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LEGAL REALISM AND LEGAL DOCTRINE

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The American Legal Realists¹ did not reject doctrine, because they did not reject the idea that judges decide cases in accordance with normative standards of some kind: “doctrine,” after all, is just a normative standard about what should be done, and not necessarily one formulated and made explicit by a statute, a court, or a treatise. A judge who decides cases based on the norm “this breach of contract is efficient” still decides based on a normative standard, even if it is not one that the law necessarily endorses. But the non-legal normative standards of yesterday can become the legally binding norms of tomorrow. What the Legal Realists taught us is that too often the doctrine that courts invoke is not really the normative standard upon which they *really* rely, and it was central to Legal Realism to reform the law to make the actual doctrine cited by courts and treatise writers correspond to the *actual* normative standards upon which judges rely. Doctrine remains so important today, as many of the contributions to this Symposium show, precisely because the realist law reform movement was successful in so many arenas.

All of these points were driven home to me almost twenty years ago when I was teaching at the University of Texas and had the opportunity to talk at some length with my colleague, the late great Professor Charles Alan

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¹ I shall refer hereafter simply to “Legal Realists.” On the profound differences between the American and the Scandinavian Legal Realists, see Brian Leiter, *Legal Realisms, Old and New*, 47 VAL. U. L. REV. 949 (2013).

Wright, then the President of the American Law Institute (ALI) and the senior author of perhaps the most important and influential treatise in American law of the past half-century, *Federal Practice and Procedure*.² Wright seemed a quintessential “doctrinalist,” perhaps the greatest and most influential of his generation, and yet he was also an unabashed Legal Realist. Understanding that apparently puzzling combination of attributes is essential to understanding the real essence of American Legal Realism.

Wright’s self-description as a Legal Realist must, of course, seem strange to anyone who recalls how the Legal Realists of the 1920s greeted the newly created American Law Institute and its proposed Restatements of the Law. The great torts scholar and reformer Leon Green declared in 1928 that “[t]he undertaking to restate the rules and principles developed by the English and American courts finds in the field of torts a most hopeless task.”³ Charles Clark, for whom Wright later clerked on the U.S. Court of Appeals for the Second Circuit, denounced the *Restatement of the Law of Contracts* as having “the rigidity of a code . . . without the opportunity for reform and advance which a code affords.”⁴ And no student of Legal Realism or the American Law Institute can forget Yale psychologist Edward Robinson’s impassioned denunciation in the pages of the *Yale Law Journal* in 1934:

And so the American Law Institute 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. . . .

. . . .

[But s]uch bodies of logically consistent doctrines as those formulated by the experts of the American Law Institute are obviously not to be considered as efforts to understand the legal institution as it is. When 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. There is a difference between the two occasions. The church fathers had far more power than does the Law Institute to enforce belief in their conclusion.⁵

² CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* (4th ed. 2008).

³ Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1014 (1928).

⁴ Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 650 (1933).

⁵ Edward S. Robinson, *Law—An Unscientific Science*, 44 YALE L.J. 235, 260-61 (1934).

Notwithstanding the vituperative rhetoric of many early Legal Realists,⁶ it is not inexplicable why Wright, the first law professor to lead the ALI, a professed Realist and a protégé of Judge Clark, would assume its mantle.

The beginnings of an answer can be found in one of the seminal documents of Legal Realism, Herman Oliphant's 1927 address as President of the Association of American Law Schools, tellingly titled "A Return to Stare Decisis."⁷ The title is notable precisely because a "return" to the binding force of precedents would be a return to a regime in which the holdings of earlier courts—their articulations of doctrine—actually did bind the decisions of later courts on relevantly similar facts, which was precisely Oliphant's aspiration. Oliphant was worried that the legal doctrines promulgated by courts and scholars had become too general and abstract, ignoring the particular factual contexts (or "situation-types," as Realists called them) in which the original disputes arose.⁸ The result was that these doctrines no longer had any value for judges in later cases, who simply "respond to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outworn abstractions in [prior] opinions and treatises."⁹ Oliphant argued that a meaningful doctrine of stare decisis could be restored by making legal doctrines more fact-specific and tailoring them to the particular factual scenarios which brought forth judicial hunches about fairness and justice. So, for example, instead of pretending that there is a single, general rule about the enforceability of contractual promises not to compete, Oliphant suggested that we attend to how the courts are really deciding cases about the validity of such promises: for instance, enforcing those promises when made by the seller of a business to the buyer, but not enforcing them when made by an employee to his employer.¹⁰ In the former scenario, Oliphant claimed, the courts were simply doing the economically sensible thing (no one would buy a business, after all, if the seller could simply open up shop next door and compete); in the latter scenario, courts were taking account of the prevailing informal norms governing labor relations at the time, which disfavored such promises

⁶ Not all were quite so negative; Walter Wheeler Cook, for example, welcomed "the movement inaugurated by the formation of the Institute [as] deserv[ing] the cordial support of the legal profession and of the country at large." Walter Wheeler Cook, *The American Law Institute*, THE NEW REPUBLIC, Mar. 21, 1923, at 89.

