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## AMERICAN LEGAL REALISM

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The realist movement in American legal thought<sup>1</sup> may be said to have reached its flower within the past five years. There were, to be sure, premonitions of it as early as the beginning of the present century. The realist himself likes to consider his movement as taking its origin in an address delivered by Justice Holmes in 1897.<sup>2</sup> As early as 1912 there existed a systematic formulation of the realist view, however little it may have been noticed.<sup>3</sup> These beginnings should suffice to confer at least a semblance of historical respectability on the realist movement. It is not a mere upstart without roots in the past. Yet it is only recently that the realist view has begun to fire the imaginations of legal scholars, that it has provoked men

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<sup>1</sup> A good bibliography of American legal realism may be found in Llewellyn, *Some Realism about Realism* (1931) 44 HARV. L. REV. 1222, 1257-1259. It should, perhaps, be pointed out that American legal realism has no traceable connection with the neo-realist movement in American philosophy. On the contrary the adherents of legal realism have for the most part inclined to an epistemology which may be called idealistic in the modern acceptance of that term. This bent is particularly noticeable in Bingham, Cook, Frank and (with less consistency) in Llewellyn.

On the other hand legal realism has a close affinity with the various "descriptive" and "institutional" methods applied by American scholars during the past decade in economics, sociology and political science. In common with all these movements it has in recent years derived much from that philosophy of life known as behavioristic psychology.

<sup>2</sup> *The Path of the Law*, published in HOLMES, COLLECTED LEGAL PAPERS (1921) 167.

<sup>3</sup> Bingham, *What is the Law?* (1912) 11 MICH. L. REV. 1, 109. While one finds the core of the realist approach in these early articles of Bingham, it is hardly fair to class Bingham with the modern realist school. The principal difference between him and them, as I see it, consists in the fact that he does not, either expressly or impliedly, set up a principle of exclusion. He sought to broaden the field of the legal scholar's research, not to rule anything out of it. The relation between his approach and that of the more recent exponents of legal realism is analogous to that existing between the early experimental psychologists and modern behaviorists. The early experimentalists insisted that muscular reactions ought to be studied; the behaviorist insists that nothing else is worthy of study. Bingham insisted that we ought to observe what courts actually do without assuming that what they do corresponds exactly with what they say; the left-wingers of legal realism seem to assume that this neutral observation of official behavior constitutes the whole of legal science.

to concerted and sustained "vocal behavior",—that it has become, in a word, a movement.

Even yet the movement reveals rather conspicuously the defects of youth. It has lived so far largely by the process of discounting its own future. There have been manifestoes, programs for action. There have been discussions of the proper "approach",—conducted for the most part at a respectful distance from the problems to be approached. Recently there have appeared scattered applications of the approach. But we lack as yet a comprehensive work which will both describe and apply the methods of legal realism, which can serve both as an exposition of the approach and as an exemplification of it. We have nothing which could be compared, let us say, to Geny's four volume *Science et Technique*<sup>4</sup> which rounded off a movement for the reform of legal method in Europe.

The nearest approach to such a work is to be found in a book recently published by Professor Llewellyn.<sup>5</sup> It was this book which furnished the stimulus for the present article. Though the remarks which follow are intended as a critical evaluation of legal realism generally, attention will be chiefly centered on Llewellyn and the book just mentioned. There are several justifications for this course. As the realists themselves insist, there is no realist "school".<sup>6</sup> The movement represents a variety of points of view; it has its left and right wings. An attempt to criticize the movement as a whole within the limits of a law review article would break down under the weight of qualification required to take into account the divergencies in the views of particular realists. On the other hand, by centering attention on the work of a single individual we may secure a point of orientation from which the entire movement may be surveyed. There are, it seems to me, good reasons why Llewellyn is entitled to be regarded as the man most representative of the movement as a whole. In the first place, despite the contrary impression sometimes created by his impulsive literary style, he is not a radical. His realism is distinctly of the middle-of-the-road variety. Furthermore, he has written extensively and his writings constitute a more or less comprehensive exposition of the realist view. Finally, more than any other realist he has been willing to expose the premises which are implied in his approach. He is a "philosopher" in the sense that he has the intellectual temerity to reveal the hidden springs of his convictions,—at least most of the time.

<sup>4</sup> François Geny, *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1913-1924).

<sup>5</sup> LLEWELLYN, *PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA, EINE SPRUCH-AUSWAHL MIT BESPRECHUNG* (1933). A review of this book appears elsewhere in the present issue of this REVIEW. See page 551.

<sup>6</sup> Llewellyn, *supra* note 1, at 1254; Yntema, *The Rational Basis of Legal Science* (1931) 31 COL. L. REV. 925. If in the course of this article I occasionally slip and refer to the "realist school" the offended realist is invited to substitute the word "movement" for "school". He should, however, remember that most schools have been started by men who protested their innocence of any desire to sectarianize their teachings.

Professor Underhill Moore with his "institutional approach" has given the realist movement a significant, and in some respects symptomatic turn which deserves a place in any criticism of the movement. Though Llewellyn's writings betray a certain sympathy for the "institutional approach", Moore's contribution remains distinctive enough to require special treatment. Accordingly a section of this article will be devoted to an analysis of his studies.<sup>7</sup>

In what follows I make no claim to dispose of all the questions raised by the realist movement, nor even of all of those raised by the writings of Llewellyn and Moore.<sup>8</sup> I have, however, attempted to select for discussion those problems which seem most intimately involved in the movement as a whole. While, as I have indicated, attention throughout is directed primarily to Llewellyn's work (supplemented to some extent by Moore's studies), I think that most of what I have to say may be applied, with some qualifications and shifts of emphasis, to the position of other legal realists.

### *Legal Certainty*

In one of the most interesting and penetrating portions of his recent book Llewellyn takes up the question of legal certainty.<sup>9</sup> He does not follow the example of those realists who attempt to ridicule this problem out of existence. For him the demand for certainty is something more than evidence of a childish petulance, unworthy of the twentieth century mind. Legal certainty is treated as a genuine social value, and the inquiry whether case law produces it is considered as having an important bearing on the merits of the system as a whole.

Llewellyn takes a needed distinction between: (1) predictability of judicial decision, and (2) the ready availability of the materials upon which prediction is based.<sup>10</sup> The first is a matter of legal certainty, the second a matter of legal "system". A body of law may be systematized to a very high degree—so that a lawyer can turn at once to the relevant section of a code,

<sup>7</sup> See *infra*, p. 453.

<sup>8</sup> The reader will find valuable and somewhat comprehensive criticisms of the realist movement in COHEN, *LAW AND THE SOCIAL ORDER* (1933) 198-247, 357-362 and *passim*; Dickinson, *Legal Rules: Their Function in the Process of Decision, Their Application and Elaboration* (1931) 79 U. OF PA. L. REV. 833, 1052; and Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697.

Llewellyn's answer to the criticism of Dean Pound, which he terms "realistic", seems to me the antithesis of realism. *Some Realism about Realism*, *supra* note 1. Llewellyn finds the refutation of Dean Pound's criticisms in the fact that (1) the realists have never expressed in so many words the implications which Pound drew from their writings, (2) when a realist reads his own articles he fails to discover these implications in them. It is interesting to speculate what things could be proved by this method. One could prove that the neo-realist movement in American philosophy is not interested in epistemology, that the New Testament does not in any essential contradict the Old. One could even prove that Dean Pound himself is innocent of the oft-repeated charge of Hegelianism.

<sup>9</sup> *Op. cit. supra* note 5, §§ 55-61.

<sup>10</sup> *Id.* § 60.

for example—without this implying certainty in the prediction of judicial action. On the other hand (and this *may* be a characteristic of case law), the materials on which prediction must be based may be scattered and difficult of access, without this implying that prediction, when finally arrived at, may not have a high degree of accuracy.

It is well to have these two notions explicitly separated. There is often a too ready assumption that “system” necessarily implies predictability, and that predictability is impossible without a highly developed “system”. On the other hand, it seems to me that Llewellyn goes too far in assuming that the two are completely independent. Surely “system” has generally been something more than a mere indexing device having no connection with the process of decision. As a matter of fact is it not clear that an indexing system which was entirely dissociated from the judicial process would necessarily fail of its own limited purpose?

A more significant contribution to the problem of certainty is found in Llewellyn’s distinction between certainty for the attorney and certainty for the layman. For the attorney certainty means predictability of judicial action. It is often assumed that the layman’s interest here is identical with that of the lawyer. Llewellyn points out that this is not true. I translate his argument:

So much for the lawyer. Incomparably more important seems to me to be the legal certainty which the layman demands. . . . It must not be forgotten that the ordinary layman guides his conduct not by *legal* norms but by *social* norms. Often these social norms are similar to those of the law. Seldom is correspondence complete. Legal rules can hardly serve as a guide to life. On the other hand the continuous reshaping and reformulation of social norms . . . does not cease because lawyers have set up legal rules. . . . Legal certainty in business and for the layman does not lie in the fact that an attorney can predict the outcome of a law suit. . . . This sort of calculability is not so important for the layman; it means for him only legal certainty in a particular piece of litigation. For him legal certainty consists rather in the fact that the transaction which he has entered, *if* it gets into litigation, will be adjudged as a prudent man (that is, a prudent *layman* in the particular circumstances) would have foreseen, if he had had in mind at the very beginning the unforeseen dispute.<sup>11</sup>

Legal certainty for the layman is not predictability of judicial decision, it is *congruence between legal rules and the ways of life*.<sup>12</sup>

<sup>11</sup> *Id.* § 58. (If the word “certainty” seems somewhat inappropriate to describe the notion here involved, it should be said that Llewellyn uses the German word *Sicherheit* which has a somewhat broader connotation than the word certainty and might have been translated here as “security”.)

<sup>12</sup> The phraseology here is mine, not Llewellyn’s. I say “congruence” instead of “correspondence” because I take it Llewellyn does not insist that legal rules be *formulated* in the same way as social norms but only that they have ultimately the same points of reference,—that they “come to the same thing in the end”.

Furthermore, this kind of certainty cannot be achieved unless legal rules *change*. Congruence with lay ways demands a constant reshaping of legal rules, since social norms are continually changing.<sup>13</sup>

This distinction between lay certainty and lawyer's certainty seems to me to be most useful and I have no desire to comment on it, except to express a doubt whether "lay norms" are quite so definite and clear-cut as Llewellyn seems to assume and to suggest that the task of determining the congruence of law and the ways of life is not so simple as he seems to imply.<sup>14</sup>

There is, however, another point about legal certainty which Llewellyn does not discuss at any length, but which it seems to me deserves careful consideration. I mean the question, what will be the probable effect on legal certainty, *i. e.*, on "lawyer's legal certainty", of an adoption by courts of the approach recommended by the realist school? The realist school has generally evaded this question, not because it was embarrassed by it, but because it considered it unimportant. One realist tells us that the really enlightened and normal person takes a "positive delight in the hazardous, incalculable character of life", and regards "life's very insecurity" as its "most inviting aspect".<sup>15</sup> The implication seems to be that for the person free from psychic repression legal uncertainty, far from being a source of concern, is really a source of delight.

