Chapter Seventeen

American Legal Realism

"Legal realism" is the label that was given to a group of American legal theorists[1] in the early decades of the 20th century,[2] who challenged the ideas about legal reasoning and adjudication dominant in the judicial and legal academic writing of their time. Their influence on legal thinking (particularly in the United States, but elsewhere as well) can be summarised by the fact that the phrase, "we are all realists now", has become a kind of legal-academic cliché.[3] 17–01

Among those writers who described themselves (or who were described by others) as "realists", there was little by way of agreed views, values, subject-matter, or methodology. It has become commonplace to note that the differences among those writers were sufficiently significant that it approaches distortion even to refer to "the legal realists", as though they formed a coherent movement (one commentator went so far as to refer to legal realism as a "feel" or "mood"[4]). With those disclaimers noted, the chapter will try to note the general outline of this school of thought.

Many of the themes (and much of the tone) of the legal realists can be found in the work of Oliver Wendell Holmes (1841–1935) who (by most ways of delimiting the realist movement) wrote most of his influential work at an earlier period.[5] In *The Common Law*, published in 1881, Holmes famously wrote:

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[1] The parallel school of Scandinavian legal realism will be discussed in Ch. 22.

[2] Some commentators see the American legal realist movement as beginning with Joseph Bingham's article, "What is the Law?" Part I and II, 11 *Michigan Law Review* 1 and 109 (1912), though even Bingham's fellow realists found his work to be obscure and hard to understand. See, e.g. Jerome Frank, *Law and the Modern Mind* (Brentano's, New York, 1930), p. 296 n.17.

[3] See, e.g. William Twining, *Karl Llewellyn and the Realist Movement* (2nd ed., Cambridge University Press, Cambridge, 2012), p. 382; see also Joseph W. Singer, "Legal Realism Now", 76 *California Law Review* 465 (1988).

[4] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995), pp. 68–69.

[5] Most discussions of Holmes praise him as one of the greatest American judges and legal theorists. A more nuanced and less laudatory portrayal can be found in Gerald

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[6]

In these few sentences one can find most of the themes for which the American legal realist movement would be remembered.

Roscoe Pound (1870–1964) was another important precursor.[7] Pound, in his early work, advocated a "sociological jurisprudence", which assumed the sort of instrumental view of law that would be a theme of the realists[8]; and he also emphasised the distinction, central to later realist writing, between "law in books" and "law in action".[9]

The "realism" in "legal realism" is the use of that term in its colloquial meaning: "being realistic" as being worldly, perhaps somewhat cynical, looking beyond ideals and appearances for what is "really going on". This realism was made vivid in another image by Holmes: that we should cut through all the false moralistic language of the lawyers, judges and legal commentators, by taking on the perspective of "the bad man", who wants to know only what the courts are "likely to do in fact".[10] The "bad man" is the client who wants to know which actions will land him in jail or cost him a fine, and which will not; everything else is (to him) superfluous and beside the point.[11]

In overview: first, the main focus of this "realism" was on judicial

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J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, Dordrecht, 2011), pp. 43–77.

[6] Oliver Wendell Holmes, *The Common Law* (Mark De Wolfe Howe ed., Little, Brown and Co., Boston, 1963), p. 5.

[7] An influential early piece was Roscoe Pound, "Mechanical Jurisprudence", 8 *Columbia Law Review* 605 (1908).

[8] See, e.g. Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence" (Pt I), 24 *Harvard Law Review* 591 (1911); (Pt II) 25 *Harvard Law Review* 140 (1912). The complication with Pound is that his later work was sometimes critical of legal realism, and was itself the subject of legal realist critiques. See Roscoe Pound, "The Call for a Realist Jurisprudence", 44 *Harvard Law Review* 697 (1931); Karl N. Llewellyn, "Some Realism about Realism: Responding to Dean Pound", 44 *Harvard Law Review* 1222 (1931). American legal realism may also be traceable, at least in part, to Rudolf von Jhering and other German theorists of the late 19th century. See James E. Herget and Stephen Wallace, "The German Free Law Movement as the Source of American Legal Realism", 73 *Virginia Law Review* 399 (1987); Rudolf von Jhering, "In the Heaven for Legal Concepts: A Fantasy", 58 *Temple Law Quarterly* 799 (1985) (Charlotte L. Levy trans., John M. Lindsey, forward). The Free Law Movement will be discussed in Ch. 22.

