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REALISM, WHAT NEXT?

II

WALTER B. KENNEDY†

I. THE PROMISES OF REALISM

“. . . the process of psychoanalysis has spread to unaccustomed fields.”¹

HOW do judges really decide cases? One of the most interesting offshoots of realist jurisprudence² has been the persistent and insistent plea for a scientific study of judicial opinions: a formidable burrowing beneath the surface of slippery sentences and “weasel words” and a critical psychoanalysis of judicial minds. The theory back of this new approach to the evaluation of case law seems to be that the judges do not say what they mean or (if you prefer) do not mean what they say; that latent in the stuff that makes for decisions is a mass of conscious and unconscious forces which shape and control the mental processes of the judiciary. Deep in the mental caverns are substrata of unexpressed feelings, prejudices, compulsives and inhibitions controlling and curbing judicial conduct. These impelling causes are hidden from the casual reader who naively believes that judicial opinions frankly and fully express the true underlying reasons which guide the courts in the shaping of their judgments. The realists tell us that the scientific method of evaluating cases is to begin their study with a skeptical mind;³ to disregard or minimize the “vocal” behavior of the courts which finds utterance in the reports and to delve deep into the background of “non-vocal” behavior.⁴ Here, we are informed, repose the real grounds of judicial decision and by this method alone may we be assured of an accurate portrayal of *what* the courts are *doing* in fact and *why* they are doing it.

† Professor of Law, Fordham University, School of Law.

The present article is a continuation of *Realism, What Next?* (1938) 7 *FORDHAM L. REV.* 203.

1. Cardozo, J., dissenting in *United States v. Constantine*, 296 U. S. 287, 299 (1935).

2. “The most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists and content with nothing less than revision to its very roots of the method of judicial decision which is part of the classical tradition.” Cardozo, Address before New York State Bar Association, 55 *REPORT OF NEW YORK STATE BAR ASSOCIATION* (1932) 267.

3. Frank, *Realism in Jurisprudence* (1934) 7 *AM. L. SCHOOL REV.* 1063; *LAW AND THE MODERN MIND* (1930) 17.

One condition of legal research, says Llewellyn, is “a huge and burning discontent with what we know.” Llewellyn, Address before American Association of American Law Schools (1929).

4. Oliphant, *A Return to Stare Decisis* (1928) 14 *A. B. A. J.* 159, 161: “Why has not our study of cases in the past yielded the results now sought? The attempt has been

Our error seems to have been that in the past we have fallen into the complacent belief that the law is found in the reports of the courts; that the judges are "thinking out loud" when they issue their pretty paragraphs awarding judgment for the plaintiff or the defendant. The fact of the matter is—so runs the critique of realism—that the formal opinion is oftentimes a legalistic cloak concealing the driving forces which really guide judicial minds into the channel of ultimate conclusions. And so there are two methods of valuing and of weighing judicial decisions: One way, the easy and old fashioned way, is to scrape the surface, to scan the printed pages of the reports, and to accept without cavil the written say-so of the courts as an accurate, complete portrayal of the law. The other way, advocated by realist reformers, is to search into the personal idiosyncracies of the judges, to prowl around their family history, to look for subconscious impulses, environmental urges, cultural compulsives, economic predilections—and lo! we come across the real, but oft unexpressed, factors which push judicial pens and help to spell out the true course of the law.⁵

Closely interlocked with the plea for a study of the *personal* elements of judge-made law is the parallel proposal that legal research must step outside of the narrowing confines of the law books and view the economic, sociological, psychological, and political situations which sway the judi-

made to show that this is largely due to the fact that we have focused our attention too largely on the *vocal behavior* of judges in deciding cases. A study with more stress on their *non-vocal behavior*, *i.e.*, what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases. Economists may well congratulate themselves that they have the statistical method to add objectivity to their results. The case method when used scientifically will be found to be a method fully as significant for law as statistics is for economics. It is outstanding as an objective method."

It seems clear that realism with its emphasis upon the shadowy, sub-vocal conduct of the judge, is accepting, however tacitly, the psychology of behaviorism. A particularly frank avowal of this trend in legal philosophy is found in Beutel, *Some Implications of Experimental Jurisprudence* (1934) 48 HARV. L. REV. 169, 175. Cf. Kennedy, *Principles or Facts?* (1935) 4 FORDHAM L. REV. 53, 69.

For articles showing the dangers of the advent of psychology of behaviorism in the law, see Cohen, *Justice Holmes and the Nature of the Law* (1931) 31 COL. L. REV. 352, 355; Sayre, *The Present Signification of "Mens Rea" in the Criminal Law*, HARVARD LEGAL ESSAYS (1934).

5. "If we are to gain an insight into the judicial process, we must engage in a study of men, for, as has been observed, the judge's training, his personality, his temperament, his courage, the spectacles through which he views life, determine his decisions." Harno, *Social Planning and Perspective Through Law* (1933) 7 AM. L. SCHOOL REV. 705, 710. See Schroeder, *The Psychologic Study of Judicial Opinions* (1918) 6 AM. L. SCHOOL REV. 89.

For a humorous, but pertinent, reply to the far flung emphasis upon the personality of the judge in the evaluation of his judicial decisions, see Scott, *Confessions of a Law Teacher*, Address before Association of American Law Schools, Dec. 27, 1938 reprinted in the HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS (1928) 24.

cial minds even though these external causes are not mentioned in the opinions of the judges.⁶ Too much emphasis, say the realists, has been paid to principles and rules which often clog and impede the search for social background.⁷ To understand law in the making, and law already made, realists insist that the scientific methods of the social sciences and the wealth of available material in these bordering disciplines offer excellent opportunities for improving the legal order, and more particularly, for appreciating just *what* the judges are *doing* and *why* they are doing it.

Now it must be freely conceded that if realism has made out a case against the surface value of opinions, and can prove that the "subjacent" probe of judicial minds brings fruitful results in terms of a more accurate disclosure of the back-of-the-scenes processes at work in the judge's study, the lawyer has been missing this verifiable technique and helpful aid in the preparation of his cases for trial and for appeal. So also it must be admitted that if realism is able by the use of fact-finding and established techniques of science to give us a more accurate and complete "opinion" than the written reports, such formulas must be adopted.

Before considering whether realism has convincingly demonstrated to date that the probing of judicial minds has been successfully accomplished and that scientific data is available, or may be made available,⁸ to test out the precise meaning of judicial decisions, it may be helpful to set down some of the claims and objectives of the new reform. The principal tenet of legal realism is that it is *real*; that it deals with persons, things, and relations as they *are*; that it observes and adheres to the *facts*; that it abhors misleading fictions, abstractions, and the make-believe concepts of traditional law.⁹ Realism indorses and purports to follow the impartial, skeptical, fact-finding and inductive experimentation of science. It insists upon breaking down lump concepts¹⁰ which lawyers and judges use to cover multiple and diverse fact situations and to consider each case in the light of the precise facts.

Thus realism raises the standards of unswerving and impartial search

6. Patterson, *Can Law be Scientific?* (1930) 25 ILL. L. REV. 121; Cook, *Scientific Method of the Law* (1927) 13 A. B. A. J. 303.

7. Llewellyn, *The Rule of Law in Our Case-Law of Contract* (1938) 47 YALE L. J. 1243.

8. Oliphant, *supra* note 4 at 161; Harno, *supra* note 5, *passim*.

9. See extensive bibliography of writers of the realistic school in Llewellyn, *Some Realism About Realism* (1931) 44 HARV. L. REV. 1222.

10. Llewellyn is the leading and most insistent advocate of the breakdown of "lump concepts"—a splitting up of the broad principles of law which cover all sorts of similar, but distinguishable, situations. For a recent discussion of the alleged dangers of lump concepts, see Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. REV. 159.

for the real facts, of maximum approach to the experimental methods of pure science, and of a stern rejection of all abstract principles which do not click with the definite knowable facts.

How has this meticulous adherence to the law "*as is*" rather than to the law "*as if*" been observed in the investigation of the realists? We may with reason expect to find that they have been most insistent that their *own* studies should be divorced from possibilities and probabilities; that they have carefully distinguished airy conjecture from verified conclusion; that they have been as *skeptical* in evaluating their findings of *fact* as they are of the findings of *law* spread forth in judicial opinions. We may likewise expect to find that realism has steered away from the dangers of a partisan, inadequate, incomplete conclusion derived from a few puny particulars welded together into an assumed generalization. In fine, we may expect to find that realism is real, scientific, skeptical, cautious, and critical not alone in the attack upon traditional law but also in the building of its own substituted methods of criticising cases and in erecting its own formulas for weighing legal decisions.

Realism began as a protest against traditional law.¹¹ Its followers, however, realized that a progressive philosophy of law cannot subsist on a negative diet of antagonism. It must offer a counter program of its own; it must reconstruct, not merely tear down, the house of the law. Realism is now entering upon the second and most important stage of development. It is building a constructive program, a new approach and technique to be used in the solution of legal problems. No longer is the realist reformer content to attack the old order; he has a plan and a program to be applied to particular segments of existing law. Taking a precise question of present-day litigation the proponents of functionalism are pulling apart case law and revising it in accordance with the pattern of realism. The experiment promises to be an interesting one and decisive of the worth and merit of the new approach. If realism can make good its promise of a better legal order by the use of its formulas in action, its advance to the stage of general adoption by the legal profession will be materially quickened. What are the results of the use of fact-finding, of the search for the "non-vocal" behaviour of the courts, and of the so called "scientific" method in the analysis of an actual problem?

II. THE PERFORMANCE OF REALISM

"[Realists] want law to deal, they themselves want to deal, with things, with people, with tangibles and observable relations between definite

11. Notes 4-10 *supra*.

tangibles—not with words alone . . . they want to check ideas and rules and formulas by facts, to keep them close to facts.”¹²

The most satisfactory, certainly the most practical, way to test out the performance of realism is to view it in action; to examine an approved piece of writing¹³ which applies the realist technique and formula to a concrete question of law which might pass over the desk of any lawyer in his daily practice. Such sampling of realism in use enables us to sense more accurately just what realists mean when they talk about “non-vocal behavior” of the courts. It also permits us to stand by while they disclose facts which “stimulate” the judges and influence their opinions. Thus we may be able to evaluate the validity and benefit of the “objective approach” and the scientific use of extra legal data applied to an every-day legal problem.

The specific article to be examined is *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts* by Lawrence R. Eno in the *Yale Law Journal*.¹⁴ This article was selected for several reasons: (1) It deals with a definite and exact question of traditional law and is not a mere general discussion of classical jurisprudence or an abstract defense of the new realism.¹⁵ (2) Eno dissects and analyzes

12. Llewellyn, *loc. cit. supra* note 9, at 1222.

13. The writer realizes the danger and the unfairness of attempting to prove the weakness of realist research into facts and data by the examination of a single article although it bears the imprimatur of realist approval. But the article selected, it is believed, is a fair sample of the technique of realism in action. At least it offers an opportunity to point out some of the dangers which are appearing in the now developing second stage of realism. It is hoped that examination of other articles in this same vein may follow. In any event the critic of realist writing must now proceed along the road travelled by the functional writers themselves. Each article on “bread-and-butter” problems must be separately treated and the precise topic of law covered must be carefully analyzed. Cf. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 *FORDHAM L. REV.* 272, 282-300.

