Legal Realism for economists*

Realismo jurídico para economistas

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ABSTRACT

Economists have made great progress in understanding the incentives and behavior of actors who operate outside of traditional economic markets, including voters, legislators, and bureaucrats. The incentives and behavior of judges, however, remain largely opaque. Do judges act as neutral third-party enforcers of substantive decisions made by others? Are judges "ordinary" policymakers who advance whatever outcomes they favor without any special consideration for law as such? Emerging recent scholarship has started to explore more nuanced conceptions of how law, facts, and judicial preferences may interact to influence judicial decisions. This work develops a perspective on judging that can usefully be understood as the modern manifestation of American Legal Realism, a jurisprudential movement of lawyers, judges, and law professors that flourished in the early twentieth century. The purpose of this essay is to introduce, in simplified form, the Realist account of judicial decision making; to contrast this view with alternative theories about law and

* Article received on May 5, 2022 and approved on May 10, 2022. Originally published in *The Journal of Economic Perspectives*, Spring, 2009, Vol. 23, No. 2 (Spring, 2009), pp. 191-211. Available at: www.jstor.org/stable/27740530. Accessed on: July 10, 2022. DOI: https://doi.org/10.12660/rda.v281.2022.85994.

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judging; and to sketch out how a more explicit integration of the Realists' conceptual insights about law and judicial behavior might enrich the rapidly expanding economic work in this field.

KEYWORDS

Legal Realism — judicial behavior — legal constraint

RESUMO

Os economistas fizeram grandes progressos na compreensão dos incentivos e do comportamento dos agentes que operam fora dos mercados econômicos tradicionais, incluindo eleitores, legisladores e burocratas. Os incentivos e o comportamento dos juízes, no entanto, permanecem em grande parte incertos. Os juízes atuam como executores neutros de decisões substantivas tomadas por terceiros? Os juízes são legisladores "comuns", que dão sequência a quaisquer resultados favoráveis, sem qualquer consideração especial pela lei como tal? Estudos recentes começaram a explorar concepções com mais nuances de como o direito, as evidências e as preferências judiciais podem interagir para influenciar as decisões judiciais. Este trabalho desenvolve uma perspectiva de julgamento que pode ser entendida como a manifestação moderna do realismo jurídico americano, um movimento jurisprudencial de advogados, juízes e professores de direito que floresceu no início do século XX. O objetivo deste ensaio é introduzir, de forma simplificada, o relato realista de decisões judiciais; contrastar esta visão com teorias alternativas sobre direito e julgamento; e esboçar como uma integração mais explícita dos *insights* conceituais dos realistas sobre direito e comportamento judicial poderia enriquecer o trabalho econômico em rápida expansão neste campo.

PALAVRAS-CHAVE

realismo jurídico — comportamento judicial — restrição legal

Most economic theory presumes — often implicitly — a system of law and adjudication. After all, institutions like property, contract, and govern ment regulation typically entail mechanisms for law-creation and law-application, which usually (though perhaps not inevitably) imply some kind of judicial system (Posner, 2008, pp. 5-6). Because judges are often responsible

for interpreting and enforcing the "rules of the game," they are significant economic policymakers.

Consider five out of many possible illustrations: First, the scope of contract rights is determined, in large measure, by judicial decisions, and judges sometimes refuse to enforce the terms of a contract as written because they view the contract as substantively unconscionable or because they discern flaws in the bargaining process. For example, in recent years many judges have demonstrated hostility to arbitration clauses in employment contracts, which in turn affects the labor market (Burton, 2006). Second, the allocation of the social costs of various economic activities has economic consequences both for distribution and, if transaction costs are nontrivial, for efficiency (Coase, 1960; Calabresi and Malamed, 1972). Courts are often responsible for making these allocations. For example, judicial decisions may determine whether landowners are liable for injuries that result from activities that take place on their property, and, if so, whether such liability shall be strict (that is, without regard to fault) or based only on negligence (Shugerman, 2000). These judicial decisions, in turn, may have significant consequences for owners' land-use decisions, as well as the location and activity choices of potential victims (Shavell, 1980). Third, even when the risks associated with particular economic activities are addressed principally through regulation rather than litigation, judges play an important role in shaping the regulatory environment. One of the most fundamental regulatory policy questions is whether the responsible agency is permitted or required to subject proposed regulations to a cost-benefit analysis. Yet many statutes do not address this issue clearly, meaning that it is up to judges to decide when cost-benefit analysis is required, prohibited, or optional (Sunstein, 2001). More generally, the authority of courts to review agency regulations for "reasonableness" gives judges considerable ability to influence the substantive content of regulatory policy (Miles and Sunstein, 2006; Stephenson, 2006a). Fourth, virtually the entire content of antitrust law in the United States, including the law on horizontal agreements, monopolization, and merger regulation, has been supplied by the courts. Although the legal basis for this body of antitrust law is nominally statutory, the relevant statutory provisions have been construed as broad grants of authority to the federal courts to fashion antitrust law (Baxter, 1982; Easterbrook, 1984, 2004). Fifth, in contrast with antitrust law, tax law is characterized by a dense thicket of detailed statutory law and regulations. Yet judges play a critical role in determining tax liability, principally due to judicially created anti-tax-avoidance principles,

such as the "business purpose" doctrine and the "economic substance" doctrine, which allow courts to impose substantial tax liabilities after the fact on entities that would avoid such liabilities according to the formal law. These judge-made doctrines have substantial economic consequences (Weisbach, 2002).

In the light of the substantial economic impact of judicial decisions on these and other issues, judicial decision making is an important subject of economic analysis. Analyzing judicial behavior poses particular challenges, though, both because judges (like many other government agents) are not motivated principally by material incentives and because judges are often supposed to interpret and enforce something called "law" — the product of supposedly authoritative decisions made by other public and private actors that includes statutes, regulations, contracts, and prior judicial decisions. How much (if at all) does this fact distinguish judges from other government policymakers? Do judges act as neutral third-party enforcers of substantive decisions made by others? Are judges "ordinary" policymakers who advance whatever outcomes they favor without any special consideration for law as such? More generally, how should we think about the relationship between judges' individual policy preferences and their role as interpreters and appliers of law?