I have already pointed out that Llewellyn does not embrace this left-wing view. On the other hand, he seems somewhat hesitant to claim that his own approach will create greater certainty than that produced by the

<sup>13</sup> LLEWELLYN, *op. cit. supra* note 5, at 83. Llewellyn acknowledges that the two kinds of certainty (certainty for the layman and certainty for the lawyer) tend to coalesce, as it were, in those situations where every step of a business transaction is guided by legal counsel. Here lay certainty is a reflection of lawyer's certainty. Llewellyn adds this further observation: In those situations where lawyer guidance is customary there is no great danger of a lack of correspondence between legal rules and social norms. The legal profession is here forced to gain an insight into changing social relations. This collective insight of the profession will tend, in some measure at least, to keep law in step with life.

In the field of lawyer-guided transactions a kind of double safeguard exists. If there is a lack of correspondence between lay ways and the law this is rendered harmless through the guidance of the lawyer. There is not likely to be such a lack of correspondence because the legal profession here cannot be ignorant of the demands of life. Both of these safeguards are absent in the case of those transactions ordinarily undertaken without legal advice.

Llewellyn might have added that there is perhaps still another reason why a lack of correspondence between law and life is unlikely in the field of lawyer-guided transactions. Is it not possible that the conservative influence of the lawyer may have operated to retard social change in these fields?

This whole discussion recalls an observation of Ihering's, that Roman law was workable in spite of its technicality because of the omnipresence of the lawyer, whose services were open to all—gratis. Where legal counsel was not likely to be available (on the battle field, for example) various legal requirements were relaxed. GEIST DES RÖMISCHEN RECHTS (7th ed. 1923) II.2, 417.

<sup>14</sup> Underhill Moore's valiant attempt to determine the degree of this congruence in the field of banking law is evidence of the difficulties of the task. Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 381, 555, 752, 928, 1055, 1219. In spite of the elaborateness of the method the results of this research seem to me to remain inconclusive.

<sup>15</sup> FRANK, LAW AND THE MODERN MIND (1930) 17.

method generally followed by courts.<sup>16</sup> In this it seems to me that he and the rest of the realist school have overlooked one of the strongest arguments against the traditional approach.

One of the chief characteristics of the traditional method is that it conceives of the area of the *legally relevant* as quite limited. Only certain types of argument, certain lines of reasoning, are "legal" in nature. Other arguments, other modes of reasoning may have relevance to the decision and may even be taken collaterally into account in deciding the case. But they remain "extra-legal" or "non-technical" considerations, mere (*sic*) arguments of "policy". They definitely occupy a humbler status than "legal" considerations. One of the chief services of the realist school has been to enlarge the field of the legally relevant and to invest "extra-legal" considerations with a species of respectability.<sup>17</sup> And it seems quite clear to me that this has also been a service to the cause of legal certainty.

The traditional method furnished the judge with a set of legal concepts and said to him, "These are the materials from which you are to build your decision. We realize that in reaching your decision you have been influenced by numerous considerations, many of which have nothing to do with these materials. We are willing to wink at that. But we insist on one condition: When you come to the actual work of construction, you must limit yourself to these materials." But suppose that by no amount of manipulation and ingenuity can the materials furnished be made to build the structure planned. What will happen then? Will the plan be revised? Or will the judge break through the taboo and get what he needs elsewhere? Here lies the source of a great deal of legal uncertainty. And here the uncertainty is directly attributable to the restraints imposed by the "traditional method".<sup>18</sup>

In a pamphlet which served as a sort of manifesto for the free law movement Kantorowicz drew an analogy between the "torture" which modern judges inflict on codes to wring from them the results they consider just and convenient, and the literal torture which judges in the middle ages inflicted on persons accused of crime.<sup>19</sup> There is a surprising parallel be-

<sup>16</sup> At the end of section 55 (*op. cit. supra* note 5) he asserts somewhat cautiously that the freer method of decision he advocates will produce a more "effective" legal certainty than the method generally followed. This is preceded by a statement that the freer method will not "endanger" legal certainty.

<sup>17</sup> It would, of course, be foolish to give the entire credit for this change in attitude to the realist school.

<sup>18</sup> Llewellyn has himself recognized this source of uncertainty in the "traditional method". In 1931 he wrote, "But a fair portion of present unpredictability is certainly attributable to the fact that the courts are using official formulas which fit, only part of the time, what the facts seem to call for. Sometimes the facts win, sometimes the formula." Llewellyn, *supra* note 1, at 1241, n. 45. The idea is also adumbrated in a note in his most recent work. *Op. cit. supra* note 5, at 77 n. 3. It is significant that the discussion of the point is in both instances relegated to a footnote.

<sup>19</sup> GNAEUS FLAVIUS (H. U. KANTOROWICZ), *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (1906) 49.

tween the two phenomena. The middle ages feared and distrusted the judge, particularly the judge sitting in criminal cases. It was thought dangerous to give him much discretion. The law, expressing this common distrust of judges, permitted the conviction of a criminal only when guilt was proved in certain ways, principally by the confession. This was intended to provide a guaranty that no man should be convicted unless the proof of his guilt was clear and certain. This was the legal theory. The practice is more generally known. What actually happened was that the judge first made up his mind—on the basis of what was then “extra-legal” evidence—whether the accused was guilty. If the decision went against the accused he was put on the rack and compelled to give up, in the form of a confession, the legally acceptable evidence of his guilt.

The traditional conception of legal method imposes a like hypocrisy on the modern judge. Often his procedure is to decide the case first on the basis of “non-technical” considerations. Then armed, not with rack and wheel, but with the intellectual equivalents of those instruments of torture—fictions, analogies, “theories”,—he proceeds to wring from his code or other body of doctrine the legally acceptable basis for his decision. The medieval institution of torture was eliminated by the simple expedient of permitting the judge more freedom in passing on the sufficiency of evidence. The intellectual torture which our courts inflict on legal doctrine will be obviated when we have brought ourselves to the point where we are willing to accept as sufficient justification for a decision the “non-technical” considerations which really motivated it.

This millenium, when it arrives, will bring not only a humanitarian reform in our treatment of legal doctrine, but also, I feel sure, greater certainty in the prediction of judicial action. For there are hazards involved in the procedure of putting legal doctrine on the rack which were not involved in the medieval institution. Legal doctrine can sometimes be very stubborn. It may hold its lips tight in spite of all our efforts and ingenuity. Furthermore the modern judge, unlike his medieval predecessor, has the unpleasant duty of spreading on the public record a written description of the process of torture itself. This puts something of a damper on the intellectual inquisition. And all of these things add to the uncertainties of the process.

In the usual course in personal property the student is introduced to certain cases which are intended to develop a concept of “possession”,—usually with especial reference to the law of wild animals. He studies the case of the harpooned whale, the case of the intercepted fox hunt, and many others.<sup>20</sup> After the “doctrines” involved in these cases have been

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<sup>20</sup> I think it could be demonstrated that more money is spent by the law schools of the United States in teaching the juristic aspects of fox-hunting than is spent in the actual pursuit of that ancient and worthy sport itself.

thoroughly digested the instructor puts a series of hypothetical cases—on an ascending scale of temptation, as it were—to test the student's fidelity to the legal doctrine he has absorbed. A great favorite is this case. Two men, *A* and *B*, happen to be hunting in the same swamp. Neither is aware of the other's presence. *A* shoots a duck; it lands in the arms of the surprised *B*. Whose duck is it? I used to put this case to my classes and I generally found a fairly even split of opinion. One group—those who stood steadfast for "legal principle"—were sure it was *B*'s duck because he alone had the requisite Power to Control. The other group were sure it was *A*'s duck, and, though they were less articulate about their reasons, they intimated a doubt as to *B*'s Intent to Possess. After this discussion had gone on for some time, I used to make it a practice to say, "Suppose you knew no law and had never read the cases in the casebook. Whose duck would you say it was?" Immediately there was a subsidence of feelings and argument gave way to complete unanimity. It was *A*'s duck. Why? *Because he shot him.*

Now I am not arguing that this is a proper kind of reason, legal or "extra-legal", to assign for a decision, though with some elaboration I think it might be expanded into a respectable argument for the decision in favor of *A*. Nor am I urging inarticulate intuition as a proper basis for judicial decision. What I am trying to say is that from the standpoint of legal certainty no rationalization at all may be better than a poor rationalization. Legal scholars are, of course, generally aware that there is danger in hasty systematization. But it is usually assumed that this danger consists merely in the possibility that "system" may work hardship in the individual case. It is ordinarily supposed that even bad "system" will at least carry the compensating advantage of greater certainty.<sup>21</sup> This assumption is demonstrably false. In the illustration I have given "legal theory", far from producing certainty, destroyed a certainty and uniformity which was already present. And in how many fields of the law is this not true?

When lawyers gather informally and argue about the probable outcome of a case pending before a court, about what does their argument usually turn? (I am supposing a case outside the field of public law, a case without any marked "political" complexion.) Do they argue about the judge's conception of proper business policy, about his social philosophy, about how he would decide the case if he were a layman? They may, but they are not likely to. More often their argument will turn on this kind of

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<sup>21</sup> This assumption is made in most of the discussions of the various RESTATEMENTS of the American Law Institute. Professor Havighurst has pointed out that a RESTATEMENT may bring about uncertainty when it produces a stress in the judicial process such as is described above. Havighurst, *The Restatement of the Law of Contracts* (1933) 27 ILL. L. REV. 910, 917.



question: Will the judge take a "technical" view, or will he yield to "non-technical" considerations? This is the source of their uncertainty.<sup>22</sup>

Perhaps I can sum up my discussion with a simile. If you put an animal in too small an enclosure you may rely on it that he will make a violent effort to escape. There is no way of predicting whether he will succeed in this effort, or where he will go if he breaks out. If you put him in a larger enclosure you may be reasonably sure that he will be content to stay inside the enclosure. And if you study your animal's habits closely you will be able to follow his movements within the enclosure and discover regularities in them. What we need, as I see it, is a larger grazing area for judges. The realists are bringing this about, and they ought to realize that in doing so they are making the judge a more tractable and predictable animal.

The traditional method places a stigma on "non-technical" considerations. This tends to produce uncertainty for a reason which I have attempted to demonstrate, namely, that we have no way of predicting when the judge will break through the taboo imposed on him. It also tends to produce uncertainty in another way. It prevents these "non-technical" considerations from being talked and written about. It prevents their possible rationalization and systematization.

