REAL RULES

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I

When Karl Llewellyn, on behalf of the American Legal Realists, suggested that professors of law should provide their students with real rules rather than paper rules,[1] he did not explain exactly how real rules would be found and how they would function in the legal system. He distinguished, however, real rules from paper rules and working rules.

Paper rules are ought rules, rules for doing things, normative statements. This is what Llewellyn means when he defines a paper rule as "a rule to which no counterpart in practice is ascribed."[2]

Working rules are like paper rules. The distinction, however, is that a working rule "indicates a rule with counterpart in practice, or else a practice *consciously* normatized."[3]

The rule in both these definitions is prescriptive. A paper rule is the traditional rule of law, and a working rule is a paper rule that has actually been followed or applied, or an "ought" that has been recognized as such and has guided or been the reason for judicial conduct.

Real rules are quite distinct from paper rules. Real rules are not expressed in prescriptive terms. Llewellyn explains the nature of real rules in the following way:

> 'Real rules' are conceived in terms of behavior; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, . . . 'Real rules', then, if I had my way with words, would by legal scientists be called the practices of the courts, and not 'rules' at all. . . . 'Paper rules' are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time, and place — what the books there say 'the law' is.[4]
>
> (Llewellyn's italics)

Real rules, then, are factual descriptions of the activities of courts.

[1] Llewellyn, "A Realistic Jurisprudence — The Next Step", 30 *Columbia Law Review* 432, 439 (1930).
[2] *Id.*, at 439, n. 9.
[3] *Ibid.* See also Recaséns Siches, *Panorama del pensamiento jurídico en el siglo XX*, vol. 2, 625, México, Editorial Porrúa. 1963.
[4] *Id.*, at 448.

Real rules are not individual norms, however. Luis Recaséns Siches, my esteemed mentor, has indicated that "the legal order does not consist solely of general rules, but also of individualized norms —judicial decisions and administrative resolutions." [5] Individualized norms are prescriptive, like the general norms, for they are "norms which can be compulsorily enforced." [6]

Combining these two theories, then, we would have a legal order that would include the following:

1. General rules (which Llewellyn calls paper rules).
2. General rules which have actually been applied (which Llewellyn calls working rules).
3. Individualized norms (there could be some distinction between working rules and individualized norms in that Llewellyn's description emphasizes the difference between rules which are followed and those which are ignored and Recaséns Siches is addressing himself primarily to the outcome of litigation in the form of court orders).
4. Real rules.

In order to arrive at some understanding of where real rules fit in this picture of the legal order, we will examine situations in which the decision maker generally does not state the justification for his decision. Consequently, there will be no paper rules that may be derived from the statements of the decision maker himself. Paper rules (or general rules, if you prefer this title) may still exist, but they will be constructed by a theoretician who has analyzed the decisions rather than be taken from the opinion of the decision maker. The difficulty will lie in distinguishing the paper rules, which will be attributed to the decisions by the analyst, from the real rules, which will be constructed in the same way.

In any event, either the paper rules of the real rules will have to be used by the legal counsellor in making predictions of judicial decisions in particular cases. The role of the lawyer in performing this function has been described as follows:

> A lawyer is a predictor, really, a prophet. He says to a client, because this and this is true, and since this and this might be true, then your alternatives are such and such, and here's what's most likely to happen. [7]

Jerome Frank made the same observation when he asserted that "the rules that lawyers would like to (but do not) have are rules which would aid them

[5] Recaséns Siches, "The Logic of the Reasonable as differentiated from the Logic of the Rational (Human Reason in the Making and the Interpretation of the Law)", *Essays in Jurisprudence in Honor of Roscoe Ponud*, 192, 194, Bobbs-Merrill Co., Inc., N. Y., 1962.

[6] *Ibid.*

[7] Mills, *One Just Man* 96, Simons and Schuster, N. Y., 1974.

in precisely predicting specific decisions in contested cases and in bringing about such specific decisions". [8]

Since the Realists concluded that paper rules could no be used for predictive purposes, they were led to look for another type of rules which could be used to predict judicial decisions. If real rules may be used for this purpose, then where do they fit in the legal order and in legal study?

II

Consider, for example, a series of cases decided by a zoning hearing board. Zoning ordinances are legislative acts which provide limitations upon the locating of buildings upon specific sites. The ordinance may provide that the building must be placed forty feet from the road and ten feet from the property line on each side. In other words, the building must at least be ten feet from the boundary line with the adjoining tract on both sides of the building.