While there has been a great deal of quantitative empirical work in economics and cognate disciplines (especially political science) on judicial decision making, much of the early work pitted a highly mechanical vision of judges as neutral "umpires" against a vision of judges as purely outcome-oriented political actors unconstrained by law. Emerging recent scholarship, however, has started to explore more nuanced conceptions of how law, facts, and judicial preferences may interact to influence judicial decisions. This work develops a perspective on judging that can usefully be understood as the modern manifestation of American Legal Realism, a jurisprudential movement of lawyers, judges, and law professors that flourished in the early twentieth century. The purpose of this essay is to introduce, in simplified form, the Realist account of judicial decision making; to contrast this view with alternative theories about law and judging; and to sketch out how a more explicit integration of the Realists' conceptual insights about law and judicial behavior might enrich the rapidly expanding economic work in this field.

Theories of adjudication: Formalism, Skepticism, Realism

To frame the discussion of different theories of judicial behavior, consider a hypothetical case. Suppose that the legislature has enacted a labor standards statute that guarantees workers overtime pay under certain conditions, and the statute also contains an "anti-retaliation" provision that prohibits firms from firing employees if they file a complaint with the government alleging noncompliance with this statute. Next, imagine that a firm that hires an employee under a contract, drafted by the firm's attorneys, that appears to give the firm the right to fire the employee at will. Sometime after the employee is hired, she complains to her boss that she is due overtime pay under the labor statute. The firm fires the employee, and the employee sues. The judge hearing the case will have to decide whether the firm can fire the employee under these circumstances. In reaching a decision, the judge would have to decide whether the at-will termination provision of the employment contract is legally valid, whether the statutory anti-retaliation provision applies in these circumstances, whether retaliation was the employer's actual motivation in this case, and so forth.[1]

What factors will influence how the judge resolves this hypothetical dispute? Before getting to the Realist perspective, let us consider first two common alternative views of judicial decision making that I will call "mechanical legal formalism" and "radical legal skepticism." These views may seem like caricatures, yet many discussions and analyses of judicial decision making implicitly or explicitly presume one of these two accounts.

Mechanical legal formalism holds that the "law" consists of a collection of rules contained in a well-defined set of source materials — principally statutes, regulations, contracts, and prior judicial decisions — along with a relatively small number of fundamental legal concepts. At least according to the pure version of Formalism, every legal question has a right answer that a properly trained lawyer or judge can deduce by correctly applying the canonical legal

[1] This example is based loosely on the federal Fair Labor Standards Act (FLSA) and on particular judicial decisions regarding the interpretation of the Act's anti-retaliation provisions. The federal courts of appeals have decided a number of such cases, yet different courts have reached quite different results. Compare, for example, the Court of Appeals for the Second Circuit's decision in *Lambert v. Genesee Hospital* (10 F.3d 46 [1993]) finding that the FLSA's anti-retaliation provision did not apply when the employee complains to the firm, rather than to the federal agency, with the Ninth Circuit's decision in *Lambert v. Ackerley* (180 F.3d 997 (en banc) [1999]), reaching the opposite conclusion.

materials to the facts of the case. This view implies that a disagreement over the correct legal conclusion can arise only when at least one of the parties has committed an error of legal reasoning, acted in bad faith, or been misinformed as to the relevant facts or law. On most versions of the Formalist account, moreover, judges strive to apply the law correctly. Therefore, although human fallibility makes errors inevitable, the outcome of most cases can be predicted by trained lawyers, who can deduce the correct legal outcome by consulting the canonical sources. More moderate Formalists acknowledge the possibility that the law may sometimes contain gaps or ambiguities, but believe these gaps to be relatively uncommon and typically filled quickly. For convenience, in this essay I will refer to mechanical legal formalism simply as "Formalism," although there are other varieties of Formalist legal thought that are more nuanced (for example, Schauer, 1988a; Tamanaha, 2008a).

How, according to the Formalist perspective, would a judge resolve the hypothetical employment dispute sketched above? First, the judge would look at what the relevant statutes, case law, and maxims of interpretation say about the criteria for contractual validity. If the contract is valid, the judge would then consider whether the labor statute limited an employer's freedom to terminate an employee for complaining to the employer (as opposed to the government) about the firm's alleged failure to comply with the statute. The judge would do this by consulting the text of the statute and applying established "canons" of statutory construction — interpretive rules for parsing statutory texts, often with fancy-sounding Latin names like *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). According to the Formalist account, all judges who properly apply the principles of legal reasoning should — and likely would — reach the same, correct answers to these questions.

In contrast, radical legal skepticism — which for convenience I will refer to as "Skepticism" — accepts the definitional claim that the "law" consists of a set of canonical legal source materials, but denies that these sources supply a determinate answer to any significant legal question. Rather, Skeptics claim law is so malleable that plausible legal arguments, derived from canonical legal sources, are almost always available to justify any conceivable resolution of a contested case — and that if a plausible legal argument were not available, a judge could always change or ignore the law. Furthermore, Skeptics argue that judges have considerable leeway to characterize the facts of the case in such a way that they can get to a preferred outcome regardless of the law

(Frank, 1949; Gennaioli and Shleifer, 2008). In this view, law is so indeterminate that it does not impose *any* meaningful constraint on judicial decision making. According to Skeptics, legal "reasoning" of the sort that appears in judicial opinions is merely an after-the-fact rationalization that obscures or mystifies the true basis for judicial decisions. What is this true basis? Generally, say the Skeptics, judicial decisions depend on the preferences of the judges over substantive outcomes — who wins and who loses. While these preferences may reflect idiosyncratic biases or concerns about career and reputation, Skeptics usually argue that the best predictor of case outcomes is the judge's political ideology. Of course, not all cases implicate highly charged political controversies like abortion or capital punishment, but most Skeptics suggest that judges have ideological preferences even with respect to more mundane controversies: judges tend to favor plaintiffs or defendants, individuals or corporations, government or private citizens, and so on. Even in non-ideological cases, judges will favor whichever party appears more sympathetic in the particular dispute.

