

# Understanding Legal Realism

Brian Z. Tamanaha\*

The emergence of legal realism in the early twentieth century is widely seen as a pivotal event in the U.S. legal tradition. A legal theorist recently attested to “the enormous influence Legal Realism has exercised upon American law and legal education over the last sixty years.”<sup>1</sup> Above all else, legal realism is credited with bringing about a revolutionary shift in views about judging in the American legal tradition. The standard account, as put by a legal historian, is this:

Formalist judges of the 1895–1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics. . . .

The Legal Realists of the 1920s and '30s, tutored by Holmes, Pound, and Cardozo, devastated these assumptions . . . . They sought to weaken, if not dissolve, the law–politics dichotomy, by showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges’ personal values.<sup>2</sup>

This conventional narrative about the Realists, told many times over, is now virtually taken for granted. A recent book by political scientists, for example, asserted:

Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences . . . . In the 1920s, however, a group of jurists and legal philosophers, known collectively as “legal realists,” recognized that judicial discretion was quite broad and that often the law did not mandate a particular result.<sup>3</sup>

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\* Benjamin N. Cardozo Professor of Law, St. John’s University School of Law. This Article was written during my year in residence as a Member of the School of Social Sciences, Institute for Advanced Study. I thank the Institute for its support. The Article is a modified version of Chapters Five and Six of my forthcoming book, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (forthcoming 2009). I thank the Princeton University Press and the Texas Law Review for allowing me to use this material in both venues. I also thank Mark Fenster for his comments on an earlier draft, and I thank the staff of the law review for their terrific work on the Article.

1. BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15 (2007).

2. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 187 (1988).

3. VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 30 (2006).

A recent article on judging reiterated the point:

According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. . . . For the realists [on the other hand], the judge “decides by feeling, and not by judgment; by ‘hunching’ and not by ratiocination” and later uses deliberative faculties “not only to justify that intuition to himself, but to make it pass muster.”<sup>4</sup>

Much of this conventional account is misleading. Legal realism is largely misunderstood because the work of the Realists is interpreted within a false set of historical and theoretical assumptions. The aim of this exploration is not only to produce a more accurate account of the Realists, but more so to *rescue* realistic views about judging from the clutches of this misunderstanding. The term *realism*, as it is used in this Article, has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. Realism refers to an awareness of the flaws, limitations, and openness of law—an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases (the skeptical aspect). But realism about law and judging also conditions this more skeptical awareness with the understanding that legal rules nonetheless can work; that judges can abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges can render generally predictable, legally based decisions (the rule-bound aspect). A realistic view holds that the rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the skepticism-inducing side, although this is an achievement that must be earned, is never perfectly achieved, and is never guaranteed.

The seminal formulation of this view of judging is *The Nature of the Judicial Process*, in which Cardozo explicitly invoked the term *realism* in this balanced sense:

Those, I think, are the conclusions to which a sense of realism must lead us. No doubt there is a field within which judicial judgment moves untrammelled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. In such cases, all that the parties to the controversy can do is to forecast the declaration of the rule as best they can, and govern themselves accordingly. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances

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4. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007).

where there is neither obscurity nor collision nor opportunity for diverse judgment.<sup>5</sup>

Although they are often painted today as skeptics,<sup>6</sup> the Legal Realists also generally adhered to this balanced realism about judging. Moreover, it will be argued, many in the legal fraternity at the time—and for some time earlier—viewed judging in similar terms.

The case for this will be made initially by emphasizing the ubiquity of expressions about the skeptical aspects of judging to which the Realists and their forebears were exposed. A steady stream of frankly realistic views of judging circulated from very early in, and throughout the course of, the legal careers of the Realists Pound and Cardozo, and even Holmes.<sup>7</sup> Such commentary was so prevalent that these respective generations of jurists virtually could not help but learn to see judging in realistic terms. Parts II, III, and V will show that judges, lawyers, and legal academics had long been aware of the openness of law and the problematic complexities of judging. The mistake of the conventional account is not just that it tells otherwise, but also that it misleadingly isolates the Legal Realists from their contemporaries, who understood judging in much the same way. The core insights about judging announced by the Legal Realists, moreover, substantially overlap with the views of the Historical Jurists<sup>8</sup> of several decades earlier, as Part III will document, and Part IV will explain. Besides establishing the much earlier presence of realistic views about judging, this overlap reveals how terribly wrong the conventional account is—for Historical Jurists are today identified with legal formalism,<sup>9</sup> which the Legal Realists are commonly thought to have destroyed.

The account of realism constructed in this Article—which pries apart (but rejoins) *realism about judging* from “legal realism”—drains away a good deal of the conventional story about the Legal Realists. What, then, was legal realism about? To answer this question, Part I will consider a set of identity issues that has long dogged legal historians: “The questions of *who* were the Realists and *what* was Realism are not trivial and are still contested.”<sup>10</sup> Debates among historians over *who* and *what* rarely entertain

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5. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 128 (1921).

6. *See infra* notes 282–304 and accompanying text.

7. *See infra* Part II.

8. *See* David M. Rabban, *The Historiography of The Common Law*, 28 *LAW & SOC. INQUIRY* 1161, 1164–65 (2003) (book review) (describing the school of historical jurisprudence as emphasizing history as the key to understanding law, rather than as theories of natural law or analytical jurisprudence).

9. For an example that draws this connection between the Historical Jurists and legal formalism, see William P. LaPiana, *Jurisprudence of History and Truth*, 23 *RUTGERS L.J.* 519, 539–42, 555–57 (1992). *See also* David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 *THEORETICAL INQUIRIES L.* 541, 567–78 (2003) (surveying the work of nine Historical Jurists).

10. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 1–2 (1995) (emphasis added).

the possibility that beneath the label there was *nothing* distinctive—nothing unique or unifying—about the Legal Realists. So much has been said and written about the Legal Realists that it seems they *must* have been about *something* important. A theorist who has written extensively on the Legal Realists recently reinforced this sentiment, gushing, “American Legal Realism was, quite justifiably, the major intellectual event in 20th century American legal practice and scholarship.”<sup>11</sup>

This Article will throw doubt on this standard refrain. It is often said today, “We are all realists now.”<sup>12</sup> The evidence presented in this Article will suggest that, with respect to views about judging,<sup>13</sup> at least three decades before the arrival of the Legal Realists, “They were all realists then too.” The standard portrait of the Legal Realists as a band of pioneering jurists shining a realistic light on judging to illuminate a previously darkened age advances a gross misunderstanding of our legal history. As Part V will draw out, what is today seen as the dawning of realism about judging is instead properly understood as just one instance of a number of skeptical outbursts that have occurred over the past two hundred years owing to unhappiness with the state of the law. All along, however, realistic views of judging have circulated within the legal culture even when not at issue. The reconstruction completed in this Article will, in effect, simultaneously confirm the insights of realism while dissolving the historical distinctiveness of the Legal Realists as a group.

These preliminary claims are undoubtedly tough to swallow—and remain to be backed up below. The Legal Realists are well-known figures, after all, and the conventional story is anchored in a background narrative with famous confirming elements like the *Lochner* case,<sup>14</sup> which purportedly was born of the deluded views the Realists railed against. According to this narrative, the Realists picked up the mantle of the Progressives and joined the fight against laissez-faire formalist judges, finally defeating the obstructionist reactionary courts in 1937 and helping to pave the way for the New Deal.<sup>15</sup> This narrative will be responded to in Part VII. It, too, turns out to be mostly a mirage based upon a lopsided view of events and fallacious timing. As a foretaste of the basic flaw in this story, consider this excerpt from the first

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11. LEITER, *supra* note 1, at 1.

12. *E.g.*, George Packer, *Unrealistic*, NEW YORKER, Nov. 27, 2006, at 83, 83.

13. The scholars associated with legal realism made novel contributions in areas other than judging, as will be indicated later, especially by their promotion of the social-scientific study of law. *See infra* notes 35–38 and accompanying text. This Article focuses on their supposedly radical views about judging, for which they are best known, to show that what they said about judging had often been said before.

14. *Lochner v. New York*, 198 U.S. 45 (1905).

15. The link between the Legal Realists and the New Deal is drawn in broad terms in G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1025–28 (1972).

sentence of a seminal history about the New Deal: “[B]y the end of 1937 the active phase of the New Deal had largely come to an end.”<sup>16</sup>

Although the foregoing might sound like an effort to discredit the Legal Realists, it is not. The conventional portrayal is a distortion of what they wrote and believed. This is a forgivable error, since a few of the Realists deliberately struck a radical pose that earned them criticism for unduly exaggerating the skeptical aspects of judging without appreciating the more rule-bound aspects. As their writings at the time and thereafter reveal, however, the Realists always appreciated both sides but chose to play up the skeptical side. This will be explained in Part VI. Despite what is commonly thought, the Legal Realists were not radical skeptics about judging. In her historical study of the Realists, Laura Kalman put it concisely: “The realists pointed to the role of idiosyncrasy in law, but they believed in a rule of law—hence they attempted to make it more efficient and more certain.”<sup>17</sup> Their goal was to improve the predictability of law, not to argue that judging was a fraud. This reconstruction of the Legal Realists is necessary to recover their more balanced position about judging, a position that has much to offer.

### I. The Accidental Birth of Legal Realism

Karl Llewellyn in 1930 published a modest essay with an outsized title: *A Realistic Jurisprudence—The Next Step*.<sup>18</sup> Also in 1930, Jerome Frank published *Law and the Modern Mind*, his impudent assault on what he portrayed as prevailing delusions about law and judging, with a chapter titled “Legal Realism.”<sup>19</sup> Perhaps in a pique, perhaps in haste and distracted by other pressing commitments, Roscoe Pound, the target of mild criticism from Llewellyn and some sharp barbs from Frank,<sup>20</sup> critically responded the following year in *The Call for a Realist Jurisprudence*.<sup>21</sup> In collaboration with Frank, both were alarmed to find themselves in a brawl with the preeminent jurist in legal academia (while also reveling in it); Llewellyn immediately countered in *Some Realism About Realism—Responding to Dean Pound*.<sup>22</sup> “Legal realism” was born in this skirmish.

The main protagonists were themselves unsure about what the *realist* label meant—as made plain by the later-revealed private correspondence

16. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 3 (1995).

17. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 231 (1986).

18. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

19. JEROME FRANK, *LAW AND THE MODERN MIND* 42–47 (1930).

20. N.E.H. HULL, *ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* 180–81 (1997).

21. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

22. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

between Pound and Llewellyn.<sup>23</sup> Seeking to pin down the terms of their dispute, over a three-week period Llewellyn sent Pound two overlapping but different lists of possible “Realists,” one with forty-four names, and he sent yet a third list of candidates to Frank.<sup>24</sup> Pound bemusedly responded that his own position could not be distinguished from the views expressed by several scholars on the list.<sup>25</sup> When reviewing Llewellyn’s proposed roll of Realists, Arthur Corbin protested that they “ha[d] so many and important differences as to make it highly misleading to classify them under a name,”<sup>26</sup> and Hessel Yntema offered the same objection.<sup>27</sup> Two years later, Leon Green explicitly denied that he was a “Realist,” or that he even knew what the label meant.<sup>28</sup> The final list Llewellyn put forth in his published response to Pound was pared down to twenty names, including Corbin, Yntema, and Green.<sup>29</sup> Llewellyn indicated that many more individuals than those named were partaking in realism.<sup>30</sup> He also made what must be considered an odd—and since overlooked—statement: “Their differences in point of view, in interest, in emphasis, in field of work, are huge. They differ among themselves well-nigh as much as any of them differs from, say, Langdell.”<sup>31</sup>

This haphazard origin helps explain why historians and theorists continue to disagree over what the label stood for and who qualified as a Legal Realist. Although the exchange indelibly cemented Llewellyn at the center of legal realism, some have argued that he was ill-placed to define it given his relative inexperience and his thin jurisprudential work to that date; Llewellyn, according to historian Morton Horwitz, produced a “distorted picture of the meaning and significance of Realism.”<sup>32</sup> But if not Llewellyn and Frank—who both separately and in collaboration coined *realism* as a label in the legal context—then who? A decade earlier Cardozo had used *realism* in passing connection with judging (“a sense of realism must lead us”),<sup>33</sup> and Felix Frankfurter had used *realism* to convey the idea that courts in constitutional cases were giving greater attention to the factual basis for legislation.<sup>34</sup> But neither attached any jurisprudential pretensions to the term.

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23. HULL, *supra* note 20, at 202–20.

24. The various lists are reproduced as an appendix to HULL, *supra* note 20, at 343–46.

25. *Id.* at 215.

26. *Id.* at 207 (quoting a letter from Corbin to Llewellyn).

27. *Id.* at 208 (citing a letter from Yntema to Llewellyn).

28. Leon Green, *Innocent Misrepresentation*, 19 VA. L. REV. 242, 247 (1933).

29. Llewellyn, *supra* note 22, at 1226 n.18.

30. *Id.*

31. *Id.* at 1234.

32. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 171 (1992).

33. CARDOZO, *supra* note 5, at 128.

34. See Felix Frankfurter, *Hours of Law and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 366 (1916) (“Courts, with increasing measure, deal with legislation affecting industry in the light of a realistic study of the industrial conditions affected.”).

Beyond the shared, skeptical take on the role of law in judging, the main characterizations of legal realism involve: the promotion of an instrumental view of law as a means to serve social ends;<sup>35</sup> the pursuit of social-scientific approaches to law;<sup>36</sup> the attempts of reformers seeking to transform legal education in order to improve legal practice and judging;<sup>37</sup> the initiatives of reformers seeking to advance a progressive political agenda in and through law;<sup>38</sup> or some amalgamation of all four. The assumption that the “Legal Realists” were a discrete group is severely tested by these alternatives for two reasons: the individuals identified as Realists did not agree on all positions,<sup>39</sup> and others not named as Realists embraced one or more of these positions.<sup>40</sup>

Furthermore, scholars disagree over whether realism was a school of thought, a movement, a full-blown jurisprudential theory, or just a “cynical state of mind.”<sup>41</sup> Llewellyn denied that there was a “school of Realists.”<sup>42</sup> He placed an exclamation point on this by closing the article with a deliberate repetition: “A *group* philosophy or program, a *group* credo of social welfare, these realists have not. They are not a group.”<sup>43</sup> In a later work, Llewellyn obscurely clarified: “What realism was, and is, is a method,

35. ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 2 (1982).

36. See SCHLEGEL, *supra* note 10, at 8 (characterizing empirical social science as one of the defining pursuits of the Realists).

37. See KALMAN, *supra* note 17, at 97 (“[T]he overriding concern of the average realist was to make the study of law more ‘realistic’ . . .”).

38. See HORWITZ, *supra* note 31, at 170; HULL, *supra* note 20, at 203 (both acknowledging a connection between realism and political reform).

39. The main internal divide relates to the social-scientific vein of realism, which some heartily endorsed and engaged in, while others took it less seriously. See SCHLEGEL, *supra* note 10, at 5 (describing the diverse attitudes of Realists toward empirical social science).

40. William Draper Lewis, the dean of Pennsylvania Law School and later director of the American Law Institute, see SCHLEGEL, *supra* note 10, at 266, was a strong progressive critic of the courts, and advocated introducing social science into legal academia, but has not been considered a Realist by anyone. See generally William Draper Lewis, *The Social Sciences as the Basis of Legal Education*, 61 U. PA. L. REV. 531, 532–33 (1913) (articulating his belief that laws are a form of expression of social ideas, and therefore must adapt as social ideas change). Harvard Law Professor Albert Kales, also not recognized as a Realist, published a highly skeptical critique of the Supreme Court. Albert M. Kales, “*Due Process, the Inarticulate Major Premise and the Adamson Act*,” 26 YALE L.J. 519 (1917). Also not on any list of Realists were Robert Eugene Cushman, Charles G. Haines, and Max Lerner. Although political scientists, all published realistic reformist law-review articles on judging. Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922); Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922); Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668 (1933).

41. WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, AND POLITICS* 6 (3d ed. 1979).

42. Llewellyn, *supra* note 22, at 1233.

43. *Id.* at 1256.

nothing more, and the only tenet involved is that the method is a good one. ‘See it fresh,’ ‘See it as it works’ . . . .”<sup>44</sup>

With these details in mind, it is plausible to think that events would have played out quite differently had Pound not responded in a manner that magnified the significance of *realism*.<sup>45</sup> A number of historians and theorists take the position that Pound and Llewellyn, notwithstanding their disagreement, substantially coincided in their views of law and judging,<sup>46</sup> which suggests that the fight was less a battle over substance than an unintended collision that followed from a clash of egos. Llewellyn and Frank initially used *realism* loosely to mark an unfavorable contrast with what they sought to advance beyond, by demeaning it as “unrealistic.” Neither defined the term when they first used it, and apparently neither initially had in mind a concrete group of “realistic” thinkers. But Pound’s criticism, by putting weight on the term *realism*, sent them scrambling in self-defense.<sup>47</sup> It became imperative for Llewellyn and Frank, unwilling to admit that they were casually spouting big claims, to come up with distinguishing content and representative jurists, which proved elusive.

## II. Ideas the Legal Realists (and Their Forebears) Were Exposed To

In the year of the fateful exchange—1931—most of the people identified as core Realists (Karl Llewellyn, Jerome Frank, Charles E. Clark, William O. Douglas, Thurman Arnold, Wesley Sturges, Herman Oliphant, and Leon Green) were between thirty-seven and forty-three years of age, just entering the prime of their professional careers. A few were a decade or so younger (Felix Cohen); and a few were a decade or so older (Walter Wheeler Cook, Max Radin, Underhill Moore, and Arthur Corbin).<sup>48</sup> Pound was sixty years old, at the peak of his influence. With a touch of paternalism, Pound referred to the Realists as “our younger teachers of law,”<sup>49</sup> before proceeding to set them straight.