Lot lines, however, do not always form square configurations and topographic and other conditions may present unusual and even unique situations. Therefore, zoning ordinances usually provide that the municipality will establish a zoning hearing board which may grant variances to individual applicants. Variances are designed to adjust the general terms of the zoning ordinance to suit particular pieces of property. The zoning hearing board is authorized to waive the limitations of the zoning ordinance by granting a variance to the applicant.

Suppose that we consider the decisions of a zoning hearing board for a two-year period in regard to the granting of variances from the requirement of ten-foot sideyards. Assume that the zoning hearing board granted variances in sixty cases, and that the board issued the customary statement in these cases that the variances are granted on the ground that the applicant has proved unnecessary hardship. In the other forty cases regarding sideyard variances, which the board heard in this two-year period, the requests were denied, and the board declared that "the variance is denied on the ground that the applicant has failed to prove unnecessary hardship".

More detailed analysis of the cases indicates that the extent of the variance requested and the result of the request was as follows:

[8] Frank, "What Courts Do in Fact", 27 *Illinois Law Review* 645, 761. 775 (1932). Oliver Wendell Holmes, Jr., expanded this aspect of the legal system into a theory of law. See Holmes, "The Path of the Law", p. 167, *Collected Legal Papers*, Harcourt, Brace and Howe, N. Y., 1920, and Moskowitz, "The Prediction Theory of Law", 39 *Temple Law Quarterly* 413 (1966).

Extent of variance in feet up to	*Granted*	*Denied*
1'	2	
2'	3	3
3'	5	1
4'	10	2
5'	12	6
6'	13	6
7'	11	8
8'	3	7
9'	1	6
10'	0	1
	60	40

Having this information allows one to construct rules which summarize the results in these cases. The rules could include the following:

1. Requests for variances of ten feet are not granted.
2. Requests for variances of nine feet are almost always denied.
3. Requests for variances of eight feet are usually denied.
4. Requests for variances of seven feet, six feet, five feet, four feet, and three feet are usually granted.
5. Requests for variances of two feet are sometimes granted.
6. Requests for variances of one foot are granted.

These rules summarize the results in the cases which have been decided, based upon the available information. If we obtained additional information, we could draft more detailed rules. Let us add to the information we have the purpose for requesting the variance —residential use, commercial or industrial use, or construction of a swimming pool:

RESIDENTIAL USE

Extent of variance in feet up to	*Granted*	*Denied*
1'		
2'	2	
3'	1	
4'	3	
5'	6	1
6'	8	4
7'	9	4
8'	3	2
9'	1	
10'		

COMMERCIAL OR INDUSTRIAL USE

Extent of variance in feet up to	*Granted*	*Denied*
1'	1	
2'		3
3'	1	1
4'	1	2
5'	2	5
6'	5	
7'	2	
8'		2
9'		4
10'		1

SWIMMING POOL USE

Extent of variance in feet up to	*Granted*	*Denied*
1'	1	
2'	1	
3'	3	
4'	6	
5'	4	
6'		2
7'		4
8'		3
9'		2
10'		

It should be obvious that, with this additional information, we could draft much more specific rules. These could be rules that express the results in response to requests for variances to permit particular types of uses. These could be rules which relate the uses requested with the number of feet for which the variance is asked. For example, variances for swimming pools are invariably granted for up to five feet and invariably denied for more than five feet.

Once you have this information, what use may the practicing lawyer make of it? He certainly may use it in advising clients as to the likelihood of success in particular situations. The rule for swimming pools would allow for a high degree of predictability in advising clients as to the likelihood of being granted a variance to construct a swimming pool. He may also refer the zoning hearing board to the result of his study and urge them to be consistent with their decision in prior cases.

It would make no difference to our analysis if I added that the zoning hearing board had very little conception of its decisions in prior cases or that a different group of three individuals decided each case with no knowledge of the decisions in prior cases or even if the zoning hearing board decided each case by flipping coins (though the possibilities of obtaining these results by this method are remote). The decision that is announced by the decision maker may have a rationale all its own even though the decision maker did not intend to be consistent with prior decisions or did not follow a rational thought process in reaching the decisions. The decision then is like a poem or a play which may have a life of its own and convey different ideas to the reader or audience than the author intended.