In our metropolitan centers the work of trial judges is frequently specialized. One judge will hear only criminal cases, another domestic relations cases, *etc.* From time to time it will be necessary to transfer a judge to a class of cases he is not in the habit of trying. This generally produces some consternation among attorneys practicing in the court. They know they are in for a period of legal uncertainty. This may, of course, be due to the judge's ignorance of legal doctrine. More often it is due to his ignorance of the glosses practice has put on legal doctrine. Often there is no way for him to learn of these glosses—these compromises that law has made with life—except to retrace the experience of his predecessors. He finds by the method of trial and error what needs to be read between the lines. Meanwhile litigants receive arbitrary treatment and legal certainty suffers. Now a legal method, such as the realist school proposes, which would recognize these glosses and compromises as falling within the province of legal science would tend to eliminate this source of uncertainty. If these things were written and talked about the judge might not have to acquire them in the uncertain and painful way he does. Not only that. If these things were openly discussed we should be in a position to attempt a rational and critical evaluation of them. Out of this evaluation would come greater certainty and greater justice for litigants.

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<sup>22</sup> Of course, I realize that this sort of question would still exist, though to a less extent, under a more liberal and realistic conception of legal method. For example, in the interpretation of requirements of formality there is always room for difference of opinion as to how strictly a requirement should be applied.

Of course, I realize that there will always remain a fringe of practice which will not get into books. There are many reasons why this is so. But the fact remains that many things are not talked about and do not get into books for the rather prudish reason that they are not supposed to be "law",—though it is admitted they have a tremendous influence on judicial decision. The absence of these things from books, the fact that they must be "picked up", introduces an element of uncertainty in the law which might, in part at least, be remedied by the general adoption of a more liberal conception of the province of legal science.

### *Case Law v. Code Law*

The American legal realist, though in obvious conflict with his environment, enjoys an advantage usually denied to revolvers against things as they are. He is fundamentally satisfied with the "system" under which he lives. The Anglo-American system of case law is entirely to his liking. It fits into his pragmatic conception of legal method. Whatever evils it may seem to display are due not to the system itself but to perversions of it, to the ogre Conceptualism which has taken possession of it.<sup>23</sup> Perhaps this affinity for case law explains why the American legal realist has displayed so little interest in European legal speculation. European realists and near realists—men like Ihering, Geny, Duguit, Ehrlich, Wurzel, Bozi, Sternberg, Kantorowicz, and Radburch—for the most part go unnoticed in this country.

It would require no elaborate demonstration to show that the realist's assumption of the superiority of the American case system has generally been based on no actual investigation of the workings of case law as compared with code law. The "pragmatism" which intuitively prefers the case method exhausts itself in the preference,—it is not applied to determine whether the preference has any empirical justification. This *a priori* pragmatism is not found in Llewellyn's recent book. Partly because the nature of his task demanded it, and partly because his own inquiring temperament led him in that direction, he attempts here something new in the literature of realism: a painstaking examination of the way case law actually operates. He begins by raising an issue of fundamental importance. I translate his own phrasing of the question. "How does it come about that a system of law which develops out of fortuitously selected cases can develop in a way that is tolerable from a political or social point of view? Why does not such a legal system become a planless, orderless chaos of doctrine?"<sup>24</sup>

<sup>23</sup> It has even been suggested that the deficiencies of case law are traceable to "a wave of continental learning [which at one time] swept over England, leaving a thick deposit of its obscurant abstractions, . . ." Oliphant, *A Return to Stare Decisis* (1928) 6 AM. L. SCHOOL REV. 215, 221. Later in America the process was repeated and "Great cargoes of continental speculations were imported and thrown in to make the dikes of the old abstractions hold." *Ibid.* In this way the pristine pragmatism of our Anglo-Saxon fathers was debauched, and our law became abstract and conceptual.

<sup>24</sup> *Op. cit. supra* note 5, at 98.

Under our precedent system courts do not regard themselves as free to anticipate the need for legal rules; they manufacture rules *ad hoc* only, for the particular case in litigation. But what issues will get into litigation? This depends on the interest of individual litigants, and there is, therefore, no way of predicting or controlling the kind of questions which will be the subject of adjudication. In consequence it might appear inevitable that our case law would be spotty and incomplete. A developing field of business practice may be in urgent need of legal direction and control, yet the purely fortuitous circumstance that no individual happens to have an interest in litigation may bring it about that no cases are decided in the field and in consequence no "law" is made.

Now as a matter of fact we know that things do not work out quite as badly as this theory would make it appear. Where legal direction is needed it is generally forthcoming. There are hiatuses in our law, to be sure, but they are neither so numerous nor so extensive as one might be led to suppose in view of the apparently planless way in which our law grows. In spite of its dependence on the past, in spite of the lack of conscious direction over its growth, our system of case law has generally proved itself capable of meeting new social conditions. How does this come about?

Llewellyn solves this problem in a way one might have anticipated. Litigation is not purely a matter of chance and individual interest. Litigation arises out of conflict. Conflict in turn arises in those fields of social activity where growth is taking place, where the relative strength of interest-groups is changing. Things are so arranged that where changing social practice demands new law individual interest will see to it that suits will be brought which will furnish a substratum for the elaboration of the needed doctrine. There is happily a kind of automatic correlation between the interest of the individual litigant and the social need for new law.

That there is an element of truth in Llewellyn's solution of this problem is pretty obvious. It is equally obvious that the solution is partial and incomplete. The correlation between the interest of the individual litigant and the interest of society in legal development—like the correlation assumed by classical economics between the individual economic interest and the common good—is unfortunately far from complete. It is scarcely necessary to demonstrate that our courts' piece-meal and backward-looking system of legislating frequently proves inadequate to meet the need for legal control in fields where social practices are changing rapidly. There are many reasons why this should be so. If the growth in social practice is at all rapid it is likely that with our crowded court calendars case law cannot keep up with it. Again, though the change in social life may involve the interests of whole sections of the population, the pecuniary interest of any individual may be

so slight as to make litigation (or at least appeal to the upper courts) impracticable.<sup>25</sup>

I do not for a moment believe that Llewellyn meant to assert any complete and nature-given coincidence between the interest of the individual litigant and the social need for new law. Perhaps he would recognize the need for the qualifications suggested here. But if that is so it must be confessed that his own treatment of the subject leaves too much to inference and presents, at most, intimations of the darker side of case law.

After proving that case law will, or is likely to, grow to meet new social conditions, Llewellyn points out that there are things which may operate to prevent that growth from being a healthy one. Often a whole field of law is influenced permanently by the particular turn taken by the first case arising in the field. This case may have carried a certain factual and ethical complexion which was actually the determinative element in its decision. The court in deciding it, however, may lay down a categorical rule which subsequently becomes divorced from the particular circumstances of its first utterance and controls perhaps hundreds of cases which from an ethical or "factual" viewpoint are quite different from the first and "critical" case. There is an even more sinister possibility. Organized interest-groups, aware of the importance of such critical cases, may see to it that these cases "come up in the right way". Thus by the expenditure of a little money and

<sup>25</sup> An example of this is to be found in the field of what is called "industrial insurance".

The history of regular life insurance, on the other hand, justifies pretty well Llewellyn's optimism concerning the ability of case law to deal with new situations. A whole new field of social practice grew up with life insurance and, as was inevitable, all sorts of abuses grew up with it. *A priori* one might argue that this is the kind of situation case law is not adequate to meet. Yet we know that, in general, the courts saw that the problem of life insurance was really a *new* problem, and they remade the law to fit this new field. They refused to apply in this new field the supposedly fundamental principles of contract, tort and agency law—not, to be sure, without causing some distress to the student writers of law review notes.

The history of standard life insurance is repeating itself, so far as social practice is concerned, in what is called "industrial insurance". Industrial insurance is written in small amounts (say \$100 to \$500). Premiums are collected weekly. The policy is issued without a medical examination, though not without warranties concerning the health of the insured sufficiently inclusive to make most of the policies issued void if these warranties were taken literally. It is no exaggeration to say that the abuses which have arisen out of this type of insurance are appalling. Many of the policies are so worded as to bind the companies to practically nothing. Not infrequently a large portion of the premium is paid for disability insurance which is *cancelable at any time by the company*. Of course, the practice is not as bad as these provisions might imply. But it is bad enough. And all of these social abuses are growing up without judicial curb. Why? For the very obvious reason that the amounts involved are too small to attract lawyers to undertake litigation. The man of moderate means, who takes out regular life insurance, has been freed from abuses of this sort by the courts—even if the courts have had to hurt the juristic sensibilities of legal theorists in order to do it. But the poor man remains a victim of the rapaciousness of the less responsible insurance companies. Is not the general indifference toward his plight in some part the product of our faith in the capacity of case law to take care of new problems? We think in terms of case law, and *we assume that the need for statutory reform is not really pressing until it makes itself manifest in the decisions.*

effort at the right time the whole future development of a field of law may be influenced.<sup>26</sup>

Llewellyn fails to mention another element of contingency in the growth of case law which it seems to me is necessary to complete the picture. I refer to the fact that it is a matter of chance *in what order* cases will arise, and what the *doctrinal* connection will be between the cases which do arise and those already decided. Just as a whole field of law may be influenced by the accidental *presence* of a particular case at a particular stage of its development, so a whole field of law may be influenced by the accidental *absence* of a decision which might serve as a sort of *doctrinal bridge* between existing rules and needed new law.

The case of *Shuey v. United States*<sup>27</sup> decided that the published offer of a reward might be effectively revoked by an announcement given equal publicity. Pollock in his treatise on contracts admits the reasonableness of the decision but adds the remark that it "seems a rather strong piece of judicial legislation".<sup>28</sup> Why this? Because previous decisions had declared that a revocation takes effect only when "communicated". This revocation had not been "communicated" since it had never come to the knowledge of the claimant of the reward. Now suppose that there had intervened between these previous decisions and the case of *Shuey v. United States* a case in which a letter of revocation had been promptly delivered at the place of business of the offeree and had been allowed to remain unopened on his desk. Without much question a court would have held that such a revocation was "communicated" so soon as the offeree had had a fair opportunity to become familiar with it. And had such a case existed before the *Shuey* case is it likely that anyone would have regarded that decision as a "strong piece of judicial legislation"? Pollock's attitude was influenced by the purely fortuitous circumstance that there did not exist a case which could operate to carry his mind, without shock, from the older cases to the decision in the *Shuey* case.