[9] Roscoe Pound, "Law in Books and Law in Action", 44 *American Law Review* 12 (1910).

[10] See Oliver Wendell Holmes, "The Path of the Law", 10 *Harvard Law Review* 457 at 460–461 (1897). Postema points out that the equation of law with predictions of court decision is found in the earlier work of Frederick Pollock, and Holmes might have gotten his view from that source. Postema, *Legal Philosophy in the Twentieth Century*, pp. 52–55.

[11] Holmes, "The Path of the Law", pp. 459–462.

decision-making—asserting that a proper understanding of judicial decision-making would show that it was fact-centred; that judges' decisions were often based (consciously or unconsciously) on personal or political biases and constructed from hunches; and that public policy and social sciences should play a larger role.[12] Secondly, feeding into this central focus on adjudication was a critique of legal reasoning generally: that beneath a veneer of scientific and deductive reasoning, legal rules and concepts were in fact often indeterminate within legal reasoning and they were rarely as neutral as they were presented as being. It was the indeterminacy of legal concepts and legal reasoning that led to the need to explain judicial decisions in other terms (hunches and biases), and the opportunity to encourage a different focus for advocacy and judicial reasoning: social sciences and "public policy".[13] This chapter will discuss those themes at greater length, after first summarising legal formalism, for arguing against a formalist approach to law may be the only thing that all the legal realists had in common.

THE TARGET: FORMALISM

The form of legal analysis dominant at the time the realists were writing was criticised as "formalistic"[14]; this meant that the argument was 17–02

[12] Again here Holmes is an important early influence. See, e.g. Oliver Wendell Holmes, "Privilege, Malice, and Intent", 8 *Harvard Law Review* 1 (1894), where Holmes argued that decisions regarding privilege, which were often presented as having been the result of logical deductions from general premises, are in fact based on conscious or unconscious decisions of policy, which should be discussed more openly. Holmes stated: "Perhaps one of the reasons why judges do not like to discuss questions of policy . . . is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless." Holmes, "Privilege, Malice, and Intent", at 7.

[13] These two themes are clearly interconnected, so there is a certain arbitrariness in where one starts in the discussion, and even in where one places various sub-issues: for example, the emphasis on the social sciences could be as easily discussed under either of the two themes.

[14] The extent to which the legal realists overstated the "formalism" of the judges of this period (and prior periods) remains controversial. See, e.g. Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, Princeton, 2009) (arguing that the formalist characterisation was largely untrue). Tamanaha's view is criticised in Alfred L. Brophy, "Did Formalism Never Exist?", 92 *Texas Law Review* 383 (2013), and Tamanaha responds in Brian Z. Tamanaha, "The Mounting Evidence Against the 'Formalist Age'", 92 *Texas Law Review* 1667 (2014). If the realists were in fact badly misrepresenting the judges of the period, it is surprising that sophisticated contemporary critics of the realists, like Lon Fuller, Morris Cohen and Roscoe Pound, did not point this out. See, e.g. Lon L. Fuller, "American Legal Realism", 82 *University of Pennsylvania Law Review* 429 (1934); Morris R. Cohen, "On Absolutisms in Legal Thought", 84 *University of Pennsylvania Law Review* 681 (1936); Roscoe Pound, "The Call for a Realistic Jurisprudence", 44 *Harvard Law Review* 697 (1931).

