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DOCTRINAL CATEGORIES, LEGAL REALISM,  
AND THE RULE OF LAW

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INTRODUCTION

The claim in vogue is that Legal Realism stands for “the insignificance of doctrine”<sup>1</sup> and its conceptualization as a “mere appearance[.]”<sup>2</sup> In particular, commentators associate Realism with a “nominalist impulse”<sup>3</sup> that minimizes the significance of doctrinal categories. Against this conventional wisdom stands the resilience of doctrinal analysis in general and, in particular, the continued role of doctrinal categories in legal practice and discourse, which

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<sup>1</sup> John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1643 (2012); *see also* John H. Langbein, *The Later History of Restitution* (arguing that Legal Realists understand doctrine as “a smokescreen for the policies, politics, values, social forces, or whatever, that really motivate the decisions. . . .”), in *RESTITUTION PAST, PRESENT AND FUTURE: ESSAYS IN HONOUR OF GARETH JONES* 57, 62 (W.R. Cornish et al. eds., 1998).

<sup>2</sup> Goldberg, *supra* note 1, at 1645.

<sup>3</sup> Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2128 (2012); *see also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 15-16 (1978) (describing Legal Realism as nominalism).

is puzzling given the substantial impact of Realism on legal education. This puzzle is the focus of our Symposium.

I argue that this puzzle is solved by discarding these conventional readings of Legal Realism and adopting, in their stead, a more accurate understanding of the realist legacy.<sup>4</sup> Charitably interpreted, Legal Realism stands for the conception of law as a going institution (or set of institutions) distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: power and reason, science and craft, and tradition and progress. This interpretation of Legal Realism, I contend, explains both why doctrinal categories (like other aspects of Doctrinalism) typify the daily life of the practice of law, *and* why they do not—and, neither can nor should—exhaust our understanding of law. Thus, rather than ignoring doctrine and doctrinal categories, Realism refines and delimits their proper functions and modes of helpful operation.

Realists argue that the availability of multiple potentially applicable doctrinal sources renders *pure* Doctrinalism impossible. Unlike many of its caricatures, true Legal Realism does not challenge the perceived stability of the doctrine or its categories at a given time and place. This stability, which rests on the convergence of lawyers' background understandings at a given time and place, is valuable for realists; it is crucial for complying with the rule of law by providing effective guidance to its addressees and constraining officials' ability to exercise unconstrained power.

This is why Realists find the law's use of categories, concepts, and rules not only unavoidable but also desirable, and, thus, why they reject nominalism. For Realists, doctrine is and should be part of the law. But because doctrine *qua* doctrine is indeterminate, Legal Realists insist that *some* legal actors—notably, legislators and appellate court judges—should *occasionally* use social developments and new cases as triggers for rethinking the doctrine's conventional understanding. That is, they should be used as opportunities to revisit a doctrine's normative viability and reexamine its categories' adequacy. This task of critical reflection is even more important for legal scholarship, a point I will address briefly in my concluding remarks.

Given this understanding of the law, it should not be surprising that Realists are not puzzled by the continued significance of doctrinal categories in legal discourse. Legal Realism definitively rejects the orthodox idea that doctrinal categories refine some eternal descriptive truths that transcend context and that doctrinal taxonomy aspires to produce a map of mutually

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<sup>4</sup> I developed this understanding in a recent book, on which this Article draws. See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY (2013).

exclusive categories. Rather, Realists insist that the main roles of doctrinal categories are to consolidate people's expectations and to express law's ideals with respect to distinct types of human interaction. Therefore, Realists reconstruct doctrinal taxonomy so as to incorporate their insights on the inherent dynamism of law and the important function of contextual normative analysis in the evolution of doctrinal categories. Recasting doctrinal categorization in these terms recognizes the dynamic dimension of the taxonomic enterprise. It also implies that doctrinal taxonomy should be sensitive to context and emphasizes the importance of relatively narrow doctrinal categories. Finally, a realist doctrinal taxonomy recognizes and accommodates substantial, although never overwhelming, overlaps among the various categories.

### I. THE REALIST CONCEPTION OF LAW

The starting point of the realist account of law is its critique of a purely doctrinalist understanding of law. Law, in the doctrinal understanding, is perceived as a comprehensive and rigorously structured science, which can generate determinate and internally valid right answers; it need not resort to any social goals or human values and is thus strictly independent of the social sciences and the humanities.<sup>5</sup> But equating law with doctrine is wrong, Realists argue, because the doctrine *qua* doctrine is radically indeterminate. Admittedly, as H.L.A. Hart claimed, the indeterminacy of discrete doctrinal sources is limited: the gap between language and reality does not mean that there are no easy cases for the application of a given legal rule.<sup>6</sup> Realism views legal doctrine as hopelessly indeterminate, although not because of the indeterminacy of discrete doctrinal sources. Rather, the indeterminacy of legal doctrine derives primarily from the multiplicity of doctrinal materials potentially applicable at each juncture in any given case.<sup>7</sup> Since legal norms are "in the habit of hunting in

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<sup>5</sup> See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9, 198-99 (1992) (describing the goal of doctrinalism to be creating doctrine that could "render one right answer to any legal question"); Paul D. Carrington, *Hail! Langdell!*, 20 *LAW & SOC. INQUIRY* 691, 707-08 (1995) (discussing the notion of law as "apolitical, value-free, [and] technocratic").

<sup>6</sup> See H. L. A. HART, *THE CONCEPT OF LAW* 123, 141-42, 144 (1961) (acknowledging that the generality of rules may lead to uncertainty in determining whether such rules apply in particular circumstances).

<sup>7</sup> See FELIX S. COHEN, *The Problems of Functional Jurisprudence*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 77, 83 (Lucy Kramer Cohen ed., 1960) ("Legal principles have a habit of running in pairs, a plaintiff principle and a defendant principle." (citation omitted)); KARL N. LLEWELLYN, *Some Realism about Realism* ("[T]he available authoritative premises . . . are at least two, and [] the two are mutually contradictory as applied to the case in hand."), in *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 42, 58 (1962); see also Andrew

pairs”<sup>8</sup>—because legal doctrine always offers at least “two buttons” between which a choice must be made—none of the doctrine’s answers to problems is preordained or inevitable.<sup>9</sup>

Thus, Karl Llewellyn claims that legal doctrines are patchworks of contradictory premises covered by “ill-disguised inconsistency,” because, in all of them, “a variety of strands, only partly consistent with one another, exist side by side.”<sup>10</sup> Any given legal doctrine—including the one guiding the lawyers’ interpretative activity (the canons of interpretation)<sup>11</sup>—suggests “at least two opposite tendencies” at every point.<sup>12</sup> For (almost) every case there are opposite doctrinal sources that need to be accommodated: a rule and a frequently vague exception, or a seemingly precise rule and a vague standard that is also potentially applicable (such as “good faith” or “reasonableness”). The availability of multiple doctrinal sources on any given legal question, all of which can be either contracted or expanded, results in profound and irreducible doctrinal indeterminacy.<sup>13</sup> Similarly, the idea of inevitable answers to legal questions is also untenable, because the elaboration of any legal concept can choose from a broad menu of possible alternatives.<sup>14</sup> The multitude of contemporary understandings regarding any

Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208 (1986) (“[T]here was always a cluster of rules relevant to the decision in any litigated case.”). To clarify, Realists do not deny that legal doctrine in itself rules out most options. They merely insist that there are always more than one option that can doctrinally apply.

<sup>8</sup> Walter Wheeler Cook, *The Paradoxes of Legal Science*, 38 YALE L.J. 405, 406 (1929) (book review).

<sup>9</sup> See FRED RODELL, *Woe Unto You, Lawyers!* 154 (1940) (“The Law is not by several long shots the certain and exact science as which it masquerades.”); see also JEROME FRANK, *LAW AND THE MODERN MIND* 138 (1935) (arguing that at least some judicial discretion is unavoidable); LLEWELLYN, *Some Realism about Realism*, *supra* note 7, at 70 (arguing for the existence of at least some uncertainties in the law); John Dewey, *Logical Method and Law* (discussing the problems of uncertainty of outcomes and legal doctrine), in *AMERICAN LEGAL REALISM* 185, 192 (William W. Fisher III et al. eds., 1993).

<sup>10</sup> KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 45 (Paul Gewirtz ed., Michael Alsandi trans., 1989) (1933); see also ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 15-22 (1983) (describing legal doctrines as involving conflicts and countervailing considerations).

<sup>11</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (detailing various canons of statutory construction which contradict one another).

<sup>12</sup> LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA*, *supra* note 10, at 51.

<sup>13</sup> See *id.* (arguing that there are at least two opposite methods of handling precedent in any given case).

