The Realist Conception of Law

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Abstract

A well known truism states that the realist conception of law is false or nonexistent. Those who view the infamous predictive theory of law as synonymous with the legal realist conception of law point to its well-known deficiencies. Others, who focus on the realists’ suspicion of conceptual analysis, hold that legal realism fails to offer any interesting insights into the concept of law.

Almost as commonplace is the claim that the reason “we are all realists now” is that legal realism represented a crude revolt against formalism, assembling an incoherent set of rudimentary ideas. Once these various claims were developed by its later heirs, legal realism inevitably diverged into a set of distinct, sharp, and oftentimes conflicting perspectives on law.

This Article contests both of these clichés. It revives the legal realists’ rich account of law as a going institution accommodating three sets of constitutive tensions—between power and reason, science and craft, and tradition and progress—and demonstrates how the major claims attributed to legal realism fit into this conception of law. Finally, this Article claims that the contemporary heirs of legal realism have each focused on one element of a single constitutive tension rather than refining, as conventional wisdom might hold, a confused collection of rudimentary claims. While contemporary accounts of law enhance our understanding of its characteristics, only the realist conception captures law’s most distinctive feature: the uncomfortable, but inevitable, accommodation of these constitutive tensions.
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ABSTRACT

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INTRODUCTION

The conviction that legal realism has transformed American legal discourse is widely shared.1 Yet, for many readers, the idea of a realist conception of law—the title of this Article—may seem as an oxymoron. Some may remember Ronald Dworkin’s description of legal realism as nominalism.2 These readers must wonder how I can claim that nominalists, who reduce phenomena to their singular manifestations, have anything to contribute to the conceptual analysis of law. Others may associate legal realism with a crude revolt against formalism,3 implying that the only (putative) contribution of legal realism to law is deconstructive. Again, if legal realism stands only for anti-formalism there can be no realist conception of law.

Still other readers may criticize my title for the opposite reason, namely, the suggestion that there is one singular realist conception of law rather than many. These readers may point to the variety of contemporary jurisprudential schools—notably law and economics and critical legal studies—that either claim to be or are portrayed as true descendants of legal

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1 See, e.g., Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 *Cornell L. Rev.* 335 (1988). The term “realism” in this context should not be confused with its technical philosophical meaning in fields such as epistemology (the belief that objects of perception exist independently of the mind), ontology (the position that universals exist independently of particulars), or philosophy of science (the view that scientific theories are at least approximately true and that scientific terms have genuine referents). See, e.g., Michael Martin, *Legal Realism: American and Scandinavian* 2-3 (1997).


3 The phrase “revolt against formalism” was coined by Morton White. See Morton White, *Social Thought in America: The Revolt Against Formalism* 11 (1949).
They may further allude to the fierce rivalry among these schools which reflects significant disagreements about the nature of law. Because these disagreements are real, legal realism must be, at best, an eclectic and potentially incoherent set of rudimentary ideas about law, which inevitably come into sharp conflict once they are properly fleshed out (a task left to the legal realists’ successors). These readers may thus reach the same unflattering conclusion, namely, that the idea of reconstructing a realist conception of law is deeply perplexing.

If all that legal realism stands for is nominalism, sheer critique, or incoherent eclecticism, looking for the realist conception of law does not make much sense. Even more charitable accounts of legal realism, which do attribute to it some core wisdom about the nature of law, are likely to share the view that an exercise seeking to revive its jurisprudential lessons is futile. These accounts usually imply that the realist vision of law is basically reducible to one or another more or less known jurisprudential school, be it empirical social science, pragmatic instrumentalism, critical realism. They may further allude to the fierce rivalry among these schools which reflects significant disagreements about the nature of law. Because these disagreements are real, legal realism must be, at best, an eclectic and potentially incoherent set of rudimentary ideas about law, which inevitably come into sharp conflict once they are properly fleshed out (a task left to the legal realists’ successors). These readers may thus reach the same unflattering conclusion, namely, that the idea of reconstructing a realist conception of law is deeply perplexing.

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6 Thus, Morton Horwitz claims that “Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed . . . more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.” Morton Horwitz, The Transformation of American Law, 1870-1960, at 169 (1992). Horwitz further argues that there are two faces to legal realism: critical and scientific. Id., at 208-12. See also, e.g., Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century’s End 26, 28-30 (1995) (characterizing the work of legal realists as “comprised of conflicting impulses and alternative strands of oppositional thought”: “radical legal realism” and “progressive legal realism”).

7 See Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 ETHICS 278, 278 (2001) (referring to the widespread view that “Legal Realism is a jurisprudential joke, a tissue of philosophical confusions”).


legal studies, or old-fashioned nihilism. But contemporary students of these divergent schools tend to present richer and more sophisticated accounts of these approaches than the ones that can be distilled from the realist literature. Therefore, excepting the (surely important) goal of setting the historical record right, the contemporary benefits of studying legal realism seem rather marginal.

As the title of this Article suggests, I beg to differ, and will argue that legal realism offers important, unique, and by now mostly forgotten jurisprudential insights. This Article demonstrates that legal realism offers a specific conception of law irreducible to any other. My reconstruction of this realist legacy is not intended as a piece of intellectual history. I am not concerned here with tracing the intellectual roots of realist ideas, with evaluating legal realism as a historical movement, or with assessing the scholarship of any given realist scholar. Instead, my purpose is to present a useful interpretation of legal realism, drawing out from the realist texts a

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10 See Horwitz, supra note 6, at 270-71.

11 See Bruce A. Ackerman, Reconstructing American Law 6-22 (1984).

12 Even Brian Leiter, in defending what he calls the realist descriptive theory of adjudication, insists that legal realism is not a theory of law. See Leiter, supra note 7, at 279.


16 In particular, this Article should not be read as an intervention in the historical debates on the philosophy of Oliver Wendell Holmes. For a (controversial) account, very different from my analysis of the Holmesian texts, see Albert W. Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes (2000).
vision of law that is currently relevant. With this aim in mind, I ignore the many excesses (and some sheer follies) found in realist literature, and read these texts as charitably as I can, presenting them in the best possible light. The same approach informs my interpretation of the texts I use, and also guides me in their selection and the emphases I ascribe to them. This charitable perspective on realism further explains why I focus on some authors, particularly Oliver Wendell Holmes, Benjamin Cardozo, Karl Llewellyn, and Felix Cohen, and marginalize others, notably Jerome Frank and Thurman Arnold.

In my reconstructed realist conception, law is conceived as a going institution that embodies three sets of constitutive tensions: between power and reason, science and craft, and tradition and progress. In the realist conception, what is most distinctive about law is the difficult accommodation of these constitutive, yet irresolvable, tensions. Law is neither brute power nor pure reason; it is neither only a science, nor is it merely a craft; law is neither exhausted by reference to its past, nor is it adequately grasped by an exclusively future-oriented perspective. Legal

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17 As William Twining notes, “[d]ead jurists have their uses. They can be treated . . . as sources of ideas that have a potential significance that transcends the particular context in which they were introduced.” William Twining, Other People’s Power: The Bad Man and English Positivism, 1897-1997, 63 Brooklyn L. Rev. 189, 189 (1997).


19 As the text implies, like any interpretation, my interpretation of legal realism should not be read as either a discovery or an invention. See generally Michael Walzer, Interpretation and Social Criticism 1-32 (1987). I am not claiming to have discovered the one true essence of legal realism which is obvious to anyone who cares to read the legal realist literature. The reading suggested here is unashamedly influenced by my own convictions about law. Nor am I pretending, however, to have invented the ideas I present: the conception of law this Article presents emerges as the underlying understanding of a sufficient number of realist texts to justify being called the realist conception of law. In other words, the success of this Article depends both on the cogency of the understanding of law I present, and on its fit to legal realist scholarship.


21 Cf. Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Texas L. Rev. 267, 269 (1997). Leiter rejects the claim that it is meaningless to talk about the core of realism apart from the views of individual writers, arguing that such a core can be found by looking for the common denominator of the views endorsed by people commonly thought to be realists. While I share this methodological premise, I disagree with Leiter’s substantive claim that the core claim of legal realism is that “in deciding cases, judges respond primarily to the stimulus of the facts.” Id. See infra Section III.B.2.
realists reject all these reductionist understandings of law, which are in vogue in contemporary jurisprudence. For the realist, law is defined by these very three tensions. A conception of law purporting to dissolve these tensions, obscures at least one of the legal phenomenon’s irreducible characteristics, and is thus hopelessly deficient.

One way of presenting the aim of this Article, then, is as an exposure of the ambiguity of the cliché stating “we are all realists now,” and the problem it evokes. This cliché is correct in the sense that many contemporary legal theories continue the realist project by refining and elaborating one realist tenet, be it its challenge to legal formalism or its account of one of the features that, according to the realist conception, are constitutive of law. And yet, the cliché is seriously misleading in the sense that by focusing on one aspect of the realist “big picture” of law, the contemporary descendants of legal realism lose sight of its core insight and thus miss out on its greatest promise: keeping the constitutive tensions of law constantly before us. The point of reconstructing and reviving the realist conception of law is precisely the possibility of restoring this promise and reinstating the realist agenda for future research and debate.

I. FROM CRITIQUE TO RECONSTRUCTION

The starting point of legal realism is its critique of formalism, a critique that may be uniquely significant at the present time given the revival of legal formalism among some judges and scholars. In this part I outline the formalist vision of law and demonstrate that the legal realists’ critique of this vision remains relevant, despite some heroic attempts to domesticate it. The realist claim that the multiplicity of legal sources (rather than merely the vagueness of discrete doctrinal sources) renders the formalist pretense of doctrinal determinacy an insidious falsity entails devastating consequences for the legitimacy and authority of a formalist legal regime. Appreciation of this radical critique is thus necessary to set the ground for the presentation of the realist alternative, which takes to

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22 Cf. Laura Kalman, Legal Realism at Yale, 1927-1960, at 229 (1986) (the claim that we are all realists now “has been made so frequently that it has become a truism to refer to it as a truism.”) But cf. Neil Duxbury, The Reinvention of American Legal Realism, 12 Legal Stud. 137, 139 (1992) (“realist jurisprudence was subjected to an ideologically motivated campaign of vilification”).

heart the ramifications of this critical lesson but is also deeply committed to rehabilitate law as a viable social institution that can be an instrument of justice.24

A. Legal Formalism

Classical formalism—culturally personified in the figure of Christopher Columbus Langdell of Harvard Law School—stands for the understanding of law as an autonomous, comprehensive, and rigorously structured doctrinal science.25 In this view, law is governed by a set of fundamental and logically demonstrable scientific-like principles.26 Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world, and the predominance of formal logic within this autonomous universe.27

In formalism, law is “an internally valid, autonomous, and self-justifying science” in which right answers are “derived from the autonomous, logical working out of the system.”28 Law is composed of concepts and rules. As per legal concepts, formalism endorses “a Platonically...
or Aristotelian theory,” according to which “a concept delineates the essence of a species or natural kind.” Legal rules, in turn, embedded either in statutes or in case law, are also capable of determining logically necessary legal answers. Induction can reduce the amalgam of statutes and case law to a limited number of principles. Legal scientists can provide right answers to every case that may arise using syllogistic reasoning: classifying the new case to these fundamental pigeonholes, and deducing correct outcomes.

Because legal reasoning is characterized by these logical terms, internal to it and independent of concrete subject matters, formalism perceives legal reasoners as technicians whose task and expertise is mechanical: to find the law, declare what it says, and apply its preexisting prescriptions. Because these doctrinal means generate determinate and internally valid right answers, lawyers need not—indeed should not—address social goals or human values.

B. The Critique of Formalism

The realist project begins with a harsh critique of this formalist conception of law. Realists claim that the doctrinalism celebrated by the

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29 Grey, supra note 27, at 11.


31 As the text implicitly clarifies, contemporary scholars who offer instrumental reasons for adopting a formalist analysis for some specific set of legal questions—for example, those who support literal interpretation of contracts accompanied by a strict parol evidence rule because it is welfare-maximizing—necessarily fall outside the purview of formalism as a conception of law, since their call for formalism is viable, by its own terms, only insofar as and to the extent of, its justification in realist terms. Roy Kreitner aptly terms this approach local instrumental formalism. See Roy Kreitner, Fear of Contract, 2004 Wis. L. Rev. 429, 437-38.

formalist enterprise does not, in fact, describe adjudication. They extend this descriptive claim in a conceptual direction, maintaining that the indeterminacy and manipulability of the formalist techniques for divining the one essential meaning of legal concepts and of induction, classification, and deduction as per legal rules, render pure doctrinalism a conceptual impossibility. Finally, these descriptive and conceptual claims give rise to the realist normative criticism of legal formalism; the accusation of serving as a means for masking normative choices and fabricating professional authority.

1. Doctrinal Indeterminacy

   a. Hart’s Challenge. Beginning a charitable reconstruction of legal realism with a discussion of its indeterminacy claim may seem awkward. After all, H. L. A. Hart’s famous conclusion that this claim is a “great exaggeration” 33 is usually taken as a decisive, devastating, and almost embarrassing critique. 34 But it is not. To be sure, Hart effectively addressed the narrower problem of rule indeterminacy, showing that the indeterminacy of discrete doctrinal sources is limited. However, realism views legal doctrine as hopelessly indeterminate not (or at least not primarily) because of the indeterminacy of discrete doctrinal sources as enshrined in statutory norms or in judicial opinions, but mainly because of their multiplicity. The indeterminacy of legal doctrine derives first and foremost from the available leeway in choosing the applicable rule rather than from the ambiguity of that rule once chosen.

   Hart recognizes that legal analysis affords some judicial latitude due to the indeterminacy of language and the multiplicity of human contingencies. But he insists that the gap between language and reality does not mean that there are no easy cases for the application of a given legal rule. He uses the example of a bylaw that forbids vehicles to enter a local park. Hart admits that “there is a limit, inherent in the nature of language, to the guidance which general language can provide,” so that it may be disputable whether “vehicle” used here includes bicycles, airplanes, and roller skates. But while these hard cases are the inevitable result of the open texture of language, there are also “plain cases constantly recurring in similar contexts to which general expressions are clearly applicable”: if

anything is a vehicle, a motor car is one. This distinction between core and penumbra in any given norm is the premise of Hart’s conclusion that, notwithstanding the realist critique, rules “are determinate enough at the centre to supply standards of correct judicial decisions.”

Hart’s analysis can domesticate some realist claims regarding the indeterminacy of discrete legal (typically statutory) rules. Thus, it effectively addresses claims by John Dewey and Max Radin that no one can “signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to.” Indeed, insofar as the indeterminacy critique of doctrinalism relies on the inevitable ambiguity of the language of legal rules and “the intrinsic impossibility of foreseeing all possible circumstances,” it is limited to doctrinally hard cases. The indeterminacy of discrete doctrinal sources—think here of one given rule in a statute—is not a serious threat to the doctrinalist project.

But Radin, who focuses on the indeterminacy of discrete statutory norms, anticipates Hart’s point and concedes that the existence of a


36 Dewey, supra note 30, at 192.

37 More specifically, Radin argues that reference to the plain meaning of a statute cannot render it determinate because the situation described in a statute is only generally determinable, a generality that makes the statute in most cases indeterminate. In other words, a statute states “a group of possible events within a situation”; because events are unique, any description of a group of events is “almost by definition ambiguous,” subject to at least two possible, at times contradictory, meanings. See Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 868-69 (1929). Radin extends his critique to other conventional methods of statutory interpretation. Thus, for example, he claims that reference to legislative intent, even if it were normatively desirable, cannot solve the indeterminacy of statutes because legislative intent is also indeterminate: frequently the legislature “has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.” Furthermore, “[t]he chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of the given determinable, are infinitesimally small. The chance is still smaller that the given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed.” Radin, supra note 37, at 870. For a Hart-like domestication of this claim, see Andrei Marmor, Interpretation and Legal Theory ch. 8 (1992). For a critique, see Jeremy Waldron, Legislators’ Intentions and Unintentional Legislation, in Law and Interpretation, supra note 13, at 329.