The core group of Realists completed their legal educations between 1910 and 1920<sup>50</sup>—a period suffused with forthright realism about judging that would have seized the attention of any intellectually curious person. In a

44. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 510 (1960).

45. See *supra* note 21 and accompanying text.

46. See, e.g., HORWITZ, *supra* note 32, at 171 (arguing that “historians have been misled into looking for sharper distinctions between [Pound’s] sociological jurisprudence and [Llewellyn’s] Legal Realism than are justified”); SUMMERS, *supra* note 35, at 23 (suggesting that Pound and Llewellyn both subscribed to a broader, pragmatic instrumentalist theory and that their “famous dispute . . . in the *Harvard Law Review* in 1931 was really an ‘inside’ affair”).

47. See *supra* notes 21–24 and accompanying text.

48. The ages and matriculation dates of major Realists can be found in the biographic appendix to SCHLEGEL, *supra* note 10, at 263–69.

49. Pound, *supra* note 21, at 697.

50. SCHLEGEL, *supra* note 10, at 263–69 (listing the credentials of the core Realists).

well-publicized 1908 speech before Congress, President Theodore Roosevelt offered this realistic appraisal of judicial decisions:

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.<sup>51</sup>

His speech was a reproach of the hostile reception some courts were according to legislative efforts to ameliorate the social and economic dislocations of the time.<sup>52</sup>

Unfriendly court treatment of legislation also provoked a more concrete campaign to rein in the judiciary. A number of states—including California, Oregon, and Arizona—enacted recall provisions to unseat judges who rendered unpopular decisions;<sup>53</sup> a bill proposing recall of federal judges was introduced unsuccessfully in Congress;<sup>54</sup> and a proposal for the recall of individual judicial decisions was also seriously debated. The main argument on behalf of these various recall provisions was that, on certain issues, judges make political decisions. Professor W.F. Dodd, an advocate of recall, wrote in 1909:

In this field [of public policy,] decisions of the courts necessarily depend not upon any fixed rules of law but upon the individual opinions of the judges on political and economic questions; and such decisions, resting, as they must, upon no general principles, will be especially subject to reversal or modification when changes take place in the personnel of the courts.<sup>55</sup>

Senator Robert L. Owen of Oklahoma asserted in 1911 that judicial decisions are, to a degree, a function “of previous predilection, of previous fixed opinion, of the point of view which has molded itself in the personal

51. Theodore Roosevelt, Address to the Senate and the House of Representatives (Dec. 8, 1908), 41 CONG. REC. 16, 21, reprinted in CARDOZO, *supra* note 5, at 171.

52. See, e.g., *Lochner v. New York*, 198 U.S. 45, 58 (1905) (striking down legislation intended to improve the health and safety of bakers as being outside the state’s police power).

53. E.g., *The Adoption of the Recall in California*, 23 GREEN BAG 634, 635 (1911).

54. S. 3112, 62d Cong. § 2 (1911); see 62 CONG. REC. 3359 (daily ed. July 31, 1911) (statement of Sen. Robert L. Owen) (introducing the bill).

55. W.F. Dodd, *The Growth of Judicial Power*, 24 POL. SCI. Q. 193, 198 (1909); see also W.F. Dodd, *The Recall and the Political Responsibility of Judges*, 10 MICH. L. REV. 79, 87 (1911) (arguing that although “judges steeped in an outworn philosophy are hardly the persons to determine industrial and social policies,” a recall provision would be “a dangerous expedient”).

experience of the judge and become a part of him.”<sup>56</sup> Since judges are political actors in this respect, Owen argued, they should be subject to political accountability. A pro-recall article averred that the public believed that the “great interests” influence judicial selection, and therefore that citizens should have a say in the matter.<sup>57</sup> Bar associations, meanwhile, vigorously fought the recall provisions as a grave threat to judicial independence,<sup>58</sup> and the issue was debated in law reviews.<sup>59</sup> Most everyone in legal circles would have been familiar with the charges about personal and political influences on judging.

Jerome Frank obtained his law degree in 1912.<sup>60</sup> That same year, Joseph Bingham contended in the *Michigan Law Review*:

[T]o require judicial reasoning to proceed always within the confines of promulgated rules and principles, will not prevent individual bias from affecting a decision. It could be demonstrated that judges are able to manipulate generalized expressions to suit their preferences as easily as they could plausibly justify the same decision by free reasoning. Indeed previous judicial and legislative expressions may be misused as a plausible mask to conceal the real motives or incapacity of the judge.<sup>61</sup>

Felix Frankfurter gave a speech at the 1912 *Harvard Law Review* annual dinner asserting that “constitutional law, in its relation to social legislation, is not at all a science, but applied politics, using the word in its noble sense.”<sup>62</sup> A 1912 book, *Our Judicial Oligarchy*, presented numerous quotes, including statements from several governors, in a chapter that detailed “popular distrust of the courts,” a distrust grounded on the widespread view that courts were biased in favor of capitalist interests.<sup>63</sup> Also in 1912,

56. Robert L. Owen, *The Right of Election and Recall of Federal Judges*, 5 ME. L. REV. 82, 93 (1912).

57. H.T. Walsh, *The Recall of Judges*, Address Delivered Before the Washington State Bar Association at its Annual Meeting, in 10 OKLA. L.J. 349, 354 (1912).

58. E.g., *Report of the Committee to Oppose Judicial Recall*, 1 A.B.A. J. 276 (1915); *Report of the Committee to Oppose Judicial Recall*, 2 A.B.A. J. 441 (1916); *Report of the Committee to Oppose Judicial Recall*, 4 A.B.A. J. 400 (1918); see also, e.g., *Bar Association Denounces Recall*, N.Y. TIMES, Aug. 28, 1912, at 6 (citing a report prepared by fifty-four American lawyers denouncing judicial recall as “dangerous to the country”); *Opposes Recall of Judges: Former Justice Brown Tells Bar Association it Is Political Folly*, N.Y. TIMES, Aug. 31, 1911, at 2 (describing an address by former Supreme Court Justice Henry B. Brown to the American Bar Association in which Justice Brown “bitterly opposed the recall of Judges”); *Taft Elected Head of Bar Association*, N.Y. TIMES, Sept. 4, 1913, at 8 (reporting that former President William H. Taft, on the eve of his selection to head the American Bar Association, gave a speech arguing that federal judges should not be subject to recall).

59. See *supra* notes 55–57 and accompanying text.

60. SCHLEGEL, *supra* note 10, at 264.

61. Joseph W. Bingham, *What Is the Law?* (pt. 2), 11 MICH. L. REV. 109, 113 n.32 (1912).

62. Felix Frankfurter, *The Zeitgeist and the Judiciary*, Address at the Harvard Law Review Annual Banquet (Mar. 30, 1912), in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938*, at 3, 6 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939).

63. GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* 8 (1912).

Gustavus Myers published an 800-page history of the Supreme Court making the case that “the Supreme Court as an institution has throughout its whole existence incarnated into final law the demands of the dominant and interconnected sections of the ruling class.”<sup>64</sup> A lawyer charged in the 1912 *Yale Law Journal* that corporate lawyers who become judges bring a subconscious class bias onto the court,<sup>65</sup> adding: “So long as our judicial opinions are formed by the mental processes of the intellectual bankrupts these will only be crude justifications of predispositions acquired through personal or class interests and sympathy, ‘moral’ superstitions, or whim and caprice.”<sup>66</sup>

Karl Llewellyn obtained his law degree in 1919.<sup>67</sup> John Henry Wigmore, one of the most famous scholars of the day, wrote in 1917 that common law judges constantly make law, and that “our own Supreme Courts have long been drawing copiously and consciously from this unbounded field of public policy.”<sup>68</sup> In 1918, Columbia law professor Thomas Reed Powell published *The Logic and Rhetoric of Constitutional Law*, arguing that judges decide constitutional questions based upon their “common sense” determinations.<sup>69</sup> “Judges argue from undisclosed assumptions . . . . Judges have preferences for social policies . . . .”<sup>70</sup> Powell revealed, “An able judge of one of our state courts tells me that he is usually able to decide cases as his independent judgment dictates.”<sup>71</sup> A 1918 article in the *California Law Review*, *The Psychologic Study of Judicial Decisions*, contended: “[E]very judicial opinion necessarily is the justification of the personal impulses of the judge, in relation to the situation before him, and that the character of these impulses is determined by the judge’s life-long series of previous experiences, with their resultant integration in emotional tones.”<sup>72</sup>

One of Llewellyn’s best known realist pieces was a 1950 article showing that the canons of statutory interpretation allow judges a great deal of leeway, and often come in opposing pairs.<sup>73</sup> In 1917, two years before Llewellyn graduated,<sup>74</sup> Ernst Freund published an article disclosing the extensive leeway courts possess in statutory interpretation, discussing how, for

64. GUSTAVUS MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 7 (1912).

65. Theodore Schroeder, *Social Justice and the Courts*, 22 *YALE L.J.* 19, 26 (1912) (book review).

66. *Id.* at 26–27.

67. SCHLEGEL, *supra* note 10, at 266.

68. John Henry Wigmore, *The Judicial Function*, in *IX SCIENCE OF THE LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS*, at xxvi, xl (1917).

69. Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15 *J. PHIL. PSYCHOL. & SCI. METHODS* 645, 646 (1918).

70. *Id.* at 648.

71. *Id.* at 652.

72. Theodore Schroeder, *The Psychologic Study of Judicial Decisions*, 6 *CAL. L. REV.* 89, 93 (1918).

73. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395, 401–06 (1950).

74. SCHLEGEL, *supra* note 10, at 266.

example, a court's treatment of legislative explicitness could result in either of "two opposite contentions" being "equally plausible."<sup>75</sup> Freund asserted that courts have ways to override or ignore rules of construction, "[a]nd most of the current maxims stated in textbooks and judicial decisions are of little value."<sup>76</sup> He argued that the frequently invoked notion of legislative intent "is in reality often a fiction."<sup>77</sup> And he advocated that "in cases of genuine ambiguity courts should use the power of interpretation consciously and deliberately to promote sound law . . ."<sup>78</sup> Bingham and Powell were on Llewellyn's list of Realists,<sup>79</sup> it should be noted, but none of the other aforementioned individuals who made realistic observations about judging were named. Frankfurter was on an early list but was removed from the final version.<sup>80</sup>

The older generation of Realists—including Corbin, Cook, Radin, and Moore, who earned their legal degrees between 1889 and 1902<sup>81</sup>—were also saturated in realistic discourse about judging in that formative period, as were Pound and Cardozo. Pound studied law at Harvard for a year, from 1889 to 1890, departing without a degree.<sup>82</sup> Benjamin Cardozo also entered the practice of law sans degree, after studying at Columbia from 1889 to 1891.<sup>83</sup> Law students and new lawyers in this period were repeatedly exposed to unadulterated realism about judging. In 1887, Columbia law professor Munroe Smith realistically described the process by which judges engage in "judicial legislation," altering the law while claiming to adhere to stare decisis:

[W]hen new law is needed, the courts are obliged to "find" it, and to find it in old cases. This can commonly be done by re-examination and re-interpretation, or, at the worst, by "distinction." By a combination of these means, it is even possible to abrogate an old rule and to set a new one in its place. When the old rule is sufficiently wormholed with "distinctions," a very slight re-examination will reduce it to dust, and a re-interpretation of the "distinguishing" cases will produce the rule that is desired.<sup>84</sup>

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75. Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 214, 214–15 (1917).

76. *Id.* at 217.

77. *Id.* at 231.

78. *Id.*

79. HULL, *supra* note 20, at 344–45.

80. *Id.* at 343.

81. DAVID W. ROBERTSON, *THE CORRESPONDENCE BETWEEN LEON GREEN AND CHARLES MCCORMICK, 1927–1962*, at 54 n.68 (Robin Meyer ed., 1988) (providing a graduation date for Radin); SCHLEGEL, *supra* note 10, at 264–67 (providing graduation dates for Corbin, Cook, and Moore).

82. SCHLEGEL, *supra* note 10, at 267.

83. Robert M. Jarvis & Phyllis Coleman, *Benjamin N. Cardozo: New York Giant*, 13 MARQ. SPORTS L. REV. 63, 72–73 (2002).

84. Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887).

Smith took the view, as did Holmes and the later Legal Realists, that law is the product of contests over social and individual interests,<sup>85</sup> and that an essential purpose of law is to advance “public policy.”<sup>86</sup> Smith advocated a “juristic science” that strives to organize legal principles and rules in “systematic form”; “but it is not this cloistered science that discovers and formulates the rules themselves,” he cautioned.<sup>87</sup> “This is done by the science that is in constant contact with the daily life of the street and the market. It would perhaps be more accurate to call this the *art* rather than the science of law.”<sup>88</sup>

Sylvester Pennoyer, former governor of Oregon,<sup>89</sup> published a historical study in 1896 in the leading *American Law Review* that denounced judicial review as devoid of a constitutional authorization, concluding with a flourish on the evils brought by this judicial usurpation of power:

[L]aws solemnly passed . . . are set aside at the mere whim of a body of men not amenable to the people through holding a life term of office, a body which has repeatedly and almost uniformly shown the disposition to apotheosize aggrandized wealth and corporate power above the general good.<sup>90</sup>

Harvard law professor John Chipman Gray asserted in a jurisprudence article in the 1892 *Harvard Law Review* that one of the main sources of law is “the opinion of judges on matters of ethics and public policy; . . . [though] judges themselves have a deprecatory habit of minimizing it, and of speaking as if their sole function was to construct syllogisms.”<sup>91</sup>

A remarkably modern-sounding article was published in the *American Law Review* in 1893, *Politics and the Supreme Court of the United States*, by Walter Coles, a St. Louis lawyer. Coles examined a number of important Supreme Court decisions of the past century, systematically matching the political backgrounds of the Justices with their decisions:

Viewing the history of the Supreme Court at large, and stating conclusions somewhat broadly, it may be said that its adjudications on constitutional questions have in their general tendencies conformed, in a greater or lesser degree, to the maxims and traditions of the political party whose appointees have, for the time being, dominated the court.<sup>92</sup>

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85. *Id.* at 122–23.

86. *Id.* at 130.

87. *Id.* at 126.

88. *Id.*

89. Pennoyer was governor of Oregon from 1886 until 1894. Adrian M. Tocklin, Pennoyer v. Neff: *The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 80 n.33 (1997).

90. Sylvester Pennoyer, *The Case of Marbury v. Madison*, 30 AM. L. REV. 188, 202 (1896).

91. John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 33 (1892).

92. Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182, 207 (1893).

He criticized several Supreme Court opinions as “characterized by the utmost vagueness,”<sup>93</sup> “weak, incoherent, and uncandid,”<sup>94</sup> and best explained not by the stated legal reasoning but by the political views of the judges. “[T]o say that no political prejudices have swayed the court,” noted Coles with consummate realism, “is to maintain that its members have been exempt from the known weaknesses of human nature, and above those influences which operate most powerfully in determining the opinions of other men.”<sup>95</sup> Especially when no clear precedent exists, he asserted, a judge’s conclusions “will be largely controlled by the influences, opinions and prejudices to which he happens to have been subjected.”<sup>96</sup>

In 1894, renowned former judge and law professor John Dillon, at the height of his professional eminence, published a realistic account of judging that conveyed the essence of what Cardozo would say almost thirty years later:<sup>97</sup>

[I]n so far as the judges are compelled, as they not infrequently are, to exercise what is really a creative power and to make a new rule—in a word to exercise, albeit covertly or circuitously the function of legislation—it seems to me that they are rightfully, because necessarily, within the domain of ethics, and that in such cases the domains of ethics and law are not and cannot be delimited in advance, nor until the line is drawn by the judges in and by the opinion and judgment which are given in the particular case.<sup>98</sup>

The following year, 1895, was memorably inauspicious for realist views about judging. The Supreme Court issued a surprising interpretation of the Sherman Antitrust Act in *United States v. E.C. Knight Co.*,<sup>99</sup> holding that the Act did not apply to the sugar trust, which monopolized well over ninety percent of the production of sugar; the tenuous reasoning of the Court was that the trust’s control of the *refining* of sugar did not involve interstate commerce.<sup>100</sup> The Court then declared the income tax unconstitutional in *Pollock v. Farmers’ Loan and Trust Co.*,<sup>101</sup> a decision that was all the more controversial because the illness of one Justice had left the first vote on the case evenly divided, and another Justice changed his position at the second

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93. *Id.* at 204 (criticizing the majority and concurring opinions in *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871)).

94. *See id.* at 205 (criticizing the Court’s opinion in *Juilliard v. Greenman*, 110 U.S. 421 (1884)).

95. *Id.* at 182.

96. *Id.* at 190, 189–90.

97. *See supra* note 5 and accompanying text.

98. John F. Dillon, *Our Law: Its Essential Nature and Ethical Foundations and Relations*, 3 COUNSELLOR 99, 103 (1894).

99. 156 U.S. 1 (1895).

100. *Id.* at 16–17.

