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# Foreword: The Constraint of Legal Doctrine

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## FOREWORD

### THE CONSTRAINT OF LEGAL DOCTRINE

SHYAMKRISHNA BALGANESH<sup>†</sup>

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## INTRODUCTION: THE “MYTH” OF DOCTRINAL CONSTRAINT

As the dominant approach to legal analysis in the United States today, Legal Realism is firmly ensconced in the way scholars discuss and debate legal issues and problems.<sup>1</sup> The phrase “we are all realists now” is treated as cliché precisely because it is in some ways taken to state an obvious reality about the mindset of American legal scholars.<sup>2</sup> While Legal Realism came to represent a variety of different views, all of these views embodied a common theme, namely, the belief that legal doctrine is “more malleable, less determinate, and less causal of judicial outcomes” than is traditionally presumed.<sup>3</sup> Judges in this view are taken to decide cases based on what they consider “fair” under the circumstances, “rather than on the basis of the applicable rules of law.”<sup>4</sup> Judicial reasoning, the Realists argued, was rarely ever the “constrained product of legal doctrine and legal materials alone.”<sup>5</sup> A hallmark of Legal Realism was therefore pervasive “skepticism” about the constraining effect of legal doctrine on judicial opinions and scholarly critiques of judge-made law.<sup>6</sup> The constraint of legal doctrine was thus believed to be mythical.

In the many decades since its arrival, the scholarly literature examining the scope, influence, virtues, vices, and varieties of Legal Realism has grown exponentially.<sup>7</sup> Acknowledging the dominance of Legal Realism as a way of

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<sup>1</sup> See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 274 (1997) (“Realism is omnipresent in American law schools and legal culture . . .”).

<sup>2</sup> Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (emphasis omitted); Leiter, *supra* note 1, at 267-68.

<sup>3</sup> Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 750 n.2 (2013).

<sup>4</sup> Leiter, *supra* note 1, at 275.

<sup>5</sup> Schauer, *supra* note 3, at 753.

<sup>6</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694 (1987) (noting the “corrosive skepticism about legal rules and doctrine preached . . . by many of the ‘legal realists’”).

<sup>7</sup> For a sampling of the literature, see JEROME FRANK, *LAW AND THE MODERN MIND* (1935); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1967* (1986); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007); JULIUS PAUL & LEON GREEN, *THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS* (1959); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (2d ed. 2014); L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988); Myres S. McDougal, *Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345 (1947); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968); Daniel A. Farber, *Toward a New*

thinking, legal academics continue to debate the extent to which the Realists were saying something altogether new, and indeed whether they mischaracterized their predecessors.<sup>8</sup> Despite the voluminous body of literature on Legal Realism, hardly anyone has sought to examine systematically the *actual effect* of its central premise on the *style, form, and substance* of legal reasoning undertaken by courts in different doctrinal areas. If legal doctrine does not constrain judicial reasoning (or at best does so minimally), as the Legal Realists claimed, and this reality is widely accepted by all participants in the judicial system, we might expect to see a difference in the way courts approach their task of deciding cases and providing reasons for their decisions. Yet, the fact remains that we simply do not.

In a variety of substantive areas, judicial opinions continue to speak the language of legal doctrine, and legal doctrine remains the “currency” of legal analysis. Judges—at least on the face of things—appear as constrained or unconstrained by legal doctrine today as they appeared to be prior to the influence of Legal Realism. Consider a pair of copyright cases as an example. In 1908, the Supreme Court decided *White-Smith Music Publishing Co. v. Apollo Co.*, and held that a manufacturer of perforated piano rolls did not commit copyright infringement, since the rolls were not “copies” for the purposes of copyright law.<sup>10</sup> In arriving at its conclusion, the Court looked to prior nonbinding case law, legislative intent, its own construction of the statute, and the common understanding of the term “copy.”<sup>11</sup> The only express suggestion of constraint in the Court’s opinion is its observation—in dicta—that if the prior case law had been of a “binding character” it would have “preclud[ed] further consideration of the question.”<sup>12</sup> Now, contrast this with a case decided by the Court in 2014, *American Broadcasting Co. v. Aereo, Inc.*<sup>13</sup> The question before the Court was whether a service that re-transmitted free broadcasting content to subscribers over the

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*Legal Realism*, 68 U. CHI. L. REV. 279 (2001) (book review); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) (book review).