38 Dewey, supra note 30, at 193.
statutory rule “imposes certain limitations in the application.” In turn, Dewey’s critique does not focus only on the indeterminacy of discrete doctrinal sources. Immediately after referring to the difficulty posed by the inherent gap between language and reality, Dewey adds that “questions of degree of this factor or that have the chief way in determining which general rule will be employed to judge the situation in question.”

b. Doctrinal Multiplicity. While Dewey tackles the problem of doctrinal multiplicity only subtly, most realists present this element more explicitly and in far greater detail. Fully appreciating the magnitude and depth of doctrinal indeterminacy, they claim, requires that we do not look merely at one given rule. Rather, the main source of doctrinal indeterminacy is the multiplicity of doctrinal materials that are potentially applicable. Since legal rules and principles are “in the habit of hunting in pairs”—because legal doctrine always offers at least “two buttons” between which a choice must be made—none of the doctrine’s answers to problems is preordained, precise, or inevitable.

Doctrinal multiplicity is endemic to law mainly due to the obvious fact that no legal rule exists in solitude and legal rules are always part of the legal system in which they are embedded. When assessing the claim of doctrinal indeterminacy, therefore, we must look at the legal doctrine as a whole, as lawyers always do. This broader perspective immediately highlights an element of choice that is obscured in any discussion focusing on the indeterminacy of discrete rules, including Hart’s: because “the authoritative tradition speaks with a forked tongue,” there is always some latitude in picking up the rule to be applied to the case at hand. For legal

39 Radin, supra note 37, at 878-79.
40 Dewey, supra note 30, at 192.
42 FRED RODELL, WOE UNTO YOU, LAWYERS! 154, 160 (1939). See also, e.g., JEROME FRANK, LAW AND THE MODERN MIND 138 (1930) (arguing that rules cannot yield determinate results because there are no available “meta-rules” [my term] “by which you can force a judge to follow an old rule” or “by which he can determine when to consider a case as an exception to an old rule, or by which he can make up his mind whether to select one or another old rule to explain or guide his judgment”).
43 Interestingly, this point has been emphasized by Hans Kelsen—a prominent legal positivist—who (correctly) claimed that legal rules gain their validity (at times even their meaning) from being a part of an effective legal system. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 3, 110-23 (Anders Wedberg Trans. 1946).
44 KARL L. LEWELLYN, SOME REALISM ABOUT REALISM, IN JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE 42, 70 (1962).
realism, the choice among rules competing to control the case is the major (and inescapable) source of doctrinal indeterminacy or, more precisely, of doctrinal under-determinacy.\textsuperscript{45}

Thus, Karl Llewellyn claims that “\textit{all} legal systems” are patchworks of contradictory premises covered by “ill-disguised inconsistency,” because we find in all of them that “a variety of strands, only partly consistent with one another, exist side by side.”\textsuperscript{46} Any given legal doctrine, including the one guiding the lawyers’ interpretative activity (the canons of interpretation),\textsuperscript{47} suggests “at least two opposite tendencies” at every point. For (almost) every case, then, lawyers find opposite doctrinal sources: a rule and an exception, or two seemingly unrelated rules that need to be accommodated.\textsuperscript{48} The availability of multiple sources on any given legal


\textsuperscript{48} Moreover, doctrinal multiplicity manifests itself even when we are dealing with one legal source, at least where that source is a case, rather than a statutory rule. (In fact, even statutory rules include in many cases more than one norm at a time, thus generating a problem of multiplicity.) As Llewellyn explains, in distinguishing between \textit{ratio decidendi} and \textit{obiter dictum}, judges can rely either on the rule stated by the previous court or on the legally relevant facts (or on both). Furthermore, even if we focus on only one method, significant indeterminacy still remains. Thus, respecting stated reasons or articulated rules, Llewellyn refers to the difficulty of accumulative or alternative reasons that generates “an intermediate type of authority”: in such “multi-point decisions,” each leg “is much more subject to challenge than it would be if the decision stood on it alone.” Furthermore, even with regard to each reason given by the court for its decision, some ambiguity remains: First, judges tend to repeat their reasons and the rules they state, but “the repetition seldom is exact.” Second, opinions are always read contextually, that is “with primary reference to the particular dispute,” which requires a difficult distinction between some arguments or illustrations that must be confined to the case at hand and others that enjoy a much more general applicability. Similar indeterminacy faces the method of figuring out the holding of a case by focusing on the facts of the actual dispute before the court. Obviously, not each and every fact stated by the court is legally (continued...,)
question, all of which can be either expanded or contracted, results in profound and irreducible doctrinal indeterminacy.\(^{49}\)

The impact of having multiple doctrinal resources is further aggravated by the complex interaction between rules and facts. Deciding what rule governs a case requires a classification of the case into a legal category. This demands a distinction between “essential” or “relevant” facts and less significant ones that are necessarily overlooked. But fact situations admit of more than one classification, and each classification contains “a degree of violence to either the fact situation or the classifying category.” Squeezing the facts into the rule requires to adjust either the facts or the rule.\(^{50}\) Describing this process of classification as an application of rules to facts is thus “deceptively simple.”\(^{51}\) To apply a rule is a misnomer; rather, one either extends a rule or contracts it.

Similarly, legal realists maintain that the idea of inevitable entailments from legal concepts is false. Instead, they assert that the interpretation or elaboration of any legal concept can choose from a broad
menu of possible alternatives. The heterogeneity of contemporary understandings regarding any given legal concept (such as property or contract) within and without any given jurisdiction, as well as the wealth of additional alternatives that legal history frequently offers, defy the formalist quest for conceptual essentialism.

In sum, the main reason for the realist claim that judges are never fully constrained by legal doctrine is not the indeterminacy of any given rule, an indeterminacy that Hart domesticated, but rather the question of whether the rule will contain a doubtful case. The multiplicity of doctrinal sources is the main reason for Justice Holmes’ famous dictum, “[y]ou can give any conclusion a logical form.” In dealing with legal rules and legal concepts the judicial task is never one of static application. At any given moment, legal doctrine contains competing trends that can apply to the particular case at issue. Judges always need to choose “and perhaps also to re-formulate the victorious trend.”

2. Cloaking Choices; Fabricating Authority

The project of legal formalism of “science for the sake of science,” focusing on “the niceties of [law’s] internal structure [and] the beauty of its logical processes,” is thus untenable. It is also disturbing and harmful. By falsely presenting (often intuitive) value judgments made by judges as inevitable entailments of predetermined rules and concepts, formalism obscures these choices, shielding them from empirical and normative scrutiny, and securing the unjustified claim of lawyers to impenetrable professionalism.

a. Formalism as Cover-up. The formalist fallacy, claims Holmes, serves as a cover-up for “considerations of social advantage” that are “the very ground and foundation of judgments” and must not be left

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55 See Paul Gewirtz, Editor’s Introduction, in Llewellyn, Case Law, supra note 46, at xvi.
56 LLEWELLYN, CASE LAW, supra note 46, at p.92 n.1.
57 Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605, 605 (1908).
unconscious. 58 Felix Cohen elaborates on the theme of cloaking normative choices in his famous critique of the formalist use of legal concepts. Although using legal concepts is unavoidable, Cohen maintains, this innocuous practice is risky because lawyers tend to “thingify” legal concepts. 59 Lawyers’ “language of transcendental nonsense” treats such concepts not as legal artifacts, but as a non-modifiable part of our natural or ethical environment, and thus misleadingly presents existing legal concepts as explanations and justifications for subsequent legal results. 60 But “the magic ‘solving words’ of traditional jurisprudence,” claims Cohen, neither explain nor justify court decisions. 61 Worse still, when “the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions,” then “the author, as well as the reader, of the opinion or argument[] is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.” 62 Formalism is objectionable because by pretending to find determinate doctrinal answers to legal questions it bars the way to an open inquiry of the normative desirability of alternative judicial decisions, thus unduly naturalizing contingent doctrinal choices. 63

58 Holmes, supra note 54, at 184.

59 Cohen, supra note 52, at 811. See also Joseph Bingham, What is the Law?, 11 Mich. L. Rev. 1, 12 (1912). Contra Horwitz, supra note 6, at 202 (presenting the task of realist jurisprudence as “root[ing] out concepts altogether and return[ing] to the raw material of reality.”)

60 Cohen, supra note 52, at 820.

61 Id. at 820, 812

62 Id. at 812. Hohfeld’s critique and reconstruction of traditional rights discourse is, in fact, part of the same move of exposing the choice behind seemingly natural legal constructs. See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913). See also Walter Wheeler Cook, Privileges of Labor Unions in the Struggle for Life, 27 Yale L.J. 779 (1918); Joseph William Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975. Karl Llewellyn further refines Hohfeld’s liberating move by implying that different types of remedies constitute different types of rights. See Llewellyn, Some Realism, supra note 44, at 63. See also Hanoch Dagan, Unjust Enrichment: A Study of Private Law and Public Values 12-14 (1997).

Dewey’s critique of syllogistic reasoning echoes Cohen’s attack on lawyers’ language as transcendental nonsense. Dewey presents legal exposition as the professional hazard of judges. The purpose of legal exposition “is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum,” and will instead “indicate a rule for dealing with similar cases in the future.” Legal exposition, therefore, tends not to reveal all the problems and doubts a legal reasoner faces along the way. Hence the appeal of syllogism with its attendant misrepresentation. “Those forms of speech which are rigorous in appearance … give an illusion of certitude” and of a judicial opinion that is “impersonal, objective, rational.” Moreover, when “the doctrine of undoubtable and necessary antecedent rules comes in,” the old is sanctified. This, in Dewey’s view, is “the great practical evil” of the syllogistic method. Privileging—indeed perpetuating—the status quo in such a way breeds “irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.”

b. Formalism and Lawyers’ Authority. Unmasking the manipulability of legal doctrine raises severe concerns as to the authority of legal reasoners (including judges, administrators, practicing lawyers, and legal academics, among others). Thus, Fred Rodell vividly presents lawyers as a “small group of men, smart, smooth and smug,” who “blend technical competence with plain and fancy hocus-focus to make themselves masters of their fellow men.” Rodell laments lawyers’ success in preventing any “brand competition or product competition,” thus capturing excessive social power. Lawyers are able to gain this unjustified privileged position by

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63 (...continued)

will notice the deliberately limited use I am making of Cohen’s argument. I do not dispute Jeremy Waldron’s claim that legal concepts help “represent[] a nexus of connections” that “may be something of substantial importance for anyone proposing to change or repeal any one or more items in the array, or even for anyone proposing simply to apply one of the rules in the array to a particular set of events in a particular case.” Jeremy Waldron, “Transcendental Nonsense” and System in the Law, 100 COLUM. L. REV. 16, 25 (2000). Nothing in the text is aimed at undermining, or in fact undermines, the role of the conceptual terminology of law in “keep[ing] track of the significance of legal changes in a complex patchwork of doctrine,” thus facilitating “law’s ability to flourish in an environment of complexity, diversity, and disagreement.” Id. at 52-53. Indeed, while insisting that not “every non-empirical connection is discreditable and unimportant,” Waldron himself is careful enough to add that “Cohen might be right in his distaste for conceptual arguments that trapeze around in cycles and epicycles without ever coming to rest on the floor of verifiable fact.” Id. at 51.

64 See Dewey, supra note 30, at 191, 193.
creating and preserving (at times self-deceptively) a distinct language with a scientific appearance: the discourse of legal formalism. This language is “a maze of confusing gestures and formalities”; a hodgepodge of “long words and sonorous phrases” with “ambiguous or empty meanings,” frequently “contradictory of each other.” Yet, lawyers are able to conceal “the confusion and vagueness and emptiness of legal reasoning” by their “sober pretense” that the legal language—which is for non-lawyers “a foreign tongue”—“is, in the main, an exact science.” Legal formalism is thus responsible for the status of lawyers as “a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.”

C. The Puzzle of Reconstruction

1. Beyond Frankified Subjectivism

The realist attack on the formalist conception of law as an autonomous science is too often misinterpreted as meaning that judges exercise unfettered discretion so as to reach results based on their personal predilections, which they then rationalize after-the-fact with appropriate legal rules and reasons. Brian Leiter has aptly described this view as the “Frankification” of legal realism, and correctly charged its subscribers with the fallacy of viewing Jerome Frank—an extreme proponent of the

65 RODELL, supra note 42, at 3-4, 6-7, 153, 157-58, 186, 189, 196, 198. Rodell’s “cure” to these faults—to “get rid of the lawyers and throw the Law out of our system of laws” (id. at 249)—has been justifiably criticized, even ridiculed. See, e.g., Neil Duxbury, In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique, 11 OX. J. LEGAL STUD. 354, 370-372 (1991). But the claim that the nature of legal discourse affects the status of the legal profession and that, more specifically, the preservation of law’s autonomy generates for lawyers far-reaching social, economic, political, and cultural advantages, is by now an almost mainstream position among sociologists of law. See Pierre Bordieu, The Force of Law: Towards a Sociology of the Juridical Field, 38 Hastings L.J. 805, 819-21, 841-43 (1987). See also, e.g., RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 5, 166 (1995).

66 Brian Leiter presents this proposition as the “received view” of legal realism. See Leiter, supra note 21, at 268. For a sample of this misinterpretation see id., at 267-268 (references to Ronald Dworkin, Jon Newman, John Hart Ely, Steven Burton, Fred Schauer, and Robert Satter).
“idiosyncracy wing” of legal realism—as its typical representative. But Frank, as Leiter notes further on, is a minority voice.67

Mainstream legal realists reject Frank’s subjectivism.68 Thus, Cohen maintains that because law is a social institution, legal results are “large-scale social facts” that “cannot be explained in terms of the atomic idiosyncrasies of personal prejudices of individuals.”69 The “hunch theory of law” magnifies “the personal and accidental factors in judicial behavior,” ignoring our daily experience of “predictable uniformity in the behavior of courts.” But law, Cohen claims, “is not a map of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls.” Decisions genuinely peculiar are therefore bound to erode and be washed away in a system that provides for appeals, rehearings, impeachments, and legislation.70 While legal realists do not deny that the personality of individual judges may affect outcomes in particular cases,71 most believe that “[t]he eccentricities of judges balance one another,”72 and the bulk of legal material falls into essentially predictable patterns.73

None of this undermines the realist claim that a gap will always exist between doctrinal materials and judicial outcomes. Law cannot be understood as a set of concepts and rules with content, able to transcend the legal tradition in which it is situated and independent of any (contingent)

67 Leiter, supra note 21, at 268-69, 283-84. See also Michael Ansaldi, The German Llewellyn, 58 BROOKLYN L. REV. 705, 775-77 (1992)

68 Frank himself never renounced the irrationalist view, encapsulated by the reference to “the judicial hunch.” He merely believed that this hunch can become more benevolent. See ROBERT JEROME GLENNON, THE INCONOCLAST AS REFORMER 49-50 (1985); Bruce A. Ackerman, Book Review of Law and the Modern Mind, 103 DEDALUS 119, 122 (1974).

69 Felix S. Cohen, Field Theory and Judicial Logic, in THE LEGAL CONSCIENCE, supra note 45, at 121, 135.

70 Cohen, Transcendental Nonsense, supra note 52, at 70.


73 See Karl L. Llewellyn, My Philosophy of Law, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 183, 196 (1941); Leiter, supra note 21, at 283-84. See also, e.g., KENT GREENAWALT, LAW AND OBJECTIVITY 34, 68 (1992).
extra-doctrinal understandings of the legal community. Unlike its Frankified caricature, however, legal realism neither maintains that the gap between doctrine and law is subjectively filled, nor does it deny the existence of legal reality. Mainstream realists agree with Benjamin Cardozo’s critique of “the jurists who seem to hold that in reality there is no law except the decisions of the courts.” This position, Cardozo argues, is fallacious because it denies the “present” of law: “Law never is, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires.” This denial of an existing legal reality is rejected because our daily experience disproves it: “Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition.”