How, according to the Skeptics, would a judge resolve the hypothetical employment example? The Skeptic would argue that the decision depends on whether the judge wants to find in favor of the employer or the employee, which in turn will have a lot to do with whether the judge is generally a left-wing, pro-labor judge or a right-wing, pro-management judge. (It may also depend on the judge's view of the particular parties involved in the case — perhaps the firm appears generally abusive toward its employees or perhaps the employee seems lazy and litigious.) Whichever way the judge wants to come out, the judge can rationalize the decision using canonical legal sources and respectable legal arguments. For example, a judge who favors the employer can point out that the employee consented to the at-will contract without any threat or duress and that the plain text of the labor statute's anti-retaliation provision only applies if the employee complains to the government agency. In support of the latter conclusion, the judge could invoke the *expressio unius* canon of construction: the specific inclusion of an anti-retaliation provision that applies when employees complain to the *government* implicitly excludes antiretaliation protections when employees complain to *someone else* (like a supervisor). On the other hand, a judge who favors the employee can just as easily find legal justifications for a contrary holding. Such a judge could reason that the contract is not truly the product of free bargaining because it is a standard-form contract prepared by the employer (Burton, 2006).

Furthermore, the labor statute's guarantee of overtime pay, and the inclusion of an anti-retaliation provision, can be read as implying a guarantee that an employee's complaint to a supervisor about failure to pay overtime may not be the basis for termination. In support of this conclusion, the judge could point to another hoary maxim of interpretation that instructs judges to construe remedial statutes broadly. According to the Skeptics, neither decision is more legally "correct" because the law does not supply a determinate answer.

It is sometimes implicitly assumed that Formalism and Skepticism are exclusive and exhaustive accounts of judicial behavior. Thus, when the evidence shows judicial behavior inconsistent with Formalism, the instinct is to revert to the Skeptical view (Hart, 1961). This tendency to reduce the universe of positive theories of adjudication to Formalism vs. Skepticism is also evident in the quantitative empirical literature on judicial decision making, which at least until recently tended to frame studies as comparisons between the "legal model" (that is, Formalism) and the "attitudinal model" (that is, Skepticism) — with Skepticism usually though not always coming out on top (for example, Segal and Spaeth, 1993, 2002; Ruger, Kim, Martin, and Quinn, 2004; Sunstein, Schkade, Ellman, and Sawicki, 2006; Chang and Schoar, 2008).[2] For example, many empirical studies equate Formalism with the null hypothesis that judge-specific variables are irrelevant to judicial decisions and treat evidence that such factors matter as evidence in favor of the Skeptical view.[3]

Not all studies adopted such an extreme either-or approach, of course. One common argument is that Formalism and Skepticism describe different domains of judicial decision making. Perhaps Formalism characterizes some areas of law, like run-of-the-mill contract law, while Skepticism is a better account in others like constitutional law, at least in the set of cases that reach the Supreme Court (Posner, 2005). Or perhaps Formalism applies up until the point where the law "runs out," at which point Skepticism takes over (Schauer, 1988b; Feldman, 2005). Even on these accounts, though, Formalism

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[2] The political science literature on judicial behavior also sometimes discusses the so-called "strategic model," but this is essentially also a version of Skepticism: the only difference between the "attitudinal model" and the "strategic model" being whether judges are constrained by other actors (for example, by the threat of legislative override) (Segal and Spaeth, 1993, 2002).

[3] This description is obviously a simplification. For a comprehensive recent survey of how the empirical literature has tried to test the effects of judicial ideology on case outcomes, see Fischman and Law (forthcoming).

and Skepticism are implicitly the only options, and the only question is which domains are better characterized by each. Yet by treating Formalism and Skepticism as exhausting the set of alternatives, we may overlook other possible relationships between legal source materials and judicial decisions.

The ideas about law and judicial behavior contained in the writings of the American Legal Realists — a jurisprudential movement of lawyers, judges, and law professors that emerged in the early twentieth century and flourished in the 1920s and 1930s — may be useful for economists who want to move beyond the dichotomy between the Formalist and Skeptical caricatures.[4] The Realists were a large and diverse group, and any attempt to summarize their views runs the risk of oversimplification. Yet if one theme clearly united the Realists, it was their opposition to the Formalism that they saw as dominating legal thought in the late nineteenth century and into the beginning of the twentieth century.[5] Building on earlier work by influential thinkers like Oliver Wendell Holmes, Jr. (1897), Roscoe Pound (1908, 1909), and Wesley Hohfeld (1913), the Realists argued that the law rarely if ever supplied determinate answers to legal questions, at least in hard cases, and that there was a significant gap between the real reasons that judges reached their decisions and the legalistic explanations advanced in their written opinions.

Because Realists critiqued Formalism on these grounds, the Realists are sometimes characterized as Skeptics. Indeed, the modern empirical

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[4] Prominent Legal Realists included Karl Llewellyn, Jerome Frank, Max Radin, Robert Hale, Underhill Moore, Herman Oliphant, Walter Wheeler Cook, and Felix Cohen, among many others. The Realist "school" declined after World War II, and few modern scholars or judges consciously self-identify as Realists. Nonetheless, the perspective associated with Realism has had a lasting impact on American legal thought. Comprehensive treatments of American Legal Realism include Leiter (2003), Kaiman (1986), Schlegel (1995), and Twining (1973). A provocative revisionist analysis of the Realists and their contributions is Tamanaha (2008b). For a useful collection of major Realist writings, with modern commentary, see Fisher, Horowitz, and Reed (1993).
While this essay focuses on the Realists' positive theories of judicial behavior, the Realists also had a normative agenda that emphasized the need to consider the actual consequences of legal rules, including their incentive and distributive effects. This portion of the Realists' agenda has had a profound influence on economic analysis of law, but it will not be the focus of discussion in this paper. In contrast, the Realists' positive theories of how judges make decisions have not generated a corresponding contemporary econimic analysis of judicial behavior.