The possibility that a doctrinal bridge may be lacking represents, then, an additional element of fortuity in the development of case law, operating to make the litigant's rights depend on the chronological order in which his case comes up. Furthermore it is an element which is especially likely to be operative in fields where social practice is changing rapidly. Social practice may change so rapidly that by the time cases actually get into litigation

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<sup>26</sup> LLEWELLYN, *op. cit. supra* note 5, at 100. This notion of the "critical" case is obviously realism of the right-wing variety. It assumes that the "vocal behavior" of courts has a significant influence over the judicial process. Llewellyn has elsewhere declared that the position on which some realists verge, that "rules" have no influence over judges at all, escapes his understanding. Llewellyn, *supra* note 1, at 1241 n. 46.

<sup>27</sup> 92 U. S. 73 (1875).

<sup>28</sup> PRINCIPLES OF CONTRACT (4th ed. 1885) \*20.

they are so far removed from what the court is familiar with that the court is left without any intellectual conduit to carry it from the old to the new.

It may be argued that the need for "doctrinal bridges" is not a peculiar fault of the case system, and that the whole thing can be reduced to a psychological truism, that men's minds hesitate at making violent jumps. This may be so, but I think it can be shown that this native intellectual skittishness of man is aggravated by the methods of reasoning necessitated in a system of case law. Under a code courts are, of course, faced with the same problem that faces our common-law courts, that of deciding cases which do not fall within existing doctrine. But the procedure under code law is generally to bring the unforeseen situation within some very general provision of the code, vague enough not to interfere with the proper decision of the case and just definite enough to appear to give the court some support. Where a large number of such general provisions are available, as they are in most codes, "doctrinal bridges" are not necessary. The statute itself will carry you anywhere you want to go. The doctrinal bridge becomes important in a system of code law where a somewhat specific provision is gradually extended to cover situations not originally comprehended within it. Here the order in which cases come up is important, and if the cases which lie just beyond the literal meaning of the section arise first, the process of extension will be accelerated. In a system of case law we have, for the most part, nothing corresponding to the catch-all provisions found in codes. Of course, one will find laid down in the cases some rather broad and general principles, but their apparent scope is generally limited by being given a point of reference in the particular case at hand. Such general principles as we have in case law lack the authoritative force which backs a statutory enactment. They are apt to be relegated to Austin's field of "positive morality". They are not quite law. The full force of precedent applies only to the particular decision. All this means that the doctrinal bridge will necessarily play a more important rôle in case law than it does under a code. And, as I attempted to show, it is an alogical, fortuitous factor.

Incidentally this whole discussion gives point to a statement once made by Ihering which would probably be disturbing to the orthodoxy of most realists.<sup>29</sup> The statement was that Roman law was great because it was built upon a system of "case law" which did not discriminate between real and hypothetical cases. The juriconsults gave answer to all cases put to them, without inquiring whether they were real. This gave a continuity to the body of doctrine which they developed which cannot exist where only "real" cases are dealt with.

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<sup>29</sup> *GEIST DES RÖMISCHEN RECHTS* (4th ed. 1858) II.2, 385-386.

*Legal Rules and the Nature of Concepts*

An attitude of scepticism toward rules has characterized the realist movement from the beginning. This scepticism rests on two closely related grounds. The first lies in a conviction that "reality" is a thing too complex, tumultuous, and vital to be kept in a straight-jacket of rules. I shall deal with this aspect of the realist's scepticism later under the heading *Law and Society*. The other ground for his distrust of rules lies not so much in a belief in the impossibility of the task imposed on rules as in a belief in the essential impotence of rules themselves. Rules are made up of concepts, and concepts are but the shadowy figments of our own minds, wholly unworthy of the simple faith the conceptualist places in them. It is with this aspect of the realist's scepticism that we are here concerned.<sup>30</sup>

The realist movement has done an immense service to American legal science in inculcating in it a healthy fear of such very real demons as Reified Abstractions, Omnibus Concepts, and Metaphors Masquerading as Facts.<sup>31</sup> One seldom encounters a law review article today of the type so common ten years ago, in which the writer starts with an inquiry into the "nature" of some legal concept and ends by deducing all sorts of important consequences from the supposed inner nature of the concept,—without more than a passing reference to the practical effects of his conclusions, and then with an air of condescension, as if to compliment the facts for showing good judgment in conforming to his theories. The outstanding foe of this sort of verbal trifling has been Professor Cook. There can be no doubt that his influence, and that of other realists like him, has been in the main beneficent.

On the other hand, it seems to me that we are now in danger of carrying the crusade against "conceptualism" too far. American legal science gives evidence that it is on the verge of making an orthodoxy of the sterile and uninspired behavioristic philosophy which has worked such havoc in the other social sciences. Professor Cohen has been warning against this danger for a long time, and one only wishes his warnings had a more discernible effect. There is so much breadth of learning and sound sense in what he has written that I hesitate to attempt any supplementation of it. Nevertheless I think I may contribute something in the matter of diagnosing the disease.<sup>32</sup>

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<sup>30</sup> Valuable criticisms of the realist's attitude toward rules will be found in COHEN, *op. cit. supra* note 8, and Dickinson, *supra* note 8. Dickinson is not merely critical, but presents a carefully thought-out theory of his own in which he makes use of so much of the realist theory as he considers acceptable.

<sup>31</sup> I have attempted a contribution toward the cause myself. See Fuller, *Legal Fictions* (1930-1931) 25 *ILL. L. REV.* 363, 513, 877.

<sup>32</sup> In the matter of diagnosis I feel I enjoy an advantage over Professor Cohen. I have suffered from the disease myself. In my discussion of the "fictitious" nature of classes (in the article cited *supra* note 31, at 877, 884) there is exemplified the same erroneous assumption concerning the use of concepts in thinking that is found in Berkeley, Llewellyn and Wurzel.

Professor Cohen calls the rule-phobia of the left-wing legal realist "nominalism".<sup>33</sup> Now one gets into all sorts of difficulties if one attempts to explain just what is meant by nominalism in the ontological sense. This is not the place to enter into that problem.<sup>34</sup> Let us, therefore, use the word nominalism frankly as a term of opprobrium, as meaning a *too* distrustful attitude toward universals and abstractions. Now what is the cause of this attitude? This is the question which has not been sufficiently examined. We can never rid a man of a disease of thought until we know how and why he succumbed to it. As I see it, the realist's nominalism generally arises from an error of psychology. This error may be stated as the belief that the individual in his own private thinking does not employ universals and abstractions and that these things are only convenient devices for the communication of ideas. It is the notion that in the internal economy of the mind only "things" are dealt with, and that abstractions and concepts are simply packages of these "things" bundled together,—for export purposes, as it were.

Nominalism is usually defined as the belief that universals exist only in the mind of the individual. So far as the origin of the nominalist attitude is concerned it seems to me that this inverts the thing. Nominalism starts with the assumption that in the mind of the individual universals have no place, that they are only a sort of social convention making language possible.

Confirmation for this theory of the psychological genesis of nominalism is found in the fact that Berkeley, certainly the greatest nominalist who ever lived, begins his *Principles of Human Knowledge* with an inquiry into the processes of thought in the mind of the individual.<sup>35</sup> The conclusion reached on the basis of this psychological investigation—that abstractions cannot be "conceived" and are mere conveniences of language—is then made the basis for his whole philosophy.

While our legal realists have vied with Berkeley in the extremes to which they have carried the nominalistic attitude, their distaste for "philosophic" discussions has generally led them to neglect any statement of the basis for this attitude. It is, therefore, fortunate that in his recent book Llewellyn has undertaken to discuss in some detail the problem of the nature of concepts and rules. His discussion seems to me to reveal the fact that

<sup>33</sup> *Op. cit. supra* note 8, at 208-247.

<sup>34</sup> Modern epistemologists, incidentally, have developed a very neat device for dodging the problem. It is no longer asserted that concepts and relations "exist", but it is firmly insisted that they do have "subsistence". But what is "subsistence"? Why, that is the kind of existence that things like concepts and relations have!

<sup>35</sup> *Introduction* §§ 1-25. Cf. ". . . if the nominalistic logic is good it should lead us, as it lead Berkeley, to deny that there can be any universal ideas in the mind." COHEN, *op. cit. supra* note 8, at 210. As I have indicated, this statement seems to me to reverse the process by which the nominalistic attitude develops.



his fundamental error, like Berkeley's, is a psychological one. I translate a passage from his book:

To speak of "applying the rule" is to use a misleading expression. Rather you either *fill the rule out*, or *put limits on it*. You can only "apply" the rule *after* you have first either included or excluded the case at hand. . . .

Let us assume a case not involving any doubt, but a case nevertheless which would never have occurred to any one at the time the rule in question was established. In spite of this let us assume it to be a case which everyone, after considering it and the rule, would acknowledge would *have* to be governed by the rule. Now I claim there is here no real "interpretation" of the rule. Even here there is an enlargement, a reformulation, an importation of something new into the rule. For the rule consists of a series, a complex of word-symbols. In itself a symbol is nothing. A symbol is, however, a means of pointing to things or thought-constructs.<sup>36</sup> In so far as things were *demonstrably* aimed at in the original use of a symbol, the symbol has from the beginning content. Every symbol, however, has to an uncertain degree something which we may call *latent content*, a capacity for expansion, as it were, which, though partly equivocal and unforeseeable, is also in part unequivocal and foreseeable. Some things that are new, some things that have hitherto not been thought of, are nevertheless perceived, so soon as they are considered, to fall at once into the already established category. . . . In our hypothetical case every lawyer would make the same extension. When he does that and does it at once *he does not note the extension*. It appears to him as if the case had always lain within this category, as if it had always been consciously intended that this case should belong to the category. In spite of this he has, though unconsciously, extended the category . . . the legislator could not have *intended* the inclusion of this case *in concreto*, the case was by hypothesis not yet thought of.<sup>37</sup>

The assumption concerning the psychological nature of concepts which underlies this discussion is, I think, demonstrably false. Suppose a legislator

<sup>36</sup> Llewellyn uses the word *Gedankengebilde* which, in an effort to be fair, I have translated as "thought-constructs", though it might have been translated as "mental images".

<sup>37</sup> *Op. cit. supra* note 5, at 72-74. Llewellyn's discussion rather closely parallels Wurzel's treatment of "projection". WURZEL, *DAS JURISTISCHE DENKEN* (2d ed. 1924), translated in *THE SCIENCE OF LEGAL METHOD* (1921) 298-428.

