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Legal Realism and 'Working' Rules

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Abstract

The American Legal Realists offered several hypotheses about alternative drivers of official decision-making (i.e., considerations other than the rules on the books). This article identifies a tension between two of those hypotheses: the 'extra-legal' factors and 'working' rules. This tension gets exacerbated in Frederick Schauer's account of Legal Realism, one which places his Dislocated Determinacy thesis—about working rules constituting an additional ground for the existence of 'easy' cases and determinacy across a legal system—into doubt.

1. Introduction

According to the American Legal Realists,[1] the 'rules on the books' are not the only, and not necessarily the most important, drivers of officials' decisions. Karl Llewellyn, a prominent Realist, asks, "[i]f a doctrine does not, in and by itself, do all that it purports to do [i.e., in guiding officials to specific outcomes for their decisions], then *what else* is at work helping the doctrine out? For there is something else at work, helping all doctrines out."[2] The Realists nevertheless disagreed about what those aids might be, offering several hypotheses about candidate alternative drivers of official decision.

This article nonetheless identifies a tension between two of those hypotheses, about (1) 'extra-legal' factors and (2) 'working' rules—especially Llewellyn's versions of them. Furthermore, given his treatment of working rules, this tension gets exacerbated in Frederick Schauer's scholarly account of Legal Realism. This not only helps to put Schauer's view into doubt, but it also points to certain basic problems with the Working Rules hypothesis more generally.

To appreciate the tension, one must first understand four Realist hypotheses of official decision-making: (1) about the under-determinacy of rules for decision; and about candidate alternative drivers: (2) extra-legal factors, (3) working rules,

1. Throughout this article 'Realism' will refer exclusively to *American* Legal Realism, rather than (a) *Scandinavian* Legal Realism or (b) *metaphysical* realism. Whatever they may have believed about the Scandinavians, the American Realists thought that *metaphysically* realist views of law are incredible.
2. Karl N Llewellyn, "On Reading and Using the Newer Jurisprudence" (1940) 40:4 Colum L Rev 581 at 587 reprinted in *Jurisprudence: Realism in Theory and Practice* (Transaction, 2008) 128 at 135 [Llewellyn, "Newer Jurisprudence"] [emphasis in original]. See also KN Llewellyn, "Karl Llewellyn" in Julius Rosenthal Foundation Northwestern University, ed, *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston Law Book Co, 1941) 183 at 194 [Llewellyn, "My Philosophy"].

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and (4) situation-types. (Llewellyn advances versions of all four of these hypotheses.)[3]

Briefly, those four hypotheses are as follows. First, many of the rules 'on the books' are, alone, under-determinate: they cannot explain or justify specific outcomes for decisions. Hence, something else must really be guiding officials to their specific conclusions. Second, per the 'Extra-Legal' Factors hypothesis, some of the alternative drivers of official decisions are non-doctrinal considerations. These 'extra-legal' factors can be sub-categorized into *social/guild-wide* ones and those which are *idiosyncratic/personal* to a given official.

A third is the Working Rules hypothesis. Building on an older distinction between laws on the books and laws in action, Llewellyn carves a paper/working/real rule distinction. For him, *some* rules on the books go unused in official decision-making—unused in the advertised, popularly assumed way at any rate. This subset of book rules is deemed to be mere 'paper' rules because something else is doing the lion's share of the work guiding official decisions. In contrast to the paper ones, a system's 'working' rules are those which officials really do predominantly rely upon to decide. Working rules are divided into two types. (I) *written* working rules: a different subset of book rules. (Officials use these in the generally assumed way.) (II) *unwritten* working rules: alternative norms that cannot be found in official sources. Officials rely upon these rules far more heavily than on their cognate ('paper') book ones to reach a specific outcome for a decision.

Fourth is the Situation-Type hypothesis. It posits the existence of unrecorded, guild-constructed categories that officials can use to both classify and decide particular cases/disputes. By relying upon such types, officials can and do decide

3. See Karl N Llewellyn, "A Realistic Jurisprudence—The Next Step" (1930) 30:4 Colum L Rev 431 [Llewellyn, "The Next Step"]; Karl N Llewellyn, "Some Realism About Realism: Responding to Dean Pound" (1931) 44:8 Harv L Rev 1222 [Llewellyn, "Responding to Pound"]; Karl N Llewellyn, "Legal Illusion (Law and the Modern Mind: A Symposium)" (1931) 31:1 Colum L Rev 82 at 83-84; Llewellyn, "My Philosophy", *supra* note 2; Karl N Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed" (1950) 3:3 Vand L Rev 395 [Llewellyn, "Theory of Appellate Decision"]; KN Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana, 1951) [Llewellyn, *The Bramble Bush*]; Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Company, 1960) [Llewellyn, *Common Law Tradition*]; Karl N Llewellyn, "On the Current Recapture of the Grand Tradition" in *Jurisprudence: Realism in Theory and in Practice* (Transaction, 2008) 215 at 218 [Llewellyn, "Grand Tradition"]; Karl N Llewellyn, *The Theory of Rules*, ed by Frederick Schauer (University of Chicago Press, 2011) [Llewellyn, *Theory of Rules*].

These four do not exhaust the set of Realist hypotheses of official decision. Others include the claim that, sometimes, officials really decide cases based upon 'institutions' (i.e., a malleable composite in an official's mind of hundreds of legal rules), rather than just being guided by a single rule. See Karl N Llewellyn, *The Case Law System in America*, ed by Paul Gewirtz, translated by Michael Ansaldi (University of Chicago Press, 1989) at xxxv, 10 [Llewellyn, *Case Law System*]. Another hypothesis concerns the evolution of rules on the books in lines of cases, without necessarily identifying a specific 'alternative' driver as being the sole catalyst for those changes. See Edward H Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1949) at 1-27; Michael Ansaldi, "The German Llewellyn" (1992) 58:3 Brook L Rev 705 at 734-40.

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differently than they would by relying (predominantly) upon a book rule's concept/category and normative content to size up cases and settle them. (For Llewellyn at least, this hypothesis either constitutes his more mature view about working rules, or it rivals the Working Rule hypothesis.)

With all that in mind, Schauer champions the Working Rules hypothesis in his scholarly account of Realism. On his view, unwritten working rules can create 'dislocated determinacy' across a legal system: more cases count as 'easy' ones (than many legal practitioners and scholars of Realism realize) *precisely because* officials will decide them in accordance with their unwritten working rules. This is possible because, on Schauer's view it seems, these sorts of rules enable officials to settle decisions in a determinate fashion, i.e., they can point to a unique outcome for the decision, one which officials will adopt.[4]

What has hitherto gone unnoticed is that there is a tension between the Extra-Legal Factors and Working Rules hypotheses. For one thing, those factors are said to (1) lead officials to treat certain book rules as 'paper' ones, and (2) assist officials in reshaping a book rule's content. However, there is no reason to believe that *unwritten* working rules would be impervious to the extra-legal factors' influence too. If so, this would seem to render the Working Rules hypothesis superfluous, as there is no need to posit the existence of alternative (unwritten working) *rules* over and above an explanation of official decisions simply in terms of the book rules and extra-legal factors (if not also with situation-types).

Identifying this tension also helps to impugn Schauer's 'Dislocated Determinacy' thesis. For if extra-legal factors invariably impact official decision-making, the *idiosyncratic/personal* variety especially, then it is doubtful whether working rules themselves regularly, let alone perforce, can control decisions to such an extent as to be able to generate determinacy. Doubts about that thesis are further compounded because (1) the very grounds by which various officials can even learn about such rules' existence are questionable, and (2) Schauer also claims that *rivalrous* working rules can obtain (and hence officials need not share a given one).

Understanding the tension between the two Realist hypotheses and its implications requires a considerable amount of explanatory legwork. The article therefore proceeds as follows. Section 2 outlines the pertinent Realist hypotheses and concepts: (I) the under-determinacy of book rules, (II) *idiosyncratic* and *social* 'extra-legal' factors, (III) *written* and *unwritten* working rules, and (IV)

4. See Frederick Schauer, "Legal Realism Untamed" (2013) 91:4 Tex L Rev 749 [Schauer, "Legal Realism Untamed"]; Frederick Schauer, "American Legal Realism—Theoretical Aspects" in Mortimer Sellers & Stephan Kirste, eds, *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, 2018), DOI: https://doi.org/10.1007/978-94-007-6730-0_67-3 [Schauer, "Theoretical Aspects"]. See also Frederick Schauer, "The Generality of Rights" (2000) 6:3 Leg Theory 323; Frederick Schauer, "Editor's Introduction" in Llewellyn, *Theory of Rules*, *supra* note 3 [Schauer, "Editor's Introduction"]; Frederick Schauer, "Forward" in William Twining, *Karl Llewellyn and the Realist Movement*, 2d ed (Cambridge University Press, 2012) ix [Schauer, "Forward"]; Frederick Schauer, "Legal Realism and Legal Reality" (2022) 13:1 Jurisprudence: Int'l J Leg & Pol Thought 113 [Schauer, "Legal Reality"].

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situation-types. Section 3 then explains Schauer's take on working rules and his Dislocated Determinacy thesis. Section 4 identifies the tension and fleshes it out in terms of legal rights and duties. That section also shows why the problem is worse for Schauer than for Llewellyn, why Schauer's view of working rules raises its own difficulties, and why his Dislocated Determinacy thesis is impugned. Section 5 suggests and rejects candidate resolutions for the tension. (The appendix provides definitions of the pertinent Realist concepts.)

2. Some Realist Hypotheses of Official Decision

Discussions of Legal Realism tend to commence with the following caveat: it was, at most, a movement composed of a relatively small, loose set of scholars, rather than a school offering a unified legal theory (or set of theories) of law, let alone a philosophical account of the 'ordinary' concept LAW.[5]

The Realists did, however, offer a family of explanations of official decision-making. (The theories differ over what actually guides and shapes official decisions, the candidate determinants' respective weights, and how those drivers operate together if at all). In perhaps his most famous article about Realism, Llewellyn proclaims—correctly, for the most part—that, amongst other things, all of the Realists adhere to the following:

> (5) Distrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing. Hence the constant emphasis on rules as "generalized predictions of what courts will do." This is much more widespread as yet than its counterpart: the careful severance of rules *for* doing (precepts) from rules *of* doing (practices). (6) Hand in hand with this distrust of traditional rules (on the descriptive side) goes a distrust of the theory that traditional prescriptive rule-formulations are ***the*** **heavily operative factor** in producing court decisions. This involves the tentative adoption of **the theory of rationalization** for the study of opinions. It will be noted that "distrust" in this and the preceding point is not at all equivalent to "negation in any given instance."[6]

In the least, these are common 'points of departure' for the original Legal Realists' various research agendas.[7] Many if not all movement members believed they were exposing something important about legal practice itself: namely, that there are, or can be, divergences between what officials *say* they are doing and

5. The contemporary philosophical convention is to use all capitals to mark concepts. This is done to distinguish them from denotations of words, phrases, and terms, for which quotation marks are used instead.

6. Llewellyn, "Responding to Pound", *supra* note 3 at 1237 [emphasis in original, bold emphasis added]. That article canvasses the work of twenty scholars whom Llewellyn and fellow Realist Jerome Frank deemed, howsoever contentiously, to be members of the Realist movement.

7. See *ibid* at 1235 & n 36. For a candidate list of the Realists' shared ideas, views, and commitments, see *ibid* at 1236-38.

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what they *actually* do.[8] The Realists claimed to be uncovering hidden (and undiscussed) features of law and official decision-making.[9]

While many of the Realists advanced some (if not all) of the following four hypotheses, certain members nonetheless advanced *different versions* of each one. This section predominantly elucidates Llewellyn's versions, as it is his account of working rules that serves, along with Schauer's take on it and the extra-legal factors, as this article's main concern.

2(A). Indeterminacy vs. Under-determinacy, and of What?

The Realists claim that legal rules are not necessarily the real/dominant/equally important[10] drivers of officials' decisions—or, at least, not the ones 'on the books.' At least in part, this is because book rules (or some subset of them, at least) are not determinate for decision: *alone*, many such rules cannot justify a unique conclusion or outcome for a decision.

There had been some debate about whether the Realists believe the book rules to be indeterminate or, instead, under-determinate for decision.[11] *Under-determinacy* entails that a given legal rule, or a set thereof, can justify a limited set of possible outcomes, but not all possible conclusions. Thus, the rule(s) cannot point you to a singularly correct, unique outcome for the decision. *Indeterminacy*, by contrast, entails that a legal rule, or a set thereof, has no constraining power whatsoever over the sort of conclusion that is possible or legitimate for a decision.[12]

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8. See e.g. *ibid* at 1249; Llewellyn, "The Next Step", *supra* note 3 at 450; Herman Oliphant, "A Return to Stare Decisis" (1928) 14:2 ABA J 71 at 76 [Oliphant, "A Return to Stare Decisis"]; Herman Oliphant, "Stare Decisis—Continued" (1928) 14:3 ABA J 159 at 161 [Oliphant, "Stare Decisis: Continued"].

9. See e.g. Llewellyn, "Responding to Pound", *supra* note 3 at 1246; Llewellyn, "Newer Jurisprudence", *supra* note 2 at 152. Llewellyn nonetheless suggests that Roscoe Pound was the Realists' source for some of (bases for) the alternative candidate determinants. See Llewellyn, "The Next Step", *supra* note 3 at 435, n 3; KN Llewellyn, "Roscoe Pound" in *Jurisprudence: Realism in Theory and Practice* (Transaction, 2008) 495 at 496. See e.g. Roscoe Pound, "Law in Books and Law in Action" (1910) 44:1 American L Rev 12 at 12, 15, 18-19, 20-22. However, certain of these can be traced through Pound to Rudolph von Jhering and certain European schools of thought, in addition to having American antecedents. See e.g. Hermann Kantorowicz, "Some Rationalism About Realism" (1934) 43:8 Yale LJ 1240 at 1240-41; Letter from Mr. Justice Holmes to Harold J Laski (November 10, 1930) in Mark DeWolfe Howe, ed, *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J Laski 1916-1935*, vol 2 (Harvard University Press, 1953) at 1296 (Holmes discussing Llewellyn); Brian Z Tamanaha, "Legal Realism in Context" in Elizabeth Mertz, Stewart Macaulay & Thomas W Mitchell, eds, *The New Legal Realism, Volume I: Translating Law-and-Society for Today's Legal Practice* (Cambridge University Press, 2016) 147. See also Llewellyn, "Newer Jurisprudence", *supra* note 2 at 149-50.

10. The Realists did not advance a uniform view of this matter either.

11. For explicit treatments, see e.g. Lawrence B Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54:2 U Chicago L Rev 462; Brian Leiter, "Legal Indeterminacy" (1995) 1:4 Leg Theory 481. *Cf* Llewellyn, *The Bramble Bush*, *supra* note 3 at 73.

12. See Brian Leiter, "American Legal Realism" in Martin P Golding & William A Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2005) 50 at 51 [Leiter, "American Legal Realism"]; Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) at 79 [Leiter, *Naturalizing Jurisprudence*].

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The under-determinacy stance is a far more credible interpretation of the original Realists' views. Either way, though, a legal rule on the books (sometimes? often?) cannot, *alone*, constrain officials to select a specific outcome for their decisions by relying on and applying it, e.g., in a court case to resolve a dispute between litigants.

Brian Leiter argues that the Realists believe legal rules are both (1) *causally* under-determinate for official decision-making (they, alone, cannot *explain* officials' decisions), and (2) *rationally* under-determinate (the rules cannot *justify* a singular outcome for a decision either).[13] Certain Realists also suggest that, while legal rules are *causally* under-determinate, they may nonetheless be *rationally* determinate.[14] One reason could be this: while a single legal rule is 'on point' and could generate a unique outcome for an official's decision, it is nevertheless treated as a mere 'paper' rule.[15]

Scholars also dispute what exactly the Realists believe to be under-determinate: the *application* of a given rule, the *content* of that rule (the possible rule formulations gleanable from a source), the *selection criteria* for determining which rule ought to apply in a given case, etc.[16] In other words, is under-determinacy exclusively a matter of (I) a given rule's interpretation and application, or also (II) an official's selection process for determining which precedent to apply, as certain Realists insist that multiple rules may be equally germane.[17] (This article will only concern (I).)