<sup>14</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820-21, 827-29 (1935) (criticizing attempts of conceptual essentialism); see also HORWITZ, *supra* note 5, at 202 (“General propositions could not decide concrete cases because . . . there were multiple inferences to be made and thus multiple conclusions to be drawn.”).

given legal concept (such as property or contract), both within and outside any given jurisdiction, as well as the wealth of additional alternatives that legal history offers, defies the doctrinalist quest to find a single answer for any given legal issue.<sup>15</sup>

The realist claim about an inevitable gap between doctrinal materials and judicial outcomes evokes two major concerns. First, what can explain past judicial behavior and predict its future course? Second, and more significantly, how can law constrain judgments made by unelected judges? How, in other words, can the distinction between law and politics be maintained despite the collapse of law's autonomy in its doctrinalist rendition? The legitimacy prong of the realist challenge is particularly formidable because, as Legal Realists show, it is bolstered by the insidious tendency of legal Doctrinalism to obscure contestable value judgments made by judges (or other legal actors) and to entrench lawyers' claim to an impenetrable professionalism, improperly shielded from critique by nonlawyers.<sup>16</sup>

Legal Realists answer this challenge by advancing the view that law is a going institution (or set of institutions) distinguished by the difficult accommodation of the three constitutive yet irresolvable tensions mentioned above—the tensions between power and reason, science and craft, and tradition and progress.<sup>17</sup>

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<sup>15</sup> See, e.g., HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 221-24 (2004) (discussing the difficulties of using the concept of property to determine whether an unjust enrichment has occurred); HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* pt. one (2011) (rejecting the misleading dominant binarism in which property is either one monistic form, structured around Blackstone's (in)famous formula of sole and despotic dominion, or a formless bundle of rights, and conceptualizing property as an umbrella for a set of institutions bearing a mutual family resemblance).

<sup>16</sup> Fred Rodell lamented along these lines lawyers' success in making themselves "masters of their fellow men." Lawyers, he argued, capture excessive social power by preventing any "brand competition or product competition." They are able to gain this unjustified privileged position by creating and preserving (at times self-deceptively) a distinct language with a scientific appearance: the discourse of legal formalism. Rodell vividly presented this language as "a maze of confusing gestures and formalities," a hodgepodge of "long words and sonorous phrases" with "ambiguous or empty meanings" frequently "contradictory of each other." He further explained that lawyers are able to conceal the "emptiness" of doctrinal reasoning by their "sober pretense" that the doctrinal language—which is for nonlawyers "a foreign tongue"—is, in the main, an exact science." Legal Formalism is thus responsible for the unjustified privileged status of lawyers. *RODELL, supra* note 9, at 8, 10, 105, 107, 125, 127; see also RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 166 (1995) (critiquing the idea of legal autonomy); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 819-21, 841-43 (1987) (detailing the use of legal rhetoric and form to restrict access).

<sup>17</sup> Descendants of Legal Realism often focus on one aspect of the law (such as science or power) that enhances our understanding of law's characteristics but ignores the central insight of Legal Realism: that law can properly be understood only if we appreciate its most distinctive feature, the uneasy but inevitable accommodation of the three constitutive tensions.

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The realist conception of law finds room for both power and reason, although it recognizes the difficulties of their coexistence. The Realists' preoccupation with coercion is justified because, unlike other judgments, those prescribed by law's carriers can recruit the state's monopoly of power to back up their enforcement as well as institutional and discursive means that tend to downplay some dimensions of law's power. These built-in features of law—notably the institutional division of labor between “interpretation specialists” and the actual executors of their judgments, together with our tendency to “thingify” legal constructs and accord them an aura of correctness and acceptability—render the danger of obscuring law's coerciveness particularly troubling.<sup>18</sup> They justify the Realists' wariness of the trap created by the romanticization of law.

But Realists reject as equally reductive the mirror image of law, which portrays it as sheer power, interest, or politics.<sup>19</sup> They insist that law is also a forum of reason, and that reason imposes real—albeit elusive—constraints on the choices of legal decisionmakers, and thus on the subsequent implementation of state power.<sup>20</sup> Law is never only about interest or power politics; it is also an exercise in reason-giving.<sup>21</sup> Furthermore, because so much is at stake when reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful, and serious.<sup>22</sup> Law's coercive power

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<sup>18</sup> See OLIVER W. HOLMES, *Law in Science and Science in Law* (criticizing formalism because pretending to find determinate doctrinal answers to legal questions prevents an open inquiry of the normative desirability of alternative judicial decisions), in COLLECTED LEGAL PAPERS 210, 230, 232, 238-39 (1920); Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* note 14, at 811-12, 820-21, 827-29 (arguing that because lawyers tend to treat legal concepts as a non-modifiable part of our natural or ethical environment, they are “apt to forget the social forces which mold the law and the social ideals by which the law is to be judged”); Dewey, *supra* note 9, at 191, 193 (criticizing syllogistic reasoning which gives “an illusion of certitude” and unduly privileges the status quo). See generally ROBERT COVER, *Violence and the Word* (discussing the way law's division of institutional labor obscures the deep connection between violence and the law), in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow et al. eds., 1993).

<sup>19</sup> See K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1362-63 (1940) (discussing the process of normative generalization, which often frames issues or arguments in diametrically opposing terms).

<sup>20</sup> See *id.* at 1364-65 (explaining that the normative power of legal authorities depends on its “effective expression of the *recognized going order* of the [e]ntirety”).

<sup>21</sup> See *id.* at 1364-65, 1367-68 (explaining the importance of regularity in addition to authority).

<sup>22</sup> See *id.* at 1370 (discussing the requirement that legal analysis include “certain minimum matters of substance” to be accepted (emphasis omitted)).

can only be justified if it is properly grounded in human values.<sup>23</sup> Realists are thus impatient with attempts to equate normative reasoning with parochial interests or arbitrary power.<sup>24</sup> They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshaling the law for morally required social change.<sup>25</sup>

Yet, Realists are also wary of the idea that reason can displace interest, or that judges can set aside all influences except for the better argument. Because reasoning about law is reasoning about power and interest, the reasons given by law's carriers should always be treated with suspicion. This caution explains Realists' endorsement of value pluralism, as well as their understanding of law's quest for justification as a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences.<sup>26</sup>

Legal Realists do not pretend they have solved the mystery of reason or demonstrated how reason can survive in law's coercive environment. Nevertheless, their recognition that coerciveness and reason are doomed to coexist in any credible account of the law is significant. Making this tension an inherent characteristic of law requires rejecting reductionist theories employing an overly romantic or too cynical conception of law. This approach also forces us to be aware of the complex interaction between reason and power. It thereby seeks to accentuate the distinct responsibility incumbent on the reasoning of and about power, minimizing the corrupting potential of the self-interested pursuit of power, and the perpetuation of what could result as merely group preferences and interests.

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<sup>23</sup> See *id.* at 1371 (“[N]othing is *True Law* which is not Just . . .”).

<sup>24</sup> See *id.* at 1381-83 (discussing the importance of the power to persuade).

<sup>25</sup> See *id.* at 1387 (discussing the legal system as a forum of societal change); see also Thomas W. Bechtler, *American Legal Realism Reevaluated* (describing the law as a “means to ends”), in *LAW IN SOCIAL CONTEXT: LIBER AMICORUM HONOURING PROFESSOR LON L. FULLER* 3, 20-21 (Thomas W. Bechtler ed., 1977); Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 *COLUM. L. REV.* 799, 809 (1961) (“In realist perspective, choice, decision, and responsibility for decision are central elements for a philosophy of law.”); Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 *COLUM. L. REV.* 925, 955 (1931) (“It is the faith of empirical legal science that ideals of justice not related to human needs are not true ideals . . .”).

<sup>26</sup> See HOLMES, *The Path of the Law* (insisting that “[n]o concrete proposition is self-evident, no matter how ready we may be to accept it . . .”), in *COLLECTED LEGAL PAPERS*, *supra* note 18, at 167, 181; LLEWELLYN, *On the Good, the True, the Beautiful, in Law* (explaining the role of common law as constantly reexamining its precedents to reach the good), in *JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE*, *supra* note 7, at 167, 211-12; Hessel E. Yntema, *Jurisprudence on Parade*, 39 *MICH. L. REV.* 1154, 1169 (1941) (discussing justice as a theory focused on “the search for better law”).