presented as if the conclusion followed simply and inexorably from undeniable premises. Once the proper label was found for an object or action ("contract", "property", "trespass", and so on), the legal conclusion soon followed.[15] The notion that most judicial decisions should or could be deduced from general concepts or general rules, with no attention to real-world conditions or consequences, critics labelled "mechanical jurisprudence".[16] One example was the United States Supreme Court's decision in the "Sugar Trust Case", *United States v E. C. Knight Co*[17] The United States government had challenged a monopoly in the manufacture of sugar, but the challenge was rejected on the basis that regulating manufacturing was outside the Congress's power to regulate interstate *commerce*, however obvious it might seem that a company's controlling 98 per cent of the nation's sugar refining capacity might have implications for interstate commerce in that good. The case was decided on labels; real-world consequences were treated as irrelevant to (or subversive of) the proper legal analysis.[18]

An equally distinctive version of formalism was influential in American legal education. Christopher Columbus Langdell, Dean of the Harvard Law School and originator of the "Case Method" of teaching law,[19] famously advocated that "law is a science [and] that all the available materials of the science are contained in printed books [of judicial opinions]."[20] For Langdell, the principles and doctrines of this science of

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[15] In large part because of the American legal realists' critique, "formalism" has become primarily a pejorative term in legal commentary. There are, however, still some who treat the formal elements of law respectfully, or even enthusiastically: see, e.g. Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law", 97 *Yale Law Journal* 949 (1988); Frederick Schauer, "Formalism", 97 *Yale Law Journal* 509 (1988); Robert S. Summers, *Form and Function in a Legal System: A General Study* (Cambridge University Press, Cambridge, 2006). See also Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, Princeton, 1997), p. 25 ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is about form."). For a useful overview of past and current uses of "formalism", see Martin Stone, "Formalism", in Jules Coleman and Scott Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002), pp. 166–205.

[16] See Roscoe Pound, "Mechanical Jurisprudence", 8 *Columbia Law Review* 605 (1908).

[17] *United States v E.C. Knight Co*, 156 U.S. 1 (1895).

[18] *United States v E C. Knight Co*, 156 U.S. at 10–18; see also Holmes, *The Common Law*, p. 164 ("Bruns . . . expresses a characteristic yearning of the German mind, when he demands an internal juristic necessity drawn from the nature of possession itself, and therefore rejects empirical reasons." (footnote omitted)).

[19] In the Case Method, the subject is learned by reading a series of (appellate court) decisions in the area, analysing closely and critically the argument offered by the courts in their decisions.

[20] Christopher Columbus Langdell, "Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College" (1887), p. 98, quoted in Twining, *Karl Llewellyn and the Realist Movement*, pp. 11–12.

law could be "discovered" in cases, much as biologists discover the principles of their science in their laboratories.[21] Langdell's approach could be summarised as follows:

"To Langdell 'science' conjured up the ideas of order, system, simplicity, taxonomy and original sources. The science of law involved the search for a system of general, logically consistent principles, built up from the study of particular instances."[22]

Once the general principles have been found:

"... it is then the task of scholars to work out, in an analytically rigorous manner, the subordinate principles entailed by them. When these subordinate principles have all been stated in propositional form and the relations of entailment among them clarified, they will, Langdell believed, together constitute a well-ordered system of rules that offers the best possible description of that particular branch of law—the best answer to the question of what the law in that area *is*."[23]

Langdell tried to derive the law from basic axioms and logical deduction. Real-world consequences and moral evaluations were excluded from this process. In one discussion of whether a proper understanding of contract law entailed the "mailbox rule",[24] Langdell's response to the argument that one rule "would produce ... unjust and absurd results" was: "The true answer to this argument is, that it is irrelevant".[25]

REALISM AND LEGAL ANALYSIS

17–03 The attack on formalist legal reasoning could be divided into two separate criticisms:

[21] See Langdell, "Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College"; see also Christopher Columbus Langdell, "Preface", in *A Selection of Cases on the Law of Contracts* (1871), quoted in Twining, *Karl Llewellyn and the Realist Movement*, p. 11. Langdell was not the only theorist to view law as an inductive science. See John Dickinson, "The Law Behind Law", 29 *Columbia Law Review* 113 at 141–146 (1929). Joseph Beale also wrote that "law ... is not a mere collection of arbitrary rules, but a body of scientific principle." Joseph Henry Beale, *A Treatise on The Conflict of Law or Private International Law*, Vol. 1, Part 1 (Harvard University Press, Cambridge, Mass., 1916), p. 135.