The Realists offer several reasons for a given legal rule's under-determinacy for decision. Here are just three. (1) The legitimate (and sometimes rivalrous) methods available for interpreting legal sources. One example is a judge's being legally empowered to produce loose/broad or strict/narrow interpretations of a precedent. Another is the legal discretion afforded to select amongst the various canons of construction in any given case, which allow for equally legitimate, but conflicting, understandings of a statute. (2) The competing, valid modes of legal

13. Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 9-12.
14. *Cf ibid* at 9-10.
15. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 27, n 18.
16. For example, Leiter suggests that the Realists did not locate under-determinacy in the rules themselves, but rather in the means of characterizing which rules are contained in a statute or precedent. See Leiter, "American Legal Realism", *supra* note 12 at 64. Certain Realists offer alternative reasons for legal under-determinacy other than the rules. For example, Frank emphasizes a judge's legal power to characterize the facts of a given case (and so to choose which facts are to be treated as being legally significant and which not). See Jerome Frank, *Law and the Modern Mind* (Doubleday & Company, 1949) at ix-x; Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 9.
17. See e.g. Oliphant, "Stare Decisis: Continued", *supra* note 8 at 159, n 5, 160; Felix S Cohen, "The Problems of a Functional Jurisprudence" (1937) 1:1 Mod L Rev 5 at 10-12 [Cohen, "Functional Jurisprudence"]. Hanoch Dagan claims that HLA Hart 'domesticated' the under-determinacy issue for a particular rule's interpretation and application, and thus the problem resides in the grounds for determining which rule to apply to a given case. See Hanoch Dagan, "The Realist Conception of Law" (2007) 57:3 UTLJ 607 at 613-17. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 5, 22 (selection from amongst a multiplicity of possible interpretations of a given precedent). However, the tension between *unwritten* working rules and extra-legal factors identified in this article undermines Dagan's 'domestication' claim.

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reasoning by use of rules (deductive, analogical, etc.).[18] (3) Given the difference between the 'core' versus the periphery ('fuzzed edges') of a legal concept, the latter can cause problems for either classifying a given case's facts and/or a given rule's application.[19]

Some of these bases can perhaps also be understood as the vehicles through which the alternative drivers of official decision, e.g., extra-legal factors and/or 'working' rules, get effectuated. For example, they are what motivate a judge to construe a precedent narrowly or broadly, or to choose one canon of construction over another vis-à-vis a particular statute.

2(B). Alternative Drivers of Decision

I. The Extra-Legal Factors Hypothesis

One Realist hypothesis about alternative determinants is that official decisions are really/mostly/equally influenced by 'extra-legal' factors.[20] These factors help to shape both outcomes for decisions and officials' understandings of rules on the books. (Again, they may also form part of an explanation of why officials 'manipulate' the book rules to reach certain outcomes for their decisions.) Perhaps the most widely discussed extra-legal factor is an official's response to the facts of a given case.

Despite the long-standing employment of the label 'extra-legal' in the literature on Legal Realism and by certain Realists themselves, these factors are nonetheless probably better understood as 'non-rule' or 'extra-doctrinal'—especially as some of them seem to be legal ones. This article will continue to refer to them as 'extra-legal' factors because of common usage, but the reader is advised to keep the label's deficiencies in mind.

At any rate, the Realists did not devise a definitive list of such factors, claim to know how many obtain,[21] or affix each one's relative weight for decision (if that is even possible).[22] Llewellyn notes that, despite their claim that the rules are not the "heavily operative factor" for decision,[23] the Realists do not actually know the

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18. See Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 9; Leiter, "American Legal Realism", *supra* note 12 at 51-52, 64.

19. See Llewellyn, "My Philosophy", *supra* note 2 at 194. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 180.

20. See e.g. Karl N Llewellyn, "The Effect of Legal Institutions Upon Economics" (1925) 15:4 American Economic Rev 665 at 665; Karl N Llewellyn, "Some Realism About Realism—Responding to Dean Pound" in *Jurisprudence: Realism in Theory and Practice* (Transaction, 2008) at 61 & n d (the lettered footnote was added thirty years later for this monograph version of "Responding to Pound").

21. See e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2. See also Underhill Moore & Gilbert Sussman, "Legal and Institutional Methods Applied to the Debiting of Direct Discounts: II. Institutional Method" (1931) 40:4 Yale LJ 555 at 560-62; Oliphant, "Stare Decisis: Continued", *supra* note 8 at 161.

22. See Wilfred E Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Cornell University Press, 1968) at 171-75. The Realists never produced a systematic theory of the "social determinants" of judicial decisions. See Brian Leiter, "Legal Realism and Legal Doctrine" (2015) 163:7 U Pa L Rev 1975 at 1979 [Leiter, "Legal Doctrine"].

23. See Llewellyn, "Responding to Pound", *supra* note 3 at 1237.

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extra-legal factors' and book rules' respective general weights within official decision. The empirical research needed to be done to work that out.[24] (This may remain to be the case.)

Regardless, Llewellyn points to Roscoe Pound as having identified some of the relevant extra-legal factors. These include: the tradition of the judge's craft and the ideals of that craft,[25] the "ideal elements" in law, and the law's "taught traditions."[26] It is via such crafts, traditions, and ideals, Llewellyn posits, that the rules on the books actually gain their meaning.[27] He also briefly explains what else these sorts of factors can do:

> These factors turn out, moreover, if one examines them, to be factors that do three things at once: (1) They help control and guide the judge or other official in ways and places in which *the rules* of law, as such, fail to control and guide. (2) They are factors which are given and present in the legal system as we have it, so that they can be known, felt, even seen by a lawyer, and they therefore can guide him both in predicting and in working out an argument to a court. (3) They are factors which afford, however, some very real degree of flexibility of adjustment both of the outcome of a particular case and of the rule laid down in a case to changing times and needs and case-situations.[28]

Furthermore, extra-legal factors can be divided into those which are *shared* by officials (e.g., *qua* guild members, such as those which are a product of judges' training and conditioning) and those which are *personal* or 'idiosyncratic' to a particular official (e.g., temperament, political and ethical views, intellectual ability, etc.)[29]

The factors mentioned above (crafts, traditions, ideals, etc.) could be characterized as being exclusively of the *guild/social* variety.[30] These, certain Realists suggest, help to establish some degree of relatively uniform regularity of decision.[31] ('Relatively uniform regularity' meaning a consistency exhibited by different officials in different locations over time, rather than just a single official or

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24. See e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 145, 150-51.

25. *Ibid* at 135; Llewellyn, *Theory of Rules*, *supra* note 4 at 63-64; Llewellyn, "My Philosophy", *supra* note 2 at 188. See also Roscoe Pound, *Jurisprudence,* vol 4 (West, 1959) at 452-57.

26. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 143, 151. *Cf* Llewellyn, "Theory of Appellate Decision", *supra* note 3 at 396; Roscoe Pound, "The Theory of Judicial Decision" (1923) 36:6 Harv L Rev 641 at 652-54.

27. See Llewellyn, "My Philosophy", *supra* note 2 at 184; Llewellyn, *Theory of Rules*, *supra* note 3 at 64.

28. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 133 [emphasis added].

29. *Cf* Leiter, "American Legal Realism", *supra* note 12 at 55-56 on the features of the "sociological", in contrast to the "idiosyncratic psychological", profile of judges. See also Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 28-30, 44-45, 89-90, 111-12 on the sociological vs. psychological "wings" (camps) of Realists.

30. Llewellyn also notes a division of crafts amongst different kinds of legal actors: counsellors, advocates, judges, administrators, etc. See Llewellyn, "My Philosophy", *supra* note 2 at 188, 191.

31. See Llewellyn, "The Next Step", *supra* note 3 at 451, n 18, 452, n 19. Additional factors are addressed in Llewellyn, "Newer Jurisprudence", *supra* note 2 at 133, 140, 143, 145, 152 and Llewellyn, "My Philosophy", *supra* note 2 at 194. See also Schauer, "Legal Realism Untamed", *supra* note 4 at 754-56.

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body exhibiting consistency across its own decisions.) For example, despite their different upbringings and temperaments, Judges Smith and Jones are both conditioned by, and gain the experience and habits of, their office of judgeship.[32] This, claim certain Realists, helps Smith and Jones come to very similar conclusions for their respective decisions.

In 1960, Llewellyn listed fourteen factors that provide a "stabilizing" force for officials and their decisions. This in turn produces a modicum of uniform regularity of American appellate court decisions and thus a real degree of predictability ('reckonability') of pending cases before such courts.[33] These factors are:

1. judges' law-conditioning;
2. legal doctrine;
3. known doctrinal techniques;
4. the judge's sense of responsibility to justice;
5. the "ideology" of believing there is a single right answer for any given case;
6. the norms and pressures accompanying an appellate court's being required to provide a published opinion;
7. the frozen factual record from below;
8. issue-framing against the background of legal doctrine and procedure;
9. adversarial argument provided by trained counsel;
10. the need for such judges to make a group decision;
11. judicial (institutional) security and honesty;
12. a known bench (based on their past opinions);
13. the pertinent period-style (i.e., *Grand*, *Formal*) of judicial thinking; and
14. a full-time professional judicial office.

These fourteen (or rather twelve of them, after subtracting "legal doctrine" and, perhaps, "known doctrinal techniques") are only a subset of all 'extra-legal' factors, though.

However, Llewellyn also identifies extra-legal factors that cannot be characterized as (purely) social ones. These include a particular judge's character and biases,[34] skill and temperament,[35] and relative insight into justice and policy.[36] Seemingly additional '*idiosyncratic'/personal* factors are (in perhaps a tepid

32. See e.g. Llewellyn, "My Philosophy", *supra* note 2 at 196-97; Llewellyn, *Common Law Tradition*, *supra* note 3 at 45-51.

33. Llewellyn, *Common Law Tradition*, *supra* note 3 at 19-51. See also Llewellyn, *Case Law System*, *supra* note 3 at 76-78. See also *infra* note 51 on 'foredoomed' appellate court cases.

34. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 132.

35. *Ibid.* *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 24.

36. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 136; Llewellyn, *Common Law Tradition*, *supra* note 3 at 24. See also Cohen, "Functional Jurisprudence", *supra* note 17 at 16; Rumble, *Skepticism*, *supra* note 22 at 158, 171, 179-80. Llewellyn deemed it to be a virtue for officials to be afforded some discretion, precisely so they can decide cases and reshape the rules in ways that meet their sense(s) of justice. See e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 137, 159.

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defence of Jerome Frank) an official's state of health and well-being at the time of decision.[37]

Llewellyn is also keen to discuss the 'experienced' or 'best' lawyers and judges. They have the sharpness of mind to recognize the relevant extra-legal factors.[38] Still, there are also inexperienced and bad judges. They too decide cases and help to shape the law.[39] Llewellyn even adjudges a lawyer's relative quality (a factor affecting the outcomes of cases) to be of sufficient importance as to warrant inclusion in his list of "real Realist" tenets.[40] In turn, a *judge's* idiosyncratic responses to well or poorly argued cases (and responses to lawyers' personalities, style, etc.) constitutes a kind of idiosyncratic extra-legal factor influencing decision.[41]

Some scholars are apprehensive about including idiosyncratic factors in an account of official decision and so they downplay the Realists' discussions of them. The concerns are these. First, emphasizing such factors' role seemingly flies in the face of the evidence: namely, (1) the observed, pervasive agreement amongst officials and others about most of the law[42] and (2) the relative regularity of decision in most court cases (hence why many cases' outcomes are predictable).[43] Second, and as a corollary, affording a lot of weight to the idiosyncratic factors might hinder social scientific explanations of official decision-making. Treating them as significant variables would render impossible the *scholarly* capacity to make meaningful predictions about official behaviour, at least beyond

37. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 140-41. See also Cohen, "Functional Jurisprudence", *supra* note 17 at 9; Dan Priel, "Law is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea" (2020) 68:3 Buffalo L Rev 899.

38. See e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 133, 149.

39. See e.g. Llewellyn, *Theory of Rules*, *supra* note 3 at 40: "Another type of factor would seem to be the personal skill, intuition, artistry, or thumb-fingeredness and obtuseness, of particular individuals at the bar and on the bench." On 'thumb-fingeredness' see *ibid* at 80, n 6 (editor's footnote). See also Llewellyn, *The Bramble Bush*, *supra* note 3 at 65-66; Llewellyn, "Newer Jurisprudence", *supra* note 2 at 141, n c; Llewellyn, *Common Law Tradition*, *supra* note 3 at 24, 30-31; Brian Leiter, "Legal Formalism and Legal Realism: What is the Issue?" (2010) 16:2 Leg Theory 111 at 125, n 64 (on the role of a judge's politics in decision) [Leiter, "What is the Issue?"].

40. Llewellyn, "Responding to Pound", *supra* note 3 at 1246 & n 60.

41. See e.g. Llewellyn, *Common Law Tradition*, *supra* note 3 at 24, 30-31; Llewellyn, "Newer Jurisprudence", *supra* note 2 at 140. See also Cohen, "Functional Jurisprudence", *supra* note 17 at 9; Patrick J Rohan, "The Common Law Tradition: Situation Sense, Subjectivism or 'Just-Result' Jurisprudence?" (1963) 32:1 Fordham L Rev 51 at 61, n 30 (*discussing* Llewellyn, *Common Law Tradition*, *supra* note 3 at 226). *Cf* Oliver Wendell Holmes, Jr, "Book Notices" (1871-72) 6 American L Rev 723 at 724; Walter Wheeler Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924) 33:5 Yale LJ 457 at 487.

42. See e.g. Llewellyn, *The Bramble Bush*, *supra* note 3 at 90; Brian Leiter, "Explaining Theoretical Disagreement" (2009) 76:3 U Chicago L Rev 1215 at 1226-27 [Leiter, "Theoretical Disagreement"]. See also *infra* note 124.

43. See e.g. *infra* note 51 on 'foredoomed' appellate court cases. Felix Cohen noted that, although such factors indicate a "large realm of uncertainty in the actual law", they seem difficult to square with the—observed—"significant body of predictable uniformity in the behavior of courts." Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 Colum L Rev 809 at 843 [Cohen, "Transcendental Nonsense"]. In theory, this concern could be obviated by affixing relative weights to the factors (social, idiosyncratic) in different types of officials' decisions and in various contexts. Perhaps only 'in theory,' though . . .

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those of particular judges.[44] Consequently, idiosyncratic factors should just be treated as matters that practicing lawyers ought to consider, for prudential purposes, when making a case to particular officials. This, such scholars go on to suggest, must have been the Realists' view too.

While there are reasons to be concerned about idiosyncratic factors (such as their leading to the creation of 'bad' law and to non-uniformity of results),[45] the second of the two reasons mentioned above merely expresses certain aspirations of social science, e.g., seeking general phenomena and variables that allow for meaningful predictions to be made. In fact, neither of the two scholarly worries, in themselves, *falsify* the empirically testable hypothesis about whether idiosyncratic factors influence official decision-making, in a weighty fashion or otherwise.[46] The practical difficulties involved in testing or proving any (causal and rational) influence of idiosyncratic extra-legal factors does not entail that they fail to obtain or are unimportant for an account of official decision. It is also untrue that admitting such factors into the total set of extra-legal ones negates the possibility of official decisions being generally or often predictable. Llewellyn thinks so, at least.[47] This, especially as the various (social and idiosyncratic) factors can operate in tandem and might not always have the same amounts of influence.

Llewellyn insists that idiosyncratic factors figure into officials' decisions, even if they are usually not the dominant considerations. Importantly, he—sometimes/inconsistently—also suggests that such factors are, to some degree, tamed by the social ones (so that the former do not, or need not, predominate over the run of decisions—though they may in a particular case), which helps to explain the modicum of regularity of decision.[48]

However, Llewellyn's remarks in furtherance of this claim, such as those about the office of judgeship with its arts and crafts transcending individualistic qualities, are difficult to square with what he also says (in the very same articles and books) about the influence of a particular judge's character, bias, skill, temperament, and experience.[49] He additionally notes that, especially in a multijurisdictional context such as the USA, there is a marketplace for legal rules, one in which the goods up for grab are shaped in part by their authors' (e.g., judges') personalities.[50] More simply, the idiosyncratic extra-legal factors help to explain why there is not perfect uniform regularity of official decision.