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

Realists emphasize the importance of empirical inquiries, such as investigating the hidden regularities of legal doctrine in order to restore law's predictability or studying the practical consequences of law in order to better guide its evolution and protect its legitimacy.<sup>27</sup> But the prototypical Realists presented in this Article reject any pretense that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable not only when evaluating empirical research, but also when simply choosing the facts to be investigated. Moreover, they are always careful not to accept existing normative preferences uncritically. Legal Realists insist that neither science nor ethics that ignores scientific data offers a valid test of law's merits. Legal analysis needs both empirical data and normative judgments.<sup>28</sup>

Because law affects people's lives dramatically, social facts and human values must always inform the law's evolution, but the realist conception of law also highlights that legal reasoning is a distinct mode of argumentation and analysis, different from other forms of practical reasoning. Hence, Realists pay attention to the distinctive institutional characteristics of law and study their potential virtues while remaining aware of their possible abuses. The procedural characteristics of the adversary process, as well as

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<sup>27</sup> See generally, e.g., JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* chs. 2 & 4 (1995) (exploring efforts made by American legal scholars to bring empirical science into the study and teaching of law); Joseph W. Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 18 n.17 (1912) (arguing that past cases are used as "experimental guides to prognostications of future decisions").

<sup>28</sup> See COHEN, *Transcendental Nonsense and the Functional Approach* (arguing that even "[l]egal description is blind without the guiding light of a theory of values"), in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN*, *supra* note 7, at 33, 76; Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 45 (1934) ("[T]he problems of the law have . . . an aspect of value, which involves a moral judgment imposed upon the social facts."); William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 151-53 (1993) (discussing Karl Llewellyn's skepticism about the project of pure empiricism).



the professional norms that bind judicial opinions—notably, the requirement of a universalizable justification—provide a unique social setting for adjudication. These characteristics establish the accountability of law’s carriers to law’s subjects and encourage judges to develop what Felix Cohen terms “a many-perspectived view of the world,” or a “synoptic vision” that “can relieve us of the endless anarchy of one-eyed vision.”<sup>29</sup>

Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and actual problems of contemporary life. This contextual feature of legal judgments facilitates lawyers’ unique ability to capture the subtleties of various types of cases and to adjust the legal treatment of them to the distinct characteristics of each case.<sup>30</sup>

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The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, which leads to the third constitutive tension identified. Law’s inherent dynamism implies that the legal positivist attempt to understand law by sheer reference to verifiable facts—such as the authoritative commands of a political superior or the rules identified by a rule of recognition<sup>31</sup>—is hopeless. Under the realist conception, law is “a going institution” or, in John Dewey’s words, “a social process, not something that can be said to be done or happen at a certain date.”<sup>32</sup> As an evolving institution, law is designed to be an “endless process of testing and

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<sup>29</sup> Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 242 (1950).

<sup>30</sup> See Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 73-74 (1928) (celebrating the common law’s use of narrow categories, which help to produce “the discrimination necessary for intimacy of treatment,” hold lawyers close to “the actual transactions before them,” and therefore encourage them to shape law “close and contemporary” to the human problems that those lawyers deal with); see also, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453, 457 (1930) (arguing that wholesale legal categories are “too big to handle” since they encompass “too many heterogeneous items,” and recommending “[t]he making of smaller categories—which may either be sub-groupings inside the received categories, or may cut across them”).

<sup>31</sup> See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 14 (David Campbell & Philip Thomas ed., 1998) (1832) (discussing concepts of command, duty, and sanction); HART, *supra* note 6, at 107 (describing the rule of recognition); see also JOSEPH RAZ, *Legal Positivism and the Sources of Law* (explaining the “social thesis”), in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37, 41-45 (1979).

<sup>32</sup> John Dewey, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 73, 77 (1941).

retesting.”<sup>33</sup> Thus understood, law is a human laboratory constantly seeking improvement.<sup>34</sup>

However, this quest for “justice and adjustment” in the legal discourse is constrained by legal tradition. The law’s past serves as the starting point for contemporary analysis because it is an anchor of intelligibility and predictability. Legal Realists begin with the existing doctrinal landscape because it may (and often does) incorporate valuable—although implicit and sometimes imperfectly executed—normative choices. In other words, because existing doctrine ideally combines both scientific and normative insights within a framework of legal professionalism premised on institutional constraints and practical wisdom, it deserves respect.

Although Legal Realists do not always defer to every existing rule, they do obey Llewellyn’s “Law of Fitness and Flavor,” whereby each outcome and rule “fit[s] with the feel” of the legal doctrine as a whole, and “go[es] with the grain rather than across or against it.”<sup>35</sup> Realists celebrate common law’s “Grand Style,” described by Llewellyn as “a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need,” mediating between “the seeming commands of the authorities and the felt demands of justice.”<sup>36</sup>

## II. THE ROLE OF DOCTRINE AND THE RULE OF LAW

Where, if at all, does doctrine fit into this scheme? The realist critique of Doctrinalism is too often misinterpreted to imply that judges exercise unfettered discretion to reach results based on their personal predilections, which they then rationalize with an appropriate doctrinal basis.<sup>37</sup> Brian

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<sup>33</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

<sup>34</sup> See Dewey, *My Philosophy of Law*, *supra* note 32, at 77 (proposing the standard for evaluating law as being a function of what goes on socially); see also Karl N. Llewellyn, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS*, *supra* note 32, at 183, 183-84 (describing the law as a “going institution”).

<sup>35</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 191, 222 (1960).

<sup>36</sup> *Id.* at 37-38; see also LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA*, *supra* note 10, at 77 (claiming that tradition-determined lawyers can solve new cases in ways “much in harmony with those of other lawyers,” as they are all trained to bring the solution to new cases into harmony with “the essence and spirit of existing law”); KARL N. LLEWELLYN, *Some Realism About Realism*, *supra* note 7, at 357, 361-62 (discussing the common law as providing limitations on deviations from existing rules); Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, *supra* note 19, at 1385 (arguing that law is typified by a persistent and “strongly present [] urge” to “make good”).

<sup>37</sup> See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267, 268 (1997) (“[I]t is . . . quite misleading to think of Realism as committed to the claim that judges exercise ‘unfettered’ discretion or that they make choices based on ‘personal’ values and tastes.”).

Leiter describes this view as the “Frankification” of Legal Realism and correctly charges its subscribers with the fallacy of viewing Jerome Frank—an extreme proponent of the so-called “Idiosyncrasy Wing” of Legal Realism—as Realism’s typical representative.<sup>38</sup> But, as Leiter notes, Frank is a minority voice.<sup>39</sup>

Indeed, mainstream Legal Realists reject Frank’s subjectivism.<sup>40</sup> Thus, Cohen maintains that because law is a social institution, legal results are “[l]arge-scale social facts” that “cannot be explained in terms of the atomic idiosyncrasies and personal prejudices of individuals.”<sup>41</sup> According to Cohen, the “hunch’ theory of law” magnifies “the personal and accidental factors in judicial behavior” and ignores the “predictable uniformity in the behavior of courts.”<sup>42</sup> Cohen further claims that “[l]aw is not a mass of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls.”<sup>43</sup> Genuinely peculiar decisions are therefore bound to erode and be washed away, forgotten in a system that regularly and consistently provides appeals, rehearings, impeachments, and legislation.<sup>44</sup> While Legal Realists do not deny that the personalities of individual judges may affect outcomes in particular cases,<sup>45</sup> most believe that “[t]he eccentricities of judges balance

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<sup>38</sup> See *id.* at 269, 279, 283 (defining the “Idiosyncrasy Wing” as the claim “that judges make [] choice[s] in light of personal or idiosyncratic tastes and values”). But see Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 775-77 (1992) (criticizing the “very different images” presented by Jerome Frank and Karl Llewellyn and reconciling their views on jurisprudence).

<sup>39</sup> Leiter, *supra* note 37, at 269, 283-84.

<sup>40</sup> Frank himself never renounced his irrationalist view, encapsulated in the reference to “the judicial hunch.” He merely believed that this hunch could become more benevolent. See ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW* 49-50 (1985) (espousing the theory that judges work back from conclusions to principles to preserve the myth that law is a consistent body of principles); Bruce A. Ackerman, *Jerome Frank’s Law and the Modern Mind*, 103 DAEDALUS 119, 122 (1974) (book review) (describing Frank’s claim that lawyers undertake “an elaborate course of rationalization to transform the law into a father-substitute which could give a clear and authoritative answer to all the problems of social existence”).

<sup>41</sup> Cohen, *Field Theory and Judicial Logic*, *supra* note 29, at 250.

<sup>42</sup> Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* note 14, at 843.

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* (“The decision that is ‘peculiar’ suffers erosion—unless it represents the first salient manifestation of a new social force, in which case it soon ceases to be peculiar.”).