One word of warning: There are, and probably always will be, realists of varying degrees and theories. I have elsewhere noted this wide divergence of thought. Kennedy, *Realism, What Next?* (1938) 7 *FORDHAM L. REV.* 203n. In the present article the writer does not mean to imply that all realists are cast in the same mold or that they would accept all the writings of any particular writer in the group. There are, however, certain common tendencies which run through the new realist school such as devotion to experimentalism, fact-finding, the functional approach, scientific methods and skepticism.

14. Eno, *Price Movement and Unstated Objections to Defective Performance of Sales Contracts* (1935) 44 *YALE L. J.* 782 (hereafter cited: Eno).

15. The value of realism to the lawyer and judge may best be determined by the way in which the new technique comes to grips with practical questions in the law. Eno's article does just that. His coverage of case law is exhaustive. So far as his principle-approach to the law is concerned, there is no ground for criticism of the legal material canvassed by him. It is only when he leaves the orthodox analysis of the cases and begins to “functionalize” and to use “scientific” data that we dissent.

a complete line of cases which have a fairly definite meaning to the book-lawyer and translates into these cases a substantially different meaning when viewed through the penetrating spectacles of realistic design.¹⁶ (3) The author uses the "sub-vocal" process of probing judicial minds and offers tentative conclusions as to what the judges were *doing* in marked contrast with what they were *saying*.¹⁷ (4) He pays tribute to and constantly applies extra legal material drawn from economic sources and offers such material as factually accurate, or at least significant, in determining the course of law as it actually is.¹⁸ (5) The selected paper was prepared with the assistance of an authority on the law of Sales who also has a recognized place as a leading advocate of realism.¹⁹

The precise question which Eno proposes to discuss in approved functional manner is a problem frequently arising in the course of the sale of goods. S contracts to sell goods to B, the terms of the contract specifying the amount and quality of the goods as well as the time, place and manner of delivery. S tenders the goods ordered to B and the latter rejects them assigning specific reasons for his rejection. Let us say that the proffered goods are not merchantable. Thereafter S sues B for the price and B contends that S must prove that he has satisfied all the terms and conditions of the contract and that B may show at

16. Here is one of the distinct contributions of the new realism. Its advocates frequently begin an examination of cases at the point where the classical jurist ends. Realists are very insistent upon background, social, economic and political. The objective of most lawyers is reached after an exhaustive reading of the pertinent authorities, the consideration of the exact point or points involved, and the separation of dictum from decision. In other words, the traditional approach stresses largely the face value of current case-law.

17. See note 4, 5, *supra*.

18. The emphasis upon extra legal materials, gathered from social sciences and data obtained outside of the law, is pronounced in the critiques of many realist writers. Books have been written in criticism of the law which are practically devoid of citations or analyses of so-called legal authorities. See, by way of extreme example, FRANK, *LAW AND THE MODERN MIND* (1930), which purports to consider the law and yet is devoted exclusively to non-legal materials. See also ARNOLD, *SYMBOLS OF GOVERNMENT* (1935); *THE FOLKLORE OF CAPITALISM* (1937); ROBINSON, *LAW AND LAWYERS* (1935).

Eno adopts a more moderate approach and cites exhaustively case-law. He then proceeds to criticize the cases by the use of extralegal material, statistics and data derived from other sources than the customary legal authorities consulted by the "book lawyer".

19. Eno acknowledges his debt of gratitude to Professor Karl N. Llewellyn of Columbia Law School: "Without his assistance this work would have been impossible." Eno, *supra* note 14, at 782 n. The basic framework of Eno's criticism is traceable to Llewellyn's attack upon lump concepts in general and upon the broad rule of *Littlejohn v. Shaw* in particular. LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 300. Llewellyn has endorsed the Eno paper by the statement that it is a "lovely job". Llewellyn, *On Warranty of Quality, and Society* (1936) 36 *COL. L. REV.* 699, 715 n. See also Llewellyn, *The Rule of Law in Our Case-Law of Contract* (1938) 47 *YALE L. J.* 1243, 1263 n; *On Our Case-Law of Contract, Offer and Acceptance I* (1938) 48 *YALE L. J.* 1, 26 n.

the trial further objections constituting defective performance although such objections were unstated at the time that B rejected the goods. Most courts,²⁰ possibly including New York,²¹ hold that a deliberate objection by the buyer placed upon particular grounds, is deemed to be a waiver of all other objections. Under this ruling B would not be allowed to set up unstated objections at the time of the trial. Other courts, under varying circumstances, permit the buyer to set up and prove his unstated reasons for rejecting the goods.²²

Eno begins his criticism of the rule refusing to allow the buyer to set forth his unstated objections to the seller's defective performance of the sales contract. He starts with a consideration of *Littlejohn v. Shaw*²³ which, he contends, was partly responsible for the crystallization of the objectionable doctrine. In that case the buyers agreed to accept and pay for twenty-five tons of No. 1 "cube gambier" which was to be shipped by the sellers at Singapore for New York. The contract contained a provision that the goods were to be of usual good quality in merchantable condition. When the merchandise arrived in New York City, the sellers sent a delivery order for the goods to the buyers who returned it with this endorsement upon it: "Rejected—not good merchantable." When the sellers sued the buyers for failure to accept the gambier, the buyers contended that the sellers had to prove that they had fulfilled all the terms of the contract and not merely those previously mentioned by the buyers when they rejected the goods. The New York Court of Appeals, affirming a judgment below for the sellers, said:

"But, in this case, the defendants placed their rejection of the gambier upon two specific grounds, viz., that it was not of good merchantable quality and that it was not in good merchantable condition. By thus formally stating their objections, they must be held to have waived all other objections. The principle is plain, and needs no argument in support of it, that, if a particular objection is taken to the performance and the party is silent as to all others, they are deemed to be waived. This waiver of all other objections is not only justly inferable, generally, but is especially so when, as under the circumstances present in this case, the deliberateness with which the objections are stated leaves it to be implied that there has been a consideration of the matter of

20. Eno collects cases following the majority rule at 785 n. See WILLISTON, SALES (2d ed. 1924) § 495.

21. *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810 (1899). The broad rule of *Littlejohn v. Shaw* is criticised in *Strasburger v. Leerburger*, 233 N. Y. 55, 134 N. E. 834 (1922), where the court suggests that the buyer's waiver of unstated objections should be confined "to those cases where if warned the party [seller] might have obviated the trouble." But cf. *O'Meara Co. v. Nat. Park Bank of N. Y.*, 239 N. Y. 386, 146 N. E. 636 (1925); *Woolward v. Schaffer Stores Co.*, 272 N. Y. 304, 5 N. E. (2d) 329 (1936).

22. Eno, at 798-800.

23. 159 N. Y. 188, 53 N. E. 810 (1899).

acceptance of the goods and a result reached upon particular grounds. The defendants therefore were not in a position to insist upon any other proof of the plaintiffs to enable them to recover upon their cause of action, than that the gambier was of good merchantable quality and in good merchantable condition."²⁴

Before considering Eno's realistic approach to the cases involving the problem of unstated objections, it is important to note clearly his *a priori* impressions of the rule enunciated in *Littlejohn v. Shaw*.²⁵ The following passage indicates that he is *not* arguing for the complete overthrow of the *Littlejohn* case but is merely contending that it should be whittled down:

"Removal of the buyer's legitimate defenses in this fashion would appear to be justifiable only when there is present some peculiar element in the factual situation, such as the possibility of obviating the complained of defect in performance had timely notice thereof been given, or when there exists cause for the belief that the buyer is endeavoring to squirm out of a contract which he finds suddenly oppressive because of an adverse price movement. Nevertheless, the broad, formal rule enunciated in *Littlejohn v. Shaw* has been, and often still is, applied blindly to cases in which neither of these justifying elements is to be found."²⁶

It appears, therefore, that Eno's contention is that the doctrine of *Littlejohn v. Shaw* is a "lump concept", too broad to do justice, a rule that should be restricted to cases which show (for example) the "most important distinguishing factor" of an adverse price-drop movement following the making of the contract. When such a price drop is present, Eno freely admits that the buyer *should* be denied the right to set up fresh objections at the time of trial. If Eno had confined his criticism to the "broad formal rule" of *Littlejohn v. Shaw* which, he contends, has been "applied blindly" by the courts, there would be no occasion for the present article. A reasoned criticism of debatable principles of the law is a healthy sign and law reviews are instituted for the purpose of permitting writers to point out defects in existing principles of law. Such practise has received the warm endorsement of the judiciary.²⁷ Whether one agrees with the stated criticism of Eno or not, his opening attack upon the rule enunciated in *Littlejohn v. Shaw* is ably presented. His thorough coverage of the cases involving unstated objections sup-

24. *Id.* at 191, 53 N. E. 810, at 811.

25. While *a priori* ideas are usually associated with conceptual thinking, realists also indulge in *a priori* speculation about facts. The danger is that they may "see" in the facts only data which support their preconceived ideas. MOLEY, ARE WE MOVIE MADE? (1938) 34.

26. Eno, *supra* note 14, at 783.

27. Crane, *Why Law School Reviews* (1935) 4 FORDHAM L. REV. 1.

ports his contention that there is a formidable dissent to the broad principle set down in the *Littlejohn* case. It must be further conceded that the historical development of the "waiver" principle in the "money tender" cases in England justifies his assertion that there is considerable doubt about the soundness of the extension of such principle to the matter of unstated objections arising in the courts of a sale of goods.²⁸ It may even be conceded that his scholarly attack, directed to the attention of the courts, might bring about a repentant mood and result in the overthrow of *Littlejohn v. Shaw*. Such eventuality has been often known to happen, but not *too* often!

Realism Arrives

But Eno is not merely content to express his disagreement with the stated rule of *Littlejohn v. Shaw*. At this point we may note the arrival of realism in action.²⁹ Here begins the probing of judicial minds, the search beneath the surface of case law, the investigation of external facts not found in the opinion of the court, and finally, the conclusion that this collection of extra-legal material raises serious doubts about the binding force of *Littlejohn v. Shaw* as a present-day precedent.

The first sentences of his article which apply the so-called realistic approach are the following:

"But if it can be shown that the vast majority of the cases out of which this precedent has been solidified contained *factual elements* which logically and equitably distinguished them from the cases to which the broad rule is today sought to be applied, *their force as precedent is substantially destroyed*. It is the purpose of this article to demonstrate that this is indeed the fact with respect to the rule against the setting up of unstated objections. The most important distinguishing factor to be taken into account is that pointed out by Llewellyn, namely, a falling market between the closing of the deal and the tendered delivery. As a matter of logic and equity, the presence of this factor alone should be sufficient to account for judicial refusal to allow the buyer to set up a trial new objections to the seller's performance. *Accordingly, the cases in which it is found should not at all be regarded as authority for the rigid rule which would bar unstated objections in all circumstances.*"³⁰

28. Eno, 783-800.

29. At this point there is noticeable a clear cut departure from the traditional approach. Eno is now going to consider actions, not words; results, not rhetoric; what the courts *do*, not what they *say*.