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44. See e.g. Michael Steven Green, "Leiter on the Legal Realists" (2011) 30:4 Law & Phil 381 at 384.
45. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 215-17, 274, 447.
46. See e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 140, n 13.
47. See e.g. *ibid* at 139, 149; Llewellyn, *Common Law Tradition*, *supra* note 3 at 4-5.
48. See e.g. Llewellyn, *Common Law Tradition*, *supra* note 3 at 51, 515-16 (*cf ibid* at 26, 121); Llewellyn, "Newer Jurisprudence", *supra* note 2 at 130, 134-36; Llewellyn, *Case Law System*, *supra* note 3 at 11. See also Llewellyn, "My Philosophy", *supra* note 2 at 196-97; Ansaldi, *supra* note 3 at 754, discussing KN Llewellyn, *Recht, Rechtsleben und Gesellschaft*, ed by Manfred Rehbinder (Duncker & Humblot, 1977) at 64 [Llewellyn, *RGG*]. He additionally claims that the background understandings or conditions plus such extra-legal factors *inform or buttress* the legal rules themselves. See Llewellyn, "My Philosophy", *supra* note 2 at 184, 193, 195.
49. See e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 135-36.
50. Llewellyn, *Theory of Rules*, *supra* note 3 at 94.

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> Quantity of appellate litigation is a good rough indicator that results in such litigation are not easily foreseeable by the bar. The very appeal of the multitude of cases Cardozo stamps "foredoomed, to affirmance without opinion" shows in their multitude an uncertainty factor which all the other factors taken together cannot wholly explain away.[51]

Again, while neither the Realists nor legal officials[52] are aware of all the relevant extra-legal factors, Llewellyn claims that 'experienced' lawyers, ones who know a particular judge well, take as many into consideration as can be surmised when presenting a case, tailoring their arguments accordingly.[53] Even then, lawyers must still *predict* how the litigation will be decided.[54]

Interestingly, fellow Realists Charles Clark and David Trubek accuse Llewellyn of unduly downplaying the idiosyncratic factors' influence upon official decision-making in his final monograph, the *Common Law Tradition*, and they are dubious of his claim that those factors can be tamed by the social ones.[55] As just one of their examples, Clark and Trubek find it paradoxical for Llewellyn to assert as much while simultaneously lauding certain famous judges' ability to significantly change the law precisely because of their exemplary individual personality traits and qualities, e.g., to influence other members of their bench and other courts.[56] Schauer, too, criticizes Llewellyn for minimizing the idiosyncratic factors' influence (seemingly regarding the latter's entire corpus).

> But perhaps Llewellyn, whose admiration for the culture of real lawyers and real judges was considerable, and who respected the collective wisdom of the legal establishment (he called them "the lawmen"), overestimated, whether always or eventually, the determinacy of even law broadly conceived, and underestimated the role that ephemeral personal, psychological, political, and economic factors played in causing legal results.[57]

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51. Karl N Llewellyn, "Our Case Law of Contract: Offer and Acceptance, I." (1938) 48:1 Yale LJ 1 at 12, n 25. By 1960 at least, following Justice Benjamin Cardozo's claims from the 1920s, Llewellyn asserts that a considerable percentage of American appellate court cases really are "foredoomed", i.e., their outcome is basically certain *ex ante*. The remainder are not. Llewellyn, *Common Law Tradition*, *supra* note 3 at 25 & n 16, 45, discussing Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924) at 60 (stating that 90% of cases are "predestined" by the legal rules). *Cf* Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) at 164-65. (Depending how one understands his earlier work, this stance may or may not reflect Llewellyn's Realism having become (even) more moderate in his later years.) The questions then become (1) what *best* explains the supermajority of cases' foredoomedness and (2) why the residual is not foredoomed.

52. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 142, 153.

53. *Ibid* at 133, 140-41, 143.

54. *Ibid* at 133, 140-43.

55. Charles E Clark & David M Trubek, "The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition" (1961) 71:2 Yale LJ 255 at 263-68. Clark had been a judge on the United States Court of Appeal for the Second Circuit for about twenty-two years by the time of his co-authoring this article.

56. *Ibid* at 263. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 32, 35, 40-41, 463, 515.

57. Schauer, "Forward", *supra* note 4 at xxiii.

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II. The Working Rule Hypothesis

A second Realist hypothesis about alternative drivers of official decision concerns 'working' rules. It is debatable whether this is Llewellyn's idea exclusively, or whether he merely provides a distinctive version of a hypothesis that was advanced by other Realists too. Regardless, the hypothesis incorporates the (older) laws on the books/laws in action distinction.[58] All Realists believe there can be divergences between 'the laws on the books,' i.e., what may be read in statutes, ordinances, court opinions, administrative regulations, law textbooks, etc., and 'the laws in action': the rules legal officials *actually use* (1) to make decisions, and (2) for enforcement purposes.[59]

Llewellyn advances a more nuanced version of the book/action distinction, though, by further distinguishing between 'paper,' 'working,' and 'real' rules. For him, rules on the books can be divided into two subsets: those which are utilized—in the assumed/advertised way—and others which are not.[60] Regarding the first subset, officials really do rely on some legal rules whose formulations may be found on the books to heavily guide their decision-making. Regarding the second, officials merely *pretend* to utilize these legal rules in the same manner, because they are really influenced or driven to a specific outcome for their decisions by something else.

If the book rule is utilized in the advertised/assumed way, then it is *also* the law in action. If it is not, that may be because the officials are relying on a different rule instead, a 'law in action.'[61] Indeed if officials do not routinely use a given law on the books in the popularly assumed way, then for the Realists it is just a 'paper' rule. Paper, because it is only on the books and not actually used—by officials. "Paper" rule "is a fair name for a rule to which no counterpart in practice is ascribed."[62] "'Paper rules' are what have been **treated**, traditionally,

58. See e.g. Llewellyn, "The Next Step", *supra* note 3 at 444-57; Llewellyn, "Responding to Pound", *supra* note 3 at 1222.

59. See e.g. Llewellyn, "The Next Step", *supra* note 3 at 439, n 9, 444, 447-50; Cohen, "Functional Jurisprudence", *supra* note 17 at 6, 9. This distinction can be traced back (at least) to Walter Bagehot, *The English Constitution*, new edition (Henry S King & Co, 1872) at 1, 164. See also Woodrow Wilson, *Congressional Government: A Study in American Politics* (Houghton Mifflin Company, 1885) at 9-10.

60. See e.g. Llewellyn, "The Next Step", *supra* note 3 at 439, n 9.

61. Llewellyn therefore seems to diverge from several other Realists by affording some subset of book rules a dispositive role in official decision. He notes "[a]t times Moore (chiefly in conversation), Oliphant … and Sturges … seem to me to verge upon a position which escapes my understanding: that the judges' reactions to the facts in such cases are only negligibly influenced by the orthodox rules." Llewellyn, "Responding to Pound", *supra* note 3 at 1241, n 46. "Oliphant wholly misses the guidance in an appellate opinion." Llewellyn, *Common Law Tradition*, *supra* note 3 at 14, n 9. On (some) rules providing guidance and some control and "narrow[ing] the spread of possible decision", see e.g. Llewellyn, "Newer Jurisprudence", *supra* note 2 at 142-43; Llewellyn, *Common Law Tradition*, *supra* note 3 at 179-80. See further *infra* notes 138-140 and the accompanying texts. For other Legal Realists, moreover, the 'laws in action' might not really be best characterized as 'rules' per se.

62. Llewellyn, "The Next Step", *supra* note 3 at 439, n 9.

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as rules of law: the accepted *doctrine* of the time and place—what the books there **say** 'the law' is."[63]

Although styled as 'paper' the label is an exaggeration, since the Realists insisted that officials do use many of these rules after all. For one thing, a 'paper' rule will serve as the *post hoc* rationalization for official decisions.[64] Although judges, for example, *really* decide cases based on some ulterior consideration φ, they nevertheless then write their court opinions *as if* the book rule had been the main or dominant reason why the cases were so decided. In other words, the judge *justifies* the decision to the public in terms of the book rule, even though it was not the actual reason for so deciding. The masquerade is thought necessary because officials do not want the fact that they decided on ulterior grounds—ulterior to what most people believe the laws governing their society to be—disclosed publicly.

Given their role as *post hoc* rationalizations, 'paper' rules also serve a second, related job: they help to narrow the set of possible legitimate outcomes for official decisions. This is so the result can, with greater or lesser credibility, be framed in terms of what the public takes the law to be, i.e., the book rules.[65] As an example, consider a lawsuit involving a contractual dispute. Even if it does not really decide a case on that basis, the court must nevertheless restrict the outcome to one that can be presented in its written opinion as if it had been based upon (a deduction from) the contract laws on the books. Since *those* book rules circumscribe the possible outcomes for a case, they are never mere 'paper'; they do guide decisions to some extent—just not in the advertised or commonly believed way, i.e., as the real basis for settling upon a specific conclusion.

Again, for Llewellyn, a law on the books can be either a paper rule or one in action.[66] "[B]ut it always remains to be noted whether that prevailing prescriptive

63. *Ibid* at 448 [bold emphasis added]. What constitutes 'legal doctrine' for Llewellyn? In 1930, the content of a rule (the 'accepted doctrine' of a mere paper rule, laid down in a court decision, say) or otherwise. *Ibid* at 448-49. By 1960, the 'body of doctrine' is said to include, not just the language of the rules, but also "the accepted lines of organizing and seeing these materials: concepts, 'fields' of law with their differential importance, pervading principles, living ideals, tendencies, constellations, tone." Llewellyn, *Common Law Tradition*, *supra* note 3 at 20. See also Llewellyn, *Theory of Rules*, *supra* note 3 at 70, 71, 72, 94-100, 104: legal rules contain categories, which are in turn shaped by the law's larger classifications (e.g., tort, contract, etc.).

64. See e.g. Llewellyn, "Responding to Pound", *supra* note 3 at 1237: "tentative adoption of the theory of rationalization"; Llewellyn, *Case Law System*, *supra* note 3 at 55, 79; Llewellyn, *Common Law Tradition*, *supra* note 3 at 12, 56. See also Oliphant, "Stare Decisis: Continued", *supra* note 8 at 159, n 5; Cohen, "Transcendental Nonsense", *supra* note 43 at 812; Frank, *supra* note 16 at 104 (footnote on Chancellor Kent's view); Leiter, "American Legal Realism", *supra* note 12 at 50; Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 61-62.

65. See e.g. Llewellyn, "The Next Step", *supra* note 3 at 450: "One observes how strongly ingrained is the tradition of requiring a good paper justification, in terms of the accepted paper rules, before any decision, however appealing on the facts, can be regarded as likely of acceptance." See also Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 79-80, 190. Even so, Llewellyn implies that different tiers of courts draft their opinions somewhat differently, i.e., the Supreme Court of the United States' opinions are "too much consciously built for public view" because it is the court which (its members know) is *most* "in the public eye." See Llewellyn, *Common Law Tradition*, *supra* note 3 at 514.

66. See Llewellyn, "The Next Step", *supra* note 3 at 439, n 9.

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rule has any counterpart in *practice*, or remains in the paper or lip-service stage."[67] In fact, though, he offers three paths for a book rule to take. "[T]he officials either pay no heed at all (the pure paper rule; the dead-letter statute; the obsolete case) or listen partly (the rule "construed" out of recognition; the rule to which lip-service only is paid, while practice runs another course) or listen with all care (the rule with which the official practice pretty accurately coincides)."[68] Thus, some book rules are purely paper ones after all: those which officials completely ignore in their public/written opinions.

Whether there is any divergence between a rule on the books and the one in action is an empirical question.[69] While, conceivably, this sort of discrepancy may or may not be a pervasive phenomenon,[70] and while they note that the empirical evidence has yet to be garnered adequately, the Realists' rhetoric, intimations, and proclamations nevertheless suggest that such divergences are quite common (in common law systems at least).

On the Working Rule hypothesis, a 'rule in action' is one that officials really rely on to help them reach a specific conclusion. What sort of rule is it, though? Is it a social, a moral, or a legal one? Is it a description of conduct, a prescription for conduct, or both? Does it operate as other legal rules do (e.g., 'bind' officials), or does it function in a 'softer' sense?[71] Is it even appropriate to call it 'a rule' at all, or is it some other sort of normative consideration?

Llewellyn's view is this. "'Rule' is well confined to the *pre*scriptive sphere."[72] (A practice that is not consciously "normatized" is not, or at least does not involve, a rule.)[73] Further, "prescriptive rules are rules *for* doing something; descriptive rules are so-called rules *of* doing something—statements of observed regularity."[74]

The hypothesis actually employs two further concepts: A WORKING RULE and A REAL RULE.[75] Llewellyn explains the former thus. "'Working rule' indicates a rule with counterpart in practice, or else a practice *consciously* normatized."[76] Note that this suggests two distinct bases for, and varieties of,

67. *Ibid* at 439, n 8 [emphasis in original].
68. *Ibid* at 449.
69. *Ibid* at 444; Schauer, "Legal Realism Untamed", *supra* note 4 at 773-78.
70. Llewellyn, "The Next Step", *supra* note 3 at 444; Schauer, "Legal Realism Untamed", *supra* note 4 at 771.
71. See Schauer, "Editor's Introduction", *supra* note 4 at 24-25.
72. Llewellyn, "The Next Step", *supra* note 3 at 439, n 9 [emphasis in original].
73. *Ibid.*
74. *Ibid* at 439 n, 7a [emphasis in original]. See also Llewellyn, *Common Law Tradition*, *supra* note 3 at 61 [emphasis in original]: "the importance, for instance, of noting that such an inadequate term as "rule *of* decision" connotes a "*practice of* decision" on the one hand, a "rule *for* decision" on the other, which two may or may not coincide or even co-exist, so that for purposes of analysis "rule *of* decision" becomes a clumsy and tricky tool."
75. See Llewellyn, "The Next Step", *supra* note 3. See also David Moskowitz, "The American Legal Realists and an Empirical Science of Law" (1966) 11:3 Vill L Rev 480 at 499-500; Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, 2011) at 107-09.
76. Llewellyn, "The Next Step", *supra* note 3 at 439, n 9.

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working rules: (**Variety 1**) a rule on the books that officials actually use and (**Variety 2**) a rule created when officials consciously 'normatize' a practice.

Technically, the first variety leaves room for a working rule to run along a spectrum from merely overlapping to some degree with the verbal formulation found on the books to its bearing identical content.[77] By contrast, the second variety might not be found on the books at all.

Llewellyn furthermore suggests that the second variety of working rules admits of two types. (**Variety 2 *Type A***): officials might adopt a norm from elsewhere (e.g., from commercial groups in their society) and render it into a legal norm they will regularly employ (at least for decision). (**Variety 2 *Type B***): alternatively, officials can create a norm or 'normatize' their own *sui generis* practice.[78] (Llewellyn only seems to discuss Type A, while Type B drives much of Schauer's account of Realism.)

Officials do not, and will not, use Variety 2 Types A or B working rules openly and explicitly. These rules need not be written down in opinions or other official sources from which the public (or other officials) would readily be able to discern that they are the key guides for decision. Again, the officials who employ them will instead publicly frame their decisions using the language of cognate paper rules.

Despite their obvious deficiencies as labels, especially because of the potential differences in terms of their origins/sources (the books vs. an adopted social practice or officials' own practice), I shall style Llewellyn's two varieties as *written* and *unwritten* working rules respectively, with the latter admitting of two types.[79]

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77. *Cf ibid* at 451-52 on "verbal formulation." For a slightly different interpretation of Llewellyn's working and paper rules, see Postema, *supra* note 75 at 108.

78. In an earlier article, Llewellyn invoked John R. Commons' conception of A WORKING RULE:

> Wherever custom has not crystallized, rules can really *regulate* conduct, *prevent* evils and disputes, only where the approved rules are known to men before they act. Rules only to be found by expert searching are not known. They may be admirable for decision of disputes; they cannot be *working* rules which will prevent such dispute . . . [Roscoe] Pound has developed the idea of rules of law as "norms of conduct," as opposed to standards of judgment or rules of decision of disputes. Commons has married this concept with [William G.] Sumner's "folkway," in his concept of *working rules*, which **(I)** may be law-created, but **(II)** more commonly are created by men's experiment, and only later taken over by the law.

Llewellyn, "Effect Upon Legal Institutions", *supra* note 20 at 671 & n 20 [emphasis in original, Roman numerals added], referencing John R Commons, *Legal Foundations of Capitalism* (Macmillan Co, 1924). Roman numeral (I), the 'law-created,' seems to concern what I have labelled as Variety 2 *Type B*.