<sup>45</sup> For a poignant example—an exception that proves the rule—see *Republic of Bolivia v. Philip Morris*, 39 F. Supp. 2d 1008, 1009-10 (S.D. Tex. 1999) (using colorful language, such as “the Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel,” and “[t]hrough only here by removal, this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparalleled fairness and alacrity, apparently in common discussion even on the mountain peaks of

one another,"<sup>46</sup> and that most legal decisions follow essentially predictable patterns.<sup>47</sup>

None of this undermines the realist claim that a gap will necessarily exist between doctrinal rules and judicial outcomes. Law cannot be fully understood as a set of concepts and rules, able to transcend the legal tradition in which it is situated and independent of any extradoctrinal understandings of the legal community.<sup>48</sup> Mainstream Legal Realism neither maintains that the gap between doctrine and law is filled with subjectivity nor denies the existence of legal reality. Instead, it aligns itself with Benjamin Cardozo's critique of "the jurists who seem to hold that in reality there is no law except the decisions of the courts."<sup>49</sup> Cardozo argues that this position is fallacious because it denies the "present" of law: "Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires."<sup>50</sup> This denial of an existing legal reality is rejected because our daily experience disproves it; "[l]aw and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition."<sup>51</sup>

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Unlike their image in some caricatures of Legal Realism, Realists do not challenge the felt predictability of the doctrine at a given time and place. While persuasively insisting that legal doctrine *qua* doctrine cannot constrain decisionmakers, they recognize that the convergence of lawyers'

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Bolivia!" in a decision on a motion to transfer venue, adding that given that "the judge of this Court simply loves cigars, the Plaintiff can be expected to suffer neither harm nor prejudice by a transfer to Washington, D.C.").

<sup>46</sup> CARDOZO, *supra* note 33, at 177; *see also* ANDREW L. KAUFMAN, CARDOZO 457-58 (1998) (describing Cardozo's belief that most neorealists do not believe in pure "ad hoc judicial subjectivism").

<sup>47</sup> *See* Leiter, *supra* note 37, at 283-84 (generalizing the works of Llewellyn, Moore, Oliphant, Cohen, and Radin as falling into the sociological wing of Realism); Llewellyn, *My Philosophy of Law*, *supra* note 32, at 196-97 (describing how legal results evolve and eventually form patterns, allowing citizens to understand and respect the rule of law).

<sup>48</sup> *Cf.* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 181-82 (1993) (arguing that results are not necessarily "required" by the wording of a rule, because such an interpretative method may lead to absurd results or the wording may be ambiguous).

<sup>49</sup> CARDOZO, *supra* note 33, at 124.

<sup>50</sup> *Id.* at 126.

<sup>51</sup> *Id.* at 127; *see also* RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 162-63 (1997) (explaining that Cardozo's agreement in Realism was its loosening of the rigidity to precedent and its recognition that principles needed to be adjusted to fit the "social consciousness").

background understandings at a given time and place generates a significant measure of stability.<sup>52</sup> It is this stability, I argue, that explains “the ubiquitous practice . . . of accusing judges who have reached disagreeable results in appellate cases of having made technical legal errors or ‘mistakes’ rather than of having the wrong substantive views.”<sup>53</sup>

Realists, for example, have demonstrated that the various methods of distinguishing between ratio decidendi (holding) and obiter dictum (dicta) allow significant leeway.<sup>54</sup> Yet they do not deny that the practice of precedent is robust enough so that different lawyers tend to employ similar techniques for the ratio decidendi–obiter dictum distinction.<sup>55</sup> Similarly, the realist claim about the indeterminacy of canons of interpretation is not threatened by the fact that the practice of law provides insiders with determinate answers to doctrinal interpretive quandaries.<sup>56</sup> Instead, refining these sources of predictability vindicates the realist claim that the real work of determining the content of the legal doctrine is accomplished through these

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<sup>52</sup> See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 32-34 (2001) (examining the “inevitable gap” that exists between rules and background morality and admonishing those contemporary jurisprudential schools of thought that attempt to reconcile them).

<sup>53</sup> Frederick Schauer, *Legal Realism Untamed*, 91 *TEX. L. REV.* 749, 762 (2013).

<sup>54</sup> As Llewellyn explains, in distinguishing between ratio decidendi and obiter dictum, judges can rely either on the rule stated by the previous court or on the legally relevant facts (or on both). Furthermore, even if we focus on only one method, significant indeterminacy still remains. Thus, respecting stated reasons or articulated rules, Llewellyn refers to the difficulty of accumulative or alternative reasons that generates “an intermediate type of authority”: in such “multi-point decision[s],” each leg “is much more subject to challenge than it would be if the decision stood on it alone.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 44 (1930). Furthermore, even with regard to each reason given by the court for its decision, some ambiguity remains. First, judges tend to repeat their reasons and the rules they state, but “the repetition seldom is exact.” *Id.* at 45. Second, opinions are always read contextually, that is “with primary reference to the particular dispute,” which requires a difficult distinction between some arguments or illustrations that must be confined to the case at hand and others that enjoy a much more general applicability. *Id.* at 39. Similar indeterminacy faces the method of figuring out the holding of a case by focusing on the facts of the actual dispute before the court. Obviously, not each and every fact stated by the court is legally significant: some are discarded “as of no interest whatsoever . . . others as dramatic but as legal nothings.” *Id.* at 46. Moreover, the relevant facts are not treated as such, but are rather classified in categories that are deemed significant. But neither the selection of the pertinent facts nor their classification into categories is a self-evident or logically necessary undertaking. In all these ways, judges have significant discretion as to the question of how wide, or how narrow, the ratio decidendi of the case should be, that is, what should its scope be vis-à-vis other rules. See generally LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA*, *supra* note 10, at 77-91.

<sup>55</sup> See Kent Greenawalt, *Reflections on Holding and Dictum*, 39 *J. LEGAL EDUC.* 431, 433-34 (1989) (analyzing the various ways of distinguishing between the categories of holding and dictum).

<sup>56</sup> But see Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” *One to Seven*, 50 *N.Y.L. SCH. L. REV.* 919, 920 (2005–2006) (arguing that Llewellyn’s tenets are “devastatingly inconsistent”).

background understandings rather than the doctrine itself.<sup>57</sup> It also shows that Legal Realism does not threaten the rule of law, but rather merely insists that law's stability and predictability do not inhere in doctrine but in the broader social practice of law.<sup>58</sup>

Legal Realism shifts the focus from black letter law to the prevalent understandings of the legal community regarding the doctrine—the implicit sense of obviousness insiders share as per “on-the-wall” interpretations of the doctrine,<sup>59</sup> which is an important feature of the legal craft. The realist claim of radical doctrinal indeterminacy implies a wide breadth of *potential* judicial choice, but does not mean that judges use, should use, or should even consider using this menu of options in every case. To the contrary, case-by-case adjudication inhibits law's ability to provide effective guidance, thereby infringing on people's ability to form reasonable expectations and plan for the future.<sup>60</sup>

Such ad hocism also implies that adjudicators face no restricting framework of public norms, thereby paving the way for judges' “preferences, their own ideology, or their own individual sense of right and wrong” to determine the outcomes of cases.<sup>61</sup> Therefore, Legal Realists who, as noted, are aware

<sup>57</sup> See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1216-17, (2015) (describing how the perceived clarity of the constitutional text is partially constructed by various extratextual methods—the purpose of constitutional provisions, structural inferences, understandings of the national ethos, consequentialist considerations, customary practices, and precedent—that are commonly presented as relevant only after a text is determined to be vague or ambiguous).

<sup>58</sup> See Frederick Schauer, *Editor's Introduction* (explaining why Llewellyn's theory of rules does not undermine law's predictability and stability), to KARL N. LLEWELLYN, *THE THEORY OF RULES* 1, 5, 7-8, 18, 20-24 (Frederick Schauer ed., 2011); see also Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 803 (1989) (“[W]e [should not] hastily conclude that because there is no such thing as traditional formal realizability, everything is indeterminate or up for grabs.”).

<sup>59</sup> See, e.g., Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 711-25 (2005) (arguing that “what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is ‘off-the-wall’ change over time in response to changing social, political, and historical conditions”); see also P. S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 5 (1985) (discussing how statutes are often passed in response to changes in the common law, which in itself contributes to further changes in common law); Gerald J. Postema, *Law's System: The Necessity of System in Common Law*, 2014 N.Z. L. REV. 69, 80 (arguing that the introduction of new legal material should be viewed as a “disturbance of the equilibrium state of a dynamic system,” rather than merely “adding an item to a list, or a stone to a pile”).

<sup>60</sup> See JOSEPH RAZ, *The Rule of Law and its Virtue* (describing the “evils of uncertainty” and arguing that law should be relatively stable), in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, *supra* note 31, at 210, 213, 220, 222 (1979).