2. Refining the Realist Challenge

Realists claim that the formalist description of law’s present (or legal reality) as synonymous with an autonomous system of concepts entailing necessary meanings and logically interconnected rules is misguided. Therefore, they also reject positivist theories which portray “the standard judicial function [as] the impartial application of determinate existing rules of law in the settlement of disputes,” and thus conceptualize law as if it were a self-regulating system of concepts and rules, a machine that in run-of-the-mill cases simply runs itself. For legal realists, a credible conception of law must allow the people who make it to occupy

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75 Cardozo, supra note 72, at 126-27. To this phenomenological reason, Cardozo adds another, namely, that legal nihilism “denies the possibility of law [by denying] the possibility of rules of general operation.” Id. But this is surely a circular argument that assumes the positivist conception of law, defeated by the realist critique of formalism.


center stage. Law, in short, must be understood as a going institution rather than a disembodied entity.

This claim does not deny the existence of rules or quarrel with the present of law. It also recognizes that law is a reasonably determinate terrain. Thus, notwithstanding his skepticism as to the ability of any given case to serve as the sole premise for legal outcomes, Llewellyn states that case law as a whole does give some “leads,” some “sureness.” The context in which we read a particular case, he explains, colors the language used in the opinion, thus giving “the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.”

Llewellyn’s prescription for looking at case law as a whole cannot be reasonably interpreted as referring to legal doctrine in its entirety: the aggregation of rules, sub-rules and exceptions. After all, the multiplicity of legal rules in any given doctrinal fabric is, by Llewellyn’s own account, the ultimate source of the indeterminacy of law in its formalist rendition. Llewellyn must therefore imply that law’s determinacy derives from something else, something that goes to the most fundamental characteristics of law. But what can this “something else” be?

This question sums up the quintessential challenge of legal realism. The slippage between doctrine and outcomes, Anthony Kronman correctly claims, raises two problems, to which he refers as intelligibility and legitimacy. First, identifying the sources of the “felt law”—once sheer doctrine is no longer a viable candidate—is crucial to explain past judicial behavior (render it intelligible) and predict its future course. Second, and even more significantly, if law is to rehabilitate its legitimacy, these sources should have redeeming qualities. Once the formalist myth of law as a set of

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78 For this reason a realist conception of the rule of law would be very different from its formalist renditions. One way of reading this Article is as offering such a conception.


81 See Martin, supra note 1, at 39-40, 76; see also Brian Leiter, Legal Indeterminacy, 1 Legal Theory 481 (1995).

82 Llewellyn, Bramble Bush, supra note 48, at 48.

83 See Kronman, supra note 1, at 335-36. See also, e.g., Glennon, supra note 68, at 52; Larua Kalman, The Strange Career of Legal Liberalism 5 (1996); Purcell, supra note 14, at 94.
agent-independent concepts and rules has been effectively discredited, these alternative sources must be capable of constraining judgments made by unelected judges and justifying their authority.

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The remainder of this Article reconstructs the realist response to these challenges while developing its unique conception of law. The realist understanding of law presents an ideal, but is decidedly not utopian. It emphasizes the human factor with its inevitable frailties, and highlights the conflicts inherent in law. It also hints at certain institutional, procedural, and discursive features that can alleviate—although by no means solve—these constitutive tensions of law. Although perhaps less glamorous, law in this account is far more intelligible and considerably more legitimate than in its (purported but mythical) formalist counterpart.

In the realist conception, law is a going institution that embodies three sets of constitutive tensions: between power and reason, science and craft, and tradition and progress. Parts II-IV are devoted to separate discussions of these sets of constitutive tensions, demonstrating their prominence in legal realist literature, while using this literature to explain why our understanding of law is deficient without an appreciation of their significance. The realist presentation of law’s perennial features is far from being complete or flawless. It is impossible to address here, let alone resolve, the questions and difficulties left open in the realist discourse, which bring to the fore several classic philosophical debates. Fortunately, this formidable undertaking is unnecessary for the task I have assumed here: reinstating the legal realist insight of keeping law’s constitutive tensions at the core of our conception of law.

II. ON POWER AND REASON

I begin with power and its tortuous relationship with reason as two prominent, yet not easily coexistent, features of law. Our starting point must be the coerciveness of law because it adds to the challenge that legal realists face when attempting to reconstruct law. Judgments issued by the carriers of law are qualitatively different from all others in their ability to recruit the state’s monopolized power to back up their enforcement. The fallacy of the formalist algorithm suggests that judges’ choices, rather than the doctrines they apply, are the trigger for coercion and power. It is

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precisely in this sense that the collapse of the formalist premise concerning the predictability and legitimacy of law is particularly devastating, and the need for reconstruction singularly acute.\footnote{As the text above implies, I use the words power, force, and coerciveness more or less as synonyms and, likewise, use reason, justification, and normativity almost interchangeably. Because this is the prevalent usage in the literature I discuss, adopting a competing vocabulary would have been inappropriate. \textit{Compare Hanna Arendt, On Violence} 43-46, 52 (1969).}

While the coerciveness of law and the challenges it poses have been too frequently ignored or domesticated, the portrayal of law as sheer power (or interest, or politics) is, realists claim, equally reductive. Law is also a forum of reason, and reason poses real—albeit elusive—constraints on the choices of legal decision-makers and thus on the entailed application of state power. Legal realists have neither solved the mystery of reason, nor have they conclusively demonstrated how reason can survive in law’s coercive environment. But their insistence that, in any credible account of the law, coerciveness and reason are fated to coexist, and their preliminary account of the difficult accommodation of power and reason are important, at least when compared to more contemporary approaches that are typically reductionist and predicated on an over-romantic or far too cynical view of law.

\textit{A. Law as Public Force}

Oliver Wendell Holmes begins \textit{The Path of the Law} by strongly emphasizing law’s coercive power. The reason why law is a profession, says Holmes, is that “in societies like ours the command of the public force is entrusted by judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.”\footnote{\textit{Holmes, supra} note 54, at 167.} This gloomy emphasis on force is not just an introductory gimmick.\footnote{\textit{Cf. Gregory S. Alexander, Comparing the Two Legal Realisms—American and Scandinavian}, 50 Am. J. Comp. L. 131, 132 (2002) (for American legal realism, which “was an extension of political Progressivism,” law “is deeply infused with questions of power”).} The claim that law is a coercive mechanism backed by state-mandated power weaves into and helps explain some important themes in this seminal essay.
1. Power as Key to The Path of the Law

Consider Holmes’ notorious dictum that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”\(^{88}\) At face value, this so-called predictive theory of law is riddled with flaws. Law as prediction makes no sense for judges addressing legal questions—are they to predict their own behavior? if so, surely they can never be wrong.\(^{89}\) Furthermore, even if we set aside this difficulty by acknowledging that judges cannot see law in this way,\(^{90}\) a predictive theory of law is seriously misleading. According to Hart’s well-known argument, legal norms are taken not only as predictions of judicial action, but also as standards and guides for conduct and judgment and as bases for claims, demands, admissions, criticism, and punishment—“The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.” For Hart, this failure to appreciate the normativity of law is significant because it ignores the “internal point of view” of people who accept the rules and voluntary cooperate in maintaining them, usually the majority. From that point of view, “the violation of a rule is not merely a basis for the prediction that a hostile

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\(^{88}\) HOLMES, supra note 54, at 173. Karl Llewellyn expands this claim to other law carriers as well: sheriffs, clerks, jailers, and lawyers. See LLEWELLYN, BRAMBLE BUSH, supra note 48, at 3 (“What these officials do about disputes is, to my mind, the law itself”).

\(^{89}\) See, e.g., Felix S. Cohen, The Problems of a Functional Jurisprudence, 1 MOD. L. REV. 5, 17 (1937) (“When a judge puts [a question of law], in the course of writing his opinion, he is not attempting to predict his own behaviour”); David Luban, The Bad Man and the Good Lawyer: A Centennial Essay on Holmes’s The Path of the Law, 72 N. Y. U. L. REV. 1547, 1577-78 (1997) (“If law is prophecies of what the courts will do, then court-made law consists of self-fulfilling prophecies.”).

\(^{90}\) See Karl L. Llewellyn, On Reading and Using the Newer Jurisprudence, in JURISPRUDENCE, supra note 44, at 128, 142. See also Bingham, supra note 59, at 10 (discussing the variety of attitudes “from which we [can] view the field of law”); MARTIN, supra note 1, at 16, 30, 32-37, 72-74 (the prediction theory is not a definition of law, but only a useful focus for counsels). Cf. J.M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 YALE L.J. 105, 110-112, 128-29, 131-136, 139-143 (1993) (law is constituted by the perspective of the legal actors in various and divergent ways, according to their various and divergent purposes, commitments and values).
reaction will follow but a reason for hostility.” Needless to add, this second flaw undermines another important theme of The Path of the Law: Holmes’ endorsement of the perspective of the bad man who “cares only for the material consequences” of his acts and discounts other reasons for action “whether inside the law or outside of it, in the vaguer sanctions of conscience.”

Another contested Holmesian theme is his call for separating law from morality. Holmes acknowledges that “[t]he law is the witness and external deposit of our moral life,” and that its “practice tends to make good citizens.” Yet, he complains that “law is full of phraseology drawn from morals,” which confusingly “invites us to pass from one domain to the other without perceiving it.” In order to avoid this trap, Holmes suggests banishing from the law “every word of moral significance” and adopting in their stead other words “which should convey legal ideas uncolored by anything outside the law.” Again, at face value, these statements are embarrassingly shallow. Not only does the claim about law’s moral function undermine the one about the impropriety of using words with moral content in legal discourse (or vice versa), but the latter claim, as David Luban notes, is a non sequitur. “The bare fact that legal words diverge from their extralegal counterpart doesn’t mean that they are different words with different meanings.” Replacing morally laden legal words with artificial terms is not really possible, because the moral and legal meanings are systematically related: “The moral baggage and nontechnical meanings of legal terms indeed co-exist with more specialized senses as the legal discourse develops them, but this is common respecting words that are used in multiple contexts (that is, respecting words, period).”

91 See Hart, supra note 33, at 79-88; see also, e.g., Benditt, supra note 80, at 39, 86-88; Joseph Raz, The Relevance of Coherence, in Ethics in the Public Domain: Essays in the Morality of Law and Politics 261, 280-81 (1994).

92 Holmes, supra note 54, at 171. See also id., at 174 (“It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it.”).

93 Holmes, supra note 54, at 170.

94 Id., at 171, 179

95 Luban, supra note 89, at 1567-69. Cf. Cardozo, supra note 72, at 133-34 (judges are duty-bound “to maintain a relation between law and morals”; the “contrasts between law and justice” should not obscure “their deeper harmonies”).
It is crude to think about law solely in terms of prediction, and it is awkward to advocate an impermeable separation of law from morality and celebrate the amoral perspective of the bad man. But these severe flaws become marginal, almost beside the point, if we interpret Holmes’ claims more charitably, reading them as means to bolster the assertion that coercion is a constitutive feature of law, that law is not just “system of reason.”

Recall that Holmes emphasizes prediction because people are afraid of the danger they will need to face, which is “so much stronger than themselves”; indeed, this is why the object of prediction is “the incidence of the public force through the instrumentality of the courts.”

Likewise, Holmes’ separation thesis, as well as his espousal of the bad man’s prudential point of view rather than that of the socialized good citizen, are best read as methodological devices for opening up some liberating distance for the addressees of law’s coercive judgments, for depriving law of some of “the majesty got from ethical associations.” Only after we wash the notion of duty with this “cynical acid,” explains Holmes, will the realm of legal duties shrink and grow more precise.

Along these lines, Llewellyn criticizes the “confused tradition [in which] if it is Legal, it is therefore Right enough.” It is mistaken to assume any inherent convergence between law and justice. Law should be separated from morality in order to “hold the responsibility for working toward the Right and the Just within the hard legal frame . . . to defuse and deconfuse the merely authoritative . . . from the Just or the Right, and to get into the pillory so much of the Law as has no business to be Law.”

Indeed, as Robin West suggests, while the fusion of law and morality tends to present law only in terms of justice and truth rather than as acts of power,

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97 *Holmes*, *supra* note 54, at 167.


99 *Holmes*, *supra* note 54, at 174, 179. See *also* id., at 171-72 (“[M]any laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, nothing but confusion of thought can result from assuming that the right of man in the moral sense are equally rights in the [legal] sense.”).

separating law from morality can help preserve our capacity for morally responsible and morally informed legal criticism.101 Similarly, William Twining suggests that we use the bad man metaphor as “rose-tinted spectacles,” serving to “filter out the seamy side of law and those elements that deserve criticism.” Taking the bad man’s detached perspective, at least intermittently,102 can help deprive law of its mythic significance and emphasize its coercive implications.103

2. The Elusiveness of Law’s Power

Hardly anyone denies law’s coercive power. Even Hart, who gives normativity center stage in legal theory, recognizes the feature distinguishing law from other normative systems that also impose obligations: the main difference between legal rules and rules of grammar or of etiquette is the seriousness of social pressure behind legal rules.104 Nevertheless, Holmes should not be criticized for rehashing a familiar point. The constitutive role of power and coercion in the practice of law is slippery and tends to be downplayed or obscured.

To begin with, while law is rather straightforwardly in the business of monopolizing (legitimized) force in society,105 law’s coercive effects extend to include other, more figurative and thus less transparent ways of wielding power. Law tends to naturalize (or at least privilege) its own contingent choices—which too often turn out to work for “entrenched interests”106—thus legitimizing them and delegitimizing other alternatives. This point, which surfaces already in Cohen’s discussion of legal concepts


102 As with any case of membership, legal actors—including citizens—cannot simultaneously identify with the values of their group and critically assess their cogency. Nonetheless, reflective members can and should occasionally take a critical perspective of these values. See Andrew Mason, Community, Solidarity and Belonging: Levels of Community and Their Normative Significance 58-59 (2000).

103 See Twining, supra note 17, at 205, 208-13, 218-20, 222-23.

104 See Hart, supra note 33, at 84.


and Dewey’s analysis of syllogistic reasoning, is helpfully elaborated by critical legal studies scholars. Thus, Robert Gordon explains that people tend to perceive legal prescriptions as “natural and necessary,” or at least as “basically uncontroversial, neutral, acceptable.” Therefore, law is one of those “clusters of belief,” “which are profoundly paralysis-inducing because they make it so hard for people (including the ruling classes themselves) even to imagine that life could be different and better.” Though legal structures are built “with human intentions, people come to ‘externalize’ them, to attribute to them existence and control over and above human choice; and, moreover, to believe that these structures must be the way they are.”

Furthermore, important features of law tend to mask the exercise of power—both material and figurative—by law’s carriers (judges and others). The institutional division of labor between “interpretation specialists” and the actual executors of their judgments facilitates law’s coerciveness by encouraging the latter to delegate violent activity to the former, while at the same time disconnecting judges from the violent outcomes that follow from their interpretive commitments. Similarly, as we have seen, in misleadingly offering an agent-independent methodology that can yield one right answer, the formalist legal algorithm downplays the legal actor’s choices, enabling actors to dodge responsibility for the coercive measures inevitably ensuing their legal activity. Even post-realist theories, like Dworkin’s, tend to obscure the dimensions of power and interest by suggesting, for example, that an ideal judge (Hercules) can totally transcend his or her self-interest and group affiliation.