79. Llewellyn's conception can perhaps be contrasted with what Arthur Corbin calls a 'tentative working rule': a generalization whose content and constituent concept/category evolves with the facts of cases (and perhaps extra-legal factors). See Arthur L Corbin, "A Tribute to Karl Llewellyn" (1962) 71:5 Yale LJ 805 at 812; Laura Kalman, *Legal Realism at Yale, 1927-60* (University of North Carolina Press, 1986) at 234-35, n 12, quoting Letter from Arthur Corbin to Karl Llewellyn (29 Jan 1961) in Llewellyn, Karl N Papers, Chicago, Hanna Holborn Gray Special Collections Research Center (R/3/5). See also Cardozo, *Judicial Process*, *supra* note 51 at 23-25. *Cf* William Twining, *Karl Llewellyn and the Realist Movement*, 2d ed (Cambridge University Press, 2012) at 232, quoting KN Llewellyn, "Case Law" in Edwin RA Seligman & Alvin Johnson, eds, *The Encyclopaedia of Social Sciences*, vol 3 (Macmillan Co, 1931) at 249 for a view of rules as "generalizations . . . when taken as normative for future disputes . . . ." See also Llewellyn, *Theory of Rules*, *supra* note 3 at 56-62; Llewellyn, *Common Law Tradition*,

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On this hypothesis, working rules are prescriptive norms that officials predominantly rely upon to help them reach specific conclusions for their decisions. They can but need not (if they be *written* ones) differ in content (significantly) from the rule on the books. (As shall be discussed in Section 5, perhaps some guild/social 'extra-legal' factors figure into officials' shaping of an *unwritten* working rule's content, which make it differ—slightly or greatly—from a cognate 'paper' rule's content.)[80]

As both paper and working rules 'guide' official decision-making, the difference between them is this. A working rule is not used as a mere rationalization for decision: it—alone—can seemingly lead officials most or all of the way to a specific conclusion. A paper rule, by contrast, either merely circumscribes the set of legitimate possible outcomes for a decision and serves as a *post hoc* rationalization, or else it is ignored entirely. If the former, then the paper rule helps to narrow the target somewhat, but it is the working rule which gets you closer to the bullseye of a specific outcome for the decision. (As shall be discussed below, for Schauer, unwritten working rules seemingly always hit the bullseye; they can invariably guide officials to a specific outcome.)

Even so, in their ignorance, people—including many lawyers—might not only believe the paper rules to be the ones in force, but that they also completely control, as opposed to merely guide, official decision. "The paper rule of ought which has now been *assumed* to *describe* the judges' *working* rule of ought (*i.e.*, to correspond with the judges' practice of decision) is now further assumed to *control* the practice of the interested laymen, to *govern* people's conduct."[81]

Llewellyn furthermore contrasts paper and working rules with 'real' rules. On his view, a 'real' rule is a description of a regularity observed in (a class of) officials' conclusions and behaviour; this, as opposed to being a prescriptive norm that can help guide officials to conclusions. He explains A REAL RULE thus.

> I should like to begin by distinguishing real "rules" and rights from paper rules and rights. The former are conceived in terms of behavior; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, except in so far as there may commonly be implied that courts *ought* to continue in their practices. "Real rules," then, if I had my way with words, would **by legal scientists** be called the practices of the courts, and not "rules" at all. And for such scientists statements of "rights" would be statements of likelihood that in a given situation a certain type of court action loomed in the

supra note 3 at 510 for a conception of a rule as a statistical generalization—though he seems to deny that it constitutes an adequate one for legal rules.

80. I submit that Llewellyn's unwritten working rules, or at least some of them, could be *legal* norms, ones that can fall under Legal Positivism's rule(s) of recognition. (This, as opposed to just being *non-legal* normative considerations that can figure into official decision.) Merely failing to be on the books or being extra-doctrinal does not perforce entail that an unwritten working rule must be an extra-legal norm. See David Frydrych, "Realism & Positivism", Jurisprudence: An International Journal of Legal and Political Thought [forthcoming]. (At least at certain points in his corpus, Llewellyn appears to endorse a version of Legal Positivism. See e.g. Llewellyn, *Theory of Rules*, *supra* note 3 at 100-01.)

81. Llewellyn, "The Next Step", *supra* note 3 at 444 [emphasis in original].

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> offing. Factual terms. No more. This use of "rights," at least, has already considerable standing among the followers of Hohfeld. This concept of "real rule" has been gaining fair since it was first put into clarity by Holmes. "Paper rules" are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—what the books there say "the law" is. The "real rules" and rights—"what the courts will do in a given case, and nothing more pretentious"—are then predictions. They are, I repeat, on the level of isness and not of oughtness; they seek earnestly to go no whit, in their suggestion, beyond the remedy actually available. Like all shorthand symbols, they are dangerous in connotation, when applied to situations which are not all quite alike. But their intent and effort is to describe. And one can adapt for them Max Weber's magnificent formulation in terms of probability: a right (or practice, or "real rule") exists *to the extent that* a likelihood exists that *A* can induce a court to squeeze, out of *B*, *A*'s damages; more: *to the extent that* the likely collections will cover *A*'s damage. In this aspect *substantive* [primary] rights and "rules," as distinct from adjective, simply disappear—on the descriptive level. The measure of a "rule," the measure of a right, becomes what can be done about the situation.[82]

In addition to Llewellyn's own later misgivings about this passage,[83] it should be noted that his conception seemingly conflates: (a) a *description* of observed regularities of official behaviour ('rules *of* doing something'); (b) a *prediction* of official decisions based on those observed regularities;[84] and (c) a court-ordered *remedy*, which include rights and duties, that appears to be (or to include) a norm or decree.[85] Consider for 'real' rights and duties: plaintiff (judgment creditor) *X is entitled to* $1000 damages from defendant (judgment debtor) *Y*.[86]

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82. Llewellyn, "The Next Step", *supra* note 3 at 448 [bold emphasis added]. See also Rumble, *Skepticism*, *supra* note 22 at 149-50.

83. Llewellyn repudiated portions of it as muddled; particularly, its being unable to account for the "reasonable regularity of judicial behavior" and failing to distinguish trial from appellate courts. KN Llewellyn, "A Realistic Jurisprudence: The Next Step", reprinted in *Jurisprudence: Realism in Theory and Practice* (Transaction, 2008) 3 at 21, n 13 (its bracketed portion). *Cf* Llewellyn, *Theory of Rules*, *supra* note 3 at 66-67 on the difficulty of making useful predictive statements and the failings of communicating predictive generalizations as 'rules' amongst 'law folk.'

84. But see Wilfred Rumble, Jr, "Law as the Effective Decisions of Officials: A 'New Look' at Legal Realism" (1971) 20 Journal of Public Law 215 at 220, 228-29; Rumble, *Skepticism*, *supra* note 22 on the descriptive-predictive nature of Realist accounts, which reflect an effort to emulate or apply social scientific methods.

85. See Oliphant, "A Return to Stare Decisis", *supra* note 8 at 72, contrasting different senses of 'decision': the 'naked judgment' or order entered versus "a proposition of law covering a group of fact situations of a group as a minimum [of two fact situations], the fact situation of the instant case and at least one other."

86. Llewellyn's is not the only Realist conception. For example, Leiter's 'rational reconstruction' of Realism, which treats situation-types as the keystone to its account of (appellate court) decision, also includes real rules. For him, 'real' rules are non-legal normative considerations that might be called 'rules.' Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 108-09, 112. See also Leiter, "What is the Issue?", *supra* note 39 at 119-20, discussing non-legal normative considerations, such as norms of fairness and efficiency gleaned from commercial practices, which appellate judges really rely on to reach their conclusions after having covertly classified the particular case before them in terms of a pertinent situation-type (instead of relying on a book rule's category/concept and normative content to do so.) Leiter's real rules, or at least some of them, *might* therefore track Llewellyn's working rule Variety 2 *Type A*, if they are not simply

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III. Situation-Senses & Situation-Types

Another Realist hypothesis about alternative drivers is that (some) decisions are really driven by officials' 'situation-types,' which are in turn formed by their 'situation-sense.' A *situation-type* is a guild-constructed category/concept, one that either contains, or is in some way associated with, normative content.[87] Based on their experience, officials deem a given fact situation to constitute a type. However, this is not just (officials' understanding of) the facts of a particular case; the latter merely constitutes a token of the situation-type.[88]

A situation-type serves at least two functions. First, what officials (can) really do is *classify* a particular case's facts in terms of a situation-type instead of doing so using a book rule's category/concept.[89] Second, officials can *decide* the case by relying on the situation-type's pointing them to ulterior normative content—if that content is not already somehow embedded within the type, that is—rather than being guided by a book rule's category and normative content. (Just like unwritten working rules, a situation-type's existence and regular employment in official decision is not public knowledge per se.)

Whatever the other Realists may have thought, Llewellyn denies that officials invariably employ situation-types for decision. (Whether he believes they ought to do so is another matter.[90]) Perhaps unlike some other movement members, he also claims that officials' situation-types additionally help them to (re-)fashion the rules on the books, in ways that render the *latter* more useful guides for future decisions.[91]

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the normative content affiliated with situation-types (if a situation-type and that type of working rule are not identical, that is).

87. See e.g. Max Radin, "The Theory of Judicial Decision: Or How Judges Think" (1925) 11:6 ABA Journal 357; Oliphant, "A Return to Stare Decisis", *supra* note 8; Llewellyn, *Common Law Tradition*, *supra* note 3. *Cf* Pound, "The Theory of Judicial Decision", *supra* note 26 at 646: a generalized type of situation of fact is defined and established. (Leiter defines a situation-type as a recurring factual pattern that elicits predictable normative responses from most officials. Leiter, "What is the Issue?", *supra* note 39 at 112.)

88. Llewellyn, *Common Law Tradition*, *supra* note 3 at 60, 121-28, 206-08; Llewellyn, "Grand Tradition", *supra* note 3 at 218. *Cf* Llewellyn, *Theory of Rules*, *supra* note 3 at 110. (In one work at least, Llewellyn seemingly treats situation-types as being akin to central cases. See Llewellyn, *Theory of Rules*, *supra* note 3 at 107, 109, 115, 117. On central cases and how they are used, see David Frydrych, "Down the Methodological Rabbit Hole" (2017) 49:147 Crítica 41 at 49-53.)

89. See e.g. Oliphant, "A Return to Stare Decisis", *supra* note 8 at 75; Llewellyn, *Common Law Tradition*, *supra* note 3. *Cf* Radin, *supra* note 87. See also Twining, *supra* note 79 at 216-27; Leiter, "Legal Doctrine", *supra* note 22 at 1977; Postema, *supra* note 75 at 128-29.

90. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 245, 268; Llewellyn, "Grand Tradition", *supra* note 3 at 222 for his preferred "formula[e]" for appellate court decision-making.

91. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 44, 200. Space does not allow for a proper discussion of the matter here, but it is worth further assessing how the notion of using situation-types to reshape book rules relates to some Realists' advocacy of replacing the large, ambiguous, overly general and abstract (1) doctrinal categories and (2) legal rules with 'narrower' ones. See e.g. Llewellyn, "Responding to Pound", *supra* note 3 at 1237, 1240-41 & n 45; Oliphant, "Stare Decisis: Continued", *supra* note 8 at 160.

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On Llewellyn's version of this hypothesis, moreover, officials (or appellate court judges, at least) 'feel' their way to the relevant situation-*types* by using their situation-*sense*, a sense that is part shaped by their guild-based expertise.[92] (This, as opposed to consciously and explicitly deliberating about such types in order to formulate them.) A particular case's facts may trigger in officials a situation-sense of a pertinent situation-type to cover both that case and like ones.

Again, a situation-type and a cognate book rule's respective categories/concepts are distinct. Llewellyn provides (what he claims is) a straightforward example using *MacPherson v. Buick*.[93] In that case, he suggests, Justice Cardozo utilized the situation-type of 'consumer-purchase in a community which has to rely on increasing un-understandable basic technology' to size up and help decide instead of (relying predominantly upon) the doctrinal category of 'dangerous instruments.'[94] Ostensibly, this situation-type helped Cardozo to (more easily) reach a different result than would have been possible by relying solely upon the doctrinal category.

Unfortunately, Llewellyn's major account of the relationship between a situation-type and normative content is woefully unclear. Are such types: *tethered* to, or *contain*, a norm adopted from some social custom; do they themselves *entail* some normative content; or do they merely *point* officials to an appropriate legal or social norm to use for a decision?[95] While other Realists' versions of this

92. "*Situation-sense* will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, way of knowledge and experience and values to see with, and to judge with." Llewellyn, *Common Law Tradition*, *supra* note 3 at 60. See *ibid* at 121-22. Also note " . . . the balanced shrewdness of the expert in the art." *Ibid* at 201. But see also KN Llewellyn, "American Common Law Tradition, and American Democracy", in *Jurisprudence: Realism in Theory and Practice* (Transaction, 2008) 282 at 301: there is a residual non-expert aspect which reflects the community's 'horse sense' of things.

Llewellyn claims that individual judges' situation-senses are conditioned by their guild experience. This in turn is said to help to tame (and re-shape) the judges' subjective, personal values and judgements (the idiosyncratic factors), thereby preventing them from predominating in official decision-making. Clark and Trubek nonetheless show why Llewellyn's *Common Law Tradition* account actually requires that appellate court judges make personal value judgements in order to be able to even discern, let alone shape or use, situation-types. For Llewellyn's account suggests that the construction, discovery, and employment process rests entirely on an *individual* judge's particular "feel of the facts." Clark & Trubek, *supra* note 55 at 261 & n 24. See also Corbin, *supra* note 79 at 811 on judicial choices being necessarily "the result of the combination and cross-fertilization of 'subjective preferences.'"

93. 217 NY 382 (1916).

94. Llewellyn, "Grand Tradition", *supra* note 3 at 223.

95. Compare Llewellyn, *Common Law Tradition*, *supra* note 3 at 44 & n 37, 71, 157, 200, 333, 474, 487, 504-05; Twining, *supra* note 79 at 217-18, 222, 227; Leiter, *Naturalizing Jurisprudence*, *supra* note 12 at 23 (calling Llewellyn's *Common Law Tradition* account of situation-types 'cryptic'), 27; Leiter, "What is the Issue?", *supra* note 39 at 112; Rumble, *Skepticism*, *supra* note 22 at 236.

Twining suggests that a situation-type either comes with a cognate policy or principle (a norm which seems to be "immanent" in the factual situation), or at least points to a principle (or a range of them) held by a particular social group. Twining, *supra* note 79 at 222. In the latter scenario, regardless of whether the situation-type concerns a particular community or the entire society, the group in question may exhibit a consensus about which (social, not legal) principles or policies are appliable to the type of situation at hand. Even if there is no agreement over that policy, the particular social group may nonetheless also exhibit a consensus about

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hypothesis may be superior to Llewellyn's, further clarification here would nevertheless be helpful.

Additionally, to date, the relationship between A WORKING RULE and A SITUATION-TYPE has not been addressed in the literature on Realism. Further assessment is warranted to determine whether: (a) they are identical;[96] (b) situation-types represent Llewellyn's more mature/evolved view of working rules; (c) a situation-type serves as a component (i.e., the crypto concept/category) within an *unwritten* working rule;[97] or (d) they are rival or complementary hypotheses.[98]

3. Schauer's 'Untamed' Realism

3(A) Schauer on 'Working' Rules

Schauer's scholarly account of Legal Realism champions, and perhaps modifies, the Working Rule hypothesis. On his view, Realism claims that certain legal rules can and do figure into official decision *qua* normative guides, ones that not only narrow the set of legitimate possible outcomes but can also lead to specific conclusions, even if they are not the sole determinants, and even if they are not necessarily the rules found on the books.[99]

> [A] central Realist theme … [is] the distinction, in Karl Llewellyn's words, between "paper rules," on the one hand, and "real rules," or "working rules," on the other. For Llewellyn and other Realists, the crux of their challenge to the traditional view of legal determinacy lay in the fact that the paper rules—the language of statutes and black-letter common law rules—were often poor approximations of the actual rules motivating judicial decisions. Judges do follow rules, Llewellyn and most other Realists insisted, but the rules they follow are not the ones found in standard legal sources.[100]

Schauer seemingly conflates Llewellyn's WORKING RULE and REAL RULE, thereby implicitly rejecting the contrast between (i) mere descriptions of official

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how to limit the range of choices for an appropriate policy or principle. *Ibid* at 227.