Llewellyn has expressed the true formula of realist research as follows: "It is not what stands on the books, but what happens, which is the center of attention . . . we remain concerned primarily with what officials *do* and the *effects* of their doing." Llewellyn, *Legal Tradition and Social Science Method—A Realist's Critique*, reprinted in HALL, READINGS IN JURISPRUDENCE (1938) 792.

30. Italics inserted. This unusual statement by Eno indicates that his proposed attack will disclose facts (not conjectures or assumptions) which point to the conclusion that

A consideration of the foregoing passage discloses that Eno not only objects to the broad rule of *Littlejohn v. Shaw*, but he proposes to show that the "vast majority of the cases" which have purported to follow this precedent have contained at least one factual element (a falling market between the closing of the sales contract and the time of delivery) which permitted the courts to rule against the buyer without accepting the wide principle of *Littlejohn v. Shaw*. Eno in the quoted passage assures the reader that he can demonstrate that such factor of price drop was in fact present in most of the sales decisions following *Littlejohn v. Shaw*, and if such be the fact, he contends that "*their force as precedent is substantially destroyed.*"

The first comment which an anti-realist would make to the proposed investigation by Eno of the factual elements entering into the cases involving unstated objections is that it promises something that it cannot perform. No matter how cumulative and convincing his attack upon current case law may be, it is difficult to follow Eno to his conclusion that such proof substantially destroys the validity of *Littlejohn v. Shaw* and subsequent cases as precedents. True it is that the courts *might* accept his argument and adopt the restricted rule regarding unstated objections. But it is by no means clear that the courts *would* do so. The formidable hurdle of judicial acceptance of the writer's argument, however persuasive it may be, must still be surmounted. Indeed, one need not go beyond the four corners of Eno's article to prove that his factual survey, however convincing, does not destroy the force of *Littlejohn v. Shaw*. Eno concedes that the courts have "applied blindly" the doctrine of the *Littlejohn* case;³¹ that there is "the tendency of many courts to blind themselves to commercial realities in their preoccupation with mechanical legal abstractions";³² that it is "unfortunate" that in many cases they lay down the "over broad rule" of *Littlejohn v. Shaw* without mention of the falling market;³³ and that such absence of comment regarding a price drop by the courts is "almost unforgivable".³⁴ Answering his optimistic belief that success in discovering falling market or a price drop in the majority of the unstated-objection cases would result in the substantial destruction of the broad principle of *Littlejohn v. Shaw*, it may be suggested that the doctrine of *stare decisis*, however unsatisfactory it may be to the advocates of the factual approach, is a

Littlejohn v. Shaw is of doubtful value as a precedent. He is not satisfied merely to state that the courts were led into error by failing to consider these facts about to be disclosed, but he is asserting that in some occult fashion these factors percolated into the judicial mind and really influenced, although not "vocally", the decision of the courts.

31. Eno, at 783.

32. Eno, at 802 n.

33. Eno, at 811.

34. Eno, at 811.

maxim which stands in the way. Whatever success awaits Eno's factual analysis the first *caveat* filed by the anti-realists is that fact-research or judicial psychoanalysis does not promise probable relief against the objectionable features of *Littlejohn v. Shaw*. Assuming, as we have, that the stated case calls for reconsideration and revision in terms of the critique of Eno, his safest course will be to submit the proposed changes to the legislature rather than to the courts.³⁵ Certain it is that his successful attack against *Littlejohn v. Shaw* may still find the courts applying its doctrine blindly to subsequent cases in accord with the noted tendency of many courts to adhere to "mechanical legal abstractions", rather than to consider commercial realities.

Whatever may be the ultimate results of Eno's search for the important factors of price drop or falling market in cases involving the admission of unstated objections by the buyer in the law of sales, *Littlejohn v. Shaw* and its brood of cases still remain in the law books, cited by lawyers until the courts of last resort utter the fatal word: overruled. It may be a matter of regret that the doctrine of *stare decisis* retards the easy erasure of an objectionable rule but it is nevertheless a fact which realists must, or should, realize.³⁶

Probing Judicial Minds

Having set for himself the task of proving that a vast majority of the cases involving the buyer's right to raise unstated objections contained the distinguishing factor of a price drop or a falling market, we now turn to the proof which Eno offers of such alleged fact. For the purposes of this paper we may accept his contention that a substantial price drop, following the making of a contract of sale, is a factor which, if present, *might* tempt the buyer to "welch" on his bargain by a delinquent notice to the seller setting up additional defects in the goods. More: we may concede that if such factor were presented to the court, the judges *might* penalize a "runaway" buyer who was endeavoring to hide behind a smoke screen of technical objections. The concessions are made in order to clear the way for the focal consideration: *the factual soundness and scientific accuracy of the extra-legal material which Eno offers in proof of market collapse.*

How does Eno substantiate his statements that in a "vast majority of cases" this factor of a depressed market is present,³⁷ accounts for judi-

35. In the concluding recommendations of his paper, Eno proposes a revision of the UNIFORM SALES ACT § 49 which would broaden the right of the buyer to set up unstated objections in subsequent litigation with the seller. Eno, at 817-818.

36. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 149; Brandeis J., *dissenting* in *Burnet v. Coronado Coal & Gas Co.*, 285 U. S. 393, 406 (1932).

37. Eno, at 783.

cial refusal to aid the buyer,³⁸ and is of "considerable if not of paramount importance in determining the result"?³⁹ The opening sentence of the proposed formula for probing judicial minds contains a frank admission of the difficulty which confronts him:

"When an effort is made to determine just how many of the reported cases have contained this element of price decline as a possibly influential factor in the mind of the court, some difficulty is presented by those decisions in which there is no evidence that any drop in the market price had been brought to the court's attention."⁴⁰

It must be conceded that the writer is correct in saying that some difficulty, perhaps insuperable difficulty, arises when he attempts to establish the presence of a price decline as a possibly influential factor in the mind of the court when a reading of the cases discloses that there is no evidence of such drop in price or that such matter had been brought to the court's attention. At the very threshold of his study of "non-vocal" behavior of the courts Eno runs into a difficulty which is inherent in psychical investigation. He is delving into "possibilities" and conjectures; he is without factual proof.

In order to supply the missing evidence of a drop in price, Eno proceeds to make several "presuppositions". His first assumption is as follows:

"(1) It must first of all be *assumed* that the court has in some way learned of the market drop, because otherwise that lively *suspicion* which is so necessary to any *desire* to hold the buyer to the contract would *possibly* not be aroused."⁴¹

This assumption is an astounding example of unscientific fact-finding. Having set out to show that the courts in a majority of the cases were influenced by the factor of a price drop to withhold from the buyer the right to rely upon unstated objections, and coming across cases

38. *Ibid.*

39. Observe that Eno is suggesting that this factor of price drop had a definite bearing upon judicial action and may be sufficient to explain *why* the courts refused to allow the buyer to prove unstated objections at the trial. He is therefore offering his proof of market depression as a justification of the court's action, not as a criticism of or attack upon the courts' actual decisions. In other words his point seems to be that in a multiplicity of cases involving unstated objections the decision of the court was right, but its "vocal" reasoning was unsatisfactory and incomplete as an explanation of the real grounds of the court's holding.

Here, it seems, is an example in action of Oliphant's proposal to probe judicial minds and search for "non-vocal behavior" of the courts. See *supra* note 4. As I read Llewellyn, he agrees with my interpretation of Eno's analysis of the sales cases. See Llewellyn, *The Rule of Law in Our Case-Law of Contract* (1938) 47 *YALE L. J.* 1243, 1263.

40. Eno, at 801.

41. *Ibid.* Italics inserted.

which disclose *no* evidence of such factor and *no* indication that the court was aware of this factor, Eno *assumes* that the court in some way knew of the price recession. Instead of establishing the certainty of judicial knowledge of a price drop, the realist conveniently assumes the fact which he sets out to prove. It thus appears at the outset of his investigation that Eno's paper begins with an *a priori* assumption of fact not generally found in the cases and based solely upon an assumed "desire" of the judge to punish the buyer. Why not assume that the court knew nothing about the price drop and was merely following the doctrine of *Littlejohn v. Shaw* which does not require a market recession in order to prevent the buyer from setting up unstated objections? If the courts say nothing about a price drop and there is no evidence of such price drop in the cases, what warrant is there for Eno's assumption that the courts may have had such price drop in mind? The fact is that the courts in these cases which are silent as to the market factor were merely applying the doctrine of *stare decisis* to the given situation and were not only not aware of, but were not interested in, the presence or absence of such a market depression.

Eno then follows with other "presuppositions"⁴² which, he concedes, must first be acceptable before he can weave his rope of sand connecting the factor of price drop with the course of judicial decisions. One conclusion may be ventured regarding his attempt to discover the unexpressed reasons for judicial decisions through a chain of assumptions: such process is not scientific; it is not fact-finding; it never rises above the level of wishful thinking, *a priori* belief and unverified hypothesis. Eno makes the same concession when he says:

"All of this discussion regarding 'presuppositions' has been said to indicate the *unsubstantial* character of any conclusion that may possibly be reached; to show that the very extraction of a positive conclusion from the mass of data

42. Briefly stated, his additional assumptions are (1) that "the court realizes the significance of the drop [in price] on the desire of the buyer to get out." He concedes that such assumption is dangerous in those cases which do not specifically say that such price drop was the real reason for the buyer's rejection. It will later appear that most of the cases examined by Eno are silent on the matter of price drop as a motivating reason for the buyer's rejection. (2) His next assumption is that the buyer may be honest in making a hurried rejection on limited grounds and may not be moved by the purpose to escape from a bad bargain. To find that the court is punishing the buyer, he concedes that he must assume that the buyer is not honest because his whole thesis rests upon the assumption that the courts are hostile to a "welching" buyer and that therefore they would not be antagonistic to a *bona fide* buyer who is acting in good faith in making additional objections. Just how Eno expects to separate the honest from the dishonest buyers is not disclosed by him; he simply *assumes* that the average buyer, faced with a price drop, is moved by a desire to avoid an unfavorable bargain rather than by an honest purpose. Eno, at 801-803.

necessitates the use of these assumptions, none of which is capable of scientific handling."⁴³

His candid admission of the unreliability of the attempted probing of judicial minds and of the search for the sub-vocal background of the cases involving unstated objections materially weakens his promise to show a substantial connection between the factor of market recession and the decisions of the courts.⁴⁴ It likewise destroys his concluding inference that such connection has been established.⁴⁵

Recalling the emphasis of realism upon "non-vocal behavior" and the importance of seeking out facts which sway judicial minds, it is in order to note that Eno's attempt to relate judicial conduct to such facts as price drop and market collapse ends in a series of "assumptions" regarding judicial "suspicions" and "desires". Before study of judicial *behavior* is seriously undertaken by the legal profession as a substitute for the examination of judicial *opinions*, sterner stuff than conjectures as to latent emotions and urges of the judiciary must be formulated.

