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Foundations of American Realism

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FOUNDATIONS OF AMERICAN REALISM

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". . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr.[1]

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"I use the phrase 'the law' in the sense of sequences of external facts and their concrete legal consequences through the concrete operation of governmental machinery." Joseph W. Bingham.[2]

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". . . Law defines a relation not always between fixed points, but often, indeed oftenest, between points of varying positions. The acts and situations to be regulated have a motion of their own. There is change whether we will it or not." Benjamin Nathan Cardozo.[3]

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IF WE were to study the history of western thought since 1850, perhaps the most important writers of the past century in terms of their impact on modern American jurisprudence would be Marx, Darwin, Comte, Freud, James and Dewey. Economic determinism, evolution and historicism, positivism, pragmatism and instrumentalism, and psychoanalysis have all had an influential part in shaping the main currents of the modern legal mind.

The past century has been an era of almost miraculous changes, not only in terms of political evolution, but also in terms of the rapid rise of modern technology, the growth of cities with all the manifold problems of urban life, the growth of centralization of governmental power in the democracies[4] as well as in the neo-dictatorships and totalitarian systems, the rise of modern mass communications, and lastly, the birth of the atomic age.

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[1] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), repr. in his COLLECTED LEGAL PAPERS 167, 173 (1920).

[2] Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 109, n. 29 (1912).

[3] CARDOZO, THE PARADOXES OF LEGAL SCIENCE 11 (1927).

[4] See Aumann, *Technology, Centralization, and the Law*, 36 So. ATLANTIC Q. 278 (1937).

But if this past century was a century of great change, it was also an "age of anxiety," to borrow the phrase of poet W. H. Auden, an age of modern science that disdained things "metaphysical," an age which took pride in the material accomplishments of its empirical methods. Karl N. Llewellyn, writing on the period from 1870 to 1900, says:

> "And what philosophy may hope for acceptance and utilization in such a situation? Positivism. Let us forget 'right reason'; let us forget the bastard something known as morality; let us acknowledge merely the obvious fact, in law, that law *as is*, is law. Justice may be an ideal; in actuality it is an accident. A logical system exists to preserve the law as is, and any other thinking is a somewhat absurd idealistic tendency, divorced from facts of life."[5]

And law, which has always been considered a conserving force in society, could not remain unaffected by these changes in the mode of man's living and the shape of his thinking. Law was bent in many directions, and felt the impact of many outside influences, sometimes in harmony with, and sometimes contradictory to past traditions. Law as idea and law as institution has helped to shape, and in turn was shaped by, this past century of scientific and intellectual discovery. The purpose of this article will be to sketch some of these key ideas in relation to the various schools of American jurisprudence that grew up around them.

Holmes' Legal Positivism: The Forerunner of Legal Realism

The impact of Darwin, and Comte after him, was felt heavily in jurisprudence. Law as a fixed mechanical guide, as a given set of rules that a judge could easily discover in the accepted treatises and codes (what the late Morris Cohen called the "phonographic theory" of the judicial function) was shattered by the positivistic and scientific impact of the late nineteenth century.

> ". . . The only certainties spared were the immediate certainties of sense, that is, of experience. All generalizations were characterized as merely tentative or probable. The search for universal truths was condemned as chimerical. . . . The application of positivism to jurisprudence was immediate. . . . With Hegelians battling the certainties of fact on the one hand and the Positivists the certainties of 'law' on the other, it is no

[5] *On Philosophy in American Law*, 82 U. Pa. L. Rev. 205, 208 (1934).

> wonder that the nineteenth century became, *par excellence,* the century of 'uncertainties.' . . .[6]

More than any other figure in American law, the late Justice Oliver Wendell Holmes was the man who laid the groundwork for the various schools of "legal realism" that followed him into the early part of the twentieth century. In rejecting the mechanistic approach, Holmes took the philosophy of positivism, which excluded everything but the *knowable,* and applied it to the law.