A similar notion, that in the *Urerlebnis* of the inner soul the mind is freed from the shackles of categories and logic, is expressed in the following passage: ". . . of the many things which have been said as to the mystery of the judicial process, the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part. The function of juristic logic and the principles which it employs seems to be like that of language, to describe the event which has already transpired. These considerations must reveal to us the impotence of general principles to control decision. Vague because of their generality, they mean nothing save what they suggest in the organized experience of the one who thinks them, and, because of their vagueness, they only remotely compel the organization of that experience." Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 *YALE L. J.* 468, 480. The reader will observe that the nominalist view ("the impotence of general principles to control decision") is here based on an hypothesis concerning the inner processes of thought.

enacts that it shall be a crime for anyone "to carry concealed on his person any dangerous weapon." After the statute is passed someone invents a machine, no larger than a fountain pen, capable of throwing a "death ray". Is such a machine included? Obviously, yes. It falls within the "latent content" of the symbol. But does the inclusion of this new machine under the concept "dangerous weapon" *change* or *enlarge* the concept? Yes, says Llewellyn, because the legislator could not have intended to include it at the time he enacted this statute since it was not then in existence. But what *did* the legislator intend "*in concreto*"? Why are we forced to conclude that his intent cannot extend to something not yet in existence? Would Llewellyn contend that the "actual intent" of our legislator could not extend to revolvers of the ordinary type manufactured after the statute was passed? Is it impossible for a man to "intend" a gift to unborn children? Perhaps Llewellyn has in mind the fact that it would be impossible for the legislator to "visualize" the non-existent object when he enacted his statute. But is a man's intent coextensive with the mental images which accompany it? Would it be impossible for a legislator to prohibit the sale of stock in any company organized to manufacture a perpetual motion machine unless he could visualize the machine? In the case of our "dangerous weapon" statute would the accident that there popped into the mind of the legislator the picture of a Colt revolver mean that his intent excluded Smith & Wesson revolvers? No one would contend that. We should have to say, he intended the class "revolvers". But if he can intend the class "revolvers", why not the class "dangerous weapons"? The fallacy underlying Llewellyn's whole discussion is the assumption that thinking must be directed toward particular "things", when as a matter of fact, it may be, and generally is, directed toward classes or universals.

The old notion that the application of a concept involves merely an extraction of something already implicit within it is misleading, though it presents in a metaphorical way one aspect of the truth.<sup>38</sup> Exactly the same thing can be said of Llewellyn's notion that *any* application to "new" situations, however obvious, effects a "change" in the concept.<sup>39</sup> Indeed, both notions, in so far as they are false, rest on the same error, namely, a hypostatization of the "concept". The old notion treated the concept as an opaque

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<sup>38</sup> A very readable and interesting refutation of the notion that concepts in some way or other "develop" new meanings out of themselves will be found in 1 JAMES, *PRINCIPLES OF PSYCHOLOGY* (1890) 464-468. Needless to say James does not find it necessary to embrace the notion that any "new" application of a concept is a change in it.

<sup>39</sup> The grain of truth contained in Llewellyn's statement consists in the fact that the application of a concept usually involves a mental operation on the part of the person making the application which did not occur in the mind of the man who first used the concept. If you say, "Man is a wonderful being", and I say, "That statement includes Beethoven", I am making an application of the concept "man" which probably did not "occur" to you; something has happened in my brain which did not happen in yours. But that does not mean that I am *changing* your concept of "man". See 1 JAMES, *op. cit. supra* note 38, at 472.

container with all sorts of unknown contents in its interior waiting to be extracted. In Llewellyn's view the concept is—for the individual who uses it—a sort of show case with its contents hung neatly in a row ready to be inventoried at a glance. The fact is that from the standpoint of individual psychology the concept is not a container or "thing" at all, but an activity of the conceiving mind. The "thingifying" comes about when we convert this mental activity into logical terms. It may be that this process of converting a dynamic activity into a static "thing" necessarily involves some distortion. But there is no need to increase the amount of this distortion by the gratuitous assumption that intent and thinking *must* be directed toward "things", and cannot be directed toward classes.<sup>40</sup>

We shall have gone a long way toward ending the controversy concerning "nominalism" if we can secure recognition for the plain fact that the inner mental experience of the individual, however precious and ineffable it may be, is "conceptual". The issue will at least be clarified if we recognize with James that we have available to us "a perfectly satisfactory decision of the nominalistic and conceptualistic controversy, so far as it touches psychology", and that "We must decide in favor of the conceptualists".<sup>41</sup>

The legal realist is emphatically of those James called "tough-minded". He loves "things",—things that are concrete, tangible, *anschaulich*. In Llewellyn's own words, the realists "want law to deal, they themselves want to deal, with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles—not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles".<sup>42</sup> Now this intellectual bias, for it *is* a bias, has its value in a science which has suffered for centuries from an unbridled pseudo-rationalism. But like all biases the realist's peculiar bias may sometimes lead him astray. He should remember that not all significant facts are "concrete". He needs to be reminded that the love of the tangible and concrete, like other human loves, may sometimes, when thwarted, fabricate its own object.

### *Do the Proposals of the Realist School Relate Solely to Method?*

The proponents of the realist approach have left an ambiguity in their position which, I think, ought to be removed. Do they propose a different kind of law, or only a different way of talking about law?

<sup>40</sup> The difficulty of expressing adequately the principles which we employ in our inner thinking is produced, not by the fact that our inner processes of thought do not employ concepts, but, as Dickinson points out (*supra* note 8, at 1064), by the fact that we often employ in our private thinking concepts and thought-units which do not correspond exactly to those implicit in ordinary language. The difficulty is increased by the fact that these unnamed concepts are peculiarly evanescent. We cannot always call them back at will for purposes of comparison and clarification.

<sup>41</sup> I JAMES, *op. cit. supra* note 38, at 472.

<sup>42</sup> Llewellyn, *supra* note 1, at 1223.

On the rare occasions when the realist discusses this question he seems to say something like this: "I am not a philosopher. I have no interest in developing a scheme of ethical values. My only interest lies in seeing that the judicial process is accurately described, that it is recognized for what it actually is. My interest is, therefore, primarily methodological, though it is obvious that good method has a social value of its own. If the judge recognizes what he is really doing, he is less apt to be led astray by delusions as to what he is doing."

On the other hand the enthusiasm for his position which the realist displays seems hard to understand if this disclaimer of any interest in ethics is accepted at its face value. When a man talks with all the zeal of the most ardent social reformer it is difficult to assume that his interest is limited to methodology. When the realist ridicules the "vocal behavior" of courts as an unimportant by-product of the judicial process it is hard to believe that his energies are concentrated on changing this "vocal behavior" and that he has no desire to change anything else.

This ambiguity in the position of the realist ought to be removed. Removing it would clarify discussion. It might have an even more important effect. It might reveal that the realist school—though free from evil intent, of course—has been guilty of the crime of misbranding its intellectual wares. For I strongly suspect that the realist movement has not been so free of "philosophic" pretensions as its proponents would have us believe. Certainly I am not inclined to take seriously Llewellyn's occasional disclaimers that his own approach involves any distinctive ethical bias.<sup>43</sup>

### *The Relation of Law and Society*

One of the fundamental problems which any social philosophy must face may be stated in a somewhat vague way as the problem of the relation between law and society,—or, if one prefers, of the relation of Law to Life.<sup>44</sup> Many of the problems of ethical philosophy, in whatever terms they may have been expressed, will be found to center about this relationship. The most imposing legal philosophies will often disclose themselves as involving fundamentally nothing more than a bias concerning this relation,—a bias in favor of "law", or in favor of "society".

A study of Llewellyn's writings<sup>45</sup> convinces me that he has reached his own solution of this problem. In discussing his solution one is under

<sup>43</sup> "I make no effort here to indicate either the proper rule, or the proper action on any legal subject." *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431, at 463. "When the matter of program [*i. e.*, of the realists] in the normative aspect is raised, the answer is: *there is none.*" Llewellyn, *supra* note 1, at 1254.

<sup>44</sup> Geny's distinction between the *donné* and the *construit* states in a somewhat different form the fundamental relation involved here and has the advantage that its terms are freer from metaphorical contamination than those employed in the text. 4 GENY, *op. cit. supra* note 4, c. 3. However, for present purposes, I have preferred to use the more common terms.

<sup>45</sup> In the discussion which follows I draw freely from all of Llewellyn's writings, particularly from the BRAMBLE BUSH (1930).

the embarrassment that Llewellyn nowhere makes as distinct and explicit an avowal as one might wish of the social philosophy which it implies. The difficulty is increased by his failure to put his own view in its historical perspective by indicating its relation to the thought of other writers.<sup>46</sup> There is, therefore, of necessity some conjecture in the account I am about to give, and I warn the reader that it is possible I have misinterpreted his views.

I shall begin by quoting a series of statements which will furnish the background for what I have to say:

"Law and the law official are not therefore in any real sense what *makes* order in society. For them society is given and order is given because society is given.<sup>47</sup> . . . The law then, the interference of officials in disputes, appears as the means of dealing with disputes which do not otherwise get settled. Not as *making* order, but as *maintaining* order when it has gotten out of order.<sup>48</sup> . . . By and large the *basic order* of our society, and for that matter in any society, is *not produced by law*.<sup>49</sup> . . . Law plays only upon the fringes."<sup>50</sup>

Certainly the emphasis is here placed on the "society" side of the relation. Law, the principle of conscious guidance, is relegated to the back-

<sup>46</sup> The citation of authorities is so often a form of intellectual exhibitionism that one hesitates to criticize a man who is free from this ostentation. Yet it does seem to me that Llewellyn errs too far in the opposite direction. I am particularly distressed at the absence of reference to that great pioneer among "realists", Rudolph von Ihering. There are a number of places in Llewellyn's writings where Ihering's views almost intrude themselves. Llewellyn seems sometimes to imply that prior to American legal realism it had never occurred to anyone to question the "ideology" of the law, or to inquire whether it coincided with the real motivation of legal rules. Yet most of Ihering's life was devoted to ferreting out the social reality concealed behind the "ideology" of the Roman Law. In addition to refusing to accept the conventional formulations of the law at their face value, Ihering also pointed out that there are frequently regularities of judicial behavior ("latent rules" he called them) which do not appear in the rules talked and written about,—something which Llewellyn regards as a particularly esoteric discovery of American realism. I. IHERING, *op. cit. supra* note 13, at § 3; *cf.* Llewellyn, *supra* note 43, at 439 n. 9. Llewellyn speaks of norms (*Sollsätze*) taking on the appearance of affirmations of fact (*Seinsätze*). *Op. cit. supra* note 5, at 89. There is no reference to Ihering's penetrating discussion of the phenomenon. III.1 IHERING, *op. cit. supra* note 13, at 311-326. Beginning on page 96 of the same book Llewellyn discusses the creation of new legal institutions, and describes the process by which existing institutions are diverted to new purposes. A good part of his article, *What Price Contract?* (1931) 40 YALE L. J. 704, is devoted to the same topic. In neither case is there any reference to Ihering's famous discussion of the problem. II.2 IHERING, *op. cit. supra* note 13, at 334-352, 504-537; III.1 *ibid.*, at 281-301. The reader will find portions of Ihering's treatment translated in my article *Legal Fictions*, *supra* note 31, at 533-535.