101. 158 U.S. 601, 637 (1895).

hearing.<sup>102</sup> In the third case, *In re Debs*,<sup>103</sup> the Court upheld a lower-court injunction prohibiting union workers' interference in railway operations during the Pullman labor strike.<sup>104</sup> Howls of protest greeted each decision, which also drew critical fire in law reviews.<sup>105</sup> The lesson critics drew from the decisions was that the court protected "the propertied class."<sup>106</sup> Judge Seymour Thompson wrote of the income tax decision, "Our judicial annals do not afford an instance of a more unpatriotic subserviency to the demands of the rich and powerful classes."<sup>107</sup> The Democratic platform for the 1896 presidential election asserted, "[W]e especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the law of the States and rights of citizens, become at once Legislators, Judges and executioners . . . ."<sup>108</sup>

Realism was also present in the generation that preceded Pound, Cardozo, and the older Realists. Oliver Wendell Holmes began to practice law in 1867, and he became a contributing editor to the *American Law Review* in 1870.<sup>109</sup> The 1870s saw heightened public criticism of the courts as servants doing the bidding of the railroads, corporations, and the rich.<sup>110</sup> In a closely watched decision that created a national stir, the Supreme Court in 1870 held unconstitutional the Legal Tender Act, which had established the greenback.<sup>111</sup> Justice Miller, dissenting, warned that the majority's reasoning "would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial

102. PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 136, 136–37 (1969) (recounting the "unsatisfactory result" produced by Justice Jackson's absence from the first decision due to illness and Justice Shiras's switch in the second decision to vote to strike down the income tax).

103. 158 U.S. 564 (1895).

104. *Id.* at 600.

105. The outrage provoked by this trio of cases is described in 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 421–26 (1922). Alan Furman Westin also explained that during this period, "the Supreme Court created a wide disenchantment with constitutional processes." Alan Furman Westin, *The Supreme Court, the Populist Movement and the Campaign of 1896*, 15 J. POL. 3, 3 (1953).

106. WARREN, *supra* note 105, at 424.

107. Seymour D. Thompson, *Government by Lawyers*, Address Delivered Before the Wash. State Bar Association at its Annual Meeting, in 30 AM. L. REV. 672, 685 (1896).

108. Democratic Party Platform (July 9, 1896), *reprinted in* WARREN, *supra* note 105, at 424 n.2.

109. SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 118 (1989).

110. Beginning in the 1870s, public dissatisfaction with the Supreme Court's decisions began to build. *See, e.g., The Week*, NATION, Apr. 27, 1871, at 281 (criticizing the Court for its reversal of very recent precedent, which occurred after a recent change in the membership of the Court). For a discussion of those decisions and their effects on the Populist movement prior to the 1896 elections, see Westin, *supra* note 105.

111. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1870).

construction . . . .”<sup>112</sup> Holmes would lodge a similar objection thirty-five years later in his *Lochner* dissent.<sup>113</sup> The very next year, following the appointment of two new Justices, the Court reversed itself to uphold the validity of the Act.<sup>114</sup> An editorial in *The Nation* warned that such sudden shifts in constitutional interpretation that result from the seating of new judges “will weaken popular respect for all decisions of the Court,” because public suspicion is heightened when “the judges who have been added to the bench since the former decision are men who were at the bar when that decision was rendered, and were interested professionally and personally in having a different decision.”<sup>115</sup> Public speculation was rampant that President Grant had appointed Justices William Strong and Joseph P. Bradley, who created the new majority, owing to their views about the Act—a suspicion which Grant privately confirmed.<sup>116</sup> His Secretary of the Treasury George S. Boutwell stated in a letter to a fellow Administration official, “A court without political opinions is a myth . . . and as the Supreme Court must be political let it be right politically rather than wrong.”<sup>117</sup>

Recognition that politics may penetrate judging was not limited to the U.S. Supreme Court. An 1870 article addressing “judge-made law” observed matter-of-factly that “the excision of politics from the judicial mind is impossible.”<sup>118</sup> The author argued that it was preferable to allow judges to openly express their views in political arenas—a practice which was frowned upon—rather than to compel the judge “to retire to the bench in the political garb and colors of his party, there to fight for the cause in secret, and shelter his animosity under the pretext of law.”<sup>119</sup> An essay about a Pennsylvania high-court judge published in 1874 made the unadorned observation—as if it were obvious—that “[e]ven on the Bench political and Constitutional

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112. *Id.* at 638 (Miller, J., dissenting).

113. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (decrying the majority’s reliance on “Mr. Herbert Spencer’s Social Statics” to strike down a New York labor law).

114. The Legal Tender Act was held invalid in *Hepburn*, 75 U.S. (8 Wall.) at 625, but held valid the following year in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553–54 (1871). In the interim, a seat was added to the Court, and Justice Grier resigned, allowing President Grant to appoint Justice William Strong and Justice Joseph P. Bradley, both of whom voted to uphold the Act. Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 346–47 (1935).

115. *The Week*, *supra* note 110, at 281.

116. *See* Ratner, *supra* note 114, at 348, 351 (referencing an alleged conversation between Grant and his Secretary of State wherein Grant claimed to know of Strong and Bradley’s favorable views on the constitutionality of the Legal Tender Act).

117. *Id.* at 353.

118. *The Civil Code of the State of New York: Relations of Judge-Made Law to a Code* (pt. 3), 2 ALB. L.J. 450, 451 (1870).

119. *Id.*

questions will arise which judges must decide, and will decide according to their political convictions.”<sup>120</sup>

Holmes’s single most famous line is probably: “The life of the law has not been logic: it has been experience.”<sup>121</sup> He first wrote this in an 1880 review of Langdell’s contracts casebook, while criticizing Langdell for overemphasizing logical symmetry. Holmes was not the first to make this point, however. In 1873, when Holmes was still a juristic neophyte, the lawyer–editors of the leading *Albany Law Journal* dismissively scoffed that it is “notoriously untrue” to assert that law is the “perfection of human reason.”<sup>122</sup> They identified this kind of talk as a “tendency common to the professors of all departments of knowledge” to extol their subject above all others.<sup>123</sup> The editors then voiced a criticism that closely prefigures Holmes’s later objection to Langdell:

If circumstances arise to make the application of the rule unfavorable to the best and broadest interests of the people or of the State, and an abrogation of it is sought on the ground of expediency, the jurist is ready with the argument that it is better that the law, once founded on reason, *should preserve its symmetry and logical continuity* than that the innovations of *experience* should be allowed to mar its beauty and endanger its “perfected reason.”<sup>124</sup>

Holmes, the master of epigrams, said it more concisely, but others said it before him.

Also in 1873, an essay in the same journal made these bluntly realistic observations about judging:

It is in the application of the law to individual cases, in the exercise of that license of discretion necessarily vested in the judge, that the danger lies. . . . The power to oppress has changed hands, and the interpreter of the law has become more powerful than its maker. He is to decide upon its purposes. In the vast abyss of precedents, he will ever be liable to find those that will give him a show of authority for what he wishes to do, and can shelter himself from impeachment behind subtle distinctions.<sup>125</sup>

Holmes’s 1905 *Lochner* dissent, criticizing the majority on the grounds that the Constitution did not enact Herbert Spencer’s views or laissez-faire economic theory,<sup>126</sup> is one of the most famous dissents in the history of U.S.

120. Eli K. Price, An Obituary Notice of Chief Justice John Meredith Read, Address Before the American Philosophical Society (Dec. 18, 1874), in 14 PROC. AM. PHIL. SOC’Y 271, 273 (1876).

121. Book Review, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES).

122. *The Scientific Basis of Law*, 7 ALB. L.J. 321, 321 (1873).

123. *Id.*

124. *Id.* (emphasis added).

125. *Forensic Eloquence*, 7 ALB. L.J. 7, 7 (1873) (emphasis added).

126. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

law. A dozen years earlier—in 1893—lawyer C.B. Labatt had articulated *precisely* the same argument in the *American Law Review*.<sup>127</sup> Labatt wrote that a Pennsylvania Supreme Court decision striking down as unconstitutional a statute that prohibited mine owners from compensating employees in credit at company stores rather than in cash—an abusive practice at the time—“breathes the very spirit of Mr. Herbert Spencer himself.”<sup>128</sup> Labatt criticized the recent trend of “freedom of contract” decisions, arguing that “there is no difficulty in escaping the preposterous conclusion which we are invited to accept, that this constitutional provision was intended to serve the purpose of stereotyping and perpetuating the *laissez faire* theories of doctrinaire economists.”<sup>129</sup> The courts’ dismissive treatment of legislation, Labatt wrote, “throws a flood of light upon the prejudiced attitude of [the courts], and strikingly illustrates the strength of the prepossessions which influence them in the consideration of these questions.”<sup>130</sup> He suggested that the courts’ tendency to disfavor labor legislation showed “the effect of the distorted medium of class prejudices through which most of the judges have viewed such questions.”<sup>131</sup>

To recite these various realism-infused and often skeptical observations about judging, it must be emphasized, is not to suggest that Holmes, Pound, Cardozo, and the Realists actually read or knew about any particular example, but rather to show that realistic observations were swirling about early in—and throughout—the legal careers of these respective generations of thinkers. Holmes was vocal in his realism, gifted with words, and had a superior platform as high-court judge from which to spread his views, but he was far from the lonely iconoclast he is often painted as. By the time the Legal Realists arrived on the scene, realism about judging had circulated inside and outside of legal circles for at least two generations.

### III. Core “Realistic” Insights About Judging Were Already Well-Known

It is not just that realistic observations were openly expressed well prior to the Realists. Virtually all the core insights about judging associated with the Realists were prominently stated decades before, often by Historical Jurists. Assertions about judging typically attributed to the Realists—ignoring the fact that the individuals identified as such did not agree on all

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127. See C.B. Labatt, *State Regulation of the Contract of Employment*, 27 AM. L. REV. 857, 863–64 (1893). There are several reasons to believe that Holmes would have read the article: this was the leading law review of the day; Holmes worked for the journal early in his career and contributed a number of articles to it over time, see *supra* note 110 and accompanying text; the article discusses a Massachusetts Supreme Court case in which Holmes had participated, see generally *Commonwealth v. Perry*, 28 N.E. 1126 (Mass. 1891), and the author singled Holmes out for praise. Labatt, *supra*, at 869.

128. Labatt, *supra* note 127, at 864.

129. *Id.* at 872.

130. *Id.* at 866–67.

131. *Id.* at 869.

points—will be set forth below, followed by similar assertions made around or prior to 1900. I have selected this arbitrary cutoff, drawn some twenty years before the claimed emergence of Legal Realism, to dramatize the point that what are now construed as scandalous revelations by the Realists were in fact old news.

The Realists are known for emphasizing that legal rules can be interpreted in various ways, and that how judges interpret the rules will be a function of their views and surrounding social forces. Christopher Tiedeman, a well-known Historical Jurist, forcefully made the same cluster of points in 1896:

If the Court is to be considered as a body of individuals, standing far above the people, out of reach of their passions and opinions, in an atmosphere of cold reason, deciding every question that is brought before them according to the principles of eternal and never-varying Justice, then and then only may we consider the opinion of the Court as the ultimate source of the law. This, however, is not the real evolution of municipal law. The *bias and peculiar views* of the individual judge do certainly exert a considerable influence over the development of the law. . . . The opinion of the court, in which the reasons for its judgment are set forth, is a most valuable guide to a knowledge of the law on a given proposition, but we cannot obtain a reliable conception of the *effect* of the decision by merely reading this opinion. This thorough knowledge is to be acquired only by studying the *social and political environment* of the parties and the subject matter of the suit, the present temper of public opinion and the scope and character of the popular demands, as they bear upon the particular question at issue.

Tiedeman advised that to understand a legal ruling one “must look beneath the judicial opinion” and take into consideration “the pressure of public opinion and the influences of private interests” revolving around the case.<sup>132</sup>

The Realists insisted that one of the main tasks of lawyers is to predict outcomes—“[o]ur business is prophecy,” said Radin<sup>133</sup>—and counseled that this cannot be done well by attention to the rules only. Llewellyn asserted that not until one understands the flexibility judges possess does one “appreciate how little, in detail, [one] can predict out of the rules alone; how much [one] must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them.”<sup>134</sup> But this too was said much earlier. Frederick Pollock, the eminent English legal historian and jurist, wrote in 1882, “The object of legal science [like natural

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132. Christopher G. Tiedeman, *The Doctrine of Stare Decisis: And a Proposed Modification of its Practical Application, in the Evolution of the Law*, Address Delivered at a Meeting of the State Bar Association of New York, in *Dictum and Decision*, 6 COLUM. L. TIMES 35, 39 (1892).

133. Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 362 (1925).

134. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND ITS STUDY* 70 (Steve Sheppard ed., Oxford Univ. Press 2008) (1930) (emphasis omitted).

science] . . . is likewise to predict events. The particular kind of events it seeks to predict are the decisions of courts of justice.”<sup>135</sup> Prediction was the job not only of the lawyer, according to Pollock, but of the judge as well, who, “following on the whole the same process as the advising counsel, makes a scientific prediction with reference to an ideal standard” of the correct legal answer.<sup>136</sup> Prior to the turn of the century, the notion that lawyers were engaged in prediction was not unusual. In 1896, a year before Holmes emphasized prediction in *The Path of the Law*,<sup>137</sup> Tiedeman wrote:

If one relies solely upon the expression of judicial opinion, his attempt to forecast the probable decision in a pending cause of action will not amount to much more than guess work, where there is any doubt as to the pre-existing law, or where intense public feeling is enlisted in the litigated question.<sup>138</sup>

The Realists maintained that statutes no less than precedents are open to different interpretations, and that judges make law in the course of applying statutes in particular situations. “For, after all, rules are merely words and those words can get into action only through decisions,” Frank pointed out, and “it is for the courts in deciding any case to say what the rules mean, whether those rules are embodied in a statute or in the opinion of some other court.”<sup>139</sup> The Legal Realists asserted that the *decision* a court makes, more immediately than the applicable rules, *is* the law. “*The law of any case*,” Llewellyn declared, “*is what the judge decides—decisions, not rules.*”<sup>140</sup> “Law is made up not of rules for decision laid down by the courts but of the decisions themselves,” Frank asserted. “All such decisions are law.”<sup>141</sup>

Four decades earlier, a famous judge made a related set of points. Judge Thomas Cooley, a Historical Jurist, recognized in 1886, “The judges must decide the cases which arise, and when a case is such that just and well instructed minds differ as to its coming within the intent of the statute, the rule laid down by the court or the prevailing majority of its members becomes a rule of law.”<sup>142</sup> Difficulties in the judicial application of law, Cooley wrote, “must always exist so long as there is variety in human minds, human standards and human transactions.”<sup>143</sup> Along parallel lines, Tiedeman claimed in 1892, “The true rule or rules, which are produced by the enactment of a

135. FREDERICK POLLOCK, *The Science of Case-Law*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* 237 (1882), reprinted in *JURISPRUDENCE AND LEGAL ESSAYS* 169, 170 (1961).

136. *Id.* at 178.

137. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897).

138. Tiedeman, *supra* note 132, at 20.

139. FRANK, *supra* note 19, at 125.

140. Karl N. Llewellyn, *Law and the Modern Mind: A Symposium* (pt. 1), 31 *COLUM. L. REV.* 82, 83–84 (1931) (book review).

141. FRANK, *supra* note 19, at 125.

142. Thomas M. Cooley, *Codification*, 20 *AM. L. REV.* 315, 333 (1886).

143. *Id.* at 465–66.

statute, are not to be found in the letter of the statute, but in the construction placed upon it by the courts.”<sup>144</sup>

The Realists argued that many rules and principles come with exceptions or counter-rules and counter-principles, which courts can invoke to support a desired outcome. As Realist Walter Wheeler Cook pithily put it, “[L]egal principles—and rules as well—are in the habit of hunting in pairs.”<sup>145</sup> A version of this classic Realist point, however, was also stated decades before. Judge Seymour Thompson observed in 1889:

Again, take the general proposition that a request is necessary to raise an implied promise. This is reiterated in many legal judgments. But it is easily shown that in many cases the law will imply a promise where there has been no request; but in what cases it will imply it and what not, who can tell? Similar doubts and infirmities seem to permeate every title of our case-made law.<sup>146</sup>

The Legal Realists argued that judges have broad leeway in connection with stare decisis. “What the courts in fact do is to manipulate the language of former decisions,” declared Frank.<sup>147</sup> “[T]his is achieved by taking a distinction,” Llewellyn remarked, “by picking out some feature which differentiates the cases, but which neither court has stressed, and by insisting that this differentiating feature is what accounts for the results.”<sup>148</sup> “[E]very single precedent, according to what may be the attitude of future judges, is ambiguous, is wide or narrow at need . . . .”<sup>149</sup> Again, however, these Realist insights were hardly a revelation. William G. Hammond, a Historical Jurist, wrote in 1881, “The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion.”<sup>150</sup> The tone of the 1887 passage by Columbia law professor Munroe Smith quoted earlier evinces how utterly transparent the process was to legal observers. “When the old rule is sufficiently wormholed with ‘distinctions,’ a very slight re-examination will reduce it to dust, and a re-interpretation of the ‘distinguishing’ cases will produce the rule that is desired.”<sup>151</sup>

144. Christopher G. Tiedeman, *Methods of Legal Education* (pt. 3), 1 YALE L.J. 150, 152 (1892).

145. Walter Wheeler Cook, Book Review, 38 YALE L.J. 405, 406 (1929) (reviewing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928)).

146. Seymour D. Thompson, *More Justice and Less Technicality*, 23 AM. L. REV. 22, 47–48 (1889).

147. FRANK, *supra* note 19, at 148.

148. LLEWELLYN, *supra* note 134, at 62 (emphasis omitted).

149. *Id.* at 71 (emphasis omitted).