<sup>61</sup> Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008); see also Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?* (“[P]erhaps the most basic and elemental consequence of arbitrary threats to one's liberty . . . [is] the potentially

of the fallibility of law bearers and are also committed to the use of law for the furtherance of human values distance themselves from the nominalist approach of open-ended discretionary decisionmaking. Legal Realism neither endorses nor implies the need to focus on the equities of the particular case or the particular parties, but sanctions the relative stability of the social practice of law. It does so by using the prevalent understandings of the legal community regarding doctrine, which serve as an invaluable means for respecting and furthering the two aspects of the rule of law: the requirement that law guide its subjects' behavior, and the prescription that law not confer on officials the right to exercise unconstrained power.

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This appreciation of law's stability explains Llewellyn's endorsement of the common law tradition. Although adjudication is necessarily creative, he claimed that cases are decided with "a desire to move in accordance with the material as well as within it . . . to reveal the latent rather than to impose new form, much less to obtrude an outside will."<sup>62</sup> The case law system imposes a "demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration."<sup>63</sup> Legal Realists begin with the existing doctrinal landscape that often reflects valuable normative choices, even if implicit and sometimes imperfectly executed. Nonetheless, Legal Realists recognize that the existing doctrinal environment always leaves interpretive leeway.<sup>64</sup>

They further insist that while law's craft-based stability meets the rule of law concerns, law's legitimacy cannot and should not rely solely on the legal craft. This is why Realists conceptualize law's potential dynamism, as long as it is properly cautious and not too frequent, as the anchor of our perennial quest for "better and best law" and, therefore, our judges' "duty to justice and adjustment," thus implying an "on-going production and improvement

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devastating impositions of power unrestrained by the need to give consideration to anything but the will and whim of the power-holder."), in *GETTING TO THE RULE OF LAW* 64, 79-80 (James E. Fleming ed., 2011).

<sup>62</sup> LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS*, *supra* note 35, at 222.

<sup>63</sup> *Id.* at 223.

<sup>64</sup> See Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, *supra* note 19, at 1385 (arguing that "in no skillfully built legal structure is the factor of movement [] and of need for movement . . . disregarded").

of rules.”<sup>65</sup> Whereas the daily life of the law relies on lawyers’ conventional understandings of the doctrine (and thus ensuring compliance with the rule of law), Realists underscore the contingency of these understandings and their potential transformation. Their conception of law invites challenges to the doctrine’s “on-the-wall” interpretations and thus forces law’s carriers to intermittently attempt to justify what they would otherwise tend to naturalize.

As Llewellyn implies, adjudication typically manifests these developments piecemeal, without explicit recourse to nondoctrinal features of law, such as empirical facts and normative judgments that often, as Realists insist, rely on the insights of other disciplines. But although Realists—like many legal theorists—pay particular attention to adjudication, they opt for a “style of jurisprudence” that goes beyond adjudication to consider many other arenas “replete with lawmaking, law applying, law interpreting, and law developing functions.”<sup>66</sup> Integrating power into their conception of law also pushes Realists to be wary of implying that the pace of legal change should always be restrained or that legal normativity is exhausted by the subset of moral principles embedded in past legal, political, and particularly adjudicative practices.<sup>67</sup> Given that the sources of law’s stability cannot be enshrined in black-letter law, even adjudication need not *necessarily* be invariably dominated by doctrinalist discourse.<sup>68</sup>

Thus, Roscoe Pound observed a fairly predictable pattern in the development of legal discourse, which alternates between periods of fixity and periods of innovation and change. In former times, “[p]erfection of scientific system and exposition tends to cut off individual initiative . . . to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another.”<sup>69</sup> These are periods “in which science degenerates, in which system decays into technicality, [and] in which a scientific jurisprudence becomes a mechanical jurisprudence” so that “artificiality in law” is regarded as an end and law’s consequences and purposes are repressed.<sup>70</sup> Then, at some point—which we

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<sup>65</sup> LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, *supra* note 35, at 36, 38, 190.

<sup>66</sup> Roy Kreitner, *Biographing Realist Jurisprudence*, 35 LAW & SOC. INQUIRY 765, 780 (2010).

<sup>67</sup> Cf. ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 26-27 (2011) (summarizing the scope of Dworkinian principles and their relation to the law).

<sup>68</sup> See, for example, Edward Rock’s account of the Delaware corporate adjudication demonstrates. Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019 (2015).

<sup>69</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908).

<sup>70</sup> *Id.* at 607-08.



might (metaphorically) call a “paradigm shift”<sup>71</sup>—the discontent with the distance between doctrinal discourse (lawyers’ “normal science”) and law’s ends becomes sufficiently high so as to break the inertia of such mechanical jurisprudence and replace it with “a jurisprudence of ends.”<sup>72</sup> And again, the sequence continues with its own structural circularity: when a jurisprudence of ends becomes mature and stable, it becomes canonized and locked in our conventional understandings of conceptions and rules, effectively becoming our new doctrine, and “the opportunity for constructive work is largely eliminated.”<sup>73</sup>

### III. DOCTRINAL CATEGORIES, REALISTICALLY RECONSTRUCTED

The same a priori—but never unqualified, and at times even suspicious—respect typical of the realist attitude towards the legal community’s dominant understandings of doctrine also characterizes the way Realists perceive doctrinal categories, again explaining both categories’ persistent significance in legal discourse and their amenability to change. Clarifying the role of doctrinal categories along these lines also sheds light on some of their typical features, thus refining the distinctive realist approach to legal categorization.

Legal Realism acknowledges the truism that reasoning in general, and legal reasoning in particular, must rely on certain concepts and categories that necessarily involve some classificatory work, and requires some organization of the body of legal rules to make them accessible to legal actors.<sup>74</sup> But Realists resist the traditional (i.e., doctrinalist) approach to categorization that views the taxonomic venture as distinct from law’s “organizational claims,”<sup>75</sup> so that doctrinal rules merely describe the legal landscape. They reject, in other words, the traditional analogy of doctrinal classification to cartog-

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<sup>71</sup> My reference here to “paradigm shift” and later to “normal science” evokes, of course, Thomas Kuhn’s distinction in THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

<sup>72</sup> Pound, *supra* note 69, at 611-12.

<sup>73</sup> *Id.* at 608. See generally EDWARD B. MCLEAN, *LAW AND CIVILIZATION: THE LEGAL THOUGHT OF ROSCOE POUND* ch. 2 (1992) (discussing Pound’s thoughts on legal history).

<sup>74</sup> See, e.g., Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 710 (1989) (“[A]ttempting to proceed without paradigms represents a denial of that which cannot be denied.”); Emily Sherwin, *Legal Taxonomy*, 15 LEGAL THEORY 25, 40 (2009) (“A comprehensive classification of legal rules helps legal actors locate pertinent rules.”); Peter Jaffey, *Classification and Unjust Enrichment*, 67 MOD. L. REV. 1012, 1013 (2004) (book review) (explaining that even when no applicable rule dictates an outcome in a particular case, judges often make decisions by analogizing the facts of a case to a similar doctrinal principle).

<sup>75</sup> See Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 249-56 (2000) (arguing that understanding law’s “organizational claims,” which includes searching for “an intelligible order within them,” is essential).

raphy.<sup>76</sup> Whereas cartography implies “a fixed and immutable topography ‘out there,’ waiting to be accurately charted,” law can (and at times should) change, so that “no map is ever likely to be produced that can, at one and the same time, explain the past and act as a means for predicting the future.”<sup>77</sup>

Thus, Llewellyn invites lawyers to rethink law’s received categories: while legal classification cannot be eliminated, “to classify is to disturb” and hence to “obscure some of the data under observation and give fictitious value to others.”<sup>78</sup> For this reason, he adds that classifications “can be excused only insofar as [they are] necessary to the accomplish[ment] of a purpose,” and that because purposes may change, “the available traditional categories” should be periodically reexamined.<sup>79</sup> Reexamining doctrinal categorization is also important because it may help expose, rethink, and hopefully remedy otherwise hidden and sometimes unjustified choices of inclusion and exclusion.<sup>80</sup> A charitable reading of Cohen’s famous critique of the “thingification” of legal concepts warns, along these lines, against the insidious tendency of contingent doctrinal categories to be made permanent as if they somehow transcend human choice and preclude modification or replacement, if necessary.<sup>81</sup>

Appreciating that our doctrinal categories do not merely frame our legal knowledge,<sup>82</sup> but necessarily participate in our construction of it and thus in

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<sup>76</sup> See, e.g., Peter Birks, *Introduction* (discussing proposals for law schools to abolish legal categories), in *ENGLISH PRIVATE LAW* xxxv, xxxv-vi (Peter Birks ed., 2000).

<sup>77</sup> Geoffrey Samuel, *Can the Common Law be Mapped?*, 55 U. TORONTO L.J. 271, 290, 295 (2005); see also STEPHEN WADDAMS, *DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING* 226 (2003) (“Cartography assumes the comparative stability of the geographical features to be mapped, but law is constantly changing . . .”); Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 942-43 (1924) (discussing various theories of the purposes of classifications).