[22] Twining, *Karl Llewellyn and the Realist Movement*, p. 12 (footnote omitted). See also Dennis Patterson, "Langdell's Legacy", 90 *Northwestern University Law Review* 901 (1995).

[23] Anthony T. Kronman, *The Lost Lawyer* (Harvard University Press, Cambridge, Mass., 1993), p. 171.

[24] The mailbox rule states that where a postal response to an offer is invited, the acceptance is valid upon posting. See, e.g. *Adams v Lindsell* (1818) 106 Eng. Rep. 250 (K.B.); *Henthorn v Fraser* [1892] 2 Ch. 27.

[25] Christopher Columbus Langdell, *A Summary of the Law of Contract* (2nd ed., Little, Brown, and Co., Boston, 1880), pp. 20–21.

1 Arguing against the idea that common law concepts and standards were "neutral" or "objective"; and

2 Arguing against the idea that general legal concepts or general legal rules could determine the results in particular cases.

As to the first, the realists argued that the premises lawyers used were open to question, and that labels and categories hid moral and policy assumptions, which should be discussed openly. An example of realist analysis can be seen on the losing side of one of the most famous American tort law cases, *Palsgraf v Long Island Railroad*.[26] In that case, a railroad employee was negligent in his attempt to assist a passenger; as a result of the negligence, the passenger dropped a package, which happened to contain explosives. An explosion occurred, which led to the injury of the plaintiff, a third party who was standing some distance away. The question in the case was whether someone should be liable for all injuries "proximately caused" by that person's negligence. The majority, in an opinion written by Judge (later Justice) Benjamin Cardozo, famously decided that the plaintiff could not recover, because the railroad employee had no duty to the plaintiff, and his negligence created liability only to the passenger he was trying to help. However, for the purpose of considering American legal realism, the more interesting opinion is the dissent, written by Judge William Andrews, which included a realist attack on the concept of "proximate cause":

> "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[27]

As to the second criticism, which Holmes famously summarised by the comment, "General propositions do not decide concrete cases",[28] the idea is that adjudication can rarely be accurately seen as a mechanical, logical deduction from general premises. At least in difficult cases,

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[26] 248 N.Y 339, 162 N.E. 99 (1928).

[27] *Palsgraf v Long Island Railroad*, 248 N.Y 339 at 352, 162 N.E. at 103 (Andrews, J., dissenting). A comparable critique of proximate cause was raised over 50 years earlier by Nicholas St. John Green, in "Proximate and Remote Cause", 4 *American Law Review* 201 (1870), reprinted in *Essays and Notes on the Law of Tort and Crime* 1–17 (George Banta Publishing Co., Menasha, Wisc., 1933).

[28] *Lochner v New York*, 198 U.S. 45 at 76 (1905) (Holmes, J., dissenting). Apparently, Holmes was willing to back up that claim, at least in informal contest: "[W]hen he was on the Supreme Court, Holmes used to invite his fellow justices, in conference, to name any legal principle they liked, and he would use it to decide the case under consideration either way. 'Cost-benefit analysis' is as malleable as 'rights talk.'" Louis Menand, *The Metaphysical Club* (Farrar, Straus and Giroux, New York, 2001), p. 340.

there remains a logical gap between the general legal proposition, or the statute couched in general terms, and the result in particular cases.[29]

Some of the later legal realists, like Jerome Frank,[30] took a more radical position: the legal phrases and concepts alone do not get us to a decision, and we are fooling ourselves and the public if we claim that they do. The final conclusion regarding, for example, whether "proximate cause" exists or not, will be based on unstated premises regarding public policy (or perhaps based on unstated biases or prejudices).