<sup>8</sup> See, e.g., BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009); Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 111 (2010); Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383 (2013) (book review); Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863 (2011) (book review).

<sup>9</sup> Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517, 517 (2006).

<sup>10</sup> 209 U.S. 1, 18 (1908).

<sup>11</sup> *Id.* at 12–17.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> 134 S. Ct. 2498 (2014).

Internet had committed copyright infringement by engaging in a “public performance” for the purposes of copyright law.<sup>14</sup> In answering the question in the affirmative, the Court justified its conclusion *entirely* by reference to the legislative history of the statute’s definitions of “public” and “perform” and its own reconstruction of Congress’s regulatory intent underlying the statute.<sup>15</sup>

The similarity in style and reasoning in the two opinions is stark and real. Both speak the language of formal legal doctrine, both make reference to precedent (when available), both defer to Congressional “intent” and purpose, and both rely as best as possible on the text of the statute. One was crafted in a pre-Realist era and the other well after the dominance of Legal Realism. Their puzzling parallelism highlights the central questions that this Symposium set out to answer: Does legal doctrine in fact continue to “constrain” judicial reasoning, even after almost every participant in the legal system today has come into contact with the central premise of Legal Realism (i.e., the supposed myth of doctrinal constraint)? Are there ways of reconciling courts’ post-Realist use of legal doctrine with the core insights of Legal Realism? How uniform—across the law—is this apparent continuity in the use of legal doctrine?

Instead of seeking to answer these questions in the abstract as philosophical inquiries, the Symposium instead chose to have leading legal scholars, each from a different substantive area of law, reflect on the role of legal doctrine in their respective areas of expertise. Our hope was that having scholars reflect on this issue by reference to their own fields of expertise would address the question of “doctrinal constraint” in the American legal system organically and trans-substantively. The areas chosen were drawn from both federal and state law, statutory and common law, and represented areas traditionally characterized as public law and private law.<sup>16</sup> Some scholars chose to reflect on the question by looking at their field as a whole, while others reflected on the issue through specific cases, rules, or problems unique to their particular field.

In what follows, I will begin in Part I by unpacking the various senses in which doctrine might be seen to “constrain” legal and judicial reasoning, the central question that unites the Articles that follow. Part II will summarize some of the key findings on the constraint of legal doctrine that emerge

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<sup>14</sup> *Id.* at 2504.

<sup>15</sup> *Id.* at 2504-10.

<sup>16</sup> The areas chosen for presentation at the Symposium were tort law, contract law, property law, criminal law, copyright law, the law of corporations, the law of evidence, family law, constitutional law, administrative law, conflict of laws, and the role of legal categories in the law.

from the Symposium contributions. Part III will then conclude by reminding readers of a now-forgotten, but nonetheless important, piece of scholarship published in this journal that addressed the very question of this Symposium eight decades ago, challenging the extreme version of the Legal Realist claim.

## I. THE MULTIPLE CONSTRAINTS OF LEGAL DOCTRINE

What exactly does it mean for doctrine to “constrain” legal and judicial reasoning? Depending on how widely or narrowly one understands the notion of a *constraint*, the question becomes either profoundly controversial or singularly uninteresting. In the rest of this Part, I advance three analytically distinct conceptions of what it might mean for legal doctrine to constrain the reasoning employed by judges (and lawyers). The categories identified below admit of some overlap and are often hard to disaggregate in application. Yet, their analytical bases remain fundamentally distinct. Each of these conceptions also finds instantiation—in part, in whole, or in conjunction with others—in the individual articles that follow, though I will not venture to suggest which particular one is at play in each article.

### A. *Mechanistic Constraint*

The first, and perhaps most extreme, form of constraint that legal reasoning by judges is sometimes accused of, entails the internalization of the belief that legal rules play a deductive role in adjudication, such that any given legal decision is fully determinable by an applicable rule. In this view, the direct application of a rule to the facts of a dispute is seen to yield a rationally determinate answer.<sup>17</sup> Legal reasoning is thus “constrained” by doctrine insofar as that doctrine dictates not just its own applicability, but also individual outcomes upon its actual application. This form of constraint earned the name “mechanical jurisprudence,” and was used by the Legal Realists as a pejorative to describe classical legal thinking, that is, Legal Formalism.<sup>18</sup>

Few, if any, would suggest (or believe) that judges and other actors today feel constrained by legal doctrine in this extreme sense—that is, as

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<sup>17</sup> See Leiter, *supra* note 8, at 111.