The risk of blurring the coerciveness of law in both its material and expressive dimensions is particularly high with respect to private law, which structures our daily interactions and tends to blend into our natural


109 See DWORKIN, supra note 18, at 259-60. See also ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 14-15 (1995) (“Law is in the first instance an exhibition of intelligence rather than a display of monopolized power . . . The attribution of self-understanding to the law draws attention to the personal self-effacement of those who participate in the elucidation of the law from within”);
environment.\footnote{110} Not surprisingly, then, legal realists focus on exposing the contingency of the concepts and rules of property, contract and tort law in an attempt to expose the hidden ways in which law applies its power.\footnote{111} Cohen’s critique about the “thingification” of property illustrates this well. Courts justify the protection of trade names on the grounds that if someone created a thing of value, she is entitled to protection against deprivation because a thing of value is property. “The vicious circle inherent in this reasoning,” explains Cohen, “is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a device depends upon the extent to which it will be legally protected.” This flawed legal reasoning obscures the coercive and distributive effects of law. What courts actually do in these cases is to establish “inequality in the commercial exploitation of language,” thus creating and distributing “a new source of economic wealth or power.” Traditional legal discourse shields these decisions from normative critique and is thus tantamount to “economic prejudice masquerading in the cloak of legal logic.” Unchecked, law may serve “to perpetuate class prejudices and uncritical assumptions which could not survive the sunlight of free ethical controversy.”\footnote{112}

B. The Power of Reason and the Reason of Power

When realists such as Cohen emphasize law’s coerciveness (despite the institutional and discursive diffusion of law’s power) and highlight the distributive and expressive implications of the choices of law’s carriers, they introduce a formidable challenge. Situating power at the midst of jurisprudence is threatening to law because it is not clear how power and reason (or coerciveness and normativity) can ever be accommodated.


\footnote{111} In other words, the most important contribution of legal realism to private law discourse is not in criticizing \textit{laissez-faire} economics, as it is sometimes presented. Rather, the realist enduring lesson here is the critique of the way doctrinalism tends to absolve private law from any need for justification.

\footnote{112} See Cohen, supra note 52, at 814-18, 840. See also Louis L. Jaffe, Law Making by Private Groups, 51 HARV. L. REV. 212 (1937). Jaffe argues that legal permissions and delegations—using custom or usage as a source of law, granting power to property-holders and promisees, as well as respecting internal decisions of various forms of association—allow specific segments of society to determine “the substance of economic and social arrangement.” The fact that this power is covert—that it is obscured by the legal rhetoric of permissions or delegations—should not shield participation in law-making by private groups from an analysis as what it is: a form of law making.
Although realists are aware of this difficulty, they resist the temptation of reductionism and argue that the uncomfortable cohabitation of power and reason is a key to a proper understanding of law.

1. The Difficulty

At first glance, the challenge posed by the notion that power (or coerciveness) is a constitutive feature of law seems easy to handle. We might imagine that law’s coerciveness can just be added to its normativity, both being two distinct characteristics of law, separate but complementary strategies for securing compliance. But Meir Dan-Cohen, who attributes this view to Hart, considers it simplistic because it ignores the potential tension (or, downright contradiction in Dan-Cohen’s view) between coerciveness and normativity. Sanctions cannot simply be appended to norms without affecting them, because backing imperatives with sanctions detracts from the normative force that an authority’s utterances might otherwise have had. Coercion is designed to bring about the commanded behavior independently of the agent’s own values and desires. As such, coercion undermines any of the legal norm’s normative appeal, invalidating any possible reason for deference and voluntary obedience (be it gratitude, identification, or trust). Power, or the threat of inflicting power, does not append normativity but rather displaces it.

Writing more than fifty years before Dan-Cohen sharply articulated this difficulty, Llewellyn also appreciated the challenge of accommodating law’s coerciveness and its claim for normativity. Law “reaches beyond the normation of oughtness into the imperative of mustness,” and at times, law-stuff “is neither right nor just.” But although law enforces its prescriptions, law “is not brute power exercised at odds with, or without reference to the going order.” Law claims “observance, obedience, authority, effectiveness” because law “is the effective expression of the recognized going order of the Entirety concerned.” As such, it is not enough for law to claim and

113 This view could have been attributed just as easily to Thomas Aquinas. See Thomas Aquinas, Summa Theologica Q. 95, a. 1.

114 Meir Dan-Cohen, In Defense of Defiance, 23 Phil. & Pub. Aff. 24, 26-27, 29, 48-49 (1994). Dan-Cohen calls his claim about the relation between coerciveness and normativity disjunctive, and distinguishes it from the reductive view in which the normativity of law is entirely a matter of law’s coerciveness. Id. at 26. For all practical purposes, however, the disjunctive collapses into the reductive. By insisting that normativity and coercion are at odds with each other, the disjunctive approach undermines any claim of law as we know it—law as public power—to carry any normative meaning; to set standards for the guidance of the members of society.
effectively enforce its supremacy. Law needs an additional “element of recognition that what is done or commanded or set as imperative or as norm is part of the going order of the Entirety concerned.” While any given specific rule need not be approved, “[t]he content and substance of the norms and activities of the imperative System, as a whole, must be felt by the Entirety concerned to serve that Entirety reasonably well.” This requirement of normativity is not easy to comply with, however. Because law lends “a tremendous power” to judges, politicians, and police forces, it is naturally perceived by others as a mere “imperative” set by an “interferer.”

In other words, Llewellyn subscribes to Holmes’ view whereby power must play a central role in any credible conception of law. He further acknowledges, as does Dan-Cohen, that since power tends to preclude reason, law’s coerciveness threatens its normativity. Llewellyn refuses to accept, however, the reductive view that law is power, namely, that its normativity is exhausted by its coerciveness. While the coexistence of power and normativity is admittedly uncomfortable, in law, Llewellyn claims, struggles for power and normative discourse are inextricably linked. “Protagonists of divergent normations struggle to capture the backing of the system of imperatives; and that is a struggle for power, and by way of power and strategy. The protagonists struggle also to persuade relevant persons that such capture will serve the commonweal; that is both a tactic for capture and a tactic for more effective operation after capture.”

When rejecting the idea that law collapses into sheer power (or interest, or politics), realists part ways with many contemporary students of
the realist critique of formalism. Unlike many lawyer economists, they do not see law as a set of (explicit or implicit) transactions among factions each trying to maximize its share. Unlike critical scholars, realists deny that law merely secures the existing structures of power by immunizing the prevailing ideology from political critique. Llewellyn’s contrary notion, stating that struggles for power in law always involve persuasion about the common good, is not aimed at dismissing, or even lessening, the concern about legal actors using reason as a mere mask for power and interest (hence the realist commitment to constantly challenge existing law, to which I shortly turn). Rather, insisting that justification plays a central role in law—that law is never only about interest or power politics—is critical because of its indispensable role in preserving the very possibility of criticizing existing law and of recruiting law for morally required social change. If reason is left out of our conception of law, as reductionist theories of “law as power” suggest, there is no point in a moral critique of law and (almost) no choice but to affirm its current application of power. Because these consequences are grave, we should make every effort to avoid them. Too much is at stake to renounce the realist project of reconciling law’s coerciveness with its claim for normativity.

2. Reasoning about Power

The realist sketch of the way in which law accommodates both power and reason begins with the idea that law’s power invites reason. Because law is a coercive mechanism backed by state-mandated power, legal discourse—our public conversation about state-mandated coercion—must be a justificatory discourse, an exercise in reason-giving. But reasoning about power has important perils and unique advantages. Its perils require a suspicious and critical attitude towards legal reasoning. Its


120 The realist insistence on the role of reason in law should certainly not be interpreted as a means for preserving law’s legitimacy: undermining law’s legitimacy might have been a fine result if it were morally required.


122 See, e.g., Llewellyn, Some Realism, supra note 44, at 70-71.
potential advantages revolve around the special burden of responsibility experienced by legal reasoners.

a. A Jurisprudence of Ends. As noted, legal reasoning for realists is not—nor can it be—exhausted by the doctrinal moves of classification, induction, and deduction, or by an inquiry into the meaning of legal concepts. Rather, legal reasoning is, as it should be, oriented towards the human ends served by that law. A jurisprudence of rules should be substituted by a jurisprudence of ends. Legal prescriptions must be justified in terms of their promotion of human values. Legal institutions and legal rules must be evaluated in terms of their effectiveness in promoting their accepted values and the continued validity and desirability of these values.

Indeed, as Holmes claimed, once the “duty of weighing” considerations of “social advantage” becomes “inevitable,” legal reasoning must be concerned with providing reasons that refer to social ends. In turn, this new focus is bound to extract legal discourse from its disciplinary solitude: jurists will have to study, Holmes predicted, “the ends sought to be attained and the reasons for desiring them,” and this inquiry will necessitate the introduction of insights and methods from other disciplines into legal discourse. Holmes explicitly mentions the beneficial use of criminology and especially “the schools of political economy,” hence his dictum that “the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”

Opening up legal discourse to insights from other disciplines—acknowledging the continuity between legal reasoning and

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123 Cf. Roscoe Pound, supra note 57, at 611-12.

124 For a powerful statement of the inevitability of applying moral judgments as part of legal discourse (even in its most descriptive aspects), see Roscoe Pound, A Comparisons of Ideals in Law, 47 Harv. L. Rev. 1, 2-3 (1933). See also, e.g., Summers, supra note 9, at 20-21; Thomas W. Bechtler, American Legal Realism Revaluated, in Law in Social Context: Liber Amicorum Honouring Professor Lon L. Fuller 3, 20-21 (Thomas W. Bechtler ed., 1978); Thomas C. Grey, Freestanding Legal Pragmatism, 18 Cardozo L. Rev. 21, 26, 41-42 (1996).

125 Holmes, supra note 54, at 184, 187-89, 195. Similarly, Pound agonizes over the “separation of jurisprudence from the other social sciences” and “the conviction of its self-sufficiency” because they generate “a narrow and partial view that was in large part to be charged with the backwardness in meeting social ends . . . and the gulf between legal thought and popular thought on matters of social reform.” He further insists on “the impossibility of a self-centered, self-sufficient science of law” and calls for “unity of the social sciences.” See Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Harv. L. Rev. 489, 510-11 (1912).
other forms of practical reasoning—inevitably upsets lawyers’ claim to specialized knowledge and expertise.\textsuperscript{126} As Holmes put it, lawyers’ language of proof or the assertion of absolute, “once and for all” rightness, must be abandoned. “Law cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics”; it cannot be treated as a matter of “doing the[\textcommas{}] sums right.” Because law requires reference to social beliefs or policy concerns, it is “not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.” Legal discourse becomes much more contingent, and jurists must become much more modest: they should “hesitate where now they are confident, and see that really they are taking sides upon debatable and often burning questions.” Disagreement (between individuals, groups, and branches of government) turns out to be a constitutive feature of law.\textsuperscript{127}

\textit{b. Constant Criticism; Value Pluralism.} This understanding of law as a forum of reason must rely, at least to some extent, on an optimistic conviction about our ability to recognize and be influenced by good moral reasons.\textsuperscript{128} And yet, because reasoning about law is reasoning about power and interest, the reasons given by law’s carriers (and by other legal reasoners) should always be taken with a grain of salt.\textsuperscript{129} Law’s normativity can be preserved only if it is treated with suspicion, only if lawyers are constantly reminded of the other, much less glorified, constitutive element of law—its coerciveness\textsuperscript{130}; only if law constantly invites criticism of both

\textsuperscript{126} \textit{See, e.g.,} Posner, supra note 54, at 73. \textit{Cf.} Horwitz, supra note 6, at 193; Gordon, supra note 45, at 91. In criticizing the use of other disciplines for the understanding of law, Ernest Weinrib correctly maintains that “[t]he premise concerned with explanation cannot concede to any other discipline the self-sufficiency that it denies to law.” Weinrib, supra note 109, at 17. Weinrib is correct to learn from this critique that a reduction of law to some other discipline is doomed to fail. \textit{Id.}, at 17-18. But his further conclusion—that if such reductionism is rejected, the only viable alternative is to “accede to the possibility that law can be understood [solely] through itself”—relies on a false binarism which denies the possibility of understanding something through itself and through something else.

\textsuperscript{127} Holmes, supra note 54, at 180-82, 184.

\textsuperscript{128} \textit{See, e.g.,} Martha Nussbaum, \textit{Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior, in The Path of the Law and Its Influence,} supra note 98, at 50, 74, 76-77.

\textsuperscript{129} In fact, if we could be absolutely sure that law’s reasons are always correct, it would be mistaken to even talk about law’s power in any interesting way, because law would then be on a par with the forces of nature.

\textsuperscript{130} In other words, realists do not subscribe to the view that denounces the possibility (continued...)}
of objectivity, a position that—as Alan Brudner shows—undermines idealism about law
and in fact collapses idealism into skepticism or nihilism. See ALAN BRUDNER, THE
modesty about moral truths is premised, above all, on an acute awareness of the
susceptibility of the authority of law (and thus of its coercive power) to abuse by its
 carriers. (Abuse of power—insofar as it is a real and endemic human phenomenon—is
surely a reason for concern from almost any humanistic standpoint.)

Echoing Holmes’s separation thesis, legal realists claim that the fact
that law’s endorsement of certain rules and values “reaches beyond the
normation of oughtness into the imperative of mustness” and, moreover,
tends to produce “a sense of rightness, a claim of right,”132 must affect the
tone of law’s justificatory discourse. Appreciating the risks of habitual
reaffirmation, realists typically approach their normative inquiries in a
critical133 and pluralistic spirit.134 They conceptualize justice as a “perennial
quest for improvement in law, functioning as symbol to represent the need
of constant criticism and constant adaptation of law to the changing society
that it articulates.” Legal realists perceive human values as “pluralistic and
multiple, dynamic and changing, hypothetical and not self-evident,
problematic rather than determinative.”135

130 (...continued)

131 HOLMES, supra note 54, at 181. See also, e.g., LLEWELLYN, Some Realism, supra
note 44, at 55 (“Any part [of the law] needs constantly to be examined.”)

132 Llewellyn, The Normative, supra note 100, at 1364, 1368.

133 Contra Charles Fried, Scholars and Judges: Reason and Power, 23 HARV. J.L.
& PUB. POL’Y 807, 824-25 (2000) (suggesting that courts’ power necessitates a claim for
permanence and universality).

134 But see WEINRIB, supra note 109, at 33-35, 39-42 (claiming that to have “a truly
justificatory role” a justification must “set its own limit,” and that reliance on “a compound
of independent and mutually limiting justifications means that the justificatory authority of
these considerations is not taken seriously”).

135 Hessel E. Yntema, Jurisprudence on Parade, 39 Mich. L. Rev. 1154, 1169
(1941). See also, e.g., LLEWELLYN, On the Good, the True, the Beautiful in Law, in
JURISPRUDENCE, supra note 44, at 167, 211-12 (“I put my faith rather as to substance, in
a means . . . in that on-going process of check-up and correction which is the method and
the very life of case-law.”); PURCELL, supra note 14, at 41-42 (discussing Dewey’s
pragmatism, in which new facts, new theories, and new viewpoints should be able to
intrude upon previously accepted formulations). Not all legal realists subscribe to this view.
(continued...)
c. Responsible Argumentation. Legal realists claim that law’s coerciveness is not only a challenge to law’s legitimacy, but also a source of certain worthy qualities in legal discourse. “With power organized behind the official-Legal,” Llewellyn explains, “normation which candidates for acceptance and mint-mark as officially imperative is anybody’s business, in the service of his desires—be they high or low.” Put differently, in a contemporary society that is “really complex and at all mobile,” legal discourse is a unique social forum precisely because it is the arena where power is divided and interests collide. What is at stake is not only material: law produces and maintains “the groupness of the group”—however thin it may be in our contemporary environment—and is recognized as the institution that can properly “speak for the Whole of Us.” Law’s material and expressive power is what brings to the legal discourse the protagonists of various ideals and conflicting views, making it “inescapably one place, in which [people] face group responsibility.” Thus, law’s coerciveness always “stands under a requirement of accountability”; unlike other domains of force and power, the power of law is always held to account.

