explanations are more often true for ideologically charged issues than otherwise, more often true in high appellate courts than in trial courts, and more often true for the messier common law than for the interpretation of statutes.

Although the empirical analysis of Supreme Court decision-making has become increasingly technical and sophisticated, the empirical claims of the Realists are essentially agnostic as to method. Some of the Realists urged research that employed what were at the time the cutting-edge methods of the social scientists, and would thus likely have been sympathetic to what are now the more sophisticated methodologies. But others believed that the careful perceptions of experienced lawyers would be sufficient to identify the "real" determinants of judicial outcomes and the real divisions or categories of the law. So although if Holmes had written a torts casebook it would probably have been divided into sections such as negligence, intentional torts, strict liability, and causation, the Realist Leon Green produced one divided along just the lines that Holmes had ridiculed in "The Path of the Law." Holmes said that categories like "shipping" and "telegraphs" could not provide the basis for accurate predictions of the law because these were not categories that actually determined judicial outcomes,[35] but Green's empirical assumption was just the opposite. Implicit in Green's division of his book into sections entitled "Transportation" and "Animals," for example, was Green's prototypically Realist belief that these were the categories that would not only

sionmaking on U.S. Courts of Appeals," 58 *Ohio St. L.J.* 1635 (1998); Richard L. Revesz, "Congressional Influence on Judicial Behavior?: An Empirical examination of Challenges to Agency Action in the D.C. Circuit," 76 *N.Y.U.L. Rev.* 1100 (2001); Richard L. Revesz, "Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry Edwards," 85 *Va. L. Rev.* 805 (1999); Richard L. Revesz, "Environmental Regulation, Ideology, and the D.C. Circuit," 83 *Va. L. Rev.* 1717 (1997); Donald R. Songer & Sue Davis, "The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals," 43 *W. Pol. Q.* 317 (1990).

35. "The Path of the Law," 10 *Harv. L. Rev.* at 475.

enable students to understand torts best and help lawyers to predict judicial outcomes best, but would also explain the factors that genuinely influenced judicial behavior best. Perhaps Green would have done an even better job with modern tools of multiple regression, but the basic point is that as a Realist he wanted to examine empirically the actual determinants of judicial decisions, determinants that he believed had little to do with the legal justifications that judges gave in their opinions.

It is worthwhile repeating, however, that the empirical assessment that the Realists have urged may in fact turn out for some courts and some issues and some types of law to be less inconsistent with the traditional view of law than most of the early Realists imagined. It may well be, for example, that the principal determinant of judicial decisions on questions of statutory interpretation is the ordinary meaning of the words of the relevant statute, and that the chief determinant on questions of contract law in appellate cases is the traditional rules and principles and doctrines of contract law as found in conventional contracts casebooks and in treatises like Corbin and Williston. Such outcomes would have surprised the Realists, but such traditional legal explanations for judicial outcomes may well be sound for some or many domains, and the very fact of taking this to be an empirical question is, in the largest sense, perhaps the most important feature and legacy of the Realist program.[36]

7.4 Realism and the Role of the Lawyer

Let us not leave Holmes too far behind, however. It is true that his commitment to the importance of characteristically legal categories was decidedly anti-Realist, but his original insight about prediction and the "bad man" was most assuredly not. The standpoint of the bad man is of course not the only perspective with which to look at the law.[37] And the "bad man" characterization is unfortunate, because most people who want or need to know what the law will do to them or for them are not "bad" in any standard sense of that word. A newspaper that wishes to

36. See Thomas J. Miles & Cass R. Sunstein, "The New Legal Realism," 75 *U. Chi. L. Rev.* 831 (2008).

37. See William Twining, "Talk about Realism," 60 *N.Y.U.L. Rev.* 329 (1985); William Twining, "The Bad Man Revisited," 58 *Cornell L. Rev.* 275 (1973). See also Michael Steven Green, "Legal Realism as Theory of Law," 46 *Wm. & Mary L. Rev.* 1915 (2005).

predict the likely legal reaction to its publication of something unflattering about a politician hardly deserves to be labeled "bad." Nor does the ordinary citizen who wants to know how much she should pay in taxes, how fast she should drive, and what she needs to do in order to ensure that upon her death all of her assets will go to her children. In all of these cases it is important to predict the reaction of the legal system to various courses of conduct, and Holmes was right to stress this crucial dimension of the law. So too were the Realists, who understood that the typical citizen in these types of circumstances is interested in what the law will do much more than what the law says. If the law will do something other than what the law in writing says—if you can drive without fear of apprehension at 60 or even 64 even though the sign says SPEED LIMIT 55—then this is something that most citizens, bad or good, would rationally want to know.