Enter Economics

Having set for himself the task of proving that the element of market depression was present in most of the cases ruling that the buyer cannot introduce unstated objections, Eno now proceeds to the proof. The type of the data to be examined introduces us to the new methods of scientific investigation approved by the school of realists. As noted above, one of the favorite topics of realist writers is the superiority of scientific method and its utility in dissecting legal problems. The mistake of the law has been its failure to use the scientific approach. But they contend that more than a change of technique is required. Vast areas of research, explored by economists and sociologists, have been neglected by the legal profession. This proposal ranges from the modest plea that the law should broaden its consideration of extra legal data to the criticism of outstanding jurists (e.g. Justices Brandeis and Cardozo) because they decided a practical question of law without any appreciation of the ethical, economic or moral issues which might be involved.⁴⁶

Eno's article delves deeply into non-legal materials and statistical economics to establish his thesis that the bulk of the cases following

43. Eno, at 803. Italics inserted.

44. See notes 37 and 38, *supra*.

45. See note 39, *supra*.

46. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 812. Cf. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORDHAM L. REV. 272, 286-295; Cohen, *Correspondence* (1936) 5 FORDHAM L. REV. 548, 549; Kennedy, *More Functional Nonsense* (1936) 6 FORDHAM L. REV. 75, 83-84; Cohen, *Correspondence* (1937) 6 FORDHAM L. REV. 356. See Kearney, *Posthumous Piffle* (1938) 14 NOTRE DAME LAWYER 98, 101.

Littlejohn v. Shaw contained the concealed factor of price drop at the time the buyers rejected the goods. It will be recalled that the majority of the cases are silent as to such economic collapse. Proof, if such there be, must be sought outside of the judicial records. He offers a statistical chart (prepared in the main by Lightner and in part by other economists) which purports to give a cross section of business conditions in America from 1818 to 1934.⁴⁷

47. The following is the text of Eno's footnote which contains the "weather barometer" of business in the United States (Eno, 805 n.):

"In considering the cases, the following weather barometer of American business history from 1818 will be used. The form of the chart and most of the information was derived from OTTO C. LIGHTNER, *HISTORY OF BUSINESS DEPRESSIONS* (1922). The other information was gathered from IRVING FISHER, *BOOMS AND DEPRESSIONS* (1932) and ARTHUR B. ADAMS, *TREND OF BUSINESS, 1922-32* (1932)."

1818—Threatening	1853—Fair	1888—Fair
1819—Hurricane	1854—Fair	1889—Threatening
1820—Gale	1855—Fair	1890—Storm
1821—Clearing	1856—Fair	1891—Fair
1822—Fair	1857—Tornado	1892—Fair
1823—Fair	1858—Clearing	1893—Storm
1824—Fair	1859—Fair	1894—Stormy
1825—Storm	1860—Storm	1895—Continued Stormy
1826—Fair	1861—Stormy	1896—Clearing
1827—Fair	1862—Fair	1897—Fair
1828—Squall	1863—Fair	1898—Fair
1829—Fair	1864—Fair	1899—Fair
1830—Fair	1865—Fair	1900—Fair
1831—Fair	1866—Fair	1901—Fair
1832—Fair	1867—Fair	1902—Fair
1833—Partly Cloudy	1868—Threatening	1903—Squall
1834—Fair	1869—Black Friday	1904—Fair
1835—Fair	1870—Fair	1905—Fair
1836—Threatening	1871—Fair	1906—Fair
1837—Hurricane	1872—Fair	1907—Cyclone
1838—Stormy	1873—Cyclone	1908—Clearing
1839—Continued Stormy	1874—High Winds	1909—Fair
1840—Clearing	1875—Clearing	1910—Fair
1841—Fair	1876—Fair	1911—Fair
1842—Fair	1877—Fair	1912—Fair
1843—Fair	1878—Storm	1913—Partly Cloudy
1844—Fair	1879—Clearing	1914—Storm
1845—Fair	1880—Fair	1915—Partly Cloudy
1846—Fair	1882—Fair	1916—Fair
1847—Storm	1883—Partly Cloudy	1917—Fair
1848—Storm	1884—Storm	1918—Fair
1849—Fair	1885—Fair	1919—Fair
1850—Fair	1886—Fair	1920—Partly Cloudy
1851—Squall	1887—Fair	1921—Stormy
1852—Fair		1922—Stormy

"Weather Barometer" of Prices

Before examining the use which Eno makes of the business chart it is necessary—and all realists would so concede—to consider the basic soundness of the statistical material; its factual content as distinguished from mere opinion; and its relevancy in situations not contemplated by the chart-maker. Such preliminary survey indicates that the chart deals not with measurable activities of natural science but with the flux and change of human action which cannot be graphed with mathematical certainty. Each economist is prone to interpret the elusive facts which make up "business activity" according to his emphasis upon the various factors.⁴⁸ Again, the stated summary of business conditions was not prepared to disclose whether a delinquent buyer was trying to escape from a bad bargain because the market price had dropped after the contract of sale was made. Lightner's "barometer" was prepared to show the general trend in business in connection with his historical study of business depressions.⁴⁹ We turn to the chart forewarned that it will reveal opinion and not facts and that it is being used for a purpose not contemplated by the originators.

It is submitted that the "weather barometer" which Eno offers as an index of *annual* business conditions in America (1) is unreliable and demonstrably inaccurate; and (2) provides insufficient data with which to determine the existence or non-existence of a price drop in the sales cases cited by him.

(1) The Inaccuracy of the "Weather Barometer".

Several shortcomings may be noted in the Lightner-Eno chart which purports to give a cross section of the state of business in the United States during each year from 1818 to 1934. The stated weather barometer is merely a lump-estimate of vacillating conditions of business based upon incomplete data⁵⁰ and subject to external factors unknown

1923—Fair	1927—Fair	1931—Stormy
1924—Fair	1928—Threatening	1932—Stormy
1925—Fair	1929—Hurricane	1933—Stormy
1926—Fair	1930—Hurricane	1934—Stormy

48. See notes 50-53, *infra*.

49. LIGHTNER, HISTORY OF BUSINESS DEPRESSIONS (1922) 123. It is significant that Lightner did not accompany his "weather barometer" with an explanation of the sources from which he derived his annual symbols of business conditions; nor does he explain the process by which he obtained the *average* business condition.

50. Lightner goes back to the year 1818 to begin his chart of annual business conditions. The inadequacy of the business data available in the early years is nowhere mentioned. One would assume that the entire span of commercial activity from 1818 to 1934 may be measured by available statistics of the same quality and quantity. The history of the recordation of business changes discloses that such equality of treatment is not possible. Indeed since the World War national and state governments, as well as private

and unknowable to the chart-maker.⁵¹ It is in other words, based upon opinion⁵² and not upon facts and is subject to all the controversy and dispute which come out of the clashing theories of economists.⁵³ This does not mean or imply that such economic statistics are without worth but it does mean that the findings are contingent upon the counter-interpretations of other experts and are merely hypotheses rather than proven facts.

The following discrepancies are visible in the attempt to compress into a single page the full sweep of American industry from 1818 to 1934:

(a) The weather barometer uses the calendar year as the time unit to express the prevalent business status during the given year. But booms and depressions know not the calendar and start and stop without regard for the season or month. To attempt, therefore, to squeeze under one symbol a variant flux of market movements and to use one index figure for three hundred and sixty-five days is a curious example of lump-fact thinking.⁵⁴ Economists concede that safety requires that the time index of business activities should be reduced to quarterly, or better still, monthly figures in order to reduce the chance of error.⁵⁵

(b) A concrete example indicates the unreliability of the calendar year as the time span for Eno's weather barometer. Sad to recall, a business cataclysm engulfed the country in the Fall of 1929. Turning back to the business chart it is noted that Eno symbolizes the business

agencies, have expanded their activities in the gathering and compiling of statistics on industrial and business activities. The result has been a corresponding improvement in the accuracy of the assembled data. ADAMS, *ANALYSES OF BUSINESS CYCLES* (1936) 62; Slichter, *The Period 1919-1936 in the United States: Its Significance for Business Cycle Theory* (1937) 19 REVIEW OF ECONOMIC STATISTICS 4.

51. Adams lists three economic factors or forces for which adequate data are not available: (1) precise volume of retail trade from month to month; (2) changes in the prices of real estate, securities, professional services and labor; and (3) lack of statistical facts interpreting the results of a particular statistical series in relation to facts deduced from other statistical series. Adams, *op. cit. supra* note 50, at 62-63.

52. The Harvard Committee on Research in Trade Cycles has appointed a sub-committee to study the problem "of the degree, to which statistical verification may be secured to support or negative existing theories of the business cycle." Slichter, *op. cit. supra*, note 50.

Observe the cautious words of Slichter in studying the course of the business cycle of 1919-1936. While more ample statistical data was available to Slichter than Lightner possessed, Slichter warns that "even the data for this period leaves much to be desired." *Ibid.*

53. Lightner points out that some economists claim that we had business depressions in the years 1867, 1882 and 1900. But he reassuringly offers the "most authoritative statistics" and their "unfailing truth" to prove that there were *no* depressions in the stated years! LIGHTNER, *op. cit. supra* note 49, at 81.

54. See pp. 73-75, *infra*.

55. Adams, *op. cit. supra* note 50, at 60.

of the year 1929 by the single word "hurricane". But when did the "hurricane" of 1929 arrive? So far as the memory of the man on the street goes, supported by expert⁵⁶ and official figures,⁵⁷ the business hurricane of 1929 did not sweep over the country until September. Remarkable to recall, it followed *eight months* of unparalleled business prosperity culminating in the zephyr-like announcement of the Department of Commerce to the effect that "on the basis of early figures business activity in August [1929] was higher than in any other similar period on record".⁵⁸ From January to August 1929, check payments, steel output, activity in the automobile industry and car loadings were mounting to new highs.⁵⁹ True, the "hurricane" arrived in 1929, but the use of the single term "hurricane" to symbolize a business collapse which was mainly confined to the *last four months* of 1929 is factually inaccurate and capable of gross misinterpretation in the subsequent use of such data.⁶⁰ A similar criticism may be made of other annual designations of business status set down in Eno's business chart.⁶¹ The fact of the matter is that the exact time when a depression starts or ends cannot be accurately timed.⁶² The undercurrent of causes is so deep and impenetrable that economists are unable to agree even after the

56. See Chart I—Index of Industrial Production; Chart II—Index of Debits of Individual Accounts; Chart XIII—Index of Business Trends, reproduced in ADAMS, *op. cit. supra* note 50, Appendix. The foregoing indices show that the first eight months of 1929 were marked by increases in industrial production and debits to individual accounts and by a rising trend in business.

57. SURVEY OF CURRENT BUSINESS (United States Department of Commerce) Nos. 90-98 (Feb. to Oct., 1929.)

58. SURVEY OF CURRENT BUSINESS (United States Department of Commerce) No. 97 (September 1929) p. 1.

59. See note 57, *supra*.

60. This very danger of drawing particular conclusions from "lump-fact" generalizations is present in Eno's use of the "weather barometer" for purposes not contemplated by or known to the economist preparing such statistical material. See pp. 64-70, *infra*.