Facing this responsibility of affecting the direction of law’s coerciveness requires every legal actor to justify, to persuade us that his or her way will better promote pertinent human goods and values. “Legalistic normation . . . has its own sophisticated claims to being just” by choosing between conflicting claims “in tune with the net requirements of the Entirety.” Law is an arena with a “persistent urge to purport to speak for the Entirety, and, in some measure, to make the purport real.” The ubiquity of coercive power in law—indeed its indispensability—is exactly what makes reason-in-law distinct and worthy of our collective respect. Unlike reasoning in the abstract, legal reasoning—with its characteristically

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135 (...continued)
Cohen, for instance, was a utilitarian. See Cohen, Transcendental Nonsense, supra note 52, at 93-94. See also Felix S. Cohen, Ethical Systems and Legal Ideals 17, 42, 145, 187-88, 220, 229 (1933). Cf. Summers, supra note 9, at 42-44.


137 Anthony T. Kronman, Monotheism and Violence (unpublished manuscript).

138 Llewellyn, The Normative, supra note 100, at 1398-99 (Llewellyn equates law in this regard to politics, as long as they are democratic).
high stakes—is more responsible because it is more urgent and emotionally rich and thus tends to be attentive, careful, and serious.  

This sense of acute responsibility helps explain why legal realists, who are by and large careful not to disregard radical alternatives, reject moral skepticism or relativism.  

Because “the process of responsible decision . . . pervades the whole of law in life”—because lawyers’ everyday business requires “choice, decision, and responsibility”—legal realists find the use of “moral insights” indispensable to law.  

Realists are impatient with some critical scholars’ characterization of reason as “a means of discipline, a coercive technology for the social regulation of passion and emotion,” and with the attendant equation of normative reasoning with parochial interests and arbitrary power.  

Legal reasons refer to ideals of justice and, as Hessel Yntema claims, not every ideal will do: “ideals of justice not related to human needs are not true ideals.”  

While always inviting challenges to law’s most accepted commonplaces, realists bracket
out skeptical doubts that undermine any possibility of both justification and criticism. Realists always engage in a constructive reexamination of law’s existing rules and of the values they promote.146

Thus, for example, the legal realist undertaking to remove the naturalist (seemingly neutral and inevitable) mask of private law concepts and rules is not aimed at subverting the possibility of a just legal order, or even necessarily the desirability of the existing one. While the risks of naturalizing private law’s contested choices and of concealing its distributive and expressive effects are endemic, private law may be redeemed. Along these lines, realist authors argue that private property is not only “dominion over things” but “also imperium over our fellow human beings,” and that traditional legal discourse fails to justify “the extent of the power over the life of others which the legal order confers on those called owners.” But exposing private law’s distributive and coercive effects and counteracting its pretense of neutrality (or even obviousness) is never the endpoint of the analysis for legal realists, but rather its beginning.147 It is a means of facilitating a constructive critical inquiry: recognizing that property is a form of government that allows, and even requires, “to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.”148

145 The commitment to the constant exposure of beliefs to experience and to arguments that might overturn them, while insisting that there are better (even best) objective answers to the questions we face, is the most fundamental sense in which legal realists are philosophical pragmatists. See Cheryl Misak, Truth, Politics, Morality: Pragmatism and Deliberation 49, 56-57, 74, 98 (2000).

146 See Edwin W. Patterson, Jurisprudence: Men and Ideas in the Law 552-53 (1953). To clarify: I do not imply that only analyses of legal rules or decisions (as opposed to analyses of the legal discourse) can answer this moral imperative of constructivism. I do believe, for example, that this Article is constructive.


Reason and power are destined to blend together within legal discourse. With reason in place, law should never be equated with unjustifiable power. Legal realists, therefore, find it unduly defeatist, indeed irresponsible, to postulate that power is bound to displace reason. And yet, because law’s power is so susceptible to abuse by its carriers, realists are equally suspicious regarding the idea—which they see as dangerously naïve—that reason can displace interest or that law can exclude all force except that of the better argument. The realist conception of law is careful not to imply that interest and power can ever be superseded.

Rejecting both purist alternatives, the realist conception of law accepts the uncomfortable accommodation of reason and power as a constitutive feature of law, while still acutely aware of the potentially devastating consequences of this unhappy union. It instructs us to observe, continuously and critically, the complex interaction of reason and power, hoping to accentuate the distinct sense of responsibility involved in the reasoning of and about power, as well as minimize the corrupting potential entailed in the self-interested pursuit of power. One important consequence of this instruction is, as we have seen, the caution with which realists approach monistic theories of justice, and their insistence on ongoing legal criticism. Another, and no less important, consequence is the rejection of cynicism as a response to law’s justifications of its current practices. This justification impulse is a fruitful source of social and moral
progress because it forces, at the very least, a respectable façade, an idealized picture of law that can often challenge conventional opinions and practices.150

III. ON SCIENCE AND CRAFT

My discussion of reason has so far been abstract, and my concern now is to put some substance into realist ideas about legal reasoning. Replacing the (untenable) formalist algorithm with a realist jurisprudence of ends provides some direction, but also puts a note of urgency on the difficulties of intelligibility and legitimacy. If legal doctrine per se does not dictate outcomes, what indeed constrains law’s carriers? Does not the continuity between legal reasoning and other forms of practical reasoning collapse the distinction between law and politics, thus undermining law’s legitimacy?151 What features of law, if any, distinguish law from a scheme of subjective and capricious commands?

Part of the answer to these questions lies in my last observation in


151 The concern that the continuity between legal reasoning and other forms of practical reasoning would collapse the distinction between politics and law animates Weinrib’s revival of a natural law kind of formalism. Weinrib’s formalism is different in many respects from the formalism discussed in section I.A; notably, it is non-positivist, it distances itself from claims about the essence of concepts, it renounces any reliance on deductive logic, and it acknowledges the indeterminacy of law and the attendant necessity of judgment in its elaboration and application. See WEINRIB, supra note 109, at 13, 15, 25, 30-31, 223, 225-26, 228-29. Nonetheless, Weinrib still insists on a “distinctively legal mode of justification” that relies solely on law’s “immanent moral rationality,” to the exclusion of any recourse to “independently valid goals.” In particular, Weinrib argues that, in rendering legal judgments, lawyers and judges should rely only on the elaboration of “a legal relationship’s internal principle of organization”—on the question of whether a justification “coheres with the other considerations that support the other features of the relationship”—and refrain from directly assessing “the substantive merit” or addressing the desirability of any particular legal relationships, arrangements or determinations. It is this “priority of the formal over the substantive”—the focus solely on the demand of justificatory coherence—that, for Weinrib, differentiates law from politics, and allows lawyers to acknowledge the “political antecedents and effects” of law while insisting on the “specifically juridical aspect” of their endeavor. Id., at 7, 25, 33-35, 45-46, 208-09, 219, 225, 230. This Article can be read as a response to Weinrib in two senses: it shows that there are distinctly legal features that may, at least at times, adequately address the (indeed devastating) concern about collapsing law into politics, and it points out some potential pitfalls that the implementation of his solution to this challenge may bring about.
the previous part regarding the significance of legal tradition. Before we can discuss (in Part IV) the place of tradition in the realist conception of law, however, we need to address the realist blueprint for the forward-looking aspects of adjudication. Realist literature suggests two types of devices for constraining the discretion of those who direct the evolution of law: science or, more precisely, scientific insights, both empirical and normative, and craft or, more precisely, certain conventional features of adjudication, notably its contextual focus and its dialogic character.\(^{152}\)

It may seem natural to present these two devices as competing, if not conflicting, responses to the realist challenge of reconstruction; this, at least, is their unfortunate predicament in contemporary scholarship.\(^{153}\) I do not deny that some realists share this sense of rift and place themselves in one side of the emerging divide. My representative realists, however, especially Cohen and Llewellyn, do not share this view. For them, and thus for my reconstructed realist conception of law, science and craft are complementary rather than incompatible. As usual, neither Cohen nor Llewellyn fully worked out the terms of this uneasy coexistence, and this Article does not attempt to fill the gap. Yet, partial as they are, their accounts suffice in order to appreciate what we are losing for as long as protagonists of science and champions of craft keep competing rather than engaging each other.

### A. Recruiting the Sciences

Identifying legal realism with the recruitment of science into law’s service is a reasonable association. As Neil Duxbury observes, while legal formalism “had been scientific only in name,” legal realists aspire towards a “truly scientific study of law,” a “systemized study, deliberately focused toward getting an adequate knowledge of the entire social structure as a functioning and changing but coherent mechanism.”\(^{154}\) It is therefore not surprising that contemporary schools with strong scientific

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152 This distinction owes much to Kronman, *supra* note 1, at 336-38. And yet there are significant differences between our accounts, both regarding the content of these constraining devices and respecting their possible coexistence.

153 See Kronman, *supra* note 1, at 339.

emphasis—notably empirical legal research and economic analysis of law—are frequently identified as rightful heirs of legal realism.\footnote{155}{For empirical legal research, see, e.g., Schlegel, supra note 8. For the economic analysis of law, see, e.g., Judith W. DeCew, Realities about Legal Realism, 4 LAW & PHIL. 405, 421 (1985); Edmund W. Kitch, The Intellectual Foundations of Law and Economics, 33 J. LEGAL EDUC. 184, 184 (1983); Alan Schwartz, Karl Llewellyn and the Origins of Contract Theory, in The Jurisprudential Foundations of Corporate and Commercial Law 18 (Jody S. Krause & Steven D. Walt eds., 2000).}

I do not deny the debt of these schools to legal realism, or their contribution to the realist project. Both the realist view of law as an instrument for the promotion of human goods, discussed above, and the realist focus on social facts and commitment to scientific inquiry, discussed below, corroborate the association between legal realism and the mobilization of social sciences for the purposes of legal discourse. And yet, as other contemporary heirs of legal realism, legal scientists also twist the realist legacy by focusing solely on this (important) aspect of the realist conception of law and omitting reference to other components of the rich conception of law in which it is situated.\footnote{156}{I use the word “twist” advisedly. Focusing on science does not only omit part of the picture of law. It may also harmfully distort it. Thus, for example, the omission of craft might deform the education of lawyers, and the omission of power might unjustifiably immunize the projects of legal scientists from a normative and distributive critique.}

1. Three Empirical Pursuits

Realists place a high premium on studying the social facts pertinent to various legal endeavors, and recommend focusing on three empirical pursuits: investigating the hidden regularities of legal doctrine in order to restore law’s intelligibility and predictability, studying the practical consequences of law in order to better direct the evolution of law and further its legitimacy, and responding to the prevailing social mores—conventional morality—in order to further stabilize law’s objectivity and legitimacy.\footnote{157}{There is, in fact, a fourth type of empirical inquiry that is attributed to realism: situating law in a broader set of social norms. Its main champion was Underhill Moore. See, e.g., Underhill Moore & Gilbert Sussman, The Lawyer’s Law, 41 YALE L.J. 566 (1932). See also Schlegel, supra note 8, at 115-46. For a survey and critique of some contemporary analogues, see Sarat & Kearns, supra note 148, at 42-47.}

a. Exposing the Law in Action. By collecting, processing, and analyzing data regarding existing judicial decisions, legal realists show the frequent divergence between law in the books and law in action. They
further uncover the hidden regularities of judicial decisions and demonstrate that these regularities can account for existing legal doctrine better than any formalist explanation. Unlike law in the books, a realist restatement of the true elements that explain law in action is also helpful to practicing lawyers because it provides a credible basis for predicting future decisions. Past cases are thus used, in Joseph Bingham’s words, as “experimental guides to prognostications of future decisions.”

b. Guiding Law Reform. A second type of empirical study is relevant to legal actors seeking to improve, rather than predict, the law. This path follows Roscoe Pound’s prescription for looking at “the actual social effects of legal institutions and legal doctrines,” both in law reform and in the application and interpretation of existing law. This project is epitomized in the famous “Brandeis brief,” where a vast array of information regarding actual conditions in the mill and the foundry was used in the preparation of a formal legal brief to the Supreme Court involving the review of regulations on maximum-working-hours for laundresses. In the heyday of legal realism, academic lawyers at Yale Law School and at the John Hopkins Institute for the Study of Law did similar work, using empirical findings about social conditions as an essential part of a reformist, progressive agenda. In these and other cases “detailed knowledge of social fact [provided and still provides] a necessary demystifying first step toward the goal of social reform.”

c. Reflecting Conventional Morality. Although rarely presented in this context, Cardozo’s reliance on conventional morality—that is, on the normative preferences of law’s constituents—as a source of guidance to judicial discretion also belongs in this category. Cardozo’s starting point

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158 See, e.g., DUXBURY, supra note 26, at 80, 96, 127; FELDMAN, supra note 154, at 113; Kronman, supra note 1, at 336. A telling example is Wesley Sturges’ demonstration that irrespective of the legal conceptualization(s) of mortgages, courts afford different treatment to differing types of factual situations. See KALMAN, supra note 22, at 24-25.


160 Pound, supra note 125, at 513.


163 HORWITZ, supra note 6, at 189.
is the realist critique of formalism. The idea of “[r]ules derived by a process of logical deduction from pre-established conceptions,” he explains, is bankrupt; therefore, the view of a lawsuit “as a mathematical problem” must be substituted by an approach focusing on “the end which the law serves, and fitting its rules to the task at service.” But this approach raises the challenge of objectivity, or, in Cardozo’s terms, “the risk of degenerating into . . . a jurisprudence of mere sentiment and feeling.” Cardozo’s response is that rather than imposing “upon the community as a rule of life [their] own idiosyncrasies of conduct or belief,” judges must rely on “the life of the community”; they are duty-bound to respond and “conform to the accepted standards of the community, the mores of the time.”

2. Facts and Values

Influenced by the intellectual distinctiveness of the 1920s and 1930s, some realists subscribed to the view that the only real knowledge about society is both empirical and experimental. The claim is that non-empirical concepts are meaningless, and scholars should develop and employ devices enabling us to identify and measure social phenomena verifiably, without value judgments. In this view, methodology replaces political morality and social progress can only be judged in terms of knowledge and scientific expertise.

164 Cardozo, supra note 72, at 99-102. In other places, Cardozo tries to domesticate the realist challenge by limiting judicial creativity to the “interstitial limits”—“the borderland, the penumbra”—within the confines of “the open spaces in the law.” By contrast, “[i]n countless litigations, the law is clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps.” Id., at 103, 113, 128, 130. As we have seen, this attempt is doomed to failure. See supra Section I.B.1.

165 Cardozo, supra note 72, at 105-06, 108. See also John C.P. Goldberg, Note, Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings, 64 N.Y.U.L. Rev. 1324, 1335, 1338, 1372 (1990) (Cardozo was a great believer in the ability of judges “to articulate and enforce” the “community’s collective sense of obligation”; “to redefine for the community its fluid core of shared moral beliefs”). Cardozo did cast doubt on the possibility of pure subjectivism: “the distinction between the subjective or individual and the objective or general conscience,” he said, “is shadowy and evanescent” because there is “constant and subtle interaction between” the “subjective mind” and “customary practices and objectified beliefs.” Id., at 110-11. See also, e.g., Melvin Aron Eisenberg, The Nature of the Common Law 15-19 (1988).

166 See Purcell, supra note 14, at 15, 19, 21-22, 24-27, 31-32. See also, e.g., Horwitz, supra note 6, at 209, 211. There certainly are some late repercussions of this (continued...)
The idea of an objective science of society has since been criticized. In fact, my typical legal realists never embraced it. Both Cohen and Llewellyn were skeptical about the project of pure empiricism in facilitating legal predictability, evaluating existing rules, or considering law reform. Cohen clarifies in his discussion the two major pitfalls of the pretense that a scientific analysis of facts is enough to do the work.