[5] Some legal historians like Tamanaha (2008a) have legitimately questioned whether the "formalism" of this earlier period in fact corresponded to Formalism as I have described it, but for present purposes, what is important is that the Realists perceived the dominant paradigm of legal thought at the time to be a version of Formalism not much more sophisticated than the caricature description presented here.

literature suggesting that judges' political attitudes are the principal determinant of case outcomes is sometimes described as "new legal realism" (Cross, 1997; Miles and Sunstein, 2008b). Yet while the Realists rejected Formalism, for the most part they did not embrace the radical Skeptical view that is sometimes attributed to them. The Realist view is distinct from Skepticism in at least three important respects, each of which has implications for the social scientific study of judicial decision making. The remainder of this essay fleshes out the Realist vision of judicial behavior by elaborating these three points of divergence from Skepticism and suggesting how this Realist perspective — implicit in some recent developments in the economic study of judicial decision making — is helpful in moving beyond a crude "law vs. ideology" debate toward a more nuanced understanding of the relationships among law, facts, judicial preferences, and case outcomes.

"Real Law" may differ from "Formal Law"

The first crucial distinction between Realism and Skepticism is that, while the Realists were united in the view that Formalist legal reasoning did not determine or accurately predict judicial decisions, most Realists did not endorse the Skeptical view that judicial decisions are idiosyncratic or crassly ideological. Rather, the dominant strain of Realism maintained that although the formal law is a poor guide to actual decisions, judges in practice apply a kind of "real law" that is more sensitive to specific substantive areas or factual contexts. Indeed, a leading historian of Realist thought has argued that the Realists' "Core Claim" was that judges respond in systematic and predictable ways to fact patterns that are not captured by the narrow set of facts that are formally "legally relevant" (Leiter, 2003). Thus, Realists believed that scholars could use inductive methods to extract from the set of decided cases the *actual* legal rules that judges were using to decide cases. Moreover, Realists emphasized that judges should (and often do) respect precedent not by looking to the formal legalistic rationales advanced in earlier cases, but rather by paying close attention to systematic patterns in how earlier judges responded to the particular fact patterns that appeared in those cases (Oliphant, 1928). Furthermore, many Realists believed that practicing lawyers within given fields have an intuitive (though perhaps incomplete) understanding of the "real" law, as do parties like businesses and government officials who deal regularly with those fields of law.

Thus, while the Realists cautioned against trying to draw conclusions about the nature and effects of law by taking written judicial opinions at face value, most Realists thought that those who rejected the notion that one can learn *anything* systematic about how the law operates in a given field are also mistaken (for example, Oliphant, 1928; Llewellyn, 1960; but see also Frank, 1930). The Realists were somewhat successful in moving legal discourse away from broad, abstract, deductive analysis and toward more a more context-sensitive, pragmatic, and self-aware style of judicial reasoning. Because of this change in how judges and scholars talk about law, the gap between the real reasons judges do what they do and the reasons the judges give in their opinions is probably smaller now than it was in the early twentieth century. Nonetheless, some gap likely persists.

The most obvious ramification of this insight for economists is that, although for some purposes it may suffice to know only the formal rules, in many areas the "formal law" that researchers can find in canonical source materials may not correspond to the "real law" as applied by judges and understood by other sophisticated participants in the legal system. The point is not simply the familiar claim that judges may be biased or ideological in some cases. Rather, Realism suggests that there may be relatively consistent, stable patterns in judicial decisions, understood (perhaps implicitly) by skilled lawyers, litigants, and judges, that are captured neither by the formal rules nor by crude ideological measures. Jurisdictions with identical formal law might have quite different real law, while jurisdictions with divergent formal rules might turn out to have quite similar legal systems in practice. Researchers interested in the effect of law on behavior might therefore be wary of relying overmuch on the formal law. It may often be important to consult with knowledgeable lawyers or other experts in the jurisdiction who can help identify (and perhaps quantify) the "law in action" as distinct from the "law in books."

Economists and other social scientists can also take up (and test) this Realist claim by seeking to uncover the "real law." Economists might, for example, investigate more closely how judges respond to case fact-patterns at a relatively high level of contextual detail, and these studies might well provide valuable insights both about judicial behavior and about the law that operates in particular fields. One recent example of economic research in this spirit is Niblett, Posner, and Shleifer (2008). This study considers judicial application of a private law doctrine called the "economic loss rule" in the context of construction disputes. The economic loss rule is

a common law (that is, nonstatutory) rule according to which individuals cannot sue in tort to recover for purely economic losses that are not due to personal injury or property damage. In the construction industry, most suits for economic losses are contract suits rather than tort suits, but the economic loss rule is still important in construction disputes as there are many cases in which the economic loss arising from the builder's alleged negligence is not covered by any express contractual warranties or the warranties have expired. Niblett et al. compare the formal statement of the economic loss rule and its recognized exceptions to how courts actually apply the rule, and find significant deviations. In particular, Niblett et al.'s data suggests that judicial willingness to invoke the economic loss rule depends on a number of factors that are not formally relevant to the doctrine, such as whether there is a substantial disparity in the economic power of the parties.

In a similar vein, Kastellec (2007) examines the influence of fact patterns on judicial decisions using a statistical technique that produces "classification trees" to show how courts respond to recurring fact patterns in a large sample of cases. Kastellec applies this method to federal court of appeals decisions in cases involving a criminal defendant's motion to suppress a confession. He finds that the courts apply a relatively systematic legal rule in these cases, but also that this rule is not fully captured by the formal statement of the doctrine. For instance, Kastellec finds that between 1946 and 1966, when the formal doctrine on coerced confessions called for an allegedly unpredictable "totality of the circumstances" test, a simple three-part rule correctly predicts almost 90 percent of the case outcomes. That rule asked, first, whether the confession involved circumstances conducive to coercion (for example, long periods of incommunicado confinement, or use of physical force); if coercion was involved, whether there were mitigating circumstances (perhaps a waiver of rights or evidence that the confession was voluntary); and if coercion was not involved, whether the confession was nonetheless the fruit of an illegal procedure (like an illegal search). In contrast, in the 1967-1971 period — immediately following the Supreme Court's decision in *Miranda v. Arizona* (384 U.S. 436 [1966]) that defendants have the right to remain silent and the right to have an attorney present during questioning — the courts followed a different implicit rule that was influenced by, but not perfectly predicted by, *Miranda*. In this period, courts asked first whether mitigating circumstances were present, almost always admitting confessions if the answer was yes; if not, the court would ask if the *Miranda* warning had been given, excluding the confession if the answer was no; finally, even when

police issued the *Miranda* warning, the courts would look to personal characteristics of the defendant that might contribute to, or detract from, the voluntariness of the confession (such as mental deficiency or previous encounters with law enforcement). In the 1972-1981 period, even though there was no substantial change in the formal doctrine, Kastellec's analysis shows yet a different legal rule with a more complex structure — one in which the presence or absence of the *Miranda* warning does not even appear as a meaningful determinative factor.

