Patterns of American Jurisprudence

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For Mary

CONCLUSION

There has been a tendency among commentators to assume that the discovery of cracks in the edifice of late nineteenth-century legal formalism led almost immediately to the birth of a new jurisprudence. This was not the case. There was never, in American jurisprudence, anything so extravagant as a 'revolt against formalism'.[254] There was, rather, only a gradual, somewhat hesitant development away from late nineteenth-century legal thinking. The great forerunners of American legal realism, Holmes and Pound, were not committed anti-formalists. Holmes was the master of ambiguity, while Pound was the master of recantation. And while some realists were intent on seeing the latter pay for his sins, with the former they had little quarrel.

The idea of a revolt against formalism implies the emergence of an explicit philosophy of anti-formalism; but between the eras of Langdell and Pound, no such legal philosophy emerged. Certain ideas and arguments at variance with the ideology of formalism came to fruition, for sure, but it was not until the emergence of legal realism that these ideas and arguments began to take the shape of a general jurisprudence. Even this interpretation of events requires qualification. Although realism was essentially opposed to legal formalism, not all realists shared the same anti-formalist outlook. Formalism meant different things for different realists. Some realists criticized primarily the tradition of Langdell, others the tradition of *laissez-faire*; and even among those realists criticizing the same tradition, there often existed discernible differences of perspective and emphasis. Who was, and what it meant to be, a realist is not entirely clear. All that is certain is that some so-called realists, despite their opposition to the tradition of legal formalism, did not, in their writings, extricate themselves once and for all from the clutches of that tradition. Legal realism, we might say, was not entirely anti-formalist; for legal formalism, often heavily disguised, persisted under the realist banner.

[254] For an example of a legal philosopher subscribing to the 'revolt against formalism' fallacy, see Martin P. Golding, 'Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments', *Jnl. Leg. Educ.*, 36 (1986), 441–80 at 443.

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The Evolution of a Mood

> When the clamour of partisan debate fades, scholars are presumably in a position to judge historical events more clearly and completely. Certainly distance is essential for any adequate evaluation of 'legal realism', that diffuse, exciting, infuriating, pretentious, perceptive, and incomplete 'movement' which was born at the turn of the century, matured in the twenties, dominated much of the thirties, and then . . . what? Perhaps even in the seventies our perspective is not yet quite long enough.[1]

American legal realism is one of the great paradoxes of modern jurisprudence. No other jurisprudential tendency of the twentieth century has exerted such a powerful influence on legal thinking while remaining so ambiguous, unsettled and undefined. More than anything else, this book is a testament to the intellectual impact of legal realism. Yet the distinctiveness of the mark which realism has made on modern legal thought is more than matched by the indeterminacy of its conceptual and thematic boundaries. With exasperation and flippancy in equal measure, John Henry Schlegel has suggested that legal realism 'is just a name. Like "chicken soup", it means what we choose to call it'.[2]

That a legal historian who has patiently and assiduously charted the emergence, the key figures and the accomplishments of legal realism should reach this conclusion is at once instructive and dispiriting. Realism, quite simply, remains as elusive as it has been influential. The quotation which opens this chapter is illustrative of the fact that academics have failed to grapple successfully with the idea of legal realism as a peculiar jurisprudential phenomenon. Fundamental to the approach taken here is the idea that realism forms but part of a broader intellectual and political history, and that it is important to try to understand not only what realism

[1] Edward A. Purcell, Jr., review of W. Twining, *Karl Llewellyn and the Realist Movement*, *Am. J. Leg. Hist.*, 29 (1975), 240–6 at 240.

[2] John Henry Schlegel, 'The Ten Thousand Dollar Question', *Stanford L. Rev.*, 41 (1989), 435–67 at 464; and see more generally William Twining, 'Talk about Realism', *New York Univ. L. Rev.*, 69 (1985), 329–84. According to Twining, most attempts at explaining the meaning of 'legal realism' ultimately re-emphasize the ambiguity and vagueness of the term.

engagé. His article criticizing 'the realists' did a good deal, ironically, to put legal realism on the jurisprudential map; in particular, it provoked a published response from Karl Llewellyn and Jerome Frank, in which the authors attempted to define legal realism as an intellectual movement.[243] Pound offered no formal rejoinder to this response. Rather, he continued, throughout the 1930s and beyond, to make isolated, often petty and invariably ill-conceived remarks accusing proponents of legal realism of political and moral bankruptcy. Realism, he alleged, 'is essentially an art that cultivates the ugly . . . in jurisprudence it is the cult of what we always supposed abnormal'[244]—the cult, that is, of might equals right. It 'eliminate[s] from its science of law all questions of what ought to be, all disputes as to canons of value, all system and principle and reason. Thus the realists bring us to an objective observation of what actually takes place judicially and administratively, assuming that it actually takes place as a series of independent actions, as a matter of individual courses of behaviour. To them law is whatever is done officially. The officials may do as they choose. What they choose to do, when they do it, becomes law.'[245]

By the mid-1940s, Pound was arguing that realism denied not only democracy but also constitutionalism, the separation of powers, limited government and the freedom of the individual.[246] In an effort to curb what he perceived to be both the popularity and the excesses of legal realism, he had not only shut the door once and for all on his own sociological jurisprudence; he had also lost his sense of critical proportion. The purported iniquities of 'the realists' had become an obsession. Besides the published remarks making clear his antipathy towards realism, certain of Pound's statements, actions and inactions, though not explicit criticisms of the legal realists, clearly offended against the basic progressive sentiments to which most if not all of them subscribed. As dean at Harvard, he was by and large opposed to making changes to the law school curriculum. He was content, apparently, to leave the structure of Langdell's LL.B. intact.[247] In 1915, he restricted his own jurisprudence course to postgraduate students, and by the end of his deanship—which ran until 1936—students were complaining about the the overall blandness of the curriculum.[248] Despite his avowed passion for sociological jurisprudence, Pound was strangely

[243] Karl N. Llewellyn, 'Some Realism about Realism—Responding to Dean Pound', *Harvard L. Rev.*, 44 (1931), 1222–64 at 1234.

[244] Roscoe Pound, 'Modern Administrative Law', *Reports of the Virginia State Bar Association*, 51 (1939), 372–88 at 385.

[245] Roscoe Pound, 'The Future of Law', *Yale L.J.*, 47 (1937), 1–13 at 6.

[246] See Roscoe Pound, 'The American Idea of Government', *American Bar Association Journal*, 30 (1944), 497–503.

[247] See Joel Seligman, *The High Citadel: The Influence of the Harvard Law School* (Boston: Houghton Mifflin, 1978), 62.

[248] Seligman, ibid. 64–7; Sutherland, *supra* n. 41, 284–5.

unwilling to take his ideas out of the books and the articles and into the classroom. Declining so much as to attempt to establish interdisciplinary study as more than just a minor segment of the Harvard curriculum, he further alienated those of his colleagues who did attempt as much. Autocratic, insensitive and generally unsupportive towards his faculty, Pound was disinclined to be drawn into the public debate over the *Sacco–Vanzetti* case in the late 1920s, even though he privately agreed with his colleague, Felix Frankfurter—who had at that time been accused of left-wing leanings in connection with the case—that the defendants had been unfairly condemned to execution.[249] And when A. Lawrence Lowell—the then President of Harvard and chairman of the committee which advised the Supreme Court of Massachusetts to refuse clemency to Sacco and Vanzetti—objected to the appointment of Jewish scholars to the Law School, Pound, despite faculty outrage, responded with timidity.[250]

When not tolerating Lowell, Pound was stooping to his level. In 1934, he remarked that the reports of Nazi violence throughout Europe were grossly exaggerated, and that Hitler was 'a man who can bring them [the Central Europeans] freedom from agitating "movements" '.[251] Though supportive of German political dominance in Europe, however, he became resistant towards the reception of continental legal ideas in the United States. Throughout his academic career, Pound, perhaps more than any other American legal academic, had been inspired by countless European philosophers and jurists. In 1914, he had bemoaned the parochialism of those who wished to erect 'a dead Chinese wall around the American legal intellect'.[252] Yet, by the early 1940s, he was proclaiming that American intellectuals 'do not . . . need any advice on law or politics from continental Europe'.[253] No one in the history of American jurisprudence underwent such a remarkable volte-face as did Pound. He set the scene for a new, progressive perspective in jurisprudence, and then systematically and quite fanatically set about denouncing that perspective.

[249] Wigdor, *supra* n. 190, 249–50. Wigdor is wrong, however, in his claim that Pound steadfastly refused to be drawn into the public debate about the *Sacco–Vanzetti* case. See N. E. H. Hull, 'Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn–Pound Exchange Over Legal Realism', *Duke L.J.* [1989], 1302–34 at 1320–1. On Frankfurter's involvement in the case, see Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis of Lawyers and Laymen* (Boston: Little, Brown & Co., 1927); Twining, *supra* n. 147, 341–9. Cf. also Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 147 where it is suggested (though without citation of a source) that Pound 'stood firmly by' Frankfurter.

[250] Wigdor, *supra* n. 190, 251; Hull, *supra* n. 249, 1325.

[251] Pound, cited in Wigdor, *supra* n. 190, 250.

[252] Roscoe Pound, 'Note to Fowler: "The New Philosophies of Law" ', *Harvard L. Rev.*, 27 (1914), 731–5 at 734.

[253] Pound, cited in Widgor, *supra* n. 190, 276.

was but, equally, what it bequeathed to modern jurisprudential culture. This demands an examination of the theoretical and political characteristics of realism, not simply to demonstrate how it failed to live up to its ambitions, but also to illustrate how certain of its messages have been neglected and suppressed.[3]

Perhaps it seems contradictory to suggest that realism has exerted a powerful influence over the direction of modern jurisprudence while simultaneously being neglected and suppressed. But there is no contradiction, for in different fields of jurisprudence realism has been treated differently. In one area of modern American jurisprudence, critical legal studies, realism has for the most part been treated in a fairly positive fashion, as the beginning of the so-called 'revolt' against legal formalism (a 'revolt' which proponents of critical legal studies have attempted to rekindle). In other areas, realism has proved influential precisely because it is perceived as the primary problem to be surmounted. Legal theorists have tended more generally to view realism as a rather barren wasteland, littered by various clichéd and largely discredited arguments and assertions.[4] 'The law is what judges do', 'judges are only human', 'stimuli and hunches, not rules, form the basis of judicial decision-making'—these and similar adages represent a common perception of legal realism: realism, that is, as the jurisprudence of legal incertitude and arbitrariness. To a certain degree, this outlook can be found in the literature of legal realism. But that is not all that there is to be found. There is much more besides, and it is important to try to excavate that which the caricature of realism leaves buried.

Not that there is no reason to take the caricature seriously. Hostility towards the view that legal rules play a limited, sometimes negligible role

[3] By far the best historical studies of legal realism are those of Laura Kalman and John Henry Schlegel. See Laura Kalman, *Legal Realism at Yale: 1927–1960* (Chapel Hill: University of North Carolina Press, 1986); John Henry Schlegel, 'American Legal Realism and Empirical Social Science: From the Yale Experience', *Buffalo L. Rev.*, 28 (1979), 459–586; 'American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore', *Buffalo L. Rev.*, 29 (1980), 195–323; *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, forthcoming 1995). For my own small-scale studies of particular realist figures and themes, see Neil Duxbury, 'Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence', *Oxford J. Leg. Studs.*, 10 (1990), 11–41; 'Robert Hale and the Economy of Legal Force', *Mod. L. Rev.*, 53 (1990), 421–44; 'Jerome Frank and the Legacy of Legal Realism', *Int. Law and Society*, 18 (1991), 175–205; 'In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique', *Oxford J. Leg. Studs.*, 11 (1991), 354–95.

[4] See Robert W. Gordon, 'Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography', *Law and Society Rev.*, 10 (1975), 9–55 at 13 fn. 11. Gordon notes that commentators on legal realism have been inclined to treat proponents of the tendency 'as (rather inept) legal philosophers', thereby underplaying the considerable extent to which most realists were concerned with legal doctrine and procedure.

in the process of judicial decision-making contributed significantly to the demise of realism. From the 1930s onwards, realist jurisprudence suffered a series of increasingly penetrative body-blows as American legal philosophers, tormented by the spectre of Nazism, became ever more determined to discover democratic values, rational processes, neutral principles and, ultimately, integrity in the law. Realism suffered a form of caricature in British jurisprudence too, owing largely to the fact that, with the publication of H. L. A. Hart's *The Concept of Law* in 1961, rule-scepticism came gradually to be regarded by legal philosophers as little more than a convenient if somewhat feeble sparring partner for the philosophy of legal positivism.[5]

In recent times, and although based on certain fundamental differences, the American jurisprudential tradition of uncovering values, processes and principles in the law and the British positivist tradition of Hart and his successors have crossed paths. This first occurred when Hart and Lon Fuller debated the moral content of legal authority,[6] and it happened again when Ronald Dworkin rejected Hart's so-called rule of recognition in favour of the idea of principled decision-making.[7] There is no need here to re-tread what is, for most legal philosophers, familiar territory. But one crucial point should be noted. Although there has been more of an emphasis of differences than a meeting of minds between the supporters of and the detractors from legal positivism, supporters and detractors alike appear to be united on at least one matter: representatives of both sides of the debate either implicitly or explicitly distance their own particular perspectives from the caricatured version of legal realism. Placed in the context of modern positivist and positivist-inspired jurisprudence, realism, caricatured, appears to be wholly unenlightening, since it not only undermines the status of legal rules in the process of judicial decision-making, but also implicitly denies the credibility of any theory of objective or interpretive legal values. For the realist, according to the popular burlesque, the law is simply what legal officials—usually judges—do when settling disputes; and what judges do, being human, is settle disputes on the basis of their intuitions as to what is right or wrong, just or unjust—

[5] See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 134–5; also E. Hunter Taylor, Jr., 'H. L. A. Hart's Concept of Law in the Perspective of American Legal Realism', *Mod. L. Rev.*, 35 (1972), 606–20.

[6] See H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard L. Rev.*, 71 (1958), 593–629; Lon L. Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart', *Harvard L. Rev.*, 71 (1958), 630–72; *The Morality of Law* (New Haven, Conn.: Yale University Press, 1964), 187–242; H. L. A. Hart, review of L. L. Fuller, *The Morality of Law*, *Harvard L. Rev.*, 78 (1965), 1281–96; and, for a general discussion, David Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984), 74–93.

[7] See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 14–130.

these intuitions being subject, of course, to the moods and whims of the particular judge. Hence, realism stands distanced both from positivism and from those critics of positivism who look beyond rules for other criteria of legal validity. Failing to contribute meaningfully to either side of the dialogue, refusing to connect the activity of judicial decision-making either to rules or to extra-legal criteria which might inform or supplement those rules, legal realism represents, for positivist and positivist-inspired jurisprudence, an antediluvian philosophy of legal validity, a perfect illustration, in short, of what jurisprudence used to be like, before legal philosophers became enlightened.

Thus caricature has led to suppression, to a cursory treatment of realism by modern legal philosophers as if it were a form of jurisprudence to be easily discredited. To attempt to undermine the essentially one-dimensional view of realism as a straightforward philosophy of legal incertitude, however, demands the recognition of a definitional trap from which there is no obvious escape. A detailed assessment of realism requires, inevitably, an explanation of what it means to attach to particular ideas, themes, arguments and individuals the label 'realist'. If realism is much more than its common caricature, what precisely is it? No attempt is made here either to present an exhaustive account of what realism is or to take stock of every figure who might, by one criterion or another, be categorized as a realist.[8] Emphasis is placed instead on what can only vaguely be described as the 'feel' of realism as an intellectual tendency—a tendency, that is, which evolved out of the period of academic and judicial formalism preceding it.

The treatment of realism here as nothing more than a tendency, without rigid intellectual boundaries, is as much a matter of accuracy as of convenience. Legal realists, one of their number once observed, 'do not constitute a "school" in any useful sense of that term, for they differ too much among themselves on too many matters'.[9] The most eminent proponent and promoter of legal realism, Karl Llewellyn, likewise hesitated to conceive of realism as a single school of thought. 'There *is*', he insisted, 'no school of realists. There is no likelihood that there will be such a school.'[10] Rather, he preferred to conceive of realism as 'a *movement* in thought and work about law'.[11] Others have followed Llewellyn's example,

[8] On the futility of trying to compile a precise list of realists, cf. Twining, *supra* n. 2, 341–2.

[9] Walter Wheeler Cook, review of J. H. Beale, *A Treatise on the Conflict of Laws*, *Columbia L. Rev.*, 35 (1935), 1154–62 at 1161. See also Max Radin, 'Legal Realism', *Columbia L. Rev.*, 31 (1931), 824–8 at 825: 'I have spoken of realists as a group, but I should properly speak only of one realist, that is, of myself, whose right to the designation to which I pretend may be challenged by others, the legal realists'.

[10] Karl N. Llewellyn, 'Some Realism about Realism—Responding to Dean Pound', *Harvard L. Rev.*, 44 (1931), 1222–64 at 1233.

[11] Ibid. 1234.

designating realism as a movement, even if sometimes putting that word in inverted commas.[12] Yet even 'movement' seems too strong a word in this context. Realism was more a mood than a movement. That mood was one of dissatisfaction with legal formalism, that is, with twentieth-century legal thought being dominated by a nineteenth-century legal world-view. 'Legal formalism' itself denoted different things for different realists; and different realists addressed their own particular conceptions of formalism in markedly different ways. So although a number of themes are singled out here as peculiarly 'realist' themes, this hardly masks the fact that realism was an intellectual phenomenon characterized as much by disparateness as by similarities among its proponents. Certainly to call realism a movement is to engage in terminological flattery; it is far more appropriate to describe it as an intellectual tendency.

Our terminological problems do not end here. The disparities which existed among so-called realists are exemplified by their disagreements over the term 'realism' itself. In 1934, Jerome Frank—rather curiously writing in the past tense (this was the period when realism was in full swing)—remarked that 'realistic jurisprudence was an unfortunate label, since the word "realism" has too many conflicting meanings'.[13] Hessel Yntema adopted a more appropriate attitude of retrospection when, in 1960, he wrote that, as an erstwhile realist, he had always disclaimed the term 'realism' for the reason that it was both inappropriate and obscure.[14] It is hardly surprising that various 'realists' should have raised such objections. American legal realism, after all, was nurtured under the wing of the social sciences, where 'realism' has traditionally been treated as something of a slippery concept.[15] This much can hardly have escaped the attention of those 'realists' who took seriously the idea of studying law in accordance with social-scientific methods. As a label, 'realism' was adopted most consistently by Llewellyn, although there is some ambiguity in his use of the term. For Llewellyn, '[a] realist is one who, no matter what

[12] William Twining, *Karl Llewellyn and the Realist Movement* (rev. edn. London: Weidenfeld & Nicolson, 1985), 26–7; Bernie R. Burrus, 'American Legal Realism', *Howard L.J.*, 8 (1962), 36–51 at 40–1; Martin P. Golding, 'Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments', *Jnl. Leg. Educ.*, 36 (1986), 441–80 at 452.

[13] Jerome Frank, 'Experimental Jurisprudence and the New Deal', *Congressional Record*, 78 (1934), 12412–14 at 12412; and cf. also Llewellyn, *supra* n. 10, 1234 fn. 35.

[14] Hessel E. Yntema, 'American Legal Realism in Retrospect', *Vanderbilt L. Rev.*, 14 (1960), 317–30 at 320; and see also Leon Green, 'Innocent Misrepresentation', *Virginia L. Rev.*, 19 (1933), 242–52 at 247: 'If I am a "legal realist" I have been ignorant of the fact. At least I have never called myself one. I subscribe to no label. . . . As far as I recall I have never used the word "realism" in my writings, and while I have no prejudice against it, I do not know what it means'.

[15] For an illustration of this point, see David J. Levy, *Realism: An Essay in Interpretation and Social Reality* (Manchester: Carcanet, 1981).

his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and to try to describe as honestly as possible what is to be seen.'[16] There were, inevitably, realists who did not quite share this belief; just as there have been lawyers who, though not realists, have subscribed to this belief quite assiduously.[17] Logomachy over 'legal realism', it seems, is a cul-de-sac.[18]

In an inspired study of American legal theory, Robert Summers jettisoned the term 'legal realism' in an effort to introduce into jurisprudential discourse a comparably less vague nomenclature. Summers argues that it is more appropriate to conceive of a tradition of 'pragmatic instrumentalism' in American jurisprudence. This term, he claims, depicts accurately the philosophical premisses underpinning the early twentieth-century jurisprudential reaction against legal formalism. 'Legal realism', in contrast, lacks terminological precision.[19] In arguing as much, however, Summers concedes that he does not anticipate a straight terminological swap. The upshot of this is a thesis somewhat less persuasive than it first appears. While, within the specific context of his own study, Summers offers convincing arguments for dispensing with the term 'legal realism', these arguments rather lack validity when applied to the use of the term by others. The reason for this hinges upon his conception of pragmatic instrumentalism. For Summers, this term is of necessity defined by the ideas of those whom he considers to qualify for the title of pragmatic instrumentalist.[20] Yet, by his criteria, various figures commonly considered to be 'realists' would not in fact qualify for the title. Moreover, at least three of his so-called pragmatic instrumentalists—Oliver Wendell Holmes, John Chipman Gray and Roscoe Pound—are not usually described as realists, but as 'proto-realists'. While it is with some justification that Summers criticizes the term 'realism' as descriptively inapposite, his own conception of pragmatic instrumentalism denotes only a highly circumscribed group of realists and realist forebears. Some realists were not pragmatic instrumentalists, just as some pragmatic instrumentalists were not realists. And whereas 'legal realism' can be criticized as a hopelessly broad catch-all category, 'pragmatic instrumentalism', when removed from the specific confines of Summers's own project, proves rather too limiting and idiosyncratic for common usage.

So, where does this leave us? The term 'legal realism' is retained here for two specific reasons. First, despite the criticisms of Summers and others, it may be argued that the merit of the term 'realism' lies precisely in its generality. 'Realism' describes accurately what was possibly the single unifying ambition of so-called realists: namely, the commitment to candour, to telling it—whatever 'it' happened to be—as it is.[21] Certainly this commitment to candour is neither the sole province nor feature of realist jurisprudence—if this were all that realism was, we would indeed all be realists now. But although candour *per se* hardly serves as a criterion for demarcating realism as a discrete intellectual tendency, its thematic importance rests in the fact that there emerged, during the early decades of this century, a peculiar 'style' of candour—one which, though it has since been emulated, did not exist in the United States prior to the advent of realist jurisprudence.

The second reason for retaining the term 'realism' is little more than a confession of resignation. For better or worse, and despite the reservations of some so-called realists, the term 'realism' stuck; and it seems, now, that it is here to stay. In his despair over the ambiguity of the term 'literature', Terry Eagleton once suggested that it should, in his writings, be considered placed under an invisible crossing-out mark, as if to indicate that while the term will not really do, we apparently have nothing better with which to replace it.[22] Perhaps there is good reason to do the same with 'realism'. Yet one should not blow this matter out of proportion. Our purpose here is to analyse an intellectual tendency. Whether or not that tendency was given the correct name—whatever that could mean—seems hardly of crucial importance.

COMPOUNDING A CONTROVERSY

That legal realism 'happened' seems now—if, indeed, it did not always seem—an inevitability. The claim that formalism is not working became, for many early twentieth-century American lawyers, something of a

[16] Twining, *supra* n. 12, 74.

[17] See e.g. Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982); *passim* and esp. p. 180. ('As a scholar, it is my job to look in dark places and try to describe, as precisely as I can, what I see'); and cf. also, in a similar vein, Guido Calabresi, letter to Paul D. Carrington, in ' "Of Law and the River", and of Nihilism and Academic Freedom', *Jnl. Leg. Educ.*, 35 (1985), 1–26 at 23–4.

[18] Wilfrid E. Rumble, Jr., *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968), 45.

[19] Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, NY: Cornell University Press, 1982), 36–7. For a similar reservation concerning 'pragmatic instrumentalism', see Twining, *supra* n. 2, 339–40 fn. 24.

[20] Summers, *supra* n. 19, 23. Summers lists eleven pragmatic instrumentalists: John Chipman Gray, Oliver Wendell Holmes, Jr., John Dewey, Roscoe Pound, Walter Wheeler Cook, Joseph Bingham, Underhill Moore, Herman Oliphant, Jerome Frank, Karl Llewellyn and Felix Cohen. This list, Summers adds, is not intended to be exhaustive.

[21] Or, in the words of Pound, the commitment to the 'accurate recording of things as they are'. Roscoe Pound, 'The Call for a Realist Jurisprudence', *Harvard L. Rev.*, 44 (1931), 697–711 at 697. See also Edward S. Robinson, 'Law—An Unscientific Science', *Yale L.J.*, 44 (1934), 235–67 at 257.

[22] Terry Eagleton, *Literary Theory: An Introduction* (Oxford: Blackwell, 1983), 11.

truism. However, the question of precisely how—or, more importantly, what it means to say that—realism 'happened' has never been answered satisfactorily. Realism did not simply come about overnight; its evolution was, rather, a hesitant one. Yet, there has been a tendency to try to conceive of the evolution of legal realism in terms of some triggering event, without which—so the assumption seems to be—'the realists' would never have come into being. The fault with this argument is that it is premissed on a name-tag approach to the history of ideas, as if the gradual movement away from legal formalism would have been an inconsequence—as if it could not properly be said to have occurred—if someone had not coined a name for it.

That 'someone' who came up with the label of realism is commonly considered to be Karl Llewellyn;[23] and indeed, in the endeavour to locate a point at which legal realism began, there has been a tendency for commentators to hone in on the famous Llewellyn–Pound *controverse* of the early 1930s. The story is something of a commonplace. Having, in early 1931,[24] accused an unnamed body of 'realists' of demonstrating an exaggerated faith in empiricism and social science while simultaneously neglecting—if not, at times, denying—the legal significance of rules, doctrines and principles, Pound quickly found himself at loggerheads with those who had made the most effort to popularize anti-formalist jurisprudence. At this point in time, the realist centre-stage was already dominated by Llewellyn and Jerome Frank. Both had just written books which were to become landmarks in the literature of realism,[25] and both felt that Pound had caricatured their ideas.[26] Llewellyn felt particularly dispirited, given that Pound had previously accepted his academic criticisms with good grace.[27] Thus it was that Llewellyn and Frank set about composing a rejoinder to Pound, eventually published in Llewellyn's name alone, in which 'twenty men and ninety-odd titles' were put forward as 'representative'[28] of 'the new ferment'[29] in jurisprudence.

Llewellyn and Frank's response is as much an exercise in legal realism as it is an idiosyncratic description of it. 'Ferment', Llewellyn begins, 'is abroad in the law. . . . It spreads. It is no mere talk.'[30] Those involved in this ferment 'are folk of modest ideals. They want law to deal, they

[23] See Twining, *supra* n. 2, 363: 'Karl Llewellyn is generally regarded as the leading internal interpreter of the Realist Movement. He neither coined the term nor founded the movement, but he is acknowledged as its first labeller and publicist.'

[24] See Pound, *supra* n. 21, *passim*.

[25] Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana, 1951; repr. of orig. student edn. 1930); Jerome Frank, *Law and the Modern Mind* (Gloucester, Mass.: Peter Smith, 1970; orig. publ. 1930).

[26] See Twining, *supra* n. 12, 72–3.

[27] Ibid. 71.

[28] Llewellyn, *supra* n. 10, 1227.

[29] Ibid. 1225.

[30] Ibid. 1223.

themselves want to deal, with things, with people, with tangibles . . . not with words alone. . . . They view rules, they view law, as means to ends.'[31] While sharing 'certain points of departure',[32] these so-called realists 'are not a group'.[33] 'They differ among themselves well-nigh as much as any of them differs from, say, Langdell.'[34] Among the realists, individualism is the order of the day: 'the justification for grouping these men together lies not in that they are *alike* in belief or work, but in that from certain common points of departure they have branched into lines of work which seem to be building themselves into a whole, a whole planned by none, foreseen by none, and (it may well be) not yet adequately grasped by any.'[35] A collection of somewhat disparate legal academics, the realists were, according to Llewellyn, united only by their apparent—sometimes inadvertent—acceptance of certain shared premisses.

The list of twenty realists which Llewellyn and Frank offer in response to Pound is but a selection and by no means intended to be exhaustive. They 'had hoped to be more precise . . . There are doubtless twenty more. But half is a fair sample.'[36] Certainly, as a sample, it was sufficient to stymie the unsubstantiated allegations made by Pound. In structuring his critique of Pound around the names on the list, furthermore, Llewellyn invoked two exemplary realist motifs: the imagery of trial court fact-finding procedure and the methodology of empiricism. Pound, according to Llewellyn, was to be tried by fact.[37] The question was: were any of Pound's allegations substantiated by anything which any of the listed realists had ever claimed? The 'evidence' discovered in Pound's favour turned out to be scant.[38] But what was most significant about Llewellyn and Frank's retort to Pound—what, equally, has by and large been overlooked—was not so much the wholly predictable conclusion that they reached, but the manner in which they purported to reach it.

Llewellyn and Frank's counter-critique of Pound is period-piece realist social science. In compiling their list, they 'selected such writings as seemed to speak most directly to points of legal theory, or most likely to contain evidence on any of [Pound's] allegations'.[39] They also '[w]rote to the men, requesting from each his suggestion as to where he had expressed himself' along lines which Pound was insisting typified realism.[40] Pound's observations were then compared with the sample material which Llewellyn and Frank had compiled, and 'the results of the test'[41]—as if arrived at in a laboratory—were put forward as a 'scientific' refutation of Pound's critique. By detailed use of what was—when all is said and done—

[31] Llewellyn, *supra* n. 10, 1223.

[32] Ibid. 1234.

[33] Ibid. 1256.

[34] Ibid. 1234.

[35] Ibid. 1225.

[36] Ibid. 1226–7.

[37] Ibid. 1235.

[38] Ibid. 1233.

[39] Ibid. 1227.

[40] Llewellyn, *supra* n. 10.

[41] Ibid. 1228.

an idiosyncratically concocted sample of legal academics and their writings, Llewellyn and Frank had not simply responded to a response, but had done so with an air of apparent objectivity. Their article—as the title makes clear—purported to offer 'some realism about realism'.

In contrast with their refutation of Pound's critique, Llewellyn and Frank were consciously less objective in presenting their own opinions on realism. 'What we here further say of realists,' Llewellyn states, having finished with Pound, is 'to be read as giving a vague and very fallible impression.'[42] Realism was not a new phenomenon, but an 'attitude' which had been around at least since 1914;[43] the response to Pound was in part a 'descriptive' endeavour[44]—descriptive, that is, of something which had been in existence for some time. For all that the Llewellyn–Pound exchange may have instilled a fragmented group of academics with a sense of unity under the banner of legal realism,[45] the tendency was certainly not born with that exchange. It was, at best, baptized by it.[46] With the Llewellyn–Pound controversy, the mood of realism, of the challenge to formalism, somehow gelled. But it was not a new mood. And it would be wrong, accordingly, to assume that realism emerged in the aftermath of the controversy. The realist mood of discontentment preceded its label.