The first problem, in Cohen’s view, is that whereas science can “throw light upon the real meaning of legal rules by tracing their effect throughout the social order,” appraising this effect is the task of ethics. Moral judgment will always be necessary “in order to render normative significance to brute facts.” But this is not the only difficulty. Even the collection of facts on the consequences of a given rule necessarily involves “some discriminating criterion of what consequences are important” and “a criterion of importance presupposes a criterion of values”; “the collection of social facts without a selective criterion of human values produces a horrid wilderness of useless statistics.” For these reasons, Cohen concludes that “legal description is blind without the guiding light of a theory of values.”

Rejecting the program of brute empiricism, Llewellyn and Cohen promote an account that grants empiricism a more modest—and more

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166 (...continued) approach. See, e.g., Posner, supra note 54, at 76.


169 Felix S. Cohen, Modern Ethics and the Law, 4 Brook. L. Rev. 33, 45 (1934). Cf. Glennon, supra note 68, at 43 (criticizing the Poundian vision of “law as a science of ‘social engineering’” since it presupposes that “legal reform [is a purely] intellectual problem caused by the system’s lapse into a period of decay rather than by a collision of ideologies and economic interests,” and is not troubled by the “antidemocratic implications of a government by an elite corps of experts”). For a critique of the economic analysis of law along similar lines, see Arthur Leff, Economic Analysis of Law: Some Realism about Nominalism, 60 Va. L. Rev. 451, 454-59 (1974).

170 Cohen, Transcendental Nonsense, supra note 52, at 75-76. Consider, for example, the potential errors of an empirical project aimed at devising tools for credible prediction if it is purely quantitative, counting cases with no regard for the perceived importance of different cases within the legal community.

171 Cohen, Transcendental Nonsense, supra note 52, at 76. See also, e.g., Lon L. Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 457-58 (1974).
reasonable—role in the legal universe.\footnote{In line with the constructive perspective of this Article, this is also the account I suggest integrating into the realist conception of law.) In this approach, the empirical phase in the legal analysis creates merely a “temporary divorce of Is and Ought.” As Llewellyn explains, “value judgments must always be appealed to in order to set objectives for [the empirical] inquiry,” yet descriptions of “what Is” should “remain as largely as possible uncontaminated” by the observer’s normative commitments.\footnote{Contra Horwitz, supra note 6, at 5, 181, 210 (portraying Llewellyn’s conception of legal realism as one of brute empiricism).} In their further endeavors—legislation, advocacy, counseling, and judging—lawyers should use the information gathered on the law in action and its impact in society as well as “technical data of fact and expert opinion” in order to supplement, rather than supplant, the normative aspect of their judgment.\footnote{Llewellyn, Some Realism, supra note 44, at 55.} The distinction between the \textit{is} and the \textit{ought} is not aimed, then, at “ignoring or dismissing the \textit{ought},” but rather at “making a future \textit{is} into an \textit{ought} for its time.”\footnote{Llewellyn, On the Good, supra note 135, at 189.} As Cohen insists, “[n]either science alone nor an ethics that ignores the data of science can offer a valid test of the goodness or badness of law.”\footnote{Cf. Myres S. McDougal, Fuller v. The American Legal Realists: An Intervention, 50 Yale L.J. 827, 835 (1941).} Legal analysis needs both empirical data and normative judgments.

Interestingly, Cardozo also subscribes to a similar position on the integration of social data and moral evaluation.\footnote{Cohen, Modern Ethics, supra note 169, at 45.} Exclusive reliance on the social facts of society’s \textit{mores} might have seemed an attractive solution to his problem of judicial objectivity.\footnote{Cf. Bernard Schwartz, Main Currents in American Legal Thought 479-80 (1993).} Yet, anticipating the contemporary

\footnote{Even the reference to conventional morality is not a magic cure. As Cardozo himself noted, “[t]he spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship (continued...)}
(justified) qualms regarding reliance on conventional morality\(^\text{179}\)—recall that \textit{Plessy v. Ferguson} is heavily predicated on “the established usages, customs and traditions of the people”\(^\text{180}\)—Cardozo refrains from excluding the normative dimension. (This lesson is too often ignored by many lawyer economists who accept people’s existing preferences—at least when they are informed—as the sole guide of social welfare.\(^\text{181}\)) In some cases, says Cardozo, the judge should not yield to prevailing community standards, since “[d]espite their temporary hold, they do not stand comparison with accepted norms of morals.” These cases “impose a duty to act in accordance with the highest standards which a man of the most delicate conscience . . . might impose upon himself.”\(^\text{182}\)

This nuanced empiricism of Cohen, Llewellyn, and Cardozo is well fitted to the pluralist posture typified by the realist approach to normative analysis, as noted in Part II. Yet, even while it avoids falling into the trap of moral skepticism, part of the challenge of legitimacy still lingers. Legal realists, who are always cautious not to romanticize law and its carriers, recognize this difficulty. As Cohen explains, because law is “\textit{par excellence}, the field of controversies,” judges’ “personal frame of reference” is likely to have a significant impact on their judgments. Judicial idiosyncrasies, à la Frank, will most likely disappear, as noted. But judges’ normative commitments may still be shaped by “the attitudes of their own economic class on social questions.”\(^\text{183}\)

* * * *

Although facts and values are indeed crucial building blocks in the realist conception of law, they are still only part of the puzzle. The challenges that realists pose to law’s intelligibility and legitimacy cannot be fully addressed without an account of the institutional characteristics of (common law) adjudication and the shared norms and traits of the legal profession. These distinctly legal features are cardinal components of the

\(^\text{178}\) (...continued)
\textit{have given us a place.” Cardozo, supra} note 72, at 174-75.
\(^\text{179}\) \textit{See, e.g., West, supra} note 84, at 106-08.
\(^\text{180}\) 163 U.S. 537, 550 (1896).
\(^\text{181}\) For a poignant example, see \textit{Louis Kaplow & Steven Shavell, Fairness versus Welfare} 18-28, 413-31 (2002).
\(^\text{182}\) \textit{Cardozo, supra} note 72, at 108-10.
\(^\text{183}\) Cohen, \textit{Field Theory, supra} note 69, at 123-24; Cohen, \textit{Transcendental Nonsense, supra} note 52, at 72.
promise of law.\footnote{184} Admittedly, even after adding these indispensable features of law, realists still lack flawless answers to the challenges of law’s intelligibility and legitimacy. A human discipline such as law offers no such magic cures. Moreover, part of the realist project is to break away from the binary option of cynicism about law versus its romantization, cultivating instead a cautious acceptance of the moral propriety of existing law, combined with a healthy dose of suspicion able to trigger informed moral criticism and instill an acute sense of responsibility in the legal mind.\footnote{185} The realist celebration of the legal craft, to which I now turn, should be read in this state of mind.\footnote{186}

\section*{B. The Legal Craft}

Talking about law as a craft could be misleading, appearing to suggest a purely conventional conception of law.\footnote{187} Llewellyn claims that lawyers’ “ways of doing,” “working knowhow,” “craft-conscience,” “operating techniques,” “ingrained ways of work,” and “habits of mind” give practitioners of the legal craft “a feeling of naturalness, even of courseness” regarding certain legal results. The ethos of the judicial office in general and of the legal profession in particular, Llewellyn argues, generates real constraints which produce some “reasonable regularity” and thus effectively dispel the fear of “free discretion.”\footnote{188}

\footnote{184} Cf. Kronman, \textit{supra} note 1, at 338 (referring to legal professionalism as a separate realist response to the challenges they posed to the legal community). \textit{But cf.} Sebok, \textit{supra} note 26, at 127 (presenting these responses as reactions to realism).

\footnote{185} The text can be read as a response to Charles Clark and David Trubek’s critique of Llewellyn’s book, \textit{The Common Law Tradition} (\textit{supra} note 48), whereby by rejecting the notion of judicial freedom and subjectivity Llewellyn obscures the impact of the judge’s personal values and outlook and shields judges from the hard responsibilities of their creative freedom. \textit{See} Charles Clark & David Trubek, \textit{The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition}, 71 \textit{Yale L.J.} 255, 256, 263-65, 268-73, 275-76 (1961).

\footnote{186} Indeed, using the notion of craft in this context may convey a more general insight about science, which itself involves an element of craft in its elaboration of imaginative theoretical tools.

\footnote{187} For such a mistake in reading Llewellyn, see Dennis Patterson, \textit{Law’s Practice}, 90 \textit{Columbia L. Rev.} 575, 597-600 (1990).

\footnote{188} Llewellyn, \textit{Case Law}, \textit{supra} note 46, at 77; Llewellyn, \textit{The Common Law Tradition}, \textit{supra} note 48, at 49, 214, 216-17; Llewellyn, \textit{My Philosophy of Law}, \textit{supra} note 73, at 183, 184. \textit{See also}, e.g., Cohen, \textit{Transcendental Nonsense}, \textit{supra} note 52, at (continued...)}
Out of their context (which is added below), these statements may seem to anticipate Stanley Fish’s account of lawyers as extensions of the know how of their practice. Lawyers, in this view, are “not only possessed of but possessed by a knowledge of the ropes”; and the only—albeit significant—constraint they face is the acceptance of their discursive, or interpretive, community. But the legal realist account of the legal craft represents a significant departure from this reductive theory. Together with Fish, legal realists use the immersion of lawyers in their craft to defend their conception of law against the accusation of judicial subjectivity, to show that “the iconoclastic buggy of an utterly free judicial prerogative [is] a fantasy or myth.” Unlike Fish, however, they suggest that the nature of the legal craft justifies, to an extent, the authority of law. In the realist conception of law, the characteristics of the legal craft not only help rehabilitate law’s predictability, but are also part of the justification of its claim to legitimacy.

1. Institutional Virtues

Recall Cohen’s (and Cardozo’s) challenge of objectivity. Opening up the legal discourse to extra-doctrinal facts and value judgments is not tantamount to giving a carte-blanche to judicial subjectivity, but does raise a concern about group distortions due to the specific (privileged) social positioning of lawyers and judges. When facing this concern, both Cohen and Llewellyn find some comfort in the institutional virtues of law.

“The ancient wisdom of our common law,” Cohen explains, “recognizes that [people] are bound to differ in their views of fact and law, not because some are honest and others dishonest, but because each of us

188 (...continued)
72 (“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”).


190 Another important distinction is that by rejecting moral skepticism and relativism, the realist conception of law also rejects Fish’s “conservative vision of the potential of criticism.” For a powerful critique of Fish on this front, see WEST, supra note 84, at 137-51.

operates in a value-charged field which gives shape and color to whatever we see.” Hence, only “a many-perspectived view of the world can relieve us of the endless anarchy of one-eyed vision.” The institutional structure of (common law) adjudication is aimed at generating exactly such “human and social view of truth and meaning.” It invites disagreements respecting questions of facts, opinion, and law, thus creating a forum where judges’ normative and empirical horizons are constantly challenged by conflicting perspectives. In this way, law as an institution encourages judges to develop a “synoptic vision” that is “a distinguishing mark of liberal civilization.”

For Llewellyn as well, the judges’ authority does not derive from their unique characteristics as individuals, but rather from “the office.” In law, the people “who do the deciding hold office . . . as full-time professionals.” Judges are situated in an institutional environment that “presses upon the office holder a demand to be selfless. Time, place, architecture and interior arrangements, supporting officials, garb, ritual combine to drive these matters home.” When adjudicating between litigants judges are not only expected to be impartial. The attitude instilled into them directs them to be also “open, truly open, to listen, to get informed, to be persuaded, to respond to good reason.” They are driven to make an effort “toward patience, toward understanding sympathetically, toward quest for wisdom in the result.”

The two most important features of that environment are the adversary process and the judicial opinion. The legal drama is structured as a competition in reason-giving, in which advocates of each side function as officers of the court, marshaling the authorities “on each side in support of one persuasive view of sense in life, as well as one view technically

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192 Cohen, Field Theory, supra note 69, at 125-26. For Cohen’s pluralism, see Dalia Tsuk, The New Deal Origin of American Legal Pluralism, 29 Fla. St. U.L. Rev. 189, 237, 253, 266 (2001). Similarly, Cardozo claims that judges are never “wholly free . . . to innovate at pleasure . . . in pursuit of [their] own idea of beauty or of goodness,” and further proclaims that judges’ training, coupled with “the judicial temperament” can “emancipate [them] from the suggestive power of individual likes and dislikes and prepossessions,” broadening “the group to which [their] subconscious loyalties are due.” Cardozo, supra note 72, at 141, 176. For a similar take on adjudication in contemporary feminist scholarship, see Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 880-87 (1990).

At the end of this process, judges must render an opinion. The opinion is intended to “bring and hold the writer’s brethren together . . . persuade them that it is a sound opinion.” Even more important, it is aimed at letting “losing counsel see they have been fairly heard,” providing “wise and cleanly guidance to the future,” and persuading “the interested public that outcome, underpinning, and workmanship are worthy.”

Taken together, these structural characteristics of the judicial office have a “majestic power” to lift out of judges the best they have to offer; channeling them into “service of the whole.” They make courts “the most appropriate body of unelected officials to review other governmental agencies (torn between politics, favoritism, enthusiasm, specialized expertness, woodenness, lopsidedness, ambition and vision).” Judges need to “account to the public, to the general law-consumer” on a regular basis and in detail. They thus become “experts in that necessary but difficult task of forming judgment without single-phased expertness, but in terms of the Whole, seen whole.”

Owen Fiss provides a succinct modern articulation of these institutional virtues which facilitate judges’ bounded objectivity:

Judges must stand independent of the interests of the parties or even those of the body politic (the requirement of judicial independence); the judges must listen to grievances they might otherwise prefer not to hear (the concept of a non-discretionary jurisdiction) and must listen to all who will be directly affected by their decision (the rules respecting parties); the judge must respond and assume personal responsibility for the decision (the tradition of the signed opinion); and judges must justify their decision in terms that can be universalizable (the neutral principles requirement).

But Fiss goes on to suggest that the procedures of adjudication are therefore analogous to John Rawls’ original position, thus implying that judges can successfully transcend their self-interest and their group alliances. Given the emphasis on interest and power as indispensable characteristics of the legal field, the realist account of the potential positive effects of law’s
institutional virtues should be read much more cautiously. These features make adjudication a unique public forum with a potential for inclusiveness, entrenching the realist rejection of cynicism about law. Yet, Llewellyn’s, Cohen’s (and Fiss’) discussions about the institutional virtues of adjudication should not be read as real-life descriptions but as accounts of the institution’s ideal, which should serve as a benchmark for evaluating its daily operation. They should not—and cannot—set aside the concern about self-serving (and at times self-deluding as well) judicial judgment. The deference towards Rawlsian impartial referees must be out of place insofar as law’s carriers are concerned (even if we set aside the mundane—but often significant—problems of heavy caseloads and limited resources). Rather than complacency, an appreciation of law’s potential institutional virtues requires legal actors to constantly challenge smug legal truisms, including the portrayal of adjudication as a purely public-regarding institutional service.

2. Situation Sense

The judicial drama is not simply a dialogue about principles of abstract justice. Accordingly, the legal craft is not exhausted by the institutional features discussed above. A legal normative discourse is always situated in a specific human context. It invokes, strengthens, and relies on the unique skill of lawyers to capture the factual subtleties of different types of cases and to adjust the legal treatment to the specific characteristics of each of these categories. Legal realists claim that, since the contextuality of legal discourse is not only part of the legal ideal but also a typical element of legal know-how, it is both a reason for law’s legitimacy and a source of its predictability.

a. Narrow Categories; Not Individual Cases. The realist prescription for a contextual inquiry is at times mistaken for advocacy of ad-hoc judgments in every particular case. Indeed, a small minority among
realists indeed does endorse this (dubious) nominalistic approach.\footnote{202} Most realists, however, take a very different position.\footnote{203} They realize that law’s use of categories, concepts, and rules is unavoidable and even desirable. Yet, they recommend that, in order to benefit from the unique situation sense of lawyers (discussed below), legal categorization should be critically examined and legal categories should be relatively narrow.\footnote{204}

Thus, Llewellyn invites us to rethink law’s received categories because, while legal classification cannot be eliminated, “to classify is to disturb,” and thus “obscure some of the data under observation and give fictitious value to others.” For this reason, our classifications “can be excused only in so far as [they are] necessary to the accomplishing of a purpose.” And because our purposes may change, we should periodically reexamine “the available tradition of categories.”\footnote{205} (Rethinking legal categorization is important for a further reason, namely, because it may help expose otherwise hidden and sometimes unjustified legal choices of inclusion and exclusion.)