But what does this say to the lawyer who is arguing a case? Although no Realist himself, Chief Justice Charles Evans Hughes notoriously observed earlier in his career that "[t]he Constitution is what the judges say it is,"[38] and this quotation stands as one of the icons of the Realist perspective. But even if it is true from the perspective of the misnamed bad man that the Constitution is what the Supreme Court says it is, a lawyer can hardly stand before the Supreme Court and say to the Court that the law is what the Court says it is. That observation may from one standpoint be true, but what the Court wants to know is why it should say that the Constitution says one thing rather than another, and on this question the point that the Constitution says what the Supreme Court says it is will be stunningly unhelpful. It may be important for lawyers and their clients to predict judicial decisions, but a lawyer arguing to a court can hardly adopt the posture that the law is the prediction of that court's decisions.

Yet although a court wants to know more than that its decision will establish the law, what Realism tells the lawyer is that the court, at some level of consciousness, may want to know rather more or rather less than what the legal doctrine says. If the principal determinant of Supreme Court decision-making is ideology, broadly speaking, as the attitudinalist

38. "We are under a Constitution, but the Constitution is what the judges say it is." Charles Evans Hughes, Governor of New York, speech before the Elmira Chamber of Commerce (May 3, 1907), *in Addresses of Charles Evans Hughes, 1906–1916,* at 179, 185 (2d ed., 1916).

political scientists and others maintain, then the effective Supreme Court advocate will try to persuade a majority of the Justices that a ruling in her client's favor will further their particular ideology. The lawyer may not articulate it in so explicit or transparent a way, but the good lawyer will nevertheless frame an argument to appeal to the actual bases for judicial decision-making. Similarly, if some judge is known systematically to be more likely to agree with whatever argument he heard last (and a well-known but no longer living United States district judge in New England was believed in the 1970s to behave in just this way), the good lawyer will try to arrange to speak last. If a judge is known to be a stickler about appearance, and if there is evidence that appearance is actually a determinant of his decisions, even if not the only determinant, then the good lawyer will make sure that his appearance and that of his client will not antagonize the judge. And if some other judge is concerned more about fairness than about the letter of the law, the lawyer arguing before that judge will try to ensure that much of her argument, whether in a trial, in a written brief, or in an appellate argument, will provide the judge with sufficient factual detail, even if some of it is technically legally irrelevant, for the judge to have the information on which to conclude that a ruling for her client will be a fair one.

None of this is to say that good lawyers will or should ignore the law, because, as we have seen, it is the rare judge who does not think it important to justify on traditional legal grounds a decision reached for other reasons. The Realist-influenced lawyer will not only argue the case in terms that will appeal to some judge's actual basis for decision, but will also provide the judge with the legal doctrine—a "hook," as it were—on which to hang and justify the decision. Even the judge who decides a case on the basis of law-free equity or justice or policy, for example, will need such a doctrinal hook or frame, and nothing in the Realist perspective would discourage the good lawyer from furnishing one to the judge, even as the lawyer is properly focusing her argument on other things.

7.5 Critical Legal Studies and Realism in Modern Dress

Although most of the pioneers of Legal Realism flourished from the 1920s to the 1940s, the Realist perspective still thrives. A common saying is that "we are all Realists now," but that is almost certainly false. Not only is the "all" an egregious exaggeration, but the form of Realism that survives turns out to be a highly domesticated one. Beliefs in the total determinacy of legal doctrine may have withered, but torts casebooks

look less like Leon Green's than might have been predicted half a century ago, with the typical modern book relying heavily on the traditional legal categories of tort doctrine. Constitutional law is still largely discussed, argued, and organized in substantial disregard of what the attitudinalists have rather firmly established, and any student who thinks that a strong Realist perspective will be rewarded on law school examinations is in for a nasty shock.

There are (at least) four explanations for what appears to be this still-conventional state of affairs. One would be that the strong empirical claims at the foundation of Realism are false. Even if it is true that something other than legal doctrine is at the heart of Supreme Court decision-making about abortion, affirmative action, and presidential power, it might be argued, once we leave this rarefied climate and look at lower court cases on less ideologically charged issues, to say nothing of non-litigated law, Realism is elevating an occasional feature of legal decision-making into something more than it is. In being an empirical response to an empirical claim, this explanation engages Realism on its own terms, and so little can be said here other than that if Realism is empirically correct for much of law, then the fact that Realism may now be substantially disregarded is surprising and disturbing. But if the centrals claims of the Realists are more false than true and more exaggerated than sound, then we should not be surprised that its import has turned out to be relatively insignificant.