One can add a third point to the attack as well. Even when one can determine what the law is *and* it is sufficient to decide the case, it may be that the law should be changed. The American legal realists were certainly not the first to subject the law to moral criticism. However, the realists' attack on the pretensions of "legal science", and on the notion that law was a self-contained moral-logical system, created an opening for moral and policy criticism, for the possibility that legislative or judicial reform of the law might be morally and politically (and legally) legitimate. We can see Holmes in two sentences taking much of the power out of the argument from precedent and tradition:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[31]

For Holmes, a strong believer in judicial restraint (in judges deferring to legislative decisions and following precedent strictly[32]), this was an argument for *legislative* change of old common law rules. In the hands of other legal realists, however, the same argument was a justification for *judicial* reform of outdated rules.[33]

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[29] Holmes meant to refer to quite general legal concepts or principles. Holmes believed that specific legal rules *would* determine results in most legal cases, leaving an open question for judicial legislation only at a penumbra, where the application of the rule becomes unclear. See Holmes, *The Common Law*, p. 101; *Southern Pacific Co v Jensen*, 244 U.S. 205 at 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially"); Thomas C. Grey, "Molecular Motions: The Holmesian Judge in Theory and Practice", 37 *William & Mary Law Review* 19 at 32–36 (1995).

[30] See, e.g. Jerome Frank, "Are Judges Human?", 80 *University of Pennsylvania Law Review* 17 (1931).

[31] Holmes, "The Path of the Law", p. 469.

[32] See Oliver Wendell Holmes, "Law in Science and Science in Law", 12 *Harvard Law Review* 443 at 460 (1899), reprinted in *Collected Legal Papers* (Harcourt, Brace and Company, New York, 1920), pp. 210–243, at p. 239 ("I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province."); see also Grey, "Molecular Motions: The Holmesian Judge in Theory and Practice", pp. 26–34.

[33] See, e.g. Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921), pp. 98–141 ("The Judge as a Legislator").

The realist view of legal reasoning also had implications for legal education. Given the realist analyses and criticisms discussed above, it is not surprising that the realists tended to be scornful of Langdell's "science of law", and all aspects of legal education that seemed to follow from it. To the extent that one can speak of "a realist view" on education, it would primarily be one of following through on the implications of other realist views: that legal concepts should be taught in a way which demystified them; and that legal issues should be shown to be often underdetermined by legal rules alone, with policy arguments appropriate and necessary for resolution.[34]

REALISM AND THE COURTS

17–04 Judicial decision-making at the time of the realist critique was often portrayed (by judges in their opinions as well as by commentators) as being a nearly mechanical, nearly syllogistic move from basic premises to undeniable conclusion. The legal realist response was to argue that judges often have discretion, that judicial decisions were often in practice determined by factors other than the legal rules, and to move the focus from conceptual analysis to policy-based arguments and fact-finding. One can get a sense of legal realism just from the titles of some of its articles, e.g. "Are Judges Human?"; "What Courts Do In Fact"; "Transcendental Nonsense and the Functional Approach"; and "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision".[35]

The classical perspective of judicial decision-making was that judges decided cases by merely discovering the appropriate legal rule, a process that required simple logical deduction from basic principles. Legal realism offered a variety of counter-images of what they thought really went on in decision-making, a number of which are summed up in this slight caricature of realism: "judges in fact follow their instincts in deciding cases, making sham references to rules of law; generally they are themselves unaware of what they are doing, and persist foolishly in believing that they are being obedient to precedent."[36]

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[34] See Duxbury, *Patterns of American Jurisprudence*, pp. 135–149; William Fisher; Morton Horwitz and Thomas Reed eds., *American Legal Realism* (Oxford University Press, New York, 1993), pp. 270–294.