> ". . . The ultimate aim of positivism is to separate the ought from the is for the sake of the is, while the aim of the natural law philosopher is to serve the ought while refusing to draw a sharp distinction between the ought and the is. . . ."[7]

By centering his attention on experience (as against mechanical legal rules, logic, or natural law), Holmes forged the link between positivism and pragmatism, and thus gave rise to the functional study of actual legal events.

In the mind of Jerome Frank, Justice Holmes was the "completely adult jurist," a man whose monumental influence was the intellectual foundation for a full fifty years of jurisprudential controversy.

> ". . . Holmes saw that law is not pure mathematics; that the so-called self-evident truths of the traditional jurisprudence are not self-evident; and that many of the axioms of legal thinking do not appear on the surface but are concealed and must be dug out for inspection."[8]

Those writers who felt that legal rules are neither self-evident nor absolute took Holmes to their bosom, and the battle over the meaning of much of what Holmes wrote was begun in earnest.[9] More than any other statement by Holmes, the following quotation has been the hallmark of modern American legal thinking, especially the school of "legal realism":

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[6] Cowan, *Legal Pragmatism and Beyond,* INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 130-142 (Sayre ed. 1947).

[7] REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS 439 (1951).

[8] Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking,* 17 CORNELL L.Q. 568, 571 (1932).

[9] "The revolt against mechanistic doctrines in law, like that against mechanistic doctrines in the other social sciences, was a revolt from forms to function, from concepts to activities, from statics to dynamics, from individual ends to social ends, from the satisfaction of intellectual ideals to the satisfaction of human wants . . ." COMMAGER, THE AMERICAN MIND; AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880's 375 (1950).

> "The actual life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[10]

The assault on logic and especially on syllogistic reasoning was carried forth with vigor by John Dewey and his school, whose pragmatic bent was felt throughout modern American philosophy and education. As in the case of Holmes, Dewey felt that logic had only limited utility, and that the core of an idea was how it *worked* in actual practice, not its logical consistency or inconsistency. Referring to his own arguments against logic, Dewey, in an article which created widespread interest, wrote:

> "They indicate either that logic must be abandoned or that it must be a logic *relative to consequences rather than to antecedents,* a logic of prediction of probabilities rather than one of deduction of certainties".[11]

But when Holmes chose "experience" over "logic," what did he really mean? Was this meant to be the death-knell for logical inquiry in the law? Did this mean that legal *ideas* and jurisprudence in general were not themselves part of the history of law? Or was Holmes merely giving experience the *prior* claim to attention over logic, which had held sway during the long pre-twentieth century era of analytical jurisprudence? These and many other questions have plagued the "legal realists" for decades and still remain burning questions.

Nevertheless, Holmes' significant contribution to American jurisprudence was his positivistic approach to the study of legal phenomena, an approach which laid firm foundations for the functional, sociological, and realistic schools of legal thought that followed Holmes' assault on mechanistic jurisprudence.[12]

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[10] THE COMMON LAW 1 (1881).

[11] *Logical Method and Law,* 10 CORNELL L.Q. 17, 26 (1924). Dewey as philosopher was of course much admired by some of the legal realists.

[12] For a succinct discussion of Justice Holmes, the realist school, and legal functionalism see Morris R. Cohen, *A Critical Sketch of Legal Philosophy in America,* in LAW: A CENTURY OF PROGRESS, 1835-1935 266, 300-314. After mentioning Holmes and Bingham, and the contributions of Brooks Adams and Melville Bigelow to the volume, *Centralization and the Law* (1906), Cohen wrote: "On a somewhat wider philosophic basis was Bentley's The Process of Government, in some respects still the most vigorous expression of legal realism in America . . ." (At 304). Bentley's book, still regarded as a classic in its field, was published in 1908.

ROSCOE POUND'S SOCIOLOGICAL JURISPRUDENCE

Once the myth of mechanical legal rules was shattered, and Justice Holmes' positivistic approach to law had gained popularity, other areas of the law became vulnerable to broader analysis. Law as an institutional means for social control, as a device that men created for their own social good, came into view.