Like all good stories, the Llewellyn–Pound exchange is not without a sub-plot. The underbelly of legal realism is to be discovered in the archives of the major American law schools. It is here, in the marginalia, the letters and the unpublished manuscripts, that there can be found many a genuine revelation, and it would have been surprising if consultation of archive sources had not shed fresh light on the Llewellyn–Pound dispute. In her archival research into Llewellyn and Pound, Natalie Hull has dug beneath the surface of their exchange as it appears in the pages of the *Harvard Law Review* and offered some 'newly uncovered' evidence on the affair.[47] Pound's article of 1931 attacking realism, she argues, may be interpreted as a response, in part, to criticisms of his work which Llewellyn had made both in print and in private correspondence between the two men dating back to 1927. She also traces the history behind Llewellyn and Frank's rejoinder, revealing, in the process, that their famous 'sample' of realists had originally extended to over double its published number, and also that, prior to the publication of their article, Pound had accused Frank—unfairly, it seems—of having mis-quoted his views. 'If there was any feud

[42] Llewellyn, *supra* n. 10, 1233. [43] Ibid. 1227. [44] Ibid. 1234.
[45] See Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 155.
[46] See Yntema, *supra* n. 14, 317.
[47] N. E. H. Hull, 'Some Realism about the Llewellyn–Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927–1931', *Wisconsin L. Rev.*, [1987], 921–69.

among the principals of the controversy, it was between Pound and Frank, not between Pound and Llewellyn.'[48]

The archival sources in fact reveal Pound, certainly during the first two decades of this century, to be very much a realist *malgré lui*, a man, indeed, whom Llewellyn regarded more as a kindred spirit than as an intellectual adversary. In 1925, Llewellyn wrote an unpublished essay in which he acknowledged Pound's considerable influence on the development of realist thinking in American law. 'Llewellyn's view of Realistic Jurisprudence', at this point in time, 'almost totally coincided with Pound's description of Sociological Jurisprudence.'[49] It was only later, in 1931, that 'Llewellyn deliberately rewrote the public version of the intellectual history of the [Realist] movement to conceal Pound's vital role in it'.[50] 'During the six years between Llewellyn's acknowledgment of Pound's inspiration of the Realist movement and the *Harvard Law Review* debate, Llewellyn completely reconceptualized the intellectual pedigree of "Realistic Jurisprudence", banishing Pound from the central place in its development.'[51]

The question to which Hull seeks an answer is that of why Llewellyn's estimation of Pound changed so radically. At one level, her answer is quite straightforward: Llewellyn 'simply adored the parry and thrust of an intellectual duel for its own sake'.[52] Pound had dropped the gauntlet, and Llewellyn was only too happy to pick it up. A consequence of this was that he adopted a rather less generous, or at least explicitly generous, view of his adversary than that which he had previously held: formal respect became the first casualty of rigorous critique. Hull, however, in developing her answer, digs rather deeper than this, and in doing so she points to two specific incidents. The first was the *Sacco–Vanzetti* affair. Llewellyn not only campaigned vigorously against the execution of Sacco and Vanzetti but also, more generally, wrote about the affair as an exemplary illustration of certain grave shortcomings in the American system of justice. For Llewellyn, the case was something of a crusade.[53] Pound, on the other hand, for all that he may privately have shared some of Llewellyn's sentiments, did his utmost to treat the affair with an attitude of 'calculated neutrality'.[54] Hull suggests that this aloofness on Pound's part probably led Llewellyn to regard him suspiciously. Yet no evidence is adduced, nor does any appear to exist, which so much as hints that Llewellyn and Pound's differing approaches to *Sacco–Vanzetti* contributed decisively to their intellectual estrangement in the early 1930s.

[48] Ibid. 948–9.
[49] N. E. H. Hull, 'Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn–Pound Exchange over Legal Realism', *Duke L.J.*, [1989], 1302–34 at 1314.
[50] Ibid. 1306. [51] Ibid. 1317. [52] Hull, *supra* n. 47, 942.
[53] See Twining, *supra* n. 12, 344–49. [54] Hull, *supra* n. 49, 1323.

The second incident on which Hull focuses to explain this estrangement proves similarly inconclusive. At the beginning of the 1930s, there emerged a possibility of Llewellyn and Pound collaborating on an article on the law of contract. Owing, basically, to crossed wires—and perhaps also to the fact that Pound seemed not particularly keen on the idea—the project never got off the ground, and eventually each published his research independently. According to Hull, this abortive venture appears to be indicative if not indeed the cause of a general falling out between Llewellyn and Pound. Again, however, there exists no evidence to support such a conclusion. Llewellyn was disappointed that the collaboration had not worked out, and was rather bewildered as to why this had been the case.[55] But to suggest, as Hull does, that Pound's failure to carry through the collaborative venture was a 'betrayal' which 'enraged' Llewellyn[56] is not only to embellish the account with an emotive gloss, but also to impute a convenient yet unsubstantiated motive for Llewellyn's decision to revise his estimation of Pound's intellectual significance *vis-à-vis* realism. The trek through the archives proves, here, to be fruitless. The reason for Llewellyn's change of mind, rather like the case of Nietzsche's forgotten umbrella,[57] remains a mystery.

The importance of Hull's research rests in the fact that it serves indirectly as a warning against interpreting legal realism primarily through the initiatives of Karl Llewellyn. Whatever Llewellyn's motives happened to be in his endeavour to put realism on the map as a distinct jurisprudential movement, it seems clear that he wished to initiate a

[55] Karl N. Llewellyn to Arthur L. Corbin, 6 April 1931, in Karl N. Llewellyn Papers, University of Chicago Law Library, A.II, 65(b), cited in Hull, ibid. 1333: 'I still can't understand how he [Pound] could write the article.'

[56] Hull, *supra*, n. 49, 1333.

[57] On the case, and the significance, of Nietzsche's forgotten umbrella, see Jacques Derrida, *Spurs: Nietzsche's Styles* (Eng. tr. B. Harlow, Chicago: University of Chicago Press, 1979), 123: (' "I have forgotten my umbrella". These words were found, isolated in quotation marks, among Nietzsche's unpublished manuscripts. . . . We will never know *for sure* what Nietzsche wanted to say or do when he noted these words, nor even that he actually *wanted* anything.') According to Hull, '[t]he historian who attempts to reconstruct the reality of what the jurisprudents themselves were doing at the time that they created the public discourse, penetrates to a second deeper level of discourse, a private level. This private discourse consists in correspondence and informal discussion among academic jurisprudents. The student of the private discourse reconstructs the reality of these intellectual exchanges, revealing the authors' intended meaning of words used in the public discourse. . . . We historians must rediscover the private discourse and use it to reinterpret the public discourse.' N. E. H. Hull, 'Networks and *Bricolage*: A Prolegomenon to a History of Twentieth-Century American Academic Jurisprudence', *Am. J. Leg. Hist.*, 35 (1991), 307–22 at 309–10. In other words, by resorting to the archival and the unpublished, we can reconstruct private discourse, and by reconstructing private discourse we can discover real authorial intentions. For a constrasting—and, to my mind, more convincing—view, see Dominick LaCapra, *Rethinking Intellectual History: Texts, Contexts, Language* (Ithaca, NY: Cornell University Press, 1983), 36–7.

definitive break with the past. Realist jurisprudence, for Llewellyn, was distinct not only from the tradition of legal formalism but also from the proto-realist initiatives of Holmes, Cardozo, Gray and, of course, Pound. None of these 'pre-realists' featured in either the published or unpublished versions of Llewellyn and Frank's sample lists.[58] None, indeed, was conceived to be part of the new ferment. Precisely why not remains a mystery. The suggestion—intimated, in fact, by Pound[59]—that the difference between the pre-realists and the realists was to some degree a generational one is rather refuted by the fact that certain of the realists named by Llewellyn and Frank were almost as old as Pound himself.[60] It is odd, too, that Llewellyn and Frank should have neglected the pre-realists while including in their sample lists—particularly the unpublished version—academics who were almost as obscure in 1931 as they are today.[61] Some of those listed were only 'realists' by virtue of their association with Llewellyn.[62] Most of those listed would not have applied the label to themselves.[63] In short, the sample of realists was a wholly arbitrary affair, the concoction of which appears to have served primarily to banish the past from the present; to ensure that there existed a cut-off point, however fabricated, between the pre-realists and the realists.

Once we move beyond this cut-off point, the task of understanding legal realism as an intellectual phenomenon seems rather more conceivable. It becomes clear that there are no good historical or conceptual reasons for demarcating the pre-realists from the realists, and that realism should, accordingly, be regarded as the continuation of a particular trend—namely, the growing dissatisfaction with legal formalism—rather than as the beginning of something substantively new. Even Llewellyn acknowledged that, by the early 1930s, the realist spirit had been in the air for well over a decade. His basic failing was that, while he recognized that the pre-realists shared in this spirit, he regarded their ideas as somehow removed from the new scene. They were inspirational—in Holmes's case, crucially inspirational—but ultimately distant voices.

Those commentators who resist according especial significance to the Llewellyn–Pound exchange have attempted generally to conceive of realism in rather broader terms than have those who treat the exchange as somehow foundational or indispensable to any proper discussion of the subject. Grant Gilmore, who had no taste at all for the Llewellyn–Pound

[58] Hull, *supra* n. 47, 967–9.

[59] Pound, *supra* n. 21, 697 (characterizing legal realists as certain of 'our younger teachers of law').

[60] See Hull, *supra* n. 47, 954; Twining, *supra* n. 12, 76, 410 fn. 25.

[61] See, in particular, the people discussed briefly by Hull, *supra* n. 47, 961.

[62] Hull, ibid. 961–2.

[63] Ibid. 957.

dispute,[64] once suggested that 'realism was the academic formulation of a crisis through which our legal system passed during the first half of this century'.[65] Realism was not, in fact, an exclusively academic affair. It was, nevertheless, very much a response to a 'crisis', even if that crisis was rather more complex than the one which Gilmore describes.

According to Gilmore, the crisis was fairly straightforward. With the initiation of the National Reporter system in the 1870s, the West Publishing Company undertook to publish all federal appellate and some trial court opinions, as well as higher state court decisions, throughout the United States. By the end of the nineteenth century, the reporting and printing of cases had reached nightmarish proportions. The avalanche of reported decisions not only made it impossible for lawyers ever to be fully informed but also resulted in the discovery, with increasing frequency, of inconsistencies and contradictions among the precedents upon which the profession relied.[66] This, Gilmore argues, was the crisis to which realism attempted to respond. Yet a more obvious response to this crisis came from a different, distinctly Langdellian-inspired, source. From its inception in 1923, a primary goal of the largely Harvard-staffed Restatement of the Law project was to eradicate unnecessary complexities in legal doctrine. It was an initiative devised precisely to meet the 'crisis' represented by the flood of reported precedents. Realism, in contrast, represented not so much a response to this crisis as a somewhat resigned acknowledgement that it existed. Indeed, if anything, legal realists tended to treat the ever-burgeoning body of published cases as less of a cause for alarm than the Restatement project itself.

The 'crisis' to which realism responded was much broader than that which Gilmore describes. Very simply, the crisis may be characterized as the persistence, into the twentieth century, of legal formalism in both of its guises. The ways in which legal formalism represented a crisis, and the ways in which so-called realists responded to this crisis, were diverse, and to make any sense of legal realism and its intellectual legacy it is necessary to attempt to untangle that diversity. This requires not the search for a key event which may have started the realist ball rolling, but rather an examination of various factors which appear to have contributed to the evolution of realism as an intellectual mood. The most general and important factor to be taken into account is the manner in which, from the earliest years of this century, the insights and the methods of the social sciences began to find their way into the American law schools. Social

[64] See Grant Gilmore, *The Ages of American Law* (New Haven, Conn.: Yale University Press, 1977), 78, 136–7 n. 25.

[65] Grant Gilmore, 'Legal Realism: Its Cause and Cure', *Yale L.J.*, 70 (1961), 1037–48 at 1037.

[66] Ibid. 1041.

science formed a crucial backdrop to legal realism, though the manner in which it did so is far from straightforward.

MAKING WAY FOR THE SOCIAL SCIENCES

Formalism left a void in American legal scholarship. The Langdellian legal scientist had a clear objective: to reduce legal doctrines to their core elements and thereby remove from the law all unnecessary complexity. But what if that objective were to be achieved: what then, beyond teaching, would be the *raison d'être* of the American academic lawyer? John Henry Schlegel has suggested that the Langdellian task of systematization had in fact been realized by around the time of the First World War; that, by then, '[t]here really wasn't much more to do'.[67] In one sense, this is a curious assertion. American law, both common law and statute, continued to proliferate and become ever more complex through-out and beyond the War—to the extent, indeed, that by the 1920s the American Law Institute had turned its attention to the matter of restatement. Clearly the task of systematization was not accomplished. Yet in another sense, Schlegel's remark rings true, for by the early decades of this century legal scholarship in the Langdellian mould had become somewhat stale. The fundamental legacy of Langdellian formalism was a decidedly monolithic conception of legal scholarship; indeed, the criterion of good scholarship—painstaking arrangement of principles with a view to demonstrating the scientific underpinnings of legal doctrine—had been established by Langdell himself. The only significant choice open to the academic lawyer in the Langdellian tradition rested in the matter of which area of law to reduce to its basics.

The mood of legal realism evolved out of this academic malaise.[68] Realism signified discontentment not just with formalism as a distinct jurisprudence but, still more fundamentally, with the fact that formalism in its Langdellian guise rather limited the range of intellectual activities that the academic lawyer could legitimately pursue. Realism represented the feeling that it was time to inject into legal research at least a semblance of the *frisson* that the case method had already brought to teaching. For all that realism constituted a general sense of unease concerning legal formalism, however, it could not be described as an outright distaste for scientific methods. Many so-called realists were happy, in principle, to embrace the

[67] John Henry Schlegel, 'Langdell's Legacy Or, The Case of the Empty Envelope', *Stanford L. Rev.*, 36 (1984), 1517–33 at 1529.

[68] Ibid. 1530–1.

idea of science as a good thing. Just as Pound had argued as early as 1908 that mechanical jurisprudence was premissed on the outmoded scientific model of deductivism,[69] so too, during the following decades, various so-called realists sought after a new 'paradigm' on which to base their own juristic inquiries. The physical sciences, Walter Wheeler Cook observed in 1924, are moving from a deductive to an inductive paradigm, a paradigm which betrays an emerging scientific faith in experimentation, in trial and error, in the observation of physical phenomena and the collection and study of data with a view to 'formulating general statements which will describe [that which has been observed] as accurately and simply as possible' and to 'predict[ing] future observations'.[70] Realism was following precisely this path. 'For we as lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. Instead of the behaviour of electrons, atoms, or planets, however, we are dealing with the behaviour of human beings. As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we may make a prediction of their probable behaviour in the future.'[71] Whereas Langdellian legal formalism had been scientific only in name, Cook and certain other realists aspired towards a 'truly scientific study of law', a '[s]ystematized study, deliberately focused towards getting an adequate knowledge of the entire social structure as a functioning and changing but coherent mechanism'.[72] Realism, thus described, was an attempt to turn jurisprudence into 'an applied science'.[73]

There are, almost inevitably, voices of dissent to be found. The general desire for scientific method in legal research is occasionally offset in some realist writings by a professed impatience with theory.[74] Others, moreover,

[69] Roscoe Pound, 'Mechanical Jurisprudence', *Columbia L. Rev.*, 8 (1908), 605–23 at 608.

[70] Walter Wheeler Cook, 'The Logical and Legal Bases of the Conflict of Laws', *Yale L.J.*, 33 (1924), 457–88 at 458.

[71] Ibid. 475.

[72] Herman Oliphant, 'A Return to Stare Decisis', *Am. Bar Assoc. Jnl.*, 14 (1928), 71–6, 107, 159–62 at 159.

[73] Hessel E. Yntema, 'The Hornbook Method and the Conflict of Laws', *Yale L.J.*, 37 (1928) 468–83 at 481; 'Jurisprudence and Metaphysics—A Triangular Correspondence', *Yale L.J.*, 59 (1950), 273–90 at 273. See also Simon N. Verdun-Jones, 'Cook, Oliphant and Yntema: The Scientific Wing of American Legal Realism', *Dalhousie L.J.*, 5 (1979), 3–44, 249–80; Anthony Kronman, 'Jurisprudential Responses to Legal Realism', *Cornell L. Rev.*, 73 (1988), 335–40 at 338. ('[T]he scientific branch of realism sought to realize Langdell's vision of law, but by abandoning the idea of law as an autonomous or independent discipline.') Realism did not represent the first attempt to turn American jurisprudence into an applied science. For an earlier attempt, see the collection of essays, *Centralization and the Law. Scientific Legal Education: An Illustration* (with an introduction by Melville M. Bigelow, Boston: Little, Brown & Co. 1906).

[74] See e.g. Herman Oliphant, 'Facts, Opinions, and Value-Judgments', *Texas L. Rev.*, 10 (1932), 127–39 at 127 fn. 1. ('Must we wait in libraries more centuries until [those who live by

viewed the prospect of bringing scientific methods to jurisprudence with extreme caution. 'When it comes to exploration and tentative development of . . . jurisprudence as a true (naturalistic) science,' Llewellyn observed, 'I find myself differing even while I agree.'[75] 'Knowledge does not have to be scientific, in order to be on the way towards Science. . . . What we need is knowledge *moving* carefully and cannily *towards* the scientific pole, accompanied by some indication of its present latitude. *That* is the scientific road *towards* Science.'[76] The apparent gist of this argument—that legal knowledge is not scientific, even though it appears gradually to aspire towards scientific status—is captured rather more precisely in the work of the Yale realist and psychologist, Edward Stevens Robinson. Law, according to Robinson, is 'an unscientific science'—unscientific in the sense that lawyers prefer to follow in the footsteps of, and occasionally borrow ideas from, scientists rather than attempt to innovate in a scientific fashion for themselves.[77] Thus it is that lawyers suffer from what he terms 'cultural lag',[78] in so far as the scientific insights on which they rely are usually at least twice removed from their source: ideas percolate down from the natural to the social sciences and then, eventually, to law. The problem, from a realist point of view, is that a good deal gets lost in the process of percolation. Lawyers, furthermore, tend to fail to appreciate the importance of the scientific innovations which ultimately reach them. As 'a profession of *social* engineers,' they 'are specialists in social arrangements'.[79] But the modern lawyer hardly thinks like a modern engineer. 'Typically frightened by social innovation' and generally 'content to justify social changes after they have happened,' the modern lawyer fails generally to recognize how 'the experimental, fact-dominated, forward-looking view of natural science is relevant to the process of social adjustment.'[80]

> The most important distinction between the man of law and the man of natural science is that the jurist is philosophically lost. . . . The intellectual embarrassments pervading the law today are not due simply to the antiquity of the conceptions of jurisprudence. The difficulty arises rather out of the fact that, living in a world in which the power of scientific ways of thinking is constantly growing, the man of law simply cannot keep clear of psychological and sociological ideas. On the other hand, he is stubborn about accepting those ideas as more than tools to be used when convenient. He feels that his fundamental aims can still be satisfactorily

philosophy] agree on a theory of knowledge?'); also Wesley A. Sturges and Samuel O. Clark, 'Legal Theory and Real Property Mortgages', *Yale L.J.*, 37 (1928), 691–715 at 701.

[75] Karl N. Llewellyn, 'The Theory of Legal "Science" ', *North Carolina L. Rev.*, 20 (1941), 1–23 at 3.

[76] Ibid. 22.

[77] Robinson, *supra* n. 21, 235.

[78] Robinson, *supra* n. 21, 235.

[79] Ibid. 237.

[80] Ibid. 238–9.

dictated by philosophical conceptions that somehow stand above or apart from the conceptions of natural science.[81]

The task of the modern lawyer is to engage in a 'continuous constructive effort to solve legal problems by the use of the method and viewpoint of natural science'; indeed, 'the established natural sciences must be scoured for facts and concepts applicable to law'.[82] Only thus might lawyers 'become leaders in social thinking instead of guardians of outworn ideas'.[83] Yet the import of Robinson's assertions is not entirely clear. This is not straightforwardly an appeal for a return to source, for lawyers to become initiated in the ways of natural scientists. It is, rather, an appeal for lawyers to become familiar with the methods of the natural sciences specifically through the methods of the social sciences. At core, Robinson's argument—an argument which harks back explicitly to Pound—is that lawyers should become adept at general social scientific method. 'There is greatly needed a social engineer who will apply that method over a wide front and in the practical solution of urgent social problems. There is greatly needed a social engineer who, through the application of the best available knowledge, will teach men new and better ways of meeting their problems—of settling their disputes. There is no doubt of the opportunity. There is simply a question as to whether the lawmen will grasp it or whether the opportunity will, itself, create a new type of public servant—a real social engineer.'[84]

Semi-prophetic allusions of this nature landed Robinson and others in hot water with those critics who suspected that the realists' social servant of the future would be a ruthless, undemocratic technocrat. At another, more obvious level, however, Robinson's argument is decidedly less controversial. The appeal to science was an appeal not to natural science but to social science—for the use, that is, of scientific methods in the study of law in society. While the likes of Cook, Oliphant, Yntema and Robinson were prone to drawing affinities between legal realism and the methods of natural science, it was to the social sciences that they in fact looked for inspiration. The realist appeal to and identification with natural science has about it a distinct air of credibility-seeking. Legal realism as applied science was, in fact, jurisprudence conceived as social science.

SOCIAL SCIENCE AND THE LAW SCHOOLS

Yet even this claim must be subjected to critical scrutiny. There has been a tendency for commentators simply to assert rather than to explain the

[81] Robinson, *supra* n. 21, 245–6. [82] Ibid. 248. [83] Ibid. 266–7.
[84] Ibid. 267.

interaction between realism and social science.[85] It is beyond doubt that a good majority of those writers who came to be associated with realism during the 1920s and 1930s were attracted in one way or another to the social sciences. This much is clear from the emergence, during those decades, of Columbia and Yale as the two great bastions of realist thought. Two years after his appointment as a professor at Columbia Law School in 1921, Herman Oliphant wrote formally to the president of the University, outlining a proposal for the reorganization of the School curriculum—a reorganization which would demand of the faculty 'a great deal of concentrated research on the interrelation of law to the other social sciences'.[86] The proposal marked the beginning of a power struggle between those who, with Oliphant, believed that the Columbia faculty should devote its energies exclusively to the task of turning the School into a major centre for research into law as an aspect of social organization, and those who believed that, instead of emphasizing only research, the faculty should devote equal energy to the task of turning the School into the leading institution for training people for public service in the law.

Oliphant and his supporters ultimately 'failed' in their quest. The struggle between the pro- and anti-Oliphant factions culminated in 1928 with the appointment of Young B. Smith in preference to Oliphant as dean of the faculty.[87] While Smith himself accepted, within certain limits,[88] the desirability of a social scientific approach to the study of law,[89] he 'was unacceptable to those who thought the Law School should devote itself exclusively to research'.[90] Yet although the initiatives of Oliphant and his supporters had made only marginal ground at Columbia, an important and lasting precedent, an alternative to the conventional law school curriculum of the time, had emerged. Columbia of the 1920s represented a tentative departure from the Langdellian world-view: law could be studied not merely as a collection of logically classifiable, interconnected principles, but as a means of social control.

> The fundamental thesis which emerged was this: Since law is a means of social control, it ought to be studied as such. . . . Columbia proceeded at once to put this

[85] For examples, see Thomas W. Bechtler, 'American Legal Realism Revaluated', in T. W. Bechtler (ed.), *Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller* (Dordrecht: Kluwer, 1978), 1–48 at 9; Ralph J. Savarese, 'American Legal Realism', *Houston L. Rev.*, 3 (1965), 180–200 at 181; Wolfgang Friedmann, *Legal Theory* (5th edn. London: Stevens & Sons, 1967), 299.
[86] William Nelson Cromwell Foundation, *A History of the School of Law: Columbia University* (New York: Columbia University Press, 1955), 299.
[87] For an account of the events, see Twining, *supra* n. 12, 41–55.
[88] On Smith's markedly qualified enthusiasm for a social scientific approach to the study of law, see Stevens, *supra* n. 45, 139–40; Twining, *supra* n. 12, 46.
[89] Cromwell Foundation, *supra* n. 86, 300.
[90] Ibid. 304.

programme into practice reorganizing courses along functional lines, reinforcing the faculty by the appointment of specialists in philosophy, business, and political science, and plunging with prodigious industry into reoriented research and the preparation of new course materials.[91]

The study of law in terms of its social functioning rather than its purported inner logic resulted in a heavy emphasis both on constitutional law and on economics in law. Typical of the latter trend was Robert Hale's course on legal economics, which ran from the early 1920s to the mid-1950s.[92] Other courses at Columbia in the 1920s, dealing with industrial relations and trade regulation, were similarly slanted towards economic analysis.[93] More generally, by looking to other disciplines for their inspiration, the social science sympathizers on the Columbia faculty began to see the American law school tradition in a fresh light. By the mid-1920s, moves were under way at Columbia to produce an entirely new law school curriculum. The report, penned by Oliphant, which resulted from this initiative stressed the recognition by the faculty that:

> the time has come for at least one school to become a 'community of scholars', devoting itself to the non-professional study of law, in order that the function of law may be comprehended, its results evaluated, and its development kept more nearly in step with the complex developments of modern life. This means not merely a broadening of the content of the legal curriculum, and not merely a graduate school in law added to the regular course; it means an entirely different approach to the law. It involves critical, constructive, creative work by both faculty and students rather than a regime devoted primarily to the acquisition of information.[94]

To this day, Oliphant's report stands as one of the most important and challenging documents to have been produced in the history of American legal education.[95] For all that, however, it failed, as a statement of purpose, to reflect the real sentiments of the Columbia faculty. While the majority was happy, in principle, to move towards the study of law as a social science, there remained a strong feeling that even a social scientific approach should place an especial emphasis on professional training. The

[91] Brainerd Currie, 'The Materials of Law Study, Parts I and II', *Jnl. Leg. Educ.*, 3 (1951), 331–87 at 334–7.

[92] See Duxbury, 'Robert Hale and the Economy of Legal Force', *supra* n. 3, 423.

[93] See Brainerd Currie, 'The Materials of Law Study, Part III', *Jnl. Leg. Educ.*, 8 (1955), 1–78 at 3. The industrial relations course was run by Noel T. Dowling, while the trade regulation course was run by Herman Oliphant.

[94] Herman Oliphant (ed.), *Summary of the Studies on Legal Education by the Faculty of Law of Columbia University* (New York: Faculty of Law of Columbia University, 1928), 20–1. Earlier in the 1920s, Oliphant had been concerned with broadening the law school curriculum specifically for the purpose of improving professional legal standards. See Herman Oliphant and Percy B. Bordwell, 'Legal Research in Law Schools', *American Law School Rev.*, 5 (1924), 293–9 at 293–7.

[95] See Stevens, *supra* n. 45, 138; Twining, *supra* n. 12, 50; Currie, *supra* n. 91, 332–41.

'entirely different approach to the law' which Oliphant was proposing was, for some of his colleagues, rather too different. His report was welcomed by the faculty, but few of its recommendations were ever implemented.[96]

The eventual choice of Smith over Oliphant for the deanship—a choice which was made by the President of the University rather than by the faculty itself—led to the resignation of certain faculty members who had supported Oliphant's candidacy and who had promoted the 'non-professional', social scientific approach to legal study at Columbia throughout the 1920s. William O. Douglas and, in 1930, Underhill Moore departed to Yale; and Hessel Yntema, Oliphant himself and a visiting professor, Leon C. Marshall, left to accept posts at Walter Wheeler Cook's newly founded Institute for the Study of Law at Johns Hopkins University.[97] Having spearheaded the social scientific approach to the study of law throughout the 1920s, the Columbia Law School, by the end of that decade, had lost some of its most innovative scholars. While, throughout Smith's deanship and beyond, the School continued to recruit talented lawyers sympathetic to the methods of the social sciences,[98] by the beginning of the 1930s, Yale and, to a lesser extent, Johns Hopkins, had emerged as the institutional centres for the social scientific approach to law. According to one commentator, the Columbia project had been 'revolutionary', it had been 'historic', but it had not been 'epoch-making'.[99]

The departure of Yntema, Oliphant and Marshall to Johns Hopkins should have marked the beginning of a marriage made in heaven. The Institute of Law offered precisely what Columbia did not: the opportunity to pursue research free from teaching commitments. For Cook, too, having spent some years prior to the founding of the Institute flitting restlessly between Columbia and Yale, here was the chance to settle with a group of talented and largely like-minded colleagues. The Johns Hopkins Board of Trustees required the Institute to develop a programme of legal research which complemented the more general, established tradition of applied science at the University. That broad remit apart, the Institute was given a free rein to pursue its goals however it wished.[100]

[96] Stevens, *supra* n. 45, 138.

[97] Cromwell Foundation, *supra* n. 86, 305. Technically, Marshall, an economist with no legal training, did not resign. His temporary appointment came to an end at the time of Smith's elevation to the deanship and, possibly as a protest, he passed over the opportunity to secure an extended contract.

[98] See generally Currie, *supra* n. 93, 22–64; Twining, *supra* n. 12, 58–9.

[99] Currie, *supra* n. 91, 337.

[100] See generally Anon., 'The Johns Hopkins Institute for the Study of Law', *American Law School Rev.*, 6 (1928), 336–8; Leon C. Marshall, 'The Institute of Law, Johns Hopkins University', *American Scholar*, 2 (1933), 115.

Given such freedom, the Columbia emigrés each began their careers at Johns Hopkins by setting about completing the various projects upon which they had embarked at their previous institution. Only once this was done did the research programme of the Institute begin to acquire an identity of its own. During the years 1931 to 1933, the members of the Institute produced a series of detailed, mainly statistics-based studies of judicial administration and civil litigation, focusing on selected state courts in New York, Maryland, and Ohio.[101] The prodigious output and careful co-ordination of research during this period was nothing short of remarkable. Without the burden of having to run a traditional law school, the members of the Institute were able to devote almost all of their energies to the pursuit of scholarship in the form of empirical social science. The bubble, however, was soon to burst. Without either students or alumni, and without the backing of a major foundation, the Institute was forced to rely on just about any organization—usually law firms—willing to play the role of benefactor. The cost of this dependence was a frequent pressure to produce research with an immediate 'practical value'. Academic integrity was, accordingly, rather compromised at times by the need for hard cash. And it was precisely this need which ultimately brought about the death of the Institute. As the Depression years rolled on, funds quickly dried up, and by the early 1930s the Institute was forced to close.[102]

Yale, however, was a different story. The appointment of Robert Maynard Hutchins as dean of the Yale Law School in 1927 marked the beginning of a new chapter in the School's history. Having been generally disaffected with teaching at the School while a student, Hutchins—still only in his late twenties when he accepted the deanship—set about breaking with the traditions of the School's rather conservative past by promoting novel methods of teaching, establishing new programmes for research and, most importantly of all, securing a number of controversial appointments to the faculty. Columbia, throughout the 1920s, had built up a strong faculty of social science-inspired lawyers; and even though the original vitality of the Law School was diminished with the resignations of 1928, Dean Smith was quick to replace lost talent.[103] Throughout this decade, Harvard too enjoyed a period of revitalization as Langdellianism found a home at the American Law Institute. Hutchins's primary ambition was to bring to New Haven a standard of academic distinction comparable with that which had been established at both Columbia and Harvard—a

[101] For a discussion of the publications of the Johns Hopkins Institute, see John W. Johnson, *American Legal Culture, 1908–1940* (Westport, Conn. : Greenwood Press, 1981), 101–2.

[102] See Stevens, *supra* n. 45, 140.

[103] See Cromwell Foundation, *supra* n. 86, 310–11.

standard which, he believed, Yale had at least glimpsed in the work of one of its earlier professors, Wesley Newcomb Hohfeld.[104] His strategy was to set about creating a faculty which—for all its distinctness—would essentially be an extension of the Columbia model.