<sup>78</sup> Llewellyn, *A Realistic Jurisprudence—The Next Step*, *supra* note 30, at 27.

<sup>79</sup> *Id.*

<sup>80</sup> See LLEWELLYN, *THE THEORY OF RULES*, *supra* note 58, at 95 (describing how classifications “both shape and limit our rules”).

<sup>81</sup> See Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* note 14, at 811-12, 814-18, 820-21, 840 (criticizing the logic of various court opinions and principles that invoke “transcendental nonsense”). As the text implies, this reading does not dispute the importance of legal concepts in facilitating law’s systematicity, namely, in “keep[ing] track of the significance of legal changes in a complex patchwork of doctrine.” Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16, 52 (2000).

<sup>82</sup> *Contra* Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 W. AUSTL. L. REV. 1, 9 (1996) (discussing how one separation between law and equity emanates into the proposition that all rights are either legal or equitable).

the ongoing evolution of law<sup>83</sup> is crucial to understanding the realist approach to legal categorization. The realist approach indeed begins, as Llewellyn prescribed, with the functions of doctrinal categories. In accordance with its insistence that law in both substance and form should serve life, Legal Realism appreciates the purposes served by doctrinal categories, which allow law to consolidate expectations and also express the normative ideals underlying its regulation of core types of human relationships. Each doctrinal category targets, in its own way and with respect to some intended realm of application, a set of human values that can be served by its constitutive rules. It thus enables people to predict the consequences of future contingencies and plan and structure their lives accordingly, and it performs a significant cultural function by expressing law's ideals for the pertinent type of human interaction.<sup>84</sup>

Both roles—consolidating expectations and expressing law's ideals—imply that law can recognize a necessarily limited number of doctrinal categories and, more importantly, that they should be relatively stable. Neither function, however, implies stagnation. Indeed, the appeal of prevailing doctrinal categories is not necessarily the end of the legal analysis, because invoking them allows some modifications to their content and boundaries. Respecting the values served by the stability of our conventional legal categorization does imply that these moments of “jurisprudence of ends” should not be too frequent and that the potential detrimental implications of destabilizing such categorization should always be taken into account. But certain legal actors should, in these more reflective moments, follow Llewellyn's injunction and refuse to accept the existing doctrinal categories as a given. They should take the values underlying these categories—and not only their conventional content—as intrinsic to their analysis, critically examining the continued validity and desirability of these values, their responsiveness to

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<sup>83</sup> See Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate*, 24 OXFORD J. LEGAL STUD. 335, 362 (2004) (“[S]chemes and paradigms are not ‘triggered’ by events but are imposed on them in order to elicit information.”); see also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 8 (1990) (positing that doctrinal categorization should be open-ended and determined through interaction rather than bounded); WADDAMS, *supra* note 77, at 2 (“A desire for precision and order naturally leads to a search for clear categories and good maps, but such a search, if pressed too far, may be self-defeating. . . .”); Feinman, *supra* note 74, at 663 (noting that a “classification problem” has unfolded along the tort–contract boundary); Pound, *supra* note 77, at 937–38 (demonstrating the inapplicability of biological classification to the practice of law); Samuel, *supra* note 77, at 286 (“[J]udges do not construct factual statements to conform to some pre-existing map but use the ‘map’—the structure—to help construct the factual situations themselves.”).

<sup>84</sup> See, e.g., DAGAN, *PROPERTY: VALUES AND INSTITUTIONS*, *supra* note 15, at 29–30 (describing the importance of analyzing values to assess the desirability of doctrinal rules in property law).

the social context in which they are situated, and the effectiveness of the rules constituting the pertinent doctrinal category for promoting its contextually examined normative goals.<sup>85</sup> Here, we must rely on the vague notion of “promoting” to capture the complex ways in which law can facilitate human values. This normative analysis recommended by Legal Realism seeks to capture law’s material effect on people’s behavior, its expressive and constitutive impact, and the intricate interdependence of the two effects.<sup>86</sup>

The realist approach to doctrinal categories is thus an exercise in legal optimism. At times, this approach helps to fill doctrinal gaps by prescribing new rules that bolster and vindicate these goals further. At other times, it points out “blemishes” in the existing categories, rules that undermine the most illuminating and defensible account of such a doctrinal category that should be reformed so that the law may live up to its own ideals.<sup>87</sup> This reformist potential may yield different types of legal reforms. In some cases, the reform may be quite radical: the abolition of a category, an overall reconstruction of its content, or a significant change in the way it is subdivided. In others, more moderate options are in order, such as restating the doctrine pertaining to a given category in a way that brings its rules closer to its underlying values and, in the process, removing indefensible rules or adjusting the category to the various social contexts in which it may be situated.<sup>88</sup>

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The constructive function and potential dynamism of the realist understanding of doctrinal categorization underlie two further characteristics of the realist taxonomic blueprint, which are again antithetic to its doctrinalist counterpart. Doctrinalists regard categories as necessarily autonomous and mutually exclusive, so that “a classified answer to a question must use categories which are perfectly distinct from one another.”<sup>89</sup> Because the project of legal categorization for them is analogous to the project of classifying natural features of our world, they see the idea of some

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<sup>85</sup> Cf. Ernest J. Weinrib, *The Juridical Classification of Obligations* (recognizing that doctrinal rules may sometimes be modified, even though the author is not a Legal Realist), in *THE CLASSIFICATION OF OBLIGATIONS* 37, 37-38, 55 (Peter Birks ed., 1997).

<sup>86</sup> See DAGAN, *PROPERTY: VALUES AND INSTITUTIONS*, *supra* note 15, ch. 6 (discussing the interdependence of property law’s incentives and its expressive effects).

<sup>87</sup> Cf. DWORKIN, *supra* note 3, at 118-23 (describing a hypothetical situation in which a modification of doctrine is desirable).

<sup>88</sup> See DAGAN, *PROPERTY: VALUES AND INSTITUTIONS*, *supra* note 15, at 31 (noting that this approach to reformulating doctrinal categories follows the common law, which mediates between “the seeming commands of the authorities and the felt demands of justice” (citation omitted)).

<sup>89</sup> Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 *TEX. L. REV.* 1767, 1794 (2001).

overlaps between categories as misguided.<sup>90</sup> For the doctrinalist, the test of success for a legal taxonomy is precisely its success in generating a scheme where different categories, governed by differing principles,<sup>91</sup> “stand in splendid isolation from one another in legal discourse.”<sup>92</sup> The ideal taxonomy is one that allows autonomy between categories and safeguards the boundaries between distinct doctrinal fields.<sup>93</sup>

By contrast, Realists are comfortable with some degree of overlap between categories. Realists are not alarmed or embarrassed by overlaps because they do not submit to the doctrinalist claim that overlaps are conceptually impossible. They highlight the confusion resulting from the assumption of this claim, namely that the endeavor of legal classifiers is exogenous to the object’s character. They insist that, once this presupposition is set aside, complete autonomy becomes a rather extreme condition and should not, in any event, be the test of taxonomical success.<sup>94</sup>

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<sup>90</sup> See *id.* at 1781 (arguing that categories of classification are exclusive of one another).

<sup>91</sup> See Weinrib, *supra* note 85, at 39 (discussing the bases underlying legal classifications); cf. Steve Hedley, *Unjust Enrichment: A Middle Course?*, 2 OXFORD U. COMMONWEALTH L.J. 181, 194-95 (2002) (summarizing different theories underlying the idea of unjust enrichment); Peter Jaffey, *Two Theories of Unjust Enrichment* (arguing that restitution is not a coherent category because different unjust enrichment claims are premised upon two different theories), in UNDERSTANDING UNJUST ENRICHMENT 139, 141 (Jason W. Neyers et al. eds., 2004).

<sup>92</sup> Bruce A. Ackerman, *The Structure of Subchapter C: An Anthropological Comment*, 87 YALE L.J. 436, 439 (1977).

<sup>93</sup> See generally Jacob Weinrib, *What Can Kant Teach Us About Legal Classification*, 23 CANADIAN J.L. & JURIS. 203 (2010) (discussing fundamental questions that must be addressed by any doctrinal classification); see also Darryn Jensen, *The Problem of Taxonomy in Private Law*, 31 MELB. U. L. REV. 516, 520 (2007) (“The precise bounds of the factual territory covered by a category will not be known in advance, but to acknowledge that is not to deny the existence of a category of cases which is susceptible to abstract definition.”).