⁷ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).

⁸ See Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 112 (2010) (defining "situation-types" as recurring fact patterns such as when a seller of a business promises not to compete with the buyer, and then tries to break the promise).

⁹ *Id.* at 75.

¹⁰ *Id.* at 159.

as unjust in light of the unequal economic position of employer and employee.

Now we can see both what the critics of the ALI were worried about, and why Wright could, like Oliphant, consider himself a thorough-going Realist. The Realist critics of the ALI feared that the Restatements would simply codify "over-general and outworn abstractions" that courts might recite but which shed no light on what the courts were doing.¹¹ By contrast, Wright conceived of the Restatements in precisely the spirit in which Oliphant called for a return to stare decisis: namely, as a way of restating legal doctrines in ways that were more fact-specific, and thus more descriptive of the relevant grounds of decision. In this regard, it is surely worth noting that the *Restatement (Second) of Contracts* in fact incorporates something very close to Oliphant's distinction between different kinds of promises not to compete!¹²

At times, the Legal Realists got carried away with this approach. Consider Leon Green's remarkable 1931 textbook on torts,¹³ which was organized *not* by the traditional *doctrinal* categories (for example, negligence, intentional torts, strict liability), but rather by the factual scenarios or situation-types in which harms occur: "surgical operations," "keeping of animals," "traffic and transportation," and so forth. The premise of such an approach was that there was not a law of torts per se, but many laws of torts specific to different situations in which injuries occur. By characterizing the rules in ways specific to these recurring factual scenarios, the rules would better capture the fact-specific intuitions about fairness and justice that actually motivated the courts. Those who took over the Green casebook later relaxed this method of organization in favor of more traditional doctrinal section headings, indicating that it had probably gone too far in the direction of making governing doctrines fact-specific.¹⁴ The Restatements have not gone to the extremes of Green's first edition of the torts casebook, but they have, in their way, maintained an allegiance to the realist heritage exemplified by Oliphant and Wright.

Over time, Realism has, to be sure, come to be associated with many other doctrines which are far removed from the Realism Oliphant, Green, and Wright envisioned—a Realism, it is worth emphasizing, that was the dominant strand among writers associated with that movement, from Karl

¹¹ *Id.* at 75.

¹² RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

¹³ LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (1st ed. 1931).

¹⁴ LEON GREEN ET AL., CASES ON THE LAW OF TORTS (2d ed. 1977).

Llewellyn to Underhill Moore.¹⁵ Those who think of Realism as standing for what we might call the “gastrointestinal theory of judicial decision”—what the judge ate for breakfast explains the decision—would, indeed, find it puzzling for a Realist to take doctrine seriously, let alone serve at the helm of the American Law Institute. But no Realist ever advocated the gastrointestinal theory, and only one, Jerome Frank, ever came close to elevating the all-too-human psychological idiosyncrasies of individual judges to the status of the pivotal factor in legal decisionmaking.¹⁶ But Frank’s view was properly rebutted by Felix Cohen’s apt observation in the *Columbia Law Review* in 1935. “Judges are human,” wrote Cohen, “but they are a peculiar breed of humans, selected to a type and held to service under a potent system of government controls A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as . . . a product of social determinants.”¹⁷

Although most Realists rejected Jerome Frank’s extremism for reasons similar to Felix Cohen’s, they never produced a systematic theory of the “social determinants” of judicial decisions. Instead, they settled for observations, like Max Radin’s, that “the standard transactions with their regulatory incidents are familiar ones to [the judge] because of his experience as a citizen and a lawyer,” where this background and experience explains the predictable way in which judges respond to differing situation-types.¹⁸ In recent decades, Professor Douglas Laycock has made a similar point, in his seminal, realist-style debunking of the irreparable injury rule. The irreparable injury rule states that courts will not enjoin misconduct when money damages will suffice to compensate the victim. According to Professor Laycock,

Courts do prevent harm when they can. Judicial opinions recite the rule constantly, but they do not apply it. . . . When courts reject plaintiff’s choice of remedy, there is always some other reason, and that reason has nothing to do with the irreparable injury rule. . . . An intuitive sense of

¹⁵ See Brian Leiter, *Rethinking Legal Realism: Toward A Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997) (explaining and refuting an earlier understanding of Realism), reprinted in BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 15 (2007).