[35] Jerome Frank, "Are Judges Human?"; Jerome Frank, "What Courts Do In Fact", Parts I and II, 26 *Illinois Law Review* 645, 761 (1932); Felix Cohen, "Transcendental Nonsense and the Functional Approach", 35 *Columbia Law Review* 809 (1935); Joseph Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision", 14 *Cornell Law Quarterly* 274 (1929).

[36] Benjamin Kaplan, "Do Intermediate Appellate Courts Have a Lawmaking Function?", 70 *Massachusetts Law Review* 10 at 10 (1985).

There were (at least) two strands to realist discussion of judicial decision-making: that decisions were strongly underdetermined by legal rules, concepts and precedent (that is, that judges in many or most cases could have, with equal warrant, come out more than one way); and that judges were (and, by some accounts, should be) highly responsive to the facts, and the way the facts were presented, in reaching their decisions.[37] One commentator has gone so far as to describe the assertion, "in deciding cases, judges respond primarily to the stimulus of the facts of the case", as the "core claim" of American legal realism.[38]

The American legal realist, Karl Llewellyn, argued for the difference between "paper rules" and "real rules"—that we should not too quickly assume that announced "black-letter" legal rules were either accurate predictors of how courts decide cases or reliable summaries of how judges came to the decisions they did (nor should we conclude, he argued, that rules described or predicted how those subject to them would act).[39] He also argued for a greater congruence between legal rules and the social norms accepted by those subject to the law, especially for the rules within his specialty, commercial law. For example, Llewellyn argued that if business people see themselves as bound to a commercial transaction under a certain set of facts, the law should usually also treat them as bound. He was able to put these ideas into practice in his work as a primary author of the Uniform Commercial Code, a set of uniform laws that continues, to this day (with some amendments) to regulate much of commercial life within the United States.

It is important to note that the claim that general principles in fact *do not* determine the results of particular cases and the claim that they *cannot* are quite distinct.[40] The first is a statement about causation in the world: why judges decide cases the way they do. The second is a statement about logical possibility, the nature of language, or the nature of rules: an argument that one cannot derive in a deductive fashion the result in (some, most, all) legal cases from general principles.

The two claims are independent; one can affirm the first without affirming the second (and perhaps vice versa). Both themes were present in the writings of the legal realists. Both themes have become embedded in the way modern lawyers and legal academics think about law, and in

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[37] On the last point, see, in particular, Jerome Frank, *Courts on Trial* (Princeton University Press, Princeton, 1949).

[38] Brian Leiter, "American Legal Realism", in Dennis Patterson ed., *A Companion to the Philosophy of Law and Legal Theory* (2nd ed., Wiley-Blackwell, Oxford, 2010), pp. 249–266, at p. 257.

[39] Karl N. Llewellyn, "A Realistic Jurisprudence—The Next Step", 30 *Columbia Law Review* 431 at 438–443, 447–453 (1930). As earlier noted, the idea of distinguishing the law "in the books" from the law "in action" can be traced back at least to Roscoe Pound's work of a generation earlier. Pound, "Law in Books and Law in Action".

[40] A similar argument is presented in Leiter, "Legal Realism", pp. 265–269.

the way law is taught. If it was once subversive to think that extra-legal factors influence judicial decisions, it now seems naive to doubt it. And it is commonplace to assume, at least for relatively important and difficult cases, that strong legal arguments can be found for both sides.

There are obvious ties with the first theme discussed: the indeterminacy and lack of neutrality of legal concepts, and the inability to derive unique results in particular cases from general legal rules. If that was the state of the law in the abstract, then it comes as no surprise that judicial decisions cannot be based solely on these rules and concepts, and judges who claim otherwise were either fooling themselves or lying.