150. W.G. Hammond, *American Law Schools, Past and Future*, 7 S. L. REV. (n.s.) 400, 412 (1881).

151. Smith, *supra* note 84, at 121.

The Realists pointed out the substantial freedom judges have to select and characterize the facts upon which their decisions are based. “[W]ith a decision already made,” Llewellyn observed, “the judge has sifted through these ‘facts’ again, and picked a few which he puts forward as essential—and whose legal bearing he then proceeds to expound.”<sup>152</sup> Again, the Realists were not the first to divulge this. Hammond astutely observed in 1881:

[T]he real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is this power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.<sup>153</sup>

The Realists also made the point that judges can regularly find legal support for whatever decision they desire, working backwards from the result. William O. Douglas remarked, “[T]here are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions.”<sup>154</sup> Llewellyn emphasized “a common occurrence: that we turn up two cases which the two courts have put upon two inconsistent grounds: upon two different, two conflicting rules.”<sup>155</sup> Frank wrote, “Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.”<sup>156</sup> He added:

A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the “facts” reported by him, combined with those traditional rules, will justify the result which he announces.<sup>157</sup>

Radical as they sound, these were old observations as well. Hammond said the same in 1881:

It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another score might be collected to support the opposite ruling. . . . [T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case.<sup>158</sup>

152. LLEWELLYN, *supra* note 134, at 34.

153. Hammond, *supra* note 150, at 413.

154. William O. Douglas, *Stare Decisis*, in *ESSAYS IN JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW* 19 (William O. Douglas ed., 1963), *quoted in* WILFRID E. RUMBLE JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* 55–56 (1968).

155. LLEWELLYN, *supra* note 134, at 62.

156. FRANK, *supra* note 19, at 101.

157. *Id.* at 135.

158. Hammond, *supra* note 150, at 412 (emphasis added).

Tiedeman asserted in 1897 that “while the legal reason is usually considered as controlling the judgment of the court, the judgment is really dictated by the [judge’s] conclusions of common sense.”<sup>159</sup> Wilbur Larremore wrote in 1904 that “judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish,” allowing courts to “do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts.”<sup>160</sup>

The Realists asserted that cases arise that are not addressed by existing legislation or case law—that there are gaps in the law—and in these situations judges try to work out the right outcome, thereby making new law.<sup>161</sup> Judge Dillon, a Historical Jurist, made a similar point in 1894: “Where the legislative will is silent, and there is no customary law or precedent, the judges frequently have no guide but what is well termed in our law ‘equity and good conscience.’”<sup>162</sup> Judges make these determinations “largely from the general sense of justice and right as interpreted and ascertained by the judges.”<sup>163</sup> Dillon positively regarded this form of “judicial legislation” as a necessary and beneficial means by which the common law develops over time, in step with society.<sup>164</sup>

The Realists emphasized that when approaching cases, judges typically respond to what they perceive as clusters of fact situations or types. Although “[t]hey are not altogether alike,” situations with shared characteristics regularly recur.<sup>165</sup> “A generalized situation of this sort is in the judge’s mind and is immediately called up,” invoking an associated set of rules or principles, Max Radin asserted, and judges often render these decisions without much thought.<sup>166</sup> “Not only in a great many cases would the judge’s mind . . . work like that, but I do not see how it very well could work otherwise,” Radin added.<sup>167</sup> Walter Wheeler Cook likewise asserted that established rules and principles “dispose of routine cases which do not require thought” when typified situations are involved.<sup>168</sup> Only “a small number [of cases] will present new and unusual aspects,”<sup>169</sup> Cook claimed, and in these cases judges must strive to arrive at “socially useful”

159. Christopher G. Tiedeman, *Silver Free Coinage and the Legal Tender Decisions*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. 198, 205 (1897).

160. Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 318 (1905).

161. E.g., LLEWELLYN, *supra* note 134, at 71.

162. JOHN FORREST DILLON, *Our Law in Its Old Home*, in THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA: BEING A SERIES OF LECTURES DELIVERED BEFORE YALE UNIVERSITY 19 (1894).

163. *Id.* at 13 n.1.

164. *Id.* at 19–20.

165. Radin, *supra* note 133, at 357.

166. *Id.*

167. *Id.* at 358

168. Walter Wheeler Cook, *An Unpublished Chapter of The Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 419 (1943).

169. *Id.* at 421.

decisions.<sup>170</sup> Radin asserted that sometimes “several categories struggle in their minds for the privilege of framing the situation before them. And since there is that struggle, how can they do otherwise than select the one that seems to them to lead to a desirable result.”<sup>171</sup> This “situation type” theory of judging—the notion that when rendering decisions judges respond more immediately to complexes of facts than they reason downward from rules<sup>172</sup>—has been identified by one theorist as *the* distinctive innovation the Legal Realists brought to American jurisprudence.<sup>173</sup>

However, what the Realists said on this subject is strikingly reminiscent of prominent Historical Jurist James C. Carter’s account of judging in the 1890s:

It is in *new cases* that nearly all the difficulty in ascertaining and applying the law arises. The great mass of the transactions of life are indeed repetitions of what has before happened—not exact repetitions, for such never occur—but repetitions of all substantial features. They have once or oftener been subjected to judicial scrutiny and the rules which govern them are known. They arise and pass away without engaging the attention of lawyers or the courts. The great bulk of controversy and litigation springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and difficulty make their appearance . . . . Several different rules—all just in their proper sphere—are competing with each other for supremacy.<sup>174</sup>

Judges make a mistake, Carter asserted, when they force on one transaction a rule that arose out of a different type of fact situation, for that “would be sacrificing justice for the sake of uniformity.”<sup>175</sup> In new situations,

The standard of justice . . . must be *adapted* to human affairs. . . . Systems of law must be shaped in accordance with the actual usages of men. It is a folly to suppose that unbending rules can be made beforehand, and men be disciplined to learn them and adapt the business of life to them.<sup>176</sup>

Uncertainty will perpetually exist in law, Carter observed, because fact groupings “displaying new features” continually appear and society

170. *Id.* at 422.

171. Radin, *supra* note 133, at 359.

172. Herman Oliphant, President, Ass’n of Am. Law Sch., A Return to Stare Decisis, Address at the Annual Meeting of the Association of American Law Schools (Dec. 29, 1927), 14 A.B.A. J. 71, 71–72 (1928).

173. LEITER, *supra* note 1, at 21–25.

174. James C. Carter, *The Provinces of the Written and Unwritten Law*, 24 AM. L. REV. 1, 15 (1890) [hereinafter Carter, *Provinces*] (emphasis in original). Carter illustrates this principle via hypothetical in JAMES COOLIDGE CARTER, LAW: ITS ORIGIN GROWTH AND FUNCTION 69–74 (1907) [hereinafter CARTER, LAW].

175. Carter, *Provinces*, *supra* note 174, at 15.

176. *Id.*

continually changes; therefore, cases will constantly arise in which the law is not known until it “has been subjected to judicial decision.”<sup>177</sup>

Finally, the Realists repeated that when rendering decisions—interpreting the law, precedent, and facts—judges are influenced by subconscious factors. Radin asserted that judges “classify the events before them into categories determined by their training, their prejudices, their conscious or unconscious interests, their philosophy, their aesthetic leanings, or even by the chance circumstances surrounding the particular hearing.”<sup>178</sup> This, too, was remarked upon much earlier. Along the same lines, Tiedeman wrote in 1892, “The court is just as much influenced by public opinion as any other honest man is.”<sup>179</sup> “I do not say,” he remarked, “that the judge consciously obeys public opinion, or does it in any improper way. I am speaking now of unconscious influence.”<sup>180</sup> “The bias and peculiar views of the individual judge do certainly exert a considerable influence over the development of the law,” he added in 1896.<sup>181</sup> As quoted earlier, Coles observed in 1893 that, especially when no clear precedent exists, a judge’s conclusions “will be largely controlled by the influences, opinions and prejudices to which he happens to have been subjected.”<sup>182</sup>

#### IV. The Striking Overlap Between the Realists and Historical Jurists

The names of prominent late-nineteenth-century Historical Jurists—Tiedeman, Dillon, Hammond, Carter, and Cooley—show up repeatedly in the above demonstration that the core insights credited to the Realists had been stated decades earlier.<sup>183</sup> What makes this close overlap all the more remarkable is that modern historians have claimed that the historical-jurisprudence “legal theories of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a ‘formalistic’ view of law and judging.”<sup>184</sup> But the Legal Realists are supposed to have debunked legal formalism. This apparent contradiction indicates that, like

177. CARTER, LAW, *supra* note 174, at 279.

178. Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824, 824 (1931).

179. Tiedeman, *supra* note 132, at 36.

180. *Id.* at 35–36.

181. Tiedeman, *supra* note 132, at 19.

182. Coles, *supra* note 92, at 190.

183. Consistent with the argument here, Lewis Grossman has recently argued that there are strong parallels between the work of James Carter and that of the Legal Realists. See generally Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149 (2007). There are two important differences between our arguments. Grossman ties Carter’s realism to his anticodification position, *id.* at 151–52, whereas I have linked it to the general position held by historical jurists. This matters because several historical jurists, most prominently John Dillon, were *for* codification, but still held the same Realist views. The second important difference is that Grossman continues to privilege the Legal Realists by calling Carter a pre-Realist, *id.* at 201, whereas I argue that realism about judging was in place before the Legal Realists.

184. LaPiana, *supra* note 9, at 557.

the account of the Legal Realists, the standard portrayal of legal formalism also is deeply flawed.<sup>185</sup>

The evident strong overlap in views is mainly attributable to the primacy these two groups of jurists accorded to society and social factors—to social norms, social influences, social values, social interests, and social attitudes—in connection with law and judging. The Realists insisted that law is not autonomous from society, and that law must evolve with and serve social needs. Historical jurisprudence championed the same propositions.

Leon Green, tagged as a Realist notwithstanding his protestation,<sup>186</sup> put it succinctly: “Government and law merely reflect the other activities of society, most of them in surprisingly clear detail.”<sup>187</sup> Green pointed to the actions of lawyers and judges, assisted by legislation, as the primary mechanisms through which social norms and interests become embodied in the law.<sup>188</sup> Llewellyn emphasized:

It is society and not the courts which gives rise to, which shapes in the first instance the emerging institution; which kicks the courts into action. It is only from observation of society that the courts can pick their notions of what needs the new institution serves, what needs it baffles. . . . In any event, if the needs press and recur, sooner or later recognition of them will work into the law. Either they will induce the courts to break through and depart from earlier molds, or the bar will find some way to put new wine into old bottles and to induce in the bottles that elasticity and change of shape which, in the long run, marks all social institutions.<sup>189</sup>

If judges do not reshape the law to conform to current social demands, Llewellyn added, it will be accomplished through legislation.<sup>190</sup>

James Carter, the foremost late-nineteenth-century champion of historical jurisprudence, would have concurred wholeheartedly, although he put it in more old-fashioned terms. “Law *begins* as the product of the automatic action of society . . . .”<sup>191</sup> Elsewhere he wrote, “It is therefore the unconscious creation of society, or, in other words, a growth.”<sup>192</sup> Carter believed that judges “are both by appointment and tradition the experts in

185. This is explained more fully in Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (St. John’s Univ. Legal Studies Research Paper Series, Paper No. 08-0130, 2008), available at <http://ssrn.com/abstract=1123498>.

186. See *supra* note 28 and accompanying text.

187. Leon Green, *My Philosophy of Law*, LAW. GUILD REV., Oct. 1941, at 10, 12.

188. See Leon Green, The Law Must Respond to the Environment, Address During Law Week at the University of Texas School of Law (May 1969), in 47 TEXAS L. REV. 1327, 1340 (1969) (“No other group is entrusted with so much power over so broad a field of human affairs.”).

189. LLEWELLYN, *supra* note 134, at 59–60.

190. *Id.*

191. CARTER, LAW, *supra* note 174, at 129.

192. James C. Carter, The Ideal and the Actual in the Law, Address Before the American Bar Association (Aug. 1890), in 24 AM. L. REV. 752, 769 (1890).

ascertaining and declaring the customs of life.”<sup>193</sup> He wrote, “The judge, the lawyer, the jurist of whatever name, [is] continually occupied in the work of examining transactions and determining the customs to which they belong, [and] whether to those which society cherishes and favors, or to those which it condemns . . . .”<sup>194</sup> Carter also recognized, like Llewellyn, that courts are prone to change the law slowly owing to the constraints of legal analysis<sup>195</sup>—so slowly that the law may fall out of sync with current needs. He allowed a legitimate—albeit circumscribed—role for legislative reform to accommodate vast changes, and he specifically endorsed “legislation which a highly developed industrial life demands.”<sup>196</sup> Dillon seconded Carter’s formulation. Finding *customs* too narrow, however, he broadened it to say that judges brought into law the community’s sense of right.<sup>197</sup> Dillon summarized the defining credo of the Historical Jurists:

[T]hat law is largely the outcome of all of the past conditions, circumstances, and customs of a people; that it ordinarily originates in or is introduced by custom (using this word in the broad sense of including judiciary law), and is supplemented by legislation, direct or oblique, when, and in general only when, the law is otherwise inadequate to meet difficult and complex or new situations and exigencies.<sup>198</sup>

Deep parallels follow from the shared commitment of the Realists and Historical Jurists to the notion that law is a reflection of social processes and that its function is to serve social needs. In his catalogue of essential realist propositions, Llewellyn placed first “[t]he conception of law in flux, of moving law, and of judicial creation of law.”<sup>199</sup> Similarly, Carter wrote: “Sympathizing with every advancing movement made by society, catching the spirit which animates its progress, it is [the judge’s] aim [to] keep jurisprudence abreast with other social tendencies.”<sup>200</sup> Second on Llewellyn’s list of shared realist positions was “[t]he conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose and for its effect.”<sup>201</sup> More than *fifty years* before Llewellyn wrote this, Hammond wrote, “[T]he law has no doctrines or rules that society cannot modify to its own purposes.”<sup>202</sup> Carter

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193. CARTER, LAW, *supra* note 174, at 327.

194. Carter, *supra* note 192, at 773.

195. CARTER, LAW, *supra* note 174, at 334.

196. *Id.* at 335.

197. DILLON, *supra* note 162, at 13 n.1.

198. *Id.* at 381.

199. Llewellyn, *supra* note 22, at 1236.

200. Carter, *supra* note 192, at 773.

201. Llewellyn, *supra* note 22, at 1236.

202. W.G. Hammond, The Legal Profession—Its Past—Its Present—Its Duty, Address to the Graduating Class in the Law Department of Iowa State University, in 9 W. JURIST 1, 12 (1875) (emphasis omitted).

wrote that the primary orientation of the judge is to ensure that the law is “fit, useful, convenient, right” for social needs.<sup>203</sup> Eighth on Llewellyn’s list was “[a]n insistence on evaluation of any part of law in terms of its effect.”<sup>204</sup> Carter wrote, “The judges in considering whether the act was right or wrong applied to it the method universally adopted by all men; they judged it by its *consequences* . . . .”<sup>205</sup>

The close parallels also extend to the two movements’ respective views on the various ways in which social considerations influence judges. Historical Jurists believed that judges brought society’s values and sense of justice into law, subconsciously (by judges’ internalization of social values) as well as consciously (by judges deliberately seeking to derive or produce or match society’s sense of right). “The more perfectly our judges could know and follow the popular will on all questions of legal doctrine,” Hammond wrote in 1875, “the better would our law become, the more harmoniously would every department of government work together for the common good.”<sup>206</sup> “In short,” Carter summarized, “it is the function of the judges to watchfully observe the developing moral thought, and catch the indications of improvement in customary conduct, and enlarge and refine correspondingly the legal rules.”<sup>207</sup> Compare that with Jerome Frank’s insistence that “[t]o do justice, to make any legal system acceptable to society, the abstract preestablished rules have to be adapted and adjusted [by judges], the static formulas made alive.”<sup>208</sup> “The will of the judge is to be directed to the just and reasonable results within the limits of the positive rule of law. Such just and reasonable results are to be aimed at consciously.”<sup>209</sup>

For both Historical Jurists and Legal Realists, in the various ways set forth above, law was and ever must be receptive to, infused by, and permeable to morality and politics produced by society, and attentive to the purposes and needs of society.<sup>210</sup> Cardozo recognized this core orientation of the historical schools (and the misleading nature of the term “historical”):

[M]any who profess to use the historical method in the adjudication of a cause are in truth less loyal to the significance of the historical school . . . and look more freely to the prevailing standards of welfare and utility . . . . If [historical school] assumptions be accepted, they exact, not blind reproductions of the past, but searching scrutiny of the

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203. Carter, *supra* note 192, at 773.

204. Llewellyn, *supra* note 22, at 1237.

205. CARTER, LAW, *supra* note 174, at 73.

206. Hammond, *supra* note 202, at 12.

207. CARTER, LAW, *supra* note 174, at 329.

208. FRANK, *supra* note 19, at 120.

209. *Id.* at 281.

210. See DILLON, *supra* note 162, at 19 (explaining that when judges are required to legislate “where the legislative will is silent and the case is novel,” they must consider ethics and morality, which are inseparable from the law).

present, for law . . . is the expression of the convictions of the present . . . .<sup>211</sup>

The Historical Jurists were not the only ones who saw law in these terms. Oliver Wendell Holmes also held this view of the relationship between law and society, which he argued in *The Common Law*.<sup>212</sup> The same basic set of views infused Roscoe Pound's sociological jurisprudence.<sup>213</sup> Benjamin Felix Frankfurter in 1912 expressed these views with respect to judicial review of social legislation: "In so far as these questions are necessarily questions of fact, dealing with actual conditions of life and current dominant public opinion, it is essential that the stream of the Zeitgeist must be allowed to flood the sympathies and the intelligence of our judges."<sup>214</sup> Many turn-of-the-century jurists saw the connections between law and society in similar terms.