> ". . . The attitude of the sociological jurist is essentially functional. . . . He rather looks upon the law as a social institution which may be consciously bettered by deliberate effort whether through a process of making law or finding it. The sociological jurist affirms the efficacy of effort. He finds the sanction of law not in the force of Austin or the custom of Carter but in the social ends which law is designed to serve. From this it follows that the sociological jurist has no essential preference for any one type of legal precept (e.g. statute or custom) except as one particular type of precept may more effectively serve as a means to secure the desirable end in a particular situation. . . ."[13]

Roscoe Pound, as law teacher and as publicist, did more than any other man in America to carry legal analysis into the interstices of sociology itself. Pound's impact on American legal education, as well as on contemporary jurisprudence, has been enormous. As an innovator, Pound had first to free himself from the bonds that the mechanistic and rationalistic approaches of the analytical and historical schools of jurisprudence of the nineteenth century had placed on juristic thought. Having been trained as a botanist in his early years (he held a Ph.D. in botany from the University of Nebraska and taught that subject there) before he went to the Harvard Law School, Pound had an unusual background for the task he set before himself.

Some writers on American law feel that Pound's botanical training is responsible for his *taxonomic* bent in jurisprudence. This, I would think, was an asset in his intellectual training, not a weakness. Nevertheless, Pound had a thorough grounding in the scientific method of the natural sciences, unlike most of his later detractors, who regard themselves as "scientists."

But to some legal realists, especially Jerome Frank, Pound was a right-wing traitor who distorted Holmes' legal teachings.

> "Pound was the right wing of the Holmes' movement. It was in the highest degree unfortunate that the first vastly influential

[13] Reuschlein, *op. cit. supra* note 7, at 129-30.

> teacher to take over Holmes' insight should thus have warped it. It might almost be said that the Holmes' point of view would have been less retarded today in its consequences had Pound opposed it. For his mode of partially adopting it was to confuse and mislead those whom he influenced."[14]

Whereas, some legal realists could dispense with values as such, with *ought-ness* (which they replaced with the *is-ness* of legal activity), Pound felt that men's ideas about law are still an integral part of jurisprudence and cannot be ignored merely because some men have exaggerated the use of metaphysics in the past.

> ". . . This question of ought turning ultimately on the theory of values is the most difficult one in jurisprudence. Those who long for an exact science analogous to mathematics, physics or astronomy are inclined to seek exactness by excluding this problem from jurisprudence altogether. But such a jurisprudence has only an illusion of reality; the significant question is the one excluded."[15]

The study of law required an entirely new viewpoint of man's needs and desires and of the new social institutions that were being created in an era of rapid social change. If law was to be pragmatic, ends as well as means had to be kept in view. To be exclusively empirical was to ignore aspects of law that were nonetheless present. The law was no longer a simple rational object of study, but was a complex system of interrelationships.

> "For the simple picture of the legal order painted by the historical school, with its one ideal to which it attributed and by which it solved everything, must give way before the results of psychology and psychological sociology. We must give up the quest for the one solving idea. The actual legal order is not a simple rational thing. It is a complex, more or less, irrational thing into which we struggle to put reason and in which, as fast as we have put some part of it in the order of reason, new irrationalities arise in the process of meeting new needs by trial and error.
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> ". . . .
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> "If the argument up to this point has been sound, we require an interpretation of legal history that will take account of the men who act in finding and adapting legal materials, of the

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[14] Frank, *Are Judges Human?* 80 U. PA. L. REV. 17, 18, 233 (1931).

[15] Pound, *Jurisprudence,* 8 ENCYC. SOC. SCI. 477, 485 (1935), and SOCIAL CONTROL THROUGH LAW 103-134 (1942).

materials with which they act, of the circumstances under which they act, and of the purposes for which they act. . . ."[16]

What Pound sought was not a denial of the positivistic trend, but rather a channeling of the movement into what he called social engineering. Law as an *instrument* of social control at all levels of governmental behavior was the core of Pound's philosophy of law.

". . . Sociological jurisprudence may be said to be an attempt to reconcile the legitimate demands of liberty and authority, individualism and solidarism, change and stability."[17]

The study of the *law in action* was an important, but not the exclusive, part of Pound's sociological jurisprudence.