While I am on this subject I should like to take notice of Llewellyn's interpretation of Ihering's theory of interests as an attempt to remove legal science still further from reality than it already was under the notion of substantive rights. Llewellyn, *supra* note 43, at 441. This interpretation is, in my opinion, nothing short of perverse.

<sup>47</sup> BRAMBLE BUSH (1930) 12.

<sup>48</sup> *Id.* at 13.

<sup>49</sup> *Id.* at 112.

<sup>50</sup> *Id.* at 113.

ground, and becomes a kind of midwife called in occasionally to assist the processes of nature, but having no hand in the act of creation itself.<sup>51</sup>

I do not contend, of course, that Llewellyn denies altogether any creative rôle to law. Though he emphasizes the "power of society over courts", he admits that there is another side to the thing which occasionally manifests itself: "the power of courts over society".<sup>52</sup> He recognizes that sometimes even a single legal decision may shape the growth of an institution,<sup>53</sup> and that men "often do orient the action which they take *apart from* litigation" on the basis of legal rules.<sup>54</sup> Llewellyn himself, then, qualifies the broad statements I have quoted previously. It cannot be asserted that he does not see the whole picture. What I fear is that he may suffer from a species of color blindness which causes him to see one part of the picture with especial vividness while the rest fades into an indistinct background. The aspect of the relation of law and society which he constantly chooses for categorical assertion is "the power of society over courts". The qualifications come later, too late to restore a proper balance of emphasis.

This bias on the side of "society" is evidenced in many parts of Llewellyn's work. It is illustrated in his theory that case law will, in a more or less automatic fashion, develop in those places where social change demands it.<sup>55</sup> It is found in his conception of the "pathological case" as the case "so exceptional that the normal ways of society afford . . . no solid basis for deciding [it] . . ." <sup>56</sup> The implication is that the ordinary, "non-pathological" case can and should find its regulation in the "normal ways of society". The same attitude is found in his discussion of legal certainty. "Layman's legal certainty" is identified with the congruence of law and social norms, and it is assumed, not only that law should generally conform to the "ways of life", but that these ways afford a substantial basis for judicial decision.<sup>57</sup>

This emphasis on the society side of the relation is also found in Llewellyn's constant insistence that the legal scholar's first task must be to master in its last detail the whole pattern of human behavior before he attempts to prescribe regulations for it. This insistence that "value judgments" be postponed until we have traced out exhaustively the whole labyrinth of social norms certainly involves itself a "value judgment", how-

<sup>51</sup> Dean Pound has pointed out the similarity between the "juristic pessimism" which the realist movement seems to imply and the views of the historical school and the positivists. Pound, *supra* note 8, at 703.

<sup>52</sup> BRAMBLE BUSH (1930) 55.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Id.* at 54.

<sup>55</sup> LLEWELLYN, *op. cit. supra* note 5, at 98.

<sup>56</sup> *Id.* at 82. BRAMBLE BUSH (1930) 54.

<sup>57</sup> LLEWELLYN, *op. cit. supra* note 5, at 81.

ever much Llewellyn may protest the rigid exclusion of "ought" from his approach. If I tell a sculptor that he must spend twenty years investigating the physical and chemical structure of the clay used in modelling before he takes up the study of modelling itself, it will hardly do for me to say I am not teaching sculpture. I shall be judged by the effects of my instructions. The man who has spent most of his life studying clay will be a different kind of sculptor from the man who has devoted more of his time to the art of modelling. There is no *a priori* reason for supposing he will be a better sculptor. If I assume he will be, it must be because of some notion I have concerning the relative importance of clay and modelling in the process of sculpturing.<sup>58</sup>

If I have to choose someone to draft a statute regulating the banking business I may put a high value on a knowledge of banking practice. I may regard as the ideal man for the task the man who knows the practices of the banking world so thoroughly that he can predict with certainty the psychological reactions which the sight of a postdated check will invoke in any banking employee, from messenger boy to president. I may prefer him to a man who, though less familiar with the behavior of bank employees, has spent his life studying the history and theory of banks and banking law, and many hours in arm-chair reflection on the possible ways of organizing and controlling the banking business. I am entitled to my preference. But I am not entitled to escape responsibility for it by saying it involves no "value judgment", no philosophy of what ought to be.

I do not deny that Llewellyn's bias for the society side of the relation may answer to a real need in our law. Lawyers have been too prone to think of society as mere clay in the hands of the "Law". Our courts too often talk as if their task were merely to cut channels, largely after a design of their own fancy, through which the waters of life are expected to flow inertly and complaisantly. To this conception Llewellyn offers a needed antidote. But it is wise to remember that antidotes can be administered too liberally, and that in the case at hand there is danger we may escape one simplification only to fall victims to another.

There are two extreme, and therefore simple, ways of conceiving of the relation of law and society. "Law" can be conceived of as the active principle operating to shape an inert element "society". This is the view toward which the imperative school tends, and it is the view tacitly assumed by most legal writers not of a particularly philosophic turn of mind.

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<sup>58</sup> In his *CASES AND MATERIALS ON SALES* (1930) xv. n. 3, Llewellyn expresses regret that his book errs "in rarely reaching beyond business practice in the evaluation of legal rules." His defense is that "time for building a wider foundation for judgment has been lacking." This frankness is commendable, and one can only hope that it means that the man who devotes more of his time to "evaluation" and less of it to the investigation of business practice may look forward to being greeted by the realist as a valued co-worker whose efforts supplement his own.

At the other extreme is the view that "society" is the active principle and that "law" is simply a function of this principle. This is the view toward which Maine, Savigny, Ehrlich and Duguit tend. Llewellyn seems to me to place himself in this class, though his closest affinity is with the last two mentioned.

These are the extreme views. Each of them has a value,—as a corrective of the other. Indeed it is often difficult to say whether the emphasis made by a given writer is intended to convey his conception of an ultimate truth, or is intended simply to restore a balance which he considers to have been disturbed by extremists on the other side. But fighting fire with fire is always attended by hazards. We avoid the difficulties which arise from these extreme simplistic positions if we recognize frankly that the relation is one of mutual action and reaction. In the relation of law and society neither element is wholly determinative, neither wholly determined. This intermediate view seems to me to represent the position of such scholars as Ihering, Pound, Geny, Stammler and Cohen.

In dealing with this problem we can employ with advantage Cohen's principle of polarity.<sup>59</sup> Law and Society are polar categories. Though we are under the necessity of opposing them to one another we must recognize that each implies the other. If we deny one, the other becomes meaningless. We may picture Law and Society as the two blades of a pair of scissors. If we watch only one blade we may conclude it does all the cutting. Savigny kept his eye on the Society blade and came virtually to deny the existence of the Law blade. With him even the most technical lawyer's law was a kind of glorified folk-way.<sup>60</sup> Austin kept his eye on the Law blade and found little occasion in a book of over a thousand pages to discuss the mere "positive morality" which social norms represent. Blackstone shifted his eye from one blade to the other and gave us the confused account in which, on the one hand, he bases the common law on custom, and, on the other, informs us that the authoritative statement of this custom is to be found only in court decisions. As if to add to the confusion, he then lays down rules for determining when a custom should be recognized by the law.<sup>61</sup> We avoid all these difficulties by the simple expedient of recognizing that both blades cut, and that neither can cut without the other.

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<sup>59</sup> See COHEN, *REASON AND NATURE* (1931) 165 *et seq.*

<sup>60</sup> Incidentally it is interesting to note that Savigny's problem here is much the same as that which Llewellyn attempts to dispose of with his notion of the "pathological case". Both start with the assumption that law ought to conform to folk-ways. Both are embarrassed by "technical lawyer's law". What shall we do with it? We not only have it, we also obviously need it. Yet it threatens the theory. Savigny's solution of the dilemma was to attempt a specious reconciliation of the fact with the theory. Llewellyn's solution is to isolate the fact so that it may not contaminate the theory as a whole.

<sup>61</sup> 1 BL. COMM. \*38-92. See Bentham's strictures, *A COMMENT ON THE COMMENTARIES* (1928) 186 *et seq.*



By saying that we avoid difficulties by adopting the "polar" view of the relation of law and society, I do not mean to imply that the adoption of this view renders the problem a simple one. On the contrary, the advantage of this view lies precisely in the fact that it reveals the difficulties which exist and enables us to prepare to meet them. This view makes it clear that the problem of the relation of law and society is not the sort of issue which can be "solved" by some "theory" and then passed over. It is, to use Radin's suggestive phrase, one of the "permanent problems of the law". But while we may not have disposed of the question, we shall at least have divested it of a specious simplicity which is itself the source of endless difficulty.

*The "Institutional Approach" of Underhill Moore*

What these difficulties are becomes apparent when an attempt is made to apply in a practical way a simplistic conception of the relation of law and society. One of the most recent and most thorough-going attempts to do this is to be found in Underhill Moore's "institutional approach". Professor Moore starts with the question, What actually controls judicial decisions? The judge moves in a complex environment—moral, intellectual, and physical—and his decisions may be regarded as reactions to that environment. But of the numberless factors of this environment, which are the most significant? The traditional theory supposed, or pretended to suppose, that the judge was influenced solely by a segment of his intellectual environment, that represented by "law" and legal theory. This view is no longer tenable. We now realize that rules are impotent to exercise any real control over the judicial process. Even when they seem to chart a definite course (which is seldom because of their vagueness) frequent judicial aberrations from the charted course remind us that there must be other, more significant factors in the judge's environment. Professor Moore then sets about to discover what these more significant factors are. One item after another is rejected. Common sense rejects the assumption that the physical environment has any very important, or at least measurable, influence over judicial decisions. A poorly ventilated court room may conceivably affect the judicial process,—but this is a remote and conjectural possibility. The notion that prevailing philosophic notions, conceptions of the good life, may have any very great influence is rejected because these things are matters of "intuition" and are therefore incapable of scientific treatment. The search for some ultimately determinative element begins to look futile. But let us not give up hope. There is one constant in our shifting firmament. We still have the "institutional patterns of behavior" which prevail in the community. We know that "men's actions move along the well-cut channels or straggling ruts of habits,"—this is, indeed, "the conclusion of the philosopher, the psychologist and the common man." These folk-ways, these institutional patterns of

behavior, become then, like "the sun, the tides, the rain, one of the constant factors among the welter of variables." Can we not assume that the judicial process is controlled by them, that judicial decisions turn ultimately on the institutional or non-institutional character of the litigants' behavior?<sup>62</sup>

Professor Moore does not rest content with enunciating a theory; he proceeds to test his theory in practice. Do the decisions actually reveal that judges are primarily controlled by the patterns of behavior which prevail in the community? To determine this three cases were selected for study. All three related to the same point of banking law. Two cases (from New York and Pennsylvania) decided the point in one way;<sup>63</sup> the other case (from South Carolina) decided it in another way.<sup>64</sup> Can we explain this difference as arising, not from a different conception of "law", not from a different philosophy of life or from other such imponderables, but from an *observable* difference in the banking practices of South Carolina as compared with those of New York and Pennsylvania? An elaborate investigation was undertaken to answer this question.<sup>65</sup>

Now before undertaking such an investigation, one has to consider at least four questions. How do you ascertain what social institutions exist, or, to use Moore's own phrase, how do you go about "ethnologizing a particular present day culture"? How do you extract out of the social institutions so ascertained a norm of decision? Can you be sure that the courts will be familiar with existing social institutions and will extract from them the same norm of decision that you do? Can you be sure that the courts will

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<sup>62</sup> This paragraph is intended to summarize the arguments found in *Rational Basis of Legal Institutions* (1923) 23 COL. L. REV. 609, and *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703.