¹⁶ Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 27 (1931) (“The evidence is overwhelming that our present judicial system is a disguised system of so-called ‘Cadi justice.’”).

¹⁷ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

¹⁸ Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 358 (1925).

justice has led judges to produce sensible results, but there has been no similar pressure to produce sensible explanations.¹⁹

The decisionmakers' "intuitive sense of justice," inspired by what Oliphant called "the stimulus of the facts in the concrete case before them" was central to the Realists' theory of how judges decide cases. As Judge Joseph Hutcheson put it in his famous 1929 article *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause."²⁰ Thus, Karl Llewellyn advised young lawyers in training that, while they must provide the court "a technical ladder" justifying the result, what the lawyer must really do is "on the facts . . . persuade the court your case is sound."²¹

One reason many scholars misunderstand the relationship between Legal Realism and doctrine relates to the more recent reinvention of Legal Realism by the Critical Legal Studies ("CLS") writers in the 1980s, who also obscured the profound influence of Realism on American law, including through the work of the American Law Institute.²² For example, the CLS version of Realism made much out of an argument against the "public-private" distinction, based on the reasoning of Columbia economist Robert Hale and philosopher Morris Cohen, figures who were in reality on the margins of the Realist movement.²³ The argument runs basically as follows: since governmental decisions create and structure the so-called private sphere (namely, by creating and enforcing a regime of property and contractual rights), there should be no presumption of "non-intervention" in this "private" realm (namely, the marketplace) because it is essentially a

¹⁹ DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* AT vii, ix (1991).

²⁰ Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

²¹ KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 71 (11th prtg. 2008).

²² Brian Tamanaha's recent misrepresentations of Realism have not helped either. See his *BEYOND THE REALIST/FORMALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009) and the documentation of the misrepresentations of both Realism, and of some of his primary sources in Leiter, *Legal Formalism*, *supra* note 8. It should constitute scholarly malpractice to cite Tamanaha's careless book for any proposition other than that nineteenth-century jurists and scholars recognized that common-law judges make law (i.e., they were not all Natural Lawyers) and that judging was not a mechanical process ("Vulgar Formalism"). But neither of the preceding claims were at issue in the aforementioned realist dispute with formalism, and Tamanaha wrongly assimilates Realism to the CLS view that judging is political.

²³ It bears noting that Robert Hale was not a lawyer, but an economist, who had relatively little involvement with the major Realists. And Cohen was, in fact, generally a critic of Realism. Nonetheless, this flawed argument became central to the CLS version of Legal Realism.

public creature. There is, in short, no natural baseline beyond which government cannot pass without becoming “interventionist” and non-neutral, because the baseline itself is an artifact of government regulation. Despite the blatant non-sequitur involved (it does not follow that it is normatively permissible for government to regulate the “private” sphere from the mere fact that government created the “private” sphere through establishing a structure of rights), this argument has proved very popular with legal academics beyond CLS.²⁴ But it has almost nothing to do with Legal Realism, which, at its core, was concerned with providing lawyers practical help in understanding the reasoning behind appellate court decisions.

The CLS writers also proffered a more radical and implausible claim about the indeterminacy of legal reasoning than any put forward by the Legal Realists. Realists like Llewellyn had argued that the “law” was indeterminate largely by appealing to familiar methods of legal and judicial reasoning, and showing how these methods often conflicted, leading, for example, to a “strict” and a “loose” interpretation of a precedent, or to opposed ways of reading the same statutory provision.²⁵ CLS writers, by contrast, took a rather different and more theoretically ambitious tact. They located the source of “indeterminacy” in law in one of two sources: either in general features of language itself (drawing here—not always accurately—on the semantic skepticism associated with Wittgenstein and Derrida²⁶); or in the existence of “contradictory” moral and political principles that they claimed underlie the substantive law, understood at a suitable level of abstraction.²⁷ This foray into theoretically ambitious, but often philosophically unsound, critiques of legal reasoning explains why, as Professor Rock observes in his contribution to this Symposium, “CLS has not . . . had anywhere near the impact on the culture of legal education or legal thinking that” Realism has.²⁸

²⁴ See, e.g., J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990) (applying Hale’s critique to First Amendment doctrine); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 917-19 (1987) (arguing for the relevance of Hale’s critique).

²⁵ For citations and discussion, see Leiter, *supra* note 15.