Studies like those of Niblett et al. (2008) and Kastellec (2007), though limited in their scope, are broadly consistent with Realist conjectures about the relationship between the law in books and the law in action. Further work along these lines may provide more evidence as to whether the Realists were correct in their hypotheses regarding the existence of a real law that is more context-sensitive than the formal law, yet still relatively stable and systematic.

Law can constrain, even if it is not determinate

A sketch of the Realist Conception of legal "constraint"

While the Realists, like the Skeptics, believed that law was *logically* indeterminate — it is possible to construct a legal justification for almost any result — most Realists implicitly believed that legal sources and principles did have a causal (and constraining) effect on case outcomes (Tamanaha, 2008b). This belief rested on two closely related observations. First, judges are rational human beings who have limited resources. As the influential Realist Max Radin (1925, p. 362) put it: "Judges are people and the economizing of mental effort is a characteristic of people, even if censorious persons call it by a less fine name. … [A] judge economic of mental effort, may decline to disturb [his initial impression of a case] by searching for new elements which might compel the substitution of a wholly different situation." As a result, judges will often apply existing legal rules and principles to situations that appear familiar, without much thought or reflection. In the words of Walter Wheeler Cook (1943), who is generally considered a Realist despite his personal discomfort with the label, although "in no field of intellectual endeavor can previously worked-out generalizations — rules and principles — be automatically applied to 'new' situations … [they] enable us to dispose of routine cases which do not require thought." This, Cook argued, was

"fortunate," because "operations of thought are like cavalry charges in battle — they are strictly limited in number" (Cook, 1943, pp. 419, quoting Whitehead, 1911).

Second, most Realists recognized that not all legal arguments are equally easy for real-world judges to derive from conventional legal materials. Indeed, some legal arguments might be so difficult or costly to construct that for practical purposes the judge experiences the law as binding (Cardozo, 1921, pp. 127-129; Kennedy, 1986). As Karl Llewellyn (1950, p. 397, emphasis in original) explained, a judge will find most of the time that "lining up the authorities [to reach a conclusion that corresponds to the judge's sense of the situation] comes close to being an automatic job. *In the very process of reading an authority* a distinction leaps to the eye, and that is 'all' that that case holds; or the language of another authority … shines forth as 'clearly stating the true rule.'" But, Llewellyn continues, "Trouble comes when the cases do not line up this clearly and semi-automatically, when they therefore call for intellectual labor, even at times for a conclusion that the law as given will not allow the sensible result to be reached."

Taken together, these two Realist propositions suggest a particular way in which law may constrain what judges can or will do.[6] Let us posit a judicial utility function in which the judge cares principally about two things: 1) the practical outcome of the case (who wins and loses, the effect on the real world, and so on); and 2) the costs associated with writing a legally persuasive opinion to justify that outcome. The judge starts with knowledge of the parties to the dispute and the basic contours of the facts, but the judge has only a rudimentary knowledge of the relevant law and of the factual details. The judge forms an initial intuitive impression, or "hunch," about how the case should come out (Radin, 1925; Hutcheson, 1929; Frank, 1930; Kennedy, 1986). The judge will then think about how easy it will be to justify this hunch legally.

Sometimes, as Llewellyn (1950) suggests, it is easy for the judge to "lin[e] up the authorities," and to make any necessary distinctions or analogies to

[6] This perspective on judging, which is implicit in the writings of many Realists, was fleshed out more explicitly by scholars associated with Critical Legal Studies, an intellectual descendant of Realism, particularly Duncan Kennedy (1976, 1986), Joseph Singer (1984), and Mark Tushnet (1996). These scholars were not only critiquing Formalism, but also responding to those who charged that Critical Legal Studies embraced radical Skepticism and to other Critical Legal Studies scholars who did in fact embrace that view. A version of this perspective on judging is also articulated in recent political economy work (for example, Bueno de Mesquita and Stephenson, 2002; Lax and Cameron, 2007; Volokh, 2008; Stephenson, 2006b).

reach the judge's preferred outcome. For example, if the judge wishes to support the employee in our hypothetical employment-at-will case, perhaps there are many recognized exceptions to the general principle that at-will termination clauses are valid, and the judge can readily fit the current case into one of those recognized exceptions. If no recognized exception is available, the judge may do some more work (or ask clerks to do more work) to see if there is a less obvious or more creative way to use the legal source materials to reach the desired outcome. For example, maybe there is no currently recognized exception in the context of at-will contracts, but language in other cases suggests limits on contractual freedom that the judge can extrapolate to this setting. Or perhaps even though the labor statute doesn't expressly protect workers from retaliatory termination in response to complaints to a supervisor, it is possible to read several provisions of that statute together to imply such a protection, or to find other statutory schemes in which courts have read anti-retaliation provisions to cover more than their plain text alone would suggest. The hypothetical judge in this setting might be consciously trying to find a way to avoid what seem to be the dictates of the law, but this need not be the case. Indeed, the judge may experience this process as "discovering" more compelling legal arguments.