'If you run over their articles and book reviews, in the bound volumes of the old law journals, you can still catch an authentic whiff of cordite.'[105] Thus wrote Eugene Rostow, dean of the Yale Law School from 1955 to 1965. The cause for Rostow's reminiscence, the Yale realists of the 1930s, is one of the most famous sagas in the history of American jurisprudence. Reduced to its essence, it is a story about the efforts of a group of men, professing a common distrust of the doctrinal orthodoxies of the time, who were prepared to articulate their sense of distrust with an unprecedented, iconoclastic fervour. The story has been told many—perhaps too many[106]—times, and there will be no attempt here to recount it again. Worth considering briefly, nonetheless, is the inspirational but short-lived deanship of Hutchins, for it is possible to discern, in his contribution to the development of the Yale faculty, an equally short-lived enthusiasm for the 'scientific' ethos—an enthusiasm which exemplified the difficulties underlying the endeavour to introduce social scientific methods into law.

That Hutchins played a crucial role—indeed, the crucial role—in setting the scene for the emergence of realism at Yale during the 1930s is, in a sense, ironic, for by the time that decade arrived, he was already part of the School's history, having departed to the University of Chicago in 1929. During his short deanship, he had achieved a great deal. Recruiting heavily so as to double the size of the faculty which he inherited from the outgoing dean, Thomas W. Swan, Hutchins at the same time reduced student intake so that, between 1927 and 1928, the number of students at the School fell from 422 to 318. 'The stated purpose of the reduction', according to his biographer, 'was to free his interdisciplinary faculty from routine instruction so that the Law School could be converted into a research institution

[104] See Schlegel, 'From the Yale Experience', *supra* n. 3, 477. Hohfeld came from Stanford to Yale in 1914. He died in 1918. He is best remembered for his quasi-scientific theory of 'jural correlatives' and 'jural opposites' which, he argued, constitute the lowest common denominators of the law. See generally the posthumous collection of essays: Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. A.L. Corbin, New Haven. Conn.: Yale University Press, 1964) esp. 63–4.

[105] Eugene V. Rostow, 'American Legal Realism and the Sense of the Profession', *Rocky Mountain L. Rev.*, 34 (1962), 123–49 at 129. See also his 'The Realist Tradition in American Law' in A.M. Schlesinger, Jr. and M. White eds., *Paths of American Thought* (Boston: Houghton Mifflin, 1963), 203–18, 556–9 at 209.

[106] Much of the general literature on legal realism produces the impression that the story of realism is little more than the story of the Yale Law School of the early 1930s. The works by Kalman and Schlegel, *supra* n. 3, are singularly important in that they resist such a characterization.

that gave selected students an appreciation of the underlying principles of jurisprudence as well as an understanding of how the law actually worked.'[107] While he could not provide the paradise of a pure research institution as was on offer at Johns Hopkins, Hutchins was determined to provide the next best thing; and it was to this end that, in 1929, in collaboration with the then dean of the Yale Medical School, Milton C. Winternitz, with the support of the president of the University, James Rowland Angell, and with the assistance of a substantial endowment from the Rockefeller Foundation, he set about establishing the Institute of Human Relations, a joint Law School-Medical School venture, devoted to 'the development of co-operative research in all fields relating to man'.[108]

The Institute was the crowning glory of Hutchins's short deanship. 'When the Yale Law School discovered that law was a social science,' he observed, 'it found that it needed the help of people trained in the social sciences.'[109] The Institute—dedicated to 'break[ing] down departmental barriers, bringing together men of common tastes and inclinations, placing at the disposal of each the resources of the other'[110]—was intended to provide the Law School with just that help. The Columbia refugees, Douglas and Moore, along with Hutchins and his former teacher and successor to the deanship, Charles E. Clark, were some of the first to embark on research under the auspices of the Institute. Hutchins also secured the appointment of Donald Slesinger, a psychologist whom he had originally brought to the law faculty to collaborate with him on a scientific analysis of the rules of evidence,[111] as executive secretary of the Institute. While the Law School and the Institute remained administratively and financially separate, an important academic link had been made which provided the faculty with the perfect opportunity for the social scientific study of law; and although Dean Clark would adopt a rather less positive view of the Institute during the 1930s, its continuation in tandem with the faculty was integral to the growth of realism at Yale.[112] It is hardly

[107] Harry S. Ashmore, *Unseasonable Truths: The Life of Robert Maynard Hutchins* (Boston: Little, Brown & Co., 1989), 55.

[108] Robert M. Hutchins, 'An Institute of Human Relations', *American Journal of Sociology*, 35 (1929), 187–93 at 192.

[109] Ibid. 190.

[110] Ibid. 191.

[111] See Robert M. Hutchins and Donald Slesinger, 'Some Observations on the Law of Evidence', *Columbia L. Rev.*, 28 (1928), 432–40; 'Some Observations on the Law of Evidence—the Competency of Witnesses', *Yale L.J.*, 37 (1928), 1017–28; 'Some Observations on the Law of Evidence—Memory', *Harvard L. Rev.*, 41 (1928), 860–73; 'Some Observations on the Law of Evidence: State of Mind in Issue', *Columbia L. Rev.*, 29 (1929), 147–57.

[112] See Charles E. Clark, 'The Educational and Scientific Objectives of the Yale School of Law', *Annals of the American Academy of Political and Social Sciences*, 167 (1933), 165–72; Dorothy Swaine Thomas, 'Some Aspects of Socio-Legal Research at Yale', *American Journal of Sociology*, 37 (1931), 213–21.

surprising to find an ebullient Hutchins claiming, in his final annual report to the faculty, that '[t]he conclusion of the year 1928-9 finds the Yale School of Law in the best condition in its history'.[113] Inspirational appointments had been made, student numbers reduced, staff complement enlarged, new honours courses established, teaching and research revitalized; in short, Yale had acquired the academic identity which Hutchins had sought for it—and the *belle époque* of realism had still to come.

Yet, even before Clark succeeded Hutchins as dean, even before realism at Yale had hit full swing, something was amiss. Rather like the precocious football talent who constantly wants the ball but is uncertain of what to do with it once in possession, Hutchins's Yale was fast and furious but ultimately lacked vision. Every bit equal to the faculty's demand for innovation was a basic absence of strategy, an inability, on Hutchins's part, to marshal its formidable talent.

> In considering Hutchins' career at the law school one can almost hear him yell, 'Do Something!' And his style reflects that command. The pace was frenetic as he constantly pushed, jostled, and probed both law in general and legal education in particular for ways to make them better, more sensible, more reputably a subject for academic inquiry . . . [T]he style put a premium on starting and little on following through, on creating opportunities but not on working with the opportunities created, on coming up with ideas but not on working them through.[114]

This style was one which 'many of the Realists shared'.[115] While they appeared to break decisively from the Langdellian past, most realists had, in fact, little notion of what they were looking for in the law schools of the future. There was simply a widespread assumption that the social sciences would provide all the necessary answers. As early as 1931, Morris Cohen—having previously welcomed Pound's interdisciplinary initiatives in attempting to undermine the dominance of mechanical jurisprudence[116]—warned that 'the gravest peril perhaps is that in reacting violently against our former isolation of law we shall neglect the results of centuries of legal scholarship and slavishly imitate other social sciences or borrow from them methods and results that are not suitable to our subject. Let us not forget that some of the social sciences are very young, and are as yet in large part only vocabularies of generous aspiration.'[117] It is a warning which, by and large, fell on deaf ears.

[113] Robert M. Hutchins, 'Dean's Report to the Faculty, Yale Law School, 1928-1929', 117; quoted in Kalman, *supra* n. 3, 115; Ashmore, *supra* n. 107, 55.

[114] Schlegel, 'From the Yale Experience', *supra* n. 3, 489–90.

[115] Ibid. 490.

[116] Morris R. Cohen, 'Jurisprudence as a Philosophical Discipline', *Journal of Philosophy, Psychology and Scientific Methods*, 10 (1913), 225–32.

[117] Morris R. Cohen, 'Justice Holmes and the Nature of Law', *Columbia L. Rev.*, 31 (1931), 352–67 at 364–5.

The 'scientific' goals of the Langdellian law school had at least been fairly obvious. What were the 'scientific' goals of the post-Langdellian law school to be? The appeal to the methods of the social sciences suggested that the realists, if no one else, had a good idea of what they were looking for. But once the general spirit of the 1920s and 1930s had dwindled, various of those who had been in the midst of the ferment acknowledged that their initiatives had tended to lack direction.[118] By and large, the so-called realists—whether they feigned or truly believed otherwise—had clung to the precipice of legal formalism, preferring, for all their admirable critical sensibilities, to remain rooted in the past rather than take a decisive leap towards the future. Thus it is that the revolt against formalism which supposedly culminated with the coming of legal realism never quite occurred. The turn to the social sciences promised far more than ever was delivered.

Hutchins was perhaps the first to concede as much. Soon after leaving Yale, he became, as one commentator has put it, 'an apostate realist'.[119] Though, by 1934, realism at Yale was at its peak, Hutchins, now president of the University of Chicago, was conceiving of the social scientific approach to law as a phenomenon of the past:

> In attempting to decide which rule worked better we had to assume a social order and the aims thereof, and then try to determine which rule did more to achieve the aims we favoured. What made this difficult was that we didn't know much about the social order. . . . Suddenly we discovered that there were people who knew all these things, people who could tell us how the law worked and why. They were the social scientists. We had every reason to resort to them. The courts were social agencies; their conclusions must be conditioned by society. The social scientists could help us to predict what the courts would do. The psychologists would help us understand the behaviour of judges . . . Hand in hand with these other scientists we could become scientific.[120]

Alas, the quest for an interdisciplinary legal science proved futile. So far as the study of law was concerned, the insights to be gained from collaboration between lawyers and social scientists were, for Hutchins, negligible:

> Imagine our confusion . . . when we discovered that from their disciplines as such the social scientists added little or nothing. . . . The fact was that though the social scientists seemed to have a great deal of information, we could not see and they could not tell us how to use it. It did not seem to show us what the courts would do or whether what they had done was right. . . . We did not know what facts to look for, or why we wanted them, or what to do with them after we got them. We were simply after facts. These facts did not help us to understand the law, the social order, or the relation between the two.[121]

Given Hutchins's account, it may seem unsurprising that fact-research at the Yale Law School began to wane almost as soon as it had become established.[122] Yet, in one sense, his account is slightly misleading, in so far as concern at Yale during the early 1930s with the empirical study of law did not disappear altogether. At the time that Hutchins was writing of the passing of the social scientific approach at Yale, Underhill Moore—probably the most committed legal empiricist American has ever seen—had only just embarked on his protracted study of driving offences in the light of New Haven's traffic and parking ordinances.[123] While Moore's work has attracted a good deal of knee-jerk ridicule,[124] including from Hutchins himself,[125] it represents a unique if rather solitary testament to the persistence at Yale during the 1930s of a quantitative social science approach to the study of law. Initiated at the end of 1933, Moore's project lasted until 1937, and would no doubt have continued for longer had funding not dried up.[126]

[118] See e.g. William O. Douglas, *Go East, Young Man: The Early Years* (New York: Random House, 1974), 170; Karl N. Llewellyn, 'On What Makes Legal Research Worthwhile?', *Jnl. Leg. Educ.*, 8 (1956), 399–421 at 400–3.

[119] Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973), 152; though cf. Johnson, *supra* n. 101, 138. ('Hutchins took many of the realists' ideas with him to the University of Chicago, where he was instrumental in inaugurating a four-year curriculum in the Law School that included courses in psychology, English constitutional history, economic theory, and ethics.')

[120] Robert M. Hutchins, 'The Autobiography of an Ex-Law Student', *U. Chicago L. Rev.*, 1 (1934), 511–8 at 512.

[121] Ibid. 512–13; and cf. also Currie, *supra* n. 93, 75–76; Arthur Nussbaum, 'Fact Research in Law', *Columbia L. Rev.*, 40 (1940), 189–219 at 199.

[122] See Kalman, *supra* n. 3, 35. ('Empiricism was disappearing from the law by 1932'); also Peter H. Schuck, 'Why Don't Law Professors Do More Empirical Research?', *Jnl. Leg. Educ.*, 39 (1989), 323–36 at 329. ('[T]he "golden age" of empiricism in law never really dawned—even on Morningside Heights or in Baltimore or New Haven during the heydey [*sic*] of the realists.') For all this, the empiricist strand of legal realism was not uninfluential as regards the subsequent development of American legal scholarship. See Arthur Nussbaum, 'Some Aspects of American "Legal Realism" ', *Jnl. Leg. Educ.*, 12 (1959), 182–92 at 185–9.

[123] For a detailed account, see Schlegel, 'The Singular Case of Underhill Moore', *supra* n. 3, 264–303.

[124] For a critique of the criticisms that have been levelled at Moore, see Schlegel, *supra* n. 3, 292–3.

[125] It is most likely that Hutchins had Moore in mind when he referred disparagingly to the degeneration of quantitative social science at Yale Law School into an exercise in 'counting telephone poles'. See Ashmore, *supra* n. 107, 154.

[126] See John P. Dawson, 'Legal Realism and Legal Scholarship', *Jnl. Leg. Educ.*, 33 (1983), 406–11 at 407. The main fruit of Moore's labour was a massive article, written in collaboration with Charles Callahan, a researcher at the Institute of Human Relations: see Underhill Moore and Charles Callahan, 'Law and Learning Theory: A Study in Legal

In another sense, Hutchins's observations are rather more telling, in that they point to an obvious yet highly significant question: namely what, precisely, were social scientific studies of law supposed to achieve? What, of value, could social scientists give to lawyers that lawyers did not have already? By resorting to the social sciences, so-called realists were attempting to engage in much more than a reaction against legal formalism. They were attempting also to carve out a future, a life after Langdellianism, for the modern American law school. Paradoxically, realism both failed and succeeded in this task. It failed in that, as Hutchins detects, the realists were by and large content to espouse, in the abstract, the virtues of the social sciences rather than demonstrate specifically how those virtues might have a special significance and validity for the study of law. But it succeeded in that the realists' affair with the social sciences set the agenda for American jurisprudence of the future. Even the jurisprudential tendencies which were to emerge as reactions against realism would not be shy of the social sciences. Realism made the interdisciplinary study of law respectable, even among its opponents.

A reactionary few have regarded this as the most pernicious legacy of legal realism. With the advent of realism, so the argument goes, American legal culture lost its innocence; law could never again be conceived as a purely autonomous body of principles and doctrines.[127] More common, though, is the failure of post-realist legal academics to recognize just how fundamental a transformation the mood of realism brought to American jurisprudence. In his survey of modern legal philosophies, for example, Richard Posner announces from the outset his intention to 'pass over the realists' for the reason that he has 'difficulty in understanding what is original in [legal realism]'.[128] The originality of legal realism was that it set the scene for the emergence of jurisprudential sub-disciplines of the 'law and' variety.[129] Realism marked the marriage of social science and law.

Control', *Yale L.J.*, 53 (1943), 1–136. For an appreciative assessment of Moore's jurisprudence, cf. Simon N. Verdun-Jones and F. Douglas Cousineau, 'The Voice Crying in the Wilderness: Underhill Moore as a Pioneer in the Establishment of an Interdisciplinary Jurisprudence', *Int. Jnl. Law and Psychiatry*, 1 (1978), 375–94; and for a less sympathetic estimation, see David H. Moskowitz, 'The American Legal Realists and an Empirical Science of Law', *Villanova L. Rev.*, 11 (1966), 480–524 at 490–7, 509–13.

[127] The most unequivocal proponent of this view is Charles Fried, 'Jurisprudential Responses to Legal Realism', *Cornell L. Rev.*, 73 (1988), 331–4.

[128] Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990), 19–20. For a discussion of Posner's neglect of legal realism, see Neil Duxbury, 'Pragmatism Without Politics', *Mod. L. Rev.*, 55 (1992), 594–610 at 609–10.

[129] Mark Tushnet, 'Post-Realist Legal Scholarship', *Jnl. of the Society of Public Teachers of Law*, 15 (1980), 20–32 at 23; Arthur Allen Leff, 'Law and', *Yale L.J.*, 87 (1978), 989–1011 at 1005–11; John Brigham and Christine B. Harrington, 'Realism and its Consequences: An Inquiry into Contemporary Sociological Research', *Int. Jnl. Sociology of Law*, 17 (1989), 41–62. This is not to claim, however, that realism was responsible for the rise of law and economics. On this matter, see the introduction to ch. 5.

Yet it is Hutchins's contention, in raising the question of what 'social science' meant for the realists, that this marriage was basically one of convenience. The point is of fundamental importance. The rather hesitant and ingenuous manner in which most legal realists brought the social sciences into the legal arena established a crucial precedent for future generations of legal scholars. Not only did so-called realists never properly come to grips with the social sciences but, more importantly, post-realist social science-oriented legal scholarship generally took its cue from their promotion of a 'new', post-Langdellian scientific ethos. After realism, American academic lawyers more or less stopped asking questions about what it meant to use the social sciences in the study of law. Such questions, it was assumed, had been raised by the legal realists; and while the realists themselves might not have been particularly adept social scientists, they had demonstrated, in principle, that interdisciplinary legal study was a virtue beyond doubt.

Thus it was that realism, ironically, brought to American legal scholarship a peculiar element of complacency. It is, indeed, doubly ironic that, in the aftermath of 1930s Yale, among the minority of voices dissenting from the view that a social scientific approach to law is an enlightened approach to law were certain of the later, second-generation realists themselves.[130] One of the fundamental failures of modern American jurisprudence has been the general unwillingness of its proponents to consider—except in the most rudimentary of terms—the question of what, for the legal realists, 'social science' actually meant. The question is not straightforwardly an institutional one—a question of who was doing what at Columbia, Johns Hopkins, Yale and elsewhere in the 1920s and 1930s—but a question concerning, first of all, how social science was coupled with the spirit of realism and, secondly, what social science meant generally for early twentieth-century American social scientists.

SOCIAL SCIENCE AND REALISM

'Realism' is an established piece of twentieth century Western intellectual currency. The term is far more prevalent in philosophy, art, literature, politics and history than ever it has been in law; and indeed, in those fields, it has come to denote ideas and beliefs which at times rather contrast with the notion of 'realism' in jurisprudence. Even in jurisprudence, 'realism' is not an exclusively American preserve;[131] and in philosophy, the term has

[130] See e.g. Fred Rodell, 'Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy Science—Or How Not to Teach Law', *Vanderbilt L. Rev.*, 1 (1947), 5–7.

[131] For an illustration of this point, see Karl Olivecrona, *Law as Fact* (2nd edn., London: Stevens & Sons, 1971), 168–85; and also, from another perspective, Gaston Gavet, 'Individualism and Realism', *Yale L.J.*, 29 (1920), 523–38, 643–53.

attracted a meaning which most legal realists would probably have considered wholly at odds with their own ideas about the world.[132] Yet, for all that 'realism' means different things for different people, it is a term which, perhaps better than any other, captures what can only be vaguely described as a peculiarly North American, early twentieth-century 'collective unconscious'.[133] During the first three decades of this century, 'realism', in competition with 'modernism', represented a primary mode of cultural expression, especially in the cinema and the art gallery.[134] Realism was part of the cultural climate; it was 'in the air'.

In the American social sciences, a distinct ethos of 'realism' developed as early as the 1870s, parallel with Langdellianism in the law schools. Early realist social thought was inspired by the experience of the Civil War and the powerful nationalist sentiments which it aroused, and also by escalating industrialism and subsequent economic depression during the post-war years.[135] Social scientists of the 1870s were very much aware of the extent to which, after the Civil War, American culture and social experience had changed, and the ethos of realism was very much a consequence of this new awareness.[136] For the first time in American history, cultural traditions of the past were not inevitably or directly related to the here and now. The problem of understanding post-War social consciousness was to be solved not, primarily, by looking to history, but by focusing on 'contemporary reality'. Thus it was that, for example, in late nineteenth and early twentieth-century American literature, 'realism' became 'the aesthetic of disinheritance', the prioritization of the present by way of response to the sense of dislocation from the past.[137] Likewise in the social sciences. In his inaugural lecture in 1872, the American sociologist, William Graham Sumner, declared that 'the traditions and usages of past ages are broken,

[132] Philosophical realism might be defined very basically 'as the belief that statements . . . possess an objective truth-value, independently of our means of knowing it: they are true or false in virtue of a reality existing independently of us.' Michael Dummett, *Truth and Other Enigmas* (Cambridge, Mass.: Harvard University Press, 1978), 146; and see also Richard Rorty, *Objectivity, Relativism, and Truth: Philosophical Papers, Volume I* (Cambridge: Cambridge University Press, 1991), 2–12. A classic example of 'realist' jurisprudence in this philosophical sense is the phenomenological legal philosophy of Adolf Reinach, on which see Neil Duxbury, 'The Legal Philosophy of Adolf Reinach', *Archiv für Rechts- und Sozialphilosophie*, 77 (1991), 314–47, 466–92. On the incompatibility of philosophical realism and American legal realism, see Summers, *supra* n. 19, 36–7.

[133] The term is a Jungian one, though I use it here in a non-technical manner, following David Mamet, *Some Freaks* (London: Faber & Faber, 1989), 70.

[134] See generally Douglas Tallack, *Twentieth-Century America: The Intellectual and Cultural Context* (London: Longman, 1991), 37–113.

[135] On the effect of the Civil War on American social thought, see George M. Frederickson, *The Inner Civil War* (New York: Harper & Row, 1965).

[136] See generally Raymond J. Seidelman, *Disenchanted Realists: Political Science and the American Crisis, 1884–1984* (Albany, NY: State University of New York Press, 1985).

[137] Roger B. Salomon, 'Realism as Disinheritance: Twain, Howells, and James', *American Quarterly*, 16 (1964), 531–44 at 533.

or at least discredited. New conditions require new institutions and we turn away from tradition and prescription to reexamine the data from which we learn what principles of the social order are *true*, that is are conformed to human nature and to the conditions of human society.'[138] In the social sciences, 'realism emerged as a way of coping with the new industrial world'.[139]

Indeed, by the turn of the nineteenth century and the onset of the era of progressivism, the social-scientific idea of realism—the search for 'facts' to depict 'contemporary reality'—had become an established method of producing authoritative knowledge about modern industrial America. 'The new concentrations of economic power, the teeming, polyglot cities, and the expansion of urban, state, and federal governance created new worlds that required detailed knowledge. The great preponderance of social scientists' publications during these years were empirical studies of the concrete operation of business, government, and social life.'[140] Typical of the social-scientific evolution towards realist empiricism was the development of late nineteenth and early twentieth-century political science. By the beginning of this century, American political scientists were distinguishing between formalist and realist styles of social inquiry. A study of 'political conditions as they now exist in the United States', wrote Frank Goodnow in 1900, reveals 'that the formal governmental system as set forth in the law is not always the same as the actual system'.[141] Three years earlier, in his study of municipal problems, the same author had asserted that to understand 'what the city really is,' it is necessary 'to treat the city rather as part of the governmental system than as an isolated phenomenon'.[142] Goodnow's preference for 'realist' political inquiry is typical of a more general endeavour by his contemporaries 'to get beneath the traditional structure of constitutional principle and examine how party politics, city government, and administration actually functioned in American political life'.[143]

It is precisely this desire for realism which made its way into the law schools; and it was the general idea of social science that was seen by most

[138] William Graham Sumner, *The Challenge of Facts and Other Essays* (ed. A. G. Keller, New Haven: Yale University Press, 1914), 394–5; and, on Sumner's sense of the break with the past after the Civil War, see further Robert C. Bannister, Jr., 'William Graham Sumner's Social Darwinism: A Reconsideration', *History of Political Economy*, 5 (1973), 89–109 at 93–4.

[139] Dorothy Ross, *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991), 64.

[140] Ibid. 156.

[141] Frank J. Goodnow, *Politics and Administration* (New York: Macmillan, 1900), v.

[142] Frank J. Goodnow, *Municipal Problems* (New York: Macmillan, 1897), v.

[143] Ross, *supra* n. 139, 297–8; and see more generally Martin Landau, 'The Myth of Hyperfactualism in the Study of American Politics', *Political Science Quarterly*, 83 (1968), 378–99.

legal realists to provide the requisite key to reality.[144] In an introduction to a text entitled *From the Physical to the Social Sciences*, published under the auspices of the Johns Hopkins Institute for the Study of Law, Herman Oliphant lamented in 1929 that:

> [m]ost of the literature of the law, whether found in judicial decisions or in academic writings, is devoted to erecting, defending, or attacking elaborate structures of autonomous thought. . . . There has been such a complete absence of effort methodically to develop the empirical side of law and such an over-elaboration of its rational side that scholarship in law tends more and more to neglect how courts actually decide cases and more and more to consider what they say about why they decide as they do, which, after all, is stating the same thing in another way.[145]

By embracing the inductive paradigm of the modern social sciences, Oliphant argues, lawyers will discover the futility of assuming law to be 'a system of fundamental and changeless "principles" existing apart from cases decided in the past,'[146] and will learn instead to treat 'the reality' of law as 'the actual decisions of cases by courts'.[147] The argument is, in one sense, rather banal, illustrative as it is of the commonplace realist faith in the indiscriminate application of social scientific methods to the study of law. In another sense, however, the argument is instructive, for it suggests how the 'realist' element of legal realism rested precisely in the appeal to the social sciences. By looking to the social sciences, particularly to those of an empirical bent, legal realists saw a means of developing on the insights of Pound and—more particularly—Holmes, of prioritizing law in action over law in books, legal experience over legal logic. The social sciences appeared to provide a method for telling it—namely, 'law'—as it is; for demonstrating how 'the concepts which the courts are using can be broken down and translated into the varying factual combinations which are found';[148] for getting almost 'as near to a case as the judge who decides it'.[149] The realist reaction against legal formalism was not straightforwardly a reaction against the idea of legal certainty, but rather a reaction against the particular certainties which formalism promoted. Legal realism

[144] See David M. Trubek, 'Back to the Future: The Short, Happy Life of the Law and Society Movement', *University of Wisconsin Law School Institute for Legal Studies Working Papers*, series 4, 1990, 28–9.

[145] Herman Oliphant and Abram Hewitt, 'Introduction', in Jacques Rueff, *From the Physical to the Social Sciences: Introduction to a Study of Economic and Ethical Theory* (Eng. tr. H. Green, Baltimore: The Johns Hopkins Press, 1929), ix–xxxii at xxvi–xxviii. Hewitt, a former student of the Columbia Law School, was Oliphant's research assistant at Johns Hopkins.

[146] Ibid. xviii.

[147] Ibid. xxvi.

[148] William O. Douglas and Carrol M. Shanks, 'Insulation from Liability Through Subsidiary Corporations', *Yale L.J.*, 39 (1929), 193–218 at 210.

[149] Oliphant, *supra* n. 72, 160.

sought a qualitatively different type of certainty—certainty, that is, in the form of a purported juridical authenticity; and this it did by looking to the social sciences. For most legal realists, social science was realism.

Law and Economics

The early intersections between law and economics provide a clear illustration of this point. Late nineteenth-century economic developments in the United States supported the move towards social-scientific realism. Though economic hardship was prevalent during the last three decades of the nineteenth century, organized industrial action generally rubbed against the grain of largely conservative public opinion and led to concerted anti-labour campaigns.[150] The ideological conflict between pro- and anti-labour supporters was reflected in an academic context primarily by late nineteenth-century developments in economics. Inspired principally by the growth of state-oriented, historical economics in Germany, an emerging group of American economists—including the likes of John Bates Clark, Henry Carter Adams, Richard T. Ely and E. R. A. Seligman—challenged the classical conception of the American political economy by questioning the 'scientific' status which classical economists accredited to the idea of free exchange.[151] The fundamental failing of *laissez-faire*, according to the new generation of economists, rested in its inability to provide a credible remedy for the problems of unemployment and working-class poverty. However, this did not amount to an outright rejection of the classical economic model. The brand of economic interventionism which this new generation of economists promoted was decidedly restrained. 'Adams, Ely, and particularly Clark continued to value the individual independence and moral strength that competitive exertion in the capitalist economy could create. Wherever genuine competition could be made to work, they hoped to retain it. By the same token, state action would be used only where necessary: to raise the plane

[150] See generally David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862–1872* (New York: Knopf, 1967); J. H. M. Laslett, *Labor and the Left: A Study of Socialist and Radical Influences in the American Labor Movement, 1881–1924* (New York: Basic Books, 1970); Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (Urbana: University of Illinois Press, 1983).

[151] For discussion in general, see Mary Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865–1905* (Lexington: University Press of Kentucky, 1975), 49–57; Dorothy Ross, 'Socialism and American Liberalism: Academic Social Thought in the 1880s', *Perspectives in American History*, 11 (1977–78), 5–79 at 15–22, 69–70; A. W. Coats, 'Henry Carter Adams: A Case Study in the Emergence of the Social Sciences in the United States, 1850–1900', *Jnl. of American Studies*, 2 (1968), 179–85; Benjamin G. Rader, *The Academic Mind and Reform: The Influence of Richard T. Ely in American Life* (Lexington: University Press of Kentucky, 1966), 1–7.

of competition, regulate monopoly, or enforce the rights of labour as workingmen increasingly gained control of industry.'[152] Retaining a basic faith in the moral legitimacy of the free market, the new generation of economists argued for 'social justice without socialism',[153] for a philosophy which fell somewhere in between interventionism and *laissez-faire*. Qualified interventionism was the flavour of the day.

It was with the advent of the philosophy of qualified interventionism that modern economics began to accommodate the ethos of social-scientific realism. While resorting primarily to formal economic laws in order to try to understand change and facilitate prediction, the new generation of economists recognized also that a persuasive method by which to demonstrate the shortcomings of free market philosophy would be to situate and test it empirically. Yet it was really only with the advent of post-classical economics proper—that is, with the emergence of the so-called 'institutionalist' economic perspective during the first two decades of this century—that economists began to regard empirical research and the gathering of quantitative facts as a peculiarly 'scientific' means of eradicating subjectivism and irrationalism from economic analysis.[154] One of the earliest proponents of institutionalism, Wesley Clair Mitchell, remarked in 1915 that 'proof means usually an appeal to the facts—facts recorded in the best cases and in statistical form. To write books of assertion or shrewd observation, won't convince people who have been in the habit of asserting other things or seeing things in a different perspective . . . [T]he only real answer lies in doing a lot of work with statistics.'[155]

Much of Mitchell's own work epitomized the style of statistics-based research into actual economic processes and activities which he believed was the proper purpose of institutionalism.[156] However, for all that they were prepared, in principle, to attest to the worthiness of such tasks, some institutionalists were reluctant, in practice, to devote much energy to the collection of data and compilation of statistics. In contrast with their often platitudinous espousals of quantitative research, a more important intellectual bond among the majority of institutional economists was their indebtedness to the work of Thorstein Veblen. In his endeavour to develop

[152] Ross, *supra* n. 139, 108–9.

[153] John Bates Clark, *Social Justice Without Socialism* (Boston: Houghton Mifflin, 1914).

[154] On institutionalist economics as part of the so-called 'revolt against formalism', see Ben B. Seligman, *Main Currents in Modern Economics: Economic Thought Since 1870* (New York: Free Press, 1962), 129–253.

[155] Wesley Clair Mitchell, 'Social Progress and Social Science', unpublished manuscript, 6 September 1915, in Wesley Clair Mitchell Papers, Rare Book and Manuscript Division, Butler Library, Columbia University.