The second explanation would be that Realism in fact thrives, but in different clothing. Insofar as Law and Economics explains much of legal decision-making in terms of efficiency maximization, for example, it would properly be understood as carrying on a Llewellynesque, policy-oriented approach to studying what judges actually do. And various other approaches—the "law in action" focus of the Law and Society perspective, for example—might also be seen as heirs to the legacy of Realism. Indeed, the fact that hearings on the nominations of Supreme Court Justices have begun routinely to focus on the nominee's extralegal political beliefs is an especially visible manifestation of an increasing Realist consciousness. The success of Realism, it might thus be said, is evidenced not by the number of diehard Realists there are but by the presence of Realist perspectives everywhere we look.

Third, it may be that law schools seek to teach their students more about the language of legal justification than about the determinants of judicial decision. Even if judges do base their decisions substantially on broad notions of equity and justice, or on policy considerations, or even

on the personal characteristics of the judge and the litigants, what lawyers need to know, and what law schools are uniquely positioned to teach, it might be argued, is the language of the law, the words and the categories and the concepts in which law talk takes place, even if beneath the talk something else entirely is going on. Lawyers can afford to be Realists, perhaps, but they will succeed only if they understand the non-Realist language and categories with which the legal system actually functions.

Fourth, perhaps Realism has been marginalized because it is too threatening. That would be the view of many members of the Critical Legal Studies Movement, some of whom seek or have sought explicitly to carry on the Realist program. Parts of Critical Legal Studies, a movement that rose to prominence in the late 1960s and may have had its greatest influence in the 1970s and 1980s, have little to do with Realism, for at least one of the important claims of Critical Legal Studies was that legal doctrine could best be understood as a reflection of contingent political and ideological decisions. Insofar as one of the important Critical Legal Studies claims was that legal doctrine reflected an existing power structure or served the interests of certain classes or segments of society, then its claims are only loosely connected with Realism and only loosely connected with this book's focus on questions of legal reasoning and legal argument.

In other respects, however, Critical Legal Studies was explicitly Realist. Some Critical Legal Studies scholars emphasized the indeterminacy of legal doctrine, arguing, as had Llewellyn in different language, that legal decision-makers typically had far more choices doctrinally open to them than the traditional view of law would have had it.[39] In light of this indeterminacy of legal doctrine, so the argument goes, it is important to understand the real bases of judicial decision-making. So when Duncan Kennedy argued, for example, that judges always had available to them sufficient "moves" to enable them with professional respectability to avoid even the clearest indications of the clearest legal rules,[40] he was

39. See, e.g., Joseph William Singer, "Legal Realism Now," 76 *Cal. L. Rev.* 467 (1988) (book review). See also Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory," 94 *Yale L.J.* 1 (1984).

40. Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging," 36 *J. Legal Educ.* 518 (1986); Duncan Kennedy, "Legal Formality," 1 *J. Legal Stud.* (1972).

making an empirical claim entirely consistent with the central core of Realism. And when Mark Tushnet insisted that political ideology was the principal determinant of much of constitutional decision-making,[41] he not only offered an explanation of American constitutional law that was consistent with those of the attitudinalist political scientists, but also offered the type of explanation that Llewellyn, even if not Jerome Frank, would have found congenial. It is true that Tushnet and others emphasized ideology rather than policy, politics rather than personality, and broad social influences rather than the equities of the particular case, but seen through a Realist lens, these differences seem comparatively minor. Although there may now be different versions of which extralegal factors in fact drive judicial decision-making and legal argument, the insistence on what traditionally would have been thought of as nonlegal connects Critical Legal Studies with the central claims of 1930s Realism.

Just as Legal Realism included perspectives on law other than those represented in the legal-reasoning focus of Hutcheson, Frank, Green, and Llewellyn, for example, so too, to repeat, Critical Legal Studies has elements unconnected with Legal Realism and indeed unconnected with the questions of legal reasoning, legal argument, and judicial decision-making. But insofar as parts of Critical Legal Studies were explicitly concerned with these topics, much of these scholars' work is best seen as carrying on the Realist program. As a set of empirical claims, the Realist program can hardly now be condemned as largely false or celebrated as largely true. The truth of Realism is itself domain-specific, and the extent to which the traditional tools and devices of legal reasoning actually determine legal outcomes will remain a continuing topic for serious research, the outcome of which will continue to vary with the subject, level, and location of judicial decision-making.

41. Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," 96 *Harv. L. Rev.* 781 (1981).