<sup>94</sup> See WADDAMS, *supra* note 77, at 226-27 (arguing that divisions are not mutually exclusive); Ackerman, *supra* note 92, at 439 (positing that principles may be dominant, subordinate, or reciprocal to one another); Samuel, *supra* note 77, at 286 (discussing how statutory codes are not “closed systems”). A degree of overlap that destroys any possibility of sensibly producing normative, and thus doctrinal, recommendations about any given doctrinal category would indeed take the bite out of the taxonomical project. But the realist case for accommodating overlaps does not take this extreme position, and this chaotic predicament is definitively not the only alternative to strict doctrinal autonomy. Some overlaps between doctrinal categories need not destroy the common denominators—the similarities holding together the rules of any given category. Cf. Kit Barker, *Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons*, (stressing that an essentialist view of unjust enrichment cannot work because the category spans a diverse range of cases), in UNDERSTANDING UNJUST ENRICHMENT, *supra* note 91, at 81; Feinman, *supra* note 74, at 699-700 (discussing how, because of the overlap of elements, paradigms often have “fuzzy” boundaries). As long as these common denominators are broad enough to yield sufficiently robust normative (and thus doctrinal) recommendations, holding on to the doctrinal category is realistically justified. Cf. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 225 (2010) (“The more that common and

Quite the contrary, Realists believe that in most cases some overlaps are perfectly acceptable, or even desirable. In justifying and framing principles for one area of the law, Bruce Ackerman explains, "lawyers often recognize that the principles governing [another area] are relevant to their problem."<sup>95</sup> Therefore, it should not be surprising to identify some relationships of dependence between legal categories, either through the subordination of one to the other or through mutual reciprocity, so that "either may be invoked as a source of argument in a lawyer's evaluation of the other."<sup>96</sup> This is a straightforward proposition for Realists, emanating from the mundane observation that life is messy and that different contexts, while distinct in some senses, often raise overlapping normative concerns.<sup>97</sup> Reciprocity, rather than autonomy, seems to be the name of the taxonomic game.<sup>98</sup>

The final distinguishing feature of the realist categorization program is its emphasis on relatively narrow categories.<sup>99</sup> Realists need not and (as we will shortly see) do not dismiss the importance of broad categories, such as property. But although such wholesale categories may be helpful as categories of thinking, they are typically troublesome as categories for deciding, because their broad common denominator derives from the similarity of the *questions* they invoke. This is why Llewellyn finds such categories, which encompass too "many heterogeneous items," "too big to handle," and therefore recommends "[t]he making of smaller categories—which may either be sub-groupings inside the received categories, or may cut across them."<sup>100</sup> By employing such narrow categories, each covering only relatively few human situations, he explains, lawyers can develop the law while

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distinctive features predominate within the field, the more useful the field is likely to be as an analytical category.").

<sup>95</sup> Ackerman, *supra* note 92, at 439.

<sup>96</sup> *Id.*

<sup>97</sup> Cf. Feinman, *supra* note 74, at 689-91 (explaining that contract and tort both embody similar, complex views of how social relations ought to be organized, and thus any classification scheme distinguishing in accordance with these is inherently flawed).

<sup>98</sup> See DAGAN, *THE LAW AND ETHICS OF RESTITUTION*, *supra* note 15, at 34 (describing overlaps between various areas of law); see also WADDAMS, *supra* note 77, at 1-2 (discussing the importance of recognizing overlap to understanding legal schemes).

<sup>99</sup> *Contra* Peter Birks, *Definition and Division: A Meditation on Institutes* 3.13 (describing core concepts supplied by the *Institutes*), in *THE CLASSIFICATION OF OBLIGATIONS*, *supra* note 85, at 1, 34-35; Weinrib, *supra* note 85, at 40 (explaining ways in which distinctions among classifications can fail).

<sup>100</sup> Llewellyn, *A Realistic Jurisprudence—The Next Step*, *supra* note 30, at 457; see also William W. Fisher III, *The Development of American Legal Theory and the Judicial Interpretation of the Bill of Rights* (commenting that it does not make sense to have a general rule governing all contracts because the circumstances surrounding different agreements vary dramatically), in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, at 266, 275 (Michael J. Lacey & Knud Haakonssen eds., 1991).

“test[ing] it against life-wisdom.”<sup>101</sup> Again, the claim is *not* that “the equities or sense of the particular case or the particular parties” should be determinative; rather, it is that decisionmaking should benefit from “the sense and reason of some significantly seen *type* of life-*situation*.”<sup>102</sup>

Our lives are divided into economically and socially differentiated—though certainly not completely separate and distinct—segments. Each “transaction of life” has some features of sufficient normative importance (meaning they gain significance from the perspective of some general principle or policy), which justify distinct legal treatment. If law is to serve life, as Realists insist it must, it should seek to tailor its categories narrowly and in accordance with these patterns of human conduct and interaction, so that it can eventually capture and respond to the characteristics of each type of case.<sup>103</sup> This substantive reasoning also implies that such carefully tailored categories are likely to be more compatible with the guidance prescription of the rule of law than the broader categories often favored by doctrinalists. Because narrow categories can be more normatively coherent—given that each one is more meaningfully informed by one animating principle (one value or one specific balance of values)—they can serve as guides for action better than the wholesale categories with much thinner common denominators to which they belong.

#### IV. A CASE STUDY: ON PROPERTY AND PROPERTY INSTITUTIONS

This short Article cannot provide a comprehensive realist categorization of our law, but the following example helps demonstrate its distinctive features. The issues that I address below—what is property and what is the significance of the various property institutions constructed by law—raise

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<sup>101</sup> LLEWELLYN, *The Current Recapture of the Grand Tradition*, in JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE, *supra* note 7, at 217.

<sup>102</sup> *Id.* at 219-20; *see also* Oliphant, *supra* note 30, at 73-74, 159 (discussing the impact of a multitude of writs and greater definiteness of pleadings in earlier English law on judges).

<sup>103</sup> *See generally* DAGAN, PROPERTY: VALUES AND INSTITUTIONS, *supra* note 15, at pts one & three; Todd D. Rakoff, *The Implied Terms of Contracts: Of ‘Default Rules’ and ‘Situation Sense’* (concluding that judges should consciously and methodically model a social and legal situation in reaching a workable and fair resolution), in GOOD FAITH AND FAULT IN CONTRACT LAW 191, 219, 222, 225 (Jack Beatson & Daniel Friedmann eds., 1995). Realists do not ignore the downside of categories that are too small, namely, that there may be too many of them and that litigation will simply become about which of the multiple of small categories each case fits into. This short Article does not offer any meta-theory of the optimal size of doctrinal categories. My modest goal is to explain why Realists argue for smaller categories than we currently employ based on a pragmatic (and somewhat impressionistic) judgment, which attempts to balance all these considerations.

complicated questions, which I discuss at some length elsewhere.<sup>104</sup> Drawing on these accounts, I hope to highlight the contribution of the realist conception of legal categorization in my answers to these perennial questions.

Although the bundle-of-sticks conception of property has been regarded as the conventional wisdom,<sup>105</sup> several leading property scholars have recently resurrected Blackstone's conception of property as "sole and despotic dominion."<sup>106</sup> Relying on the implausibility of the nominalistic understanding of property as formless and open to ad hoc judicial adjustments, these theorists insist that although property does not always and necessarily entail unqualified dominion, "the right of the owner to act as the exclusive gatekeeper of the owned thing" is "the differentiating feature of a system of property."<sup>107</sup>

The structurally pluralistic account of property I have developed in recent years begins with the observation that, rather than a uniform bulwark of independence, property manifests itself in law in a much more nuanced, contextualized, and multifaceted way. Property law is divided into different institutions that reflect distinct types of human interaction with respect to given categories of resources. Some property institutions, such as fee simple absolute, govern arm's length relationships between strangers (or market transactors) and are accordingly structured along the lines of the Blackstonian conception of property: they are atomistic and competitive and vindicate people's negative liberty. Other property institutions, such as marital property, deal with intimate relationships and are therefore dominated by a much more communitarian view of property in which ownership is a locus of sharing. Finally, many other property institutions governing relationships between people who are neither strangers nor intimates, such as landlords, tenants, neighbors, co-owners, and members of the same local community, lie somewhere along the spectrum between atomistic and communitarian norms. In all these cases, both autonomy and community are implicated, and ownership thus implies both rights and responsibilities.

Structural pluralism takes the heterogeneity of our existing property doctrines seriously. While conceding that there is some value in looking for

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<sup>104</sup> See generally DAGAN, PROPERTY: VALUES AND INSTITUTIONS, *supra* note 15; Hanoch Dagan, *Inside Property*, 63 U. TORONTO L.J. 1 (2013); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409 (2012).

<sup>105</sup> RESTATEMENT (FIRST) OF PROP. intro., §§ 1-5 (1936) (clarifying the scope of property to include "legal relations between persons with respect to a thing").