[156] See e.g. Wesley Clair Mitchell, 'The Rationality of Economic Activity', *Jnl. of Political Economy*, 18 (1910), 197–216.

a theory of economics which was both critical and scientific, Veblen looked to late nineteenth-century evolutionary anthropology, from which he derived not only a theory of evolution but also a specific notion of objectivity, epitomized by the standpoint of the hypothetical 'alien observer'.[157] In turning to anthropology, Veblen attempted to develop an evolutionary theory of economics which countered the classicists' tendency to accord paradigmatic status to the idea of free exchange. Economics, he insisted, must be transformed into a genuine evolutionary science, into a study not of *laissez-faire* supported by the principle of natural selection, but of the American political economy as an evolving cultural process. It is not in the abstract paradigm of free exchange, but 'in the human material that the continuity of development is to be looked for; and it is here . . . that the motor forces of the process of economic development must be studied if they are to be studied in action at all. Economic action must be the subject-matter of the science if the science is to fall into line as an evolutionary science.'[158] Basically, 'an evolutionary economics must be the theory of a process of cultural growth as determined by the economic interest, a theory of a cumulative sequence of economic institutions stated in terms of the process itself'.[159] For Veblen, evolutionary science teaches that, in economics as elsewhere, historical study must focus on culture rather than causality.

It was thus that Veblen contributed to the emergence of institutionalism in economics. By re-casting economics as an evolutionary science, rather than merely as an ideology backed up by the scientific gloss of Social Darwinism, he 'showed how economists could accept history and legitimate change, even radical change, while assuming a stance of scientific objectivity; how they could undermine convention, yet speak in the name of universal truth'.[160] After Veblen, economic theory premissed on the validity of market intervention—intervention, as Veblen would have it, for the sake of 'cultural growth'—could be just as 'scientific', in an evolutionary sense, as competing, classical theories founded on the primacy of free exchange. Evolutionism provided a theoretical grounding for both pro- and anti-economic interventionists. 'Science' was no longer the preserve of economic inquiry in the classical tradition.

Building on the initiatives of Veblen, the economists who came to typify the institutionalist perspective during the early decades of this century by and large adopted as their primary focus of critique not the espousal by classical economists of free market virtues, but the neo-classicist faith in

[157] See Ross, *supra* n. 139, 154.

[158] Thorstein Veblen, 'Why is Economics Not an Evolutionary Science?', *Quarterly Journal of Economics*, 12 (1898), 373–97 at 388.

[159] Ibid. 393.

[160] Ross, *supra* n. 139, 215.

qualified interventionism. 'What fueled the institutionalist ambition was an overflow of realism and new liberal idealism that could not be contained by neoclassical practice. Impatient with the incapacity of economic theory to lead the way to real social democracy, the institutionalists gathered up the hopes and discontents of the [First World] war years into a call for a new kind of economic science.'[161] True to the Veblenian spirit, the new 'science' for which institutionalists appealed was a science of economic interventionism.

But it was not the language of economic interventionism which the institutionalists employed in putting forward their plans for the reorganization of the market in the interests of general social welfare and democracy. Rather, it was the language of the broader social sciences to which they resorted. Institutionalists concerned themselves not, specifically, with the notion of economic intervention but, more generally, with the use of economics to facilitate 'social control'. In what is, perhaps, the exemplary institutionalist text, John Maurice Clark conceives of social control as an insidious economic phenomenon:

> 'Control' means, primarily, coercion: orders backed by irresistible power. . . . But there are other less obvious ways of exercising control. In a broad sense, you can control me if you can make me do what you want, no matter what motive you use. . . . Suppose a labourer canvasses the field and finds no one offering a satisfactory living wage for his grade of work. He is 'compelled' to accept less; but whence comes the compulsion? Does it come from the employer who last discharged him, or from an informal control of the market by the employers in general, or from the customs and habits of business, or from the 'impersonal and immutable laws' of supply and demand? If he is actually getting the benefit of active competition, he will have chances to get approximately as much as some typical employer can afford to pay him, so that if he is still underpaid it is due to the forces of supply and demand, and not to deliberate oppression. But this occurs chiefly at times of business depression, which is coming to be regarded as a remediable disease of industry, so that society has some responsibility for the compulsions of supply and demand, to the extent that it has power to alleviate them. And this impersonal machinery of private industry evidently has penalties at its disposal which often carry more material hardship than a jail sentence. Yet a jail sentence is coercion such as only the state can employ; while the loss of one's job is merely an incident of 'free bargaining'.[162]

The casual disparaging of classical economics here,[163] and the optimistic belief that the 'new' economics would herald a remedy to the Depression, betray a peculiar institutionalist naivety. With the approach of the 1930s, institutionalism began to appear every bit as ineffectual in pragmatic terms as the tradition of non-interventionism to which it supposedly offered a challenge[164]—so much so, indeed, that President Hoover eventually sought a Keynesian remedy to the economic downturn.[165] While rejecting the argument that the economic slump would right itself with a minimum of market intervention, institutionalist economists were nonetheless unable to procure a better understanding of, or propose a more convincing remedy for, the Depression than had their neo-classical precursors: for all that they were convinced of the shortcomings of neo-classicism, they were unable convincingly to improve upon those shortcomings. Part of the problem was the general institutionalist preoccupation with critique at the expense of pragmatic proposals for economic reform. Indeed, rather ironically, institutionalist economists generally devoted little energy to the study of institutions, preferring instead to draw upon the insights of the likes of Veblen, Marx, and Sydney and Beatrice Webb. A greater problem, however, rested in the fact that, having acquired prominence very much on the back of the Depression, most institutionalists simply turned away from the problem on realizing that, beyond the rhetoric of social control, they had little idea as to how to deal with it. When, for example, Wesley Clair Mitchell was proved wrong by time in his prediction that the sharp economic downturn following the Crash would remedy itself within a year or two, he retreated from the problem by turning his attention exclusively to empirical research into economic planning.[166]

While institutionalism was something of a pragmatic failure, however, its broader intellectual legacy was more enduring and impressive. This much is clear from the manner in which institutionalist sentiments gradually permeated progressive legal thinking. Given their general preoccupation with the nature of social control, it is unsuprising that most institutionalist economists should have been concerned in one way or another with the

[161] Ross, *supra* n. 139, 411.

[162] John Maurice Clark, *Social Control of Business* (Chicago: University of Chicago Press, 1926), 6; and, in a similar institutionalist vein, see Rexford G. Tugwell, 'The Economic Basis for Business Regulation', *American Economic Rev.*, 11 (1921), 643–58.

[163] Clark was to some extent an exception among the institutional economists in so far as his criticisms of the neo-classical tradition were, for the most part, decidedly restrained. This may have been because his father, John Bates Clark, was a prime exponent of neo-classicist economics. For an illustration of Maurice Clark's cautious critique of neo-classicism, see John Maurice Clark, 'Soundings in Non-Euclidean Economics', *Papers and Proceedings of the American Economic Association*, 11 (1921), 132–43; and, for an illustration of his respect for the intellectual achievements of his father, his review of A. C. Pigou, *Wealth and Welfare*, *American Economic Rev.*, 3 (1913), 623–5 at 624.

[164] Although institutionalism never died out once and for all, as is clear from its continuing if somewhat marginal impact on American legal scholarship. For a discussion, see Neil Duxbury, 'Is There a Dissenting Tradition in Law and Economics?', *Mod. L. Rev.*, 54 (1991), 300–11.

[165] See John Kenneth Galbraith, *The Great Crash 1929* (Harmondsworth: Penguin, 1962; orig. publ. 1954), 156–7; and also Seligman, *supra* n. 154, 730–47.

[166] It was to this end that he accepted a post as a visiting professor at the University of Oxford for the academic year 1931–2. See generally Joseph Dorfman, *The Economic Mind in American Civilization, Volume V: 1918–1933* (New York: Viking, 1949), 666–9.

legal system as regulatory apparatus; so too is it unsurprising that, as progressive lawyers became drawn ever more to the methods of the social sciences, institutionalist economics should have proved a peculiarly attractive proposition. One of Hutchins's earliest initiatives at the Yale Law School was to secure the appointment of Walton Hale Hamilton, an institutionalist economist without any formal legal training. Yet it was at Columbia, where John Maurice Clark held a chair in economics, that institutionalism made its most profound impact on legal thinking.

According to Clark, the fundamental failure of classical economics rests in its misapprehension of interventionism as a purely public-regulatory affair. Analysis of the concept of social control, he insists, reveals that 'external' regulation of economic activities is essentially a private rather than a public phenomenon. '[W]hen the state acts . . . it is always some individual official who is really acting . . . [F]or all practical purposes, he is the state.'[167] The same point is made with equal force by Clark's institutionalist *confrère*, John Commons:

> The state is what its officials do. . . . The state is not 'the people,' nor 'the public,' it is the working rules of the discretionary officials of the past and present who have had and now have the legal power to put their will into effect within the limits set by other officials, past and present, and through the instrumentality of other officials or employees, present and future.[168]

As a source of social control, the state is inevitably instrumental in the shaping of economic liberties. 'An economic liberty', Commons suggests, 'exists only through official behaviour designed to permit and authorize it.'[169] However, the limits, as opposed to the existence, of any particular economic liberty is not exclusively a matter for the state. Indeed, according to Clark, so far as the social control of business is concerned, the state, even under a system of interventionism, plays only a minimal governmental role, since liberty is primarily at the mercy of internal market forces:

> The substance of liberty . . . has an economic basis. It depends, in the first instance, on knowledge, especially (in the economic field) knowledge of the market and knowledge of how to produce something with a marketable value and how to dispose of it at a fair market price. A person who does not have a job or any other source of income, and who does not know where to get one and how to go about canvassing the market effectively, does not possess the substance of liberty. That person is in a position to be exploited and to be forced to make contracts which are essentially made under duress.[170]

[167] Clark, *supra* n. 162, 9.
[168] John R. Commons, *Legal Foundations of Capitalism* (New York: Macmillan, 1924), 122, 149. Commons was a professor of economics at the University of Wisconsin.
[169] Ibid. 127.
[170] Clark, *supra* n. 162, 110.

Thus it is that the possession of a liberty is by no means tantamount to the possession of a right. 'Has a labourer a right to work? He clearly has a liberty to work . . . but so long as no one has a duty to furnish him a job, getting a chance to work is not a right in the strict sense.'[171] Equally, '[t]he freedom to make a million dollars is not worth a cent to one who is out of work. Nor is the freedom to starve, or to work for wages less than the minimum of subsistence, one that any rational being can prize—whatever learned courts may say to the contrary'.[172] Hence the institutionalist objection to the classical idea of free exchange. The liberty which the classical economists extolled was an insubstantial, unprotected liberty: freedom as mere absence of restraint. Real liberty—liberty backed by rights—could only be achieved through the simultaneous promotion and facilitation of economic equality:

> If all individuals were exactly equal in physical, economic and persuasive powers, then there would be no reasonable purpose in placing any limits on their liberties, since no one could harm or mislead another anyhow. But, since the real fact is one of astounding inequalities, limits are placed somewhat on the liberties of the more powerful under the name of duties, such that a more reasonable degree of equality may be maintained. These duties create correlative rights on behalf of the inferiors which are equivalent to reducing the exposure of the weaker parties by reducing the liberty of the stronger. Conversely, a reduction of duties on the part of inferiors increases their liberty while reducing the rights and enlarging the exposures of the stronger. According to the degree to which these determinations are carried is there constructed a reciprocal exposure of each to the liberty of the other and a reciprocity of rights and duties.[173]

While more directly indebted to Hohfeld's theory of jural relations than to the writings of any particular proto-realist jurist,[174] the institutionalist critique of economic liberty bolstered the spirit of dissent against liberty of contract which had found its original, if somewhat tentative, expression in the various anti-*laissez-faire* statements of Holmes and Pound. It is hardly surprising, accordingly, that certain realists, in reacting against legal formalism, should have latched on to the institutionalist position. Yet those realists who looked to institutionalism found more than just intellectual inspiration and affinity. That, after all, they had already found in the writings of Holmes and Pound. What institutionalism gave to some realists was a sense of external approval. Here was a number of lawyers who were taking their first, hesitant steps into the realm of the social

[171] Ibid. 100.
[172] Morris R. Cohen, 'The Basis of Contract', *Harvard L. Rev.*, 46 (1933), 553–92 at 560.
[173] Commons, *supra* n. 168, 129–30.
[174] See Commons, ibid. 91–100; 'Law and Economics', *Yale L.J.*, 34 (1925), 371–82 at 375; 'The Problem of Correlating Law, Economics and Ethics', *Wisconsin L. Rev.*, 8 (1932), 3–26 at 14–18.

sciences. That they were to discover a group of social scientists reaching essentially the same conclusions as themselves about the idea of free exchange can only have strengthened their resolve to take further steps in the same direction.

Institutionalist economists, too, were happy to build bridges with so-called realists. Karl Llewellyn, who joined the Columbia law faculty as a visiting lecturer in May 1924, is acknowledged by John Maurice Clark in the preface to *Social Control of Business* for having, at the author's invitation, read and commented on an earlier draft of the book.[175] Clark also expressed his approval of Llewellyn's own ideas on the relationship between law and economics,[176] which ideas were developed by Llewellyn in a paper delivered to the American Economic Association in December 1924. Adopting the terminology then prevalent among economists and other social scientists, Llewellyn suggests in his paper that the institutionalist preoccupation with social control is mirrored in jurisprudence by the Poundian concept of social engineering.[177] '[T]he legal feature of this age', he argues, is 'the emergence of diverse and specialized groups with a need for specialized control.'[178] As agencies of control, '[l]egal institutions provide a general atmosphere of security from personal aggression without which economic life could hardly be expected to unfold.'[179] Accordingly, as important as the question of what economic theory may offer for the understanding of law is the question, 'what may law have to contribute to economic theory?'[180] By regulating competition, distribution and production, for example, 'legal institutions fix and guarantee the presuppositions on which the economic order rests'.[181] Of all the institutionalist-inspired realists, Llewellyn was unique in that he was concerned more with the impact of law on economics than with economics on law.

Llewellyn did, nevertheless, acknowledge that institutionalism highlights some novel legal insights. Having recognized, as early as 1924, the 'striking contribution of Professor Commons' to the economic analysis of law,[182]

[175] See Clark, *supra* n. 162, xv.

[176] Ibid. 187 fn. 1.

[177] Karl N. Llewellyn, 'The Effect of Legal Institutions Upon Economics', *American Economic Rev.*, 15 (1925), 665–83 at 666. More generally, on the concept of social control in modern American jurisprudence and law and economics, see Robert C. Ellickson, 'A Critique of Economic and Sociological Theories of Social Control', *Jnl. Leg. Studs.*, 16 (1987), 67–99.

[178] Llewellyn, *supra* n. 177, 669.

[179] Ibid. 668.

[180] Ibid.

[181] Ibid. In a similar vein, see H.W. Robinson, 'Law and Economics', *Mod. L. Rev.*, 2 (1938), 257–65 at 260–1.

[182] Llewellyn, *supra* n. 177, 680. For a similarly appreciative assessment of Commons's contribution to the economic analysis of law, see generally Raymond J. Heilman, 'The Correlation Between the Sciences of Law and Economics', *California L. Rev.*, 20 (1932), 379–95.

Llewellyn, throughout his writings of the 1920s, came to question with increasing vigour the formalist picture of law without a human element. Just as Commons had asserted that the state is what its officials do, Llewellyn, by 1929—though ultimately he would retract the statement—was telling his students at Columbia that '[w]hat [legal] officials do about disputes is . . . the law itself'.[183] Perhaps more importantly, he also recognized that while the development of economics was in various ways parasitic on the functioning of legal institutions, the regulatory threshold of those institutions could, in one vital sense, be illustrated through economic theory, since, from an institutionalist perspective,

> it may be queried whether any sane public regulation of economic activity in the public interest—whatever that may be—is not largely accidental. The way of growth seems to be along whatever balance results from the pull and prodding of this and the other private interest.[184]

This one short quotation rather captures the institutionalist contribution to realist legal thought. To resist the public regulation of economic activities out of a respect for market freedom is to fail, unwittingly or otherwise, to see how the market itself is an oppressive rather than a liberating force. This is precisely the argument which various realists adopted in their attempts to discredit the tradition of *laissez-faire* in the courts. Llewellyn himself, writing in 1931, drew attention to the subtle regulatory function of the 'lop-sided' contract, that is, the contract where 'skill and power enter on one side only'.[185] 'It is', he insists, 'a form of contract which, in the measure of the importance of the particular deal in the other party's life, amounts to the exercise of unofficial government of some by others, via private law.'[186] For all that such bargains can sometimes 'press to the point where contract may mean rather fierce control,' the courts have nonetheless 'been slow to see what was needed, or to find means to fill the need. Beneath the surface of the opinions one feels a persistent doubt—one feels it even while interference proceeds—as to the wisdom of any interference with men's bargains.'[187] Essentially the same argument is offered by Morris Cohen. In their subscription to 'the classical economic optimism that there is a sort of pre-established harmony between the good of all and the pursuit by each of his own selfish economic gain,' the American courts had come under the spell of the 'cult of freedom'.[188] Supreme Court decisions such as *Lochner* v. *New York*[189] and *Coppage* v. *Kansas*[190] had the effect of

[183] Llewellyn, *supra* n. 25, 3; and for Llewellyn's retraction, see ibid. ix–xi; and Twining, *supra* n. 12, 149–52.

[184] Llewellyn, *supra* n. 177, 672.

[185] Karl N. Llewellyn, 'What Price Contract?—An Essay in Perspective', *Yale L.J.*, 40 (1931), 704–51 at 731.

[186] Ibid.

[187] Ibid. 732.

[188] Cohen, *supra* n. 172, 558–9.

[189] *Lochner* v. *New York* (1905) 198 U.S. 45.

[190] *Coppage* v. *Kansas* (1915) 236 U.S. 1.

legitimizing 'the fiction of the so-called labour contract as a free bargain', when 'not only is there actually little freedom to bargain on the part of the steel worker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord.'[191] 'There is, in fact, no real bargaining between the modern large employer . . . and its individual employees. The working-man has no real power to negotiate or confer with the corporation as to the terms under which he will agree to work. He either decides to work under the conditions and schedule of wages fixed by the employer or else he is out of a job.'[192]

Thus it is that legal realism, following in the path of the institutionalist economists, came to challenge legal formalism in the courts.[193] For all that it had been cherished by the Supreme Court, the free market was not a natural phenomenon, guided by the invisible hand of natural selection; rather, it was a social construct, an ideology. Economic freedom—the freedom to choose—conceals economic duress; coercion is an integral feature of the free market. The advent of realism marked the demise—if only temporary—of a pervasive legal-economic myth: the myth, that is, of unimpeded voluntary action, of the free economic agent situated in a realm of pure choice and motivated by competitive Darwinist instinct. By the late 1930s and 1940s, as the Supreme Court—beginning with *West Coast Hotel*

[191] Morris R. Cohen, 'Property and Sovereignty', *Cornell L.Q.*, 13 (1927), 8–30 at 12.

[192] Cohen, *supra* n. 172, 569; and see also Cohen, *supra* n. 117, 353–5; Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach', *Columbia L. Rev.*, 35 (1935), 809–49 at 816–17.

[193] Although my thesis here is that legal realists, in so far as they adopted economic arguments, tended to apply institutionalist insights to doctrinal problems, it should be noted that there was one specific strain of realist legal analysis—namely, the study of tort doctrine—which drew on economics in a rather different manner. Leon Green, Dean of the Northwestern University School of Law from 1929 through to the mid-1940s, exemplified this tendency. According to G. Edward White, 'Green was the most influential Realist tort theoretician of the early twentieth century.' G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1980), 76. A good deal of Green's work addressed issues relating to the role of judges and juries in tort cases; and he insisted, in his analysis of these issues, that a primary consideration for judges and juries is the allocation of economic risk. See Wilfrid Rumble, Jr., 'Law as the Effective Decisions of Officials: A "New Look" at Legal Realism', *Int. of Public Law*, 20 (1971), 215–71 at 265. According to one commentator, 'Green would use the term ["risk"] in a way that . . . has economic significance as well as moral and personal injury connotations . . . Green has opened the door in negligence law to such a comprehensive value approach.' Walter Probert, 'Causation in the Negligence Jargon: A Plea for Balanced "Realism" ', *U. Florida L. Rev.*, 18 (1965), 369–97 at 392; and see also David W. Robertson, 'The Legal Philosophy of Leon Green', *Texas L. Rev.*, 56 (1978), 393–437 at 422–4. Green was not, in fact, the first American lawyer to attempt an economic interpretation of the law of torts: in this matter, he had been foreshadowed by his academic rival, Francis Bohlen. See Francis Bohlen, *The Basis of Affirmative Obligations in the Law of Tort* (Philadelphia: Department of Law of the University of Pennsylvania, 1905). See also Green, *supra* n. 14, 245–51; and Roscoe Pound, 'The Economic Interpretation and the Law of Torts', *Harvard L. Rev.*, 53 (1940), 365–85.

Co. v. *Parrish*[194]—gradually outgrew the formalism of *Lochner* and *Coppage*, realist-inspired doctrinal lawyers began to wonder how any court could ever have taken seriously the late nineteenth-century liberty of contract model.[195] By the late 1970s and 1980s, proponents of critical legal studies in the United States had adopted the realist attack on the tradition of *laissez-faire* as part of their own jurisprudential agenda.[196]

Of all the realists who challenged the tradition of *laissez-faire*, none was more inspirational to future generations of American academic lawyers than Robert Hale. Trained in both law and economics, Hale was appointed as a full-time professor at the Columbia Law School in 1928 as part of Dean Smith's drive to replenish a somewhat depleted faculty following the resignations over the deanship controversy. Through his training, Hale was able to recognize clearly the manner in which late nineteenth and early twentieth-century legal and economic ideas were following parallel paths. Beginning with *Lochner*, the classic dissenting opinions of Justice Holmes marked, for Hale, the demise of Spencerian economic austerity in the courts. He cited as a 'literary masterpiece'[197] Holmes's dissent in *Tyson & Bro.* v. *Banton*, in which the majority of the Supreme Court declared unconstitutional a New York statute limiting the resale price of theatre tickets to fifty cents in excess of the box office price.[198] In that case, Holmes took the view that 'the legislature may forbid or restrict any

[194] *West Coast Hotel Co.* v. *Parrish* (1937) 300 U.S. 379, overruling *Adkins* v. *Children's Hospital* (1923) 261 U.S. 525. Compare also *Hebe* v. *Shaw* (1919) 248 U.S. 297 (early indication of the Supreme Court moving away from *Lochner*); and see, generally, Samuel Herman, 'Economic Predilection and the Law', *American Political Science Rev.*, 31 (1937), 821–41 at 823–6; David P. Currie, 'The Constitution in the Supreme Court: The New Deal, 1931–1940', *U. Chicago L. Rev.*, 54 (1987), 504–55 at 541–53.

[195] See John P. Dawson, 'Economic Duress and the Fair Exchange in French and German Law', *Tulane L. Rev.*, 11 (1937), 345–76 at 345; 'Economic Duress—An Essay in Perspective', *Michigan L. Rev.*, 45 (1947), 253–90 esp. 266–7; John Dalzell, 'Duress by Economic Pressure', *North Carolina L. Rev.*, 20 (1942), 237–77, 341–86.

[196] The proponent of critical legal studies who has championed the realist assault on *laissez-faire* most vigorously is Joseph W. Singer, 'Legal Realism Now', *California L. Rev.*, 76 (1988), 465–544, though this is not to overlook the efforts of so-called 'first-generation' critical legal scholars such as Karl Klare, Duncan Kennedy and especially Morton Horwitz. See e.g. Karl E. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941', *Minnesota L. Rev.*, 62 (1978), 265–339 at 296–310; Duncan Kennedy, 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities', *American University L. Rev.*, 34 (1985), 939–1001 at 951–2; and Morton J. Horwitz, 'The History of the Public/Private Distinction', *U. Pennsylvania L. Rev.*, 130 (1982), 1423–8 at 1426; *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 169–246. Nor should one overlook the fact that the realist analysis of the concept of coercion has been influential outside critical legal circles. See e.g. Summers, *supra* n. 19, 224–35.

[197] Robert L. Hale, 'The Constitution and the Price System: Some Reflections on *Nebbia* v. *New York*', *Columbia L. Rev.*, 34 (1934), 401–25 at 415.

[198] *Tyson & Bro.* v. *Banton* (1927) 273 U.S. 418.

business when it has a sufficient force of public opinion behind it.'[199] Hale also lauded Holmes's recognition that, in an economic transaction, choice and duress are by no means mutually exclusive.[200]

More clearly than any other realist, Hale saw too that Holmes's ostensibly anti-Spencerian remarks were but tentative allusions to a broader anti-classical economic tradition. By drawing on this tradition—the emerging tradition of institutionalism—it would be possible, Hale believed, to put forward a detailed legal-economic critique of *laissez-faire*; a critique far more carefully and constructively worked out than anything to be gleaned from the random, often qualified, invariably contextually specific remarks which peppered Holmes's Supreme Court opinions. Hale took it upon himself to formulate this critique, and his starting point was, perhaps inevitably, Thorstein Veblen. Published one year prior to the decision in *Lochner*, and very much a natural progression from his earlier work castigating the failure of late nineteenth-century economists to embrace the insights of evolutionary science, Veblen's *The Theory of Business Enterprise* had become established as a classic proto-institutionalist critique of the notion of economic liberty. By the end of the nineteenth century, Veblen argues in that book, the idea of natural economic liberty had 'taken the firmest hold on the legal mind',[201] owing primarily to the judicial imperative that 'the principle of free contract be left intact in so far as the circumstances of the case permit'.[202] '[T]hrough gradual change of the economic situation, this conventional principle of unmitigated and inalienable freedom of contract began to grow obsolete,' Veblen concludes, 'from about the time when it was fairly installed; obsolescent, of course, not in point of law, but in point of fact.'[203]

This is, in effect, the argument which was adopted by Hale. Even though the principle of natural liberty 'may perhaps be derived by intuition from some highly respectable source—the Fourteenth Amendment, or the genius of our institutions, or Herbert Spencer . . . it is incapable of

[199] Ibid. 446.

[200] See *Union Pacific Railway* v. *Public Service Commission of Missouri* (1918), 246 U.S. 67, 70 (Holmes J. dissenting); and *The Eliza Lines* (1905) 199 U.S. 119, 130–1, (Holmes J. dissenting); also Robert L. Hale, 'Force and the State: A Comparison of "Political" and "Economic" Compulsion', *Columbia L. Rev.*, 35 (1935), 149–201 at 150 *et seq.*; 'Unconstitutional Conditions and Constitutional Rights', *Columbia L. Rev.*, 35 (1935), 321–59 at 339 *et seq.* A detailed study of Hale's own brand of law and economics is scheduled to appear in 1995: Barbara H. Fried, *Robert Hale and Progressive Legal Economics* (Cambridge, Mass.: Harvard University Press, forthcoming).

[201] Thorstein Veblen, *The Theory of Business Enterprise* (New York: Mentor, 1958; orig. publ. 1904), 130.

[202] Ibid. 131.

[203] Ibid.

application',[204] since 'the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom and with restrictions, moreover, out of conformity with any formula of "equal opportunity" or of "preserving the equal rights of others". Some sort of coercive restriction is absolutely unavoidable, and cannot be made to conform to any Spencerian formula.'[205] By turning coercion into the nub of the economic apparatus, Hale inspired as much as he followed other institutionalists. He preceded both Commons and Clark in his insistence that, since 'economy' connotes regulation and management, the notion of a 'free economy' is an oxymoron.[206] Indeed, in this respect, he was very much an institutionalist *sui generis*. 'Every price, like every tax,' he insisted 'is in some measure regulatory and to some extent interposes an economic impediment to the use of the article for which the price is charged.'[207] Coercion thus lies at the heart of every bargain, since the extent of our 'freedom' as economic agents is relative to the level of our individual bargaining power, our ability to afford the requisite price. Greater bargaining power entails a capacity to require those with comparably less bargaining power to accept one's economic terms; it entails also a comparably greater capacity to reject or modify the contractual terms set by others. Very simply, the more bargaining power I have, the less susceptible I am to the economic coercion of others, and vice versa.

That Hale recognized this was important enough. The free market ethos of the late nineteenth and early twentieth-century Supreme Court had been exposed as a myth. Economic freedom was economic compulsion. More important yet, however, was Hale's transformation of this insight into a specific theory of regulation. The use of economic wealth to facilitate both freedom and coercion, he argued, demonstrates that government is a private as well as a public phenomenon. Formalism persisted in the American courts owing precisely to a general judicial inability or unwillingness to face this fact. In its interpretation of the due process clause of the Fourteenth Amendment, for example, the Supreme Court of the *Lochner* era emphasized the constitutional impropriety of state interference with agreements between private citizens. 'No State shall . . . deprive any person of life, liberty, or property, without due process of law'

[204] Robert L. Hale, 'Rate Making and the Revision of the Property Concept', *Columbia L. Rev.*, 22 (1922), 209–16 at 212.

[205] Robert L. Hale, 'Coercion and Distribution in a Supposedly Non-coercive State', *Political Science Quarterly*, 38 (1923), 470–94 at 470.

[206] Robert L. Hale, 'Law Making by Unofficial Minorities', *Columbia L. Rev.*, 20 (1920), 451–6 at 455.

[207] Robert L. Hale, 'Our Equivocal Constitutional Guaranties', *Columbia L. Rev.*, 39 (1939), 563–94 at 566.

was taken to mean, *inter alia*, that states have no business attempting to regulate private economic relations. Such relations were a matter for the market, to be governed only by the contractual terms freely accepted by economic agents. Public (state) government, in other words, has no right to interfere with private economic freedom. For Hale, however, there is no such thing as economic freedom. The 'free market' is every bit as much a regulatory apparatus as is the state. Accordingly, the constitutional protection of freedom of contract from state intervention is premissed on a fictional differentiation between public and private, on an assumption, that is, that the potential to regulate economic affairs is solely a characteristic of the public domain.

> A man's liberty is thought to need no constitutional protection against private individuals, for the ordinary law protects him against any violent interference practised by others. If others induce him to refrain from exercising any of his constitutional rights, by refusing otherwise to deal with him, his renunciation is looked upon as a voluntary one, made in the course of a process known as 'freedom of contract', in which all the participants have equal rights. It is the federal and state governments, and their subordinate branches, which are alone thought capable of forcibly interfering with this liberty, and it is against these governments that his constitutional rights are for the most part protected.[208]

The constitutional protection of the individual's right to contract is, accordingly, a protection of the individual against the state. But it is not a protection against interference by other individuals—individuals, that is, who, owing to their superior bargaining power, are possessed of the ability to influence, if not to control, the contractual choices of their economic subordinates. This ability to exert economic influence and control over others with comparably less bargaining power is the essence of what Hale terms private government. 'Various private groups to which a man belongs may govern him quite as effectively as do organs of the official government', indeed, 'both in scope and in efficiency many exertions of what is called economic power are indistinguishable from many exertions of what is recognized as political power.'[209] For Hale, legal formalism in the late nineteenth and early twentieth-century American courts consisted of more than just the sanctification of *laissez-faire*; it was defined also by a separation of the public and the private which was as strict as it was artificial. Only the state could unreasonably interfere with private economic transactions. The possibility of the entrepreneurial abuse of private government—of monopoly, unfair competition, economic duress and the like—was overlooked. Yet, ironically, only public government—in the form of state legislation or constitutional protection—could ever realistically keep such abuse in check. 'The individual liberty of the governed often demands some sort of protection against abuses of private governing power, analogous to the safeguards which our constitutional system furnishes against the abuse of official government. Such safeguards only the official government itself can furnish.'[210] Through their reluctance to acknowledge that economic coercion has its private as well as its public dimension, the late nineteenth and early twentieth-century American courts failed to appreciate that the major obstacle preventing a flourishing free market economy was not the threat of public control over private economic affairs, but the nature of the market itself.

In recent times, the task of collapsing the public/private distinction has been revived by certain proponents of critical legal studies.[211] Hale, in his writings on the nature of economic coercion, was the first American academic lawyer to bring this task to light. The modern critique of the public/private dichotomy can, accordingly, be said to have its origins in the early twentieth-century intermeshing of institutionalist economics and realist juristic sensibilities. If only inadvertently and indirectly, realism, in its appeal to institutionalism, set the scene for a good deal of modern American jurisprudential debate.