It may be objected at this point that Moore's study is not pertinent to the present inquiry because he clearly disclaims any intent to say what law ought to be. He does not say how courts *ought* to decide cases; he only describes how they *must* decide them. It would be easy to answer this objection by pointing out that it is no unheard of thing for moralists to present their Utopias as necessities, their "oughts" as "musts". But let us give Professor Moore the benefit of the doubt and assume that he is not a preacher disguised as a scientist. His study still remains pertinent to our discussion. Moore is at least disposing of other people's "oughts" whether he is setting up one of his own or not. If courts *must* decide cases by a reference to prevailing behavior patterns, then those who argue that they ought to decide them on some other basis are wasting their breath. For this reason the ethical philosopher cannot avoid bringing Moore into his discussions, however little Moore may feel inclined to return the compliment.

<sup>63</sup> *Delano v. Equitable Trust Co.*, 110 Misc. 704, 181 N. Y. Supp. 852 (1920); *Goldstein v. Jefferson Title & Trust Co.*, 95 Pa. Super. 167 (1928).

<sup>64</sup> *Callahan v. Bank of Anderson*, 69 S. C. 374, 48 S. E. 293 (1904).

<sup>65</sup> Moore and Sussman, *supra* note 14, a total of 145 pages. The method succeeded in explaining the South Carolina decision, and Moore therefore concludes that "the study probably justifies the inference of a causal relation" between judicial decisions and the institutional or deviational character of the litigants' behavior. *Id.* at 1249. Aside from the question whether the ability to explain a single decision is a very impressive demonstration of the validity of a method, it is interesting to observe that the South Carolina case was decided by an equally divided court. So while Moore succeeded in explaining why two of the judges voted to affirm the decision of the lower court, he has yet to explain why the other two members of the court voted the other way.

necessarily regard the norm of decision implied in a given social institution as the best one? Moore's study involves an answer to each of these questions and, it seems to me, in each case the answer which he gives is erroneous.

First of all, how do you go about determining what social institutions, what folk-ways, exist? Professor Moore's answer is that you simply observe the way people behave. If you are investigating banking practice with reference to notes, you send an investigator into the cage of the note teller to make a record of what he does. Or, you put a hypothetical situation to an experienced banker and ask him how he would conduct himself in such a case. The emphasis is on behavior. The purpose back of that behavior, the rationalizations and intellectual activity which accompany it are ignored.

This, it seems to me, constitutes the fundamental fallacy of the "institutional approach" of Moore—the assumption that the significance of institutions is exhausted in behavior. In an early article he writes, "To say that a legal institution,—private property, the federal government of the United States, Columbia University,—exists is to say that a group of persons is doing something, is acting in some way."<sup>66</sup> Now many people would say that a legal institution consists not of actions, but of attitudes of mind to which actions merely give external expression. This view is rejected by Moore on the ground, I take it, that these attitudes of mind are usually simply rationalizations of the behavior which they accompany, and are therefore the effect of the behavior, not the cause of it. *Now it is quite true that this is often the case.* But the truth here happens to be complex, and it is also true that behavior is, at least sometimes, the expression of mental attitudes. This fact is enough to vitiate any purely "behavioristic" approach to social institutions.

Bankers were never asked by Professor Moore's investigators what they were trying to accomplish, or why they acted as they did. They were only "observed", or were asked to state how they would react to certain situations selected by Professor Moore and phrased in his own language. The fallacy of this procedure becomes apparent when we realize that it is impossible to define what the "situation" is to which the banker reacts unless we know what is going on in his mind. We observe that a banker, whose customer's note is due and unpaid, refrains from charging the amount of the note against the customer's checking account until the consent of the customer has been obtained. What is the situation which called forth this reaction? Moore defines the situation entirely in terms of "observables". Was the note secured? How did the note come into the hands of the bank? Had the note just come due, or had it been overdue for some time? Yet from the standpoint of the banker, these were perhaps the least significant elements in the situation. The most significant factor from the standpoint of the

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<sup>66</sup> Moore, *supra* note 62, at 609.

banker may have been the fact that the customer's default on the note was obviously due to an oversight, or the fact that the customer was a man of good credit standing, or some other fact not stated in Moore's hypothetical "situation".

The realists regard as one of the fundamental fallacies of the traditional method its assumption that the judge reacts only to those facts of the case which are visible through the prism of legal theory. In truth, the judge's decision represents a reaction to the whole situation, including many facts which from the standpoint of legal theory are irrelevant. The realist condemns the traditional method for its mistaken assumption that you can limit the influence of facts to those tagged as legally relevant, and for the corollary assumption that it is profitable to discuss the solution of controversies on the basis of textbook outlines of the facts. Yet precisely the same fallacy, if it is a fallacy, is contained in Moore's approach. He adopts toward bankers the same attitude the traditional theory adopts toward judges,—a procedure which could only be justified on the doubtful assumption that bankers possess less complicated personalities than judges. He assumes that there are principles guiding the practice of banking which one can discover merely by asking a banker how he would react in certain skeletonized "situations".<sup>67</sup> He seems aware of the temerity of this procedure and of the need for justifying it for he is at pains to report that the answers which bankers gave to his questions were "stated with the positive assurance with which are given descriptions of the way everyday situations are met."<sup>68</sup> This may seem to prove that he had accurately stated the "situations" to which bankers react, but I think that this inference is wholly without justification. If some earnest sociologist were to attempt a "scientific" investigation into the folk-ways of lawyers, and were to ask one hundred unselected lawyers, "Can a man who has rescinded a contract, sue on it?" I suspect that most of his answers would be in the negative and would be given with "positive assurance". The "positive assurance" would exist precisely because the lawyer was asked about a skeletonized, "conceptual" situation. If he were put a series of actual cases his assurance would probably diminish to the vanishing point. Professor Moore asked his bankers if, when a customer's note was due, they charged the note against his account without authority from him. They gave, for the most part, ready answers. Would the answers have been so ready if the situation had been filled out with such

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<sup>67</sup> For the purpose of making clear my own attitude, I should say that I do not share unqualifiedly the realist's antipathy toward skeletonized cases. I think such cases have both a dialectic and a pedagogical utility. But the "skeletonizing" of cases is a delicate business, and necessarily anticipates the analysis which will be applied to the simplified situation. This means that when you "skeletonize" situations for bankers you have to do so with reference to the principles on which bankers act in the conduct of their business. This is what Moore made no attempt to do.

<sup>68</sup> Moore and Sussman, *supra* note 14, at 759.

pertinent facts as the credit standing of the customer, the availability or non-availability of legal advice inside the bank, the apparent reason for the customer's default (oversight, insolvency, temporary stringency, *etc.*) and the purpose for which the account was being used? And if not, does the uniformity of the banker's reactions to skeletonized fact situations represent a really significant "institution"?

An uncritical adherence to the behavioristic approach leads to another erroneous assumption, that norms of decision may be extracted directly from regularities of behavior, and that where you have a definite "behavior pattern" you necessarily have a correspondingly definite norm of decision. Now this is demonstrably untrue. It may be the practice of department stores generally to accept goods returned by customers. This behavior pattern may be exemplified in literally thousands of instances. But what norm of decision is implied in this practice? The department store, we shall assume, refuses to accept goods returned by the customer and the customer sues. Now we cannot decide this case simply by referring to the existence of a pattern of behavior. The mere fact that people habitually act in certain ways in certain situations is not itself a criterion on the basis of which lawsuits may be decided. If a folk-way is relevant to decision, it must be because it has a "normative" aspect.<sup>69</sup> But we cannot discover this normative aspect

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<sup>69</sup> Moore does not attempt to extract a norm of decision directly out of the behavior patterns which his investigation uncovered. This would have been impossible in view of the behavioristic method pursued in charting these patterns. Nevertheless it is obvious that sooner or later it will be necessary to bridge the gap between plain brute fact and sentiments and attitudes which alone can serve as a basis for judicial decision. It is interesting to note how and where Moore makes this transition. His investigation disclosed that the behavior involved in all three cases was "non-institutional"—a result which he had anticipated. Yet obviously this cannot explain why one case was decided in one way and the other two cases in another. This disparity is to be explained by the fact that there was a difference in the *degree* in which the behavior involved deviated from the *nearest institutional pattern*. *Id.* at 1219. Now two questions arise. What is the nearest institutional pattern? One might have expected that Professor Moore would begin at this point to treat his bank tellers as something other than automata, and he might inquire what patterns *they* would be most likely to regard as offering a precedent for their behavior. But no, our bank tellers remain mere habit complexes, and the "nearest institutional pattern" is determined without any reference to their possible mental processes by a mechanical procedure akin to matching samples of cloth. We are now ready to measure the degree of deviation. One might suppose that the same "objective", mathematical method would have been preserved in dealing with this problem. But instead we find that Professor Moore has suddenly endowed his bank tellers with brains, and they are now assumed to act purposively and intelligently. We measure the "degree of deviation" by asking such questions as whether the actual conduct of the parties was as efficient a device for doing business as the institutional pattern, whether it was such a deviation as would be likely to arouse resentment on account of its unfairness—in short, by asking whether the departure was "reasonable" under the circumstances. In the end, then, Moore's method turns out to involve the same intangible elements which are involved in the more conventional approach. The only difference is that in determining "reasonableness" under his method you are forced to take as your standard of comparison what the charts reveal as the nearest institutional pattern of behavior. But after all this limitation is more apparent than real, since the basis on which comparison is made remains vague enough to afford sufficient leeway for the active legal imagination.