What was to fill the conceptual gap left when one's faith in the neutrality and determinacy of legal concepts was undermined? For many of the realists, the answer was social science: the understanding of how people actually behave, and the way in which legal rules reflect or affect behaviour. This turn to the social sciences can be seen in a number of places, including "The Brandeis Brief", a brief on legal issues that bases its legal conclusions on extensive sociological research. The "Brandeis Brief" was named after Louis Brandeis, a legal reformer who later sat as a Justice on the United States Supreme Court. The term refers in particular to a brief Brandeis co-wrote defending the constitutionality of a state statute limiting the maximum working hours for women.[41] "Containing two pages of legal argument and 95 pages of sociological and economic data about the conditions of working women's lives in factories, the Brandeis brief, by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality."[42]

This faith in the social sciences can also be seen indirectly through the work many realists did in the American "New Deal", creating administrative agencies and regulations meant to solve various social problems through the law.[43] The weak point of realist thinking in this area was the tendency towards technocracy, the belief that social scientific expertise by itself would be sufficient to lead to right results, missing the point that there is always a need for a moral or political structure within which to present (or to do) the empirical work; there could not be "neutral experts" on how society should be organised.[44]

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[41] *Muller v Oregon*, 208 U.S 412 (1908).

[42] Morton J. Horwitz, *The Transformation of American Law 1870–1960* (Oxford University Press, Oxford, 1992), p. 209. For a less laudatory view, see David Bernstein, "Brandeis Brief Myths", 15 *The Green Bag* 2d 9 (2011), available at *http://www.greenbag.org/v15n1/v15n1_articles_bernstein.pdf*.

[43] See generally Horwitz, *The Transformation of American Law 1870–1960*, pp. 213–246 ("Legal Realism, Bureaucratic State, and Law"). Neil Duxbury cautions against overstating the connection between the "New Deal" and realism in Duxbury, *Patterns of American Jurisprudence*, pp. 153–158.

[44] See Horwitz, *The Transformation of American Law 1870–1960*, pp. 217–246.

AN OVERVIEW AND POSTSCRIPT

The basic misunderstanding of American legal realism by some later writers turned on a confusion regarding the purpose and point of the realists' work. For example, when the realists stated that we should see law from the perspective of a prediction of what judges will do ("the bad man's" perspective[45]), later writers misunderstood the argument when they saw that as a conceptual claim.[46] **17–05**

As a conceptual claim, it would have obvious weaknesses. For example, how can a judge on the highest court see the law as a prediction of what the judges will do? The highest court is the final word on what the law will mean and there is no other court whose decisions the judges could try to predict.[47] Law is what guides judges (at least those acting in good faith), not merely the product of their actions. Additionally, legal rules help to constitute who counts as a judge.

The predictive theory is better understood as an attempt to shake up the overly abstract and formalistic approach many judges and legal scholars had used for discussing law. To put the matter another way, the realists wanted people in the legal profession to spend more time thinking about how law appears "on the ground" or (to change the metaphor) "at the sharp end": to citizens for whom the law means only a prediction of what the trial judge will do in their case (or a prediction of how the police will treat them on the street corner).

In various ways, American legal realism can be seen as the forerunner of the perspectives on law to be discussed in the following chapters: law and economics[48] (Ch. 18), critical legal studies, critical race theory and feminist legal theory (all in Ch. 19). The connection is often indirect: by undermining the confidence in the "science" of law and the ability to deduce unique correct answers from legal principles (as well as questioning the "neutrality" of those legal principles), the realists created a need for a new justification of legal rules and judicial actions. Also, the realists offered a set of arguments that could be used to support claims

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[45] See Holmes, "The Path of the Law", pp. 460–461.

[46] Compare H. L. A. Hart, *The Concept of Law* (3rd ed., Clarendon Press, Oxford, 2012), pp. 136–141 (a conceptual reading of the view) with Leiter, "Legal Realism", pp. 262–264.

[47] Richard A. Posner, *The Problems of Jurisprudence* (Harvard University Press, Cambridge, Mass., 1990), p. 224.