There are notable differences between the Realists and Historical Jurists. They were separated in time by several decades that featured a vast transformation in the economy, society, and ideas. A prominent theme for a number of Realists was the social-scientific study of law,<sup>215</sup> about which Historical Jurists had said little, because the social sciences were in their infancy in the late nineteenth century. The Realists also promoted the reform of legal education,<sup>216</sup> which was not a major concern of the Historical Jurists. The Realists were less complacent than Historical Jurists about the possibility that judges' views reflected the interests of the elite class rather than the whole society.<sup>217</sup> A number of Realists sought legal and social reform, which they pursued in their doctrinal analysis.<sup>218</sup> The Historical Jurists, in contrast, were not social reformers, a fact reflected in their conservative doctrinal analysis. On legal reform they were split—Dillon and Hammond worried about the state of the law and advocated codification to reduce uncertainty, a measure which Carter and Cooley actively opposed.<sup>219</sup>

211. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 103–04 (1924).

212. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2 (1881) (stressing that he uses the "history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further").

213. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 2), 25 HARV. L. REV. 140, 146–47 (1912) ("[T]he conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life.").

214. Frankfurter, *supra* note 62, at 7.

215. See generally SCHLEGEL, *supra* note 10.

216. See *infra* notes 261–61, 386 and accompanying text.

217. See *infra* notes 278–84 and accompanying text.

218. See *infra* notes 250–71 and accompanying text.

219. See JOHN FORREST DILLON, *Our Law: Its Progressive Forces*, in *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA*, *supra* note 162, at 344 ("[C]odification is [often] practicable, and so far as it is practicable, it is, if well done, desirable."); Cooley, *supra* note 142, at 464–66 (arguing that codification does not make the law more clear, and that common law decisions are required to properly apply the law to the infinite variety of facts that will arise in different cases); Grossman, *supra* note 183, at 155 (identifying Carter as a leading opponent of codification);

More than any other factor, these two groups were separated by their politics. Historical Jurists were often cast by their progressive critics as laissez-faire enthusiasts,<sup>220</sup> but that is overdone. Cooley set and enforced railroad rates as the first chairman of the Interstate Commerce Commission, he supported labor arbitration, and he warned about the “merciless power of concentrated capital.”<sup>221</sup> Dillon and Cooley attacked public subsidies for railroads; neither of them were corporate apologists.<sup>222</sup> Like others at the time, they valued liberty and perceived a clear distinction between the public and private spheres, and they criticized what they considered an alarming expansion of state police power and a host of intrusive legislation.<sup>223</sup> Judging from the mix of positions they took, in today’s political terminology, they would be called moderate libertarians.<sup>224</sup> Two generations later, key Realists supported New Deal reforms, and were more enthusiastic about utilizing law—legislation in particular—to advance social objectives, situating them on the other side of the political spectrum from the Historical Jurists.<sup>225</sup> But their contrasting political positions—with corresponding differences in the substantive legal doctrines they advocated—do not diminish the strong overlap of their views about judging and about the relationship between law and society.

## V. Why Realistic Insights About Judging Have Long Been Known

The reason the core realist insights about judging were articulated decades earlier than commonly thought is that they are *plainly evident*

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Hammond, *supra* note 150, at 406, 405–08 (stating that codification has improved the law by requiring lawyers actually to comprehend the law rather than rely on the old “forms of action” and “language of pleading”).

220. See CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954).

221. Thomas M. Cooley, *The Interstate Commerce Act—Pooling and Combinations Which Affect Its Operation*, Address at the Dinner of the Boston Merchants’ Association (Jan. 8, 1889), reprinted in CHARLES CURTICE MCCAIN, *COMPENDIUM OF TRANSPORTATION THEORIES: A COMPILATION OF ESSAYS UPON TRANSPORTATION SUBJECTS BY EMINENT EXPERTS* 242, 248 (1893).

222. See MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 187 (1977) (noting that Dillon and Cooley “led the assault on railroad and other aid”); *id.* at 400, 399–400 (placing Cooley among those who worked to create a “system of arbitration for labor-capital disputes” to “check the abuses that threatened” employer–employee relationships).

223. *Id.* at 346, 344–46 (describing Dillon, Cooley, and others advocating for “more intensive judicial review of other units of government”). Cooley specifically “thought it the duty of the judiciary to intervene when legislation threatened the ‘personal, civil, and political’ rights of the individual.” *Id.* at 345. Tiedeman and others criticized the amount of legislation based on state police power. *Id.* at 410.

224. Tiedeman, for example, criticized miscegenation laws and opposed school Bible readings. See CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* § 157, at 536–37 (1886) (arguing against miscegenation statutes); *id.* § 71, at 161 (arguing against school Bible readings).

225. See *supra* notes 14–16 and accompanying text.

*aspects of judging* in common law systems. It is as simple as that. It was apparent to many that the law was flawed, ran short, and routinely came up against unanticipated situations, and that judges possessed a substantial degree of freedom when working with legal materials. It was obvious to observers that different judges had different interpretations of the law. Dissenting opinions, and shifts in constitutional interpretation that resulted from changes in personnel, are constant reminders of this.<sup>226</sup> The Realists were astute observers of the judicial craft, to be sure, and they elaborated illuminating lines of analysis. But the fundamentals of what they put out had been said much earlier by other astute and candid observers of judging, of whom there were many in the late nineteenth century.

These insights can be found even further back. Echoes of realism reverberate in these observations by Chief Justice Vaughan in a 1670 case:

I would know whether any thing be more common, than for two men students, barristers, or Judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should inferr distinct conclusions from the same testimony: Is any thing more known than that the same author, and place in that author, is forcibly urg'd to maintain contrary conclusions, and the decision hard, which is in the right?

. . . .

A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers understanding or reasoning . . . .<sup>227</sup>

Crudely expressed by modern lights, perhaps, but the core realistic insights surrounding legal and factual judgments are there.

Another striking example can be found in an 1836 speech by a prominent lawyer, Robert Rantoul, in his campaign for codification: “The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law.”<sup>228</sup> “Almost any case, where there is any difference of opinion,” Rantoul continued, “may be decided either way, and plausible analogies found in the great storehouse of precedent to justify the decision. The law, then, is the final whim of the judge, after counsel for both parties have done their utmost to sway it to the one side or the

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226. See *supra* notes 112–20 and accompanying text. See generally Robert Eugene Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771, 773–90 (1921) (discussing the implications of bare-majority rulings on the doctrine of reasonable doubt); Albert H. Putney, *Five to Four Constitutional Law Decisions*, 24 YALE L.J. 460, 462 (1914) (noting that the Court’s decision in the *Prize Cases* demonstrated the importance of its composition).

227. *Bushell’s Case*, 124 Eng. Rep. 1006, 1009–13 (C.P. 1670).

228. Robert Rantoul, Oration at Scituate (July 4, 1836), in AMERICAN LEGAL HISTORY: CASES AND MATERIALS 317, 318 (Kermit L. Hall et al. eds., 2d ed. 1996).

other.”<sup>229</sup> Rantoul said this a century before the Realists, and just as provocatively.

In 1838, a year after Chief Justice Taney replaced the long-serving Chief Justice Marshall on the Supreme Court, an alarmed commentator reviewing the decisions issued in Taney’s first term found a wholesale “departure” underway in which the new majority endeavored to “subvert” established precedent to bring a return of “anti-federal doctrines.”<sup>230</sup> Another critic in 1838 disdained the “ultra-radical tirades of those friends of the administration, who exult in the complete revolution which the judiciary has undergone, and the prospect that a new system of jurisprudence will be established on the ruins of long-settled doctrines.”<sup>231</sup> The Supreme Court, “in leaving settled principles, and depending on *private ideas of justice*, is exercising a legislative as well as a judicial power,” the critic objected.<sup>232</sup>

In his famous 1839 book *Legal and Political Hermeneutics*, Francis Lieber declared that “the ‘uncertainty of the law,’ which originates in a great measure from the different interpretation to which one and the same law may be subject, has become proverbial.”<sup>233</sup> Lieber quoted Professor Simon Greenleaf of Harvard:

The manner of the decision, too, and the reasons on which it is professedly founded, and even the decision itself, may receive some coloring and impress, from the position of the judges, their political principles, their habits of life, their physical temperament, their intellectual, moral and religious character. Not that the decision will depend on these; but only that they are considerations not to be wholly disregarded in perusing and weighing the judgment delivered.<sup>234</sup>

Lieber added:

[I]n decisions on all important matters, much depends upon a certain instinctive feeling, not derived from any course of reasoning, an inclination of our mind one way or the other, in nicely balanced cases, not from whim, but in consequence of long experience, and the effect of a thousand details on our mind, which details, although properly affecting a sound mind, can nevertheless not be strictly summed up.<sup>235</sup>

229. *Id.*

230. Richard Peters, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States: January Term, 1837*, 46 N. AM. REV. 126, 153–54 (1838).

231. *Political Regeneration*, 11 AM. MONTHLY MAG. 297, 299 (1838).

232. *Id.* at 300 (emphasis added).

233. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 40 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1970) (1839).

234. *Id.* at 230. This passage was taken from Greenleaf’s *Introductory Lecture*, published in *Notes on Professor Greenleaf’s Introductory Lecture, at the Present Term*, 1 LAW REP. 217, 219 (1838).

235. LIEBER, *supra* note 231, at 236–37.

Lieber was “without serious question the most eminent legal scholar in [nineteenth-century] America.”<sup>236</sup> His book was cited twice by the U.S. Supreme Court,<sup>237</sup> and appeared in three editions.<sup>238</sup>

The historical record gets thinner—and harder to pore over—the further back one goes, but the tone and content of these various statements offer evidence that realism about judging has a lengthy heritage. Importantly, a consistent source of such insights has been judges themselves. Frank’s sound and fury drowns out a telling aspect of his blast against the purportedly pervasive delusions about judging.<sup>239</sup> The two key skeptical chapters of *Law and the Modern Mind* were peppered with realistic depictions of judging by judges. Frank cited and quoted Holmes, Cardozo, Hutcheson, Hand—the regular standbys—along with Judges Peters, Lehman, Cuthbert Pound, and Lord Halsbury.<sup>240</sup> These judges had already made many of Frank’s points about the flexibility of interpretation and openness of judicial decision making. Realistic observations by Judges Cooley, Dillon, and Thompson<sup>241</sup> have been cited earlier in this Article, and similar statements by Judges Colt<sup>242</sup> and Amidon<sup>243</sup> will be added later. Many more such comments from judges can be found in the literature of the period.<sup>244</sup> Judges were intimately familiar with the often difficult, uncertain, and complex aspects of judging. They did not frequently blab about these aspects of judging, but they were by no means silent.

It is also essential to recognize that the judges who made realistic comments about judging apparently still felt they were genuinely engaged in the interpretation and application of law. By their accounts, it worked despite the serious challenges, and judging was not inevitably the product of the personal biases or views of judges. Holmes, the famed skeptic, is a prime example. He once said, “It has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what

236. Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 *CARDOZO L. REV.* 2135, 2144 (1995).

237. M.H. Hoeflich & Ronald D. Rotunda, *Simon Greenleaf on Desuetude and Judge-Made Law: An Unpublished Letter to Francis Lieber*, 10 *CONST. COMMENT.* 93, 101 n.32 (1993). The two cases were *United States v. Farenholt*, 206 U.S. 226, 229–30 (1907) (quoting LIEBER, *supra* note 233, at 56), and *Lowrey v. Hawaii*, 206 U.S. 206, 223–24 (1907) (quoting LIEBER, *supra* note 233, at 144).

238. See Hoeflich & Rotunda, *supra* note 237, at 94 n.11 (noting that the third edition was published in 1881).

239. Frank engaged in deliberate distortions when making his case. See Tamanaha, *supra* note 185, at 10–16.

240. See generally FRANK, *supra* note 19, at 118–59.

241. See *supra* note 146 and accompanying text.

242. See *infra* notes 363–67.

243. See *infra* notes 369–71 and accompanying text.

244. See Tamanaha, *supra* note 185, at 18–24, 48–51 (citing statements from Judges Burch, Baker, Hough, Hiscock, Colt, McClain, Ewing, Savage, and Fellows).

the Constitution permits.”<sup>245</sup> His critique of the majority in *Lochner* was precisely that it was improper for the judges to import their views into the Constitution. “I strongly believe,” Holmes wrote, “that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”<sup>246</sup> In his final dissent, opposing what he saw as a pattern of the Court invalidating whatever happened “to strike a majority of this Court as for any reason undesirable,”<sup>247</sup> Holmes uttered, “I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.”<sup>248</sup>

## VI. The Legal Realists Were Committed to the Law

Now to dispel another common misunderstanding: the notion that the Realists were deeply skeptical about law and judging. A leading contemporary legal philosopher has characterized the Realists in such highly skeptical terms:

The Realists believed that decision-makers, especially judges deciding hard cases, initially make an “all things considered” judgement about who ought to win. That preliminary judgement, taking into account moral, political, economic, and psychological factors, is not arbitrary, but is particularistic in focusing on the optimal result *for this case*. . . . To the Legal Realist, rules serve not as sources of *ex ante* guidance, but as vehicles of *ex post* legitimation of decisions reached without regard for the rules.<sup>249</sup>

This misconstrues their position. The Realists believed in the law and they fervently labored to improve it. Llewellyn unabashedly proclaimed his “faith about the Good in this institution of our law,”<sup>250</sup> and waxed poetically on “the esthetics of certain legal arts I deeply love.”<sup>251</sup> In defense of the Realists, Yale Law School Dean Eugene Rostow, who knew many of the key players, remarked that “the legal realists were among our most devoted and effective reformers, both of law and of society.”<sup>252</sup> Jerome Frank made the heartfelt confession: “I am—I make no secret of it—a reformer . . . .”<sup>253</sup>

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245. Letter from Oliver Wendell Holmes to John T. Morse (Nov. 28, 1926), *quoted in* LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 67 (2001).

246. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

247. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

248. *Id.*

249. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 192 (1991).

250. K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 264 (1942).

251. *Id.* at 250.

252. Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MTN. L. REV. 123, 132 (1962).

253. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 2 (1949).

The various goals of the Realists were to increase the certainty and predictability of law; to train better lawyers; to advance legal justice; and to reform the law to better serve social needs. This constructive orientation was borne out in the legal careers of the main Realists, many of whom were not bookish academics but engaged jurists. Jerome Frank, Charles Clark, and Thurman Arnold became federal appellate judges.<sup>254</sup> Joseph Hutcheson was a federal trial judge, and later became an appellate judge.<sup>255</sup> William Douglas became a Supreme Court Justice in 1939.<sup>256</sup> Frank, Douglas, Arnold, Felix Cohen, Wesley Sturges, and Herman Oliphant held legal positions in the federal government during the Roosevelt Administration.<sup>257</sup> Llewellyn took a lead role in drafting the Uniform Commercial Code, Clark in drafting the Federal Code of Civil Procedure.<sup>258</sup> Arnold, Clark, Green, and Sturges served stints as law school deans.<sup>259</sup> Several Realists sought to reform legal education to train better-skilled lawyers,<sup>260</sup> including Frank as an enthusiastic proponent of “clinical law schools.”<sup>261</sup> Their collective insistence that law is a powerful instrument to serve the social good, and their sustained efforts to bring this about, bespeaks their abiding faith in the law.

Rostow offered a nuanced, corrective reading of their position:

[The realists] were alleged to believe that decisions were based on unstated interests or value preferences, and that the reasons given for decisions were in fact after-thoughts, cynical rationalizations, representing the judge not as a conscientious lawyer, working within the permissible limits of his discretion, but as a willful autocrat. By and large (though with several exceptional and occasional aberrations) the charge was not justified: the realist literature agreed with Pkelis’

254. SCHLEGEL, *supra* note 10, at 263–65.

255. See Charles L. Zelden, *The Judge Intuitive: The Life and Judicial Philosophy of Joseph C. Hutcheson, Jr.*, 39 S. TEX. L. REV. 905, 908–09 (1998) (discussing Judge Hutcheson’s judicial career, including his service on the United States District Court for the Southern District of Texas from 1917 to 1931 followed by his tenure as judge on the United States Court of Appeals for the Fifth Circuit from 1931 to 1968).

256. SCHLEGEL, *supra* note 10, at 264.

257. *Id.* at 263–67 (noting that Frank and Douglas served at the SEC, Arnold was a U.S. Assistant Attorney General, and Oliphant was general counsel for the Treasury Department); Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 363 (1997) (observing that Felix Cohen worked in the Solicitor’s Office of the Department of the Interior); Interview by Joe B. Frantz of Justice Abe Fortas (Aug. 14, 1969), *transcript available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/fortasa/fortas01.pdf> (indicating that Wesley Sturges served in the Department of Agriculture).

258. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 163 (2000) (calling Llewellyn “the U.C.C.’s drafter”); SCHLEGEL, *supra* note 10, at 264 (noting Clark’s role on the Advisory Committee on Civil Procedure).

259. SCHLEGEL, *supra* note 10, at 263–68.

260. *E.g.*, K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 678 (1935).