61. For example, (1) Lightner's chart, which has been adopted and accepted by Eno without appreciable qualification, lists the year 1837 as a "hurricane" year. Yet Lightner shows that the real panic in that year began on May 10, 1837 when the banks of New York City decided to suspend specie demands. Lightner, *op. cit. supra* note 49, at p. 127. (2) Eno lists 1922 as "stormy", while Adams says: "Employment and payroll conditions began to improve in February 1922 and retail trade definitely increased in volume after April 1922. By 1922, recovery from the depression was an accomplished fact so far as production, trade, employment, prices and consumption were concerned. In other words, there was recovery in business (profit-making conditions); but there still remained underlying problems of maladjustments, such as the bad conditions in the agricultural industry, and the 'frozen' debts." ADAMS, *op. cit. supra* note 50, at 80. (3) Eno lists 1928 as "threatening", while the Index of Business Trends shows a net rise in index figures from 130 to 150 between January and December 1928. ADAMS, *op. cit. supra* note 50, Appendix, 277.

62. ADAMS, *op. cit. supra* note 50, at 65

event as to the precise status of business at a certain period in our history. This is due to the scarcity of statistical data and to the presence of such external elements as seasonal variations and secular trends. The best that can be said about the chart of business is that it is a rough approximation of annual conditions, an "average"⁶³ or a composite picture which does not reveal, and was not intended to reveal, the possible up and down trends within the year-unit.

(c) Lightner's weather barometer of business aims to show the condition of trade in *all* industries under a single caption for each year. Thus the chart lists *all* business as "fair" or "stormy" or "threatening", etc. It is clear that such compact table does not, and cannot, reveal the condition of business in any *particular* industry or trade except on the false assumption that all industrial and business activities rise and fall at the same time and in the same degree.⁶⁴ It is evident that the yearly symbol used by Lightner merely presents a summary of *general* business conditions in the given year. Certain it is that any attempt to use the data collected to establish the range of prices in a *particular* industry at a *definite* time is unscientific and exceeds the scope and utility of his chart.

Concluding the preliminary examination of the "weather barometer" it appears that such table of business conditions does not reveal facts but merely possibilities.⁶⁵ It is a summary of many clashing factors some of them uncertain and dubious, woven into a tentative index and

63. This of course is obvious. The very purpose of a statistical chart indexing business conditions during a given period of time is to give the *average* status rather than to record fluctuations within the period. ADAMS, *op. cit. supra* note 50, at 65.

64. For an interesting study of the varying effects of a depression on the price of different kinds of goods see ADAMS, *op. cit. supra* note 50, at 152. He points out that prices of raw materials and capital equipment decline faster than the prices of finished consumers' goods; that retail prices do not decline as rapidly as wholesale prices. It is not unusual for the prices of certain commodities to be falling while other commodities are rising in price. SURVEY OF CURRENT BUSINESS No. 89 (U. S. Dep't of Commerce, Jan. 1929) p. 5.

The courts have taken judicial notice of the fact that the depression began in 1929 and did not appreciably affect real estate and mortgage values until late in 1931 or early in 1932. *Corn Exchange Bank v. Ekenberg*, 161 Misc. 62, 292 N. Y. Supp. 142 (1936); see *Matter of Flint*, 240 App. Div. 217, 226, 269 N. Y. Supp. 470 (1934). After the stock market crashed in 1929 investors turned from stock to guaranteed mortgage certificates and one New York company sold more guaranteed mortgages in 1930-1931 than ever before. See *Matter of Balfe*, 152 Misc. 739, 748, 274 N. Y. Supp. 284 (1934).

I am indebted to Milton R. Friedman of the New York Bar for the latter cases in New York which show very strikingly that depressions do not affect all commercial activities in the same degree or at the same time.

65. "Possibilities are not facts. The prudent man cannot act wisely in the light of mere possibilities. He must have something more definite to go on. He must have some sort of knowledge about the relative facts." MOLEY, *ARE WE MOVIE MADE?* (1938) 55.

subject to all the vagaries of economic theory. So long as we deal with such statistics with these limitations in mind, so long as we do not veer from *may be* to *is* in evaluating the hypothetical assumptions of such data,⁶⁶ some benefit may be derived from the collected material. Our next line of inquiry will be to ascertain what use Eno makes of these simplified symbols depicting the state of business in the United States from 1818 to 1934.

(2) Eno's Use of the "Weather Barometer".

The most interesting and provocative part of Eno's contribution is his extensive acceptance and uncritical adoption of the weather barometer and its second-hand use to settle the legal problems arising out of *Littlejohn v. Shaw* and the cases following the latter holding.⁶⁷ Recall that Eno has promised to prove that the vast majority of cases since *Littlejohn v. Shaw* were decided during periods of business depression; that this economic factor influenced the buyer to squirm out of his contract; that the courts were possibly aware of the market depression; and that a probable reason for refusing to allow the buyer to set up his unstated objections was the courts' unwillingness to permit the buyer to escape from the contract in these circumstances.⁶⁸ The cases, with few exceptions, are silent as to the general collapse of business or as to a drop in the price of a specific commodity.⁶⁹ Therefore Eno must

66. Professors Michael and Adler have performed a real service in pointing out that *a priori* ideas of a scientist are apt to lead him from a modest assertion that his data *may* support his ideas to a dogmatic conclusion that his fragmentary findings *do* substantiate his preconceived assumption. MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* (1933) *passim*; ADLER, *ART AND PRUDENCE* (1937) *passim*. See also MOLEY, *op. cit. supra* note 65, at 34.

67. Patterson, defending the use of the scientific approach in the law, criticises the lack of adequate investigation of social and economic facts by the judges. He says: "The judges' experiences are limited and their methods of collecting data are likely to be that of casual observation. Moreover, the 'facts change'; the facts of a prior decision are often warmed-over facts." Patterson, *Can Law Be Scientific?* (1930) 25 ILL. L. REV. 121, 140. It strikes the observer of realism in action that a similar use of "warmed-over facts," gathered by social scientists for other purposes, is frequently visible in the writings of the new modernists.

68. See notes 37, 38, 39 *supra*.

69. Until realism arrived the examination of a case or line of cases by the legal profession was restricted to the points actually presented, argued and decided. Unless the point was openly litigated, it was not thought to be involved in the decision even though the point was in fact present.

The Supreme Court has said: "Questions which merely lurk in the record, neither brought to the attention of the court or ruled upon, are not to be considered as having been so decided as to constitute precedent." *Webster v. Fall*, 266 U. S. 507, 511 (1924), cited by Loughran, J., dissenting in *Matter of Schinasi*, 277 N. Y. 252, 269, 14 N. E. (2d) 58, 64 (1938).

But the new realist technique raises to the surface facts not directed to the attention

establish this fact, if at all, by extraneous evidence not found in the records of the cases. How does he bridge the chasm between case law and economic statistics?

Let us trace out his technique. He first collects all the cases from 1818 to 1934 which involve the problem of unstated objections and which decide that the buyer cannot supplement his original objections by fresh objections later made. Next he finds the year (regardless of the exact month) when the buyer rejected the goods. Lacking evidence in the case itself indicating the condition of the market in that commodity at the time of the buyer's rejection, he turns to the weather barometer and sets down the given symbol which classifies the business weather for the specific year. If he finds that the buyer's refusal to take the goods, occurred *at any time* within a year when the weather chart indicated "stormy" or "threatening" or "unsettled" commercial weather he concludes that such case *contains* the possible factor of a price drop and that this trade recession probably is one reason why the court resisted the buyer's attempt to add unstated objections in order to escape from an unfavorable bargain.

Perhaps a few concrete examples, taken out of Eno's analysis of the sales cases, may show the inadequacy and unreliability of accepting a

of the court or ruled upon, or even mentioned in the court's opinion. More startling is the effort to inject new facts into the cases following the examination of extra-legal data obtained from sources far removed from the testimony. Having discovered the new facts by an independent investigation the realist does not hesitate to assume that the courts knew about these newly discovered facts and perhaps based their decisions upon them.

One cannot refrain from wondering what is going to happen to the good old maxim, *de minimis non curat lex*, if the fact-fishing expedition of the modernists is actually used in the preparation of briefs and the analysis of cases. The technique of the brief writer will be: Not to find out what a judge *said* but what he *did*; not to determine what the judge did about the facts, but what the facts did to the judge; not to discover the facts which were presented to the court, but to rediscover facts which were not presented.

But more than that: if law is to a considerable extent weighted and shaped by personalized factors of behavior, desire, etc. (notes 4, 5, 29, 30, 39 *supra*), then law becomes highly *personal*; it ceases to be largely impersonal. What then? If frank mention were made of these judicial predilections and urges extracted by realism out of past cases, the main issue might become the conduct of the judges rather than the conduct of the litigants, raising a nice question of *res inter alios acta*. But more embarrassing still would be the candid use of the behavior-approach as applied to the judges sitting in the pending controversy. Here at least, I know, realists would not insist that their "as-is" analysis of judicial behavior be interwoven into the trial or appellate brief insofar as the sitting judges were involved. In such a situation, even realists would probably revert to "word magic" of traditional law to put across the hidden psychic forces at work; law would again become, externally at least, impersonal.

All of which amounts to this: the entry of *personal* law (colored with behaviorism) raises some knotty tactical as well as psychological questions. In the traditional era it was simple enough to argue with *any* judge (present or absent) as to *what* he thought the law was. More delicate is the task of realism in informing the judge *why* he thinks it.

ready made "weather barometer" and applying it to the specific purpose of determining a price drop in the unstated objection cases canvassed by the writer.

His case material is divisible into two parts:

(1) Those cases which decide against the buyer and mention in varying degrees of clarity the economic factor of a price drop or a falling market.

(2) Those cases which do not mention the factor of price drop or market recession in the course of the court's opinion or statement of the facts.

(1) *Cases Mentioning Economic Recession*: It is not without significance that Eno finds few cases⁷⁰ which even mention that the buyer breached his contract at a time when prices were descending or market conditions were unfavorable. Why did the courts omit all mention of the economic factors which Eno deems most important? A fair assumption would seem to be that the courts' omission of reference to falling prices was due to the fact that the rule of *Littlejohn v. Shaw*, so widely adopted by the courts, does not recognize such factor as essential in the denial to the buyer of a right to set up unstated objections. The buyer is barred from enlarging the grounds upon which he rejected the goods, whether the market is stable or shaky, whether prices are up or down, whenever he places his original refusal to accept the goods upon particular grounds and later tries to enlarge these objections by the statement of fresh defects at the time of trial. Let us recall the pertinent language of the basic decision of *Littlejohn v. Shaw*:

"The principle is plain, and needs no argument in support of it, that, if a particular objection is taken to the performance, and the party is silent as to all others, they are deemed to be waived."⁷¹

Surely the statement of this broad principle, not limited to times of depressed prices, sufficiently accounts for the paucity of judicial decisions mentioning the economic factors of price recession or falling market.

Moreover, Eno's analysis of the few cases, which in some degree mention a prevalent mark down of prices, offers scant support for his contention that price drop is an "important" factor which whittles down the broad rule of *Littlejohn v. Shaw* and confines it to situations where we have "run away" buyers who are trying to escape from unfavorable bargains.⁷² While the cases are few in number in which the courts say

70. Eno quotes from ten cases which, to some extent, expressly set down the factor of price drop or depressed market in the course of the statement of facts or judicial opinion. See *infra* note 72.

71. *Littlejohn v. Shaw*, 159 N. Y. 188, 191, 53 N. E. 810, 811 (1899).