Some writers have labelled Pound's philosophy of law as "functional" jurisprudence. Others call it "pragmatic" or "experimental" in its approach. But regardless of the label, the major tenet of Pound's school of jurisprudence is that the sanction of law is not found in the command of a sovereign, or in a mechanical set of legal rules or principles, or even in the traditional customs or mores of the community, but is found in the *social ends* which law, as an instrument of the community, must serve.

In order to understand and describe what the law *is*, we must understand what the law *does*. But always implicit in the balancing of social interests, and in the preservation of the community's stability, is the problem of *values*. Pound has never denied this, any more than William James denied the reality of religious experience. The problem of values, from the point of view of the sociological jurist, is not the search for a final set of eternal truths, but is rather the choice of values that can best serve the social interests of a community in a particular situation.[18]

". . . Sociological jurists looking at law functionally have been more interested in what law does and how it does it than in what it is and so have looked primarily at the legal order. . . ."[19]

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[16] POUND, INTERPRETATIONS OF LEGAL HISTORY 21, 141 (1946). It is my feeling that Dean Pound's early training as a botanist gave him an invaluable sense of *organic* unity and interrelationships, and of the complexity as well as the unifying elements of nature and of human knowledge.

[17] Aronson, *Tendencies in American Jurisprudence*, 4 U. TORONTO L.J. 90, 99 (1941).

[18] In this connection see the Goble-Kenealy and Carpenter-Mueller disputes, the former at 41 A.B.A.J. 403 (1955), 1 CATH. LAW. 259 (1955), 2 CATH. LAW. 226, 3 CATH. LAW. 22; the latter at 7 J. LEGAL ED. 163 (1954), 7 J. LEGAL ED. 567 (1955), 8 J. LEGAL ED. 185 (1955).

[19] Pound, *Jurisprudence*, 8 ENCYC. SOC. SCI. 477, 478 (1935). For a critical discussion of Pound's views, see THE IDEA OF JUSTICE IN SOCIOLOGICAL

Dig deep into the Poundian thesis and the pragmatic test will always be found. It is implicit in almost all of the so-called functionalist writings on the law.

INSTITUTIONAL AND ANTHROPOLOGICAL APPROACHES TO LAW

Whereas Pound's emphasis was on the law itself, and its functioning in relation to the total social organism (society), other writers took the pragmatic, functional approach another step further in their institutional and anthropological approaches to the study of law. The entire basis of legal "reality" was broadened to include the study of *all* of the influences that helped to shape the legal order, especially in an era of dynamic and rapid social change.[20]

Douglas, Shanks, Berle, Means, Arnold, Hamilton and others studied law institutionally in terms of the *economic order.*[21] Karl Llewellyn chose to study a primitive society, the Cheyenne Indians of the American west, in order to see how legal sanctions differ in various cultures.[22] Others merely swept legal study into the whole panorama of the social sciences.[23]

JURISPRUDENCE (unpublished doctoral dissertation, Department of Political Science, University of Minnesota, 1953). Dr. Walter regards the neo-realist "group" as a part of the sociological school.

[20] "Professor J. W. Bingham, in 'What is Law?' . . . probably began the neo-realist exegesis." STONE, THE PROVINCE AND FUNCTION OF LAW; LAW AS LOGIC, JUSTICE AND SOCIAL CONTROL 415, n.191 (1946). Another "pioneer" article was Professor Corbin's *The Law and the Judges,* 3 YALE REV. 234 (N.S. 1914).

[21] See Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations,* 39 YALE L.J. 195 (1929); Hamilton, *Affectation with a Public Interest,* 39 YALE L.J. 1089 (1929); MEANS AND BERLE, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) and THE FOLKLORE OF CAPITALISM (1937); FAINSOD AND GORDON, GOVERNMENT AND THE AMERICAN ECONOMY (rev. ed. 1948); Mueller, *Inquiry into the State of a Divorceless Society,* 18 U. PITT. L. REV. 545 (1957).