The real rules for a decision may be argued to the decision maker. You may argue to the zoning hearing board, for example, that they never have granted variances to anyone requesting that a swimming pool be located within one foot of their property line. The members of the zoning hearing board may be surprised to hear this. They may never have analyzed their past decisions. They may believe that they decide each case on its own merits without reference to prior decisions.

Even so, the real rules may still be of use to the legal counsellor. Their usefulness will depend on their reliability for the purposes of prediction. Their place in the legal order and in legal education must still be determined.

III

In the zoning hearing board example, the problem is not one of whether the paper rules are working rules. There are no paper rules in the sense that the board does not state the rules which operate to determine individual decisions. There may, however, be legal rules which would justify the decisions even though they have not been announced as such by the board.

Just as a poem or a play may convey a message to the reader or the audience that does not comport with the intention of its author, so a decision may be justified by a *ratio lecidendi* which has not been stated as such by the decision maker, may not have been thought of by the decision maker, and may even be of some surprise to the decision maker when it is declared to be the *ratio decidendi* of his decision. The interesting question is whether the decision maker is bound by the *ratio decidendi* of a prior decision and what it means for him to be so bound.

Let us consider another example of a series of decisions for which the decision maker gives no reasons as justification for the decisions. Take sentencing practices in the United States courts as the example.[9] Frank would like us to list all the sentences imposed by a particular judge over a period of several years. Compare these sentences to any number of relevant (and conceivably legally-irrelevant) factors, such as the nature of the crime, whether or not there were victims, whether or not there was violence, age of the defendant, prior record of the defendant, military service record of the defendant, and any number of other relevant factors, blending into the legally irrelevant factors. These could be the political affiliation of the jugde, the race or religion of the defendant, the length of hair of the defendant, the race or religion of the victim, etcétera.

This same type of analysis could be attempted for all of the judges in any court, or all the judges in the nation. Frank felt that there was tremendous disparity among individual judges, and he therefore proposes that we construct rules for each judge, which could be called "rules for decisions by Judge Brown, Green, Blue, Yellow, or Purple."[10] We could refine the process even further and arrive at rules for each judge for each particular crime in relation to each of the other elements.

This is the type of information which knowledgeable practicing lawyers possess and which they use in the representation of their clients. They will try to steer the drug cases away from Judge Jones and into the courtroom of judge Smith, and they attempt the opposite for sex cases. They may prefer one judge to another in all criminal cases. In any event, they are able to predict what the outcome will be in a particular case by analysis of all the factors which are present in a situation and they will advise their client what to do based upon this prediction.

This prediction is not, of course, the law itself.[11] The law may not even include this type of real rule. What, then, however, does the law include? Does it include only the list of legally-relevant factors? If we assume that the practicing lawyer, as a result of his analysis, does not even consider these so-called legal criteria because they bear very little relationship to the actual sentencing patterns of judges and are of no predictive value, but instead

[9] See, in general, Frankel, *Criminal Sentences*, Hill and Wang, N. Y., 1972.
[10] Frank, *supra.*, note 8 at 775.
[11] See the law review articles listed above in note 8.

relies upon a set of completely different factors which make prediction possible, how do we characterize the set of reliable factors for predictive purposes?

One answer may be that the judge is bound to apply these rules once they are presented to him. What does it mean for the judge to be bound? He is certainly not bound to obey the law in the same sense as the ordinary citizen is in complying with primary rules.[12] If the citizen disobeys the prescriptive rules, he may be found guilty of committing a crime and he may have to suffer a sanction. If the citizen does not employ the power-conferring rules in the appropriate manner, his act may be a legal nullity. The situation for the judge is entirely different.

The secondary rules which bind judges do not necessarily render their acts which are contrary to the rules either illegal or invalid. These rules include the requirement of deliberation in application of the law. But, if a judge decided cases by flipping coins, and then issued the typical judicial opinions, these opinions would still form part of the law. It is not even clear if the results in the cases would be reversed for this reason.

If it could be established that a judge was bribed to reach a particular result, this would justify a reversal of his decision. However, it is still not absolutely certain that the opinions he wrote would not be cited for the principles contained therein.[13]

The judge, whether corrupt or honest, is free, in the Anglo-American judicial system at least, to establish new rules to decide the cases before him. For centuries, the common law declared that the tenant must pay his rent regardless of the condition of the leased premises. Is the 1970's many of the courts in the states have recognized an implied warranty of habitability which may absolve the tenant of this obligation if the leased premises are not habitable.[14] The parties to the lease agreement did not agree to this warranty. Rather, the courts have inserted in into their leases. There are innumerable other examples which I could mention of the creation of new legal rules by the courts.