<sup>18</sup> See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); see also ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 78-79 (1998) (describing this usage and its origins).

“automaton[s].”<sup>19</sup> It presupposes a belief in both the autonomy of legal reasoning and in the obligatory nature of that autonomy. Indeed, as some have pointed out, this form of constraint is often a caricature rather than an accurate representation of how judicial decisionmaking in any real context actually works. Nonetheless, it represents an extreme and idealized understanding of doctrinal constraint that is often used as a foil to criticize judicial reasoning.

### B. Structural Constraint

A second way in which legal doctrine might constrain decisionmakers is by structuring the question in a way that renders certain aspects of the dispute/controversy at hand more or less salient than others, thereby emphasizing particular elements of the dispute during its resolution. Psychologists refer to this in other contexts as the “framing effect” that influences certain kinds of decisions.<sup>20</sup> One might thus consider legal doctrine to do the same, i.e., constrain the decision by framing the inquiry and analysis, in situations where it applies. Doctrine in this understanding constrains by directing attention towards certain aspects of the factual record, and rendering certain other elements of the dispute altogether irrelevant or secondary to the analysis. As one early scholar, identifying this framing function of doctrine for judges, put it, “[doctrine] supplies a structure for his thought to follow, [and] draws a sketch map for him of the way into and through a case.”<sup>21</sup>

On occasion we see courts recognizing this constraint of framing, and consciously rejecting particular doctrinal categories during their analysis solely to avoid being limited by such a choice. Consider the New Jersey Supreme Court’s refusal in the famed case of *State v. Shack* to analyze the problem before it using landlord–tenant law.<sup>22</sup> The court categorically observed that there was “no profit in trying to decide upon a conventional category and then forcing the present subject into it” since such an “approach would be artificial and distorting.”<sup>23</sup> In this observation the court can be seen to suggest that a particular doctrinal category might constrain

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<sup>19</sup> John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 833 (1931) [hereinafter Dickinson, *Legal Rules*]. Dickinson traced this conception back to Montesquieu. *Id.*

<sup>20</sup> See, e.g. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981).

<sup>21</sup> Dickinson, *Legal Rules*, *supra* note 19, at 849.

<sup>22</sup> 277 A.2d 369, 374 (N.J. 1971).

<sup>23</sup> *Id.*

its reasoning, by “forcing” it to approach the problem in a way demanded by that category.

Unlike the absolutist model of internalized deduction, the constraint of framing recognizes doctrine to legitimately constrain, but in a more limited manner. Additionally, it makes no supposition about the autonomy of the doctrine, or about the irrelevance of non-legal criteria. Indeed, it accepts the possibility (and on occasion embraces the idea) that the constraint of doctrine is motivated by normative considerations on which legal doctrines are superimposed (e.g., efficiency, or information costs).

### C. *Conventionalist Constraint (Versus Rationalization)*

A third important way in which doctrine might be seen to constrain judicial reasoning originates in the norms and practices of the legal community, the primary audience for a judge’s opinions and orders. To the extent that judges are members of a community where their opinion writing is seen to require express reliance on the language of legal doctrine, judicial reasoning comes to be constrained by those practices, and in the process, legal doctrine. In this understanding, the constraint comes less from doctrine itself and more from the norms surrounding its use within the relevant community.<sup>24</sup> If it is indeed the case that the community of lawyers and judges articulate their reasoning in a particular way,<sup>25</sup> judges might thus actually reach a decision based on criteria other than legal doctrine, but then feel compelled to adhere to the conventions of opinion writing and present their decision in the language of doctrine.<sup>26</sup> Legal doctrine then—through its surrounding conventions—becomes a constraint. The conventionalist constraint is thus in large part a “stylistic” constraint, where adherence to a particular style in the expression of legal reasoning is seen as obligatory.