²⁶ For a critical discussion of this aspect of CLS, see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 568-72 (1993) (criticizing the CLS arguments for legal indeterminacy).

²⁷ The most famous example of this strategy of CLS argument is Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

²⁸ Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019, 2026 (2015).

Professor Rock's essay also calls attention to one of the most puzzling aspects of Legal Realism for an American common lawyer: the failure of Realism to get any traction in the most important commonwealth jurisdiction, England. Professor Rock, with his illuminating examples from corporate or "company" law, rightly characterizes this difference as more stylistic than substantive, since "in a field such as corporate law . . . market and institutional pressures demand practical solutions to practical problems" that turn out to be similar despite "different implicit jurisprudence in the two systems."²⁹ But why did Legal Realism, which seems so obvious and sensible to leading American lawyers, from Edward Levi³⁰ to Edward Rock, gain so little traction in England?

I begin with an illustrative anecdote. Peter Birks, the late Regius Professor of Civil Law at Oxford and a leading scholar of the law of restitution, was a visiting professor at the University of Texas when I taught there. Once, in the faculty lounge, while we were discussing Legal Realism, he told me that the central problem with Realism was that it was "immoral"—not false, but *immoral*! Of course, Birks thought it false too, but by deeming it "immoral" he meant that it encouraged the pernicious idea that legal doctrines do not significantly constrain the decisions, at least those of the appellate courts. And I take it he worried that by suggesting as much, it might lead judges to make decisions based on "policy" rather than law. But as Professor Rock's discussion of the substantive convergence of American and English "corporate" law demonstrates, the policy considerations that are explicit on the American side are also at work, albeit implicitly, on the English side. So why the hostility to this realist insight?

I venture three hypotheses as to why the other great common law legal system should be so "skeptical" about realist skepticism about the traditional role of doctrine. First, the English system of higher education requires the young person to commit to a course of study at a very early age (late teens), while all American students take law as a post-graduate degree *after* completing a different course of study, which might be economics or history or psychology. One perhaps predictable result is that the English youngster who has given over so much of his or her life to the study of legal doctrine is more inclined to take it seriously, at "face value," than the person who has had some exposure to historical, economic, and psychological perspectives on human institutions.

Second, the English judiciary is still largely a civil service system, with advancement predicated on professional competence as assessed by peers.

²⁹ *Id.*

³⁰ EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

This characteristic obviously has an important disciplining effect on the judiciary, restricting, one imagines, the freedom in argument and interpretation so characteristic of American judges, who are either elected or appointed for politically partisan reasons. So perhaps English judges *really are* more committed to doctrine than their American counterparts? Third, as Grant Gilmore argued long ago,³¹ the existence of a federal system in America means that there are fifty-one jurisdictions in one country—the federal legal system and that of the fifty states—with the result that almost any legal argument can claim a pedigree in some court’s decision. That too might make the realist diagnosis of the indeterminacy of legal doctrine and reasoning more apt in the American than the English context.

And, yet, as Professor Rock’s examples show, the Americans and the English end up in roughly similar places when it comes to the corporate law issues he considers. That fact strongly suggests that English indignation at Realism is misplaced. It may be that arbiters of disputes, whether American or English, share enough common normative intuitions that they reach similar outcomes—that might be explained by the demands of capitalism in the modern era, the socialization of the decisionmakers, or both. The crucial fact, though, is that judges resolve disputes, and they do so by reference to normative standards that enjoy sufficient resonance in the communities in which they are binding. Whether those normative standards are official “legal doctrine” or only educated “situation-sense” does not matter: the legitimacy and viability of legal orders depend on quite a bit more than whether or not its outcomes are licensed by doctrine. It was the ambition of American Legal Realism, to be sure, to bring existing doctrine “down to earth,” meaning down to the level of the normative expectations of those whose disputes came before the courts. One reason American legal education has veered so heavily away from “merely” doctrinal education to interdisciplinary education is precisely because the normative expectations for behavior to which courts are quite plainly sensitive are not those captured by the doctrinal categories of yesteryear. Economic efficiency norms are, unsurprisingly in capitalist democracies, the most important, but sensitivity to political and social norms has clearly played a crucial role in adjudication in other domains.³² There may come a day in which Legal Realism is banal, and that is what the Realists would have expected: for we could get to a point where our legal doctrine tracks judicial intuitions about

³¹ Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1039-40, 1042, 1046 (1961).

³² See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

what is normatively important on the facts of the case, and at that point, we will have no need for Realist skepticism about existing doctrinal categories. In the United States, we may not yet be there, but we are getting close.