Realism, History and the Constitution

Whereas Hale's theory of economic coercion was of an unmistakably institutionalist bent, other realist affinities with institutionalism—while no less significant so far as the intellectual history of realism is concerned—were of a distinctly broader variety. Some realists, while not especially indebted to institutionalist insights, seemed to have a passion for imitating Veblenian polemic. In his famous tirade against the leisure class, first published in 1899, Veblen claimed that the progression from feudalism to modernity was distinguished by subtle changes in the nature of control and consumption on the part of the dominant class. Fraud, first of all, had supplanted brute force as the primary method of dominance and exploitation. The modern entrepreneurial élite, in its successful utilization of fraudulent techniques, was aided and abetted by the profession of lawyers. 'The lawyer is exclusively occupied with the details of predatory fraud, either in achieving or checkmating chicanery, and success in the

[208] Ibid. 564.
[209] Robert Lee Hale Papers, Rare Book and Manuscript Division, Butler Library, Columbia University, folder 56, item 1, p. 17; and folder 80, item 8, p. 7.
[210] Hale Papers, ibid. folder 57, item 9, p. 10.
[211] See Kenneth M. Casebeer, 'Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law', *U. Miami L. Rev.*, 37 (1983), 379–431; Alan Freeman and Elizabeth Mensch, 'The Public–Private Distinction in American Law and Life', *Buffalo L. Rev.*, 36 (1987), 237–57; and cf. also the 'Symposium on the Public/Private Distinction', *U. Pennsylvania L. Rev.*, 130 (1982), 1289–609.

profession is therefore accepted as marking a large endowment of that barbarian astuteness which has always commanded men's respect and fear.'[212] Secondly, whereas the feudal aristocrat had been happy to cultivate to a high art a conspicuous personal disdain for work and utility, the modern captain of industry, being concerned above all with economic productivity, has come to conceive of leisure in a rather more subtle fashion, namely, as the celebration of such productivity, as consumption. The modern aristocracy, for Veblen, is a leisure class, a class of conspicuous consumers, held under the sway of mass advertising.

This style of broad-brush polemic is mirrored in the writings of 'radical' realists such as Fred Rodell and Thurman Arnold. The opening lines of Rodell's *succès de scandale* in denunciation of the legal profession are a perfect illustration of Veblenian bombast:

> In tribal times, there were the medicine men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trades and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.[213]

Rodell's modern lawyer, like Veblen's modern entrepreneur, is the successor to an earlier dominant class. Law is a fraud, a scam, 'a high-class racket';[214] its practice is but the manipulation of the laity by an élite. Veblen's work provided Rodell and other realists with an attractive, if flagrantly overgeneralized historical perspective. By resorting to Veblenian rhetoric, the ills of modern North America, or certainly of modern North American law, could conveniently be diagnosed as the outcome of the pernicious process of evolution from medieval brute force to modern predatory fraud. Thus it was that the tradition of institutionalism in the American social sciences gave some legal realists a taste not so much for economic analysis as for historical generalization about the law.

It is perhaps unsurprising that those realists who looked to institutionalism should have found history rather than economics. Most institutionalist writings were highly technical and focused on specific problems such as overhead costs and business cycles—the sorts of problems which would have made little sense to, or held little appeal for, realists without any economic training. Veblen's romantic, conspiratorial *grands récits*, in

[212] Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (New York: Mentor, 1953; orig. publ. 1899), 156. For an excellent, general discussion of the Veblenian position, see Theodor W. Adorno, *Prisms* (Eng. trans. S. and S. Weber, Cambridge, Mass.: MIT Press, 1981), 75–94.

[213] Fred Rodell, *Woe Unto You, Lawyers!* (New York: Berkeley, 1980; orig. publ. 1939), 1.

[214] Ibid. 10.

contrast, were as readable as good fiction—and in some ways were best treated as such. However, there was a tendency for legal realists to treat Veblen quite literally, primarily because they found in his work an 'indictment of classical economic theory' which could 'be applied word for word to classical jurisprudence',[215] but also because they discovered there a potted history of modern America which rather confirmed their own intuitions about the legal world. It is not insignificant that historically-oriented legal scholarship was never particularly prevalent among so-called realists. A possible reason for this is that, in their various attempts to use—or at least to toy with—the methods of the social sciences, these realists discovered—ready-formulated, as it were—various hypotheses, including historical hypotheses, which amply supported their own arguments. Given that, by the late 1920s, the basic historical path which some realists might have cared to tread had already been covered by Veblen and other social scientists with institutionalist leanings, there seemed little point for any legal realist to retrace those steps again.

This is not to assert, as Grant Gilmore does, that legal realism was totally ahistorical.[216] Realists such as Karl Llewellyn, Walton Hale Hamilton, Walter Nelles and Max Radin produced excellent historical studies in their own areas of specialization.[217] Such studies, however, were the exception rather than the rule.[218] The literature of legal realism is, for the most part, distinguished not only by a paucity of original historical scholarship, but also by a general lack of appreciation for history in its own right. The conception of history to be found in most realist literature conforms with what Laura Kalman has termed 'presentist' history—the idea, that is, that the only worthwhile reason for studying the past is to cast light on the problems of the present.[219] Presentism was very much a *fil*

[215] Cohen, *supra* n. 192, 832; and cf. also Kalman, *supra* n. 3, 19.

[216] See Gilmore, *supra* n. 64, 103. ('In the law schools, until some time after World War II, the study of any field of law from a historical point of view was almost unheard of. Indeed, the Realists (with the exception of Karl Llewellyn) were no more interested in the past than the Langdellian formalists had been.')

[217] See e.g. Karl N. Llewellyn, 'On Warranty of Quality and Society', *Columbia L. Rev.*, 36 (1936), 699–744; *Columbia L. Rev.*, 37 (1937), 341–409; 'Across Sales on Horseback', *Harvard L. Rev.*, 52 (1939), 725–46; 'The First Struggle to Unhorse Sales', *Harvard L. Rev.*, 52 (1939), 874–904; Walton H. Hamilton, 'The Ancient Maxim *Caveat Emptor*', *Yale L.J.*, 40 (1931), 1133–87; Walter Nelles, '*Commonwealth* v. *Hunt*', *Columbia L. Rev.*, 32 (1932), 1128–69; 'Towards Legal Understanding', *Columbia L. Rev.*, 34 (1934), 862–89, 1041–75; Max Radin, 'The Right to a Public Trial', *Temple L.Q.*, 6 (1932), 381–98.

[218] See Gordon, *supra* n. 4, 28–29 fn. 61. On the dearth of historical scholarship in the American law schools generally, see Daniel J. Boorstin, *The Americans: The National Experience* (London: Cardinal, 1988; orig. publ. 1965), 444.

[219] Kalman, *supra* n. 3, 37. Presentism is also a feature of Holmesian jurisprudence. See Oliver Wendell Holmes, Jr., 'The Path of the Law', *Harvard L. Rev.*, 10 (1897), 457–78 at 474. ('We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present.')

conducteur in Veblen's writings. Those realists who adopted a presentist perspective on legal history, however, did so not simply out of admiration for Veblen's polemical initiatives; they did so because of their similarly high regard for the works of various largely Veblen-inspired early twentieth-century political scientists and constitutional scholars.

Principal among these was Charles Beard. As early as 1907, Beard had declared his intention to 'subordinate[] the past to the present'.[220] The past—more specifically, the period leading up to 1787—holds the key, he insisted, to the political conservatism of early twentieth-century interpretations of the Constitution. The politics of the 1780s had been 'dominated by a deep-seated conflict between a popular party based on paper money and agrarian interests, and a conservative party centred in the towns and resting on financial, mercantile, and personalty interests.'[221] Hampered by a Confederation government, and unable to achieve substantial reform through formal congressional channels, the conservatives effectively bypassed the existing legal framework by adopting the Constitution of 1787; in doing this, they acted not, primarily, out of respect for constitutional principles, but out of concern for economic interests. For the conservatives, the successful promotion of economic interests demanded the creation of a national government. 'Only by locating the source of authority and political obligation in the "nation" itself could the constitutional order adapt to the changing realities of social and economic power.'[222] Accordingly, the purpose of the Constitution was not, as had originally been anticipated, to support a fragmented system of government, but instead to provide a federal mechanism for the control of the national economy. Modern constitutional arrangements, for Beard, must be seen to be premissed upon and motivated by powerful economic considerations and pressures.[223]

Other political scientists, particularly during the Progressive era, shared Beard's presentist outlook. Charles Merriam, Herbert Croly, Charles Groves Haines and other constitutional scholars of this period took the view that the Constitution must be treated primarily as a contemporary

[220] James Robinson and Charles Beard, *The Development of Modern Europe* (two vols. Boston: Ginn & Co. 1907), I, ix.

[221] Herman Belz, 'The Realist Critique of Constitutionalism in the Era of Reform', *Am. J. Leg. Hist.*, 15 (1971), 288–306 at 292.

[222] Andrew W. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990), 92.

[223] See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1st edn. New York: Macmillan, 1913); and, for a careful analysis of Beard's thesis, cf. also Pope McCorkle, 'The Historian as Intellectual: Charles Beard and the Constitution Reconsidered', *Am. J. Leg. Hist.*, 28 (1984), 314–63.

governmental institution rather than just as a code of law behind which, historically, there exists some mystical 'original intent' of the Framers.[224] 'The constitution', wrote Arthur Bentley in 1908, 'is always what is.'[225] Less cryptically, Howard McBain observed that '[t]he constitution of the United States was not handed down on Mount Sinai by the Lord God of Hosts. It is not revealed law. . . . It is human means. The system of government which it provides can scarcely be read at all in the stately procession of its simple clauses.'[226] Basically, political scientists of the Progressive era were fast coming round to the view that 'the constitution means what the courts say it means'.[227]

In this sense, the notion of rule scepticism—so strong an undercurrent of realist legal thinking—was paralleled if not prefigured by a belief, common among early twentieth-century political scientists, that judicial review of legislation was a far from objective affair. During the second and third decades of this century, the Supreme Court, under the respective Chief Justiceships of Edward Douglass White and William Howard Taft, interpreted key amendments to the Constitution in an increasingly erratic fashion. On the one hand, for example, the Court used liberty of contract—a principle nowhere mentioned in the Constitution—to declare invalid governmental restrictions on the disposal of private property, while on the other it distorted the language of the First Amendment by upholding governmental interference with certain kinds of speech.[228] Such doublethink was recognized not only by so-called legal realists. Progressive intellectuals and politicians in general believed that the search for objectivity and principled consistency in Supreme Court decision-making was a rather futile exercise. 'Progressives scoffed at the idea that as soon as an individual donned black judicial robes he gained the wisdom of King Solomon. . . . They contended that jurists were conscious moulders of policy rather than impersonal vehicles of revealed truth.'[229]

[224] See Belz, *supra* n. 221, *passim*; Kalman, *supra* n. 3, 39.

[225] Arthur F. Bentley, *The Process of Government: A Study of Social Pressures* (Evanston: Principia, 1949; orig. publ., 1908), 295.

[226] Howard L. McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (New York: Workers Education Bureau Press, 1927), 3–5, 272.

[227] Charles Evans Hughes, Speech at Elmira, New York, 3 May 1907, quoted in Kalman, *supra* n. 3, 40.

[228] For general doctrinal analysis and commentary, see David P. Currie, 'The Constitution in the Supreme Court: 1910–1921', *Duke L.J.*, [1985], 1111–62; 'The Constitution in the Supreme Court: 1921–1930', *Duke L.J.*, [1986], 65–144; and also Howard Owen Hunter, 'Problems in Search of Principles: The First Amendment in the Supreme Court From 1791–1930', *Emory L.J.*, 35 (1986), 59–137 at 90–127.

[229] Steven F. Lawson, 'Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s', *The Historian*, 42 (1979–80), 419–36 at 429–30.

Parallels between progressivism and legal realism should nonetheless be drawn with a measure of circumspection. In its broadest sense, progressivism denoted the general late nineteenth and early twentieth-century idea of a search for order, of a basic social scientific endeavour to 'professionalize' knowledge by situating it within specific disciplinary categories.[230] In this sense, even Langdellian legal formalism could be conceived to be vaguely progressive. Langdellianism, after all, while it lacked input from the social sciences, represented an attempt to elevate law to the status of an epistemologically discrete entity through the compartmentalization of legal doctrine. In a more specific sense, progressivism denoted the quest to rationalize the American political economy by reorienting social thought away from the inequities of nineteenth century *laissez-faire* liberalism. In this sense, legal realism was progressive in a manner that Langdellian formalism most definitely was not. Yet this is not to assert that political progressivism and legal realism were ideologically indistinguishable. Political scientists of the 1920s 'tended to be liberals, who, unlike the lawyers of the era, worried that judicial review was antidemocratic and that the openness with which the Supreme Court manipulated law made the end of judicial review inevitable'.[231] 'Suspicious of judicial activism, they contended that restraint had to be imposed upon the justices from outside the court and legal profession. . . . Seeking to limit the institutional power of the Supreme Court, progressives refused to budge from their blanket condemnation of judicial review. In the following decade, their solutions lost appeal to New Deal liberals who eventually discerned that judicial power could also serve as an instrument for promoting social reform and civil rights.'[232]

It would be incorrect, accordingly, to argue that realist interpretations of the Constitution were but jurisprudential exercises in political progressivism. That some realists were indebted to progressive political science is certainly beyond doubt. Karl Llewellyn, for example, in his disparaging of theories of original intent in favour of an 'institutionalist' study of the Constitution in its contemporary political setting, takes his cue from progressives such as Veblen, McBain and, especially, Bentley.[233] Fred

[230] See Robert H. Wiebe, *The Search for Order, 1877–1920* (Westport, Conn.: Greenwood Press, 1980; orig. publ. 1967), 111–95; and also Furner, *supra* n. 151, *passim*; Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority* (Urbana: University of Illinois Press, 1977); Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge: Cambridge University Press, 1988), *passim* esp. 47–60.

[231] Kalman, *supra* n. 3, 40. [232] Lawson, *supra* n. 229, 435.

[233] Karl N. Llewellyn, 'The Constitution as an Institution', *Columbia L. Rev.*, 34 (1934), 1–40. For criticisms of Llewellyn's position, see Max Ascoli, 'Realism versus the Constitution', *Social Research*, 1 (1934), 169–84; Giovanni Tarello, *Il realismo giuridico Americano* (Milan: Giuffrè, 1962), 98–104.

Rodell, too, followed squarely in the presentist path of Beard when, as late as 1955, he asserted that '[t]he origins of Supreme Court power are of little real import today,' given that 'that power indubitably exists.'[234] 'Those who see the past through the rosy glow of fable,' he concluded, 'too readily misapprehend the present.'[235] In contrast, however, the critique of the so-called 'higher law' background to constitutional law—the idea that the text of the Constitution itself is but the secularization of specific (primarily Lockean) natural rights[236]—remained very much an initiative of political scientists rather than lawyers.[237] While progressives of the 1920s insisted that the Constitution must be understood first and foremost to be a contemporary political institution, furthermore, legal realists of the 1930s were generally intent on stressing its totemic function. This shift in emphasis was as fundamental as it was subtle. Progressive political scientists were concerned not so much with the symbolic importance of the Constitution as with its use in the process of judicial review to secure apparently contradictory ends—for example, the Supreme Court's curbing one form of freedom while promoting another. Gradually, however, with the progression of the 1930s, the symbolic function of the Constitution became as much a matter for concern as its judicial interpretation; for it was with the authority of the Constitution that the Supreme Court—showing scant regard for the principle that statutes should, if possible, be construed so as to preserve their constitutionality—effectively swept aside major New Deal legislative initiatives.[238] Legal realists—some of whom were, by this stage, active New Dealers—tended to be surprised less by the heavy-handed authoritarianism of the Supreme Court than they were by the willingness of the American public to accept the Court's decisions. The explanation for this general acceptance seemed to rest in the symbolic value that ordinary Americans were prepared to attach to their Constitution. On this point, Thurman Arnold, the Yale realist turned New Dealer, wrote with unmatched candour:

[234] Fred Rodell, *Nine Men: A Political History of the Supreme Court From 1790 to 1955* (New York: Random House, 1955), 34. For Rodell's indebtedness to Beard, see Fred Rodell, *Fifty Five Men* (Harrisburg: The Telegraph Press, 1936), 7–8.

[235] Rodell, *Nine Men*, 35.

[236] For discussion, see Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham, NC: Duke University Press, 1990); David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989), 150–53.

[237] The classic illustration here being the work of the Princeton constitutional scholar, Edward S. Corwin, 'The "Higher Law" Background of American Constitutional Law', *Harvard L. Rev.*, 42 (1928–29), 149–85, 365–409.

[238] See e.g. *Panama Refining Co.* v. *Ryan* (1935) 93 U.S. 388; *Schechter Poultry Corp* v. *United States* (1935) 295 U.S. 495; and *Carter* v. *Carter Coal Co.* (1936) 298 U.S. 238.

The Constitution is praised in general as the great bulwark, even though there could be no possible agreement in the group which was praising it as to how that Constitution should reconcile their conflicting interests. The Supreme Court hovers over the whole picture, and it is to it that prayers are addressed. However, they are fearful prayers, because the group knows that there is never any certainty as to what the next decision will be. Yet in times of confusion and fear, there is nothing that so comforts the heart [*sic*] of timid men as a combination of prayer and denunciation. For this purpose the Constitution becomes for most conservatives the symbol of security in which all conflicting hopes and fears are somehow resolved.[239]

Writing in 1933, Llewellyn observed that 'popular loyalty' to the Constitution, 'though real, is blind'.[240] Yet Arnold insisted that while faith in the Constitution as an irrefragable symbol of security may be blind faith, it is an understandable faith, for such reverence is fostered and maintained both by the courts and by a 'scholargarchy' of jurists.[241] Academic and practising lawyers alike take it to be 'essential to constitutionalism as a vital creed that [the Constitution] be capable of being used . . . on both sides of any question, because it must be the creed of all groups in order to function as a unifying symbol'.[242] For all that debates may rage as to the proper interpretation of constitutional provisions and amendments, what is not open to debate is the legitimacy of the Constitution itself. 'Arguments may occur within the terms of the constitution, but to attack the constitution itself is heresy.'[243] During the 1930s, other writers with inclinations towards realism were quick to adopt Arnold's tack. Max Lerner observed in 1937 that the 'Constitution and Supreme Court are symbols of an ancient sureness and a comforting stability'.[244] 'Constitution worship'[245] on the part of the American people, he insisted, owes more to emotion than to reason: 'Men are notably more sensitive to images than to ideas, more responsive to stereotypes than to logic. . . . Men possess thoughts, but symbols possess men.'[246] Essentially the same point had been made by Edward Corwin only one year earlier: 'American constitutional symbolism looks . . . to the past and links hands with conceptions which long antedate the rise of science and its belief in a predictable, manageable causation. Its consecration of an *already established order of things* harks back to primitive man's terror of a chaotic universe, and his struggle towards

[239] Thurman W. Arnold, *The Symbols of Government* (New York: Harcourt, Brace & World, 1962; orig. publ. 1935), 230–1.
[240] Llewellyn, *supra* n. 233, 24.
[241] Thurman W. Arnold, *The Folklore of Capitalism* (New Haven, Conn.: Yale University Press, 1937), 67.
[242] Ibid. 29.
[243] Ibid. 28.
[244] Max Lerner, 'Constitution and Court as Symbols', *Yale L.J.*, 46 (1937), 1290–319 at 1291.
[245] Ibid. 1295.
[246] Ibid. 1293.

security and significance behind a slowly erected barrier of custom, magic, fetish, tabu.'[247]

The Modern Legal Mind

The emphasis placed on symbolism by legal realists in their analyses of the Constitution was by no means casual. The power of symbolism over humanity, as certain of their number recognized, was a Holmesian theme.[248] More than this, the fascination with symbolism was yet another facet of the general realist inclination towards the methods, ideas and indeed trends to be found in the early twentieth-century social sciences. As early as 1922, a political commentator, Walter Lippmann, had suggested that successful governmental control of public opinion depended on the political manipulation of symbols of democracy.[249] In the following year, the theme of symbolism was popularized still further with the publication of Charles Ogden and Ivor Richards's classic study, *The Meaning of Meaning*. 'From the earliest times,' the authors asserted, 'the Symbols which men have used to aid the process of thinking and to record their achievements have been a continuous source of wonder and illusion. The whole human race has been so impressed by the properties of words as instruments for the control of objects, that in every age it has attributed to them occult powers. . . . Unless we fully realize the profound influence of superstitions concerning words, we shall not understand the fixity of certain widespread linguistic habits which still vitiate even the most careful thinking.'[250] Some legal realists were quick to heed this message, or at least to adapt it to their own ends. The basic realist disdain for 'abstract magniloquence'[251] in the law—the respect for the Holmesian injunction 'to keep to the real and the true'[252]—became, in the wake of Ogden and

[247] Edward S. Corwin, 'The Constitution as Instrument and as Symbol', *American Political Science Rev.*, 30 (1936), 1071–85 at 1072. See also Edward Stevens Robinson, *Law and the Lawyers* (New York: Macmillan, 1935), 53.
[248] Oliver Wendell Holmes, Jr., *Collected Legal Papers* (New York: Harcourt, Brace & Howe, 1920), 270; and see also Cohen, *supra* n. 117, 355; Lerner, *supra* n. 244, 1290.
[249] Walter Lippmann, *Public Opinion* (New York: Harcourt, Brace & Co., 1922); and see also Purcell, *supra* n. 119, 104–8.
[250] C. K. Ogden and I. A. Richards, *The Meaning of Meaning: A Study of the Influence of Language upon Thought and the Science of Symbolism* (London: Ark, 1985; orig. publ. 1923), 24.
[251] Max Radin, 'The Theory of Judicial Decision: Or How Judges Think', *Am. Bar Assoc. Jnl.*, 11 (1925), 357–62 at 360.
[252] 'We must think things not in words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.' Oliver Wendell Holmes, Jr., 'Law in Science and Science in Law', *Harvard L. Rev.*, 12 (1899), 443–63 at 460.

Richards, something rather more grandiose. Lawyers were no longer just verbose; rather, they practised 'word magic'.[253] 'Word magic', Charles Clark wrote, 'is the bane and life of the law.'[254] 'Word ritual under one guise or another has always been one of the primary methods of law administration. . . . We can scarcely realize the part which sacred words, taboo words, magic words, continue to play in our law.'[255]

Throughout the literature of legal realism, the spirit of Ogden and Richards is nowhere more at large than it is in the work of Jerome Frank. Just as *The Meaning of Meaning* was comprised largely of miscellaneous insights taken from psychoanalysis, behaviourism, philosophy, ethnology and aesthetics (to mention but some of the disciplines from which the authors drew); Frank's *Law and the Modern Mind* was a similar piece of unrestrained eclecticism. 'Legal Absolutism', Frank argues in that book, is a form of 'word-worship'.[256] The legal formalist of the Langdellian tradition, whom he labels as 'the Bealist',[257]

> dematerializes the facts he purports to describe; the vagueness of his vocabulary aids him to avoid recognizing contradictions and absurdities which his assertions involve . . . Such dematerialized but sonorous terms as Uniformity, Continuity, Universality, when applied to law by the legal Absolutist, have the same capacity for emotional satisfaction that terms like Oneness, Eternity, or The True, have when applied by the metaphysician to the Absolute. Although the Bealist's arguments may be full of contradictions . . . they acquire, by means of the emotive value of his words, a compensatory significance.[258]

The use of 'compensatory verbiage'[259] enables Frank's Bealist to neglect the reality of law as an activity and to concentrate instead on law as an abstract ideal, that is, as a determinate system of formally interrelated rules and principles. This concentration on the abstract ideal, Frank argues, 'tends to breed nihilistic scepticism' within the legal profession:

> Bealism, which is the verbal expression of excessive optimism, is sure to breed excessive cynicism. To many a young Bealish-trained lawyer the judges seem to be traitors to the true law; when the promised juristic parade turns out to be a fairy story, the whole juristic world seems drab and dull; or worse—intellectually or perhaps even morally dishonest.[260]

[253] Ogden and Richards, *supra* n. 250, 40.
[254] Charles E. Clark, 'The Restatement of the Law of Contracts', *Yale L.J.*, 42 (1933), 643–67 at 647.
[255] Leon Green, 'The Duty Problem in Negligence Cases', *Columbia L. Rev.*, 28 (1928), 1014–45; *Columbia L. Rev.*, 29 (1929), 255–84 at pt. I, 1016; and see also Sturges and Clark, *supra* n. 74, 714–15.
[256] Frank, *supra* n. 25, 63.
[257] Or sometimes (and no less vaguely), 'Beale & Co.' See Frank, ibid. 66–7.
[258] Frank *supra* n. 25, 67.
[259] Ibid. 68.
[260] Ibid. 68–9.

It is interesting that Frank criticizes the Langdellian world-view for what he considers to be its implicit nihilism. In some quarters, during the 1940s and 1950s, he himself was branded a nihilist precisely because of his denunciation of that world-view.[261] Still more interesting is Frank's suggestion that even the disillusioned lawyer trained in the Langdellian tradition will have some conception of 'the true law'. For it is commonly assumed that a defining characteristic of legal realism is apostasy, in so far as those who, willingly or otherwise, came to be branded as realists were united at least in their endeavour to break from the formalist belief that some sort of 'truth' resides in the law. Such an assumption, however—and Frank's work implicitly bears testament to this—is not quite correct. Rather than abandon the idea of truth in law, most legal realists replaced what they perceived to be the formalist version of truth with their own.

Traditionally, Frank argues, scientific logic and legal logic have shared the same sin: both are 'inveterately verbalistic'.[262] However, whereas '"scholasticism" and verbalizing have survived in lawyerdom . . . they have become obsolescent (if not obsolete) in the natural sciences'.[263] Having offered this unsubstantiated assumption as if it were an indubitable fact, Frank sets about outlining the problem which he intends to solve: namely, why have lawyers continued to keep faith in word magic and, *a fortiori*, in the formalistic ideal of the complete certainty of law? The core of his answer to this question—and here we have the centre-piece of Frank's jurisprudence—is that lawyers and ordinary citizens alike subscribe to a basic legal myth—the myth, that is, that legal rules are certain and that their application to specific cases is essentially a mechanical task to be performed by the courts. The reason we subscribe to this myth, the reason we believe in absolute legal certainty, is essentially psychological: law, for the adult, is a father substitute. As the father is the controlling force in childhood, so the law serves precisely the same function in adulthood:

> To the child the father is the Infallible Judge, the Maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgement and punishes misdeeds. The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge.[264]

[261] See, in particular, Edward F. Barrett, 'Confession and Avoidance?—Reflections on Rereading Judge Frank's *Law and the Modern Mind*', *Notre Dame Lawyer*, 24 (1949), 447–59; John T. Schuett, 'A Study of the Legal Philosophy of Jerome N. Frank', *U. Detroit L.J.*, 35 (1957), 28–69.
[262] Frank, *supra* n. 25, 73.
[263] Ibid. 74.
[264] Ibid. 19.

To look for certainty in the law, accordingly, is to nurture a faith in authority which has its origins in childhood. Through their acceptance of the basic legal myth, most lawyers fail to appreciate the true complexity of the American legal system. In seeking a surrogate paternal authority in the law, the psychologically immature adult will accept at face value the censoriousness, the certainty and the apparent irrefragability of the American system of justice while having little or no regard for the ethical or political criteria which that system promotes. The time has come, Frank insisted, not only for the lawyers but also for the citizens of America to develop a 'modern mind', to shake off their childish emotions and attachments and grow up.

Apart, however, from asserting that the writings and judicial opinions of Oliver Wendell Holmes provide 'an indispensable aid and an inspiration'[265] for the post-formalist lawyer, Frank, in his early works, offered little by way of suggestion as to how the modern mind might be cultivated. He himself, rather ironically, seemed to treat Holmes as something of a father figure.[266] Furthermore, he had a tendency to suggest that the basic legal myth is not just a feature of the American psyche but also foundational to and pervasive throughout Western religion and culture.[267] Given the supposedly all-encompassing nature of this myth, his own reticence with regard to the matter of how it might successfully be exposed and outstripped is perhaps unsurprising. But even in so far as Frank explains the basic legal myth as an essentially psychological phenomenon, there seems to be a fundamental fault with his reasoning, since it seems impossible, on his terms, ever to define adulthood. If a defining characteristic of the adult mind is the childhood craving for patriarchal order and security, how, psychologically, are we to distinguish between the adult and the child? Adults are assumed to have more or less the same basic emotions as children. Thus it is that Frank, in developing the idea of the basic legal myth, makes no provision for rites of passage.

In this sense, his argument seems to be essentially self-defeating. It might nevertheless be claimed that his rather half-hearted attempt at grappling with psychoanalytical ideas hardly frustrates his basic realist sentiment, which is that we must stop conceiving of law as a fairly strict system of rules. In essence, Frank was adding social scientific gloss to an argument which had, he believed, originated in the proto-realist writings of

[265] Frank, *supra* n. 25, 270.
[266] See ibid. 270–7; and Jan Vetter, 'The Evolution of Holmes, Holmes and Evolution', *California L. Rev.*, 72 (1984), 343–68 at 359–60 fn. 90.
[267] Frank, *supra* n. 25, 281–2.

Holmes, Cardozo and Gray,[268] and which he regarded as having been developed further by certain of his realist *confrères*. 'Judges, we know, are people,' Max Radin had asserted in 1924. 'They eat the same foods, seem moved by the same emotions, and laugh at the same jokes.'[269] 'The control of judges', according to Leon Green, 'is not to be found in rules, but in the fact that they are men nourished on the same thoughts and other life-giving forces as the rest of us, and are subject to be influenced by the same factors in making their judgements as those which influence their fellows generally.'[270] 'If, therefore, in a controversy in which we are engaged, we could rid ourselves of the personal interest in it, we might shrewdly guess that a great many judges would like to see the same person win who appeals to us.'[271] Whereas Langdellian legal science was founded on the assumption that the normative scope of legal rules is a matter of 'formal certitude',[272] the realist assumption, by which it was gradually superseded, was that judges—stimulated, primarily, by the facts before them rather than by the rules to which those facts might be fitted[273]—work backwards, 'from a desirable conclusion to one or another of a stock of logical premises'.[274] To put the matter at its simplest, judges are not inhibited by rules but liberated by them. It is by resorting to legal rules, after all, that judges are able retroactively to furnish their instincts with authority. Precisely this point had been made in the early 1920s by the pragmatist philosopher, John Dewey. Human beings, according to Dewey, 'act not upon deliberation but from routine, instinct, the direct pressure of appetite, or a blind "hunch" '.[275] Successful lawyering entails the tailoring of a conclusion to fit the particular hunch.[276] One judge, by the late 1920s, had the candour to confess that the Deweyan—or, as he saw it, Rabelaisian—notion of lawyering by hunch seemed to capture the decision-making process to a T.[277] Indeed, it was this 'discovery'—the revelation of the 'hunch' as the primary factor in the decision-making process—which fuelled Frank's scepticism with regard to the nature and

[268] Ibid. 39, 131–3, 252–5, 270–7.
[269] Radin, *supra* n. 251, 359.
[270] Green, *supra* n. 255, pt. 1, p. 1021.
[271] Radin, *supra* n. 251, 359.
[272] Yntema, 'The Hornbook Method and the Conflict of Laws', *supra* n. 73, 468.
[273] See Oliphant, *supra* n. 72, 161; also *supra* n. 74, 132–3.
[274] Radin, *supra* n. 251, 359.
[275] John Dewey, 'Logical Method and Law', *Cornell L.Q.*, 10 (1924), 17–27 at 17. With regard to this article, see Golding, *supra* n. 12, 467–9.
[276] Dewey, *supra* n. 275, 23; and see also John Dewey, *Experience and Nature* (New York: Dover, 1958), 272–3.
[277] Joseph C. Hutcheson, Jr., 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision', *Cornell L.Q.*, 14 (1929), 274–88. Hutcheson apparently later qualified his position. See Karl N. Llewellyn, 'On Reading and Using the Newer Jurisprudence', *Columbia L. Rev.*, 40 (1940), 581–614 at 604.

function of legal rules. 'Whatever produces the judge's hunches,' he insisted, 'makes the law.'[278]

Frank's embracing of the hunch-thesis epitomizes the realist rejection of Langdellian formalism. Langdell himself, Frank believed, had been a 'neurotic escapist character'[279] possessed by 'an obsessive and almost exclusive interest in books',[280] a man with regard solely for the life of the law as logic rather than as human experience and action. 'The lawyer–client relation, the numerous non-rational factors involved in a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up the "atmosphere" of a case—everything that is undisclosed in upper-court opinions—was virtually unknown (and was therefore all but meaningless) to Langdell.'[281] All these factors which Langdell ignored, Frank was to stress. After the exhilarating if ultimately unconstructive polemic of *Law and the Modern Mind*, he began to develop an increasingly hortatory style of anti-formalist critique. Whereas, during the early 1930s, he had exploited the idea of the modern mind to bemoan the conservatism of the psychologically immature, certainty-craving, ethically non-committed lawyer, the spectre of Nazism forced him to recognize that this so-called mind—were it to be more than a handy rhetorical tool—would have to represent the basic *Zeitgeist* of a post-fascist democracy.[282] Throughout the 1930s, Frank had barraged 'Bealism' so frequently and unequivocally that his own peculiar anti-formalist perspective had become something of a saturated ploy. Gradually, he came to regard his task not simply to be one of uncovering the ills of the American legal system and the Langdellian pedagogic framework by which it was supported, but of suggesting how that system might be transformed into an institutional reflection of his postulated modern mind.