<sup>106</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

<sup>107</sup> Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007); see also J.E. PENNER, THE IDEA OF PROPERTY IN LAW 103 (1997) (stating that the right to property should be conceived as the right of exclusive use).



a rather thin common denominator among the myriad of legal doctrines covered by the wholesale category of property, it insists that such a common denominator is not robust enough to explain the existing doctrines or determinative enough to provide significant guidance concerning their evaluation or development. Conceptualizing the right to exclude as the core of property marginalizes or possibly even undermines two significant constitutive characteristics of property: governance and inclusion. Property law is often shaped by a wide range of sophisticated governance regimes aiming to facilitate various forms of interpersonal relationships (such as the law of waste, landlord–tenant law, trust law, and the law of common-interest communities). Moreover, examining the more precise scope of owners' right to exclude shows that inclusion is sometimes inherent in property: non-owners' rights to entry in important categories of property cases (for example, the law of public accommodations, the copyright doctrine of fair use, and the law of fair housing, notably in the contexts of common-interest communities law and landlord–tenant law) are indispensable characteristics of the property institution under examination.

Accordingly, a structurally pluralistic conception of property understands it as an umbrella for a limited and standardized set of property institutions, which serve as important default frameworks of interpersonal interaction. All these property institutions—the doctrinal categories to which we should pay most of our attention—mediate the relationship between owners and non-owners regarding a resource. In all property institutions, owners have some rights to exclude others. This common denominator of exclusion derives from the role of property in vindicating people's independence. Alongside this important property value, however, other values also play crucial roles in shaping property institutions. Property also can, and does, serve our commitments to personhood, desert, aggregate welfare, social responsibility, and distributive justice. Property institutions offer differing configurations of entitlements that constitute the contents of an owner's rights vis-à-vis others, or a certain type of others, with respect to a given resource.

The particular configuration of these entitlements is by no means arbitrary or random. Rather, it is, at least at its best, determined by the character of the property institution at issue, namely by its unique balance of property values. These values both construct and reflect the ideal ways in which people interact in a given category of social contexts, such as market, community, and family, and with respect to a given category of resources, such as land, chattels, copyright, and patents. The ongoing process of reshaping property as institutions is usually addressed with an appropriate

degree of caution. And yet, the possibility of repackaging allows lawyers and judges, in those moments of “jurisprudence of ends,” to further develop existing property forms by accentuating their normative desirability while remaining attuned to their social context.

Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. Rather than imposing the impersonal norms of the market governing the fee simple absolute on these divergent spheres, property law ideally facilitates their flourishing by supplying robust default mechanisms, particularly antiopportunistic devices, befitting their animating underlying principles. Thus, unlike the Blackstonian view, the structurally pluralistic construct recognizes the significant role that our social values play in our conception of property. Each of our property institutions, as noted, reflects a specific set of values to be served by its constitutive rules in one subset of social life. Both the existing categories and their underlying animating principles can become subject to debate and reform, so that some institutions may fade away while new ones emerge and yet others change their character or split. But at any given moment, each such institution consolidates people’s expectations regarding a core type of human relationships so that they can anticipate developments when entering, for instance, a common interest community, or marriage, or invading other people’s rights in a specific form of intellectual property. Thus, a set of fairly precise rules or informative, as opposed to open-ended, standards govern each of these property institutions, enabling people to predict the consequences of future contingencies and to plan their lives accordingly. Furthermore, our property institutions also serve as means for expressing normative ideals of law for these types of human interaction.<sup>108</sup> In this way, structural pluralism obeys the Legal Realist prescription of curbing law’s power. By opening up alternatives, it allows individuals to navigate their own course, bypassing certain legal prescriptions and avoiding their implications, as well as the power of those who have issued them—without neglecting or undermining law’s normativity.

Trying to impose a uniform understanding of property on such a diverse set of property institutions is not only misleading, but also unfortunate, because property’s structural pluralism enables diverse forms of the good to flourish. Only a sufficiently heterogeneous property law, alongside an

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<sup>108</sup> The doctrinal home of this feature of property law is, of course, the *numerus clausus* principle. While it has no direct parallel in contract law, that body of law also complies to a significant degree with the injunctions of structural pluralism. See generally HANOCH DAGAN & MICHAEL A. HELLER, *THE CHOICE THEORY OF CONTRACT* (forthcoming 2016) (arguing that contract law promotes not only the familiar freedom to bargain for terms *within* a contract, but also the neglected freedom to choose from *among* contract types).

attendant commitment to freedom of contract regarding property rules, facilitates the coexistence of a diverse set of social institutions crucial for our autonomy. We should thus conceptualize property in a way that celebrates the existing multiplicity of property law, guiding its expansion to include a repertoire of sufficiently distinct institutions in all relevant spheres of human activity. Indeed, as long as the boundaries between these multiple property institutions are open and as long as nonabusive navigation within this diverse system is a matter of individual choice, commitment to personal autonomy does not necessitate the hegemony of the fee simple absolute. Nor does this commitment undermine the value of other, more communitarian or utilitarian property institutions. The eradication or marginalization of the fee simple absolute would have entailed an excessive restriction of liberty, because it would have erased the option of private sovereignty and thus eliminated the option of retreat into one's own safe haven. But as long as this property institution remains a viable alternative, the availability of several different, but equally valuable and obtainable, proprietary frameworks of interpersonal interaction makes autonomy more, not less, meaningful.

Structural pluralism is likely to be *more* compatible with the rule of law than its monistic counterpart due to its acknowledgement of multiple categories. By making options available rather than channeling everyone to the one possibility privileged by law, a structurally pluralistic property law constrains the power of lawmakers. Moreover, resorting to relatively small categories (property institutions) implies that where bright line rules cannot adequately serve as guides for action, standards can be informative (thus complying with the guidance prescription of the rule of law), since they reflect the robust animating principle of the pertinent property institution, rather than the thin common denominator of property writ large.

This pluralist conception of property does not discount the significance of property as a doctrinal category. The similarities among the various property institutions justify treating them as the subject matter of unified scholarly treatments. Often, however, these similarities merely mean that studying the various institutions of property law requires us to ask similar questions, such as the following: What is the appropriate scope of an owner's exclusion? Or, what is the optimal governance regime for this property institution? At times, these commonalities imply some overlap in the pertinent values that affect the regulative principles of these diverse institutions such as the personhood concerns that inform a certain subset of property institutions, while utility is significant in another subset. These similarities ensure that reflecting on the variety of property institutions is

likely to yield some useful cross-fertilization. They do imply, then, that property may well be a useful category of thinking. However, they do not imply the type of normative coherence needed to justify making membership in property law a reason for any concrete prescriptive consequence. In other words, they do not justify treating property as a singular category for decisionmaking purposes.

#### CONCLUSION

I conclude with a brief reflection on the institutional implications of my claims. This Article demonstrated how the realist conception of law does not threaten conventional understandings of legal professionalism.<sup>109</sup> Doctrinalism is alive because lawyers' convergent background understandings renders it robust enough for the daily practice of law. But by insisting that predictability is intrinsic to the broader social practice of law rather than to doctrine, Realists discredit the law–doctrine equation, revealing the law's inherent potential dynamism.

This dynamism makes room for the realist celebration of law's embeddedness in the social sciences and the humanities. It implies that *some* legal actors—such as legislators and appellate judges—should *occasionally* use new social developments and cases as triggers for an ongoing refinement of the law and as opportunities for revisiting the normative viability of our existing doctrines and reexamining the adequacy of their categorization. This understanding of law bears even more significant implications for legal scholarship, because critical reflection is its *raison d'être* as an academic discipline. It implies that the realist “demotion” of purely doctrinal analysis “to lesser status within the modern U.S. legal academy”<sup>110</sup> is appropriate. Realists reject the popular idea that legal theory is merely the application of the methods of other disciplines to the data of law.<sup>111</sup> Yet, their devastating critique of the reduction of law to doctrine suggests that doctrinal inquiry cannot be the core of law as an academic discipline. Against these two disappointing alternatives and in line with their conception of law, Realists claim that there are two interconnected aspects of legal theory's distinct character, which is the core identifier of law as an academic discipline: the

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<sup>109</sup> Cf. J.E. Penner, *Decent Burial for Dead Concepts*, 58 CURRENT LEGAL PROBS. 313, 314 (2010) (arguing that lawyers are engaged in critical thinking, not theorizing).

<sup>110</sup> Goldberg, *supra* note 1, at 1656.

<sup>111</sup> See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 779 (1987) (defining legal theory as “the study of the law . . . ‘from the outside,’ using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system”).

attention it gives to law as a set of coercive normative institutions and its relentless effort to incorporate and synthesize the lessons of other disciplines about law.<sup>112</sup>

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<sup>112</sup> See Hanoch Dagan, *Law as an Academic Discipline*, in *STATELESS LAW* 43 (Shauna Van Praagh & Helge Dedek eds., 2015).