261. Jerome Frank, *Why Not a Clinical Lawyer-School?* 81 U. PA. L. REV. 907, 920, 917–20 (1933).

striking remark, amending one of Holmes' most famous quips, that "concrete cases cannot be decided by general propositions—nor without them." The realists—or most of them—were not trying to deny the inevitability of rules in a system of law that sought at any given time to decide like cases alike. What they were trying to achieve was an awareness of the relationship between rules and policy, viewing law as an instrument for social action in a society constantly in flux, "and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve."<sup>262</sup>

Realist writings are replete with statements that support this characterization. Walter Wheeler Cook, for example, asserted:

This view does not lead to the discarding of all principles and rules, but quite the contrary. It demands them as tools with which to work; as tools without which we cannot work effectively. It does, however, make sure that they are used as tools and are not perverted to an apparently mechanical use.<sup>263</sup>

He acknowledged that, "Our legal 'rules' and 'principles' will give us the answer to the vast bulk of human transactions . . . ."<sup>264</sup>

Although Llewellyn gleefully exposed the manipulability of precedent and the openness of the rules of statutory interpretation, he consistently disclaimed the most radical implications of these observations, cautioning:

[W]hile it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly*. And of these few there are some, or there is one, toward which the prior cases pretty definitely press. Already you see the walls closing in around the judge.<sup>265</sup>

A skilled lawyer asked to predict the fate of a case on appeal, Llewellyn conjectured, ought "to average correct prediction of outcome eight times out of ten, and better than that if he knows the appeal counsel on both sides or sees the briefs."<sup>266</sup> When identifying the sources of this high degree of predictability, Llewellyn elaborated on several "stabilizing factors." Judges are indoctrinated into the legal tradition such that they "see things . . . through law-spectacles";<sup>267</sup> much legal doctrine—which includes rules, principles, and statutes—is reasonably clear and well developed;<sup>268</sup>

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262. Rostow, *supra* note 252, at 131 (quoting ALEXANDER H. PEKELIS, *The Case for a Jurisprudence of Welfare*, in *LAW AND SOCIAL ACTION: SELECTED ESSAYS OF ALEXANDER H. PEKELIS* 1, 20 (Milton R. Kovnitz ed., 1950), and Llewellyn, *supra* note 22, at 1236, respectively).

263. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457, 487 (1924).

264. Cook, *supra* note 168, at 421.

265. LLEWELLYN, *supra* note 134, at 73.

266. LLEWELLYN, *supra* note 44, at 45.

267. *Id.* at 19–20 (emphasis omitted).

268. *Id.* at 20–21.

judges follow accepted doctrinal techniques, strive to produce a just result, and strive to come up with the right legal answer;<sup>269</sup> judges sitting together on an appellate bench interact “to smooth the unevenness of individual temper”;<sup>270</sup> and judges’ desire and commitment to live up to the obligations of the judicial role, to earn the approval of their legal audience for appropriate judicial behavior, and their desire to avoid reversal by a higher court, prompt judges to engage in a good-faith effort to conduct an unbiased search for the correct legal result.<sup>271</sup>

The Realists, to be sure, harped on the various limitations of, and room to maneuver allowed by, legal rules, principles, statutory interpretation, stare decisis, and the finding and stating of facts in judicial decision making.<sup>272</sup> But their position is easily misunderstood if their target is not kept in mind: they were attacking the notion that judging merely entailed the logical application of legal rules and principles. Their refutation of this view—a straw man, as it were<sup>273</sup>—did not mean that they embraced its polar opposite, the notion that legal rules and principles do not have a significant role in judges’ decisions. Morris Cohen warned in 1916, when the core Realists were just starting their legal careers: “They who scorn the idea of the judge as a logical automaton are apt to fall into the opposite error of exaggerating as irresistible the force of bias or prejudice.”<sup>274</sup> None of the Legal Realists, not even Jerome Frank, made this error.

Rather, the Realists endeavored to make plain that more is involved in the process of judging than just the application of precedents, rules, and principles, and their message was that the failure to attend to these other factors constitutes poor lawyering. They did not entirely agree among themselves on what those other factors were. Llewellyn, as described above, emphasized the totality of the legal and judicial setting, including legal knowledge, legal indoctrination, the approval of peers (lawyers, academics, and judges), the collaborative nature of judging, a sense of judicial obligation, and institutional constraints.<sup>275</sup> Oliphant took the position that “[t]he predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them.”<sup>276</sup> Other Realists suggested that a complex of surrounding social factors influenced judicial decision making. Felix Cohen recognized that “experience does reveal a

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269. *Id.* at 21–25.

270. *Id.* at 26.

271. *Id.* at 45–51.

272. *See supra* Part II.

273. *See* Tamanaha, *supra* note 185, at 3 (noting that the Realists, in attacking their opponents’ arguments, identified the position advanced by formalist judges as “a slavish adherence to rules contrary to good sense”).

274. Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 638 (1916).

275. LLEWELLYN, *supra* note 44, at 45–51.

276. Oliphant, *supra* note 172, at 159.

significant body of predictable uniformity in the behavior of courts.”<sup>277</sup> He speculated that dominant economic forces—the judges’ attitudes toward class, their past experiences, and the eloquence of the lawyers in a case—are some of the forces that mold judicial decisions. He said, “We know, too, that judges are craftsmen, with aesthetic ideals, concerned with the aesthetic judgments that the bar and the law schools will pass upon their awkward or skillful, harmonious or unharmonious, anomalous or satisfying, actions and theories . . . .”<sup>278</sup> Like Llewellyn, Cohen also acknowledged the constraining impact of the institutional setting (including the potential for reversal)<sup>279</sup> and the judicial office: “[T]he man who dons the judicial robe with the greatest contempt for precedent finds that the pressure of his office-space compels him to follow paths that, from outside the office-space, once appeared absurd.”<sup>280</sup>

The misperception of the Realists as skeptics of judging is substantially attributable to Jerome Frank’s spectacular cannonball splash,<sup>281</sup> which soaked all the other Realists standing off to the side.<sup>282</sup> But Frank was an outlier. In his exchange with Pound, Llewellyn pointed out—with Frank’s input—that Frank *alone* among the Realists argued that “the rational element in law is an illusion,”<sup>283</sup> and that only Frank laid a heavy emphasis on the judge’s personal preferences in decision making.<sup>284</sup> Both Llewellyn and Felix Cohen criticized Frank for this position. In a review of *Law and the Modern Mind*, Llewellyn wrote that Frank’s commendable desire to smash illusions produced in his account an unfortunate “skewing” of judging, which is “much more predictable, and hence more certain, than [Frank’s] treatment would indicate.”<sup>285</sup> Llewellyn clarified:

For while we may properly proclaim that general propositions do not decide concrete cases, we none the less must recognize that *ways* of deciding, *ways* of thinking, *ways* of sizing up facts “in terms of their legal relevance” are distinctly enough marked in our courts . . . . It is not merely decisions, but decisions *in this setting* of their semi-regularity, which make up the core of law.<sup>286</sup>

Felix Cohen criticized the “hunch” theory of judging and Frank’s emphasis on the personal idiosyncrasies of judges for failing to recognize the

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

278. *Id.* at 845 (footnote omitted).

279. *Id.* at 843.

280. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 251 (1950).

281. *See supra* note 19 and accompanying text.

282. Leiter labels this the “Frankification of Realism”—the tendency to wrongly see realism in terms of Frank’s unrepresentative position. LEITER, *supra* note 1, at 17.

283. Llewellyn, *supra* note 22, at 1230 (emphasis omitted).

284. *Id.* at 1242–43.

285. Llewellyn, *supra* note 140, at 87.

286. *Id.*

“significant, predictable, social determinants that govern the course of judicial decision.”<sup>287</sup> Within *social*, Cohen included the constraints provided by the legal culture generally and by the institutional context of judging.<sup>288</sup>

Even Frank was not the wild skeptic implied by his fusillade. “The conscientious judge, having tentatively arrived at a conclusion,” he wrote, “can check [legal rules and principles] to see whether such a conclusion, without unfair distortion of the facts, can be linked with the generalized points of view theretofore acceptable.”<sup>289</sup> He also acknowledged that legal rules and principles “may be aides to the judge in tentatively testing or formulating conclusions; they may be positive factors in bending his mind towards wise or unwise solutions of the problem before him.”<sup>290</sup> The purpose of Frank’s book was to explode complacency, which led him to press hard on every angle of skeptical realism, in the process saying little about the ways law constrains judicial decisions. But the rule-bound side emerged in his more reflective writings. Although Frank exposed the manipulability of *stare decisis*, for example, he reassured the reader that “no sensible person suggests that *stare decisis* be abandoned.”<sup>291</sup> In a 1943 legal opinion joined by Judge Learned Hand, Judge Frank acknowledged that personal values can influence a judge’s decision, but he nonetheless asserted, “The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect.”<sup>292</sup> In his 1948 review of a newly published collection of Cardozo’s writings, Frank said, with respect to upper courts, that he would accept as “not too wide of the mark” Cardozo’s claim that “[n]ine-tenths, perhaps more, of the cases that come before a court . . . are predetermined—predetermined in the sense that they are predestined—their fate established by inevitable laws that follow them from birth to death.”<sup>293</sup> “[I]n the great majority of suits,” Frank asserted, “both sides agree as to the applicable rules, the disputes relating to the facts alone.”<sup>294</sup> In the course of his career, Frank shifted the focus away

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287. Cohen, *supra* note 277, at 843; *accord* Cohen, *supra* note 280, at 248.

288. *See* Cohen, *supra* note 277, at 843 (arguing that judges’ actions are shaped by the judicial system in which they operate as well as by general social forces).

289. FRANK, *supra* note 19, at 131.

290. *Id.*

291. FRANK, *supra* note 253, at 286 (emphasis omitted).

292. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (1943). Frank wrote the unanimous opinion for a three-judge panel that included Judge Learned Hand, another judge with a realistic view of the law. Frank made the same point in a later publication: “It is well, too, that a judge be himself aware of his own human foibles and prejudices: he will then be the better able to master them.” Jerome Frank, *The Cult of the Robe*, SATURDAY REV. LITERATURE, Oct. 13, 1945, at 12, 12.

293. Jerome Frank, *Cardozo and the Upper-Court Myth*, 13 LAW & CONTEMP. PROBS. 369, 373–74 (1948) (reviewing BENJAMIN N. CARDOZO, *SELECTED WRITINGS OF BENJAMIN N. CARDOZO* (Margaret E. Hall ed., 1947)) (quoting CARDOZO, *supra* note 211, at 60).

294. *Id.* at 380.

from legal rules and principles to identify the vagaries of fact-finding at the trial-court level as the main source of uncertainty in the law.<sup>295</sup>

A careful reading shows that Llewellyn and Frank, and the rest of those identified as Realists, all along recognized the stabilizing and constraining factors in law. Their deliberately polemical postures placed the skeptical aspects up front, but they recognized the rule-bound aspect of judging as well, and their considered views amounted to balanced realism. The author of one of the leading historical studies of the Legal Realists,<sup>296</sup> William Twining, concluded, “[T]he image of Realism as being mainly a skeptical attack on the rationality of judicial processes does not score high marks in the minimal test of historical and textual accuracy.”<sup>297</sup> Both Llewellyn and Frank in later editions expressed some regret about *The Bramble Bush* and *Law and the Modern Mind*, respectively.<sup>298</sup> It was a work of youth, Llewellyn noted (he was thirty-seven at its writing), “and a man’s own ideas . . . change as he gains experience.”<sup>299</sup> Their regret was not a retraction of the substance of their observations—which in Llewellyn’s case were always balanced—but about the tone and emphasis of the presentation, which encouraged and enabled critics to misread and easily discredit their positions.<sup>300</sup>

In a touching memorial to Frank upon his death, Thurman Arnold may have offered the best way to understand this episode of realism. Arnold aptly called *Law and the Modern Mind* a “shock treatment.”<sup>301</sup> The book was published when the country was mired in the second year of the miserable Depression, with government and law doing little to address the situation. “Realistic jurisprudence is a good medicine for a sick and troubled society,” Arnold observed.<sup>302</sup> “The America of the early 1930’s was such a society.”<sup>303</sup> Considered among the more radical Realists, Arnold offered this broader assessment: “But realism, despite its liberating virtues, is not a sustaining food for a stable civilization.”<sup>304</sup>

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295. Frank’s argument to this effect can be found in Jerome Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle* (pt. 2), 25 NOTRE DAME LAW. 460, 460–61 (1950).

296. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

297. William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 350 (1985).

298. FRANK, *supra* note 253, at 66–67 (referring to *Law and the Modern Mind* as a foolish attempt at defining “law”); LLEWELLYN, *supra* note 134, at xxiii (quoting the preface to the 1951 edition of *The Bramble Bush*).

299. LLEWELLYN, *supra* note 135, at xxiii (quoting the preface to the 1951 edition of *The Bramble Bush*).

300. *Id.* at xxiv.

301. Thurman Arnold, *Judge Jerome Frank*, 24 U. CHI. L. REV. 633, 635 (1957).

302. *Id.*

303. *Id.*

304. *Id.*

## VII. Latecomers to the Battle Against Judges

The final misconception that must be dispelled is the background story against which the Realists are often understood: the narrative that judges at the time were laissez-faire enthusiasts who consistently obstructed pro-labor and social-welfare legislation.<sup>305</sup> According to this account, the Realists were crucial warriors in the battle against reactionary judges, a battle finally won with the “constitutional revolution” of 1937 (following the threat of Roosevelt’s court-packing plan), after which courts finally halted their obstruction of economic legislation.<sup>306</sup> Credence is given to this account by well-known examples of such court actions—from *Lochner* (which Holmes explicitly tied to laissez-faire ideology) to the Supreme Court’s invalidation of four pieces of New Deal legislation in 1935 and 1936.<sup>307</sup> Relying upon this narrative, a jurist claimed, “The final defeat of the Old Court majority in the exciting events of 1937 represented, no doubt, the apogée of the Legal Realists’ achievements.”<sup>308</sup>

This picture, however, distorts matters. It fails to acknowledge the massive increase of intrusive legislation that occurred from the final decade of the nineteenth century onward. “The most casual newspaper-reader and observer of legislation,” an editor wrote in 1887, “must have had his attention attracted to a growing tendency in our legislation toward the regulation of private and personal concerns.”<sup>309</sup> James Bryce, a respected English observer of the American legal scene, wrote in 1908, “[T]he output of legislation has of late been incomparably greater than in any previous age—greater not only absolutely but in proportion to the population of the civilized nations . . . .”<sup>310</sup> He continued, “[I]n no country is the output so large as in the United States, where, besides Congress, forty-six State Legislatures are busily at work turning out laws on all imaginable subjects . . . .”<sup>311</sup> Indeed,

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305. William Novak challenges the credibility of this narrative in an important new article. William Novak, *The Myth of the Weak American State*, 113 AM. HIST. REV. 752 (2008).

306. A description of these events can be found in BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 77–81 (2006).

307. *Morehead v. New York ex rel. Tiplido*, 298 U.S. 587 (1936) (invalidating state minimum-wage laws for women); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating provisions of the Bituminous Coal Conservation Act that regulated miners’ wages and coal prices); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating provisions of the Agricultural Adjustment Act that required crop reduction and price increases for agricultural products); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating minimum-wage and maximum-hours provisions for poultry-industry workers).

308. Edward McWhinney, *Judge Jerome Frank and Legal Realism: An Appraisal*, 3 N.Y. L.F. 113, 116 (1957).

309. *The Increase of State Interference in the United States*, 10 SCIENCE 2, 2 (1887).

310. James Bryce, *The Methods and Conditions of Legislation in Our Time*, Address Delivered Before the New York State Bar Association (Jan. 24, 1908), in 8 COLUM. L. REV. 157, 157 (1908).

311. *Id.*

“[a]t no time and in no country [had] legislation been so active,”<sup>312</sup> remarked another commentator in 1911.

A legislative onslaught it was. The broad array of subjects covered was conveyed in an annual review of *Social and Economic Legislation of the States* that began to run in 1890.<sup>313</sup> The author grouped the legislation into six classes: “(1) laws concerning the family and domestic relations; (2) laws providing for the State care of the unfortunate and depraved members of society; (3) laws for the regulation of labor and the laboring classes; (4) laws for the regulation of the different forms of corporate industry and concentrated capital; (5) State and local finance; (6) all legislation looking to the development of natural resources.”<sup>314</sup>

This legislation was plentiful, detailed, and reached deep into the crevasses of social and economic life. All aspects of work conditions were addressed, including hour limits, availability of bathrooms, mandatory days off, forms of payment, restrictions on child labor, and protections for labor unions that prohibited blacklisting and disallowed the hiring of nonresidents as private security to prevent vicious treatment of striking laborers.<sup>315</sup> The legislation intrusively limited contractual terms—including prohibiting waivers of employer liability to injured workers<sup>316</sup>—prompting the author of the survey to observe “[t]hat legislatures no longer hesitate to abridge the freedom of private contract.”<sup>317</sup> Legislation also imposed a variety of taxes;<sup>318</sup> restrictions on gambling,<sup>319</sup> cigarettes,<sup>320</sup> and alcohol;<sup>321</sup> mandatory education;<sup>322</sup> a host of health and safety regulations (including food-quality and labeling requirements); banking legislation; and a variety of restrictions on corporate operations;<sup>323</sup> and even imposed price limits on certain utilities.<sup>324</sup> The author of the legislative survey noted in 1894, “While the

312. Frederick N. Judson, The Progress of the Law in the United States, Annual Address Before the Colorado Bar Association (June 30, 1911), in 23 GREEN BAG 560, 560 (1911).

313. See William B. Shaw, *Social and Economic Legislation of the States in 1890*, 5 Q.J. ECON. 385, 385 (1891).

314. *Id.* at 385.

315. *Id.* at 387–91.

316. *E.g.*, William B. Shaw, *Social and Economic Legislation of the States in 1894*, 9 Q.J. ECON. 195, 195 (1895) [hereinafter Shaw, *Legislation 1894*] (mentioning a similar statute enacted in Massachusetts); William B. Shaw, *Social and Economic Legislation of the States in 1891*, 6 Q.J. ECON. 227, 232 (1892) [hereinafter Shaw, *Legislation 1891*] (describing a Texas statute that invalidated contracts aiming to limit an employer’s liability for injury to an employee).

317. Shaw, *Legislation 1891*, *supra* note 316, at 227.

318. *E.g.*, *id.* at 237–38.

319. *E.g.*, William B. Shaw, *Social and Economic Legislation of the States in 1895*, 10 Q.J. ECON. 218, 222 (1896).