In other cases, though, the judge will find that the costs of writing a legally persuasive opinion in favor of the most-preferred outcome are very high, perhaps requiring an extraordinary degree of legal creativity and complexity. In such cases, the judge may find that the opinion originally preferred "just won't write" (Wald, 1995). The judge might subjectively experience these cases as ones in which the law "dictates" a decision. Of course, even if a judge finds it too costly to write a persuasive opinion justifying the *most* preferred outcome, the judge may still be willing to bear the costs of writing an opinion that gets somewhat closer to the desired outcome. Put another way, judges do not automatically select the opinion that is easiest to justify legally, nor the opinion that delivers the most desired outcome, but rather the judge balances these interests, making whatever trade-off is optimal in agiven case (see also Volokh, 2008).

In this framework, Formalism simply describes a special case of the more general Realist model in which the costs of writing a legally persuasive opinion are infinite for all opinions except the one which is legally correct — and for that opinion these costs are close to zero. Likewise, Skepticism can also be described as a special case of this more general framework, in which the costs of writing a legally persuasive opinion are identical for all possible

outcomes. The Realist account of judicial behavior is useful because it suggests that, compared to these special cases, more variability and complexity is both possible and likely.

This conceptualization of the judicial utility function and the nature of the legal constraint, however, begs some central questions: Why do judges care whether the justifications that they give are legally plausible? What determines which legal arguments are deemed "plausible" (and by whom), and why are some such arguments "easier" or "harder" to make? To the extent that the Realists themselves engaged these questions, they seemed to think that the answers had something to do with the shared expectations and normative commitments of the relevant community regarding what should count as a "good" or "correct" or "legitimate" legal reason for a particular conclusion. More recent commentators have similarly suggested that legal argumentation is like a game that judges enjoy playing, and whose enjoyment would be diminished if they didn't play by the rules (Posner, 1993; but see Schuaer, 2000), or that judges are like artists or craftsmen who value aesthetic excellence in their field (Posner, 2008). These analogies may capture something about how judges experience their work, but they still beg the question: Why do judges feel like they're playing a game with rules? Why these *particular* rules?

Perhaps the explanation may lie in judges' concern with various external observers and constituencies. Lower court judges might care about avoiding reversal by appellate courts (Higgins and Rubin, 1980) or increasing their chances for promotion to higher courts (Cohen, 1991). Judges may also care about avoiding reversal or retaliation by the political branches (Gely and Spiller, 1992a, b). Yet these explanations are also incomplete. Even if the main reason that lower court judges care about advancing persuasive legal justifications for their rulings is to avoid reversal on appeal, this just kicks the question up a level: Why then should the appellate judges or Supreme Court justices care about persuasive legal reasoning? Likewise, while judges might care about the reaction of other political actors, such as the legislature or the executive, it is not clear why those actors should care about the quality of legal argumentation in the opinion, as opposed to the outcome of the case — and in most cases they probably don't. Perhaps judges care about legal persuasiveness because they enjoy being showered with praise for legal brilliance by colleagues and elite law professors, and dislike being pilloried for legal sloppiness, in something of the spirit discussed by Posner (1993) and Singer (1984). But again, we are answering the question of why judges

care about legal craft by positing that some *other* set of actors, to whom judges are responsive, cares about legal craft. But why do these other actors care? And why do judges care what they think?

No one, to my knowledge, has developed a fully convincing social scientific account of the incentives that shape the judicial desire for legal persuasiveness and the differential costliness of various legal arguments. Yet contemporary participants in the legal system regularly report that something like this actually does exist. Figuring out why judges experience law as constraining (assuming that they do) might suggest additional insights into how variation across judges may affect case outcomes. For instance, does a judge's legal talent affect the degree to which that judge experiences law as a constraint? Perhaps a more talented judge will face lower costs in finding a plausible legal argument to justify a preferred conclusion, which suggests talent is inversely correlated with constraint. However, a more talented judge may also face relatively higher costs for engaging in more creative legal arguments because of the greater attention to detail that such arguments will demand from a meticulous judge. As another possibility, judges' backgrounds and personal characteristics as well as their method of selection and retention may also affect how much they care about legal craft, and what sorts of legal arguments they or their constituencies experience as "persuasive."

Some implications of the Realist account of legal constraint

The Realist conceptualization of the judge's utility function suggests a useful and flexible way of conceptualizing the fact that both legal and nonlegal factors may have a causal effect on judicial behavior. The most straightforward implication of the Realist approach concerns how the judge's interest in the case outcome affects the degree to which legal sources influence the decision.

Consider judicial interpretation of contracts. While judges usually enforce contracts according to their apparent terms, few contracts are complete. Moreover, contract law doctrine recognizes exceptions to general rules, qualifications to the exceptions, and so forth. For example, according to a doctrine called the "parol evidence rule," judges are supposed to consider only the written contract, not any prior oral agreements. That sounds like a clear restraint on judges' ability to depart from the terms of the written contract – but there is a recognized exception to the parol evidence rule for cases where the content or scope of the written contract is ambiguous. The ambiguity

determination leaves judges considerable discretion (Chirelstein, 2001). Given that judges have some discretion to avoid the apparent terms of a written contract, it is reasonable to hypothesize that a judge may be more likely to try to find a legal justification for avoiding enforcement of these terms when enforcement leads to outcomes that the judge views as particularly distasteful (Niblett, Posner, and Shleifer, 2008; Gennaioli, 2006). Skilled judges can often construct plausible legal arguments to get to a nonobvious result if they are sufficiently motivated to do so.

Similarly, it may usually be relatively easy for judges to resolve questions of statutory construction by looking to the statute's "plain meaning" without extensive inquiries into legislative history or purpose and without engaging in nonobvious semantic arguments. When a case arouses a judge's moral or policy commitments, though, that judge is more likely to look beyond text to other legal sources, and more likely to reach a conclusion that differs from what might seem to be the most "plain" reading of the text. There is some evidence that Supreme Court justices behave this way. Schauer (1991) examined all the statutory interpretation cases from a single Supreme Court term and found that almost all the justices relied on "plain meaning" in low-stakes, nonideological cases but were much more likely to engage in more creative forms of interpretation in high-stakes cases. This is consistent with the view that statutory text and canons of interpretation can constrain judges by making certain decisions more costly, but the constraint is weaker when a judge cares more about the outcome (Volokh, 2008).