[22] LLEWELLYN AND HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941); HOEBEL, THE LAW OF PRIMITIVE MAN (1954); *Cf.* MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); A. R. Radcliffe-Brown: "In its most elementary developments law is intimately bound up with magic and religion; legal sanctions are closely related to ritual sanctions. A full understanding of the beginnings of law in simpler societies can therefore be reached only by a comparative study of whole systems of social sanctions." *Law—Primitive,* in 9 ENCYC. SOC. SCI. 202, 206 (1935), repr. in his STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 219 (1952); Riesman, *Toward an Anthropological Science of Law and the Legal Profession,* 57 AM. J. OF SOC. 121 (1951). Mueller, *Tort, Crime and the Primitive,* 46 J. CRIM. L., C. & P.S. 303 (1955); Jeffery, *Crime, Law and Social Structure,* 47 J. CRIM. L., C. & P.S. 423, 430 (1956).

[23] See Frank, *An Institutional Analysis of the Law,* 24 COLUM. L. REV. 480 (1924); Cantor, *Law and the Social Sciences,* 16 A.B.A.J. 385 (1930); Riesman,

Still others carried the anthropological and comparative approaches to law into the field of comparative and international law. Sometimes the comparison was on the level of ideas; at other times, the level of institutions. Noteworthy examples have been the studies in comparative and international law at the Harvard Law School and the University of Chicago Comparative Law Research Center, and the studies on Soviet law and jurisprudence by Professor Harold J. Berman at the Harvard Russian Research Center and Professor John N. Hazard at Columbia University's Russian Institute.[24]

Despite their topical differences, all of these approaches to the study of law are held together by a common desire to study the law *in action*, whatever the tools of analysis might happen to be. Some writers have used economic analysis as the core of their studies (Hamilton), others sociological tools (*e.g.*, Jerome Hall and the Gluecks), and still others, the anthropological study of legal institutions and social mores (Llewellyn). At the root of these various approaches to the study of law, one can almost always find the pragmatic tradition laid down by Holmes, Dewey, Pound, and their followers.

> ". . . Effectively, the law is what it does. . . . It exists, so to speak, in the interstices of the social structure and regulates, more or less, all the exchanges between the elements of that structure. The law is not a body of abstract rules under which cases are formally subsumed. It is more truly a tissue of interacting elements of human behavior, beginning with the formulation of a rule by a legislature, continuing in the decision of a court and the consequent action of an official, and having its final incidence in the modified behavior of those for whom or against whom the law is enforced. . . . For a knowledge of the actual interrelationships of human beings, of their actual behavior, and of the effects of their behavior, is necessary to that conscious and methodical choice of ends and means which the scientific study of law requires".[25]

Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration, 50 YALE L.J. 636 (1941); Cowan, *The Relation of Law to Experimental Social Science*, 96 U. PA. L. REV. 484 (1948); the preface and section entitled "Conclusion: Law and Social Science," in MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE 382-384 (1933); CAIRNS, LAW AND THE SOCIAL SCIENCES (1935).

[24] Professor Hazard, both in his writing on Soviet law and jurisprudence, and on the teaching podium, has tried to be the dispassionate observer of Soviet legal behavior. In my opinion, these efforts have not always been successful because Soviet law in theory is sometimes quite different (at times radically different) from Soviet law *in action*.

[25] Sabine, *The Pragmatic Approach to Politics*, 24 AM. POL. SCI. REV. 865, 878-879 (1930).

With the advent of Freudian psychology and Watsonian behaviorism, another school of jurisprudence came into being, *viz.*, behavioristic jurisprudence, which was short-lived and perhaps only a transitional stage in the subsequent development of the psychological side of American legal realism. Behavioristic jurisprudence was much too mechanical for the emancipated "functionalist" writers of modern vintage. Although it could add some light to the behavioral study of judicial action, it was far too monistic in its approach to legal science.[26] In actual practice, however, the behaviorists were not any less dogmatic in their assertions than some of the addicts to Freudian psychoanalysis, whom I will discuss next.