The point is that judges are free to disregard the pre-existing rules in making decisions. In this respect, they are not at all like umpires in games. They may change the rules that they will apply to judge the situations before them. Arguments to them requesting them to change the rules are perfectly appropriate. This is not meant to deny that ordinary human beings feel constrained to repeat their actions. I notice in my classroom that students tend to sit in the same seats for each succeding class that they happen to find

[12] We are employing H. L. A. Hart's description of primary and secondary rules contained in Hart, *The Concept of Law*, The Clarendon Press, Oxford, 1961.

[13] Judge Manton of the Court of Appeals of the 2nd Circuit authored over two thousand opinions and one still sees these cited even though he was convicted of accepting bribes to induce him to decide cases for particular parties.

[14] See *Javins v. First National Realty Corporation*, 428 Federal Reporter 2nd 1072 (District of Columbia Circuit 1970) and the cases following this decision.

for the first class of the term. When the seats at a theatrical or athletic event are unreserved, people tend to recognize the "right" of a person to return to his seat after the intermission even if everyone in the auditorum left it during the intermission. The judicial process reflects this impulse to habitual conduct, both because of allowance for the expectations of ordinary citizens and because judges are human beings after all.

Is this all we mean when we say that a judge is bound to apply the legal rules which were in existence prior to reaching the decision in a particular case? Is this merely a recognition of habitual conduct? Is it like the habit of going to church each Sunday or holding the door for ladies (assuming that such a practice would not be chauvinistic)?

H. L. A. Hart responds that the binding nature of legal rules as applied to judges must include more than recognition of a habit. Judges are subject to criticism if they fail to apply pre-existing rules. However, as we have already stated, judges, despite this, are legally authorized to disregard, and even change, pre-existing rules. Going even further, judges are permitted to change the legal principles which are basic to the legal system, and the public policies that underlay the legal system.

In addition, judges are also subject to criticism if they fail to reach just results or fail to reach results which reflect the expectations of ordinary citizens as to what the law must be as applied to their particular situation. Consider *Almota Farmers Elevator and Warehouse Company v. United States,*[15] which involves the condemnation of a grain elevator leased to the plaintiff. The leasehold interest terminated at the end of seven years. The plaintiff testified that he expected to renew the lease and he based this expectation on the general practice of the landlord in renewing leases in he past. When the leased premises were taken by exercise of the power of eminent domain, the just result, from the perspective of the plaintiff, required that the condemnor compensate him for not only the period which he had a legal right to the possession of the leased premises but also for the additional period when he had a resasonable expectation that his tenancy would continue. The court agreed.[16]

The court gave the tenant more than the law provided for prior to the decision in this case. Not only did the tenant not have a legal right to have his lease renewed before or after the decision in this case, but he had no right to compensation for denial of the opportunity to be a tenant at the condemned

[15] 93 Supreme Court Reporter 791 (1973).

[16] The Supreme Court declared the following: "At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements be valued as though there were no possibility of continued use. That is not how the market would have valued such improvements; it is not what a private buyer would have paid." *Almota Farmers Elevator and Warehouse Company v. United States,* 93 Supreme Court Reporter at 796-97.

premises beyond the termination of his leasehold period prior to the decision in this case.

The court may be criticized, of course, for having disregarded the legal rules which were in existence prior to the decision in this case. However, the court might also be criticized if it denied the plaintiff-condemnee damages for the building he had erected on the leased premises based upon his reasonable expectation that his lease would be renewed. The court could be criticized for reaching an unjust result.

Judge are bound, then, to dispense justice as well as apply pre-existing legal rules. They may not be able to do both in all situations. They may be criticized for doing either rather than the other. They obviously cannot be bound to do both in the same sense if the just result conflicts with the correct result. One cannot be equally obligated to do mutually inconsistent acts if doing one or the other necessarily means that the result is subject to criticism for being either incorrect or unjust.

The judge is both bound to apply the pre-existing legal rules and free to disregard them or to alter them. The same is true for the judge being bound to ensure that his decisions are just.

In addition, there are instances in the legal order where the judges have retained such a broad area of discretion that there is no meaningful way in which one may describe them as being bound to apply pre-existing legal rules.