72. Eno divides his case material into three classes: (1) Cases decided before *Littlejohn*

that they are aware of the falling market and that therefore the buyer ought to stand by his bad bargain, it is somewhat strange to find that Eno dwells at some length upon this fragmentary list of cases. Let it be recalled that realism stresses judicial *behavior* and tends to minimize the face value of judicial *utterances*. We have been informed that more emphasis should be given to non-vocal law. This line of cleavage is abandoned by Eno when he comes across infrequent vocal pronouncements of the courts which support his thesis.⁷³ It seems that some

v. Shaw; (2) cases decided after *Littlejohn v. Shaw* and before *Ginn v. Clark*, 143 Mich. 84, 106 N. W. 867 (1906); and (3) cases decided subsequent to *Ginn v. Clark*.

Comparatively few cases are discovered by Eno before or after *Littlejohn v. Shaw* which expressly mention the factor of price decline or market depression.

Before *Littlejohn v. Shaw*, he mentions two cases which specifically state that there was a drop in the market. *Donner v. Thompson*, 6 Hill. 208, 212 (N. Y. 1843); *Hayden v. Demets*, 53 N. Y. 426 (1873). It is of interest to note that in neither one of these cases does the court expressly rest its decision upon such price drop.

Between the "base-line" decisions of *Littlejohn v. Shaw* and *Ginn v. Clark*, Eno finds four cases which contain facts more or less vaguely indicating that the buyer's alleged breach took place in time of business stress or after a drop in the price of the specific commodity. *Peterson v. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162 (1903); *Olcree v. Mobile Fruit & Trading Co.*, 112 Ill. App. 281 (1904); *Drucklieb v. Universal Tobacco Co.*, 106 App. Div. 470, 94 N. Y. Supp. 777 (1st Dep't 1905). It is noteworthy that even though the price factor is in some degree mentioned by the courts in the above cases, the courts in question do not rely upon the depressed market as a reason for deciding against the buyer. Eno states that it is "unfortunate" that the courts did not realize the importance of this factor. (Eno, at 807). If the courts ignore the alleged significance of the price drop in cases where such evidence is brought to the attention of the court, his stated purpose of proving that such price recession is a motivating factor in cases where the courts do not mention it at all seems to be a formidable task.

After *Ginn v. Clark*, Eno cites four cases where there is evidence of a price drop and some language in the opinions indicative that this factor seems to be regarded as material by the judges. *Daniels v. Morris*, 65 Ore. 289, 130 Pac. 397 (1913); *Fielding v. Robertson*, 141 Va. 123, 126 S. E. 231 (1925); *Armsby Co. v. Raymond Bros.-Clarke Co.*, 90 Neb. 553, 134 N. W. 174 (1912); *Lowinson v. Newman*, 201 App. Div. 266, 194 N. Y. Supp. 253 (1st Dep't 1922) (see Eno, at 810-811). Following such citations, Eno mentions other cases where the drop in the market is so pronounced that the failure of the court to mention such factor as a real reason for rejection is "almost unforgivable". One extreme case involves a price drop from 23 $\frac{3}{4}$ ¢ to 6 $\frac{1}{4}$ ¢ per pound and yet no reliance on such price recession is made by the court. *Colonial Ice Cream Co. v. Intercean Mercantile Corp.*, 296 Fed. 316 (C. C. A. 3d, 1924).

Answering Eno's contention that the failure of the courts to mention price recession is "unfortunate" or "unforgivable", the explanation of such omission seems to be fairly obvious. The courts were adhering to the broad doctrine enunciated by *Littlejohn v. Shaw*, and were not interested in the non-essential factors of price drop or market collapse. Summing up the few cases which expressly mention the unfavorable market prevailing at the time of the sales contracts in question, it seems that Eno can derive scant comfort from the manner in which the courts curtly dismiss the economic factors of price or market.

73. Eno confines the case-quotations in his text to the few cases in which mention

realists are not averse to stress judicial *language* provided only that the judicial language is in accord with their views. One final comment on the cases which mentions the factor of price drop or market collapse: The followers of the traditional approach readily concede that insofar as a court mentions, and really relies upon such economic factors, no quarrel is possible with a commentator's plausible conclusion that such judicial statement may properly be considered as an indication of the court's recognition of such economic factors as possible conditions qualifying the otherwise broad rule of *Littlejohn v. Shaw*. All we insist upon is that an *absence* of such factors in the courts' opinions argues for their unimportance in the present stage of case-law.

(2) *Cases Not Mentioning Economic Recession*: The danger of the acceptance of statistics without careful examination of the source and reliability of the data, and without adequate consideration of the limited purpose for which they were collected, is clearly visible when we weigh Eno's conclusions regarding the cases which are silent as to a price drop or market collapse. Basing his conclusion almost exclusively upon the skeletonized weather chart prepared principally by Lightner, Eno claims that two-thirds of all the cases involving unstated objections by buyer "*reveal a generally depressed market or a price drop in the specific commodity.*"⁷⁴ A reexamination of the weather barometer, accepted by Eno as an accurate index of business "weather" prevailing when the sales cases in question were before the courts, discloses some fatal defects in such summation.

Passing the aforementioned shortcomings of Lightner's ambitious attempt to squeeze into a single page the fluctuations of American business during this century and more of complex mercantile movements,⁷⁵ the following additional objections may be made to lump statistics utilized to describe exact market conditions prevailing in sixty-five sales cases decided at irregular intervals during one hundred years.

(1) The weather chart upon which Eno relies uses the *year* as a time-unit to depict the average business trend within that annual period. Eno erroneously assumes that such yearly symbol correctly discloses the prevailing "trade winds" at all times during the given calendar year.⁷⁶

is made of the price drop by the courts (Eno, at 804, 810, 811, 815, 816). Despite the fact that the vast majority of the cases say nothing about price drop and that many of them contain language unqualifiedly applying the rule of *Littlejohn v. Shaw*, such judicial language is not mentioned. In other words, Eno seems to press down very hard on *vocal* law when it fits his thesis, but ignores it when it does not.

74. Eno, at 817.

75. See pp. 60-63, *supra*.

76. An examination of Eno's classification of the sales cases indicates that he considered only the *year* when a buyer rejected the goods; no mention is made of the *month* when such rejection took place. Obviously there may be a wide variance in business conditions between January and December of a given year. See notes 56-59 *supra*.

(2) Lightner's barometer does nothing more than to sum up the *general* business status without any attempt to classify the state of business in different industries. Eno infers erroneously that such general data may be used to indicate the price and market variations in any *particular* commodity.⁷⁷

(3) Eno does not consider the possibility that a rise in prices may take place even during a period of depression but concludes that all prices continue downward in all commodities throughout the entire period of unsettled business.

(4) He does not take into account seasonal spurts in particular commodities which are possible and probable even while the general business condition may be subnormal. When such occasional upswing occurs, a stiffening of or increase in price is a factor which temporarily retards the descending cycle of prices.

(5) While Eno concedes⁷⁸ that the business conditions prevailing *at the time of sales litigation* may have a greater effect in influencing the court's decision than the business situation obtaining *at the time of the alleged breach* of the buyer's contract, his statistics and summary are seemingly based solely upon the price range in existence *at the time of the breach*.⁷⁹

(6) At least eleven of the cases,⁸⁰ which he argues reveal a price drop either in the particular product contracted for or in the general

77. Lightner's chart is used by Eno in his attempt to discover the presence of a price drop in the cases involving unstated objections by the buyer. Occasionally he refers to government statistics relating to a particular industry. See note 64 *supra*.

78. Eno, at 802 n.

79. While Eno lists the business conditions prevailing in each case at the time of the decision, as well as the business conditions at the time of the breach, his constant emphasis is upon the business conditions in existence "at the time of the breach." Cf. Eno, at 805, 812, 815.

80. *Bank of America v. Whitney Central Nat. Bank*, 291 Fed. 929 (C. C. A. 5th, 1923); *Godchaux Sugars, Inc. v. Meridian Wholesale Co.*, 289 Fed. 359 (C. C. A. 5th, 1923); *Erie Food Products Corp. v. Interocean Mercantile Corp.*, 299 Fed. 71 (C. C. A. 6th, 1924); *Garcia & Maggini Co. v. Washington Dehydrated Food Co.*, 294 Fed. 765, 768 (C. C. A. 9th, 1924); *Bank of Taiwan v. Union Nat. Bank of Philadelphia*, 1 F. (2d) 65 (C. C. A. 3d, 1924); *National Importing & Trading Co. v. Bear & Co.*, 236 Ill. App. 426 (1925); *Memhard v. Gabrielsen Co.*, 224 Ky. 238, 5 S. W. (2d) 1070 (1928); *Harvard Co. v. Himmelein*, 226 Mich. 691, 198 N. W. 207 (1924); *Miller v. Ungerer & Co.*, 188 App. Div. 655, 176 N. Y. Supp. 850 (2d Dep't, 1919); *Carson Petroleum Co. v. Balboa Trading Co.*, 120 Misc. 389, 198 N. Y. Supp. 556 (Sup. Ct. 1923); *Fielding v. Robertson*, 141 Va. 123, 126 S. E. 231 (1925).

It is true that an analysis of some of the above cases may disclose some evidence of a price drop. My point here is that Lightner's symbol, "partly cloudy," does not necessarily disclose such factor and should not be alone relied on to establish such proof. If space permitted, it is submitted that a similar criticism could be made of other symbols appearing in Lightner's chart, e.g., "threatening," "squall," etc. Such terms are vague and general and are nowhere defined by Lightner or Eno.

market, were decided during business weather which Lightner lists as "partly cloudy". Such vague term may mean anything. "Partly cloudy" weather may symbolize normal business in some lines of goods, and subnormal business activity in other lines; it may mean that business is good in some sections of the country, and not so good in other sections; it may mean that there is some slight threat of impending storms in the commercial world which have not yet sufficiently materialized to affect prices at all. Neither Lightner, nor Eno, offers a word of explanation as to the precise meaning of the term or the causal connection between such type of "weather" and falling prices. *Despite the pronounced ambiguity of such symbol, Eno apparently lists all cases involving a buyer's refusal to accept delivery during a year listed as "partly cloudy" as cases showing a price drop.*⁸¹

(7) Ten of the eleven cases⁸² showing breaches of contract during "partly cloudy" weather involved breaches *during the year 1920.*⁸³ There is considerable doubt whether such label is accurate as an expression of business conditions prevailing during the entire year. Adams would doubtless contend that the true designation for 1920 should be "fair" from January to July, followed by "threatening" weather.⁸⁴ Whether Lightner or Adams is correct, it is not necessary now to decide, if such decision is possible;⁸⁵ it suffices to point out that the commercial symbol of "partly cloudy" weather in 1920 is itself partly cloudy! And all deductions from such elusive symbol must be similarly shadowy and uncertain.

Considering the unreliability and uncertainty of the statistical data collected for purposes far removed from the exact objectives sought by Eno, and noting the above mentioned defects in his uncritical use of such material to establish the presence of a price drop or a depressed market in sales cases which are silent as to such factors, it is submitted that his conclusion that such factors are present in two-thirds of the cases examined has not been established by adequate or satisfactory proof.⁸⁶

81. This statement is based upon Eno's summary wherein he claims that forty-four cases canvassed by him "contained the factor of depression." Eno, at 817 n. The count of the present writer would indicate that all cases decided in "partly cloudy" weather were included by Eno in the list of cases containing the factor of depression.