To the Legal Realists, of course, the existence of such conventions was hardly a constraint. To many of them, most notably Felix Cohen and

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<sup>24</sup> For an excellent account of such conventions, see Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995). Posner characterizes the account of judicial opinion writing that exhibits the constraint described above as the “pure” style of opinion writing. *Id.* at 1429. He notes that in this style, opinions “conform[] closely to professional expectations about the structure and style of a judicial opinion” and that the style uses “technical legal terms without translation into everyday English, quotes heavily from previous judicial opinions, [and] complies scrupulously with whatever are the current conventions of citation form.” *Id.*

<sup>25</sup> For a useful exploration of whether lawyers think and reason differently from others, see Nathan Isaacs, *How Lawyers Think*, 23 COLUM. L. REV. 555 (1923).

<sup>26</sup> See Posner, *supra* note 24, at 1431 (noting how adherence to the conventions of “pure” opinion writing plays a persuasive role in legitimizing the decision and conforms to audience expectation).



Jerome Frank, the process of articulating a judicial opinion in the language of legal doctrine when the actual reasoning of the judge originated independently of the doctrine, i.e., in extra-doctrinal considerations, was indeed the basic problem.<sup>27</sup> The process was instead to them nothing more than formal ex post “rationalization,” where doctrine enabled judges to “conceal” the real reasons for the decision.<sup>28</sup> Cohen thus observed that in such judicial rationalization the doctrinal “grounds of decision often represent nothing more objective than a resolution to use sanctified words wherever specified results are dictated by undisclosed determinants.”<sup>29</sup>

The difference between the constraint of convention and “rationalization” is subtle yet analytically important for our purposes. In the former, the constraint is real in the sense of obligating courts to speak the formal language of legal doctrine in order to legitimate their opinions and maintain systemic continuity with other participants (i.e., other courts, superior courts, lawyers); whereas in the latter, the constraint is artificial and entirely a trope that is set up to justify the court’s exclusive reliance on doctrine, which in turn masks the true grounds of decision. Determining when a court relies on one or the other is often a complex empirical question that is hard to answer in any individual case.

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The multiple senses in which legal doctrine can be understood to “constrain” judicial reasoning thus serve to complicate the question of whether courts are indeed so constrained today, despite the influence of Legal Realism. There is, of course, the further issue of whether such constraints—even if shown to exist as an empirical matter—serve important systemic and institutional purposes (such as the maintenance of a separation of powers) that render their real or artificial nature somewhat secondary. The articles in this issue grapple with these dimensions of doctrinal constraint as well, as they relate to the individual substantive areas under investigation.

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<sup>27</sup> See FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 237 (1959); FRANK, *supra*, note 7, at 130 (“[O]ne of their chief uses is to enable the judges to give formal justifications . . . of the conclusions at which they otherwise arrive.”).

<sup>28</sup> COHEN, *supra* note 27, at 238; FRANK, *supra* note 7, at 130.

<sup>29</sup> COHEN, *supra* note 27, at 237.

## II. THE CONSTRAINT OF LEGAL DOCTRINE IN DIFFERENT AREAS OF THE LAW

As noted previously, each of the articles in this issue examines the question of doctrinal constraint within a particular area of the law, in an effort to shed light on the overall role of legal doctrine today within the world of legal and judicial reasoning. Not surprisingly, each approaches the question somewhat differently. The overwhelming conclusion that the contributions point to may seem somewhat unexceptional: legal doctrine remains an important constraining force on legal and judicial reasoning today. What the contributions additionally highlight, though, is how different substantive areas have internalized the idea of constraint into their everyday functioning.

As a purely empirical matter, there appears to be hardly any substantive area of law that has managed to distance itself altogether (or even significantly) from relying on legal rules and principles in its approach to reasoning. The challenge, of course, is determining why this constraint continues to exist, even after the rule- and doctrine-skepticism of Legal Realism. As Brian Leiter's contribution in this issue argues, not only was this to be expected, but it was also in keeping with the fundamental premise of Legal Realism.<sup>30</sup> Since legal doctrine is little more than a crystallization of a particular set of normative standards in an area, and the Realists acknowledged that judges decide cases by reference to normative criteria, it was in some ways inevitable that doctrine would remain an aspect of legal reasoning even in a post-Legal Realist landscape.<sup>31</sup> To Leiter, the contemporary importance of doctrine—reformed to bring it closer to the real normative criteria *actually* used by courts—represents the success, rather than the failure, of Legal Realism.<sup>32</sup>

Hanoch Dagan's contribution focuses on the role of doctrinal categories in the law, and their compatibility with the core lessons of Legal Realism.<sup>33</sup> Unlike others, however, Dagan offers a reconstructed version of Legal Realism that builds on his prior work. In his account, Legal Realism, when so "charitably interpreted," sees the need for doctrinal categories so long as they do not assume a life of their own and exhaust the domain of legal reasoning.<sup>34</sup> Doctrine—and doctrinal categories—are, to Dagan, compo-

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<sup>30</sup> Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1975 (2015).