In criticizing Realists' suggestion that certain situation-types will incline officials to adopt the customs/norms of commercial actors as the basis by which to really decide cases instead of the book rules, Lon Fuller casts doubt on whether (and how) most judges actually know what the community's business (or other social) practices and norms even are. Lon L Fuller, "American Legal Realism" (1934) 82:5 U Pa L Rev 429 at 458-59, n 70.

96. But see Llewellyn, *Common Law Tradition*, *supra* note 3 at 44, 157, 200; Llewellyn, "Grand Tradition", *supra* note 3 at 218.

97. Depending upon their relationship, where a situation-type's category/concept differs from a (paper) rule's doctrinal category, conceivably, it could also be used to show how a Llewellynite *unwritten* working rule's category differs from a paper rule's doctrinal one.

98. Llewellyn advances the Situation-Type hypothesis as a non-exclusive/partial account of decision in his earlier work (see e.g. Llewellyn, *Case Law System*, *supra* note 33 at 79-80; Llewellyn, "The Next Step", *supra* note 3 at 438; Karl Llewellyn, *Cases and Materials on the Law of Sales* (Callaghan & Co, 1930) xxiii, *discussed in* Ansaldi, *supra* note 3 at 732 n 109). However, it became far more prominent in his later writings.

99. Schauer, "Legal Realism Untamed", *supra* note 4 at 750-51 & n 5.

100. Schauer, "Legal Realism Untamed", *supra* note 4 at 750-51.

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behaviour and (ii) legal prescriptions.[101] In the least, he just replaces the label 'working' with 'real' for the rules officials employ for decision.[102] Further, these rules are genuinely prescriptive, are internalized by officials, and are said to provide—non-conclusive[103]—reasons for decision.[104] Schauer also seems to deem all such rules to be "non-inscribed,"[105] unlocatable in the "standard legal sources"[106] (whereas Llewellyn posits the existence of both written and unwritten working rules). For Schauer, then, a 'real' rule is normative, and not a mere description of regularity as Llewellyn has it.[107]

> If this guidance is still a rule-based guidance—otherwise why talk of a real rule at all?—presumably it comes from a *non-inscribed* rule formulation that nevertheless exists in the mind of the rule-applier. Llewellyn is not nearly as lucid as he could be about the source of these real rules, or about the way in which they guide decisions, but he appears to maintain that the real rule that judges (and other legal decision-makers) apply is a rule which the judge understands as a rule, and that the judge uses to guide her decisions, but which does not exist in canonical form on a piece of paper.[108]

The difference between a paper and 'real' rule, though, is not just a divergence between the verbal formulations found in the books versus those in practice.

> The judges under such a scenario would be applying a rule, but they would be applying a rule other than that written down in the law books. And this is a crucial dimension of the Realist position about rules, especially as put forward by Llewellyn. To be a rule skeptic, or at least a rule skeptic of one sort, is not necessarily to deny that rules guide and constrain the decisions of judges, but is often to maintain that the rules that guide and constrain rule-guided and rule-constrained judges are rules *other than the ones* located in the words of statutes, reported cases, and legal treatises.[109]

Here is one of Schauer's examples:

> [C]onsider, as an aid to grasping the basic idea, the typical interstate highway speed limit. The official limit is often 65 miles per hour, which is what is posted on signs, located in codified highway rules and regulations, and sometimes even set forth in a statute. Sixty-five miles per hour is the relevant paper rule. Yet although 65 is the paper rule, it is common knowledge that the real rule is often 74. Police rarely ticket drivers unless they are exceeding 74, and judges, in the unlikely event a driver [is] summoned to court for driving at greater than 65 but less than 75, might, although more debatably, find a way to acquit or dismiss. Insofar as both police officers and

101. *Ibid* at 750, 766; Schauer, "Editor's Introduction", *supra* note 4 at 23.
102. See Schauer, "Legal Realism Untamed", *supra* note 4 at 766-67, 776; Schauer, "Theoretical Aspects", *supra* note 4 at 7.
103. Schauer, "Legal Realism Untamed", *supra* note 4 at 767.
104. *Ibid* at 766-68, 776.
105. Schauer, "Editor's Introduction", *supra* note 4 at 23.
106. Schauer, "Legal Realism Untamed", *supra* note 4 at 768.
107. Schauer, "Editor's Introduction", *supra* note 4 at 27-28.
108. *Ibid* at 23 [emphasis added].
109. *Ibid* at 18 [emphasis added]. See also *ibid* at 19 & n 48.

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> judges actually so behave, the real rule is a speed limit of 74 and not 65. And this divergence between the paper rule of 65 and the real rule of 74 is exactly what the Realists were at pains to stress.
>
> Note that 74 miles per hour in the example *is a genuine prescriptive and guiding rule, providing a reason, albeit not necessarily a conclusive one, for decision pursuant to it*. Some police officers and some judges could believe that sound public policy permitted driving up to but not above 74, believing that the posted limits are too low, that speed is not a major contributor to highway accidents, that losses in safety from faster driving are not worth losses in efficiency from slower driving, or that it is useful to enforce a limit containing a substantial margin of error. But whatever the reason, *they might well internalize*, exactly in [HLA] Hart's sense, the "speed limit 74" rule, *albeit with opinions couched in different terms and relying, often disingenuously, on different reasons*.[110]
>
> Of course some judges might enforce 65 even if police officers routinely applied 74. Police officers might not ordinarily ticket anyone driving under 75, but if they happened to do so, judges might still convict anyone proved to be driving over 65. On the other hand, judges, aware of the 74-miles-per-hour real rule … might instead find a way to acquit drivers proved to be driving at greater than 65 but less than 75. *More broadly, therefore, the real rule for a police officer might well not be the real rule for a judge. Or the real rule for a judge might be closer to the paper rule than it is for a police officer*. It is thus a mistake to assume that the distinction between paper and real rules operates in the same way for all officials, but, as the Realists stressed, it is also a mistake to assume, without empirical investigation, that the real rules that even judges used could be identified simply by identifying the formal legal doctrine or the "announced" rules.[111]

Schauer is nevertheless inconsistent about these 'non-inscribed' rules, as, for example, the rule-on-the-books 65mph speed limit ends up being a 'real' rule too. This difficulty might be obviated by maintaining Llewellyn's working/real rule distinction: a working rule helps to guide (perhaps even control) official decision, while a real rule is the decision and ruling plus a description of an observed regularity of official behaviour. The remainder of this article sticks with Llewellyn's terminology by styling the practiced, prescriptive norms used by officials to guide their decisions as 'working' rules, even when addressing Schauer's account.[112]

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110. Schauer, "Legal Realism Untamed", *supra* note 4 at 767 [emphasis added and citations omitted]. "But "speed limit 74" is nowhere to be found in the official law, which is exactly what Llewellyn and [other Realists] sought to highlight." *Ibid* at 768.

111. *Ibid* at 767, n 81 [emphasis added]. See Schauer, "Editor's Introduction", *supra* note 4 at 19-21 on a causal relationship between the paper rule's content and that of the cognate [working] rule, e.g., the [working] rule's speed limit being 74 mph *in part because* it is in the ballpark of the paper rule's 65 mph content. Any such causal influence is an empirical question, however. *Ibid* at 21.

112. Schauer also seemingly downplays situation-types and a situation-sense's role in his account. Schauer, "Legal Realism Untamed", *supra* note 4 at 755 & nn 21-22.

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Effectiveness and What Counts as 'The Real'

Why posit the existence of unwritten working rules, though? Why insist that there are two different/rivalrous rules, one paper and another actually practiced? Why not instead just say that there is a *conduct* rule on the books prescribing legally permissible or required behaviour, but that officials are simply afforded wide discretion (legal power) via on-the-books *enforcement* rules? Even accepting a conduct/decision rule distinction,[113] why posit the existence of an additional crypto rule held by officials for use in decisions, i.e., an unwritten working rule? For example, why not just claim that the (one and only) speed limit is 65 mph, but that it is just rarely enforced strictly? Further, is an unwritten working rule better understood as the true conduct ('primary') rule, as just the enforcement rule for official decision, or as both a conduct and enforcement rule?

Note, too, the following difficulty. If police mostly issue tickets to drivers going 75 mph or higher, but some judges nevertheless enforce those few tickets issued to drivers going between 65-74 mph, then 65 mph is a working rule too. Furthermore, do the police really harbour a distinct working rule, as Schauer suggests, or are the judges alone the ultimate possessors/determinants of *all* working rules?[114]

The hypothesis' defenders will insist upon the need to posit this sort of unwritten rule. For one thing, it captures a difference in content—in terms of both the normative prescription/proscription and the category/concept embedded in the working rule—from the rule on the books. Llewellyn's additional answer appears to be this: to be a genuine member of the legal system, a rule must be (regularly?) enforced and applied administratively and judicially. Hence, effectiveness in the form of (regular?) official employment is key. "For without effectiveness, a rule is paper only, not backed by, nor sanctioned by the State, but mouthed or printed merely, and left unprevailing. *A rule cannot prevail in any State save to the extent that it cogs into that State's going institutional structure*."[115] This applies equally to decision rules. (Note, however, that both a working and cognate paper rule can be 'effective': one by guiding officials' decision significantly; the other by serving as a legitimate outcome circumscriber plus veneer for the true basis of decision *qua post hoc* rationale.)

This 'Effectiveness' hypothesis would help to explain why—on the Realists' view, or at least those movement members who defend it—A WORKING RULE is a necessary feature of any adequate theory of official decision (if not also of law), and why it would be inadequate to merely point to a difference between conduct rules and official discretion concerning enforcement rules;[116] for

113. See *supra* note 78, mentioning Roscoe Pound's carving this distinction.
114. *Cf* Llewellyn, *Theory of Rules*, *supra* note 3 at 57.
115. *Ibid* at 61-62 [emphasis in original]. See also Llewellyn, "The Next Step", *supra* note 3 at 437-38, 448 vis-à-vis legal rights.
116. *Cf* Leslie Green, "Positivism, Realism, and Sources of Law" in Torban Spaak & Patricia Mindus, eds, *The Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021) 39 at 45. This appears to be Schauer's understanding of the Realism too. See

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working rules constitute distinct prescriptive norms—ones that perhaps also count as valid norms of the legal system—if, that is, it can be established that the police and judges are indeed guided by ulterior *rules*.[117]

3(B) Dislocated Determinacy

For Schauer, Realism's scope is wider than other scholarly accounts of the movement have realized: it is about all of law, and not merely (as others suggest) 'hard' cases, i.e., ones that get disputed and lead to institutional resolution processes such as litigation (or even just some subset of these, i.e., where the dispute is not simply due to one side's clear mistake about what the law is).

Delimiting it to 'hard' cases unduly 'tames' Legal Realism, i.e., it presents an under-inclusive account of what the movement was on about.[118] ('Tamed' accounts, then, predominantly concern judges' 'gap-filling.')[119] Schauer insists that the paper/working rules distinction *itself* shows why Realism is 'untamed': it impacts an entire legal system, not just disputed cases.[120]

> The distinction between [working] and paper rules is well known, but the effect of the distinction upon the supposed marginalization of Legal Realism has remained unnoticed. For when the paper rules do not describe the actual rules that judges use in making decisions, the divergence between paper and [working] rules will

Schauer, "Legal Realism Untamed", *supra* note 4 at 773. However, he also believes that Legal Realism is predicated upon, or assumes, a Razian version of Exclusive Legal Positivism. See Schauer, "Theoretical Aspects", *supra* note 4 at 2. Under that view, paper rules are equally valid norms of a legal system: officials will consider 'paper' rules to be valid norms of the legal system per their rule(s) of recognition *because* they are to be employed—in the least—in the public presentations of decisions (e.g., in court opinions). Still, a Legal Realist 'Effectiveness' view can be squared with Legal Positivism's Rule(s) of Recognition hypothesis *if* the former is understood to just be a claim about what is 'most important' in and about law, and not about what renders a norm legally valid or invalid. *Cf* Llewellyn, "The Next Step", *supra* note 3 at 438 & n 7.

Regarding the conduct/decision rule distinction, Llewellyn *might* want to claim that working rules are merely rules for official decision, not ones for general conduct (See *supra* note 74). However, Schauer and others could challenge that characterization on at least two grounds. First, it is precisely these crypto rules "for decision" which Holmes' bad man wants to know ex ante in order to prudently plan his actions, i.e., to avoid losing in court or on appeal downstream if sued or charged with a crime (See Oliver Wendell Holmes, Jr, "The Path of the Law" (1897) 10:8 Harv L Rev 457 at 457, 459). Second, and relatedly, it precisely for these sorts of reasons, coupled with that about law needing to 'cog' into state institutional practices in order to count as real, and (so) for believing that law is best measured in terms of its 'effects,' that Llewellyn himself claimed that both the notion of 'primary' rights, and the substantive/adjective law distinction, are illusory, as it were. See e.g. Llewellyn, "The Next Step", *supra* note 3 at 437-38, 442-43; Llewellyn, *The Bramble Bush*, *supra* note 3 at 83-86; *infra* note 148. (See *infra* note 147 on primary rights). *Cf* Schauer, "Legal Reality", *supra* note 4 at 116 ("locating legal reality in the choices that judges and other legal actors make . . . "). Hence, the Realists undercut the conduct rule/decision rule distinction, as it were.

117. If these are not rules, then perhaps another of the Realists' alternative drivers could explain what is going on here: either the convergence of book rules with extra-legal factors, or the convergence of the book rules + extra-legal factors + officials' situation-types. At any rate, any ulterior normative content would also allow for the predictability of applicable decisions.

118. Schauer, "Legal Realism Untamed", *supra* note 4 at 751.

119. *Ibid* at 750-51, 771, 774, 776-77.

120. *Ibid* at 750-51, 773.

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> influence the distribution between easy and hard cases. Thus, *even if* the indeterminacy claims of Realism are limited to the domain of litigated cases, *the distinction between paper and* [working] *rules determines the makeup of that domain*, *and accordingly pervades the entirety of law*. The gap between paper and [working] rules, therefore, by producing consequences throughout law and not merely to a small subset of it, reveals the Realist challenge to be more foundational, less marginal, and—importantly—less tamed.
>
> What makes hard cases hard, and easy ones easy? The answer is empirical, varying with time, place, and area of law. But Legal Realism in its untamed version not only directs us to this question, but also suggests that the answer to the empirical question might, in some contexts and in some domains, challenge the standard view of how law works *even its routine and nonlitigated operation*.[121]

Schauer therefore also—consciously—opposes, as it were, Llewellyn and certain other Realists who claim to be concerned with litigated,[122] and thus 'marginal,'[123] cases.[124] For working rules provide an additional basis for the existence of 'easy' cases—over and above the subset of book rules that officials use in the advertised/generally assumed way.[125] "But the easiness of the easy cases will no longer be determined by the conventional legal meaning of published legal rules, as

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121. *Ibid* at 751 [emphasis added]. Schauer also states:
> [The Realist challenge] is a claim about the impotence of paper rules (and traditional techniques of legal reasoning) in generating legal outcomes. *Insofar as the claim is empirically sound, it is thus about all of law, and not just the law to be applied when paper rules are indeterminate*. The challenge is now to the very idea of positive or formal law as the source of legal determinacy [i.e., because working rules constitute an additional source], and is thus Realism in its far less interstitial and thus far less tamed dimension. Untamed Realism does not claim that there is no legal determinacy, *but instead that legal determinacy is often a product of something other* than the conventional legal meaning of official rules.

Ibid at 768-69 [emphasis added].

122. See Llewellyn, "Responding to Pound", *supra* note 3 at 1239: any case doubtful enough to make litigation respectable; Karl Llewellyn, "The Theory of Legal Science" (1941) 20:1 NC L Rev 1 at 5, n 6: "in doubtful cases, most of the time"); Llewellyn, *The Bramble Bush*, *supra* note 3 at 13: what officials do in disputed cases. See also Llewellyn, *Common Law Tradition*, *supra* note 3 at 11-12, 154, 189. Schauer points out that, already in *The Bramble Bush*, Llewellyn had sensed what today is called the selection effect. See Schauer, "Editor's Introduction", *supra* note 4 at 16. See also Llewellyn, *The Bramble Bush*, *supra* note 3 at 58: "You will find one great group of litigated cases which were predestined to be litigated. They bear the same relation as does homicidal mania or sleeping sickness, to our normal life."