Legal Realism and the Psychological Approach to Law

George W. Paton, reviewing the literature of modern jurisprudence, has attempted a classification of writers advocating a functional approach to law. Paton places Roscoe Pound's sociological jurisprudence in the "right wing" of this modern trend in American law, and the legal realists in the "left wing" of the functional school;[27] Jerome Frank is then the left wing of the left wing.

Since most of the legal realists would trace their origins to the philosophical skepticism of Holmes, the real problem is not that of finding the origin of their ideas as much as it is the variation in interpretation of what American legal realism is supposed to represent. Karl Llewellyn has vigorously denied the existence of a single school of legal realism.[28] And Roscoe Pound has always reminded his fellow brethren of the need for toleration of many schools of legal thinking:

> ". . . But in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work. . . ."[29]

The binding force of all of the legal realists was their *action-approach* to law, and their continual reiteration of the assertion that

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[26] *E.g.*, Malan, *The Behavioristic Basis of the Science of Law*, 8 A.B.A.J. 737 (1922) and 9 A.B.A.J. 43 (1923); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928).

[27] A Text-Book of Jurisprudence 18-22 (1946).

[28] Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1225-1256 (1931). Llewellyn has always been skeptical of the psychoanalytical approach to the study of legal behavior.

[29] Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697, 711 (1931).

law is not a body of rules, but a set of *facts* that can be observed in the official actions of courts or other public officials.[30]

Having rejected the rationalistic approach of the mechanistic and analytical schools, the legal realists set out to make jurisprudence an empirical study of actual events. Perhaps the basic difference between Pound's "functional" jurisprudence and the left-wing legal realists is the *degree* of emphasis on empiricism and the *content* of the materials being studied.

> ". . . The new realists have been doing good work at this point. But such critical activity, important as it is, is not the whole of jurisprudence, nor can we build a science of law which shall faithfully describe the actualities of the legal order and organize our knowledge of these actualities, merely on the basis of such criticism. There is as much actuality in the old picture as in the new. Each selects a set of aspects for emphasis. Neither portrays the whole as it is. . . . Faithful portrayal of what courts and law-makers and jurists do is not the whole task of a science of law. . . ."[31]

Most legal realists could accept Sabine's definition of legal behavior,[32] but few would go as far as did Schroeder, Frank, Lasswell, Malan, Robinson, Oliphant, and West in their defense of psychoanalysis and the use of psychological materials. As early as 1918, one writer, Theodore Schroeder, was setting a fast pace for the psychological legal realists, a good decade ahead of Frank and Lasswell:

> "By the deductive application of the general psychoanalytic principles we come to the conclusion that every judicial opinion necessarily is the justification of the personal impulses of the judge, in relation to the situation before him, and that the character of these impulses is determined by the judge's life-long

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[30] Generally speaking, the realist school has included such men as Frank, Hamiltom, Llewellyn, Powell, Cook, Oliphant, Moore, Radin, Hale, Yntema, Hutcheson, Patterson, Arnold, Robinson, Bingham, Lasswell, Lerner, Laski, Boudin, Garlan, Green, Douglas, Felix Cohen, Nelles, Rodell and McDougal. Harold G. Reuschlein differs from this somewhat. He classifies Cook and Oliphant as exponents of "The Scientific Method" and treats Hamilton separately, although he admits that he is a realist. Patterson is with Cardozo, Cairns, Morris Cohen, Fuller, J. Hall, and Cahn in a chapter entitled "Integrative Jurisprudence." Moore is classified as an "institutionalist" and is treated alone. Judge Hutcheson of "hunch" fame is discussed in "The Reign of Law." Table of contents, REUSCHLEIN. JURISPRUDENCE—ITS AMERICAN PROPHETS. These categories are of course not fixed and if the general requirements of the legal realist school are stated, most of the above-mentioned men could be included.

[31] Pound, *The Call for a Realist Jurisprudence,* 44 HARV. L. REV. 697, 699-700 (1931.)