320. *E.g.*, Shaw, *Legislation 1894*, *supra* note 316, at 204.

321. *E.g.*, *id.* at 201–02.

322. *E.g.*, Shaw, *supra* note 313, at 389.

323. *E.g.*, *id.* at 392–93.

324. *E.g.*, William B. Shaw, *Social and Economic Legislation of the States in 1893*, 8 Q.J. ECON. 230, 237 (1894).

effort to extend the functions of State governments has been more noticeable, perhaps, in those parts of the country where the ‘farmers’ movement’ has made most headway, the tendency in the direction of enlarging municipal activities is everywhere gaining strength, East and West.”<sup>325</sup> Most of this legislation was enacted pursuant to the legislatures’ broad discretion under the state “police power” to advance the health and safety of citizens.

The overwhelming bulk of this voluminous legislation survived challenges in state and federal courts. “An 1897 review of 1,639 state labor laws enacted during the preceding twenty years found that only 114 of them—7 %—had been held unconstitutional.”<sup>326</sup> The eminent Supreme Court historian Charles Warren, sympathetic to progressive reforms, wrote a 1913 article extolling the “progressivism” of the Supreme Court. He found that out of a total of 302 Supreme Court cases between 1873 and 1912 involving challenges to the exercise of state police power, “only 36 State statutes were held unconstitutional in 40 years”<sup>327</sup>—an average of less than *one* invalidation per year. In a separate study that looked at cases from 1887 to 1911 in which a claim was made that state legislation violated the Due Process or Equal Protection Clauses of the Constitution, Warren found that out of “560 State statutes or other form of State action adjudicated upon . . . during the last twenty-five years, the Court has upheld over 530”<sup>328</sup>—an average of just over *one* invalidation per year. *Lochner* was one of the latter cases, although it also bears mention that the New York high court had upheld the statute before the Supreme Court struck it down.<sup>329</sup> Consistent with Warren’s analysis,<sup>330</sup> Munroe Smith observed in 1913 that “the attitude of the federal Supreme Court is at present satisfactory to friends of social-reform legislation.”<sup>331</sup>

State courts were less accepting of such legislation, but even in state courts the degree of interference must not be exaggerated. Ernst Freund published a 1910 article that examined state-court treatment of labor legislation. He noted that the “great mass of labor statutes have not been contested in the courts.”<sup>332</sup> Further, he said, “Of those that have been questioned in the courts practically all that had any immediate bearing on safety, sanitation or

325. *Id.*

326. KELLER, *supra* note 222, at 407.

327. Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913).

328. Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 309 (1913).

329. *People v. Lochner*, 69 N.E. 373, 378–81 (1904).

330. A recent historical study confirms Warren’s argument that a high proportion of state statutes survived challenge. Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 488–89 (1998).

331. Munroe Smith, *The Development of American Constitutional Law*, PROC. ACAD. POL. SCI. N.Y., Jan. 1913, at 52, 63.

332. Ernst Freund, *Constitutional Limitations and Labor Legislation*, 4 ILL. L. REV. 609, 610 (1910).

decency have been sustained . . . .”<sup>333</sup> While state courts did show a tendency to strike down certain types of labor legislation, Freund found that the states nonetheless were divided among themselves on these issues—and that for each type that was struck down, a majority of jurisdictions nonetheless upheld similar legislation against challenge.<sup>334</sup>

Courts in the period *did* invalidate legislation at a level not seen before.<sup>335</sup> The resultant uncertainty about what would survive challenge had inhibiting effects. These actions provoked the ire and criticism of labor unions, populists, and progressives—prompting the recall initiatives mentioned earlier.<sup>336</sup> But the overall picture is twisted counter to reality if one ignores the overwhelming bulk of legislation that remained on the books. The real story of the late nineteenth century—recognized by a growing number of political historians<sup>337</sup>—is the inexorable rise and expansion of the modern bureaucratic state (including at the municipal, state, and federal levels), with its intrusive, instrumental, many-fingered forays into social and economic affairs, carried out through legislation and the administrative system. Far from standing together with arms locked in resistance against this advance out of a commitment to *laissez-faire*, courts largely stood by and let it happen, except for occasional obstructions that garnered a lot of attention.<sup>338</sup>

The conventional *laissez-faire* story about the period told today also does not comport with what observers were saying at the time. In 1892, Tiedeman remarked that fifty years earlier “*laissez-faire* philosophy exerted the dominant influence over public opinion . . . but in the last thirty years or more a strong tendency to socialism had been developed and public opinion now justifies a great many interferences with private business that would not have been tolerated fifty years ago.”<sup>339</sup> Albert Dicey similarly described the second half of the nineteenth century (in England, though reflecting a broader trend) as undergoing a sea change in law from individualism to

333. *Id.*

334. *Id.* at 610–14.

335. *See id.* at 610–11 (acknowledging that the twenty judicial decisions from 1885 to 1910 that declared state labor regulations unconstitutional were from “many different sections of the country” and “produced a great impression upon the legal profession and the community at large”).

336. *See supra* notes 53–59 and accompanying text.

337. *E.g.*, Novak, *supra* note 305, at 753–54 (describing the disconnect between the narrative of a *laissez-faire* America and the reality of the powerful American state). A superb account of the nineteenth-century expansion of the bureaucratic state is KELLER, *supra* note 222. *See also* Richard R. John, *Ruling Passions: Political Economy in Nineteenth-Century America*, 18 J. POL’Y HIST. 1, 8–9 (2006) (noting that historians no longer accept the myth of nineteenth-century *laissez-faire*).

338. *See supra* notes 99–114 and accompanying text.

339. Tiedeman, *supra* note 132, at 36. In a fascinating and convincing study that details the great amount of regulation—much of it local—in the early nineteenth century, William Novak shows that the nineteenth century was not a golden age of *laissez-faire*, as has often been claimed. WILLIAM NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN THE NINETEENTH CENTURY* 112 (1996).

collectivism effected through legislation.<sup>340</sup> This shift was a common topic of late nineteenth-century economic and political commentary.<sup>341</sup> “One of the most prominent facts of contemporary politics, both theoretical and practical,” remarked a political scientist in 1888, “is the movement away from what is called ‘Individualism.’”<sup>342</sup>

Given the unprecedented increase in the quantity, scope, and intrusiveness of legislation in the period, which chafed against traditional legal understandings, it should not be surprising that some legislation was invalidated. A considerable number of late-nineteenth-century judges, though what proportion is unclear, must have looked askance at much of this legislation, as did Cooley, Carter, and Dicey.<sup>343</sup> Many in law vocally supported it.<sup>344</sup> But there are indications that by the turn of the century judicial resistance began to diminish, and thereafter began to rapidly fade.<sup>345</sup> The incoming generation of judges at the beginning of the century would have been trained after the broad transition in social views was already underway.

A thoughtful firsthand account by a judge confirms this construal of events. In 1927, Judge Leonard Crouch described the rapid changes in the economy and society that took place at the turn of the century.<sup>346</sup> America underwent a dramatic shift from a rural society based on agricultural

340. ALBERT VENN DICEY, *LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY* 65–66 (1917).

341. *See, e.g.*, SIDNEY WEBB, *FABIAN TRACT NO. 69: THE DIFFICULTIES OF INDIVIDUALISM* (1896), *reprinted in* *FABIAN TRACTS NOS. 1 TO 212* (1925). Webb recognized that the nineteenth century “ha[d] seen an almost complete upsetting of every economic and industrial relation in the country.” *Id.* at 3. The wave of change had created a “rapidly-spreading conviction” that “the production and distribution of wealth, like any other public function, cannot safely be entrusted to the unfettered freedom of individuals, but needs to be organized and controlled for the benefit of the whole community . . . [and is] more advantageously accomplished through the collective enterprise.” *Id.* at 5.

342. Thomas Whittaker, *Individualism and State-Action*, 13 *MIND* 52, 52 (1888).

343. DICEY, *supra* note 340, at xxxv (criticizing the Old Age Pensions Act as “evil” and as “nothing but a new form of outdoor relief for the poor”); Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration*, 53 *J. AM. HIST.* 751, 768 (1967) (indicating that Cooley “did not usually look to government for a solution to the problems of the relations of labor and capital”); Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 *AM. J. COMP. L.* 95, 116 (1989) (describing Carter’s opposition to socioeconomic legislation).

344. Seymour Thompson and William Draper Lewis were among the most vocal supporters of progressive legislation and were strongly opposed to judicial nullification of such laws. *See* William Draper Lewis, *The Recall of Judicial Decisions*, *PROC. ACAD. POL. SCI. N.Y.*, Jan. 1913, at 37, 37 (supporting a proposal that would allow the electorate to override the judiciary by voting to reinstate laws that had previously been declared unconstitutional); Thompson, *supra* note 107, at 682 (lamenting the judiciary’s power to overturn the “useful and necessary” revenue laws of the states and the federal government).

345. *See supra* notes 326–34 and accompanying text.

346. Leonard C. Crouch, *Assoc. Justice, N.Y. Supreme Court, Judicial Tendencies of the Court of Appeals During the Incumbency of Chief Judge Hiscock*, Address Delivered at the Fourth Annual Meeting of the Cornell Law Association (Nov. 13, 1926), *in* 12 *CORNELL L.Q.* 137, 139 (1927).

production to a mostly urban, industrialized, mechanized society. This period ushered in modern society, with the age of incorporation, the rise of big business, the growth of bureaucratic government and the administrative state, the expansion of labor unions, and the shift to a consumer-oriented economy and society.<sup>347</sup> Judges who presided during this period, Crouch wrote, were trained to see law in terms defined by a different age:

The 19th century was a period of individualism. In politics, a minimum of government was best; in economics, free competition was essential; and in law the preservation of the rights of persons and property, including freedom of contract, was fundamental. Except as he himself had willed the existence of a relation to which the law attached a sanction, an individual was to be free from exaction; nor was he to be liable unless for a fault.<sup>348</sup>

Crouch could appreciate these older legal understandings because he underwent his legal training when they were still being taught.<sup>349</sup> He wrote, “The long succession of decisions in the [1890s] and in the first ten or twelve years of the [twentieth] century, holding unconstitutional many acts of the legislature which interfered with the property rights and freedom of contract of the individual, *seemed to most of us* sound law and socially desirable.”<sup>350</sup> The failure of the courts to respond to the transformed situation, however, incited popular “discontent with and criticism of the courts” and “an attack upon the common law itself.”<sup>351</sup> Subject to this agitation, courts in the first decade of the new century began gradually to move the common law in a more progressive direction.<sup>352</sup>

Others at the time reported a similar shift. A dramatic expression of the ongoing change can be found in John Wigmore’s vigorous opposition in 1914 to a then-current proposal by the American Academy of Jurisprudence to compile a statement of legal doctrine.<sup>353</sup> Daniel Ernst summarized a letter Wigmore sent to the Academy’s members that was highly critical of the project:

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347. Excellent chronicles of the various transformations that occurred during this period include JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900* (2007); REBECCA EDWARDS, *NEW SPIRITS: AMERICANS IN THE GILDED AGE, 1865–1905* (2006); MAUREEN A. FLANAGAN, *AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS, 1890S–1920S* (2007); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917* (1999); ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* (2007).

348. Crouch, *supra* note 346, at 142 (footnotes omitted).

349. Crouch received a Ph.B. from Cornell in 1889. *See* A CATALOGUE OF THE CORNELL CHAPTER OF PHI BETA KAPPA (THETA OF NEW YORK), 1882–1912, at 21 (1912).

350. Crouch, *supra* note 346, at 141–42 (emphasis added).

351. *Id.* at 140.

352. *Id.* at 147–52.

353. Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1020 (1993) (book review).

“The present decade (or even generation) is precisely the time when a formal statement of the law is inappropriate,” Wigmore wrote. “The law is so obviously in a seething change that one might as well expect to analyze a chemical reaction while the test tube is over the flame.” “Take any branch of law you like,” Wigmore continued. Torts? “The old-time doctrines of liability are changing so fast that it is difficult to keep up with them.” Criminal Law? “All along the line a radical recasting is going on.” Evidence? “Nobody knows how many rules are on the point of crumbling away in the next twenty years.” Constitutional Law? “A prophet would be needed to tell us what its complexion will be as soon as the present unrest has subsided; certainly many existing books may [be] sold for old paper.”<sup>354</sup>

A 1917 law-review article entitled *The Decline of Traditionalism and Individualism* opened with the recognition that “[t]he short period of the present century has witnessed in this country many legislative and judicial changes in the law.”<sup>355</sup> “So far as laws relative to business are concerned,” the author continued, “the principle of laissez faire is giving way to that of regulation.”<sup>356</sup> In 1921, Benjamin Cardozo wrote:

[T]he tendency today is in the direction of a growing liberalism. The new spirit has made its way gradually; and its progress, unnoticed step by step, is visible in retrospect as we look back upon the distance traversed. The old forms remain, but they are filled with a new content . . . . We are thinking of the end which the law serves, and fitting its rules to the task of service.<sup>357</sup>

Judging from these accounts, it appears that by the time the Realists came on the scene in the mid-1920s and 1930s the tide of attitudes within the judiciary had already decisively turned. It is true that the Supreme Court was controlled mostly by a conservative majority in this period,<sup>358</sup> but that did not reflect the broader situation. Nor is there any evidence that the writings of the Legal Realists about judging played *any* role in the final acquiescence of judicial conservatives to social and economic legislation.

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354. *Id.* at 1020 (quoting Letter from John Henry Wigmore to William Howard Taft, *enclosed in Letter from John Henry Wigmore to Elihu Root* (Jan. 28, 1914)) (footnote omitted).

355. Edwin R. Keedy, *The Decline of Traditionalism and Individualism*, 65 U. PA. L. REV. 764, 764 (1917).

356. *Id.* at 766.

357. CARDOZO, *supra* note 5, at 101–02. Legal historian Frederick Pollock also wrote at the time that the law had already begun to change in these respects in the late nineteenth century. *See* FREDERICK POLLOCK, *THE GENIUS OF THE COMMON LAW* 107–08 (1912). Pollock wrote that when “the reign of utilitarian individualism,” which had begun in the 1830s, began to subside after “approximately half a century,” it became “a probable or plausible, opinion, that the State was abdicating its functions by remaining passive, and should not only leave the road open for ability, but give active assistance in suppressing unfavourable external conditions and equalizing opportunities.” *Id.* Pollock added: “The present generation is full of this spirit, and its power seems likely to increase for some time yet.” *Id.* at 108.

358. *See supra* notes 305–12 and accompanying text.

### VIII. Two Realistic *Generations* in Law (at Least)

When all the conventional stereotypes are stripped away, what is left beneath “legal realism” is a *label* and an *image*. Had this catchy label not been coined (initially with no real content in mind), had the ire of Pound not been provoked, had a few personalities not reveled in pushing the envelope of respectability, the folks tagged as Realists would probably not have been seen as a discrete group at all—as some of those involved objected at the time.<sup>359</sup> Several of the Realists were pioneers of the social-scientific study of law, others were reformers of legal education, and others pursued a progressive political agenda.<sup>360</sup>

For the most part, however, they were hardly distinguishable from the many other law professors, judges, and legislators in the period who were developing substantive legal rules and doctrines in ways that better adjusted to, and addressed the new social, material, and economic circumstances of, a vastly changed society. This essential transformational work was undertaken and accomplished by at least two full generations of legal scholars: the Realists’ generation, and the generation before. These generations of jurists, many of them quite well-known at the time, have been obliterated from the modern consciousness by the misleading story about the revolutionary changes wrought by the Realists. Take, for example, William Draper Lewis—the dean of the University of Pennsylvania Law School, and head, at different times, of the Association of American Law Schools and of the American Law Institute.<sup>361</sup> Lewis asserted that law serves social needs, and wrote in 1897 that “all law does depend on the proper public policy for the conditions which exist, and the changes in the conditions of life which have been going on for the past eighty years are great enough to produce the most profound changes in our law.”<sup>362</sup>

To obtain a sense of how deeply this set of views had penetrated turn-of-the-century juristic thought, consider the words of two prominent judges. Delivering the 1903 Annual Address to the American Bar Association, Second Circuit Judge LeBaron Colt insisted that it has always been the special role of courts and lawyers to “keep the law in harmony with social progress, to make it more reasonable as social necessities and public sentiment have demanded.”<sup>363</sup> He said:

Ever recognizing that “the matter changeth, the custom, the contracts, the commerce, the dispositions, educations, and tempers of men and societies,” they have conceived theories, invoked doctrines, and

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359. See *supra* notes 18–32 and accompanying text.

360. See *supra* notes 35–40 and accompanying text.

361. See *supra* note 40.

362. William Draper Lewis, *The Possibility of New Legal Obligations*, 45 AM. L. REG. & REV. 1, 6 (1897).

363. LeBaron B. Colt, U.S. Circuit Judge, First Circuit, Law and Reasonableness, Address at the American Bar Association Meeting, in 37 AM. L. REV. 657, 674 (1903).

inaugurated instrumentalities to relieve the situation. They have carried on judicial legislation from the infancy of the law in order that it might advance with society. By the adoption of broad and elastic rules of interpretation, they have maintained, in large measure, the supreme law of the land in harmony with national growth . . . .<sup>364</sup>

Colt frankly acknowledged that judges invoked the “doctrine of reasonableness”<sup>365</sup> and “liberally” construed statutory and constitutional provisions to change the law and accommodate social changes.<sup>366</sup> Colt insisted, again and again:

The law should always be viewed from the standpoint of society, and not from the standpoint of the law itself. . . . The law is made for society, and not society for the law. The interests of society are primary; the interests of the law secondary. Society is the master, and the law its handmaid.<sup>367</sup>

Colt said this in front of a gathering of lawyers several years before Pound urged much the same,<sup>368</sup> and a generation before the Legal Realists would stake out the same position.