123. See Max Radin, "In Defense of an Unsystematic Science of Law" (1941-1942) 51:8 Yale LJ 1269 at 1271, quoted in Leiter, "American Legal Realism", *supra* note 12 at 52.

124. See Schauer, "Legal Realism Untamed", *supra* note 4 at 751, 758. See also Leiter, "Theoretical Disagreement", *supra* note 42 at 1226-27 on the existence of pervasive agreement about the law throughout the system, which is why litigated cases represent only a tiny minority of legal relationships which have gone awry and so require official dispute resolution processes (and why appealed cases constitute an even smaller fraction). (Compare with Llewellyn, *The Bramble Bush*, *supra* note 3 at 90; Cardozo, *Judicial Process*, *supra* note 51 at 128-29.) The question then becomes, what best explains the existence of that pervasive agreement?

125. Schauer, "Legal Realism Untamed", *supra* note 4 at 768. See also *ibid* at 751, 771.

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tamed Realism maintains, but instead by the plain understanding of a rule not located in standard legal sources."[126]

By virtue of such working rules obtaining, there are more kinds of cases where litigation would (not) be worthwhile. This, not only where (*Scenario #1*) the book rules are under-determinate and would-be plaintiffs predict they will have a good chance of winning a lawsuit based on alterative considerations, such as extra-legal factors, but additionally (*Scenario #2*) where officials' working rules differ in content from the book ones, and the former, it is predicted, will probably (not) work to the plaintiffs' advantage. Moreover, (2a) as book rules are under-determinate, official decision-making will rely on working rules to reach a particular outcome; but also (2b), *even if* certain book rules would be 'determinate' for decision, officials might possess, prefer, and utilize a cognate working rule instead.[127] Again, being unduly restricted to *Scenario #1*, 'tamed' accounts of Legal Realism underestimate and undercount the bases of the law's determinacy.[128]

> Untamed Realism does not claim that there is no legal determinacy, but instead that legal determinacy is often a product of something other than the conventional legal meaning of official rules. Or, to put it differently, the Realist claim about the gap between paper and [working] rules is not about indeterminacy, but about what we might call *dislocated determinacy*.[129]

Let us style this Schauer's **Dislocated Determinacy** thesis: unwritten working rules can regularly/invariably control official decision to such an extent as to be able to generate an additional basis of legal determinacy, i.e., they can not only hit the bullseye for a unique decision every time, but working rules also —somehow—compel officials to select that specific outcome.[130]

The Dislocated Determinacy thesis nonetheless comes with a caveat.[131] Schauer acknowledges that any real-world divergences between the laws on the books and those in action is an empirical query.[132] While at certain points he admits that this might turn out to be a rare phenomenon,[133] he nevertheless

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126. *Ibid* at 768.
127. *Ibid* at 764-66, 779. See also Llewellyn, *Common Law Tradition*, *supra* note 3 at 27, n 18 and the text accompanying *supra* note 15.
128. Schauer, "Legal Realism Untamed", *supra* note 4 at 768-69, 773.
129. *Ibid* at 769 [emphasis in original].
130. Schauer presented the Dislocated Determinacy thesis in 2013. Two years earlier, though, he had claimed that Llewellyn would have thought it mistaken to believe that either paper or working rules really guide decision much, let alone afford determinacy. See Schauer, "Editor's Introduction", *supra* note 4 at 21-22. His view thus seems to have evolved by affording more weight to working rules.
131. The thesis also appears to rely upon the 'Effectiveness' thesis. Even so, note the problem of overlap of determinacy of certain book rules and cognate working rules. Both sorts of rules could be 'effective,' and not just in terms of one's guiding public conduct exclusively and the other solely guiding official decision, e.g., if most of the public are familiar with (and accept) the book rule and are ignorant about a cognate working rule's existence, but the courts utilise the book rule as a rationalization for their decisions in disputes. (See also *supra* note 116 on the working rule guiding the bad man's conduct).
132. See Schauer, "Editor's Introduction", *supra* note 4 at 20-21; Schauer, "Legal Realism Untamed", *supra* note 4 at 768-69, 773-74.
133. See Schauer, "Legal Realism Untamed", *supra* note 4 at 777.

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also insists that such deviations are frequently or generally the case, bearing effects across a legal system.[134] He additionally believes that Llewellyn, too, considered such deviations to be frequent.[135]

Llewellyn vs. Schauer

Schauer's account is Llewellyn*ite* for several reasons. First, like Llewellyn, he provides a more robust role for legal rules in official decision than other Legal Realists do. Schauer also construes working rules to be normative prescriptions and guides, ones held (secretively) by officials. Second, while Llewelyn distinguishes between written and unwritten varieties of working rules, Schauer seemingly does not (or, he at least does not style the written rules as 'working' ones).

Llewellyn might nevertheless disagree with Schauer's Dislocated Determinacy thesis.[136] Consider just the following as evidence. Llewellyn—sometimes—insists that officials' *idiosyncratic* extra-legal factors typically get dominated by the social factors, which helps to account for the relatively uniform regularity of decision produced by different legal officials in different places within a jurisdiction over time.[137] He furthermore suggests that, in at least some cases, certain book rules can almost 'control,' rather than merely guide, official decision.[138] (On the other hand, in *The Common Law Tradition*, he denies that most book rules are capable of doing so.)[139] This seems to be because those unusual book rules bear content of a certain kind.[140] Ostensibly, the potential to 'control' decision could not be attributed to *all* unwritten working rules unless they bear that kind of content too. However, there is no reason to believe that Llewellyn himself thought they (all) must. He furthermore identifies appellate courts' different 'period-style' thinking,[141] notes that inferior quality judges prioritize the 'fireside equities' of the immediate case over the situation-sense and type,[142] and insists that some unknown number of idiosyncratic factors influence

134. See e.g. Schauer, "Editor's Introduction", *supra* note 4 at 12, 19; Schauer, "Legal Realism Untamed", *supra* note 4 at 751, 769, 774.
135. See Schauer, "Editor's Introduction", *supra* note 4 at 13; Schauer, "Legal Realism Untamed", *supra* note 4 at 751, 774, 779.
136. What Llewellyn's views would have thought about various kinds of officials (e.g., the police versus judges, and/or just amongst different judges) harbouring rivalrous working rules is less clear.
137. See *supra* note 48.
138. See Llewellyn, "My Philosophy", *supra* note 2 at 189; Llewellyn, *Common Law Tradition*, *supra* note 3 at 179; Llewellyn, *Theory of Rules*, *supra* note 3 at 78-82.
139. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 76.
140. *Ibid* at 179: "Where the rule rates high in wisdom and is also technically clear and neat, the guidance is indeed so cogent as, in effect, to be almost equivalent to control or dictation; so, also, when the measure is technically well designed and the rule is a legislative product of unmistakable policy and is too fresh off the griddle for modifying circumstance to have supervened." See also Llewellyn, *Theory of Rules*, *supra* note 3 at 78-82.
141. On the differences between (supposed) 'Grand Style' and 'Formal' styles of official decision-making, see Llewellyn, *Common Law Tradition*, *supra* note 3 at 36-41.
142. 'Fireside equities' is Llewellyn's neologism for judges' sense of justice and equity triggered by the unique facts of the specific case before them. He exhorts appellate court judges not to jump to the fireside equities in the first step in their decision-making process. See Llewellyn,

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official decisions.[143] Together, these ideas suggest that Llewellyn would reject the idea of unwritten working rules *perforce* overriding, or completely subordinating, all extra-legal factors influencing official decision-making so as to be able to invariably generate dislocated determinacy.

In turn, Schauer, again, believes that Llewellyn erred in downplaying the role of idiosyncratic extra-legal factors in official decision.[144] However, reconciling that stance with the former's claims about working rules and what they can accomplish is difficult. Indeed, it exposes a tension in both Llewellyn and Schauer's accounts.

4. The Tension

It is difficult to reconcile (1) the idea that both *idiosyncratic* and *social* extra-legal factors invariably influence official decision-making to some extent with (2) that of officials relying predominantly upon working rules to reach a specific outcome (Llewellyn), let alone such rules generally or perforce being determinate for decision (Schauer).

First, how are *written* working rules even able to basically control decision free from the effect of idiosyncratic extra-legal factors?[145] Second, why would *unwritten* working rules be immune to the extra-legal factors' influence, such that the former's content would go unmodified and/or be prevented from 'controlling' decision? On the other hand, if they are not immune, then are those rules often outweighed by, or subordinated to, (some? all?) extra-legal factors? Moreover, would this factors-working rules interaction not only affect the outcomes of official decisions, but also allow for a working rule's very content to potentially be reshaped every time it arises in a case (just as might happen for a book rule)? If so, then why are unwritten working rules not thereby rendered just as relatively impotent for decision as book rules? *If* they are, does this not threaten the value of positing A WORKING RULE in the first place? For why insist upon the

Common Law Tradition, *supra* note 3 at 121, 245, 268-70, 447; Llewellyn, "Grand Tradition", *supra* note 3 at 117, 222-23.

143. It is insufficient to note differences between supposed 'Grand Style' and 'Formal' styles, because even during (supposedly superior) Grand Style periods, not only are there are judges whose decisions reflect the Formal style (See Llewellyn, *Common Law Tradition*, *supra* note 3 at 40-44), but there are also other judges who simply do bad jobs due to: a lack of experience; possessing inferior intellects; and/or their use of inferior/inappropriate decision-making processes. (See e.g. *ibid* at 121, 157.) Further, even if judges' responses to 'fireside equities' are in part shaped by their guild experience on the bench, their responses are not uniform *precisely because* of the idiosyncratic factors. (Still, Llewellyn makes clear that the *relative regularity* of their decisions shows why American appellate court decisions are not and cannot be solely, or even predominantly, influenced frequently by the idiosyncratic factors. *Ibid* at 121.)

144. See Schauer, "Forward", *supra* note 4 at xxiii and the text accompanying *supra* note 57.

145. Again, Llewellyn claims that a certain rare set of rules can basically control official decision-making. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 179; Llewellyn, *Theory of Rules*, *supra* note 3 at 78-82. However, his explanation is woefully inadequate, and he does not sufficiently address the potential influence of *personal* extra-legal factors when those sorts of rules are in play.

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existence of cognate unwritten *rules* if official decisions can seemingly be explained just as well in terms of the rules on the books plus the extra-legal factors?

The tension between the Extra-Legal Factors and Working Rules hypotheses appears to be worse for Schauer. How are *unwritten* working rules, which on his account are non-conclusive reasons, ever capable of generating dislocated determinacy if idiosyncratic extra-legal factors influence official decisions to some degree or other?

It is also worth mentioning that the other Legal Realists might have rejected the Working Rules hypothesis altogether. They themselves might have only cut a paper/real rule distinction, not a paper/*working*/real rule one.[146] If so, those other Realists, such as Herman Oliphant and Max Radin, might therefore ask the following of Llewellyn and Schauer: how can working rules, be they written or unwritten, ever really factor into decision-making, let alone in a significant fashion, if (as we suggest) officials predominantly just respond to the facts of the case and rely on their situation-types—unless unwritten working rules *simply are* (versions of) those types?

To the best of my knowledge, no one has identified this tension between the Extra-Legal Factors and the Working Rules hypotheses before. I discovered it when trying to determine where both paper and working rule-based primary, secondary, and tertiary rights and duties (legal positions) would fit in Llewellyn's and Schauer's respective accounts.[147] Resolving the tension adequately would require a cogent explanation of how working rules and extra-legal factors 'interact' in official decision-making.

4(A). Possible Implications for Rights & Duties

Consider the following possible implications of the tension.

Route 1: adopting Schauer's formula. Assume that Schauer's Dislocated Determinacy thesis holds. Herein:

- *Unwritten* working rules can be, alone, determinative for official decision.

146. If so, these other Realists would be unfazed by the identified tension. Whether they nevertheless ought to be will turn in part upon how one understands the relationship between working rules, situation-types, and extra-legal factors.

147. The primary/secondary/tertiary rights distinction, which is commonplace in legal and jurisprudential literature, is this. *Primary* rights are substantive entitlements, e.g., to engage in free speech, to purchase some land, etc. *Secondary* (or 'procedural') rights do several things. Some authorize their holders to initiate dispute resolution proceedings (litigation, arbitration, administrative proceedings, etc.) when primary rights seem to have been, or are threatened to be, violated. They also authorize right-holders to waive such processes. Others are the rights afforded and utilized within official proceedings, e.g., to file certain motions. Still others are employed outside of institutional settings, e.g., entitlements to undertake self-help remedies. *Tertiary* rights are the 'remedial' entitlements provided in dispute resolution proceedings, e.g., a monetary award. See for example Wesley Newcomb Hohfeld, "The Relations Between Equity and Law" (1913) 11:8 Mich L Rev 537. One might add quaternary rights: the legal mechanisms by which to try to secure a court-ordered remedial entitlement.

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- Unwritten working rules predominate in officials' decision-making when applicable, but book rules need not.
- Cognate 'paper' rules serve as *post hoc* rationalizations, because official decisions must be couched in terms of publicly acceptable reasons.
- While extra-legal factors might help to form an unwritten working rule's content, that exhausts their role. Those factors do not additionally vie with the unwritten rule in officials' minds for settling upon a specific outcome for a decision.

With these features in mind, consider the situation wherein disputants *believe* their primary legal positions (rights and duties) are predicated upon a book rule, but their tertiary positions are actually based on the officials' unwritten working rule. Here, then, either people's *true* primary positions—or at least those facets that get contested in a dispute resolution process such as litigation—are (***Option 1.I***) simply 'illusions' of our legal discourses, as it were, or (***Option 1.II***) they are actually based upon the working rule—whether disputants are aware of this or not.[148]

Option 1.II itself generates at least two possibilities regarding people's knowledge of their rights and duties. (***1.II.A***): the 'true' content of people's primary positions is not always discernible *ex ante*, i.e., prior to an official decision concerning them, because they may sometimes be based upon officials' unwritten working rules, ones the public neither know nor can discover—without the help and work of social scientists, legal theorists, and/or their lawyers at any rate. (***1.II.B***): Alternatively, members of the public can and always do, on their own, discover the 'true' content of their primary legal positions prior to any disputes arising regarding them, even when those rights and duties are (at least in part) predicated upon unwritten working rules. Accordingly, primary legal positions can invariably serve as 'accurate' guides for people's actions, even if some digging is always required to discover their 'real' content.

1.II.A seems to better capture Llewellyn's view than does *1.II.B*. This is because he intimates that most members of the public believe that the law on the books describes their actual rights and duties.[149] Hence, they would normally see no need to go hunting for hidden alternative content. Now, perhaps experience has taught their lawyers to believe that good grounds often exist to go search for unwritten working rules, rights, and duties. Even so, Llewellyn and the other Realists claim to be *exposing* hidden facts about legal systems' operations, things that were supposedly unknown to many lawyers, let alone by *hoi polloi*. This

148. See Rumble, "A New Look", *supra* note 84 at 227-28; David Frydrych, "Hohfeld vs the Legal Realists" (2018) 24:4 Legal Theory 291 at 315-22 on Llewellyn and other Realists' basically identical views about rights and duties (i.e., of primary rights being somewhat illusory). Again, Llewellyn (nor Schauer) will seemingly not countenance the possibility of primary legal rights and duties (*qua* products of 'substantive' rules exclusively) really being as stated on the books, and officials merely possessing wide discretion concerning those positions' application and enforcement.

149. See Llewellyn, "The Next Step", *supra* note 3 at 444 and the text accompanying *supra* note 81 ("assumed to describe").

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suggests the Realists believe that, to the extent most people even concern themselves with the law at all when organizing their affairs, they go about their business as though their legal rights and duties are wholly shaped by the 'book' rules.[150]

Route 2: Non-Schauerian. This alternative possible implication of the tension assumes that Schauer's Dislocated Determinacy thesis is mistaken. Herein:

- Extra-legal factors and working rules (written or unwritten), both influence officials' decisions and suffice to account for their reaching a specific outcome.
- Extra-legal factors can either (a) supplement the working rule, or (b) predominate over it in the decision-making process. The factors can also influence a working rule's modification.
- When an unwritten working rule is in play, a paper rule serves as a *post hoc* rationalization and legitimate outcome circumscriber.

If legal rights and duties—or certain of their aspects, i.e., those facets which give rise to a dispute—are only rendered fully determinate via official decisions, and if those decisions are invariably influenced in part by extra-legal factors, then a working rule, *alone*, can neither fully explain people's 'true' primary or tertiary legal positions, nor an official's decision.