<sup>31</sup> *Id.* at 1983-84.

<sup>32</sup> *Id.*

<sup>33</sup> Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1890 (2015).

<sup>34</sup> *Id.*

nents of the lawyer's craft, which Realism sees as critical.<sup>35</sup> Dagan therefore suggests that once Legal Realism is reconstructed in this manner, the "puzzle" of contemporary doctrinal dominance despite the influence of Realism disappears altogether, since doctrine comes to be seen as one important—though not the only—component of legal decisionmaking in the Realist universe. In this respect, his conclusion is similar to Leiter's.<sup>36</sup>

Whether or not Legal Realism ever set out to eliminate *any* and all reliance on doctrine, Celia Fassberg's fascinating account of the "conflict of laws revolution" that was spearheaded by Legal Realists shows us precisely why such a wholesale abandonment (of legal doctrine) may have been wrong-headed from its very conception.<sup>37</sup> Fassberg shows how conflict of law scholarship and law reform initiatives in the mid-twentieth century attempted to distance legal reasoning from formal blackletter doctrine and conceptual thinking, in an effort to focus on the real normative and strategic considerations that were at play in courts' decisions.<sup>38</sup> The result, as Fassberg points out, was complete disarray, eventually resulting in a return to more structured doctrinal mechanisms.<sup>39</sup> Fassberg places the primary blame for this on the Legal Realist critique of doctrine, but cautions that conflict of laws as an area might be an outlier given its peculiar relationship to Legal Realism, and its trans-substantive dimension. Modern trends in the area, she notes, seem to be translating the basic lessons of Realism into a doctrinal approach, again recognizing the inevitability (and importance) of legal doctrine that itself better represents the issues and values at stake.<sup>40</sup>

Doctrine continues to play a critical role in the three primary areas of the common law: property, tort, and contract. In Henry Smith's account, property law today remains heavily doctrinal primarily because of its basic structure as a "system" that seeks to manage the informational problems that flow from the law's need to regulate complex interactions between an indeterminate number of individuals and discrete resources.<sup>41</sup> Smith points out that despite Legal Realism-inspired claims about the "disintegration" of property and its fragmentation into an elusive "bundle of rights,"

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<sup>35</sup> *Id.*

<sup>36</sup> Leiter, *supra* note 30, at 1983-84.

<sup>37</sup> Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper*, 163 U. PA. L. REV. 1919, 1941 (2015).

<sup>38</sup> *Id.* at 1923-32.

<sup>39</sup> *Id.* at 1938-40.

<sup>40</sup> *Id.* at 1941-44.

<sup>41</sup> Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055, 2057 (2015).

the system of property law remains reliant on the basic architecture of its doctrinal devices, with the influence of Legal Realism having been felt only on the very peripheries of the system.<sup>42</sup>

Ben Zipursky examines the role of doctrine in tort law by focusing on the legal concept of “reasonableness” and its use in negligence cases.<sup>43</sup> According to Zipursky, the concept of reasonableness has a definitive meaning within tort law, one that economic accounts (or indeed the Hand Formula) fail to capture. It involves focusing factfinders’ attention on a particular kind of person for their analysis, which derives from the reality that negligence law is built on the existence of duties of care that members of society owe each other in their everyday life.<sup>44</sup> The doctrinal concept, he argues, captures a basic normative intuition about the role of tort law and its overall structure. In Zipursky’s account, negligence law can fruitfully continue to rely on the concept of reasonableness for both normative and structural reasons, without at the same time requiring an acceptance of its mechanistic role in legal reasoning.<sup>45</sup> Reasonableness remains a robust doctrinal part of tort law, with a definitive meaning.