Llewellyn finds wholesale legal categories (think of contracts or property) “too big to handle” since they encompass too “many heterogeneous items.” He thus recommends “[t]he making of smaller categories—which may either be sub-groupings inside the received categories, or may cut across them.”\footnote{206} By employing these narrow categories lawyers can develop the law while “testing it against life-wisdom.” Again, the claim is not that “the equities or sense of the particular case or the particular parties,” should be determinative; rather, it is that decisionmaking should benefit from “the sense and reason of some significantly seen type of life-situation.”\footnote{207}

\footnote{202 See, e.g., RODELL, supra note 42, at 169-174, 201-202. Like any caricature, Dworkin’s portrayal of legal realism as nominalism has a (small) grain of truth.}

\footnote{203 See, e.g., Andrew Altman, The Legacy of Legal Realism: A Critique of Ackerman, 10 LEGAL STUD. FORUM 167, 171-72 (1986).}

\footnote{204 See Fisher, supra note 30, at 272-73, 275.}

\footnote{205 LLEWELLYN, A Realistic Jurisprudence: The Next Step, in JURISPRUDENCE, supra note 44, at 3, 27. See also, e.g., Walter Wheeler Cook, Scientific Method and the Law, in AMERICAN LEGAL REALISM, supra note 30, at 242, 246.}

\footnote{206 LLEWELLYN, A Realistic Jurisprudence, supra note 205, at 27-28, 32; LLEWELLYN, Some Realism, supra note 44, at 59-60. See also, e.g., Fisher, supra note 30, at 275.}

\footnote{207 LLEWELLYN, The Current Recapture of the Grand Tradition, in JURISPRUDENCE, supra note 44, at 215, 217, 219-220.}
b. Supplementing—Not Supplanting—Normative Analysis. Brian Leiter equates the realist prescription of “fact-guided decision making” with “a naturalized jurisprudence predicated on a pragmatic outlook,” which he presents as the core claim of legal realism. For Leiter, realism stands for the view that in deciding cases, judges generally respond to the stimulus of the facts of the case, rather than to legal rules or reasons. Leiter’s conceptualization of the realist legacy has some support in the writings of legal realists. The idea that a normative solution is inherent in the facts themselves, however, so that general principles and policies play no role, is fraught with difficulties.

A prescription for sensitivity to situations and facts is vacuous without general normative commitments. These commitments are indispensable if we are to resolve—as law always needs to—conflicts between the very demands and interests that case sensitivity exposes. Although normative consensus within the affected group may emerge in some limited contexts, law in modern heterogeneous societies cannot usually assume a robust, stable, and shared tradition that can guide lawyers in resolving these conflicts. Moreover, even where such a convergence does exist, it should not conclusively define our aspirations concerning legal norms; law should always beware of perpetuating unjust social norms.

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208 Llewellyn, Case Law, supra note 46, at 77.

209 Leiter, supra note 21, at 267, 275, 277, 283. See also, e.g., Brian Leiter, Legal Realism, in A Companion to Philosophy of Law and Legal Theory 261, 269-71 (Dennis Patterson ed. 1996); Brian Leiter, Legal Realism, in Blackwell Guide to the Philosophy of Law and Legal Theory *, * (Martin Golding ed. 2004).


213 See Will Kymlicka, Contemporary Political Philosophy 267-69 (1990); Fiss, supra note 139, at 215-20; Summers, supra note 9, at 58; Gewirtz, supra note 55, at xx-xxi.
For these reasons, I discard the idea that a situation sense can substitute for value judgments and, in line with my task of a charitable reconstruction, suggest a different reading of the realist contextualist theme. In this view, attention to the “situation-type” exemplified by the case at hand supplements rather than supplants law’s normative engagement.

c. The Significance of Context. In this realist approach, attention to context is important for two reasons. The first reason emerges from Herman Oliphant’s celebration of the traditional common law strategy of employing narrow legal categories, each covering only relatively few human situations. This strategy “divided and minutely subdivided the transactions of life for legal treatment,” with the desirable result of a significant “particularity and minuteness in the [legal] classification of human transactions.” Such narrow categories help to produce “the discrimination necessary for intimacy of treatment,” holding lawyers and judges close to “the actual transactions before them” and thus encouraging them to shape law “close and contemporary” to the human problems they deal with. In these ways, the traditional common law contextualist strategy facilitates one distinct comparative advantage of lawyers (judges) in producing legal norms—their “battered experiences of . . . brutal facts,” namely: their daily and unmediated access to actual human situations and problems in contemporary life. When law’s categories are in tune with those of life so that an “alert sense of actuality checks our reveries in theory,” lawyers uniquely enjoy “the illumination which only immediacy affords and the judiciousness which reality alone can induce.”

Indeed, our lives are divided into economically and socially differentiated segments, and each such “transaction of life” has some features that are of sufficient normative importance—that is, that gain significance from the perspective of some general principle or policy that

214 Herman Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71, 73-74, 159 (1928). Joseph Raz’s analysis of the phenomenon of distinguishing cases brings home a very similar point. See Joseph Raz, The Authority of Law 183-97 (1979). Cf. Dworkin, supra note 63 (law schools may be particularly good places to study moral and political philosophy because in a legal context “we consider moral issues in clotted and real contexts”). A charitable reading of these claims of first-hand experience must have in mind the virtues of law as a competition of reason-giving, discussed above. Characterizing judges’ encounter with life experiences as “many-perspectived” (to use Cohen’s term), is necessary in order to (partly) ameliorate the risk that the judges’ experience of reality merely perpetuates the status quo even when unjust.

justifies a distinct legal treatment.\textsuperscript{216} If law is to serve life, it should tailor its categories narrowly and in accordance with these patterns of human conduct and interaction so that it can capture and respond to the characteristics of each type of cases.\textsuperscript{217}

Furthermore, instilling attentiveness to context into legal discourse helps to nourish some of the legal profession’s most significant qualities. In interpreting Llewellyn’s jurisprudence, Kronman conceptualizes these qualities in terms of sympathy and detachment: the uneasy combination between, on the one hand, a compassion enabling lawyers to imagine themselves in their clients’ position (or, for judges, in that of the litigants) so as to understand their experience from within and, on the other hand, fostering the independence, coolness, and reserve that are prerequisites for the ability to pass judgment on the situation’s merits.\textsuperscript{218} This combination of sympathy and detachment is a critical feature of the professional ideal of law. It is the toolkit lawyers need in order to credibly claim they have unique access to “the illumination which only immediacy affords and the judiciousness which reality alone can induce.” It is therefore an essential part of judges’ claim to authority, of law’s legitimacy.

Kronman contrasts the qualities of sympathy and detachment with “theoretical extravagance,” and further argues that the professional ideal he articulates should be divorced from, and arguably reject, any instrumental approach to law, and not “be tempted by the false ideal of a legal science.”\textsuperscript{219} Kronman is surely correct in distinguishing the “educated sensibility” of the legal craft from the technical expertise and rationality of legal science (in either its empirical or its normative side).\textsuperscript{220} The temperamental tension between the Aristotelian judge that Kronman anticipates and the social engineer envisioned by Pound suggests we have no fast and easy formula for their accommodation in the person of one


\textsuperscript{218} See Kronman, supra note 191, at 72-73.

\textsuperscript{219} Id. at 223-24.

\textsuperscript{220} Id. at 224-25.
lawyer. But as is true of the tension between sympathy and detachment, we have no reason to believe that a person with the character traits that Kronman rightly celebrates is incapable of also applying value judgments and paying attention to relevant social facts. The realist conception of law celebrates such a mixture of empirical knowledge and normative insight with a devotion to the legal office and sensitivity to the context at hand. This mixture may actually account for the (happy) fact that, notwithstanding the integration of normative and empirical inquiries into mainstream American legal thought, the boundaries between legal discourse and political rhetoric have not been totally erased, and the understanding of legal reasoning as a somewhat distinctive mode of argumentation and analysis remains in place.\(^{221}\)

### IV. On Tradition and Progress

The third constitutive tension of law according to the realist conception is already implicit in my discussion in the last two parts, and I will now consider it in more detail. The realist commitment to reason, and its complex plan for accommodating scientific and normative insights within a legal professionalism premised on institutional constraints and practical wisdom, imply that the existing doctrine is—and indeed should be—the starting point for analyzing legal questions. Realists, however, are always suspicious about law’s power and refuse to equate law with morality. For this reason, they do not essentialize existing doctrine and do not accord every existing rule overwhelming normative authority. In the realist conception of law, the appeal to existing doctrine is not, and should never be, the end of the legal analysis.

For legal realists, then, the notion of legal evolution—the accommodation of tradition and progress\(^ {222}\)—is not merely a sociological observation about law. For realists legal evolution is part of law’s answer to the tension between power and reason and to the challenges of intelligibility and legitimacy. Accordingly, the realist conception of law is profoundly dynamic. Realists reject the legal positivist attempt to understand law in static terms, by sheer reference to such verifiable facts as the authoritative commands of a political superior or the collection of rules

\(^{221}\) _But cf._ Peller, _supra_ note 142, at 1153 (criticizing this predicament as “the domestication of much of realist work”).

\(^{222}\) Indeed, the realist conception of law denies that the relationship between tradition and progress is one of antinomy. _See also_ Martin Krygier, _Law as Tradition, 5 Law & Phil._ 237, 251 (1986).
identified by a rule of recognition.223 The positivist quest for an empirical pedigree is hopeless because law is “a social process, not something that can be done or happen at a certain date.”224 In the realist conception, law is “a going institution” that includes a host of people “running and ruling in courses somewhat channeled, with ideas and ideals somewhat controlled.”225 Therefore, rather than identifying the content of doctrinal rules at any given moment, a viable conception of law must focus on the dynamics of legal evolution.

Given this nonpositivistic tenet of legal realism, some may be tempted to describe realists as (early) proponents of Dworkin’s *Law’s Empire*, a temptation that may be further reinforced when we notice the striking similarities between Llewellyn’s account of the evolution of law and Dworkin’s algorithm for his Herculean judge. This lure should be resisted, however, because the realist voice, as we will see, is quite different from Dworkin’s. As recurrently noted, the realist conception of law is not just an early incarnation of a currently fashionable legal theory but rather a viable alternative to them all.

**A. Between Past and Future**

My inclusion of legal tradition within the realist conception of law may lead some to wonder, given that Holmes, the godfather of legal realism, was the one to issue the well-known dictum deploiring the power of legal tradition as a “blind imitation of the past.” For Holmes, upholding legal rules whose “grounds have vanished” only because they were “laid down in the time of Henry IV” is “revolting.”226 Such continuity with law’s past is objectionable because it “limits the possibilities of our imagination,

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223 See respectively J O H N A U S T I N , T H E P R O V I N C E O F J U R I S P R U D E N C E D E T E R M I N E D 14 (H.L.A. Hart ed., 1954) (1832); H A R T , s u p r a n o t e 3 3 , at 1 0 7 . S e e a l s o , e . g . , R A Z , s u p r a n o t e 2 1 4 , at 4 0 ( t h e “s o u r c e s t h e s i s”).

224 John Dewey, M y P h i l o s o p h y o f L a w , i n M y P h i l o s o p h y o f L a w , s u p r a n o t e 7 3 , a t 7 3 , 7 7 . S e e a l s o , e . g . , M a x R a d i n , M y P h i l o s o p h y o f L a w , i n M y P h i l o s o p h y o f L a w , i d . , a t 2 8 5 , 2 9 5 (“l a w c a n n o t b e a n y t h i n g e l s e t h a n a c o n t i n u a l s t a t e o f c r e a t i o n , i n w h i c h t h e c o n s t a n t e l e m e n t s w i l l b e t h o s e f a i r l y s u r e t o b e r e c r e a t e d a t a n y g i v e n m o m e n t o f s o c i a l d e v e l o p m e n t”).

225 L l w e l l y n , M y P h i l o s o p h y o f L a w , s u p r a n o t e 7 3 , a t 1 8 3 - 8 4 .

226 H O L M E S , s u p r a n o t e 5 4 , a t 1 8 7 .
and settles the terms in which we shall be compelled to think.”227 While history “must be a part of the study” of law, it should be “the first step toward an enlightened skepticism, that is, [] a deliberate reconsideration of the worth of [the existing] rules.”228

Kronman interprets Holmes’ dictum as “a call for the rejection of tradition,” an attempt to unshackle the law from the authority of the past, replacing this authority with “the timeless authority of reason.”229 To be sure, reason (understood as the judgment of benefits to law’s current users) may justify according some degree of binding power to precedents, due to the instrumental benefits of the practice of precedent by way of maximizing utility or guaranteeing equality (or fairness). Yet, for Kronman even this more moderate approach undervalues the role of tradition in law by underestimating the authority and resiliency of the practice of precedent in law.230

I suggest a different interpretation of Holmes’ motto. Instead of rejecting tradition, I propose a more moderate reading of his call for an enlightened skepticism, which seriously addresses his commitment to look at the law as laid down as the first step in every legal inquiry. In my reading, Holmes’ problem with blind imitation of the past does not relate to this first step and, therefore, should not be solved by repudiating the authority of tradition. Rather, the problem of blind imitation of the past stands for the absence of a second step. Accordingly, the proper remedy is to supplement legal tradition with a program for directing law’s future evolution.

Holmes’ original intention is, as usual, hard to discern. Fortunately, it is also somewhat beside the point of this Article. My concern is to show that my reading is coherent with some of the main themes of Holmes’ realist followers, notably—but not only—Llewellyn. The realist approach seeks to open up a space for a forward-looking perspective within law’s respect for tradition. It is best read as a celebration of the common law’s Grand Style, described by Llewellyn as “a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose,

227  HOLSME, supra note 63, at 211.
228  HOLSME, supra note 54, at 186-87. See also, e.g., POSNER, supra note 54, at 6, 71-72.
230  See id., at 1036-43.
of measure with need,” mediating between “the seeming commands of the authorities and the felt demands of justice.”

1. Fitness and Flavor

In summarily dismissing the question of whether judges find the law or make it as “meaningless,” Llewellyn argues that “judges in fact do both at once.” As noted, adjudication for Llewellyn is necessarily creative at least in the sense of “the sharp or loose phrasing of the solving rule” and its “limitation or extension and [] direction.” But this creativity is considerably constrained by the “given materials which come to [the judges] not only with content but with organization, which not only limit but guide, which strain and ‘feel’ in one direction rather than another and with one intensity rather than another and with one color and tone rather than another.” Thus, the story of the law (at its best) is one of “on-going renovation of doctrine, but touch with the past is too close . . . the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform.” For this reason, judicial decisions are “found and recognized, as well as made.”

More specifically, Llewellyn describes an adjudicatory phenomenon he calls “the law of fitness and flavor.” He observes that cases are decided with “a desire to move in accordance with the material as well as within it . . . to reveal the latent rather than to impose new form, much less to obtrude an outside will.” Llewellyn is not talking about following precedents, as he is careful to explain that no specific case generates this sense of flavor and fitness. Rather, it is the case law system that generates “a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration.” The instant outcome and rule must “fit the flavor of the whole”; it must “think with the feel of the body of our law” and “go with the grain rather than across or against it.”