Even so, it would still make sense to say here that people's true primary legal positions are predicated (at least in part) upon a working rule, be it written or unwritten, while their tertiary rights and duties might sometimes/often be shaped—either in part, or mostly—by the extra-legal factors. If so, primary rights and duties are not mere illusions of our legal discourses unless working rules are too.

While Route 2 seems to better preserve a role for extra-legal factors (as understood by both Llewellyn and Schauer), one affording them a more direct influence in officials' decisions, it nonetheless suffers its own difficulties. For one thing, *how* do working rules, especially unwritten ones, weigh up against the influence of extra-legal factors when officials decide (and generate tertiary rights and duties)? Moreover, if the extra-legal factors can bear significant influence for a decision, then, once again, that seemingly renders AN UNWRITTEN WORKING RULE superfluous. For why could unwritten working rules not get worked over by officials in just the same way(s) that 'paper' ones do, which is what led the Legal Realists to look for ulterior explanations of official decision in the first place? (This, *a fortiori* if multiple/rivalrous working rules are in play for a given decision.) What is the point of positing that officials harbour a cognate unwritten working *rule* if, decisions can be correctly explained simply in terms of

150. See *infra* note 157 regarding Llewellyn's views here. At any rate, if Schauer is correct that unwritten working rules can, alone, account for dislocated determinacy throughout a legal system, then more primary and tertiary legal rights and duties may be determinate and certain than the Realists themselves—including Llewellyn—suggest. *Cf* Frydrych, "Hohfeld vs the Legal Realists", *supra* note 148 at 315-22; Schauer, "The Generality of Rights", *supra* note 4.

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the paper rules, the extra-legal factors, and the discretion officials are afforded (if not also a situation-sense and type)?

4(B). The Implications for Schauer

The tension between the Extra-Legal Factors and Working Rules hypotheses bears further implications for Schauer: it helps to impugn his account of working rules and the Dislocated Determinacy thesis. For one thing, reasons are needed to believe that unwritten working rules predominate in decision so as be able to generate dislocated determinacy, let alone invariably be capable of doing so. None, however, is offered. Once more, what makes it the case that rules on the books are subject to extra-legal factors (and so get manipulated by the canons of construction or other judicial techniques), which helps officials to 'reach' the results they want, but unwritten working rules are not and so can generate an additional basis for determinacy?

Further, if working rules are indeed non-conclusive reasons,[151] then how can they, and why must they, be *determinate* for decision? If such rules are instead under-determinate for decision, and subject to the influence and effect of (idiosyncratic) extra-legal factors in decisions, then working rules cannot perforce generate 'easy' cases and dislocated determinacy.

Schauer also appears to allow for cases wherein more than one unwritten working rule is applicable. Could under-determinacy not be generated in this fashion too?[152] Additionally, why could officials not (sometimes, often) be motivated to tweak an unwritten working rule in order to obtain a desired result for a given case? Imagine that a particular unwritten working rule is directly on point, but the officials doubt that its strict application will lead to a just or equitable outcome for the case at hand. Why would, or must, the officials follow the unwritten rule strictly here, rather than be swayed by extra-legal factors, e.g., by what Llewellyn calls the 'fireside equities'?

Merely appealing to unwritten working rules being 'clearer' than the paper rule cognates and/or the former containing more apt/narrower categories,[153] still leaves unmotivated the idea of such rules' strict application, let alone of their being capable of generating dislocated determinacy throughout a legal system. Something more is needed to explain why working rules would and must be applied in such a controlling, mechanical fashion, unlike book rules.

151. If working rules are defeasible reasons, then it is imperative to learn about what defeats them and how.

152. Again, even if a book rule is perfectly clear, on point, and seemingly determinate, officials might nevertheless prefer their cognate unwritten working rule instead. Schauer, "Legal Realism Untamed", *supra* note 4 at 764-66, 779.

153. See e.g. Llewellyn, "Responding to Pound", *supra* note 3 at 1237, 1240-41 & n 45; Oliphant, "Stare Decisis: Continued", *supra* note 8 at 160 on narrower categories.

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Whatever that deeper basis might be, it is not identified by Schauer (or by Llewellyn).[154]

Second, although at one point he suggests that empirical research is required to discover them,[155] Schauer otherwise seems to assume that people will know the officials' unwritten working rule's content.[156] However, as intimated above, *how* will, or can, the public invariably know, or be able to discover, such rules? Can there not be cases wherein, although the fact that a given book rule is merely paper is an open secret, the pertinent cognate unwritten working rule's precise content is not widely known?

Additionally, if, in their ignorance of the unwritten working rules' existence, some or most members of the public organize their affairs in accordance with the paper rules, would this also undermine the Dislocated Determinacy thesis?[157] For, as noted above, if people structure their behaviour and relationships in terms of the paper ones, does that not also render the latter ones 'effective' too?[158]

Third, how will *officials themselves* know about the unwritten working rules? How will they obtain information about such rules from other officials in their jurisdiction or from related jurisdictions? Are there 'esoteric' ways of reading court opinions and other official sources such that the astute reader can not only glean that the surface reasons are mere veneer/rationalizations, but also what the true basis for the decisions really were?[159] Are there alternative modes of information transmission? Back channels? The idea of officials (of a particular kind at least, e.g., appellate court judges), *all* bearing a secret internalized prescriptive rule, or set of such norms, for employment in decision (as opposed to the norms and practices of their office which are learned/inferred from experience but not

154. One might object that this criticism relies on a stronger conception of determinacy than Schauer's, rendering it inapt by conflating determinacy with strict certainty and rote application. Cannot a rule be determinate even if it is not applied in a strictly mechanical way to control decisions? What makes it problematic to claim that unwritten working rules guide decisions and so generate determinacy, but that cases can nevertheless come out differently due to other factors?

The objection is inapt. Schauer suggests that unwritten working rules present an additional basis for classifying cases as 'easy' or 'hard.' However, if within the subset of cases wherein such rules are said to apply extra-legal factors can sway the decisions one way or another, then those are not necessarily 'easy' cases, because the judges will still be deciding upon other grounds—ulterior even to the unwritten rules. Hence, such rules could not *perforce* produce dislocated determinacy.

155. See Schauer, "Editor's Introduction", *supra* note 4 at 20 regarding the speeding rule. "[I]t is plausible that a Llewellynesque empirical analysis of the [working] rule that governed the speed of cars . . . would reveal that the [working] rule had set the speed limit at seventy-four miles per hour." Note that that appears to be a task for social scientists, not lawyers in their usual roles.

156. For example, "[d]rivers will know that the [working] "speed limit 74" rule gives them chances the paper rule does not." Schauer, "Legal Realism Untamed", *supra* note 4 at 768.

157. Compare Llewellyn, *Case Law System*, *supra* note 33 at 82 & n 1 with Llewellyn, *The Bramble Bush*, *supra* note 3 at 59 about the extent to which members of the public even know about the relevant legal rules and how they mostly structure their actions in accordance with *social* norms anyway.

158. See *supra* notes 116, 131 on effectiveness.

159. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 157; Llewellyn, "Newer Jurisprudence", *supra* note 2 at 135, 159.

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expressly taught) seems dubious, at least as concerning modern legal systems with large judiciaries and bureaucracies—*a fortiori* to the extent required to generate dislocated determinacy, i.e., the rule's uniform application in a controlling fashion, across a whole legal system.

Llewellyn also notes that official decisions can differ because judges and lawyers are of varying quality. Perhaps the better judges follow the unwritten rule strictly. What about the poor-quality judges, or the novices? What about divided benches? How will they know about and/or apply the pertinent unwritten working rule uniformly so as to produce dislocated determinacy throughout the system?[160]

Fourth, over and above the issue of mere knowledge about a given unwritten working rule is the question of the extent to which officials will and must endorse and utilize it. Schauer's account suggests that, even amongst officials within a given jurisdiction, some might abide by the rule, but others might not (let alone that still others may be wholly ignorant of its existence).[161] *Pace* Schauer, then, you might challenge your speeding ticket in court *not* because it presents a clear, easy case (given the existence of an unwritten working rule on point), but rather *because* it is a hard one and it is unclear how a given trial court, or a given appellate court bench, will decide in this instance, given that judge's/panel's views about both the book rule and the unwritten working rule.[162]

Fifth, Schauer posits that different kinds of officials, e.g., judges and the police, may harbour rivalrous working rules. However, as 'effectiveness' is seemingly the Realists' test for assessing which count as a legal system's more important rules, such competitions pose an additional threat to the possibility of dislocated determinacy. For the judges' (ostensibly shared) working rule seem to bear of the potential of being rendered into 'mere paper' if enforcement officials (e.g., sheriffs/bailiffs executing writs of execution) regularly utilize a different working rule.[163] If appellate courts always side with the plaintiffs in Case Type *X* by relying upon their judiciary-wide unwritten working rule, but the sheriffs render the judgement creditors' rights (i.e., the tertiary ones that are typically granted in Case Type *X*) wholly impotent by using their own guild's distinct working rule regarding enforcement, then which sort of legal officials' rule is the system's actual, or most important, one? If both guilds' respective working

160. Llewellyn's claims in *The Common Law Tradition* entail that both inexperienced and bad officials either do not see or use their 'situation-sense,' or, at least not (as well) as experienced and good judges do. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 244, 264 (on judges lacking the requisite background in a given area of law and so being more easily led astray by counsel's arguments). Similarly, do bad and/or inexperienced judges decide cases by following the 'paper' rules, or something else, rather than being guided by the unwritten working rules? Alternatively, might they harbour different or flawed understandings of the unwritten working rules?

161. For examples, see Schauer, "Legal Realism Untamed", *supra* note 4 at 769.

162. See Llewellyn, "Newer Jurisprudence", *supra* note 2 at 139-40. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 24.

163. *A fortiori* if the unwritten working rules (the judges', the police's, or both) are themselves under-determinate.

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rules are valid norms of the legal system, then perhaps the enforcement officials' rule ought to be deemed the most important one from a 'Realistic' point of view.

5. Thrusts & Parries

Candidate #1: No Set Formula

This section concerns two candidate means by which to try to resolve the tension between the two Realist hypotheses of official decision. The first is to suggest that there is simply no set formula for how working rules and extra-legal factors 'interact' to influence officials. On this view, the very identification of a putative tension is based on the erroneous assumption that the various determinants invariably apply in every official decision, in the same way, and with the same weight or effect each time. Llewellyn claims:

> The office of rules is to control and guide and unify official behavior. To effect their office they must be clear. To show wherein any rule fails to accomplish that purpose in itself, or wherein *other factors than rules play in either to aid or to hamper the guidance and unification of official behavior*, or to take one further step toward a more adequate technique of doing the work that rules are for, whether the more adequate technique be by the technical improvement of the rules, *or by conscious enlistment of other technical tools*, or by a more effective combination of both. But the convention, as has been said, gives comfort.[164]

Furthermore, both he and Schauer admit that working rules and extra-legal factors' actual roles in official decision are empirical questions—ones for which definitive answers are lacking unto this day. For example, Llewellyn states:

> Do I suggest that (to cut in at one crucial point) the "accepted rules," the rules the judges say that they apply, are without influence upon their actual behavior? I do not. I do not even say that, *sometimes*, these "accepted rules" may not be a very accurate description of the judges' actual behavior. What I say is that **such accuracy of description is rare**. The question is how, and how much, and in what direction, do the accepted rule and the practice of decision diverge? More: how, and how much, *in each case*? You cannot generalize on this, without investigation. Your guesses may be worth something, in the large. *They are worth nothing at all, in the particular*. The one thing we know now for certain is, that **different rules have totally different relations** to the behavior of judges, of other officials, and of the particular persons "governed" (optimistic word!) by those different rules. The approach here argued for admits, then, out of hand, *some* relation between *any* accepted rule and judicial behavior; and then proceeds to deny that that admission involves anything but a problem for investigation in the case in hand; and to argue that the significance of the particular rule will appear only *after* the investigation of the vital, focal, phenomenon: the behavior.[165]

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164. Llewellyn, *Theory of Rules*, *supra* note 3 at 48 [emphasis added].

165. Llewellyn, "The Next Step", *supra* note 3 at 444 [bold emphasis added]. He also notes: "Rules and principles are part of what produces decision, says [Jerome] Frank. There is more, much more. What more? How much more? How can we bring the "more" under more rational

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Further:

> We are left, then, with a range both of great uniformity *and* of openness to material variation within the field "covered" by the rules of law themselves. We are left, secondly, wherever the rules fail to have been formulated with crystal clarity, again both with a field of prospective uniformity and a field of prospective variation in the understanding and action of lawyer-personnel and of judge-personnel and of other official personnel [sic]. We are left, by consequence, with a government both of laws *and* of men; a government **which ranges from** utter predominance of the first, through degrees of mixture in which individual variation becomes more and more important, on into spots **where the most vital factor in the case will be the idiosyncrasy of the particular official**. We are left with a rationalized and articulate framework of rules which *aims* at elimination of such idiosyncrasy, but which makes the grade only in part.[166]

Schauer similarly notes:

> Although the distinction between paper and [working] rules is conceptually important, and although there can be genuine prescriptive and internalized rules that vary from the paper rules governing the same acts, it could turn out that *what is conceptually possible and occasionally extant is in reality rare in practice*—rather like pandas or pineapple wine.[167]

Rejoinder #1

Before addressing the candidate resolution, note that, although Llewellyn and Schauer offer caveats about confronting empirical questions and so the need to undertake investigations, both nonetheless repeatedly make clear their true views: frequently, the alternative drivers are the real bases of official decisions. They recurrently offer unsubstantiated claims to that effect, and Schauer even provides (what he believes count as) real-world examples.

However, there are no empirical data about how the alternative drivers of decision interact, or how frequently working rules diverge from book ones (if ever). So, it is question begging to claim that: (1) legal rules on the books are not necessarily, cannot be, or frequently are not, the "heavily operative factor" in official decision;[168] or that (2) determinacy is 'often' a product of unwritten working rules,[169] rather than something else.[170] This is not simply a matter of discarding

control? Frank did not know, for sure. Neither do you. But we need to know." Llewellyn, "Newer Jurisprudence", *supra* note 2 at 150-51.

166. Llewellyn, *Theory of Rules*, *supra* note 3 at 42 [bold emphasis added].

167. Schauer, "Legal Realism Untamed", *supra* note 4 at 776-77 [emphasis added]. See also *ibid* at 773-74.

168. Llewellyn, "Responding to Pound", *supra* note 3 at 1237.

169. See e.g. Schauer, "Legal Realism Untamed", *supra* note 4 at 751, 754, 769. But *cf* Schauer, "Legal Reality", *supra* note 4 at 118-20.

170. Even in the passage quoted at *supra* note 165, Llewellyn presumes: the rarity of 'accepted' rules being the heavily operative influence in decision; different rules have dissimilar effects on the governing and the governed; etc. This is typical throughout his corpus: caveats advocating moderation and caution are undermined and belied by his insistence of the alternative candidate drivers' pervasiveness and influence.

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hyperbole; for it may turn out that the Working Rules hypothesis is simply false, concerned with very rare phenomena, or presents a mere conceptual possibility.

Turning to the 'no set formula for interaction' candidate resolution's merits, it actually undermines some of Llewellyn's and Schauer's ideas about working rules, if not also the very concept thereof. For one thing, extra-legal factors would influence official decision-making, in the least, by leading them to render some book rules into paper ones. The factors help to catalyze officials' reasons for presenting 'broad' or 'narrow' interpretations of a precedent, to select one canon of construction over another when construing a statute, etc. Thus, once again, if officials can invariably reach the specific outcomes they want for decisions—and theorists can in turn equally well explain those results—simply in terms of the rule on the books plus the extra-legal factors (with the latter bearing greater or lesser degrees of influence in particular cases), then there seems to be no need to add the ideas of (1) a book rule being deemed a 'working' one, or (2) the existence of unwritten working *rules*.

Consider also Llewellyn's endorsement of Justice Cardozo's claim that some sizeable percentage of American appellate court cases are "predetermined" or (in Llewellyn's language) "foredoomed."[171] That, of course, leaves only a relatively small minority of cases non-foredoomed. Why is (some quantum of) foredoomedness better explained in terms of unwritten working *rules*, rather than just the book rules plus extra-legal factors (and/or situation-types)?[172] Why attribute the non-foredoomedness of the residual cases to a rivalry between different judges' unwritten working rules, or to a clash between those judges who wield unwritten working rules and others on the same bench who seek to apply the book rules, rather than just to the influence of idiosyncratic extra-legal factors (or, somehow, a clash generated by different social factors' influence on officials of different outlooks and experiences)? Reasons are needed to believe that unwritten working rules, rather than something else, are the actual/dominant determinants for either the foredoomed or non-foredoomed sets of cases.