[32] Note 25 *supra.*

series of previous experiences, with their resultant integration in emotional tones."[33]

For Harold Lasswell, the free-phantasy method was the elixir of the new jurisprudence, a jurisprudence, one might add, that would not only free us from the logical fetters of the past, but also from all of the prejudices and misconceptions of the pre-psychoanalytical era of the law. Here is a typical example of Lasswell's approach:

"Free phantasy is not a momentary relaxation of selective criticism, but a prolonged emancipation from logical fetters. . . .

". . . .

"It would be possible to fill many volumes with illustrations of the hitherto unseen meanings which have been discovered by men and women who learned to use the free-phantasy technique. They have often been able to find how and why their emotions tended to be aroused favorably or unfavorably toward individuals of their own or the opposite sex who exhibited certain traits, and to understand why they tended to choose certain secretaries, to sponsor certain proteges, and to be impressed by certain witnesses and attorneys. They have been able to inspect the phraseology of law, politics, and culture, and to extricate themselves from many of the logically irrelevant meanings which they tended to read into it".[34]

Although psychological jurisprudence had much to contribute to the new trends in legal thinking, it was perhaps regrettable that a nihilistic stream of influence tended to mar the really important insights that this school contributed to a fuller understanding of the judicial process.

JEROME FRANK'S CONTRIBUTION

Most of the legal realists could accept the contributions of Holmes and Pound without sacrificing their sense of balance for a novel approach to the study of law. Even a political scientist like

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[33] *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89, 93 (1918). Note the use of the word, "necessarily," which is the danger that most of the extremists of this school faced later on, succumbing in one fashion or another to the blatant assertion that the exposure of the unconscious drives of the individual judge will tell us everything we had failed to learn from jurisprudence before the birth of Sigmund Freud.

[34] *Self-Analysis and Judicial Thinking*, 40 INT'L J. OF ETHICS 354, 358, 361 (1930). Lasswell goes on to say that both logic and the free-phantasy method are necessary for the training of judges, administrators, and theorists. In his book, POWER AND PERSONALITY (1948), Lasswell was bold enough to recommend the psychoanalysis of all future political candidates and leaders. Neither major party has, as yet, seriously considered this suggestion.

the late Charles Grove Haines could understand the need for behavioral study of the law *without* addiction to either free-phantasy or hypnosis:

> "While in theory, then, we have often been led to believe that constitutional law has been developed solely through the application of the rules of formal logic in accordance with well established principles, in reality we have found it has been to a considerable extent the result of human forces in which the personality of the judges, their education, associations, and individual views are of prime importance".[35]

The *enfant terrible* came in 1930, with the publication of the late Jerome Frank's first book, *Law and the Modern Mind.* This book still remains a landmark in modern American jurisprudence, especially in its attempt at applying the tenets of psychoanalysis and child psychology to the behavior of judges and juries. Having broken through the "unconscious," Frank felt that the myth of legal rule certainty, which he called a fetish because it had become a kind of father-substitute, could be exposed and eliminated, with the end-result being self-awareness. Judges would no longer need to deceive themselves or the public. And once the "truth" was known and proclaimed throughout the land, glory be to jurisprudence and the legal profession for this new freedom and self-knowledge! The "unconscious" became the "inarticulate major premise" of psychological legal realism.[36]

Lasswell's articles had presaged what the psychological extremists had in store, but Frank's book was the storm-raiser if ever there was one. Even as confirmed a legal realist as Karl Llewellyn could not swallow whole-hog the tenets of psychoanalysis, the fetish, the father-image, and the hallowed free-phantasy technique:

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[35] *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges,* 17 ILL. L. REV. 96, 113-114 (1922). Rheinstein, *Who Watches the Watchmen?* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 601, 602 (Sayre ed. 1947). Id., *What Should Be The Relation of Morals to Law? A Round Table,* 1 J. PUB. L. 259, 287 (1952).