This commitment to push the legal envelope as it is found rather than starting always afresh is not a mere derivation from pragmatic reality, which presumes existing rules cannot be abandoned completely. First, the realist conservativism about law—its acceptance of the legal past as

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232 Id., at 36; LLEWELLYN, Law and the Social Sciences, supra note 136, at 361-62.
235 Cf. HERZOG, supra note 149, at 15.
both central and authoritative to the legal present—responds to the challenges of predictability and legitimacy. Thus, although judicial creativity is not limited to borderline cases but is instead “every day stuff, almost every-case stuff,” tradition-determined lawyers can solve new cases in a way “much in harmony with those of other lawyers,” as they are all trained to bring the solution to the new case into harmony with “the essence and spirit of existing law.” It is this “juristic method” rather than the formalist syllogistic reasoning from preexisting doctrinal concepts or rules that constrains judges, and explains how the bulk of the legal materials is in fact predictable.

Moreover, law’s past is not only an anchor of intelligibility and predictability. Legal realists always begin with the existing doctrinal landscape because it may (and often does) incorporate valuable—although implicit and sometimes imperfectly executed—normative choices. They assume, in other words, that because the adjudicatory process uniquely combines, as we have seen, craft and science, its past yield represents an accumulated judicial experience and judgment worthy of respect. This

235 See Krygier, supra note 222, at 239, 241, 245, 251, 254.
237 Llewellyn, Case Law, supra note 46, at 77.
238 Brudner powerfully criticizes Dworkin’s notion of fit as psychological constraint. See Brudner, supra note 130, at 268-77. Nothing in Llewellyn’s account implies that fitness is only a matter of the interpretive mind.
239 See Llewellyn, Impressions of the Conference on Precedent, in Jurisprudence, supra note 44, at 116, 126 (only reasoned rules “afford dynamic certainty”); Llewellyn, On the Good, supra note 135, at 250, 260 (only rules whose purpose and reason are clear provide guidance to lawyers and lay people alike); Llewellyn, supra note 100, at 1400 (“If one wants to startle himself with light on how little explicit effective guidance Our Legal System offers the judges . . . let him look at the judges . . . not as entrusted with the application of Rules of Law, but as entrusted with the application of juristic method to the Rules of Law and with them. It is a truer picture”). See also Fisher, supra note 30, at 276.
240 Cf. Herzog, supra note 149, at 15 (the commitment to tradition is premised on a (healthy) suspicion of “those who would attempt an apocalyptic break with the past” which may, in turn, be based on an observation that “things work reasonably well right now” and that existing institutions composed of a large number of individuals acting collectively may, in the long run, be wiser than any given individual); Grey, supra note 27, at 12 (discussing the pragmatic approach to “legal categories and concepts as instruments for making practical judgments”; in this view, a legal concept has the shape it does because it promotes “judgments that had survival value, were useful to some practical purpose”).
241 See James Boyd White, Justice as Translation: An Essay on Cultural and (continued...
approach to legal tradition may not be as reverential as Kronman would recommend.\footnote{Kronman holds that we have a (limited) obligation to respect our legal past for its own sake; just because it is the past we happen to have. This obligation derives from “our participation in the world of culture,” which is the source of “our distinctive identity as human beings.” This feature of humanity “liberates us from the narrow temporal constraints to which our ambitions would have otherwise been confined.” It also imposes on us a “considerable responsibility of preservation”: an obligation “to respect the work of past generations.” Kronman, supra note 229, at 1052, 1054, 1066-68. Whatever the force of this account regarding other artefacts is, it must be curtailed insofar as law is concerned. The realist conception of law resists, as we have seen, any approach to law that might obscure the role of power and interest in law.} And yet it is a far cry from viewing our legal past as “just a repository of information” or even as a source of the purely instrumental benefits of maximizing utility or guaranteeing fairness.\footnote{Contra Kronman, supra note 229, at 1032-33.}

2. Justice and Adjustment

Profound respect for law’s past is only one side of the realist coin. The other is a focus on the intrinsic dynamism of law. For legal realists law cannot be understood merely by reference to its static elements (concepts and rules). Law is a doctrinal system in movement; “developed and interpreted and in continuous flux.” Therefore, a viable conception of law must include “also those elements that direct and propel legal development.”\footnote{See Cotterrell, supra note 77, at 153, 156. Cf. White, supra note 241, at 216, 241.}

Legal realists give two reasons for incorporating and studying this dynamic dimension. The first follows from their critique of the formalist idea of deriving solutions to new cases from preexisting concepts and rules. Realists recognize that the existing legal environment always leaves considerable interpretive leeway. They understand that as the shape of legal doctrines “is made and remade as its narrative continues to unfold . . . even apparently surprising lurches can be integrated seamlessly.”\footnote{Herzog, supra note 149, at 18. See also id., at 15-16 (because “societies have many traditions jostling uneasily together,” choosing our way at “an interpretive fork in the road” is not “a matter of [our single] tradition against radical innovation,” but rather one}
accept Pound’s claim that legal ideals inevitably play a “highly significant”—indeed an essential—role in the unfolding legal narrative “as the criteria for valuing claims, deciding upon the intrinsic merit of competing interpretations, choosing from among possible starting points of legal reasoning or competing analogies, and determining what is reasonable and just.”

The reference to legal ideals as the engine of change is not coincidental of course. Rather, it captures the essence of the second reason for the realist focus on legal dynamism. Recall that by integrating power into their conception of law, realists are committed to challenge law constantly, and are wary of implying that the pace of legal change should always be restrained. With Cardozo, realists see law as an “endless process of testing and retesting,” which is aimed at removing mistakes and eccentricities and preserving “whatever is pure and sound and fine.” This vision of law as a great human laboratory continuously seeking improvement is founded on a spirit of modernist optimism; it relies (as we have seen) on a belief in reason and its ability to react properly to changes in society, constantly providing for social advancement.

This emphasis on the dynamic aspect of law need not undermine the realist claim of rehabilitating legal predictability. While some measure of unpredictability remains, the realist scheme is still relatively predictable, at least when it is compared with the radically indeterminate formulae of legal formalism. The remaining unpredictability, and thus retroactivity, are not necessarily alarming. Insofar as law’s evolution is indeed due to its perennial quest for justice, it may help cultivate within the citizenry a

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245 (...continued)
“of which tradition to choose”); Krygier, supra note 222, at 242, 248 (same).

246 Roscoe Pound, A Comparisons of Ideals in Law, 47 Harv. L. Rev. 1, 2-3 (1933).

247 See Herzog, supra note 149, at 21-22.

248 Cardozo, supra note 72, at 179. See also Dworkin, supra note 18, at 400-13.

249 See, e.g., Roscoe Pound, A Survey of Social Interests, 37 Harv. L. Rev. 1, 39, 48 (1943) (“the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and desires . . . so as to give effect to the greatest total of interests that weigh most in our civilization, with the least sacrifice of the system as a whole”). See also, e.g., Robert Samuel Summers, Introduction, in AMERICAN LEGAL THEORY xiii, xiv (Robert Samuel Summers ed. 1992). Cf. Hull, supra note 161, at 30; Edward B. McLean, LAW AND CIVILIZATION: THE LEGAL THOUGHT OF ROSCOE POUND xiii-xv (1992).

desirable attitude of cautious—maybe even suspicious—acceptance of the moral propriety of positive law, and an anticipation of its moral improvement; a healthy expectation of law and from law that it should work itself pure.251

As usual, it is Llewellyn who best sketches the dynamic dimension of the realist conception of law. For Llewellyn, law involves “the constant questing for better and best law”; a relentless “re-examination and reworking of the heritage.” Judges have the responsibility to move forward: the “duty to justice and adjustment,” which means an “on-going production and improvement of rules.” While these new rules are “to be built on and out of what the past can offer,” they must also be forward-looking: they must be decided “with a feeling, explicit or implicit, of willingness, of readiness, to do the like again, if, as, and when a like case may arise.”252 Indeed, “blindness and woodedness and red tape and sheer stupidity . . . distortion to wrong ends [and] abuse for profit or favor” are part of the life of the law. (Realists, mind you, are careful not to fall into the trap of its romantization.253) But these are always deemed to be disruptions, which are “desperately bad.” And against them, there is “in every ‘legal’ structure . . . [an implicit] recognition of duty to make good”; not necessarily in every detail, but at the level of “the Whole of the system in net effect and especially in net intent.” It is at this level that the law makes “necessary contact with justification” of itself. This quest for justice—the demand of justification—is not just “an ethical demand upon the system (though it is [also] that).” Rather, it is “an element conceived to be always and strongly present in urge”; one that cannot be “negated by the most cynical egocentric who ever ran” the legal system.254

Indeed, the realist conception of law is both backward looking and forward looking, constantly challenging the desirability of existing doctrines’ normative underpinnings, their responsiveness to the social context in which they are situated, and their effectiveness in promoting their contextually-examined normative goals. (I deliberately use here the vague


A conception of law as a dynamic justificatory practice that evolves along the lines of fit[ness] and justification has been popularized in recent times by Ronald Dworkin. Although major similarities are discernible between the realist conception of law and Dworkin’s conception of law as integrity, the differences between them are equally significant. Just as the endorsement of science or the suspicion of law’s power do not turn legal realists into members of the law and economics school or the critical legal studies movement (respectively), the realist understanding of legal evolution cannot be equated with Dworkin’s account of law as a chain novel.

I begin with the continuities between the realist conception of law and Dworkin’s conception of law as integrity. Both understand law as an evolving tradition, a justificatory practice that continuously attempts to cast and recast itself in the best possible normative light. Both are exercises in law’s optimism, seeking to direct the evolution of law in a way that accentuates its normative desirability. Both understand the quest for justice as integral to law rather than merely an external criterion (as it is according to positivism), or as a test for the validity of law (as it is in natural law theory). In both, normative discourse—an ongoing critical and constructive inquiry of the values underlying the existing doctrine—is thus integrated into legal discourse. In all these respects the realist conception of law is an important precursor of Dworkin’s *Law’s Empire*, anticipating Dworkin’s account of fit and justification as the two dimensions of legal evolution. (The fact that the debt of Dworkin’s theory of law to the realist conception of law has been acknowledged is an important point.)

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255 See Dagan, *supra* note 53, at 1561. Even an analysis of law’s material effect on people’s behavior is, at least at times, more complicated than is frequently assumed. For our purposes it is enough to accept the modest claim that whatever the influence a legal ruling may have—which is frequently unknown—it should push in the desirable normative direction. See Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 251-54 (1983).

256 See DWORKIN, *supra* note 18, at 52-53, 164-258.
of law was hitherto unrecognized—recall Dworkin’s own dismissal of realism as nominalism, with which this Article began—is one more testimony to the realist legacy’s unhappy predicament.)

Together with these similarities, the realist account of each of these dimensions significantly differ from Dworkin’s. Unlike Dworkin, realists do not treat the dimension of fit[ness] as a global imperative; instead, and in line with their commitment to situation sense, they seek coherence at a far more localized level. Llewellyn explicitly combines the idea of law as an evolving tradition with the realist prescription for contextualism when he claims that the two main keys to wise decision are “the open quest for situation-sense and situation-rightness” and the “recurring accounting at once to the authorities as received and to the need for the ever sounder, ever clearer phrasing of guiding for the future.” Indeed, in the contemporary terms set by Joseph Raz, Llewellyn’s law of flavor and fitness can be interpreted as a prescription for local, rather than global, coherence: an injunction to sustain pockets of coherence that reflect clusters of cases sufficiently similar in terms of the pertinent normative principles that should guide their regulation and the appropriate weight of those principles, so as to suggest that they should be subject to a unified legal framework.

The realists’ rejection of global coherence derives from their value pluralism: local, as opposed to global, coherence facilitates the coexistence of a plurality of social contexts governed by distinct and potentially incommensurable moral principles. The realist commitment to value pluralism, which contrasts sharply with Dworkin’s meta-ethical monism, also explains the difference between the realist approach to the dimension


258 Llewellyn, The Common Law Tradition, supra note 48, at 194. See also id., at 44 (“The wise place to search thoroughly for what is a right and fair solution is the recurring problem-situation of which the instant case is typical. For in the first place this presses, this drives toward formulating a solving and guiding rule; and to address oneself to the rule side of the puzzle is of necessity both to look back upon the heritage of doctrine and also to look forward into prospective consequences and prospective further problems—and to account to each.”).

259 See Raz, supra note 23, at 281-82, 294-304. Dworkin’s doctrine of “local priority” concedes, to some extent, the significance of context. See Dworkin, supra note 18, at 250-54.

of justification and Dworkin’s rendition of this dimension. For realists the dimension of justification requires identifying the human values underlying the existing doctrine and the ways in which they can be optimally promoted. In this framework, there is no room for the (putative) distinction between principles and policies (or rights and public policy), which plays such a core role in Dworkin’s jurisprudence.262

One final distinction is in place. The realists’ commitment to value pluralism, their distrust of claims by law’s carriers that they represent the pure voice of reason, and their view of legal reasoning as an ongoing exercise of persuasion in which confident claims of finding the one right answer are to be viewed with suspicion, all explain the identification of legal realism in American legal thought with a backlash against judicial review.263 By contrast, Dworkin is closely associated with the idea that legal questions have one right answer, and is a staunch defender of strong judicial review.264

ARE WE ALL REALISTS NOW?

So are we all realists now? If my reconstruction of the realist conception of law in this Article is convincing, the answer to this question is as clear as it may be surprising. We are not all realists now—even if we set aside those of us who want to revive legal formalism—because rather

261 See, e.g., Radin, My Philosophy of Law, supra note 224, at 299 (“Within the fields in which legal judgments are given, moral right, economic utility, public order, desire for social readjustment, or for social stability—all these things tend to break the pattern that technical law attempts to create out of past judgments and formulations, and there is almost never an occasion in which these considerations are wilfully ignored by those who issue legal judgment”).

262 See Dworkin, supra note 2, at 82-88. For criticism of this distinction and of its role in Dworkin’s jurisprudence, see, e.g., Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 GA. L. REV. 991, 1010-33 (1977); Alon Harel, Revisionist Theories of Rights: An Unwelcome Defense, 11 CAN. J. L. & JURISP. 227 (1998).

263 See Thomas C. Grey, Judicial Review and Legal Pragmatism, 38 WAKE FOREST L. REV. 473 (2003) (discussing the difference between this American narrative and the experience in other places in recent times where “judicial review stimulates legal pragmatism by making more vivid the relationship of law with governance and public policy”). See also, e.g., Posner, supra note 54, at 121-22.

than carrying the realist legacy forward, legal theorists of the last decades have torn it apart. 265 The disintegration of legal theory during this period robbed the realist conception of law of its most promising lessons.

Contemporary accounts of law’s violence, or of its role as a forum of reason, may certainly be richer than the realist accounts of power and reason in law. By the same token, the use of science in legal discourse is today more sophisticated than at the pinnacle of legal realism and some aspects of the craft of lawyering are better understood now than they were by Llewellyn et al. Finally, contemporary accounts of legal evolution can undoubtedly enrich the sketchy realist thesis about the constitutive dynamism of law.

I do not dismiss or minimize the importance of these (and other) refinements and improvements. But a reconstruction of the realist conception of law raises serious misgivings about this process of specialization and fragmentation. The price of this process is high, indeed too high, because the realist conception of law implies that debates between law-as-power and law-as-reason, law-as-science and law-as-craft, or law-as-tradition and law-as-progress are futile and harmful, and that any unidimensional account of law is hopelessly deficient. 266 Law (or any specific legal doctrine or institution) can be properly understood only if we regain the realist appreciation of its most significant feature: its difficult accommodation of power and reason, science and craft, and tradition and progress.

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265 This process is probably most conspicuous with respect to law and economics that, according to Ronald Coase, “is now professionally recognized as a separate discipline or subdiscipline.” R.H. Coase, Law and Economics at Chicago, 36 J.L. & Econ. 239, 254 (1993).

266 As the text suggests, I believe that the realist conception of law has important implications for legal scholarship and legal education. A discussion of these implications must await another day.