Frank approached this task from a variety of angles, some of which are unique to his own work, others of which are but instances of a more general realist world-view. Having originally treated legal formalism as, at core, a psychological problem—the problem of the basic legal myth—he subsequently considered the possibility that psychology might also provide a partial cure as well as a diagnosis. 'Lawyers and judges', he came to

[278] Frank, *supra* n. 25, 112.

[279] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1973; orig. publ. 1949), 227.

[280] Ibid. 225.

[281] Ibid. 225–26; and see also Calvin Woodard, 'The Limits of Legal Realism: An Historical Perspective', *Virginia L. Rev.*, 54 (1969), 689–739 at 716.

[282] Frank's most eloquent expression of this belief came near the end of his life. See Jerome Frank, 'Some Reflections on Judge Learned Hand', *U. Chicago L. Rev.*, 24 (1957), 666–705 at 686–87.

believe—as had the political scientist, Harold Lasswell, before him[283]—'must constantly act as psychologists or psychiatrists' so as to become aware of and, so far as possible, to overcome their own limitations as social agents.[284] Like Lasswell, Frank assumed that, by resorting to the methods of psychoanalysis, judges would not only discover their prejudices but would also, in consequence, set about ridding themselves of those prejudices. The judge who is periodically subjected to psychoanalysis, furthermore, would be likely not only to remedy his or her own biases but also to understand better the behaviour of witnesses in any particular case.[285]

Psychology, Pragmatism and Predictivism

While Frank espoused the virtues of psychology and psychoanalysis in his own distinct way, he was not the only or even the first legal realist to resort to such ideas.[286] Psychology began its rise to prominence as a social scientific discipline in the United States as early as the 1890s, and within a few years legal theorists were trying to learn from its insights and methods.[287] The popularity of psychology, among social scientists and legal realists alike, may be attributed to the fact that it not only accommodated but appeared actually to cast new light on many of the most pressing social-scientific themes of the day. Premissed on the idea that the human mind has an infinite capacity for adaptation and creative rationality, late nineteenth-century functional psychology accorded well with the spirit of evolutionism which bore such a strong influence over the development of anthropology and other social sciences. By the turn of the nineteenth century, behaviourist psychology was beginning to make a still stronger impact on American social thought, as social scientists turned their attentions increasingly to the problem of how modern societies control the conduct of their citizens. 'Psychology as the behaviourist views it,' one early twentieth-century psychologist explained, 'is a purely objective

[283] See Harold D. Lasswell, 'Self-analysis and Judicial Thinking', *Int. Jnl. of Ethics*, 40 (1930), 354–62.

[284] Jerome Frank, 'Judicial Fact-Finding and Psychology', *Ohio State L.J.*, 14 (1953), 183–9 at 183. Compare, however, Frank's concurring opinion, written only a few months before his death, in *United States* v. *Flores–Rodriguez*, 237 F.2d 405, 412 (2nd Cir. 1956): 'I think it is a mistake for my colleagues needlessly to embark . . . on an amateur's voyage on the fog-enshrouded sea of psychiatry.'

[285] On Frank's own experience of therapy, see Duxbury, 'Jerome Frank and the Legacy of Legal Realism', *supra* n. 3, 199 n. 9.

[286] For a general discussion of the impact of psychoanalysis on mid-twentieth-century American jurisprudence, see Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* (Brooklyn: Foundation Press, 1953), 548–52.

[287] See, in particular, Theodore Schroeder, 'The Psychologic Study of Judicial Opinions', *California L. Rev.*, 6 (1918), 89–113.

experimental branch of natural science. Its theoretical goal is the prediction and control of behaviour.'[288] Behaviourism thus offered the prospect of the scientific study of social control. 'Behaviourism promised the scientific control of life to a generation who felt their lives increasingly out of control.'[289]

It was through behaviourism, accordingly, that social control became part of the common currency of the early twentieth-century social sciences. Owing to its emphasis on the concept of social control, furthermore, behaviourism became a distinct social scientific facet of legal realism. Concerned 'with law conceived as human *behaviour* instead of the traditional body of rules and concepts',[290] behaviourist-inspired realists argued that rules are essentially stimuli for prompting particular kinds of human response.[291] This argument is epitomized by Underhill Moore's so-called 'learning theory', which he developed in his study of New Haven parking offences. The motorist's behaviour is determined, according to Moore, 'by the relation between four factors—drive, cue, response, and reward—which relation he has learned, or is learning. In order to learn one must be driven to make a response in the presence of a cue, and that response must be rewarded.'[292] The necessary 'drive' of which he writes is prompted by legal rules, for it is such rules which—for example, with regard to the regulation of traffic—provide the 'reward' (that is, the omission of sanction) for the individual motorist's compliance in learning the appropriate responses to the relevant ordinances.

Moore apart, however, legal realists generally were disinclined to apply the methods of behavioural science to the study of law with any real rigour.[293] Indeed, in so far as behaviourism made any significant mark on American legal theory, that mark had been made some years before the emergence of legal realism—with the publication, to be precise, of Joseph Bingham's article, 'What is the Law?' in 1912. In that article, Bingham

[288] John B. Watson, 'Psychology as a Behaviourist Views It', *Psychological Rev.*, 20 (1913), 158–77 at 158.
[289] Ross, *supra* n. 139, 312.
[290] Yntema, *supra* n. 14, 318.
[291] See e.g. Underhill Moore, 'Rational Basis of Legal Institutions', *Columbia L. Rev.*, 23 (1923), 609–17 at 610; Oliphant, *supra* n. 74, 137; and cf. also Rumble, *supra* n. 18, 159–61; Summers, *supra* n. 19, 88–9; G. Edward White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America', *Virginia L. Rev.*, 58 (1972), 999–1028 at 1015–16.
[292] Moore and Callahan, *supra* n. 126, 61. For critical estimations of this theory, see Clark L. Hull, 'Moore and Callahan's "Law and Learning Theory": A Psychologist's Impressions', *Yale L.J.*, 53 (1944), 330–337; Hessel E. Yntema, '"Law and Learning Theory" through the Looking Glass of Legal Theory', *Yale L.J.*, 53 (1944), 338–47.
[293] See Kalman, *supra* n. 3, 18–19; David E. Ingersoll, 'Karl Llewellyn, American Legal Realism, and Contemporary Legal Behaviouralism', *Ethics*, 76 (1966), 253–66 at 263; also, for a critique of behaviourism as applied to law, cf. Cohen, *supra* n. 117, 357–60.

developed what was to become the trademark realist view that the formalist notion of law as 'a system of rules and principles enforced by political authority . . . is fundamentally erroneous and . . . a bar to a scientific understanding of our law'.[294] Properly understood, rules and principles are but 'mental tools'—ideas held subjectively by those who think about law—to be used to explain human responses to authoritative governmental control.[295] Law, accordingly, is 'dependent on the existence of authoritative government',[296] and '[t]he practical interest of lawyers and of laymen lies in the concrete operations and effects of governmental machinery and not in generalizations excepting insofar as they cause, explain, or indicate such phenomena.'[297]

The scientific study of law, then, according to Bingham, consists of analysing the operation of judicial machinery with a view to predicting future decisions: 'cases past and potential are the essential substance in the field of law. Past cases are experimental guides to prognostications of future decisions.'[298] By 'observation, report, inductive and deductive reasoning and the other methods of scientific investigation', the concrete phenomena of authoritative government 'may be generalized into rules and principles'[299]—rules and principles deduced not by way of Langdellian speculation, but by treating law as a practical activity. Bingham was, in essence, attempting to take the proto-realist insights of Pound and Holmes one step further by appropriating the already established idea of science in law and putting it to a more progressive use. No longer, he was arguing, need science be the preserve of mechanical jurisprudence, for the foundations of legal science could be re-cast in order to serve predictivist ends. While Bingham's argument hinted at behaviourism—not to mention the predictivist rhetoric of Holmes[300]—it was, more directly, the broader philosophy of pragmatism to which he seemed to appeal.

Pragmatism brought to late nineteenth and early twentieth-century American social thought the idea that science could be put to the service of

[294] Joseph W. Bingham, 'What is the Law?', *Michigan L. Rev.*, 11 (1912), 1–25, 109–121 at 3. For a discussion of Bingham *vis-à-vis* legal realism, see Françoise Michaut, *L'École de la 'Sociological Jurisprudence' et le Mouvement Realiste Américain: Le Rôle du Juge et la Théorie du Droit* (Doctoral dissertation, Université de Paris X, Nanterre, année universitaire 1984–5), 118–23.
[295] Bingham, *supra* n. 294, 9–11.
[296] Ibid. 10.
[297] Joseph W. Bingham, 'Science and the Law', *Green Bag*, 25 (1913), 162–7 at 164–5.
[298] Bingham, *supra* n. 294, 17.
[299] Ibid. 9.
[300] Compare Bingham, *supra* n. 297, 164–5 with Oliver Wendell Holmes, Jr., 'The Path of the Law', *Harvard L. Rev.*, 10 (1897), 457–78 at 457.

understanding social change.[301] William James, in 1910, wrote in defence of pragmatism that it could 'remain religious like the rationalisms, but at the same time, like the empiricisms, it can preserve the richest intimacy with the facts'.[302] This was precisely the claim which Bingham made with regard to jurisprudence. If grounded in predictivism, jurisprudence could maintain the scientific pretensions beloved of Langdellian formalism while outstripping the limitations of such formalism by establishing an intimacy with the facts of law. The key to achieving this near-paradigm shift was for jurists to conceive of law not as a static body of rules and principles, but as a phenomenon in flux. According to John Dewey, writing in the same year as James, pragmatism required philosophers to transfer their attention 'from the permanent to the changing' and, rather than seek to establish universal certainties, treat their discipline as 'a method of moral and political diagnosis and prognosis'.[303] While the value of prediction had, of course, found early juristic recognition in the writings of Holmes, it was through the pragmatism of James and Dewey that the activity of prognosis was elevated to the status of a science. Holmes bequeathed to legal realism an implicitly anti-Langdellian notion of prediction as a legal activity. But it was a fairly modest, pragmatically specific activity—the activity, primarily, of gauging just how far individuals might be able to tread before becoming legally accountable for their actions. Pragmatist philosophers, ironically, treated the activity of prediction as a less specifically pragmatic affair.

This much is clear from the manner in which early twentieth-century social theorists looked to the philosophy of pragmatism for scientific inspiration. In its emphasis on prognosis and prediction as peculiarly scientific means of understanding social change, the philosophy of pragmatism fitted well with the then prevalent spirit of social-scientific realism. The capacity to predict—especially to predict 'scientifically'—was, after all, but another facet of the broader ethos of social control. But predictivism, for social scientists, was more than just another tool for understanding social change. Its acceptance as such marked an important shift in social-scientific outlook:

> The realistic search for concrete experience continued as a new reality continually presented itself for observation. . . . Yet even realism began to change under the impact of modernism. As the social scientists began to see facts as process, the concrete reality they sought to grasp receded into flux. . . . A science of natural process tended to drive beneath the level of concrete facts to causal process.[304]

Social-scientific realism, then, was supplemented by a predictivist-inspired emphasis on causality. The upshot of this was that realism, in a social scientific context, no longer meant the discovery and analysis of the facts which constitute reality. Rather, it denoted analysis of the processes by which those facts come into existence—analysis with a view, furthermore, to predicting how, and indeed what manner of, further facts will come into existence in the future.

For all that legal realists rarely utilized it with much conviction, this scientifically premissed, pragmatist concept of predictivism became, for many of them, almost as basic to their thinking as the juridically specific prediction theory of Holmes. One possible reason for this is that the pragmatist inclination towards analyses of processes complemented the general realist concern with judicial procedure—that is, with process—over and above legal doctrine.[305] Karl Llewellyn, for example, took the view that 'almost the only way to get deeply under the skin of a pre-science about behaviour in matters legal is by way of the detailed *processes* which lead to the larger phenomena—watching the men, within the institution, under the impact of fresh stimuli'.[306] A more likely reason for the general realist turn towards pragmatism rests in the fact that the philosophy had already been applied to law with some success by Pound. Indeed, the concept of social engineering rather epitomized the pragmatist ethos that scientific knowledge about law could be made useful.[307] Those legal realists who looked to pragmatism to give scientific credibility to their claims about the legal world were looking to a philosophy which they regarded as juridically tried and tested.[308] Their use of that philosophy to turn the process of legal prediction into a purportedly scientific task hardly constituted a radical step forward either from Poundian proto-realism or even Langdellian legal formalism.

This much becomes especially clear if one considers the question of what purpose legal prediction was supposed to serve. The immediate answer to the question is the answer which was offered up by certain realists: predictivism provides the key to the study of law as a modern social

[301] See David Hollinger, 'The Problem of Pragmatism in American History', *Jnl. of American History*, 67 (1980), 88–107.

[302] William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (New York: Longmans, Green & Co. 1910), 33.

[303] John Dewey, 'The Influence of Darwin on Philosophy', in John Dewey, *The Middle Works, 1899–1924* (15 vols. ed. J. A. Boydston, Carbondale: Southern Illinois University Press, 1976–83), IV, 13.

[304] Ross, *supra* n. 139, 318–19.

[305] See Rumble, *supra* n. 193, 250; Kalman, *supra* n. 3, 20; Stevens, *supra* n. 45, 56; Grant Gilmore, 'Law, Logic and Experience', *Howard L.J.*, 3 (1957), 26–41 at 38.

[306] Llewellyn, *supra* n. 75, 10–11.

[307] See Note [Rand Rosenblatt], 'Legal Theory and Legal Education', *Yale L.J.*, 79 (1970), 1153–78 at 1157–65.

[308] See Yntema, *supra* n. 14, 322; Woodard, *supra* n. 281, 703–4.

science. 'Surely progress in the science of law', Walter Wheeler Cook claimed, 'consists in continually reformulating our generalizations so as to make them bring out more clearly just what the past phenomena described really are and just what we predict will happen in the future.'[309] Similarly, for Herman Oliphant, '[t]he predictable element' in the judicial decision 'will be the dominant subject matter of any truly scientific study of law.'[310] But such an answer simply raises the same question afresh. Even if it is granted that predictivism provides a key to the understanding of law as a social science, why should anyone wish to conceive of law as such a science? What, precisely, might the appeal to social science achieve?

Throughout the literature of legal realism there runs a distinct caginess with respect to this last question. Conspicuously little effort was made by any of the so-called realists to explain why, exactly, the integration of law with the broader social sciences should prove to be such an enlightened initiative. By the early 1940s, Karl Llewellyn, for one, was willing to concede that realist attempts at such integration had not been a success;[311] and, indeed, from the mid-1930s onwards, realism suffered a gradual institutional and intellectual demise as its proponents became ever more indifferent and even hostile to 'the clumsy jargon of the so-called social sciences'.[312] Disillusionment with the social sciences was, of course, only part of the reason for this general demise. The cause of the disillusionment itself is crucial to any detailed assessment of legal realism. In appealing to the social sciences, and to pragmatism in particular, various legal realists discovered what they considered to be a vital conceptual apparatus for articulating the essential 'realism' of their particular perspectives: the social sciences provided a pathway to the legal facts, to the reality of law. This social science-induced realism turned out, however, to entail its own brand of formalism. And while it would be hyperbole to assert that so-called realists were 'Langdellians *malgré eux*',[313] it is important nonetheless to recognize the formalist elements implicit in realist thought.

The essential purpose behind the realist stress on predictivism was the promotion of certainty in law. Prediction entails focusing not only on legal rules, but also on other factors which might effect the outcome of a

[309] Cook, *supra* n. 70, 485.
[310] Oliphant, *supra* n. 72, 159.
[311] See Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941), 41. ('Effort after effort at synthesis of the social disciplines over the past ten years has made worthwhile headway in all phases, except that of integrating law-stuff with the rest.') The language is unmistakably Llewellyn's, a fact which is confirmed by E. Adamson Hoebel, 'Karl Llewellyn: Anthropological Jurisprude', *Rutgers L. Rev.*, 18 (1964), 735–44 at 740 fn. 23.
[312] Rodell, *supra* n. 130, 6; and see also Kalman, *supra* n. 3, 42.
[313] Gilmore, *supra* n. 64, 78.

decision—factors such as the known predilections and background of the judge. Such factors are likely to be important for the purposes of ensuring consistently accurate prediction.[314] But what might this be taken to imply? The implication seems to be that judicial decisions 'could and should become more predictable'.[315] But just how predictable? Are we to assume that an ideal legal system would be one in which all future legal decisions could be predicted? Certainly no legal realist was so naive as to treat such an aspiration as a real possibility. However—and this is the important point—the realist notion of predictivism as a science is founded on the idea that the aspiration is a worthy one. That is, predictivist-inspired realism treats as notionally desirable the facilitation of a formally certain, 'prediction-friendly' system of law. At the same time, the general predictivist quest for legal certainty betrays an implicit fear of judicial discretion and incertitude. And it is thus that realism, certainly in its predictivist guise, appears to attempt to discredit one formalist conception of law only to replace it with another. This much is clear from Max Radin's analysis of the nature of judicial decision-making. Having expressed his dismay over the Langdellian tendency to treat the legal dispute 'like a nickel in a slot machine',[316] whereby the correct result is reached as if automatically by the judicial application of the appropriate precedent, Radin argues that the business of legal realism—as a reaction to Langdellian formalism—is prophecy, through which 'we can come fairly near certainty'.[317] This, it seems, is to denounce mechanical jurisprudence in one breath while reinstating it in the next. The assumption that it may be possible to predict future legal decisions with considerable, if not quite total, accuracy is hardly less formalist—is hardly less supportive of so-called slot machine justice—than the basic Langdellian belief that legal doctrine is reducible to a handful of common law principles which may be applied uncontroversially to future legal disputes.

This is not to claim that the formalism of legal realism was intentional. Rather, formalism persisted *faute de mieux*. Legal realists had been fairly successful in adopting social scientific methods and insights to criticize the

[314] Oliphant, *supra* n. 74, 130–32; and see also Summers, *supra* n. 19, 143–4.
[315] Rumble, *supra* n. 18, 140.
[316] Radin, *supra* n. 251, 358.
[317] Radin, ibid. 362; and cf. further, for a detailed pronouncement of this position, Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960), 302–3; *The Case Law System in America* (P. Gewirtz ed., Eng. trans. M. Ansaldi, Chicago: University of Chicago Press, 1989; orig. German publ. 1933), 76–89; Max Radin, 'Case Law and Stare Decisis: Concerning *Präjudizienrecht in Amerika*', *Columbia L. Rev.*, 33 (1933), 199–212 at 212; Lon L. Fuller, 'American Legal Realism', *U. Pennsylvania L. Rev.*, 82 (1934), 429–62 at 431–4. On the realist quest for certainty, see generally Charles E. Clark and David M. Trubek, 'The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition', *Yale L.J.*, 71 (1961), 255–76 at 267–76.

laissez-faire formalism of the courts. It is significant, indeed, that those legal realists who attempted this task—Robert Hale was exemplary—tended to be academics with a more than casual interest in interdisciplinary study. Owing, however, to a mixture of reluctance and inability on the part of most legal realists to pay little more than lip service to the methods of the social sciences, the utilization of interdisciplinary perspectives to criticize Langdellian formalism fared comparably poorly. That certain realists turned the predictivist element of pragmatist philosophy into an implicitly formalist method is indicative of as much.

The same is illustrated, too, by the manner in which some realists embraced the concept of functionalism. For such realists, functionalism, as Felix Cohen observed, tended to be little more than a synonym for pragmatism.[318] In fact, the use of the term 'functionalism' by certain realists was usually but an intimation of their desire to demonstrate a peculiar form of legal certainty—of their intention, that is, to dig beneath the conceptual façade of law and tell it as it really is.[319] William O. Douglas, for example, declared that a 'functional' approach to the law of business associations demands 'a consideration of the phenomena observed in the organization and operation of a business' rather than an examination 'of the mere form itself of business'.[320] Such an approach 'would result in observations of the things men attempt to do and are found doing when engaging in business'.[321] For Cohen, the problem with approaches such as that adopted by Douglas is that they are not, in any specific sense, functionalist. Indeed, those realists who attempted to appropriate the concept of functionalism by and large lacked the inclination or the imagination to develop and apply it in a legal setting. 'Unfortunately,' Cohen lamented, 'certain advocates of realistic jurisprudence, after using the functional method to break down rules and concepts into atomic decisions, refuse to go any further with the analytic process.'[322]

[318] Cohen, *supra* n. 192, 821–2.

[319] See Kalman, *supra* n. 3, 8–10, 30–1.

[320] William O. Douglas, 'A Functional Approach to the Law of Business Associations', *Illinois L. Rev.*, 23 (1929), 673–82 at 675.

[321] Ibid.

[322] Cohen, *supra* n. 192, 843. Cohen himself suggests that a functional approach to law would not be entirely hostile to the tenets of Langdellian formalism: 'The functionalist must have recourse to the logical instruments that analytical jurisprudence furnishes. Analytical jurisprudence, in turn, may develop more fruitful modes of analysis with a better understanding of the law-in-action.' Felix S. Cohen, 'The Problems of a Functional Jurisprudence', *Mod. L. Rev.*, 1 (1937), 5–26 at 7. For a critical analysis of Cohen's own application of the functional method to law, see Martin P. Golding, 'Realism and Functionalism in the Legal Thought of Felix S. Cohen', *Cornell L. Rev.*, 66 (1981), 1032–57 at 1051–7; and cf. also, more generally, 'Jurisprudential Symposium in Memory of Felix S. Cohen', *Rutgers L. Rev.*, 9 (1954), 343–475.

It should be recognized that Jerome Frank—with whom, originally, we were dealing—regarded neither functionalism nor predictivism as a useful legal tool. Indeed, with regard to predictivism he could be particularly disparaging. Since the outcome of any particular legal decision will depend on the variable instincts of the judge or the feelings of the jury, the quest for accurate prediction must be 'doomed to failure'.[323] Psychology demonstrates precisely this fact.[324] The concept of behaviourist psychology with which certain realists had dabbled during the 1920s was premissed on the idea that the human mind responds rationally to given stimuli. It is the essential rationality of human thought and action, indeed, which, for the behaviourist, allows for the possibility of scientific prediction. However, as Freudianism began to make its mark on American social thought during the 1920s and 1930s, legal realists—and Frank is exemplary here—began to conceive of psychology in a somewhat different fashion.[325] To put the matter simplistically, rationalism in psychology was supplanted by irrationalism.[326] Edward S. Robinson wrote in the mid-1930s that '[i]t is especially important that the student of jurisprudence should be aware of the nature of the psychology written by Freud and his followers',[327] since Freudianism demonstrates 'the possibility of viewing human nature with a new honesty and a new detachment; it has shown us how to look behind the rationalizations that men give of their own conduct and to view candidly any motive whatever that may be discovered there'; indeed, 'it is just this new psychological detachment that is needed as a basis for a natural science of the law. In no field of human endeavour is it more precarious to take human nature at its own face value than in the field of social regulation'.[328] Frank, though he approached psychoanalysis in a markedly more casual fashion than did Robinson, similarly adopted the view that psychology generally provides a strong theoretical basis for criticizing the idea of legal rationality.[329] That is why he was keen to see psychoanalysis established as part of the judicial craft; and it is also why he rejected the more general realist view that there is an implicit rationality

[323] Frank, *supra* n. 25, 399.

[324] Ibid. 126 fn. 13.

[325] On the impact of Freudian psychoanalysis in the United States, see Nathan G. Hale, Jr., *Freud and the Americans: The Beginnings of Psychoanalysis in the United States, 1876–1917* (New York: Oxford University Press, 1971); Harold D. Lasswell, 'The Impact of Psychoanalytic Thinking on the Social Sciences', in L.D. White ed., *The State of the Social Sciences* (Chicago: University of Chicago Press, 1956), 84–115. On Freudianism and legal realism, see Radin, *supra* n. 9, 827–8; Savarese, *supra* n. 85, 181–2, 194–5; Duxbury, 'Jerome Frank and the Legacy of Legal Realism', *supra* n. 3, 180–1.

[326] See Kalman, *supra* n. 3, 6, 20; Purcell, *supra* n. 119, 99.

[327] Robinson, *supra* n. 247, 108.

[328] Ibid. 61.

[329] See generally Anthony Chase, 'Jerome Frank and American Psychoanalytic Jurisprudence', *Int. Jnl. Law and Psychiatry*, 2 (1979), 29–54.

about the legal process which allows for the possibility of predicting future decisions with a fair degree of accuracy. The ingenuity of Frank was that he recognized how predictivist rhetoric, for all its appeal to the 'reality' of law, was actually little other than a variant on the more traditional, 'Bealist' version of legal formalism.[330]

Yet despite this, Frank himself was unable to escape the grip of formalist jurisprudence. This much is especially clear from his critique of the jury system. Throughout his writings, Frank was consistent in professing 'to disbelieve thoroughly'[331] in the use of juries. As a collection of twelve legally uneducated lay-persons, the jury, he insisted, is an incompetent fact-finding body. Happily he would have seen their use seriously curtailed, if not eradicated altogether. His main work on the subject, written with his daughter and published posthumously, is essentially a chronicle of the cases of thirty-six men who, owing primarily to the errors of juries, were found guilty only later to be discovered innocent.[332] While obviously the jury system is not about to fall into disuse, there is no reason, he argued, that juries should not be made more accountable to judges. That he should have adopted this line of argument, however, is curious. Given that judges supposedly act primarily on instincts rather than on rules, why should we place any more faith in the judge than we do in the jury? Frank's answer is revealing:

> To comprehend the meaning of many a legal rule requires special training. It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as a result of hundreds of years of professional disputation in the courts.[333]

Thus it is that, in condemning the jury system, Frank elevates the judge to a status not obviously compatible with his original realist thesis. No longer straightforwardly a human being, the judge has been transformed into the saviour and the oracle of the law, into the repository and guardian of an artificial reason which the untrained plebeian should neither pretend, nor be expected, to understand. The implication is clear: law is, of necessity, the preserve of a legal priesthood. Such an argument is distinctly more

[330] See Frank, *supra* n. 25, 127.
[331] Jerome Frank, 'Are Judges Human?', *U. Pennsylvania L. Rev.*, 80 (1931), 17–53, 233–67 at 27.
[332] Jerome Frank and Barbara Frank, *Not Guilty* (New York: Doubleday, 1957); and for further discussion of Frank's dislike of the jury system, see Duxbury, 'Jerome Frank and the Legacy of Legal Realism', *supra* n. 3, 188–9.
[333] Frank, *supra* n. 279, 116.

Bealist than realist,[334] and it is odd that Frank should have offered it, given that he claimed more generally to reject the notion of expertise as elitist and undemocratic.[335] Fifteen years after his initial denunciation of childish legal thought-ways, he lamented that 'perhaps . . . despite my years, I have not yet fully matured'.[336] *Law and the Modern Mind* had fallen 'like a bomb on the legal world';[337] and yet, as with many a *succès de scandale*, it ultimately demanded more of its author than it did of anyone else. In rejecting the jury system, Frank had implicitly celebrated the verities of legal certainty and tradition. And it was precisely thus that he trapped himself within his own realist critique.

LEGAL REALISM AND LEGAL EDUCATION

Frank himself seemed to be blissfully unaware of this fact. Almost two decades on from the first publication of *Law and the Modern Mind*, and nearly eighty years after Langdell's appointment as dean at Harvard, he was still vilifying the legacy of Langdellian formalism *con brio*, even if his peculiar style of disparagement had, over the years, acquired something of a constructive edge. Whereas, in his early writings, the poverty and the popularity of the Langdellian legal world-view was attributed to the widespread if implicit acceptance of the basic legal myth, in his writings from the late 1940s onwards he began to stress the pervasive effect of 'the myth that upper courts are at the heart of court-house government. This myth induces the false belief that it is of no importance whether or not trial judges are well-trained for their job, fair-minded, conscientious in listening to testimony, and honest. In considerable part, this belief arises from the fallacious notion that the legal rules, supervised by the upper courts, control decisions.'[338]

Although Frank was not the first legal realist to draw attention to this so-called upper-court myth,[339] he was the only one of their number to accord it especial juridical significance. As with the basic legal myth, the upper-court myth was very much a part of the Langdellian scheme of things. Langdell himself had founded the case method on old English appeal

[334] See Warren J. Samuels, 'Joseph Henry Beale's Lectures on Jurisprudence, 1909', *U. Miami L. Rev.*, 29 (1975), 260–333 at 292; Duxbury, 'Some Radicalism about Realism?', *supra* n. 3, 29.
[335] Jerome Frank, 'The Place of the Expert in a Democratic Society', *Philosophy of Science*, 16 (1949), 3–24 at 23.
[336] *United States* v. *Rubenstein*, 151 F.2d. 915; 923 (2nd Cir. 1945), (Frank J., dissenting).
[337] Charles E. Clark, 'Jerome N. Frank', *Yale L.J.*, 66 (1957), 817–18 at 817.
[338] Frank, *supra* n. 279, 222.
[339] See e.g. Green, *supra* n. 255, pt. I, 1037.

cases, and had paid almost no attention to the decisions of lower courts. Even Cardozo 'completely by-passed the operations of the trial courts'.[340] A truly post-Langdellian jurisprudence, in contrast, would focus not primarily on the upper court interpretations and applications of legal rules and principles, but on the lower court process of fact-finding upon which upper court decision-making depends. Not that Frank believed facts to be any more determinate than rules. 'The trial court's facts are not "data", not something that is "given"; they are not waiting somewhere, ready made, for the court to discover, to "find" '.[341] Facts are simply testimonies about past events, and, as such, are eminently susceptible to distortion through human fallibility. Yet for all this, they are crucial to realist legal thought. Since most decisions are not appealed, fact-finding at first instance determines the outcome of a majority of cases. Even when a case is appealed, the upper court will tend to accept as final the trial court's finding of facts. For whereas the trial court hears witnesses' oral testimonies, and is able to scrutinize the demeanour of witnesses presenting their testimonies, the upper court has before it only a transcript of the trial court's findings, thus putting it in a poor position to review issues of fact. Accordingly, only by focusing on facts might jurisprudence become more reform-oriented. 'Through careful and critical study of fact-finding procedure we may be able to identify and eradicate distortions in human testimonies, and, more than this, we may come to understand, and eventually to remedy, more general procedural and administrative faults inherent in the adjudicative process itself.