In her discussion of contract law, Tess Wilkinson-Ryan captures a different dimension of the law’s reliance on doctrine, namely, its influence on people’s intuitions about what contract law requires of them.<sup>46</sup> While recognizing that contract law continues to rely on a host of formal rules (e.g., consideration) in different contexts, she argues that consumers extrapolate from these legal rules to draw conclusions about the working of contract law in contexts where the law’s own provision of flexibility and protection might enable them to do otherwise.<sup>47</sup> She thus identifies an additional constraining effect of legal doctrine, namely, its role in shaping (mis)perceptions about the obligatory requirements of the law.<sup>48</sup>

A natural and well-known corollary to the question of doctrinal constraint is what some scholars refer to as the “indeterminacy thesis,” the belief that legal doctrine cannot provide determinate outcomes in individual cases, that additional extra-legal considerations are required, and that legal

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<sup>42</sup> *Id.* at 2059-2061, 2067-74.

<sup>43</sup> Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131, 2135 (2015).

<sup>44</sup> *Id.* at 260-65, 268-69.

<sup>45</sup> *Id.* at 2170.

<sup>46</sup> Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109, 2110-11 (2015).

<sup>47</sup> *Id.* at 2126.

<sup>48</sup> *Id.* at 2127-28.

doctrine is little more than window dressing.<sup>49</sup> Leo Katz examines the applicability of the indeterminacy thesis within criminal law, offering nine different perspectives from which one might resolve, attenuate, or unwittingly exacerbate the problem.<sup>50</sup> In acknowledging that it remains a “really hard problem,” Katz seemingly admits that legal doctrine does not operate as a complete constraint.<sup>51</sup> All the same, by suggesting ways in which the problems of indeterminacy can be minimized, he seems to suggest that doctrine does indeed operate as a constraint in very many situations, even if it doesn’t do so perfectly.

When we move away from basic areas of the law to the more specialized and statute-laden ones, the issue of doctrinal constraint becomes more complex. Here, unlike in other domains, questions of institutional role, separation of powers, and inter-governmental (i.e., federal–state, and inter-branch) coordination become intertwined with doctrinal considerations within the domain of legal reasoning. Yet, here too we see doctrine constraining both the form and content of judicial reasoning.

Melissa Murray examines this question within family law by looking at recent judicial interpretations of the Uniform Parentage Act (UPA) within the state of California.<sup>52</sup> Analyzing how courts have attempted to rely on the blackletter rules of the Act when presented with novel family arrangements and disputes, Murray concludes that doctrine certainly matters in this domain, and does indeed operate as a constraint.<sup>53</sup> Yet, she argues that legal doctrine encapsulates more than just rules, cases, and regulation, but instead extends to certain ideals and principles that inform the interpretation and application of the rules and regulations.<sup>54</sup> In this regard, she echoes arguments famously made by Ronald Dworkin in his account of how “principles” inform the application of legal doctrine in hard cases, and thus enable courts to work within the parameters of the law in their decisionmaking.<sup>55</sup>

Gideon Parchomovsky and I show how the Supreme Court creates law within the interstices of the federal copyright statute by identifying obvious

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<sup>49</sup> For an overview of the indeterminacy problem in legal analysis, see generally Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

<sup>50</sup> Leo Katz, *Nine Takes on Indeterminacy, with Special Emphasis on the Criminal Law*, 163 U. PA. L. REV. 1945, 1951 (2015).

<sup>51</sup> *Id.* at 1973.

<sup>52</sup> Melissa Murray, *Family Law’s Doctrines*, 163 U. PA. L. REV. 1985, 1989 (2015).

<sup>53</sup> *Id.* at 2012-17.

<sup>54</sup> *Id.* at 2017-18.

<sup>55</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 38 (1977).

indeterminacies in the application of the statute's primary directives.<sup>56</sup> In so doing, we argue, the Court appears to be following an age-old approach to judicial lawmaking, referred to as the process of determining the "equity" of the statute. By adopting this approach, the Court's jurisprudence accepts the indeterminacy critique of pure textualism, but at the same time shows fidelity to the constraint of core legislative ideals and principles that it discerns from the structure of the statute.<sup>57</sup> Much like Murray's point in family law, we argue that copyright doctrine—as revealed in the Court's jurisprudence under the 1976 Copyright Act—extends to certain basic principles and ideals that it sees as integral to the working of the copyright system, that is, the "equity" of the copyright statute so to speak.<sup>58</sup> The Court draws these principles from prior case law, the Constitution, or at times from its own intuitions; and at all times emphasizes that these principles constrain its decisionmaking.