One can make a similar point with respect to the role of precedent. Many lawyers and legal scholars assert both that precedent matters a great deal to judges and that it is usually possible to construct arguments consistent with prior precedent for a variety of possible results. These beliefs appear to be in some tension, but on the Realist view, they can be reconciled. While it is *possible* to construct arguments from precedent (or, at least, consistent with precedent) for almost any outcome, some arguments are straightforward while others require more judicial creativity. A judge's willingness to incur the costs associated with more creative legal maneuvers will depend on the strength of the incentives to do so (Bueno de Mesquita and Stephenson, 2002; Gennaioli and Shleifer, 2007a, b). The magnitude of these costs may depend in part on the density and specificity of the precedents that have developed within the relevant field of law (Kennedy, 1986; Bueno de Mesquita and Stephenson, 2002). It is not necessarily the case, however, that a greater stock of precedents will impose more constraints on the judge. Sometimes a large

body of precedent gives the judge more freedom, because there is more material to work with – more analogies to choose from, more exceptions to entertain, and so forth.

The Realist perspective on adjudication also has implications for the degree to which judges defer to legal decisions reached by other institutions, such as legislatures and executive officials. Courts often have an incentive to defer, and to develop general doctrines of deference, because it is usually less costly to write an opinion upholding the act of another entity than to explain why that entity was legally mistaken. But such deference is less likely when the judge views the decision under review as leading to a bad outcome (Stephenson, 2006a, b). The empirical evidence on judicial deference, though limited in many ways, seems generally consistent with this view. Miles and Sunstein (2006, 2008a) find that while judges routinely defer to administrative agency decisions with which they disagree, judges are much less likely to defer in case of a substantive policy disagreement than when they share the agency's political views. Furthermore, if the Realist position is correct, the political salience of a case should be inversely correlated with the probability that a judge defers to an agency decision that he or she dislikes on ideological grounds. Recent high-profile Supreme Court cases — such as the decision in *Massachusetts v. EPA* (549 U.S. 497 [2007]) to invalidate the EPA's claim that it had no authority to regulate greenhouse gases and the decision in *FDA v. Brown & Williamson Tobacco* (529 U.S. 120 [2000]) to strike down the FDA's decision to regulate tobacco products — provide anecdotal support for this hypothesis, as these cases, which involved high-profile and contentious (and partisan) political disputes, both produced a 5-4 split along predictable ideological lines with the majority refusing to defer to the agency's interpretation of the governing statute.

Another implication of the Realist account of judging is that as the demands on judicial time and resources increase, judges are less likely to devote substantial effort to developing complex or creative legal arguments because the opportunity costs of doing so are higher. If this is true, greater judicial workloads may be associated with "cheaper" legal methods of resolving cases — dismissals on procedural grounds, upholding lower court decisions rather than overturning them, and so forth. Huang's (2007) examination of how the federal courts of appeals have responded to caseload shocks finds evidence consistent with this view. This finding further suggests that placing greater demands on judicial time and resources might also induce more difficult-to-measure, but perhaps more interesting and important, changes

in judicial behavior. Perhaps, following Schauer's (1991) suggestive evidence on Supreme Court statutory interpretation decisions, greater workloads might induce more reliance on "plain meaning" in statutory cases or, more generally, might increase the observed strength of the legal "constraint," as judges strive for quick and easy ways to dispose of a larger number of cases. There is not to my knowledge any direct evidence for these hypotheses, but they seem worth exploring.

The Realist view of judging may also shed additional light on the role of legal advocacy in the judicial decision-making process. Some social science research analogizes lawyers to lobbyists supplying information about the policy consequences of a particular decision (Johnson, 2001; Dewatripont and Tirole, 1999). This analogy may help capture the Realist insight that judges care very much about factual context and policy considerations, yet the analogy also seems to miss important aspects of modern legal advocacy: the arguments from precedent, the careful parsing of statutory or regulatory language, and the analogies to other areas of law. Although the Realists did not, for the most part, develop a positive account of legal advocacy, many of them developed arguments about effective legal advocacy that are largely consistent with the belief that judges feel the need to justify their decisions according to accepted modes of legitimate legal reasoning and that the difficulties of doing so may sometimes shape their outcome. In addition to supplying judges with information about facts, legal advocates make specifically legal arguments as a way of lowering the cost to the judge of reaching the advocate's preferred outcome by, in essence, doing some of the judge's work.[7]

Karl Llewellyn (1960), drawing on earlier observations by Fuller (1934), captured this idea by pointing out that a lawyer is unlikely to succeed, even when the judge is sympathetic to the lawyer's proposed case outcome, if the lawyer "fail[s] to furnish … a 'doctrinal bridge' over Jordan; doubly not if counsel actually set[s] up barriers by a doctrinal argument so inept as to make a gap and innovation seem bigger … than they are." An effective legal advocate may also be able to raise the cost of an opposing view by pointing out problems and complications that would force a conscientious judge to do more legal work to justify that outcome. This perspective is consistent with Johnson, Wahlbeck, and Spriggs's (2006) finding that the quality of a lawyer's argument (measured principally by the "grades" that former Justice Harry

[7] For an analogous argument with respect to legislative lobbying, see Hall and Deardorff (2006).

Blackmun assigned various advocates in his private notes on arguments before the Supreme Court[8]) had a greater effect on a justice's vote when the lawyer was arguing for a position that was not too far from the justice's preferred outcome. As a Realist perspective would predict, good legal advocacy can furnish the "bridge over Jordan" for a sympathetic justice — indeed, it can make the difference between getting and losing that justice's vote — but it is unlikely to sway a justice who strongly opposes the attorney's favored outcome. In a similar vein, McAtee and McGuire (2007) find that the quality of a Supreme Court advocate (measured using a combination of the Blackmun grades and the lawyer's prior Supreme Court litigating experience) appears to have a greater impact on case outcomes in cases with lower public salience (as measured by media coverage). This finding is also consistent with the Realist hypothesis that legal argumentation can have an important influence on judicial votes, but is less likely to do so when the stakes are high. While studies in this vein are far from conclusive — especially since the proxies for the quality of legal argument are problematic — They are more consistent with a Realist perspective on judging than with the Formalist or Skeptical accounts.