Whereas the basic legal myth seemed so psychologically pervasive as to be well-nigh insurmountable, the upper-court myth, Frank believed, posed a problem which could be remedied. This myth had been created in the law school; it could be destroyed there also. The law schools of the Langdellian tradition, Frank argued, 'are upper-court law schools',[342] engaged in a form of 'ersatz teaching'[343] which stresses the written reports of upper-court decisions without ever considering the reality of the relationship between those who represent and those who have dealings with the legal process. To combat the upper-court myth, these 'library law schools' must liberate themselves from the case-book tradition and become 'lawyer schools'.[344] This new lawyer school would be staffed mainly by teachers with at least five years' experience practising law; the 'book law teacher' would not be eliminated entirely from the new régime, but would occupy

[340] Jerome Frank, 'Cardozo and the Upper Court Myth', *Law and Contemporary Problems*, 13 (1948), 369–90 at 373.

[341] Frank, *supra* n. 279, 25.

[342] Jerome Frank, 'A Plea for Lawyer Schools', *Yale L.J.*, 56 (1947), 1303–44 at 1306.

[343] Jerome Frank, 'Both Ends Against the Middle', *U. Pennsylvania L. Rev.*, 100 (1951), 20–47 at 28.

[344] Frank, *supra* n. 342, 1312–13.

only a subordinate role (for example, instructing students on how to write briefs for the appellate courts); the student would complete his or her entire course of upper-court decision reading in around six months; and the rest of the degree course would be devoted to a clinical legal education.[345]

The legal clinic is at the heart of Frank's proposals for reform. Under the guidance of their teachers, students would be required to spend a period of their time at law school working in the clinic—which would operate very much along the lines of the local legal aid clinic—providing legal services either free or for a small fee. In this way, law students, like medical students, would be required actually to practise various elements of their discipline before they could complete their formal legal education. The ultimate benefit of such a system would be that law would be brought down from the clouds of rules, principles and upper-court decisions, so that students would experience it as a human phenomenon rather than merely as a set of concepts to be encountered in the textbooks.[346]

Although Frank was not the first American lawyer to propose a clinical model of legal education,[347] there is a striking irony in the fact that he devised any sort of blueprint for pedagogic reform given that he was never, at any stage throughout his career, a full-time member of an academic institution. While his proposals had a fairly limited impact on the way in which clinical programmes ultimately developed in the American law schools,[348] they represented nonetheless a classic—perhaps the classic—realist attempt to move beyond the confines of the Langdellian library-laboratory. The clinical model provided the vital element of practical experiment which had been absent from its Langdellian counterpart. Furthermore, the idea of clinical experience as the inculcation of the practitioner's craft seemed to demonstrate that, for all the various appeals to the methods of the social sciences, the roots of realism were in fact profoundly professional.[349] Perhaps, after all, it was both fitting and typical that the prime realist advocate of the clinical model should have been an erstwhile Wall Street corporate specialist; for the clinical lawyer school was intended, more than anything else, to be the training ground for the hard-boiled legal technician.

[345] See Jerome Frank, 'What Constitutes a Good Legal Education?', *American Law School Rev.*, 7 (1933), 894–902.

[346] See Jerome Frank, 'Why Not a Clinical Lawyer School?', *U. Pennsylvania L. Rev.*, 81 (1933), 907–23 at 914–23.

[347] See Stevens, *supra* n. 45, 165 n. 14; John M. Lindsey, 'John Saeger Bradway—the Tireless Pioneer of Clinical Education', *Oklahoma City Univ. L. Rev.*, 4 (1979), 1–16.

[348] See Robert Stevens, 'Two Cheers for 1870: The American Law School', *Perspectives in American History*, 5 (1971), 403–548 at 491–2; *supra* n. 45, 162, 215–16.

[349] See Angèle Auburtin, 'Amerikanische Rechtsauffassung und die neueren amerikanischen Theorien der Rechtssoziologie und des Rechtsrealismus', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 3 (1933), 529–67 at 557–8; Kalman, *supra* n. 3, 17, 21; Bechtler, *supra* n. 85, 19.

Since Frank's proposals were as divorced from the opinions of most realists as they were from the tradition of Langdell, it was perhaps typical also that, during the 1930s, the lawyer school blueprint should generally have fallen on fallow ground. Apart from the occasional, vague aside to the effect that the introduction of snippets of 'the humanities' into the clinical curriculum might enable law students to identify with the feelings and grievances of their clients,[350] Frank's suggestions seemed almost entirely to neglect that which most realists cherished above all: namely, the teaching of and research into law as a social science. Hardly surprising was it that Llewellyn declared, in 1935, that 'I do not believe, as Frank seems to, in the substitution of practice or clinic for theoretical instruction.'[351] For legal realists to take the lawyer school route would have involved massive sacrifices, given especially the fundamental changes in curricular content and structure, in personnel, and the vast expenditure of energy and resources that the implementation of the clinical model would have demanded.

It was not until the 1960s that the clinical model—and even then, not Frank's model—began to flourish in the American law schools.[352] In the early 1930s, when Frank held a post as a research associate at Yale, the faculty had 'welcomed him warmly and his ideas with reservations'.[353] The occasional vocationally oriented course had been added to the curriculum; but by and large clinical education failed to take root. Frank seemed genuinely frustrated by this fact. In an address to the Yale Law School in 1941, he chided his erstwhile realist colleagues for their quiescence: 'You folks here at New Haven take a programme for having law students act like lawyers—and you talk about it. Gosh, if you're going to spank—or woo—our Lady of the Law, go and do it. Don't become mere Yodellers—or, for that matter, Rodellers.'[354] The pun is not without significance. Fred Rodell spent much of his academic energy vilifying the Harvard Law School and insisting on the intellectual superiority of Yale[355]—complaining about the ills of modern legal education, in other words, rather than trying to remedy them. It was precisely this words-over-action world-view of which Frank became disenamoured. And yet, ironically, Frank hardly hesitated to join

[350] See Frank, *supra* n. 343, 38–40, 46–7.

[351] Karl N. Llewellyn, 'On What is Wrong With So-Called Legal Education', *Columbia L. Rev.*, 35 (1935), 651–78 at 675. For general critical discussion of Frank's clinical law school model, see George K. Gardner, 'Why Not a Clinical Lawyer-School?—Some Reflections', *U. Pennsylvania L. Rev.*, 82 (1934), 785–804; Leon T. David, 'The Clinical Lawyer School: The Clinic', *U. Pennsylvania L. Rev.*, 83 (1934), 1–22.

[352] Stevens, *supra* n. 45, 157, 215–16.

[353] Kalman, *supra* n. 3, 172.

[354] Jerome Frank, 'Yodellers and Rodellers', talk before the Judge's Gavel, Yale Law School, 15 February 1941, in Jerome N. Frank Papers, Yale University, Sterling Memorial Library, Manuscripts and Archives Division, box 169, folder 628 at 16.

[355] See Duxbury, 'In the Twilight of Legal Realism', *supra* n. 3, 385–90.

in the same game. 'Where the Langdellian atmosphere is thickest,' he wrote in 1933, 'teaching is weakest; where that atmosphere is thinnest, teaching is strongest.'[356] Almost fifteen years later, he remained steadfast to his belief 'that, as a whole, Yale Law School . . . comes closer to grips with lawyers' realities than Harvard'.[357] Very simply, Frank was a Harvard-baiter just as was Rodell.

Indeed, Harvard-baiting—or certainly disenchantment with the academic and professional prestige which the Harvard Law School enjoyed—was at the core of a good deal of realist pedagogic critique. Viewed in rather crude terms, realism was very much an Ivy League law school phenomenon, a controversy between Harvard on the one hand, and Columbia and Yale on the other. When, in 1935, Karl Llewellyn offered his reflections on the state of American legal education, he prefaced his comments with the warning that he was concerned only with ' "legal education" as practised at Columbia, Harvard, and Yale'.[358] While, furthermore, neither Llewellyn nor any other so-called realist was willing to indulge Harvard-phobia as shamelessly as did Rodell, there was a widespread recognition of the problem which the latter liked to dramatize. Edmund M. Morgan, for example, a Harvard Law School graduate and professor there from 1925 onwards, professed no sympathy at all for Rodell's anti-Harvard histrionics;[359] yet he was prepared privately to acknowledge that the School faced something of a problem during the 1930s in so far as it was 'regarded as entirely too much satisfied with itself, and as having a supercilious, if not a hostile, attitude towards experiments in legal education and new methods of attack upon legal problems which originate elsewhere'.[360]

Naturally, during the the 1930s, there were those in Cambridge—not least Felix Frankfurter—who insisted that allegations of Harvardian academic aloofness and condescension were unfair and unfounded.[361] Yet

[356] Frank, *supra* n. 345, 898.

[357] Frank, *supra* n. 342, 1342.

[358] Llewellyn, *supra* n. 351, 652. In the 1920s, Harvard, Yale, Columbia and possibly a half-dozen other law schools were distinct in so far as they conceived themselves to be national institutions, without any special obligation to prepare students to pass the bar examinations of any particular state. Other schools, in contrast, were rather more concerned with preparing students for provincial legal practice. See Bruce A. Ackerman, '*Law and the Modern Mind* by Jerome Frank', *Daedalus*, 103 (1974), 119–130 at 126 n. 2.

[359] See Edmund M. Morgan to Guy W. Ross, 8 March 1961, in Edmund M. Morgan Papers, Vanderbilt University, Heard Library, Special Collections Department, box 3 ('You are entirely right in thinking that I have a low opinion of Fred Rodell. . . . He would rather make smart sentences than tell the truth'); also Felix Frankfurter to Edmund M. Morgan, 10 November 1947, in Edmund M. Morgan Papers, Harvard Law School Library, Manuscripts Division, box 11, folder 16.

[360] Edmund M. Morgan to Karl N. Llewellyn, 28 March 1931, in Karl N. Llewellyn Papers, University of Chicago Law Library, A.65(b), cited in Hull, *supra* n. 47, 952.

[361] See Kalman, *supra* n. 3, 174.

even Frankfurter could not but have recognized how such allegations would have got off the ground. Harvard was, among other things, the birthplace of the modern law school, the home of the case method and the academic arm of the Restatement project. This, too, during the Depression period, when many lesser schools were struggling to find funds, let alone establish solid links with the profession. Harvard enjoyed academic and professional kudos which even its Ivy League rivals could not match; to say that the School had a good deal going for it would be rather gross understatement.

Realism, accordingly, emerged at Columbia and Yale largely as an endeavour to supplant, or at least genuinely to compete with, Harvard's professional and academic dominance. Purely at the level of legal education, the endeavour involved four fundamental, interrelated strategies, all of which revolved around the debunking of Langdellianism.

First of all, and most generally, there was the basic realist desire to conceive of legal education in non-Langdellian terms. For many legal realists, this meant looking to the methods of the social sciences for an alternative to Harvard-style formalism. The strategy of others was to play down the Langdellian tradition while venerating the achievements of proto-realists such as—indeed, especially—Holmes. Some adopted both of these strategies. Some also looked to their past teachers for inspiration. For example, at Yale, Hohfeld and the great contracts scholar, Arthur L. Corbin, were elevated by some to a quasi-Langdellian status, the latter in particular being treated as something of a realist *éminence grise*. This was primarily because of Corbin's redoubtable influence as a teacher—Llewellyn, for instance, regarded him as a father-figure[362]—though it was also because of his penchant for making realist-style pronouncements on the nature of legal evolution, on judicial creativity, and on the importance of facts as well as rules in the decision-making process.[363] These, after all, were precisely the themes to which Corbin's realist successors resorted in developing their second anti-Langdellian strategy: namely, the critique of *stare decisis* as a foundational pedagogic principle.

The classic illustration of the realist critique of *stare decisis* is commonly considered to be Herman Oliphant's presidential address to the Association of American Law Schools in 1927. In truth, Oliphant was markedly less outspoken on the matter of *stare decisis* than commentators have tended to assume. Indeed, rather than reject the doctrine, he lamented its erosion. '*Stare decisis*', he argued, 'has been sapped of much of the spirit of

[362] See Hull, *supra* n. 49, 1327.

[363] On Corbin's realist predilections, see Kalman, *supra* n. 3, 98–107; Twining, *supra* n. 12, 27–34; and E. Donald Elliott, 'The Evolutionary Tradition in Jurisprudence', *Columbia L. Rev.*, 85 (1985), 38–94 at 55–9.

the common law,'[364] owing to the fact that Langdellianism precipitated a 'general retreat in legal thinking towards supergeneralized and outworn abstractions'.[365] For all its simplicity, the argument was an ingenious one. Langdellian legal science, so received wisdom had it, was premissed upon an intense respect for *stare decisis*. Yet here was Oliphant, suggesting that Langdellianism did not nurture but rather suffocated the doctrine. How could this be so? Oliphant's answer was that Langdellian formalists tended to conceive of *stare decisis* in an inordinately narrow fashion, that is, as the following of principles—*stare dictis*—rather than as the following of decisions. Langdellian legal science, accordingly, required the student only to seek the general 'doctrine' or 'principle' of a case without any consideration of the peculiar facts upon which the decision itself was founded. In sacrificing particularism in the pursuit of generalized abstractions, Langdellianism had mistaken *stare dictis* for *stare decisis*. '[T]here has', Oliphant summarized, 'been such a shift in our work on cases from particularity to generality of treatment and such a shift of life from the grooves of our present long-standing abstractions, that our scholarship becomes loose and unreal. . . . Our categories of thought have become unreal by life having left them behind and no alert sense of actuality checks our reveries in theory.'[366] The fundamental task facing legal realists, he concluded, is one of securing a return to *stare decisis* proper: 'Because our law students are to be the scholars, advocates, counselors, and judges of tomorrow, their training is the area of supreme strategic importance in this whole situation. That is our opportunity and responsibility. Regaining the values lost to judicial government by the retreat from *stare decisis* and making law more a science of realities and less a theology of doctrines require a radical reorganization of legal education.'[367]

While Oliphant took the view that the formalist conception of *stare decisis* was not the genuine article, other realists were willing to accept Langdellianism at face value and criticize it for its slavish adherence to precedent. 'A decision of a case is no more law than the light from last night's lamp is electricity,' wrote Leon Green.[368] The general tenor of the realist argument was that, in so far as precedents existed, conflict could invariably be found among them, and it was precisely that conflict which allowed—indeed, required—judges to make law.[369] The fundamental failure of the Langdellian reliance on *stare decisis* rested in the unquestioned assumption that precedents bred legal certainty. In truth, so the realist argument went, precedents tend to breed uncertainty.

It was the recognition of this fact which inspired the third realist

[364] Oliphant, *supra* n. 72, 160.

[365] Ibid. 75.

[366] Ibid. 76.

[367] Ibid. 159.

[368] Green, *supra* n. 255, pt. I, 1015.

[369] See generally Kalman, *supra* n. 3, 21–2.

pedagogic strategy: namely, the critique of the case method. At the beginning of the 1950s, Thurman Arnold wrote of the case method that '[n]o more time-wasting system of studying law has ever been devised. . . . Yet a blind faith in the case-by-case system still persists in the great majority of American law schools.'[370] Much the same point had been made by Llewellyn in the 1930s when he denounced the case method as a 'pseudo-Socratic monologue'.[371] Yet, as Arnold pointed out, the case method did indeed survive. Why should this have been so? Legal realism itself seems largely to have been responsible for the longevity of the case method; for, the comments of Arnold and Llewellyn aside, it is possible to discern in the literature of realism a marked reluctance to abandon case method teaching. This is hardly surprising. The qualities of the case method as an efficient and engaging teaching style were appreciated by most American academic lawyers by the early decades of this century.[372] And even realists recognized a good thing when they saw one—even, indeed, when that good thing had Langdellian pedigree. While, moreover, no legal realist would have wished to use the case method as Langdell and his successors had used it, they saw nevertheless that it provided a superb means of encouraging a broadly sceptical approach to the study of law.[373] Thus it was that realists such as Max Radin and Herman Oliphant, though opposed to Langdellian legal science, considered the case method to be a perfect vehicle for demonstrating the shortcomings of that so-called science.[374] The case method could be employed to demonstrate to students that the principles to be found in cases sometimes conflict, that legal doctrine often conceals uncertainties and contradictions, and that judges frequently rely on instinct rather than on precedent.

Legal realism, then, entailed the reorienting rather than the jettisoning of the case method. A similar, if slightly more ruthless strategy was adopted with regard to the traditional case-book. Brian Simpson has suggested that realism contributed significantly to the demise of the treatise-writing tradition in the United States.[375] Possibly it did. Wesley Sturges's 'severely analytical'[376] article, 'Legal Theory and Real Property Mortgages', is an obvious if unique illustration of realist hostility towards the genre of conventional treatise-writing. Written in collaboration with a third-year student, Samuel O. Clark, Sturges's article is an examination of how 'an American law student'[377] might be expected to conceive of mortgages, in both law and equity, from reading the classic treatises on the subject. By way of a series of rhetorical questions, Sturges demonstrates that any student who cared to examine critically the legal language of the treatises would discover that, certainly as regards mortgages, the relationship between law and equity is defined by inconsistency, uncertainty and conflict. The legal treatises, he insisted, glossed over doctrinal incoherence in the 'fruitless quest'[378] to depict law as a well-nigh flawless body of logically interlocking concepts.

Similar remarks were made by Hessel Yntema with regard to the 'hornbook method' of studying the conflict of laws. According to Yntema, both Joseph Beale and Herbert Goodrich—the prime advocates of this method—used it to promote a brand of 'juristic theology' which confined legal study to 'the squirrel-cage of conceptualism', without any concern whatsoever for 'the realities of judicial administration'.[379] Yet the major contribution of realism to the development of legal writing rested not in the occasional outburst against the legal treatise or the hornbook, but in the more general rejection of the Langdellian-style case-book in favour of a new type of legal text, the 'cases and materials' text.

In one sense, the emergence of this new style of text may be regarded as an academic response to the initiatives of the National Reporter system. An ever-burgeoning body of case material quickly rendered impossible the concept of a 'pure' case-book offering a complete, systematically ordered body of decisions.[380] In a broader sense, however, the evolution of the cases and materials text was part and parcel of the realist disappointment with Langdellian educational goals. Originating at Columbia in the early 1920s,[381] the new case-books, or rather their authors, tended to utilize a variety of 'materials'—statutes, doctrinal commentary, the methods of the social sciences, among other things—in an endeavour to offer to students an idea of how legal doctrines function in a social context. Sometimes, furthermore, these new texts would be structured around novel doctrinal, often comparativist-oriented categories: so that, for example, whereas the old, Langdellian-style case-book would offer *A Selection of Cases on the Law of Contracts*, the new-style text might be comprised of *Cases and*

[370] Thurman Arnold, *Fair Fights and Foul: A Dissenting Lawyer's Life* (New York: Harcourt, Brace & World, 1951), 263.
[371] Llewellyn, *supra* n. 351, 677, also 653, 666.
[372] See Stevens, *supra* n. 45, 122–3.
[373] See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 78.
[374] See Max Radin, 'The Education of a Lawyer', *California L. Rev.*, 25 (1937), 676–91; Oliphant, *supra* n. 72, 161.
[375] A. W. B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature', *U. Chicago L. Rev.*, 48 (1981), 632–79 at 677–9.
[376] Grant Gilmore, 'For Wesley Sturges: On the Teaching and Study of Law', *Yale L.J.*, 72 (1963), 646–54 at 651.
[377] Sturges and Clark, *supra* n. 74, 701.
[378] Ibid. 704.
[379] Yntema, 'The Hornbook Method', *supra* n. 73, 481.
[380] See Albert Ehrenzweig, 'The American Casebook: "Cases and Materials" ', *Georgetown L.J.*, 32 (1944), 224–47 at 225–6.
[381] Herman Oliphant's *Cases and Materials on the Law of Trade Regulation* (St. Paul, Minn.: West Publishing Co. 1923) set the ball rolling. See Kalman, *supra* n. 3, 78; also Currie, *supra* n. 91, 337.

Materials on the Law of Corporate Reorganization.[382] Throughout the 1930s, cases and materials texts proliferated to such a degree—a dozen such texts emanated from Yale in 1931 alone—that, by the following decade, they were unquestionably an integral part of the American law school curriculum; indeed, by the early 1950s, the literal case-law instructor had become more or less extinct.[383]

Certain of the cases and materials texts hardly departed radically in substance from the old case-books. But others rather encapsulated the realist disaffection with Langdellianism. Most commonly singled out for its originality is Llewellyn's *Cases and Materials on the Law of Sales* of 1930,[384] a text which, besides having been hailed as 'the first major work of the realist movement',[385] constitutes a germinal expression of some of the ideas which, in later years, would find their way into Llewellyn's drafts of article 2 of the Uniform Commercial Code.[386] Llewellyn's approach to the editing, classification and arrangement of cases and materials was unprecedented. In order to compile a text containing far more legal material than had previously been reproduced in a case-book on sales, he took the bold step of summarizing a good many decisions, thereby 'violating the classic principle' that cases be reproduced in their entirety.[387] He also made extensive use of digests of cases. In both structure and content, the resulting text was a far cry from more conventional, Langdellian-inspired offerings.[388]

Cases and Materials on the Law of Sales also entailed a novel approach to legal doctrine. Rather than simply anchor his discussion on the case law relating to sales, Llewellyn addressed specific matters of economics and business practice—matters which, in his view, shaped the expectations and behaviour of commercial buyers, sellers and middlemen. The opening lines of the first chapter, for example, highlight the function of price: 'Price is the heart of the sales contract; and peculiarly so in sales to a dealer. Ours is a money economy, a price system; business centres on profit; profit centres

[382] See Stevens, *supra* n. 45, 158; *supra* n. 348, 483–4.

[383] See Stevens, *supra* n. 348, 483–4; Woodard, *supra* n. 281, 723; and Albert J. Harno, *Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession* (San Francisco: Bancroft-Whitney, 1953), 69.

[384] Karl N. Llewellyn, *Cases and Materials on the Law of Sales* (Chicago: Callaghan, 1930).

[385] William Twining, 'Two Works of Karl Llewellyn', *Mod. L. Rev.*, 30 (1967), 514–30; *Mod. L. Rev.*, 31 (1968), 165–82 pt. I, 517.

[386] See Twining, *supra* n. 12, 139; and Zipporah Batshaw Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules', *Harvard L. Rev.*, 100 (1987), 465–545 at 476. More generally, cf. Eugene F. Mooney, 'Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law', *Villanova L. Rev.*, 11 (1966), 213–258.

[387] Ehrenzweig, *supra* n. 380, 235.

[388] By Llewellyn's estimation, *Cases and Materials on the Law of Sales* was 33% cases, 36% digests, 28% annotations and 3% statutes. See Kalman, *supra* n. 3, 79.

on price.'[389] Unlike earlier writers on the subject, furthermore, Llewellyn emphasized the contractual rather than the proprietary dimension of the law of sales, on the basis that 'the contract for future delivery . . . is far more important to the lawyer in practice and more typical of business transactions in a credit economy'.[390] Students, he insisted, must eschew generalized legal concepts and categories in favour of an essentially pragmatic, particularistic approach to legal doctrine. A classic piece of realist revisionism, and 'a major step forward in the development of teaching tools in American law schools',[391] Llewellyn's case-book refuted the Langdellian conception of doctrine every bit as vigorously as Langdellians themselves had promoted it.

Yet while Llewellyn's case-book epitomized a particular realist achievement—the gradual discrediting of the Langdellian case-book tradition—it also, in another sense, exemplified failure. In the Preface to his work, Llewellyn professed his intention to utilize the findings of experimental logic, social psychology, anthropology and sociology; yet, for the most part, his presentation of the law of sales unfolds without any resort whatsoever to social scientific methods or materials. Generally, those legal realists who produced case-books tended neither to make effective use of the social sciences nor to raise matters of social policy over which such sciences could have cast light.[392] Indeed, for all that it became established in the mainstream of American university law teaching, the cases and materials text stands as a testament to the failure of legal realists to develop a social scientific approach to the study of law beyond the planning stage. Critique of Langdellian assumptions was easy compared with implementing a programme of legal education; and while realists tended to excel at the former task, they fared comparably poorly at the latter. As stated earlier, ideas proliferated; but little emphasis was placed on following through. Quotations from the letters of two Yale law students of the early 1940s illustrate the point. On the one hand, Irving Clark viewed Yale of the 1930s with bright-eyed awe. Under Hutchins's deanship, he claimed, 'Yale shot to the front rank—precisely because it acquired a faculty equipped as no other in the country to present every philosophy of the law, to relate the law to all the other social sciences; a faculty, in short, whose catalytic influence has leavened the thought of lawyers everywhere from Wall Street to Washington.'[393] Grant Gilmore, on the other hand,

[389] Llewellyn, *supra* n. 384, 1.

[390] Twining, *supra* n. 385, pt. I, 524.

[391] Ibid. pt. I, 526.

[392] See Kalman, *supra* n. 3, 88–94.

[393] Irving Clark, Jr. to Charles Seymour, 26 July 1943, in Charles Seymour Papers, Yale University, Sterling Memorial Library, Manuscripts and Archives Division, box 94, folder 807.

reflecting on his own education in the 1940s, took a less sanguine view of Yale's achievements:

> What has most puzzled me over the years in thinking about the instruction we received in the early 1940s is how extremely conventional or traditional it was. . . . Of course the prime movers and shakers (Hutchins, Clark, Douglas, Arnold) had long since left New Haven. However, Underhill Moore, Walton Hamilton, Wesley Sturges, and Harry Shulman (not to mention Arthur Corbin) were still on the faculty—and indeed I took courses with each of them. Without exception, the courses they taught were entirely standard exercises in case law (or, occasionally, statutory) analysis, which would not have been out of place at Harvard. Not a word from any of them about history, jurisprudence, the scientific approach, empirical research—except that Corbin gave a preliminary lecture in the first-year Contracts course on Hohfeldian analysis (after which no more was heard of Hohfeld). . . . If there is anything in the Great Teacher idea, these men were Great Teachers—certainly the greatest I ever studied under. But, by 1940, despite their own deep involvement in the ferment of Legal Realism, they had all evidently decided to exclude from their teaching any reference to the ideas which had concerned, indeed obsessed them, during the 1920s and 1930s.[394]

The intellectual ferment of legal realism, as Karl Llewellyn called it, failed to make much of an impact on the bulk of the American law schools.[395] Even at the schools where it had come to prominence, realism was more an endeavour to relate legal study to legal practice than to make use of the social sciences. The appeal to the social sciences, it turned out, had been but an appeal to 'otherness'. Lawyers had become frustrated with, even jealous of, other lawyers. Harvard seemed to be holding all the best cards, and the social sciences offered law professors—mainly, though by no means exclusively, at other Ivy League universities—a good opportunity for bluff-calling. Here, it was claimed, was a collection of disciplines which would at once expose Langdellianism as antediluvian and inject new life into the study of law. And who, in the 1920s and early 1930s, was to say that these disciplines could not deliver the goods? Only as the 1930s progressed did it become increasingly clear that most legal realists were either unable or unwilling to use social scientific methods to facilitate a genuinely non-Langdellian approach to the teaching of law. Rather than becoming the norm, the interdisciplinary approach developed, or rather disintegrated, into an *ad hoc* affair,[396] to be adopted by particular academics rather than throughout the law school system. Legal realism certainly inspired the future flourishing of interdisciplinary legal research and education. Yet inspiration was basically all that it achieved.

[394] Grant Gilmore to John Henry Schlegel, 18 June 1980 (letter supplied to author by Professor J. H. Schlegel).

[395] Stevens, *supra* n. 45, 172.

[396] See Dawson, *supra* n. 126, 408: 'Many of us concluded that what we needed and wanted to know from other disciplines, we would have to learn all by ourselves, with occasional help from friends in other specialties after we had learned enough to ask them questions.'

To the four anti-Langdellian, realist pedagogic initiatives outlined above, there may be added a fifth strategy: namely, the critique of the Restatement movement. While this critique was not straightforwardly a rejection of the methods of the Langdellian law school, it was very much a part of the realist assault on legal formalism. Not that every realist viewed the Restatement project with disdain. Herman Oliphant, for example, apparently without irony, lauded the project as 'truly impressive'.[397] But generally, legal realists considered the Restatements to represent 'the high-water mark of conceptual jurisprudence'.[398]

The fundamental ambition of the restaters was not to codify the common law, but, in true Langdellian fashion, to reduce its principles to a simpler and more systematic form. This entailed stripping the major common law fields—contracts, trusts, property, torts, agency, business corporations, conflict of laws—of their doctrinal complexity and leaving only the bare bones of black-letter rules and principles.[399] The first Restatement, of contracts, was completed in 1932; and the task of restating—and re-restating—continues to this day. The longevity of the project is something of a miracle, not least because, during its formative years, it was subjected to sustained and fairly ferocious critical onslaught. Indeed, the Restatements inspired some of the most carefully conceived realist doctrinal critique of the 1930s.[400] They also inspired an equal amount of unashamedly negative polemic. 'The undertaking to restate the rules and principles developed by the English and American courts finds in the field of torts a most hopeless task,' wrote Leon Green in 1928.[401] For Charles Clark, the Restatement of the Law of Contracts possessed 'the rigidity of a code . . .

[397] Oliphant, *supra* n. 72, 71.

[398] Lawrence M. Friedman, *A History of American Law* (2nd edn. New York: Simon & Schuster, 1985), 676.

[399] On the emergence of the Restatement project, see Nathan M. Crystal, 'Codification and the Rise of the Restatement Movement', *Washington L. Rev.*, 54 (1979), 239–73; N. E. H. Hull, 'Restatement and Reform: A New Perspective on the Origins of the American Law Institute', *Law and History Rev.*, 8 (1990), 55–96.

[400] See, in particular, Arthur L. Corbin, 'The Restatement of the Law of Contracts', *Am. Bar Assoc. Jnl.*, 14 (1928), 602–5, 652–6; 'The Restatement of the Common Law by the American Law Institute', *Iowa L. Rev.*, 15 (1929), 19–41; Thurman W. Arnold, 'The Restatement of the Law of Trusts', *Columbia L. Rev.*, 31 (1931), 800–23; Clark, *supra* n. 254, *passim*; Leon Green, 'The Torts Restatement', *Illinois L. Rev.*, 29 (1935), 582–607; Ernest G. Lorenzen and Raymond J. Heilman, 'The Restatement of the Conflict of Laws', *U. Pennsylvania L. Rev.*, 83 (1935), 555–89; Hessel E. Yntema, 'The Restatement of the Law of Conflict of Laws', *Columbia L. Rev.*, 36 (1936), 183–223; William R. Vance, 'The Restatement of the Law of Property', *U. Pennsylvania L. Rev.*, 86 (1937), 173–88.