82. See note 80 *supra*.

83. With the exception of *Miller v. Ungerer & Co.*, 188 App. Div. 655, 176 N. Y. Supp. 850 (2d Dep't, 1919), the cases cited in note 80 *supra* were cases in which the alleged breach of the sales contract by the buyer occurred during 1920.

84. Adams, *op. cit. supra* note 50, at 61, 65. See also Index of department-store sales; Index of wholesale commodity prices; Index of loans of banks; Index of business trends; Table I—construction contracts awarded. *Id.* Appendix.

85. See notes 49-53 *supra*.

86. Note the assertion of Eno that as a result of his factual analysis of price drop and

The selection of Eno's article for extended analysis was due to the fact that it bore the imprimatur of realists' approval⁸⁷ and applied the formulas, technique and philosophy of legal realism to a concrete problem of everyday law. He purported to examine facts not found in the cases; he attempted to "observe" judicial behavior and to record the "impact of facts" upon judicial decisions; he accepted economic statistics at their face value and used them in the analysis of case law; he looked beneath the surface of judicial opinions and criticised verbal rules by means of his newly discovered facts.

The experiment does not appear to be successful. The so-called "facts" garnered from economic data and statistics are demonstrably conjectures of doubtful value. Even though he succeeded in proving the presence of facts not mentioned in the opinions of the courts, his attempt to observe judicial behavior and to discover how far the courts reacted to such facts is a failure. Indeed he frankly concedes that his attempt to psychoanalyze judicial minds never rises above the level of "presuppositions" as to the possible course of judicial thinking.

The two main objectives of Eno's paper, we believe, stand unproved: (1) He does not show that a vast majority of the cases before or after *Littlejohn v. Shaw* actually contain the factor of price drop or a falling market; and (2) he does not show that such factor of economic depression (even if present) had any appreciable effect in impelling the courts to refuse to the buyer the right to rely on unstated objections at the time of the trial.

Before concluding the study of realism applied by Eno to a precise question of the law of sales, it should be again stated that the alleged failure of accomplishment is not traceable to lack of research on his part. On the contrary the genuine tribute paid to his work in so far as it proceeded along the traditional lines of legal research is restated.⁸⁸ The criticism, whatever its worth, centers solely around his attempt to invoke the realist approach and to leave the path of the law in his analysis of the stated problem. It is believed that he did the best that he

its presence in two-thirds of all cases examined, he believes that it is justifiable to say that the precedent of *Littlejohn v. Shaw* is cut down to situations wherein the price drop is shown to be present (Eno, at 817). Such conclusion, even assuming that he has proved the price drop factor to be in the background at the time of the court's decisions, is a *non sequitur* (see pp. 53-55, *supra*). In view of his alleged *failure* to establish the presence of a price drop, his conclusion regarding the partial overthrow of *Littlejohn v. Shaw* becomes doubly objectionable.

The course of Eno's argument, moving from a series of "presuppositions" as to judicial conduct (Eno, at 801-803) to a tentative conclusion that the "courts should pay no heed to seeming precedent" (Eno, at 817), fails to convince an anti-realist that his "presuppositions" have been proved or that precedent has been undermined.

87. See note 19, *supra*.

88. See pp. 52-53, *supra*.

could with the materials available. Whatever failure is visible is traceable not to the worker, but to the inadequate tools in his workshop. The science of psychology did not, and could not, give him a reliable technique that would enable him to probe into judicial minds and fathom the subconscious forces there at work in the formulation of courts' decisions. The data of economics provided no materials which could give him an accurate picture of the fluctuating prices in specific commodities at the particular time when buyers rejected goods tendered by their sellers.

III. SOME DEFECTS OF APPLIED REALISM

*"Good thinking, the thinking of a competent scientist or philosopher, must not be wishful. . . . The premises used must be chosen and accepted, not because they prove a conclusion we desire to believe, but because by the criteria of evidence they are sound and true in fact."*⁸⁹

Llewellyn good-naturedly refers to the harmless realist pastime of hurling verbal volleys at "top hats" in the shape of antique rules and principles; he promises, and makes good his promise, to ask in a gentlemanly manner for their removal and examination.⁹⁰ I trust that the same privilege of bowling over an occasional "top hat" adorning realistic heads will be accorded to the critic of realism without the inference that our attack is directed against realist headgear in general. But because of the variant and multicolored types of juristic millinery bearing the label of realism,⁹¹ the critic is never quite sure whether he is directing his fire against "top hats" or tam-o-shanters! Therefore, if an occasional shot falls into the wrong yard because of poor aim or because of confusion of headgear, the writer must apologize in advance when realism, like the hapless husband, is misunderstood. Such misunderstanding will be due in part, we believe, to the overlapping left, center, and right groups—all claiming the same privilege to "go formal" and to wear the top hat and tails of Realism. More about this diversity of realistic doctrine as we proceed with our examination.

Using the Eno article as a basis for discussion, it may be possible to extract out of his application of realist theories some constructive suggestions which may be of value to the advocates of the functional or realist approach in the law. Some of the defects of Realism, perhaps many of them, are curable: minor ailments which may be likened to the growing pains of youth, temporary disorders which will pass away when the full stature of a developed and applied philosophy of law is

89. ADLER, *WHAT MAN HAS MADE OF MAN* (1937) 63.

90. Llewellyn, *The Rule of Law in Our Case-Law of Contract* (1938) 47 *YALE L. J.* 1243, 1271 n.

91. Kennedy, *Realism, What Next?* (1938) 7 *FORDHAM L. REV.* 203.

established.⁹² Other shortcomings, it is feared, call at least for compromise, change of emphasis, and modification of the violent assault upon the old legal order which marks the barrage of the outriders in the realist ranks.

Lump Concepts versus Lump Facts

The realists warn: Beware of lump concepts; of word charms which are powerless to sense the social facts; of pseudo rules which miss the economic issues; of static standards which are blind to the pressure of ever changing facts. Concepts are what concepts do; the test of the validity of a principle is the observation of the results of the principle in action. Break down the lump concepts and thereby achieve a real rather than a make-believe certainty in the law. So runs the critique against lump concepts.

The reader of the attack against concepts confesses that he is somewhat confused about the breadth of the opposition; he does not know just how far realism aims to go in its ouster of broad rules and principles. A study of the writings of Arnold,⁹³ Frank,⁹⁴ Sturges,⁹⁵ and Moore,⁹⁶ for example, leaves the perplexed traditionalist with the impression that they contest the validity, permanency, and utility of all concepts, rules, or principles. Opportunism and anarchistic individualism run riot through their pages; "the cult of the single decision" correctly stamps the output of writers we have elsewhere called sur-realists. Observe the argument which proposes nothing less than the wholesale removal of the "lump concepts" of Corporation, Contract, Title, Property, and others.⁹⁷ The adherent to rule or principle finds no common ground for compromise when faced with a legal philosophy of chaos and chance. Suffice it to say that such extreme antagonism to rules and principles merely attempts to translate into the law and into government⁹⁸ the tenets of a philosophy⁹⁹ which refuses to recognize that there are any

92. I have attempted to show the youth-element of realism in my article *Principles or Facts?* (1935) 4 *FORDHAM L. REV.* 53, 56.

93. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); *THE FOLKLORE OF CAPITALISM* (1937).

94. FRANK, *LAW AND THE MODERN MIND* (1930).

95. Sturges and Clark, *Legal Theory and Real Property Mortgages* (1928) 37 *YALE L. J.* 691. See also Llewellyn, *Some Realism About Realism* (1931) 44 *HARVARD L. REV.* 1222, 1241 n.

96. Moore, *Rational Basis of Legal Institutions* (1923) 23 *COL. L. REV.* 609; *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1932) 40 *YALE L. J.* 381, 555, 752, 928.

97. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 *COL. L. REV.* 809, 820-821.

98. Arnold, *Government*, N. Y. Herald Tribune, Oct. 30, 1938, sec. XI, p. 17, col. 1.

99. Lippman, *The Modern Malady*, N. Y. Herald Tribune, Nov. 3, 1938, p. 21, col. 2:

fundamental truths or that there is any basic distinction between the good and the bad, the true and the false. Meeting the issue engendered by such extreme opposition to legal concepts solely on a pragmatic basis, it is asserted that the complete abandonment of principles would spell the end of the legal order. It has been elsewhere noted that Russia experimented with this ouster of law in the form of a broadside attack against legal dogmas without complete success.¹⁰⁰ True it is that principles and concepts can be carried too far. But this overemphasis provides no valid reason for lifting them out of the law in their entirety.¹⁰¹

It is not asserted or believed that all realists hold that concepts and rules are without purpose or utility in the legal order. More moderate criticism of "lump concepts" is visible in the writings of Llewellyn¹⁰² and Patterson.¹⁰³ Llewellyn repeatedly warns against distorting his criticism of pseudo rules into a bombardment of Rules or Concepts at large.¹⁰⁴ He freely concedes that rules and principles are a necessary part of the legal order. But the time has arrived to issue a warning even to the middle-of-the-road realists who are busily at work on pseudo rules and moribund concepts. Attention is directed to the prevalent error of realism in attempting to undermine *lump concepts* by spurious assortments of *lump facts*.

By "lump facts" we mean a conglomerate pile of data, statistics, and facts (untested and unverified) welded together into a loose generalization and offered in the name of science to contest the validity of a legal formula or doctrine. Despite the rigid insistence that realism aims to portray things *as is* it is suspected that the advocates of fact-finding have "seen" facts which were not present and have fixed their gaze so steadily upon the desired result (the ouster or change of existing rules of law) that they are suffering from an optical delusion productive of juristic astigmatism. "Wishful thinking" so often associated with conceptual adherents, is not wholly absent from the reformers' search for facts and functions. At this point it is well to recall that the eye as well as the mind may err; a "fact" does not become such merely

"The modern man has persuaded himself that nothing is really true, and that all truths are just the convenient opinions of a class or of a nation at a particular moment. But this disbelief in the existence of a central tradition of human wisdom is the philosophy of the spiritual proletariat."

100. Gsovski, *The Soviet Concept of Law* (1938) 7 *FORDHAM L. REV.* 1.

101. Kennedy, *Pragmatism as a Philosophy of Law* (1925) 9 *MARQUETTE L. REV.* 64, 71.

102. Llewellyn, *Law and the Modern Mind: A Symposium* (1931) 31 *COL. L. REV.* 82, 84.

103. Patterson, *op. cit. supra* note 67; See Llewellyn, *op. cit. supra* note 90, at 1271 n.

104. Llewellyn, *The Rule of Law in our Case-Law of Contract* (1938) 47 *YALE L. J.* 1243, 1269.

because it issues forth from an economist's study or a psychological laboratory.