by a mere statistical investigation, by inquiring, in the case I have supposed, how many times department stores have accepted returned goods. We have to discover whether this practice is merely a matter of accommodation ("the customer is always right"), or has established an attitude of expectancy, a sentiment of "ought", which can serve as a norm of decision. The interesting thing is that we can get the most light on this normative aspect of the practice from the way in which the department store acts in what Professor Moore calls "deviational" cases, for example, where the customer's dissatisfaction with the goods is patently unreasonable. The essence of an "institution" will generally be found, not in "behavior", but in mental attitudes, *and frequently the nature of these attitudes is revealed and defined only in "non-institutional" situations. Often it is the observation of behavior in the unusual case which gives definiteness to the contour of an institution.*

So soon as we abandon the attempt to stick to a purely behavioristic approach, and begin to take into account the intellectual processes which accompany and guide behavior, we see at once the absurdity of the view that the law should (or does) simply take over social institutions as a ready-made norm of decision. We see that our note teller's patterns of behavior may be shaped, not by an invisible psychological force which confines him to some "straggling rut of habit", but by his own imperfect notions of the law, so that to take over his patterns of behavior as a norm of decision is simply to put the judicial ermine on the bank teller and to substitute second-hand knowledge and rumor for the researches of judge and counsel. We see also that "law" and "institutional patterns of behavior" often derive from a common emotional and intellectual source—for example, from current conceptions of business expediency and social justice.<sup>70</sup> For assistance in

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Moore's method requires us to answer three questions: (1) what institutional patterns of behavior exist? (2) which of the institutional patterns does the actual behavior of the parties most nearly resemble? (3) how much does the actual conduct of the parties deviate from this pattern? Moore attempts to answer the first two questions on a purely behavioristic basis. In answering the third question the behavioristic approach is abandoned. Moore's study does not, then achieve "objectivity" through the total elimination of "rational" and "intuitive" elements. All it achieves is a postponement of these elements. What is accomplished by that postponement remains unexplained.

Professor Moore has performed a valuable service in calling attention to the need for an actual investigation of lay practices where they are relevant to judicial decision. Courts too often glibly and erroneously assume that they know what these practices are. But Moore's method, as I see it, is fatally defective in its assumption that these practices can profitably be divorced from their "rational" background.

<sup>70</sup> The South Carolina deviation from the rule obtaining in Pennsylvania and New York might conceivably have been explained on the basis of Southern business *mores*. My own experience in the South would lead me to believe that the Southerner does not typically regard the debtor-creditor relationship in the impersonal, "business-like" way it is regarded in the North. It is a personal relation, involving a duty of consideration not only of debtor toward creditor, but of creditor toward debtor. This makes it understandable why a Southern judge would feel a resentment toward a banker who suddenly began turning down his customer's checks, after allowing his note to remain overdue without action for a considerable

understanding these intangibles we shall be forced to call back the "brilliant intuitionists" whom Professor Moore so cavalierly dismissed at the beginning of his study.

Professor Moore claims for his method that it corresponds to the method actually employed by courts, whether they are aware of that fact or not. This necessarily assumes that courts are familiar with the behavior patterns of the community. For the culture patterns of life inside the bank teller's cage can influence the judge only if he knows of them. Yet there seems a certain temerity in the assumption that the justices of the Supreme Court of South Carolina (whose biographies incidentally reveal no practical banking experience<sup>71</sup>) already knew what Moore's investigators took months to learn. Moore meets this point only by saying that the judge's "attitudes and ideas are molded by a cultural matrix whose patterns are engraved by frequency. Put in another way, if the court [the judge?] is not conditioned by frequent contact with the behavior itself, it is conditioned by verbal behavior which will be found, on last analysis, to be causally related to the patterns or institutions."<sup>72</sup> I am not quite sure that I understand this. It seems to mean that the judge in the contacts of daily life will inevitably hear turns of expression which, in some subtle way, will convey to him an insight into what note tellers are doing about debiting direct discounts. But it is hard to believe Professor Moore meant anything quite so preposterous as that. In view of the uncertainty of his meaning, perhaps it would be best to let this point go without refutation.

Let us, then, grant Professor Moore his point about the "cultural matrix", even if we remain a little obscure as to what it is we are granting. Let us assume that there exists a definite pattern of behavior, that the court knows of it, and that the court has been able to extract from it a norm of decision. Still it by no means follows, as Moore seems to assume, that the court will or should regard the norm so obtained as the most desirable basis of decision. Obviously where a court disapproves the end toward which a social practice is directed, it may refuse to accept the practice as a norm of decision. A court may decline to enforce a gambling debt, though it be

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period. Professor Moore would, of course, scoff at any such explanation as resting on "intuition". But is any more "intuition" involved in this explanation than is involved in his assumption that, in some mysterious way, judges know or "sense" the institutional patterns of behavior prevailing in their communities? But then this assumption probably represents an example of the "qualitative subjective judgment" which Moore admits is involved in his method; it cannot be mere "intuition" for that is presumably excluded from his approach.

<sup>71</sup> See BROOKS, *SOUTH CAROLINA BENCH AND BAR* (1908) for biographical sketches of the four justices involved. Incidentally there is nothing in the biographies of the two dissenting judges which would explain why the cultural matrix failed to make an impress on them.

<sup>72</sup> Moore and Sussman, *supra* note 14, at 1219.

admitted that the norms of society call for the payment of such debts. Courts exercise at least a veto power over folk-ways. This qualification of the "institutional method" is so obvious that we would be unfair if we did not assume that the proponents of the method had it tacitly in mind. Let us turn to a less obvious point. Does the institutional method remain valid in those situations where the court regards as innocent the purpose which the parties are attempting to achieve? I think not. To accept the "institutional approach" uncritically even in these cases is to overlook the fact that a court may refuse to conform to a folk-way, not because it disapproves of the object toward which it is directed, but because it considers it ill-adapted to achieve that object. It is to ignore the possibility that a court may undertake to reshape a "behavior pattern" to assist it in reaching its own end. If it were true, for example, that laymen generally regarded the ceremony of "shaking on it" as creating a binding contract, it would not follow that a court would have to accept this ceremony as a valid legal formality if it considered that it offered insufficient safeguards against the dangers which legal formalities are supposed to avert.<sup>73</sup> *The law has always to weigh against the advantages of conforming to life, the advantages of reshaping and clarifying life,* bearing always in mind that its attempts to reshape life may miscarry, or may cost more than they achieve.<sup>74</sup>

Llewellyn does not, I think, carry the behavioristic view as far as it is carried by Moore. He recognizes a qualification on the "institutional approach" which Moore apparently does not—that in many cases law, instead of merely conforming to folk-ways, actually shapes and controls them. Nevertheless he is not, I think, entirely free from the erroneous assumptions found in Moore's study. I have already expressed the view that he is guilty of at least an error in emphasis. Furthermore there seems to run through his writings the assumption that "law" is only a kind of surrogate for missing folk-ways. In terms of the figure of the scissors, the Law blade only comes into operation when for some reason the Society blade is unable to cut by itself. Indeed, the situation where "the normal ways of society afford . . . no solid basis" of decision and where, accordingly, we must resort to the

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<sup>73</sup> Our courts probably made a mistake in following lay practice in the "liberalization" of the requirement of a seal. In this way they frittered away, perhaps irretrievably, a valuable social practice.

<sup>74</sup> Ihering speaks of the close relation which existed between law and business in ancient Rome. He goes on to say, "The intimacy of the relation between legal science and business redounded to the benefit of both. To the benefit of business, because the lawyer had his hand constantly on its pulse and knew what it needed and how it could be helped. To the benefit of jurisprudence because, without denying in any material respect the demands of business, it could bring business into that form which was, from the legal standpoint, the most desirable one." IHERING, *op. cit. supra* note 13, at 418. American "institutionalists" should, I think, ponder the last sentence, to see whether it may not describe a desideratum they have fallen into the habit of overlooking.



“law” for solution is quite frankly labelled “pathological”.<sup>75</sup> This, it seems to me, clearly implies a behavioristic ethics.

### *The Emotional Foundations of Realism*

The positivistic and behavioristic ethical philosophy of Llewellyn and Moore is found in other realists. In fact it may be said to constitute a strong undercurrent of the realist movement as a whole. Duguit’s “positivism”, which is another kind of realism, has led him to a similar position. Why should this be? Why should realism, which starts out as a reform movement, carry in its loins this essentially reactionary principle? I think the paradox is explainable.

It is well to remember that the difference between the realist and the “conceptualist” is not so much a matter of specific beliefs as it is of mental constitutions. The conceptualist is not naïve enough to suppose that his principles always realize themselves in practice. Indeed, since he is usually a practical man, he is apt to be more familiar with the specific ways in which life fails to conform to the rules imposed on it than the more philosophic realist. It is not, then, that the conceptualist is ignorant of the discrepancy between Is and Ought. He is simply undisturbed by it.

On the other hand, the cleft between Is and Ought causes acute distress to the realist. He sets about resolutely to eliminate it. There are two ways in which this may be done. The Is may be compelled to conform to the Ought, or the Ought may be permitted to acquiesce in the Is. There are enormous difficulties in the first course. Life resists our attempts to subject it to rules; the muddy flow of Being sweeps contemptuously over the barriers of our Ought. There is something even more disheartening. We find it impossible to say exactly what it is we wish life to conform to, what our Ought is. Life laughs at our rules, and even our rules betray us by refusing to reveal their nature to us. The easier course beckons temptingly, to let the Ought acquiesce in the Is, to let law surrender to life.

The realist ends in ambiguity. About one thing he is clear. The disgraceful discrepancy between life and rules must be eliminated. But he is not sure whether his prescription is to force life into conformity with a new, more carefully drawn set of rules, or to permit rules to give way to life. This ambiguity is found in what is perhaps the most ancient formulation of legal realism: *Regula est, quae rem quae est breviter enarrat. Non ex*

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<sup>75</sup> LLEWELLYN, *loc. cit. supra* note 56. The attitude of Moore and Llewellyn toward the problem of the relation of law and society may perhaps reveal the distortion which comes from viewing the law from the perspective of one specialty; in their case, commercial law. It is doubtful whether it would occur to a specialist in torts or criminal law to urge a greater conformity of law to folk-ways, though such a person would probably go along with Moore and Llewellyn in urging the *relevance* of folk-ways in those fields.

*regula ius sumatur, sed ex jure quod est regula fiat.*<sup>76</sup> Don't get your law from rules, but get your rules from the law that is. Is this merely a methodological caution, warning us that paper rules often fail to express adequately the principles actually in force? Or does it mean that principles really have no force, and we must get our rules from the "law" of life itself? The clarity of the realist position has not increased perceptibly since the time of Paulus. The modern realist is still not clear in his own mind whether he objects to "conceptualism" because it fails to achieve an accurate formulation of its principles, or because it pretends to proceed according to principle at all.

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<sup>76</sup> Paulus in DIG. 50, 17, *De diversis regulis*, 1.