[401] Green, *supra* n. 255, pt. I, 1014.

without the opportunity for reform and advance which a code affords'.[402] Even William Reynolds Vance, one of the most conservative legal scholars at Yale during the 1930s, was prepared to denounce the Restatement of the Law of Property as a series of 'solemn declarations . . . so obvious that they are rather ludicrous. . . . The judge who would base his decision of any question of law upon these black letter declarations would be worse than lazy; he would be incredibly stupid.'[403]

Possibly the most outspoken critic of the Restatement project was Edward Robinson. '[T]he American Law Institute', he observed, 'has thought that it can help simple-minded lawyers by giving an artificial and arbitrary picture of the principles in terms of which human disputes are supposed to be settled.'[404] However, 'the result thus far secured is hideously difficult. There is some reason to believe that it would be easier and more satisfactory to learn law by random sampling of the cases with all their contradictions and complexities than by reading the abstract propositions in the volumes issued by the Institute.'[405] Indeed, he concluded, '[w]hen one considers these "restatements" of the common law and how they are being formulated, one remembers how the expert theologians got together in the Council of Nicaea and decided by a vote the nature of the Trinity.'[406]

One collaborator in the Restatement project, Dean Herbert Goodrich of the University of Pennsylvania Law School, took offence at Robinson's remarks, condemning them as 'fighting words, clearly passing the limit of fair comment' and 'bitterly resent[ed]' by 'all of us who have put in a share of the sweat and tears which have gone into the effort thus far'.[407] Robinson's Yale *confrère*, Thurman Arnold, offered a purportedly semi-placatory rejoinder. 'Dean Goodrich', Arnold asserted, 'completely misunderstands what Professor Robinson is trying to say, and interprets [his remarks] out of context, as a personal attack on himself and his collaborators.'[408] Whereas Goodrich 'is a disciple of a science *of* law,' Robinson 'is talking in terms of a science *about* law'.[409] And while, '[f]rom the point of view of a science *of* law, the Restatement by the American Law Institute is as near perfection as human beings can make it', from the perspective 'of a science *about* law, the picture is entirely different. To understand the problem as an observer of human affairs . . . it is necessary to describe the great post-war legal inflation of cases and concepts which

[402] Clark, *supra* n. 254, 650.
[403] Vance, *supra* n. 400, 187–88.
[404] Robinson, *supra* n. 21, 260.
[405] Robinson, *supra* n. 247, 36.
[406] Robinson, *supra* n. 21, 261.
[407] Herbert Goodrich, 'Institute Bards and Yale Reviewers', *U. Pennsylvania L. Rev.*, 84 (1936), 449–66 at 452.
[408] Thurman Arnold, 'Institute Priests and Yale Observers—A Reply to Dean Goodrich', *U. Pennsylvania L. Rev.*, 84 (1936), 811–24 at 812.
[409] Ibid. 814.

has not yet reached its peak.'[410] The ever-inflating body of published cases and legal materials, Arnold insisted, 'is beginning to be a great burden. . . . And the only thing that can stop it is a complete change of attitude which will produce a different and simpler type of legal literature.'[411] The Restatements, he concluded, were not the solution to the problem.

But then, what was the solution to the problem? By Arnold's own admission, a science about law—whatever that might entail—would provide only a means of understanding the problem. He himself, rather than suggest a method for coping with the crisis of an ever-ballooning legal literature, simply evades the issue: 'The writer suggests no new formula because at present it is only too evident that no new formula will be accepted.'[412] Again, as with the treatment of Langdellian legal education generally, one finds in the literature of realism a reluctance to develop critique of the Restatements into solid proposals for reform. Possibly this reluctance stemmed from the fact that, for all the formalist underpinnings of the Restatement movement, one of its primary goals—the simplification of the common law—rather echoed the general realist disdain for legal verbosity and word magic. Fred Rodell, for example, wondered why legal documents lack the plainness of language of cook-books, almanacs or columns of classified advertisements: surely, he reasoned, it must be possible 'to cut through those layers upon layers of verbal varnish and bare the true grain that lies beneath'.[413] Such a sentiment would not have been out of place at the Harvard Law School, which he so despised. The restaters too, after all, were trying to uncover the true grain of the law.

REALISM AND THE REGULATORY STATE

The changes which certain legal realists were busy trying to procure in the law schools seem minor when compared with those of a more general nature that were taking place in American law and society. By the early decades of this century, the process of 'statutorification' had been set in motion.[414] Nineteenth century legislative activity, most of which had taken place in commercial law, had largely been a matter of re-casting existing

[410] Ibid. 817.
[411] Ibid. 822.
[412] Ibid. 813.
[413] Rodell, *supra* n. 213, 123; 'Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment—Or, How to Hide the Melody of What You Mean Behind the Words of What You Say', *Georgetown L.J.*, 47 (1959), 483–90 at 484.
[414] Calabresi, *A Common Law for the Age of Statutes*, *supra* n. 17, 1. The classic exposition of this point is to be found in James McCauley Landis, 'Statutes and the Sources of Law', in R. Pound (ed.), *Harvard Legal Essays Written in Honor of and Presented to Joseph Henry Beale and Samuel Williston* (Cambridge, Mass.: Harvard University Press, 1934), 213–246.

common law principles.[415] By the 1930s, the significance of statute-making had altered radically. Following the Wall Street Crash of 1929, the United States national income dropped from 81 billion dollars to 41 billion dollars in 1932. During this same period, 85,000 businesses went into dissolution, 5,761 banks failed and 9 million savings accounts disappeared. Between 1932 and 1933, somewhere in the region of 13 to 16 million—roughly a quarter of the labour force of the time—were unemployed.[416] On the continent, furthermore, the emergence of Stalinism and fascism was highlighting both the importance and the political precariousness of government by democracy. Still clinging to the coat-tails of the *Lochner* era, the American courts proved slow to respond to social change. Statute-making, in contrast, offered the possibility of efficient and effective social planning. Through the creation of statutes, institutional constraints could be placed upon economic freedom and the foundations could be laid for the development of a democratic welfare state. In short, statute-making offered the key to curbing the worst effects of the Depression while promoting the credo of Rooseveltian welfare liberalism. Within the famous first 'Hundred Days' of the New Deal, the statutorification of American law had arrived with a vengeance.

The coming of statutorification meant more than just Roosevelt working in tandem with Congress to produce an unprecedented outpouring of legislation. For the passing of legislation itself often necessitated the founding of new federal government bureaus and independent administrative agencies, charged with the task of monitoring specific social concerns and empowered to apply laws and issue rulings. The dramatic increase in legislation signalled an equally dramatic boost in administrative activity. When statutorification arrived, the regulatory state arrived with it.

Early twentieth century American administrative lawyers—what few of them there were—were hardly surprised by this development. As early as 1915, the pioneer of modern American administrative law, Ernst Freund, had advocated an increase in delegative legislation. 'Legislative power can', he argued, 'be exercised more effectually and more in accordance with the spirit of the Constitution through delegation [to administrative commissions] than directly.'[417] As the century progressed, administrative scholars, Freund included, began to reject this notion of delegation, on the basis that the promotion of responsible administrative decision-making

[415] See Grant Gilmore, 'On Statutory Obsolescence', *U. Colorado L. Rev.*, 39 (1967), 461–77 at 466.

[416] It almost goes without saying that the literature on the Depression period in United States history is voluminous. For a reliable account of the period, see Lester V. Chandler, *America's Greatest Depression* (New York: Harper & Row, 1970).

[417] Ernst Freund, *Standards of American Legislation* (Chicago: University of Chicago Press, 1965; orig. publ. 1917), 302. The book was written originally as a series of lectures for delivery at Johns Hopkins University in 1915.

demands of the legislature not that it authorizes widespread delegation, but that it endeavours to constrain the discretionary exercise of legislative power by issuing precise directives detailing the scope and purpose of particular administrative initiatives.[418] Yet for all that administrative law developed gradually towards a doctrine of non-delegation,[419] the basic philosophy of regulation remained constant. The advantage of delegating powers to administrative agencies, Freund had argued in 1915, is that such bodies 'are likely to be better trained and informed and more professional in their attitude than legislative bodies'.[420] More or less the same sentiment emerged again in James Landis's Storrs Lecture to the Yale Law School in 1938. 'Efficiency in the process of governmental regulation is best served by the creation of more rather than less agencies', Landis insisted.[421] 'With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation.'[422] Such 'expertness' was not to be found in the American courts, for judges, trained in the common law tradition, were 'jacks-of-all-trades and masters of none'.[423] The proliferation of administrative agencies during the New Deal era 'sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods as they related to particular industrial problems'.[424] Specialization was the key to successful regulation; and the agencies, unlike the courts, were staffed by specialists.

Yet these were specialists who, for all their expertise, enjoyed a great deal of discretion. It would be intolerably inefficient, Landis argued, to require administrators to follow rigid judicial procedures.[425] Others, however, were not convinced. In some quarters, not least in the Supreme Court, the delegation of broad discretion to administrators was considered

[418] See Ernst Freund, *Administrative Powers over Persons and Property* (Chicago: University of Chicago Press, 1928), 582–3.

[419] On which see Richard B. Stewart, 'The Reformation of American Administrative Law', *Harvard L. Rev.*, 88 (1975), 1667–813 at 1672–97.

[420] Freund, *supra* n. 417, 301.

[421] James M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938), 24.

[422] Ibid. 23.

[423] Ibid. 31. According to Mitchell Franklin, writing in 1934, '[t]he very existence of the administrative body indicates that in some measure the common law procedure has failed.' Mitchell Franklin, 'Administrative Law in the United States', *Tulane L. Rev.*, 8 (1934), 483–506 at 498.

[424] Landis, *supra* n. 421, 30. For a discussion of Landis's position, see Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, Mass.: Belknap Press, 1984), 212–16.

[425] Landis, *supra* n. 421, 10–24, 46, 91–100.

inimical to the principles of separation of powers and formal justice.[426] Indeed, one of the Court's primary reasons for striking down certain New Deal statutes during the mid-1930s was that legislative delegation, under the terms of those statutes, appeared to be running riot.[427] By the middle of the next decade, judicial power to review administrative action was supplemented by statutory control in the form of the Administrative Procedure Act of 1946. Certainly the political developments abroad which culminated in the War had convinced many American lawyers that bureaucracy must be kept firmly in check. But, for some, the experience of the New Deal had proved equally persuasive. By the late 1930s, Roscoe Pound, once keen for the expansion of administrative powers,[428] was rallying against what he termed the recrudescence of administrative absolutism.[429] Like Friedrich Hayek, he took the view that administrative action, being premissed generally on the prioritization of collectivist planning rather than on the maintenance of individualized justice, could lead only to the erosion of the Rule of Law ideal.[430] Certainly as Pound expressed it, the view seemed rather exaggerated, if not hysterical.[431] It was a view with a peculiar political context, set, as it was, not only against the backdrop of political tyranny abroad, but also against Roosevelt's endeavour to enlarge the composition of the Supreme Court from nine to fifteen Justices in a bid to create a judiciary more sympathetic to New Deal legislative programmes.[432]

[426] See e.g. John Dickinson, 'Legal Change and the Rule of Law', *Dickinson L. Rev.*, 44 (1940), 149–161 at 158–9; and also Stewart, *supra* n. 419, 1678–9. For the origins of the American distrust of delegated authority, see Alexander Hamilton, 'Federalist Papers, LXXVIII: A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour' in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (ed. I. Kramnick, Harmondsworth: Penguin, 1987; orig. publ. 1788), 436–42 at 438 ('every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void').

[427] See cases cited *supra* n. 238; and also Currie *supra* n. 194, 517–23.

[428] See Roscoe Pound, 'The Growth of Administrative Justice', *Wisconsin L. Rev.*, 2 (1924), 321–39 at 330–1.

[429] See Roscoe Pound, Walter F. Dodd, James R. Garfield, O. R. McGuire and Robert F. McGuire, 'Report of the Special Committee on Administrative Law', *American Bar Assoc. Reports*, 63 (1938), 331–68 at 342–54; Roscoe Pound, 'The Recrudescence of Absolutism', *Sewanee Review*, 47 (1939), 18–28 at 26; 'Individualization of Justice', *Fordham L. Rev.*, 7 (1938), 153–66 at 160–5.

[430] See Roscoe Pound, 'The Future of Law', *Yale L.J.*, 47 (1937), 1–13 at 12; 'Modern Administrative Law', *Reports of the Virginia State Bar Association*, 51 (1939), 372–88; *Social Control Through Law* (New Haven, Conn.: Yale University Press, 1942), 27. Cf. also Friedrich A. von Hayek, *The Road to Serfdom* (London: Routledge & Kegan Paul, 1944), 54–65.

[431] See David Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, Conn.: Greenwood Press, 1974), 271.

[432] For discussion of Roosevelt's court-packing plan and its genesis, see William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963), 231–8; and Kermit L. Hall, William M. Wiecek and Paul Finkelman, *American Legal History: Cases and Materials* (New York: Oxford University Press, 1991), 483–6.

Pound's intellectual development—from the supremely confident and iconoclastic critic of mechanical jurisprudence to the rather reactionary opponent of the New Deal administrative agencies—highlights the manner of development of early twentieth-century American jurisprudence itself. By the late 1930s, Pound was faced with a totally different jurisprudential ball-game from that which he had first confronted three decades earlier.[433] With the arrival of statutorification and the regulatory state had come the danger—or the possibility, depending on how one viewed it—of widespread political manipulation of law. It was precisely such manipulation to which Pound was objecting. Despite the faults of the common law system as enshrined in the Langdellian tradition, he seemed to be arguing, it had at least eschewed the tendency towards overt politicization which was so much a feature of the modern regulatory apparatus. Statutorification had changed the entire complexion of American law. With the coming of the New Deal, lawyers trained in common law techniques were suddenly expected to speak a new and different language, the language of the administrative state.[434] Legal realism, Pound insisted, was instrumental in creating that language: 'realist doctrine . . . may be seen in action in administrative absolutism'.[435]

This assumption—that realist jurisprudence was New Deal jurisprudence—is something of a commonplace. Yet it needs to be questioned very seriously. Certainly some legal realists became active participants in Roosevelt's New Deal programmes. But quite what bearing realist legal thought had on the New Deal administration—or vice versa—is difficult to ascertain. In 1934, Jerome Frank, having recently been appointed by Roosevelt as General Counsel for the Agricultural Adjustment Administration, argued that realist jurisprudence and New Deal politics share a basic faith in experimentalism: both treat legal institutions 'as human contrivances to be judged by their everyday human consequences'.[436] Indeed that, he suggested, is why many legal realists were eager for a piece of the political action: they were 'stimulated by the opportunity to help contrive new governmental agencies to be used experimentally as means for achieving better results in agriculture, industry, labour conditions, taxation, corporate reorganization, municipal finance, unemployment relief, and a multitude of other subjects'.[437] While certain legal realists did

[433] As Pound himself recognized. See Roscoe Pound, 'The Ideal and the Actual in Law—Forty Years After', *George Washington L. Rev.*, 1 (1933), 431–47 at 443.

[434] See Bruce A. Ackerman, *Reconstructing American Law* (Cambridge, Mass.: Harvard University Press, 1984), 6–11; and cf. Leon Green, 'Must the Legal Profession Undergo a Spiritual Rebirth?', *Indiana L.J.*, 16 (1940), 15–30 at 23–4.

[435] Roscoe Pound, *Contemporary Juristic Theory* (Claremont, CA: Ward Ritchie, 1940), 20.

[436] Frank, *supra* n. 13, 1241–4; and cf. Robinson, *supra* n. 21, 239.

[437] Frank, *supra* n. 13, 1241–4.

indeed rise to the challenge of the New Deal, this is hardly proof that realist jurisprudence was wrapped up in Rooseveltian politics.

The case of Thurman Arnold is illustrative. In 1937, Arnold ridiculed the essentially symbolic, toothless nature of American antitrust regulation. 'The antitrust laws,' he asserted, 'being a preaching device, naturally performed only the functions of preaching.'[438] In the following year, Roosevelt appointed Arnold to succeed Robert Jackson as head of the Antitrust Division of the Justice Department. Suddenly, Arnold was vested with the responsibility of administering the very laws which he had debunked only a year earlier. How could he be expected to do this with conviction?

Arnold's answer to those who viewed with scepticism his ability to enforce the antitrust laws was simple: as a writer, he had attempted merely to observe how these laws were used—or rather, not used—throughout the Depression period; once in office, however, he regarded his task to be one of enforcing these laws and ensuring that New Deal antitrust policy was implemented and administered efficiently.[439] Those who doubted the sincerity of his resolve were to be proved wrong. By the time he left the Justice Department in 1943, he had expanded significantly both the budget and the staff of his Division; fiscal appropriations had almost quadrupled during his five years of office; and he had filed, and won, more antitrust cases than the Justice Department had initiated in its entire previous history.[440] More importantly, Arnold revived the idea that antitrust laws could form a basis for public policy. Particularly significant was the emphasis which he placed on the symbolic function of the Sherman Antitrust Act of 1890. This Act, he insisted, represents the American ideal of free competition; and while earlier interpretations had concealed and encouraged business consolidation—owing primarily to the fact that the terminology of the Act was so vague as to permit the concentration of corporate wealth in the absence of vigorous enforcement policies—it could, if interpreted differently, be applied more efficiently as a means of protecting consumers' interests. Basically, what mattered was the manner in which the Act was conceived and promoted as a political symbol. Arnold's tactic was to promote it as 'a symbol of our traditional ideals'—that is, not only as a symbol of free enterprise, but as a symbol of democracy itself.[441]

[438] Arnold, *supra* n. 241, 211–12.
[439] See Arnold, *supra* n. 370, 136.
[440] See generally Corwin D. Edwards, 'Thurman Arnold and the Antitrust Laws', *Political Science Quarterly*, 58 (1943), 338–55.
[441] See Thurman Arnold, *The Bottlenecks of Business* (New York: Reynal & Hitchcock, 1940), 92; *Democracy and Free Enterprise* (Norman: University of Oklahoma Press, 1942),

What is particularly interesting about Arnold's trust-busting activities is the manner in which he was willing to separate theory and practice. In his writings of the mid-1930s, he had insisted that, to be effective, institutions must escape from their ideals. Yet, as head of the Antitrust Division, his primary assertion was that business institutions could not be effective if they failed to promote the ideal of free competition as embodied in the Sherman Act. While, as a legal writer, Arnold had denounced the enshrining of the *laissez-faire* ideal in symbolic legislation, as a New Dealer, he was more than happy to embrace this ideal, legislation and all, if it served a desired political goal.[442] Thurman Arnold the legal realist was a rather different beast than Thurman Arnold the New Dealer.

The point for emphasis is simple: while legal realists such as Arnold, Frank, Oliphant, Clark, William O. Douglas and Felix Cohen may have flocked to Washington to work under Roosevelt, they did not necessarily take their realist ideas with them. Certainly, at a very generalized level, realist jurisprudence and New Deal politics intermeshed. This is hardly surprising. Whereas a basic tenet of realism was that the abstract concepts of legal formalism must be brought down from the clouds and shown for what they are—that is, limited, pliable, often flawed tools for dealing with disputes and social problems—an equally basic requirement of the New Deal agencies (especially during the first New Deal programme, when administrative experimentation was considered a necessity) was a legal staff trained to treat law as a tool for shaping social policy. This explained, Karl Llewellyn believed, why students educated in the values of legal realism tended to make good New Deal lawyers.[443] There has been a tendency, however, too readily to assume that the New Deal lawyer put realism into political practice. In fact, as G. Edward White has remarked, '[g]raduates of law schools in the 1930s . . . did not necessarily join the New Deal because they had been imbued with realist messages, nor did the existence of New Deal programmes necessarily provide a stimulus for the articulation of Realist jurisprudential theories.'[444] Apart from the institutionalist-realist critique of *laissez-faire*, the tenor of which re-emerged in a good measure of New Deal legislation, realist jurisprudence made a fairly limited impact on American politics in the 1930s.

46; and cf. more generally Alan Brinkley, 'The New Deal and the Idea of the State', in S. Fraser and G. Gerstle (eds.), *The Rise and Fall of the New Deal Order, 1930–1980* (Princeton, NJ: Princeton University Press, 1989), 85–121.

[442] See generally Duxbury, 'Some Radicalism about Realism?' *supra* n. 3, 34–5; and also Douglas Ayer, 'In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period', *Stanford L. Rev.*, 23 (1971), 1049–86.
[443] See Llewellyn, *supra* n. 351, 662.
[444] G. Edward White, 'Recapturing New Deal Lawyers', *Harvard L. Rev.*, 102 (1988), 489–521 at 514.

The reasons for this may be many. But if one reason stands out above others, it is that realism never truly evolved into a jurisprudence of legislation and administrative regulation. First-year courses in administrative law began to appear at many law schools in the 1930s. But these courses tended to be court-centred, focusing primarily on judicial review of administrative action. It would be another decade before there was widespread academic recognition that the activities of administrative agencies themselves were an appropriate subject for legal study.[445] Furthermore, if any school deserves to be described as pioneering in the administrative law field, it is Harvard.[446] Purely as regards the recruitment of lawyers to the New Deal administrative agencies, it was Felix Frankfurter—a Harvardian, and a man whom Llewellyn declined to label a realist[447]—who served as Roosevelt's principal talent scout.[448] Certain of Frankfurter's students—figures such as James Landis, Louis Jaffe and Charles Wyzanski—not only acted as consultants to the Roosevelt government on questions of administrative law and practice but also wrote on and taught the subject.[449] If anything bound these and other Harvard-educated administrative lawyers together, aside from their indebtedness to Frankfurter, it was a general feeling that, just as the courts of the 1930s, in exercising judicial review, often failed to appreciate the nature and objectives of administrative decision-making, so too studies of law from an essentially court-centred perspective tended to misconceive or neglect the legislative basis of modern administrative regulation.[450]

By no means, then, did administrative law find its first foothold in the realist law schools. Indeed, it has been suggested that realism stultified rather than fostered the development of administrative law as an academic discipline. According to William Chase, for Columbia and Yale, '[b]reaking with "Harvard" had meant replacing, a little sooner than Harvard did, an older conception of the nature of judge-made law with a newer one, or using a little earlier social science materials to supplement the study of cases. But the experience of the case class remained the balance wheel of

[445] See Stevens, *supra* n. 45, 160; *supra* n. 348, 487.

[446] See William C. Chase, *The American Law School and the Rise of Administrative Government* (Madison: University of Wisconsin Press, 1982), x.

[447] See Llewellyn, *supra* n. 10, 1227. Fred Rodell's view of Frankfurter as an anti-realist bordered on paranoia. See Duxbury, 'In the Twilight of Legal Realism', *supra* n. 3, 386.

[448] See Johnson, *supra* n. 101, 139; Leuchtenburg, *supra* n. 432, 64; and also G. Edward White, 'Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s', in his *Intervention and Detachment: Essays in Legal History and Jurisprudence* (New York: Oxford University Press, 1994), 149–74.

[449] See H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981), 99–111.

[450] See Chase, *supra* n. 446, 141–2; also Robert M. Cooper, 'Administrative Justice and the Role of Discretion', *Yale L.J.*, 47 (1938), 577–602 at 596–7.

the professional law teacher's existence, determining for him what was "strictly legal" and what he should be about in his scholarship.'[451] While legal realists were hardly hostile to the growth of legislation[452]—and indeed occasionally encouraged such growth in certain areas of private law[453]—they were nonetheless concerned mainly with adjudication rather than with administration or the interpretation of statutes. When, in 1930, Max Radin offered a realist perspective on statutory interpretation, concluding that the intent of the legislature is irrelevant because generally undiscoverable,[454] James Landis pronounced his arguments to be a mixture of the uninformed and the unintelligible.[455] Ignoring 'not only theoretical but practical considerations of Anglo-American government',[456] Landis asserted, Radin seemed unaware of the fact that '[l]egislative history . . . affords in many instances accurate and compelling guides to legislative meaning.'[457] For example, '[t]he voting down of an amendment or its acceptance . . . may disclose real evidence of intent.'[458] Legal realism had emerged primarily as an endeavour to discredit nineteenth-century formalist notions about private law doctrine; and for all that certain so-called realists became eminent New Deal administrators, realist jurisprudence itself, lacking a distinct public law dimension, failed to develop a critical literature devoted either to administrative regulation or to statutory interpretation. The conservatism of legal realism rested ultimately in the fact that it remained a private law jurisprudence in a

[451] Chase, *supra* n. 446, 116.

[452] See Yntema, *supra* n. 14, 325–6; Hans A. Linde, 'Judges, Critics, and the Realist Tradition', *Yale L.J.*, 82 (1972), 227–56 at 227–8; Julius Cohen, 'Towards Realism in Legisprudence', *Yale L.J.*, 59 (1950), 886–97 (attempting to extend realist insights beyond judge-made law to legislation). Nor were realist insights relevant only to common law jurisdictions. See Fritz Morstein Marx, 'Juristischer Realismus in den Vereinigten Staaten von Amerika', *Revue internationale de la théorie du droit*, 10 (1936), 28–38 at 31; though cf. Fuller, *supra* n. 317, 438.

[453] Llewellyn's work on the Uniform Commercial Code is exemplary here—on which, see Wiseman, *supra* n. 386, *passim*.

[454] Max Radin, 'Statutory Interpretation', *Harvard L. Rev.*, 43 (1930), 863–85.

[455] James M. Landis, 'A Note on "Statutory Interpretation" ', *Harvard L. Rev.*, 43 (1930), 886–93 at 887. See also, generally, Frederick J. de Sloovère, 'The Functions of Judge and Jury in the Interpretation of Statutes', *Harvard L. Rev.*, 46 (1933), 1086–110.

[456] Landis, ibid.

[457] Landis, ibid. 889. More generally, on Radin and Landis, see Patrick O. Gudridge, 'Legislation in Legal Imagination: Introductory Exercises', *U. Miami L. Rev.*, 37 (1983), 493–572; and William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (unpublished mimeograph, Georgetown University Law Center, Washington, DC, n.d. [on file with author: copy supplied by Professor Eskridge]), ch. 7 ('A Jurisprudential History of Extrinsic Sources in Statutory Interpretation').

[458] Landis, *supra* n. 455, 889. Radin continued, nevertheless, to develop a realist perspective on statutory interpretation. See further Max Radin, 'Solving Problems by Statute', *Oregon L. Rev.*, 14 (1934), 90–107; and compare his 'A Short Way With Statutes', *Harvard L. Rev.*, 56 (1942), 388–426.

public law world. The problems of modern administrative government never supplemented its original critical agenda.[459]

CONCLUSION

There are, to this day, lawyers here and there who claim to be 'legal realists'.[460] They are, however, a very rare breed. The common view is that realism is something which modern lawyers outgrew once they had assimilated its primary messages.[461] But what were those messages?

The fact is that 'realism' was a complex array of messages, some of which seemed rather feeble once placed in an institutional context. Legal realists made a good deal of fuss about bringing social sciences to the law schools. But they did disappointingly little with such sciences once they had got them there. Legal realists rallied against the Langdellian pedagogic framework. But they failed to devise a convincing alternative framework of their own. By shining a harsh spotlight on the system of *stare decisis*, legal realists cleared the way for the growth of legislation. But they proved themselves rather prudish once the 'orgy of statute making' was set in motion.[462] Some legal realists were drawn to New Deal politics. But the overlap between jurisprudence and politics turned out to be largely adventitious.

Such a catalogue of missed opportunities rather suggests that legal realists generally lost their nerve when faced with the implications of their own jurisprudential constructions.[463] Realism evolved as a broad critique of the formalist assumptions at the basis of late nineteenth and early twentieth-century private law doctrine and teaching. Beyond this critique, however, there remained little but a marked absence of vision. Rather than emerge as the jurisprudence of the New Deal, realism was outstripped by political and legal developments, and when various realists left their faculties to head for Washington they did so not out of a desire to put experimental jurisprudence into practice, but in search of promising career prospects. The development of administrative law as an academic subject, furthermore, remained principally in the hands of the Harvard Law School, where the study of the activities of legislatures and administrative agencies as well as of courts was gradually broadened to cover the entire legal process (see Chapter 4). With the entrenchment of the regulatory state, realism had conceded defeat.

Realism had made a fairly profound impact, nevertheless, on American jurisprudential culture. Even in the late 1930s, the critique of legal formalism continued in certain quarters to touch some particularly sensitive nerves. Indeed, there existed a feeling that realism, especially in its anti-Langdellian guise, had violated a basic sense of legal integrity which needed to be restored. Massive political upheavals both at home and abroad had convinced many American lawyers that legal systems ought to promote not *ad hoc* justice, but political values and moral principles founded on genuine social consensus. In the eyes of certain detractors, realist scepticism seemed to deny the possibility of such consensus.[464] As legal realism slowly faded from view, American academic lawyers began to acquire a sense that there was a good deal of jurisprudential rebuilding to be done.

[459] Bruce Ackerman argues that 'it was only by assimilating large chunks of Realist wisdom' that the legal profession of the 1930s 'managed to preserve so much of its traditional common law discourse'. Ackerman, *supra* n. 434, 13.

[460] See e.g. John E. Nowak, 'Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices', *Suffolk Univ. L. Rev.*, 17 (1983), 549–620; 'Realism, Nihilism, and the Supreme Court: Do the Emperors Have Nothing but Robes?', *Washburn L.J.*, 22 (1983), 246–67.

[461] See e.g. Twining, *supra* n. 2, 381–3.

[462] The metaphor belongs to Gilmore, *supra* n. 64, 95.

[463] See Schlegel, 'From the Yale Experience', *supra* n. 3, 460; 'The Singular Case of Underhill Moore', *supra*, n. 3, 196.

[464] See, generally, Neil Duxbury, 'The Reinvention of American Legal Realism', *Legal Studies*, 12 (1992), 137–77.

3

Lawyers for the Future

We saw, in the previous chapter, that no sooner had the mood of realism emerged in certain of the American law schools than it became the subject of fairly intense critical reaction. From the 1930s onwards, various legal writers began to detect in the writings of Oliver Wendell Holmes and his intellectual successors arguments which seemed not simply to fly in the face of conventional democratic wisdom but implicitly to support ethical relativism and political tyranny. The consequence of this perception was that legal realism came to be conceived in markedly narrow terms. Rather than being treated as the diverse assortment of professional and educational initiatives which have been identified, it was taken to stand for something much less complex: for the sceptical—or, as some detractors would have it, nihilistic—insistence that neither morals nor rules necessarily guide or even influence legal policy and decision-making. At its crudest, the anti-realist critique entailed reading into the literature of legal realism an essentially anti-democratic ideology to which no so-called realist would consciously have subscribed. Caricatured as communistic and totalitarian jurisprudence',[1] with its roots in the faith that might equals right, realism was branded 'unacceptable to those who look for justice, liberty, and the democratic way of life, under law'.[2] It was in this way that, during the middle period of this century, realism came to be accorded an historico-political identity which bore little relation to the professional, pedagogic and general sociological concerns which motivated realist legal thought.[3]

Despite being rooted in caricature, the anti-realist critique was significant, for it epitomized a general mid-twentieth-century sense of anxiety over the threat which totalitarianism seemed to pose for the future survival of American democratic theory and policy.[4] Fascism and communism had alerted many American lawyers to the importance of treating law not

[1] Francis E. Lucey, 'Jurisprudence and the Future of Social Order', *Social Science*, 16 (1941), 211–17 at 213.

[2] Miriam T. Rooney, 'Law and the New Logic', *Proceedings of the American Catholic Philosophical Association*, 16 (1940), 192–222 at 217.

[3] For a development of this argument, see Neil Duxbury, 'The Reinvention of American Legal Realism', *Legal Studies*, 12 (1992), 137–77.

[4] For an analysis of this anxiety, see Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973); Robert A. Skotheim, *Totalitarianism and American Social Thought* (New York: Holt, Rinehart and Winston, 1971), 38–67.