Moving to a third specialized area, the law of corporations, Edward Rock approaches the question of doctrinal constraint through a uniquely comparative lens.<sup>59</sup> To examine the question of doctrinal constraint Rock takes two important corporate law issues—controlling shareholder freezeouts and bondholder exit consents—and within those issues contrasts the approaches of English and American courts.<sup>60</sup> American judicial reasoning is commonly believed to have internalized the lessons of Legal Realism, whereas English judicial thinking is taken to represent the vestiges of Legal Formalism. Upon undertaking this fascinating comparison, Rock concludes that while judges in both legal systems arrive at more or less similar solutions to the problems that they identify, their "styles of decisionmaking are strikingly different."<sup>61</sup> American (i.e., Delaware) judges appear to tackle the policy and economic issues at stake directly as part of their reasoning, whereas English judges do so from *within* the language of case law and the traditional sources of legal reasoning. While Rock is circumspect about whether the difference actually affects outcomes in cases, he concludes that one of the effects of Legal Realism on reasoning in this domain may have been its relaxation of the stylistic (or formal) constraints

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<sup>56</sup> Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1865, 1871-72 (2015).

<sup>57</sup> *Id.* at 1887.

<sup>58</sup> *Id.* at 1888.

<sup>59</sup> Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019, 2029 (2015).

<sup>60</sup> *Id.* at 2029-48.

<sup>61</sup> *Id.* at 2048-49.

of legal doctrine, which has enabled lawyers and judges to focus more directly on the normative considerations at stake.<sup>62</sup>

Alex Stein's contribution to the Symposium looks at the role of doctrine within the law of evidence, an area that is at once both trans-substantive and of relevance to a variety of public law and private law areas.<sup>63</sup> Critiquing versions of "antidoctrinalism" that are seen in the work of some scholars, Stein argues that evidence law is characterized by several "organizing principles" that draw on, and integrate, ideas from economics, morality and epistemology.<sup>64</sup> These organizing principles are in turn a central component of evidence law doctrine that courts and litigants apply to individual cases. Stein shows that evidence law (and jurisprudence) is incapable of being comprehended without appreciating the crucial role of these organizing principles in balancing the area's incommensurable normative considerations, in turn reifying the centrality of legal doctrine to the area and the fundamentally "legal" nature of evidence discourse.<sup>65</sup>

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What then do we take away from the reality that (a) doctrine remains an important component of legal reasoning in just about every area of the law, and (b) that its role and importance vary from one area to another? I think there are three tentative analytical lessons that may be drawn from these contributions.

First, doctrine performs a variety of different roles within the domain of legal reasoning, ranging from providing actors with an independent normative basis for their decisionmaking, to allowing different institutional actors within a system to maintain their political legitimacy vis-à-vis each other, and in the minds of the lay public. Each of these roles "constrains" reasoning in important, but distinct ways. The constraint of doctrine is thus necessarily pluralist.

Second, the sources of legal doctrine—that collectively constrain legal reasoning—vary from one substantive area to another, and from one institutional actor to another. Acknowledging the constraining effect of doctrine has thus meant that courts and litigants today seek to expand the

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<sup>62</sup> *Id.* at 2052-53.

<sup>63</sup> Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. PA. L. REV. 2085, 2086 (2015).

<sup>64</sup> *Id.* at 2088-96.

<sup>65</sup> *Id.* at 2095.

source and content of legal doctrine as part of their reasoning, rather than treat the new considerations that demand their attention as being purely “extra-doctrinal.” The most common technique in this regard appears to be a ready recourse to background “principles” that inform and animate the textual or formal content of rules and regulations.