To go back to the Eno article for an example of "lump fact" thinking, we have it in his uncritical use of the statistical data prepared by Lightner purporting to set down accurately the business conditions of America from 1818 to 1934.¹⁰⁵ Such "lumping" of economic facts is inaccurate in its original setting and doubly dangerous when translated into the law of sales. Another instance of lump-fact thinking is found in Cohen's article, *Transcendental Nonsense and the Functional Approach*,¹⁰⁶ wherein he attempts to overthrow the legal concepts in *Tauza v. Susquehanna Coal Co.*¹⁰⁷ and *United Mine Workers of America v. Coronado Coal Co.*¹⁰⁸ by refusing to "see" facts expressly set down in the courts' opinions. Lump-fact thinking arrives when he argues for the redefinition of legal concepts in terms of "such positive [*sic*] sciences as economics and psychology!"¹⁰⁹

Doubtless the deficiency of lump-fact thinking is temporary and may be removed in part when the realists appreciate that skepticism should dominate the consideration of *facts* as well as their analysis of *legal principles*.¹¹⁰ Facts are nimble things even when viewed through the microscope of realism; and the critic merely asks that realists apply the same scientific exactitude in analyzing their facts which uniformly characterizes their lack of faith in legal concepts. Skepticism, no less than the charitable urge, should begin at home—and realism may fairly be said to be "at home" with facts.

The Law Visits Science

Let us be more specific in criticizing the boundless faith of realism

105. See pp. 64-70, *supra*.

106. Cohen, *op. cit. supra* note 97, at 809-814.

107. 220 N. Y. 259, 115 N. E. 915 (1917).

108. 259 U. S. 344 (1922).

109. *Id.* at 821. For a critique of Cohen's ouster of concepts, see my articles, *op. cit. supra* note 46.

110. A vibrant skepticism, argues Frank, marks the experiments of the new movement in the law. His faith is limited to a faith in the validity of facts, functions, and desires, and to a recognition that rules, reason, and judgment play a small part in human affairs. [Frank, *Modern Trends in Jurisprudence* (1934) 7 *AM. L. SCHOOL REV.* 1063]. Llewellyn more moderately insists that his faith in facts in no wise impairs his interest in better law. [Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 *N. Y. U. L. Q. REV.* 159, 161-162]. The difficulty which confuses the onlooker is the contrast between the unbelief of realism in the face value of opinions of the courts and in the rules set down therein, and the realists' belief and ready acceptance of factual data, statistics, charts, and graphs without adequate weighing or evaluation. Such criticism takes full cognizance of the importance of facts but demands that these facts be real and not "pseudo"; that they be sprayed with the same "cynical acid" which is used to cleanse and purify legal concepts. [Cohen, *op. cit. supra* note 97, at 840].

in pseudo facts and the consequent danger of over-emphasis of pseudo rules. To make fruitful their attack upon "the prevailing doctrinal formulation of precise rule and guiding principle," realists must understand the importance of their initial step: convincing proof that the scalpel and forceps of science are digging and probing for (and finding) *real* facts. Then, and only then, can they weigh their facts against current rules and principles for the purpose of showing the need for doctrinal reformation. A finer fact-filtering process must be developed in order to satisfy the conservative lawyer that realism offers any appreciable advantage over the case law scheme of things with its background of principles, rules, and standards. So we suggest, that a long period of experimentation must first be conducted lest we run the danger of overthrowing "lump concepts" by "lump facts" which have not been adequately distilled.

If this lack of adequate "cooking" of functions and facts were the result merely of "recipes" necessarily experimental and tentative in the formative steps of a new school of jurisprudence, one might postpone the further criticism of the manhandling of extra-legal material and conclude with the moderate suggestion that the "raw data" of the social sciences be subjected to a prolonged period of aging in the realists' laboratory before their use in juristic refectories. But a fundamental difference of viewpoint has grown up between realism and its opponents on the question of the basic skill and training required to utilize accurately extra-legal material in relation to the problems of law under investigation.

The issue may be clearly defined. Realists demand the integration of social and economic facts into the legal order¹¹¹—the infiltration of psychology,¹¹² economics,¹¹³ and sociology¹¹⁴ (not to mention physics,¹¹⁵ mathematics,¹¹⁶ and anthropology).¹¹⁷ We are not now concerned with the *value* of such extra-legal data but merely with the *method* of acquiring such information and doing it in a satisfactory and scientific manner. Quite a sizeable task for any jurist, law professor, or lawyer to undertake! What degree of skill and proficiency must the legal realist acquire in these bordering disciplines in order to use such non-legal material intelligently and wisely in the improvement of current rules and principles? Llewellyn answers:

111. Llewellyn, *On What is Wrong with So-Called Legal Education* (1935) 35 COL. L. REV. 651, 671.

112. ROBINSON, *LAW AND THE LAWYERS* (1935) *passim*. See note 4 *supra*.

113. Beutel, *op. cit. supra* note 4.

114. Angell, *The Value of Sociology to Law* (1933) 31 MICH. L. REV. 512; Harno, *supra* note 5.

115. RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* (1929); Cohen, *supra* note 97.

116. Cohen, *op. cit. supra* note 97, at 825.

117. CAIRNS, *LAW AND THE SOCIAL SCIENCES* (1935).

"The instructor has first of all to conquer inertia. It is hard to plough new ground, and one needs to plough around the field before he knows its nature and its possibilities. The instructor has, second, to keep his balance. I agree *in toto* with Goodrich's cautioning: The social sciences harbor both school-exaggeration and a lunatic fringe; nor can a man *master* (in one sense) many disciplines. Yet there is a chasm of difference between such "mastery" as means first-rate standing as a worker in neighboring ploughland, and such modest 'mastery' as means only the ability to read critically, and to evaluate the findings read and the methods out of which they came. Only this last is called for. It is enough to rejog thinking, and to awaken appetite. True, shifting vocabulary solves no legal problems; but the concepts a new vocabulary adds, and the information which comes packaged in those concepts, may raise or clarify dozens of legal problems at a time."¹¹⁸

A similar optimism regarding the absorption of scientific knowledge is visible in the writings of Robinson,¹¹⁹ Oliphant,¹²⁰ Rueff,¹²¹ Patterson,¹²² and Beutel.¹²³ The proposal to widen the frontiers of the law by a leisurely excursion into the realms of psychology, economics, sociology, and neighboring fields demands some consideration. It has been wisely said that "as the diameter of our knowledge increases so also does the circumference of our ignorance."¹²⁴ As Llewellyn concedes, such an expansion *is* "a gigantic task,"¹²⁵ and a task, I submit, which is not accomplished merely by a "modest mastery" and critical reading. To qualify the legalist to read critically and evaluate findings, something more is required. Unless the lawyer is able to weigh the competing theories, let us say of psychology or economics, he will be unable to reach a sound decision as to the best theory to be utilized as a "background" for the legal order. True it is that the social sciences "harbor both school-exaggeration and a lunatic fringe."¹²⁶ How, we ask, will modest mastery suffice to spot a scholastic "hobby horse" or academic abnormality? How much more skill is required to spot a War Admiral (out of Science) and groom him for the Legal Sweepstakes! A thorough knowledge of all competitive and clashing theories must first be acquired lest the aforementioned danger of "lump fact" thinking reappear in the translation of social sciences into the law.

118. Llewellyn, *op. cit. supra* note 111, at 671 n.

119. Robinson, *op. cit. supra* note 112.

120. Oliphant, *op. cit. supra* note 4.

121. Rueff, *op. cit. supra* note 115.

122. Patterson, *Can Law Be Scientific?* (1930) 25 ILL. L. REV. 121.

123. Beutel, *op. cit. supra* note 4.

124. Wilkinson, *The Lawyer and the Defense of Constitutional Democracy in America* (1938) 7 FORDHAM L. REV. 301.

125. Llewellyn, *op. cit. supra* note 111, at 672.

126. For a warning of the danger of "school-exaggeration", see *PSYCHOLOGIES OF 1925*, Preface.

Take an example: Professor Robinson insisted that "all of its [the law's] fundamental concepts will have to be brought into line with psychological knowledge."¹²⁷ Very well. How is this overhauling job to be undertaken? What is "psychological knowledge"? Read the contradictory psychological holdings of Watson, Hunter, Woodworth, Koffka, Kohler, Prince, McDougall, Dunlap, and Bentley,¹²⁸ and we may sense the stupendous task of reconciling, evaluating, and deciding the correct theories to be lifted out of psychology and used as a background for legal reform. No, a modest mastery seemingly will not suffice; the law cannot safely build in a background of the social sciences until it thoroughly masters foreground as well. Dealing only with the *methods* of expanding legal research into bordering disciplines, the realists must avoid the danger of a short cut which may cut short the efficacy of the proposed excursion into extra-legal areas. To so counsel is not to maintain a defeatist attitude or to argue that such excursion should not be attempted but merely to suggest that the realist's proposal "to plough around the field" does not satisfy; he must also plant, cultivate, and harvest the crop of scientific data before such products can be safely stored in the legal warehouse. Otherwise the consumption of lump facts—no less than of lump concepts—may bring about legal indigestion.

127. ROBINSON, *op. cit. supra* note 112, at v.

128. The contrasted views of the above mentioned psychologists will be found in *PSYCHOLOGIES OF 1925*. One need not go beyond the pages of a single authoritative work on psychology to realize the utter confusion and antagonism of psychological theories. Schools divide into warring groups. Behaviorists form not one, but many, schools; dynamic psychology does not typify one trend of psychological thought but is a term of varied meanings. This is indeed an "era of psychologies."

Our objective, at this moment, is not to consider whether such clashing and controversial theories offer any promise to the law, but merely to point out that the utility of psychology can only be determined after an exhaustive analysis of the competitive theories and their evaluation.

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Editorial and General Offices, Woolworth Building. New York

CONTRIBUTORS TO THIS ISSUE

VLADIMIR GSOVSKI, First Class Diploma, 1914, Imperial University of Moscow, School of Law; Ph.D., 1935, Georgetown University. Formerly County Judge and lawyer in Russia. Assistant in Foreign Law to the Law Librarian of Congress. Professor of Russian, Georgetown University, School of Foreign Service. Author of *USTAV GRAZHDANSKAGO SUDOPROIZVODSTVA* (1923); *PRIVATNE TESTAMENTY* (1926). Compiler of the Russian section of the *LIST OF SERIAL PUBLICATIONS OF THE FOREIGN GOVERNMENTS* (1932). Contributor to numerous foreign and American periodicals.

NEWTON COLE, LL.B., 1938, Indiana Law School

WALTER B. KENNEDY, A.B., 1906, A.M., 1912, Holy Cross College; LL.B., 1909, Harvard University, School of Law. Member of the New York, Massachusetts and District of Columbia Bars. Professor of Law, Fordham University, School of Law. Author of *CASES ON PERSONAL PROPERTY* (1932); *Garnishment of Intangible Debts in New York* (1926) 35 *YALE L. J.* 689; *The New Deal in the Law* (1934) 63 *U. S. L. REV.* 533, (1934) 2 *U. S. L. WEEK* 41, and other articles in law reviews.

HAMILTON VREELAND, JR., Litt. B., 1913, Princeton University; M.A., 1915, LL.B., 1916, Ph.D., 1917, Columbia University. Associate Professor of Law, Catholic University of America, 1931-1938. Author of *VALIDITY OF FOREIGN DIVORCE DECREES*, 1938.

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