Llewellyn and Schauer must therefore explain why, in cases where the books rules are not the 'heavily operative factor,' it is ever worthwhile to posit the existence of cognate *rules*. Why construe these alternative drivers to be rules, rather just extra-legal factors, such as commercial actors' and other social groups' practices, the official's/legal guild's own prejudices/normative preferences, norms that do not amount to rules, etc.?

Though not of course a proof, Ockham's razor suggests that extra-legal factors constitute a simpler explanation than the idea of a shared crypto *rule* held by (some subset of) legal officials. This, given the reasonable doubts about how various officials will even come to learn about such rules from one another, let alone

171. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 25, n 16, 45, *discussing* Cardozo, *Growth of the Law*, *supra* note 51 at 60.

172. If they do differ (mostly or completely) after all, then the Situation-Type hypothesis *may* be more cogent than the Working Rules one if, and to the extent that, it does not concern rules (i.e., internalized normative prescriptions) per se—at least not ones embedded into the type, if ever they are.

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qualms about whether and why they would abide by them (let alone invariably do so such as to generate dislocated determinacy). The contrast furthermore concerns (a) the influence of such factors on decision-making, some of which the officials might not even be (fully) aware versus (b) ulterior crypto (shared) norms that officials consciously adhere to *qua* prescriptions.

One, but perhaps not the sole, reason for believing in AN UNWRITTEN WORKING RULE's utility would be if such rules were concocted in furtherance of (I) a conspiracy or (II) a covert/secretive government policy.[173] In these two scenarios, there is some *prima facie* plausibility that an unwritten working rule would be applied in a determinate fashion, e.g., because of officials' fear of repercussions for failing to comply. Still, this is not what Llewellyn has in mind when advancing the concept, nor what the Realists were generally thinking about vis-à-vis alternative drivers of decision. On the other hand, even if quite fanciful, one could imagine officials engaging in conspiracies and harbouring secret policies to use alternative rules for private law, and not just for public law.

At any rate, even if it is true, this 'no set formula' candidate resolution to the tension only helps to undermine Schauer's Dislocated Determinacy thesis. As Schauer deems them all to be non-conclusive reasons,[174] unwritten working rules seem equally subject to both idiosyncratic and social extra-legal factors' (and perhaps other kinds of determinants') influence. This suggests that unwritten working rules need not be applied uniformly, and so, will not and cannot necessarily generate 'easy' cases or determinacy.

Candidate #2: Incorporation

An alternative candidate resolution is to try to dissolve the tension. As they are 'guild' constructs (of the judiciary, say), one might believe that unwritten working rules are, in part, the product of both social and idiosyncratic extra-legal factors. Hence, those rules cannot be in tension with any such factors because the latter have—all—already been incorporated into the very shaping of the working rules. On this candidate resolution, then, the identified tension presents an erroneous reduplication in application of the extra-legal factors' influence on officials.

Rejoinder #2

This 'incorporation' interpretation is untenable, especially as it begs the question that the factors would and can only just plug into the working rule construction process. For one thing, it cannot explain the influence of extra-legal factors upon the very (non-)selection and (non-)utilization of a given working rule for decision. Consider once again the scenario wherein officials believe that their own unwritten working rule would *itself* produce an injustice if it were to be

173. Note that this is not the same thing as governments possessing secret laws per se; for secret laws may still be 'on the books,' even if the public lacks legal access to the sources. *Cf* Mikolaj Barczentewicz, "The Illuminati Problem and Rules of Recognition" (2018) 38:3 Oxford J Leg Stud 500.

174. See Schauer, "Legal Realism Untamed", *supra* note 4 at 766-68, 776.

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applied mechanically to the case at hand.[175] There is no reason why the extra-legal factors, the same catalysts that influence officials' choices to provide narrow or broad understandings of precedents, or to choose one canon of construction over another, could not also lead them to either modify the unwritten working rules, or to simply disregard them for the case at hand.

Furthermore, which meta-rule (meta-working rule?) guides officials to utilize an unwritten working rule even when a book rule appears to be determinate after all? Might not both the shared and idiosyncratic factors influence an official's decision to be guided by an unwritten working rule or not, let alone to select a particular unwritten working rule for the case at hand? For Schauer, which meta-rule guides legal officials to prefer one candidate working rule over their colleague's rival working rule, or even that of a different legal guild's (for example, a given judge choosing to use the police's working rule to decide a case instead of using the judiciary's normal working rule?)

The notion of an unwritten working rule—a shared norm—incorporating all *idiosyncratic* factors is also rather doubtful. Again, Llewellyn (and certain other Realists) insist upon that subset of factors' influence on official decision-making, which leads to divergences from expected outcomes and thus impacts the predictability of official decisions, e.g., in some percentage of appellate court cases, and a higher percentage of trial court cases.[176] He discusses judges of varying degrees of intelligence, the influence of bad lawyers, good or bad lawyers' arguments having varying levels of impact on judges of different levels of experience and skill, a given judge's ethical and political predilections, all impacting official decisions to some extent. These factors cannot all figure into a shared rule *qua* norm to be employed for decision; more likely, they will instead directly influence a decision's specific outcome (in a weighty fashion or otherwise). Llewellyn's view therefore suggests that Judge Smith could decide a case differently from Judge Jones, even if they both harbour the same unwritten working rule, at least in part because of their respective idiosyncratic factors.

This candidate 'incorporation' resolution cannot help Schauer's account either. He treats working rules as determinate (even if non-conclusive) for decision. This, while insisting upon idiosyncratic factors' relevance for decision, without considering how they impact the working rules themselves. For him, moreover, working rules can (a) be shared by a whole class of officials, (b) be shared by just a handful of that class' members, or (c) be held exclusively by a single official. (Further, different kinds of officials are said to possess rivalrous working rules, e.g., the judges' working rule may differ from the police's rule.) Indeed, his view entails that on an appellate court panel composed of three judges, although one or two of its members might harbour a shared unwritten working rule, they bring their respective idiosyncratic extra-legal factors to the

175. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 24.

176. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 10: there is a greater opportunity for idiosyncratic factors to influence trial court decisions than appellate court ones due to the lack of a group decision in trial courts.

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table too. Worse still, Schauer's provides the putative example of Justice William O. Douglas' personal working rule of 'taxpayer always wins' in tax cases,[177] which suggests that the bench could be composed of judges who each bear a distinct, rivalrous working rule too. Here, once again, the decision-making involved in a bench's choices regarding (i) whether to employ one unwritten working rule over another, or (ii) to use any unwritten working rule whatsoever (especially if the judges know that enforcement officials bear their own such rule) seem open to *both* the social and idiosyncratic factors' influence. Again, as they would be relevant for those sorts of choices too, the extra-legal factors' role would not simply be restricted to the construction process for working rules.

6. Conclusion

This article identified a tension between two Legal Realist hypotheses of alternative drivers of official decisions, about 'extra-legal' factors and 'working' rules, particularly as advanced by Karl Llewellyn and then interpreted by Frederick Schauer. The tension raises doubts about the very utility of A WORKING RULE, at least in most cases,[178] i.e., whether Realists could not equally well, and more simply, explain official decisions just in terms of the rules on the books and the extra-legal factors (if not also situation-types).

The tension also helps to impugn Schauer's account of Legal Realism. Given his views about: (i) idiosyncratic extra-legal factors' influence in decision; (ii) unwritten working rules being non-conclusive reasons; and (iii) such rules not needing to be adhered to by all (types of) officials, it is doubtful whether his version of the Working Rules hypothesis concerns genuinely shared norms, let alone ones that can generate 'dislocated determinacy' throughout a legal system.

The article offered several reasons for deeming Schauer's view of working rules to be untenable. First, if unwritten working rules are themselves underdeterminate and/or regularly/invariably subject to extra-legal factors after all, then they cannot generate 'easy' cases; if there are no such easy cases, then there is no dislocated determinacy. Second, no reasons are provided to believe that unwritten working rules must predominate within official decision-making over other considerations so that they are (invariably) capable of generating determinacy in the first place. Third, it is unclear how the public (or their lawyers) would always be able to learn what 'the' unwritten working rules happen to be, or whether they would regularly learn about some or many of them at any rate. Fourth, it is equally unclear how officials themselves will learn about many or all such rules from their peers. Fifth, if, some officials do not share or endorse the rule (different judges within the same jurisdiction, say), as Schauer suggests is

177. See Schauer, "Legal Realism Untamed", *supra* note 4 at 769. See also Schauer, "Editor's Introduction", *supra* note 4 at 19 & n 48.

178. However, this question also bears implications for A SITUATION-TYPE, i.e., the extent to which it is worthwhile to claim that officials possess an ulterior category-plus-norm (or a norm about adopting or utilizing certain social norms), regardless of whether it is related to A WORKING RULE, or is instead a wholly distinct concept.

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the case, then the rule cannot yield determinacy of decision and thus generate 'easy' cases. Six, the notion of rivalrous unwritten working rules held by different sorts of officials, e.g., by the police and judges, raises the possibility of one group rendering the other's 'working' rule into a mere paper one. For example, police either enforcing a judgment creditor's rights per a court order or failing to do so in accordance with their *own* working rule, rather than abiding by and applying the judges' working rule.

However, it is doubtful that all six problems listed in the previous paragraph impact Llewellyn's account—especially as he probably would not have endorsed Schauer's Dislocated Determinacy thesis. For, even if he had moderated his views later in life, Llewellyn notes throughout his corpus it is unrealistic to believe that absolute certainty can be gained when predicting appellate court outcomes—even though some cases are 'foredoomed.'[179]

One last point. This article does not dispute the fact that there is pervasive agreement about the law, or the possibility that some percentage of (appellate) litigation is 'foredoomed.' Noting Llewellyn and Schauer's respective claims about *idiosyncratic* extra-legal factors' influence upon official decision-making merely helps to cast doubt upon the Working Rules hypothesis as (1) an alternative basis for the existence of determinacy in law, and (2) a viable, pervasive candidate driver of decision taking the form of an alternative (shared) *rule*.

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179. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 215-16.

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7. Appendix: Definitions

The following definitions are built from Llewellyn's works (with the exception of Schauer's 'real' rule).

Laws on the books*:* legal norms found in statutes, court opinions, and other official sources.[180]

Laws in action: the norms officials actually rely on to reach their specific conclusions and which they enforce. For Llewellyn, these may or may not track the rules on the books.[181]

Paper rule: "'Paper rule' is a fair name for a rule to which no counterpart in practice is ascribed."[182]

- It is a law on the books that is not really used to guide official decisions to a specific conclusion—at least not in the advertised or assumed way.
- Instead, it can be employed as (1) a legitimate outcome circumscriber and (2) a *post hoc* rationalization for decisions.[183] It serves these roles because, although their decisions are reached on other grounds, officials must present their results in terms of the publicly accepted reasons, i.e., the book rules that people believe constitutes the law.[184] A paper rule therefore *can* guide official decision to an extent, because it circumscribes a decision's potential outcomes to only that subset which could credibly be explained in its terms (again, even though it is not the true/dispositive basis for the specific outcome reached in the decision.)
- Some paper rules may nevertheless be wholly ignored, i.e., not even be used as legitimate outcome circumscribers and *post hoc* rationales.

Working rule: "'Working rule' indicates a rule with counterpart in practice, or else a practice *consciously* normatized."[185]

- It is a prescriptive, guiding rule used by officials in decision. Llewellyn posits two varieties:
- **Variety 1: Written**: a rule found on the books (technically, one with a 'counterpart' in practice, since the verbal formulations may vary) that officials actually rely upon to reach a specific conclusion in their decision-making. Hence, it is also the law in action.[186]
- **Variety 2: Unwritten**: a rule not found on the books, but which is in action. Their existence and/or employment by officials is not public knowledge.

  Type A: a norm adopted from some group within the society (e.g., commercial actors) that legal officials will rely upon to reach a specific outcome.[187]

180. See Llewellyn, "The Next Step", *supra* note 3 at 439 & n 9, 444, 447-50.
181. See *ibid* at 439, n 8-9, 449, 450.
182. Llewellyn, "The Next Step", *supra* note 3 at 439, n 9.
183. See Llewellyn, "The Next Step", *supra* note 3 at 450; Llewellyn, "Responding to Pound", *supra* note 3 at 1237. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 at 27, 154-55.
184. Llewellyn nevertheless also notes that lawyers' arguments framed in the paper rules' language, howsoever slyly offered with an ulterior agenda, can influence officials' decisions. See Llewellyn, "The Next Step", *supra* note 3 at 451.
185. *Ibid* at 439, n 9.
186. *Cf* Llewellyn, *Common Law Tradition*, *supra* note 3 on 'singing' rules.
187. *Ibid*; Llewellyn, "Effect Upon Legal Institutions", *supra* note 20 at 671, n 20.

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Type B: an unwritten rule constructed by legal officials themselves to use instead of the book rule to reach a conclusion.[188]

Real rule: Llewellyn's definition conflates different notions:

a) A *description* of observed regularities of official behaviour (i.e., statistical generalizations based on official decisions);
b) A *prediction* about official decisions based on those observed regularities; and
c) A court-ordered *remedy*, which generate rights and duties, and which appears to be (or include) a norm or decree.[189]

Schauer's 'real' rule: Llewellyn's unwritten working rule. It is claimed to be determinative for decision and so can create 'dislocated determinacy' throughout a legal system. (Schauer's examples tend to concern Llewellyn's Variety 2 *Type B*.)[190]

Situation-Type: "... a *relatively* concrete *going* life-situation seen as a *type*."[191]

- A category/concept of a fact pattern. It is held by officials and is in part shaped by their guild-based experience. It is not merely a given official's understanding of the facts of a particular case; the latter is merely a token of the situation-type.[192] Its existence, let alone its employment in official decision, is not public knowledge per se.
- The type's relevance stems from officials' replying predominantly upon it to categorize particular cases before them (e.g., in specific lawsuits) instead of (solely) using a book rule's category/concept to do so.
- Further, the type either provides, or points to, ulterior norms by which to really decide those cases instead of the book rule's normative content.[193]
- It can also help to (re-)shape book rules (written working ones and paper ones).[194]

Situation-Sense: officials' partially guild-formed *sense*, which is in part the product of their expertise.[195]

- This helps them to both discern and to (re-)shape both situation-types[196] and (in conjunction with the situation-types) the rules on the books.[197]

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188. See Llewellyn, "The Next Step", *supra* note 3 at 439, n 9; Llewellyn, "Effect Upon Legal Institutions", *supra* note 20 at 671, n 20.
189. See Llewellyn, "The Next Step", *supra* note 3 at 448.
190. See Section 3(A) above.
191. Llewellyn, *Common Law Tradition*, *supra* note 3 at 60 [emphasis added].
192. See Llewellyn, *Common Law Tradition*, *supra* note 3 at 44, 60, 121-28, 206-08; Llewellyn, "Grand Tradition", *supra* note 3 at 218.
193. See e.g. Llewellyn, *Common Law Tradition*, *supra* note 3. See also Oliphant, "A Return to Stare Decisis", *supra* note 8 at 75; Radin, *supra* note 87; Twining, *supra* note 79 at 216-27; Leiter, "Legal Doctrine", *supra* note 22 at 1977; Postema, *supra* note 75 at 128-29.
194. See e.g. Llewellyn, *Common Law Tradition*, *supra* note 3 at 44, 200.
195. See *ibid* at 60, 121-22; Llewellyn, *Case Law System*, *supra* note 33 at 79. See also Llewellyn, *Common Law Tradition*, *supra* note 3 at 201 concerning Llewellyn's related (and overlapping) concept, HORSE SENSE: the sense of the skilled expert).
196. See e.g. Llewellyn, *Common Law Tradition*, *supra* note 3 at 5.
197. See e.g. *ibid* at 5, 44, 200. Other Realists (save at least for Corbin, if counted as a movement member) might disagree with the later Llewellyn (of the *Common Law Tradition*) to the extent that he suggests that appellate court judges refashion book rules *so that* they, alone, are, or can be, dispositive for future decisions.

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