Third, while Legal Realism may not have eliminated all reliance on doctrine (and it is of course questionable whether this was ever its motivation), it has nonetheless had a discernible impact on our understanding of doctrine in the U.S. legal system. Doctrine is today seen as important, not for its own sake, but because of its connection to normative criteria that are deemed independently worthwhile for the law to adopt. In this sense, Legal Realism has succeeded in moving the inquiry from one rooted in the “science of law” to one striving to develop “science about law,” as Thurman Arnold famously put it.<sup>66</sup> Legal doctrine is today seen as rooted in ideals from economics, moral philosophy, sociology, behavioral psychology, and political science in a way that has produced an equilibrium where doctrinal and non-doctrinal considerations are treated as equally important for a fuller understanding of the law. It is perhaps this equilibrium that we may appropriately identify as the “New Doctrinalism” of the American legal thinking.

### III. JOHN DICKINSON ON THE CONSTRAINT OF LEGAL RULES

It is particularly fitting that this Symposium on the role of legal doctrine in legal reasoning is being published in the *University of Pennsylvania Law Review*. In addition to being the site of some of the most trenchant (and often times acrimonious) debates about Legal Realism,<sup>67</sup> the journal was also the site of one of the earliest systematic explorations of this very topic during the heyday of Legal Realism, conducted by a former member of the University of Pennsylvania Law School faculty, John Dickinson.<sup>68</sup> Dickinson was trained as a political scientist and lawyer, and spent a good deal of his scholarly attention exposing the inadequacies of extreme Legal Realism.<sup>69</sup> In an article titled *Legal Rules: Their Function in the Process of Decision*,<sup>70</sup> he

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<sup>66</sup> See Thurman W. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811, 813 (1936).

<sup>67</sup> See, e.g., *id.*; Fuller, *supra* note 7, at 429; Herbert F. Goodrich, *Institute Bards and Yale Reviewers*, 84 U. PA. L. REV. 449 (1936).

<sup>68</sup> Dickinson, *Legal Rules*, *supra* note 19.

<sup>69</sup> See, e.g., John Dickinson, *The Law Behind Law*, 29 COLUM. L. REV. 113 (1929); John Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052 (1931); John Dickinson, *The Problem of the Unprovided Case*, 81 U. PA. L. REV. 115 (1932).

<sup>70</sup> Dickinson, *Legal Rules*, *supra* note 19.



set out to explore—in no uncertain terms—the extent to which legal rules (i.e., legal doctrine) constrain judicial decisions. His conclusion on the issue was rather poignant:

The fact that legal rules do not always dictate decisions of cases does not, however, mean that they may not have influence, and sometimes a controlling one, in the process of decision. Sceptics who minimize the influence of such rules often seem only disappointed absolutists, who expected the traditional theory of legal determinism to work out to the bitter limit of its clock-work logic, and on finding it play them false, react into an opposite extreme of naïve unwillingness to recognize the less absolute, but none the less relatively effective, way in which legal rules do their work, holding an impossibly exalted view of certainty, they insist on all or none.<sup>71</sup>

In examining the issue, Dickinson's piece undertakes a detailed survey of the ways in which judges employ legal rules, and the effect that such rules have on their thinking and reasoning.<sup>72</sup> Indeed, he anticipates some of the principal mechanisms described previously,<sup>73</sup> including the framing role of legal doctrine as a source of constraint.<sup>74</sup> While he disagreed with the claims of the extreme (or "skeptical") school of Legal Realists, his core claim was that the central insights of Legal Realism—involving the role of "policy, taste, and value judgments" in judicial decisionmaking—were indeed compatible with a constraining role for legal doctrine,<sup>75</sup> and that a happy equilibrium between them should not be ruled out in advance.

Dickinson died young,<sup>76</sup> and most of his work on the role of legal doctrine in legal reasoning remains underappreciated. The articles that follow pay implicit tribute to Dickinson's line of inquiry by carrying it forward into the twenty-first century, and they do so by respecting his cautionary note that the question of constraint be approached in a less absolute and more nuanced manner, thereby making "sound progress" in our understanding of the "technique of legal thinking in the application and elaboration of law."<sup>77</sup>

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<sup>71</sup> *Id.* at 835-36.

<sup>72</sup> *Id.* at 838-66.

<sup>73</sup> *See supra* Part I.

<sup>74</sup> Dickinson, *Legal Rules*, *supra* note 19, at 849.

<sup>75</sup> *Id.* at 868.

<sup>76</sup> George L. Haskins, *John Dickinson: 1894-1952*, 101 U. PA. L. REV. 1 (1952).

<sup>77</sup> Dickinson, *Legal Rules*, *supra* note 19, at 868.