Judges care about shaping future decisions through legal doctrine

A third sense in which the Realist account of judging differs from the Skeptical account is the Realist emphasis on the fact that judges are not only law-appliers, but also law-creators. Judges, that is, are producers as well as consumers of judicial precedent. An appellate judge deciding a case is likely to consider not only the outcome of the individual case and the costs of writing a plausible legal justification for that outcome, but also how the opinion will affect the development of legal doctrine and hence the costs that *future* judges will face in legally justifying particular results in future cases. Because the Realists were acutely aware that the legal doctrines developed and elaborated by judges would influence subsequent decisions, they emphasized the role that considerations of justice and policy ought to play in the development

[8] Interestingly, Johnson, Wahlbeck, and Spriggs (2006) also find that Justice Blackmun's grades are somewhat correlated with other proxies for attorney quality and do not seem driven simply by the degree to which Justice Blackmun agreed with the position the attorney was advocating.

of doctrine. In the Realist view, a judge may sometimes be willing to reach a less-preferred result in a particular case, or to incur additional costs of squaring a decision with legal authority, in order to establish or entrench a doctrine or principle that the judge favors or to modify one that the judge dislikes.

The most famous example of this sort of behavior from U.S. legal history is probably the Supreme Court's decision in *Marbury v. Madison* (5 U.S. 137 [1803]), in which Chief Justice John Marshall reached a decision that favored his political opponents, but in the process wrote an opinion entrenching the doctrine of judicial review — which Marshall viewed as more important than the outcome of the case at hand.[9] Such behavior, though perhaps not common, appears to take place in other, less dramatic contexts as well. For example, a judge may occasionally defer to the decision of a regulatory agency that the judge dislikes in order to strengthen the presumption of deference to agency interpretations, or a judge might deny standing (the right to bring a lawsuit) to a plaintiff with whom the judge sympathizes, in order to maintain strict adherence to a standing doctrine that the judge believes will be desirable in the majority of cases (Ho and Ross, forthcoming). Actions in support of desired legal doctrines, rather than desired case outcomes, are likely to be more pronounced for judges on higher courts, who can reasonably expect to have a significant influence on doctrinal development, than for lower court judges, who are likely to see their marginal contribution to doctrinal development as trivial.

Some recent formal models of judicial decision making have taken up this Realist insight, considering both the interest of appellate judges in influencing future appellate policy outcomes (Rasmussen, 1994; Posner, 2008) and their interest in influencing the application of law by lower courts (Bueno de Mesquita and Stephenson, 2002; Lax, 2008). These models emphasize

[9] The specific dispute in *Marbury v. Madison* involved President John Adams' "midnight appointment" of federal judges and magistrates after Thomas Jefferson won the 1800 presidential election. Not all these new appointees received their commissions before Jefferson took office. One of these appointees (Marbury) sought a judicial order that the new Secretary of State (Madison) deliver his commission. The new Chief Justice Marshall's political sympathies likely lay with Marbury, but his opinion for the Supreme Court in *Marbury v. Madison* rejected Marbury's claim on the grounds that the statute on which he based that claim, the Judiciary Act of 1801, was unconstitutional. This was significant because Marshall favored a strong federal Supreme Court with the power of judicial review, which the Jeffersonians generally opposed. Justice Marshall gave the Jeffersonians a victory in the particular case — Marbury never got his commission — but did so in a way that secured a much more significant doctrinal victory for proponents of a strong Supreme Court.

that an appellate judge may face a trade-off between achieving that judge's most-preferred outcome in the current case and securing more favorable outcomes in future cases decided by other courts. This may increase the appellate judge's willingness to adhere to past precedent, both to maintain an equilibrium in which that judge's own rulings are respected (Rasmussen, 1994) and to communicate more effectively with lower courts (Bueno de Mesquita and Stephenson, 2002). The interest in controlling future decisions may also lead the appellate judge to endorse clear rules rather than discretionary standards, at least when monitoring lower court compliance is relatively more important (Lax, 2008). These lines of inquiry suggest a promising avenue for future research.

Conclusion

Economists have made great progress in understanding the incentives and behavior of actors who operate outside of traditional economic markets, including voters, legislators, and bureaucrats. The incentives and behavior of judges, however, remain largely opaque. The jurisprudential theories of the American Legal Realists suggest a nuanced account of judicial decision making that goes beyond the Formalist and Skeptical perspectives on judging. This Realist theory of adjudication is based on a belief that judges care about outcomes, but that legal doctrine also exerts an influence on legal decisions because judges feel the need to justify their conclusions in acceptable legal terms. Judges must therefore consider the relative costs and benefits of investing effort in following something other than the path of least (legal) resistance.

Taking the Realist perspective seriously opens up a variety of research possibilities. First, it would be useful to follow the lead of those researchers who have explored more sophisticated ways of classifying judicial decisions, in order to test empirically the Realists' core claim that there are underlying patterns of judicial decision making captured neither by formal doctrine nor by crude measures of ideology. Second, given that so much of the Realist account depends on the idea that judges experience different costs of writing legal opinions for different outcomes, researchers might seek to identify the sources of these costs. Third, the Realist perspective suggests a number of comparative hypotheses regarding the conditions under which law and legal argument are most (or least) likely to matter, as well as how judicial

behavior might change in response to changes in resource constraints, talent, or the external environment. The stale Formalism vs. Skepticism dichotomy obscures these and other questions, while the Realist perspective brings them to the fore.

• *I am grateful to John Coates, Josh Fischman, Barry Friedman, Dan Ho, Bert Huang, Louis Kaplow, Lewis Komhauser, Duncan Kennedy, Nicola Persico, Todd Rakoff Ben Sachs, Fred Schauer, Andrei Shleifer, Jed Shugerman, Mark Tushnet, Adrian Vermeule, and Alexander Volokh for helpful comments and conversations.*

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