[48] One central figure in law and economics disclaims direct influence from legal realism. Richard A. Posner, *Overcoming Law* (Harvard University Press, Cambridge, Mass., 1995), p. 3. However, Posner does not consider the argument (first cogently presented by Arthur Leff, and summarised at the beginning of the next chapter) that legal realism led *indirectly* to law and economics, by undermining the more traditional approaches to law, with law and economics then filling the resulting judicial-academic vacuum.

of pervasive bias (against the poor, against women, or against minorities) in the legal system, tools that would be used by later critical movements.

There were more short-term reactions to American legal realism within American legal thought. Some people, both within and outside academia, became uncomfortable with the sceptical, cynical and occasionally nihilistic tone of the realists. The discomfort was especially strong during the Second World War, when commentators were trying to emphasise the superiority of democratic governance over Fascism, and again, after the war, when the same argument was being made relative to Communism.[49] If it was good versus evil, some were not always sure that the realists were "on the right side".[50] Some writers turned to natural law theory (discussed in Ch. 5), others sought a way to concede part of the realists' criticisms, while still affirming central "rule of law" values. This path led to the legal process school, discussed briefly in Chs. 6 and 22.[51]

Suggested Further Reading

17–06

Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, Oxford, 2013).

Neil Duxbury *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995), pp. 65–159.

William Fisher, Morton Horwitz and Thomas Reed eds., *American Legal Realism* (Oxford University Press, New York, 1993) (this book contains a collection of (excerpts from) many American legal realist articles, plus a thorough bibliography).

Jerome Frank, *Law and the Modern Mind* (Brentano's, New York, 1930).

Brian Leiter, "American Legal Realism", in Martin Golding and William A. Edmundson eds., *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell, Oxford, 2005), pp. 50–66.

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[49] See generally Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (University Press of Kentucky, Lexington, 1973). Purcell writes:

> "[The realists'] position raised two basic questions about traditional democratic theory. First, how could the idea of subjectivity of judicial decision be squared with the doctrine that free men should be subject only to known and established law, one of the hallmarks of republican as opposed to despotic government? Second, if the acts of government officials were the only real law, on what basis could anyone evaluate or criticise those acts? What, in other words, was the moral basis of the legal system in particular and of democratic government in general?"

Purcell, *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value*, p. 94.

[50] One thus comes across great article names like Ben W. Palmer, "Hobbes, Holmes, and Hitler", 31 *American Bar Association Journal* 569 (1945).

[51] For a discussion of this (traditional) view of the connection between American legal realism and legal process, see, e.g. Horwitz, *The Transformation of American Law* 1870–1960, pp. 247–268. For an argument that this traditional view is, at the least, too simplistic, see Duxbury, *Patterns of American Jurisprudence*, pp. 205–299.

—, "Legal Realism", in *A Companion to the Philosophy of Law and Legal Theory* (2nd ed., D. Patterson ed., Blackwell, Oxford, 2010), pp. 249–266.

—, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, Oxford, 2007).

Karl Llewellyn, "Some Realism about Realism—Responding to Dean Pound", 44 *Harvard Law Review* 1222 (1931).

Michael Lobban, "Legal Formalism", in Markus D. Dubber and Christopher Tomlins, eds., *The Oxford Handbook of Legal History* (Oxford University Press, Oxford, 2018), pp. 419–456.

Michael Martin, *Legal Realism: American and Scandinavian* (New York: Peter Lang, 1997).

Roscoe Pound, "The Call for a Realist Jurisprudence", 44 *Harvard Law Review* 697 (1931).

Dan Priel, "The Return of Legal Realism", in Markus D. Dubber and Christopher Tomlins, eds., *The Oxford Handbook of Legal History* (Oxford University Press, Oxford, 2018), pp. 457–477.

William Twining, *Karl Llewellyn and the Realist Movement* (2nd ed., Cambridge University Press, Cambridge, 2012).