IV

The judges themselves may acknowledge that they are not bound by the paper rules. Consider the rules announced by the Court of Appeals of the Third Circuit of the United States federal judicial system. Rule 12(6) provides that the court will decide whether or not there should be oral argument in any particular appeal. In deciding whether there will be oral argument, Rule 12(6) provides that the court will be guided by Internal Operating Procedure B.3., which is entitled "Suggested Criteria for Application of Rule 12(6)". Either party to the appeal may request oral argument, but Rule 12(6) provides that "the specific request for argument not be binding on the court. Failure to grant the request shall not be reconsidered by the panel or the court en banc." Therefore, the decision whether or not to grant oral argument is final and non-reviewable.

Internal Operating Procedure B.3. provides as follows:

> Suggested Criteria for Application of Rule 12(6).
> a. Experience discloses that judges usually vote to eliminate oral argument:
> (1) Where the issue is tightly constrained, not novel, and the briefs adequately cover the arguments.
> (2) Where the outcome of the appeal is clearly controlled by a decision of the Supreme Court or this Court.

(3) Where the sole issue is sufficiency of the evidence, the adequacy of jury instruction or rulings as to admissibility of evidence and the briefs make adequate reference to the record and the state of the record will determine the outcome.

b. Experience discloses that judges usually vote for oral argument:

(1) Where the appeal presents a substantial and novel legal issue.

(2) Where the appeal presents one or more issues, the resolution of which will be of institutional or precedential value.

(3) Where a judge has questions to ask counsel, the answers to which will clarify an important legal, factual or procedural point.

(4) Where a decision, legislation or event subsequent to the filing of the last brief may significantly bear on the case.

(5) Where an important public interest may be affected.

c. The foregoing criteria shall not be construed to limit any judge's discretion in voting for oral argument.

It is clear that the Court of Appeals of the Third Circuit has retained complete discretion in regard to whether or not the court will allow oral argument on an appeal. The criteria are not binding on the judges; they retain the maximum amount of flexibility. They have refused to bind themselves, event to their own rules, and their decision is not reversible by any higher court.

Suppose that you and your client believe that oral argument is crucial for the effective presentation of your case. You will file an appeal if oral argument will be granted; you will not do so if oral argument will be denied. You might consult the criteria presented above, but you would be much more accurate in your prediction if you knew the probabilities of argument being permitted based upon the court's reactions to the requests filed in the last five years. The court is not bound by these prior decisions, but it is also not bound by its own criteria. If the court had heard oral argument in ninety percent of the cases filed in the last five years, that would be highly significant. If the figure was actually five percent, that would also be significant. You could refine the analysis even further and obtain the figures for criminal and civil cases, for involving more than $ 100,000.00, for appeals from Judge Jones and appeals from Judge Brown, and so forth.

Your client asks you what the law is in regard to his "right" to have oral argument in his case. Do you tell him that there is no law, in the sense that there is no legal rule that binds the judge? Do you tell him that the court is applying the law both if it grants and if it denies oral argument in the sense that eithr act is valid and irreversible?

Are the criteria that "experience discloses" are present when oral argument is permitted or denied real rules or paper rules? They are not paper rules since they are not regarded by anyone as binding. They are not real rules unless they are accurate statements of the circumstances in which oral argument is granted or denied. In other words, they will be real rules only if they

have predictive value. They are useful if they have predictive value even if they are not "binding".

V

At the very minimum, we may agree that the real rules have an existence as tools of analysis regardless of whether or not the decision maker applies them, knows of them or even places any significance upon them. The real rules may be used for the purposes of prediction of decision and counselling of clients.

There still remains the question of whether the real rules should have any place in legal education or whether law schools should teach only the paper rules. Is it the job of law schools to train students to be effective lawyers? Will these students be more effective in representing clients who are going to be sentenced if they learn only the list of legally-relevant criteria, even though these are of no use in predicting the actions of judges? Should students ignore the real rules of the granting of variances by zoning hearing boards even though the boards refuse to be bound by these rules in reaching later decisions? Are the rules of the Court of Appeals in deciding whether or not there shall be oral argument of no legal interest because they do not rise even to the class of paper rules?

To ignore the real rules in legal education is to refuse to study what the courts, administrative agencies, and law enforcement personnel are actually doing. It may be disillusioning for law students to be taught the realities of how the system works, but improvement of this system will come only if the actual workings of the system are studied, analyzed, criticized, and expressed in the form of real rules.