Another high-profile federal circuit judge, Charles F. Amidon, made explicit in 1907 what everyone could see, namely: “The fact that the Supreme Court in constitutional cases so frequently stands five to four, each division assigning weighty reasons for diametrically opposite views, shows plainly how much the Constitution in actual application is a matter of interpretation.”<sup>369</sup> He added that the cases are “frequently decided not upon the language of the Constitution, but upon conflicting notions of life.”<sup>370</sup> Given the “wide latitude for judicial construction,” Amidon wrote, “the court in construing the Constitution is exercising a political power second only to that of the convention that framed the instrument.”<sup>371</sup>

Many of the most prominent legal figures of the day—including Ernst Freund, Samuel Williston, John Henry Wigmore, and Harlan Fiske Stone—noted the openness of judging, advocated that law should change with and meet the needs of society, and promoted the reform of legal education.<sup>372</sup>

364. *Id.*

365. *Id.* at 670.

366. *Id.* at 673.

367. *Id.* at 675.

368. Pound, *supra* note 21, at 709.

369. Charles F. Amidon, *The Nation and the Constitution*, 19 GREEN BAG 594, 598 (1907).

370. *Id.* at 599.

371. *Id.*

372. *See, e.g.*, Freund, *supra* note 75, at 231 (suggesting that “in cases of genuine ambiguity courts should use the power of interpretation consciously and deliberately to promote sound law and sound principles of legislation . . . [rather than] a painstaking fidelity to the supposed legislative intent”); John Henry Wigmore, *Problems of the Law’s Evolution*, 4 VA. L. REV. 247, 251 (1917) (“The lesson here to be drawn is that the study of the *substantial* element of law begins always with social facts and institutions.”); John Henry Wigmore, *Problems of the Law’s Mechanism in America*, 4 VA. L. REV. 337, 344 (1917) (arguing that adherence to precedent must be tempered

Even Joseph Beale, held up by Frank as the epitome of wrongheaded, purely abstract thinking about law,<sup>373</sup> in 1914 characterized law as a means to social ends, and explicitly advocated “sociological jurisprudence.” He wrote, “The importance of these investigations cannot be overestimated. Every part of the law ought to be tested to find out how far it is conforming to its purpose.”<sup>374</sup>

The essential error perpetuated by current understandings is to see “the Realists” as a hardy *band* of rebellious thinkers, when the views about judging they held—their balanced realism, not their skeptical pose—were shared by most jurists at the time. A large clue that points toward this conclusion can be found in Llewellyn’s response to Pound.<sup>375</sup> When citing examples of realistic work, Llewellyn referred to “about sixty-five people (in addition to the list of twenty).”<sup>376</sup> That makes roughly *eighty-five* jurists thinking along realist lines, by Llewellyn’s account, including leading names of the day—such as Pound, Cardozo, Frankfurter, and Landis—across a range of fields.<sup>377</sup> This was a *generation* of legal thinkers. Pound said as much when he objected to Llewellyn’s initial list of forty-four Realists: “[Y]ou might put almost all of us there. All of us today surely have something of what is in the juristic air we breathe.”<sup>378</sup>

Llewellyn’s initially odd observation about the list of twenty Realists now makes more sense: “Their differences in point of view, in interest, in emphasis, in field of work, are huge. They differ among themselves well-nigh as much as any of them differs from, say, Langdell.”<sup>379</sup> Llewellyn was not exaggerating. For example, Francis Bohlen and Leon Green, today

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with the need for flexibility and fluidity); John H. Wigmore, *The Qualities of Current Judicial Decisions*, 9 ILL. L. REV. 529, 533 (1915) (observing the shortcomings associated with judges’ “undue servitude to the bondage of *precedent*”); Samuel Williston, *Change in the Law*, 69 U.S.L. REV. 237, 239 (1935) (“To the extent that social needs and mores change, legal principles should change . . .”); Harlan F. Stone, Assoc. Justice, U.S. Supreme Court, Fifty Years’ Work of the United States Supreme Court, Address Delivered at the Semi-Centennial Meeting of the American Bar Association, in 14 A.B.A. J. 428, 429–30 (1928) (praising the adaptation of the Commerce Clause to the growing needs of national and local governments after the Civil War); Harlan F. Stone, U.S. Att’y Gen., Some Phases of Legal Education, Address at the Centennial Celebration of Yale Law School (June 18, 1924), in 5 AM. L. SCH. REV. 389, 391 (1924) (praising the legal education system for “bring[ing] to the service of mankind a more profound knowledge of legal principles and their more perfect adjustment to social and economic needs”); see also CARDOZO, *supra* note 211, at 14–16 (discussing the reformist work of several of these thinkers and others).

373. See FRANK, *supra* note 19, at 48, 53, 48–56 (“Beale seems to consider that the judgment of any court is too finite, too lowly, of too little real import, to be worthy the name Law.”).

374. Joseph H. Beale, *The Necessity for a Study of Legal System*, 1914 PROC. AM. ASS’N L. SCH. 31, 39.

375. Llewellyn, *supra* note 22; see *supra* notes 29–31 and accompanying text.

376. William W. Fisher et al., *The Struggle over the Meaning of Realism*, in AMERICAN LEGAL REALISM 51 (William W. Fisher et al. eds., 1993).

377. HULL, *supra* note 20, at 343–46.

378. Letter from Roscoe Pound to Karl N. Llewellyn (Apr. 9, 1931), quoted in HULL, *supra* note 20, at 215.

379. Llewellyn, *supra* note 22, at 1234.

described as representing sharply contrasting views of tort law,<sup>380</sup> were both on Llewellyn's initial list of Realists.<sup>381</sup> That explains the final words of Llewellyn's essay: "They are not a group."<sup>382</sup> Like every generation, this legal generation was driven by many differences. But on the core issues for which the Realists are known—a realistic view of judging, the insistence that law must keep up with and meet the needs of society—there was basic agreement (although dissenters existed, as always).

The argument pressed here—that the Realists' views about judging were common to their generation—would appear to be inconsistent with the fact that they were subjected to criticism by their peers at the time. That can be explained, however. One set of criticisms came from jurists—mainly natural-law thinkers—opposed to the proposition that law is purely a means to serve social interests, a perspective that critics thought emptied law of its ethical content and reduced it to a system of power.<sup>383</sup> This was troublesome indeed, but it was a dilemma the entire generation struggled with, as law was widely seen by that time as a means to serve social ends.<sup>384</sup> A few critics—including Robert Hutchins, also on Llewellyn's first list of Realists<sup>385</sup>—were skeptical about the usefulness of shifting legal education to focus on fact situations, and about the fruitfulness of social-scientific studies.<sup>386</sup> These were legitimate doubts.

Critics who objected to the Realists' views about judging fixated on their skeptical excesses, chastising the Realists for failing to adequately appreciate the role played by legal rules in legal decisions.<sup>387</sup> This criticism was not unfair with respect to Frank (and his *Law and the Modern Mind*), but it was a distorted reading of the Realists—which is understandable given their skeptical pose—who held a balanced realism about judging.<sup>388</sup>

380. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 78 (2003) ("Bohlen never endorsed Realism nor accommodated his thinking about Torts to that of Green.").

381. HULL, *supra* note 20, at 344–45 tbls.1 & 2.

382. Llewellyn, *supra* note 22, at 1256.

383. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159–62 (1973) (claiming that collective fears during World War II contributed to the growing fear that legal realism, like Hitler's relativism, could lead to oppressive totalitarianism if left unchecked by defined legal boundaries).

384. See TAMANAHA, *supra* note 306, at 60–63. Although in that work I described the rise of instrumental thinking about law, the timing of the analysis now appears to be incorrect, as I did not know at the time that realism was in place earlier than discussed.

385. HULL, *supra* note 20, at 344 tbl.1.

386. Robert M. Hutchins, President, Univ. of Chi., *The Autobiography of an Ex-Law Student*, Address Delivered at the Association of American Law Schools Banquet (Dec. 29, 1933), in 7 *AM. L. SCH. REV.* 1051, 1052–53 (1934). Thurman Arnold also later expressed doubt about the fruits of the social-science initiative. Arnold, *supra* note 301, at 641–42.

387. E.g., John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 *U. PA. L. REV.* 833, 835–36 (1931) [hereinafter Dickinson, *Legal Rules*]; John Dickinson, *The Problem of the Unprovided Case*, 81 *U. PA. L. REV.* 115, 122 (1932) [hereinafter Dickinson, *Unprovided Case*]; Hermann Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L.J.* 1240, 1241 (1934).

388. Rostow explained this well. See *supra* note 262 and accompanying text.

Remember that Llewellyn and Cohen criticized Frank on these grounds as well.<sup>389</sup> The essential point is that the critics *also* held a balanced realism about judging. Pound, Dickinson, and Fuller, the best known critics, all accepted the validity of the Realists' points about the openness of law and judging and the impropriety of thinking that legal rules were certain and answers easy.<sup>390</sup> However, Pound wrote in criticism of the Realists: "It is just as unreal to refuse to see the extent to which legal technique, with all its faults, applied to authoritative legal materials, with all their defects, keeps down the alogical or unrational element or holds it to tolerable limits in practice."<sup>391</sup> Llewellyn and other Realists, as indicated above, agreed with this and protested that the critics had unfairly distorted their position. No critic denied that law has many open spaces, that precedent can be putty in the hands of judges, or that judges sometimes reason backwards from outcomes. When properly understood in these terms, the criticism of the Realists' views of judging at the time *confirms* the core argument of this Article: that many jurists—including the Realists—held balanced, realistic views of judging.<sup>392</sup>

One clarification must be emphasized in closing. To assert that legal realism was really an empty label, and that the Realists' views about judging were typical of their generation, is not to say that realism had no impact. The very *belief* that the Legal Realists valiantly battled against prevailing ignorant views of judging, though misleading, has had a continuing effect in shaping contemporary views about judging in terms of a formalist–realist divide, reflected in the quotations given at the outset of this Article.<sup>393</sup> Frank and Llewellyn helped perpetuate this divide through their exaggerated portraits of what they were combating, and they too ended up unwillingly hooked on the opposite end of their creation.<sup>394</sup> This Article is part of an attempt to loosen the hold of that distorted framework. Furthermore, thanks in

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389. See *supra* notes 283–88 and accompanying text.

390. Dickinson, *Legal Rules*, *supra* note 387, at 835; Dickinson, *Unprovided Case*, *supra* note 387, at 124; L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 434 (1934); Kantorowicz, *supra* note 387, at 1244.

391. Pound, *supra* note 21, at 707.

392. Brian Leiter argues that the fact of the criticism is proof that the Realists' views challenged prevailing views. See Brian Leiter's Legal Philosophy Blog, <http://leiterlegalphilosophy.typepad.com/leiter/2008/04/tamanaha-on-the.html> (Apr. 30, 2008) ("[I]f it were true that there was no 'formalist' age and that Legal Realism just continued earlier lines of thinking, then why did Roscoe Pound, John Dickinson, and Lon Fuller, among others, react so strongly to Realism?"). But this argument fails to appreciate the nature of the criticism. The critics argued that the Realists overemphasized skepticism at the expense of recognizing the rule-bound aspect; Llewellyn responded that this criticism was a distortion, that they did in fact recognize the rule-bound aspects. With respect to the underlying views about judging, both the Realists and their critics accepted the presence of the skeptical aspects and the rule-bound aspects (and both agreed that the law largely worked, and was predictable)—they both adhered to the "realism" defined at the outset of this Article. See *supra* notes 4–5 and accompanying text.

393. See *supra* notes 2–5 and accompanying text.

394. See *supra* notes 18–22 and accompanying text.

part to the work of the Realists, significant changes have taken place in how casebooks are written and how the law is taught, and the social-scientific study of law is thriving. Changes have also occurred in the style of written judicial decisions, with more open discussions of policy and social consequences. The Legal Realists contributed to these changes, which they worked to bring about. Nothing in this Article detracts from the historical studies that have documented the efforts of the Legal Realists in these respects. The thrust of this analysis, however, is that the named Realists were a dozen-plus individuals singled out for attention, and given inordinate credit, for what was the work and success of two generational waves of jurists with similar views about judging, engaging in the same enterprise, and working to bring the law into a closer match with a vastly transformed society and set of social understandings.

#### IX. Repeated Bouts of Skeptical Realism

When viewed in a longer historical frame that stretches backward to the early nineteenth century and forward to the late twentieth century, the evidence presented in this Article suggests that skeptical-realistic insights about judging regularly emerge in the U.S. legal tradition, often linked to heightened social and political turmoil. Three examples of such skepticism were recited from the 1830s—one uttered in advocacy of codification, and two others in connection with what the authors feared was a looming constitutional crisis.<sup>395</sup> Further historical excavation will likely locate additional expressions of skeptical realism in the first half of the nineteenth century.<sup>396</sup> Skeptical observations about judging appeared in response to the Legal Tender Decisions of 1870–1871, continuing in a low key, then bursting forth in the early 1890s—a period of severe depression, strife, and dislocation. Many battles took place in legal arenas in this period.<sup>397</sup> Skeptical realism about judging continued apace through the turn of the twentieth century<sup>398</sup> and on into its first, second, and third decades, until it appears to have quieted in the 1940s. The improvements brought by the New Deal, the final retreat of recalcitrant judges, and the threats of the Second World War and Communist Russia perhaps combined to help sublimate such skepticism. Viewed in this longer frame, it appears more accurate to situate the “Legal

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395. See *supra* notes 228–38 and accompanying text.

396. Another remarkable example of early realism about judging can be found in an 1812 work urging the reform of common law crimes. See JOHN M. GOODENOW, *HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE* 283 (Roy M. Mersky & J. Myron Jacobstein eds., 1972) (1819) (arguing that the Constitution does not compel courts to follow English common law).

397. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 253–308 (3d ed. 2005) (1973).

398. For additional realistic statements from the 1870s through the 1920s about the law and judging, see Tamanaha, *supra* note 185, at 42–46.

Realists” at the *tail end* of more than five decades of a continuous stream of candid realism about law and judging.

Following more than a decade of relative quiescence, a renewed episode of skeptical realism about judging in the U.S. legal culture emerged. In the late 1950s and 1960s this was manifested in Southern and conservative critics who charged the Warren Supreme Court with reading liberal values into the Constitution.<sup>399</sup> In the 1970s and 1980s, skeptical realism was embraced by the leftist Critical Legal Studies movement, fueled by the turmoil of race-based protests and opposition to the Vietnam War.<sup>400</sup> In the 1990s and 2000s, a steady drumbeat of skeptical realism has been directed at the courts—and especially the Supreme Court—from both the left and the right.<sup>401</sup> Our own time replays a number of the same debates and arguments about the legitimacy of judicial review, and the relationship between law and politics, that were raised a century earlier.

What especially stands out about expressions of skeptical realism is the striking similarity of the arguments across time. Rantoul in 1836,<sup>402</sup> Hammond in 1881,<sup>403</sup> the Legal Realists in the 1920s and 1930s,<sup>404</sup> Critical Legal Studies in the 1970s and 1980s, and others along the way, all argued—in interchangeable terms—that judges have the freedom to decide cases in accordance with their political views and to cover these decisions with legal justifications. Most of the skepticism reproduced in this Article was articulated by members of the legal fraternity.

The identity of these arguments, which span nearly two centuries, leads to the surmise that realism about the openness of law and the complexities of judging is present even when not made an issue of. This is confirmed by Lieber’s remark in the 1830s that the recognition that uncertainty of interpretation will arise owing to contrasting views of judges “has become proverbial.”<sup>405</sup> If this is correct, then the expression of skeptical realism does not reflect a newfound awareness about the operation of judging, but rather is prompted by deep unhappiness about law or judges, with critics time and again deploying already-at-hand skeptical arguments as a weapon.

The difference today is that the skeptical emphasis appears to have become a normalized aspect of discourse about judging. The current generation of legal academics and lawyers—although there is no poll to prove it—appears prone to express a casual skepticism about judging.<sup>406</sup>

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399. TAMANAHA, *supra* note 306, at 77–100.

400. *See generally id.* at 101–32.

401. *See generally id.* at 172–89, 227–45.

402. *See supra* notes 228–29 and accompanying text.

403. *See supra* note 158 and accompanying text.

404. *See supra* note 2 and accompanying text.

405. LIEBER, *supra* note 233, at 30.

406. Judge Alex Kozinski contrasted the skepticism about judging taught in law schools with his more balanced realism. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993).

High-profile political attacks on courts and increasingly politicized battles over the appointment of federal and state judges potentially fan skepticism among the public.<sup>407</sup> Karl Llewellyn wrote a lengthy book that elaborated on the sources of predictability in judicial decisions because he was concerned about the corrosive effect of pervasive skepticism about judging.<sup>408</sup> We do not know what effect unrelenting skepticism might have on judging, but it is plausible to think that it might threaten the balance between the skeptical aspects and rule-bound aspects of a balanced realist view that leading judges and jurists, including the Legal Realists, have expressed for more than a century. Judge Harry Edwards has urged that “we should at least consider the idea that judges, told often enough that their decisionmaking is crucially informed by their politics, will begin to believe what they hear and to respond accordingly.”<sup>409</sup> This is a fitting place to repeat the warning of Judge Thurman Arnold, one of the great Legal Realists, that skeptical “realism, despite its liberating virtues, is not a sustaining food for a stable civilization.”<sup>410</sup>

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407. See generally TAMANAHA, *supra* note 306, at 172–89.

408. LLEWELLYN, *supra* note 44, at 3.

409. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decision Making*, 1991 WIS. L. REV. 837, 855.

410. Arnold, *supra* note 301, at 635.