[36] *Cf.* Holmes, *The Path of Law,* 10 HARV. L. REV. 457, 466 (1897), repr. in COLLECTED LEGAL PAPERS 167, 181 (1920); dissenting opinion in Lochner v. N.Y., 198 U.S. 45, 76 (1905). Following FRANK'S LAW AND THE MODERN MIND (1930), LASSWELL published PSYCHOPATHOLOGY AND POLITICS (1931); Arnold his two books, *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937); and Edward S. ROBINSON followed with his LAW AND THE LAWYERS (1935). All of these men, together with Myres S. McDougal and Walton H. Hamilton, were at one time or another associated with the Yale Law School, which helped to father and nurture the psychological study of law and legal behavior.

> "One's first reaction to this is amazement. How is it possible for the canny student who discriminates so skilfully the proved from the dubious when reading a legal writer to swallow at a gulp a yearning for pre-natal serenity which is not only unproved but unprovable? How can the same mind which cuts through rule and *legal* concept to bare decision accept as dogmatic Must-Be's such stereotyped psychoanalytic concepts as womb-yearning, father-omnipotence, father-substitution, law as the father-substitute—accept them as applying not to *some* person, but to almost all. The basic fallacy of whole-hog psychoanalytic theory is the assumption that what may well be possibly or even probably *often* true is always or almost always true. . . ."[37]

The failure to understand the importance of values, the exaggerated use of psychological techniques,[38] and at times, a misuse, or even a distortion of the scientific method and its aims have been the major criticisms of the left-wing legal realists.

> ". . . Realism is still in the early stages of that infantile disease of adjustment to the scientific virus which all the disciplines, physical as well as social, have experienced and outgrown."[39]

Describing the *Is* of experience does not prescribe the *Ought,* and furthermore, the careless use of these two terms *(is* and *ought)* as though they were synonymous elements in a science of the legal order, has been a cardinal sin of those writers who regard themselves, in and out of the law, as "empiricists."

Benjamin Cardozo, Morris Cohen, and Max Rheinstein have all made the very important point that when the myth of absolute legal rules has been broken, something adequate must take its place, and scientific method *alone* is not the substitute. Rheinstein, writing about the myth of legal rules, says:

> "To us, who have eaten from the tree of knowledge, that happy state of innocence is no longer possible. . . . In the age of psychoanalysis, judicial self-deception simply became impossible. It has been destroyed, and with it there has been destroyed one

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[37] Book Review, Legal Illusion, in the symposium on *Law and the Modern Mind,* 31 COLUM. L. REV. 82, 85-86 (1931).

[38] "One cannot accept so simple an explanation of so complex a psychic phenomenon. Indeed, one is left to wonder what experience of the author's nursery days could have left him so dogmatic and unscientific in his explanation of that want of scientific open-mindedness in the law which he lays bare with such acuity and gusto." Cavers, book review, *Law and the Modern Mind,* 37 W. VA. L.Q. 322, 324 (1931).

[39] Aronson, *supra* note 17, at 102-03. *Cf.,* Radin, *Legal Realism,* 31 COLUM. L. REV. 824 (1931).

> of the most effective guarantees of judicial law observance. That destruction was inevitable and cannot be reversed. But there remains the task of establishing, or re-establishing, other safeguards, lest the door be opened to a despotism of judges which would be no less dangerous than any other despotisms."[40]

Jerome Frank, on many occasions, both in his speeches and in his writings has persistently tried to deny his addiction to the psychological approach to law or to any other single approach. One particular speech that he delivered before the Association of American Law Schools' annual meeting in Chicago on December 30, 1933, still remains the best short statement of his philosophy of legal realism. In this speech, Frank said:

> "Parenthetically, let me say that realistic jurisprudence was an unfortunate label, since the word 'realism' has too many conflicting meanings. In the light of its congeniality with experimental economics, I suggest that realistic jurisprudence be renamed 'experimental jurisprudence' and that those who lean in that direction be called 'experimental.' The attitude of the experimentalists among the lawyers and economists cannot be adequately compressed into a few words. But briefly it can be described thus: These men are critical students of institutions who are committed not to mere detached study but are devoted to action on the basis of their tentative judgments. . . ."[41]

Having only barely begun the statement of his argument, Frank, in my opinion, has already made two serious mistakes: (1) he has given up the term "realistic jurisprudence" for purposes of clarification, but this has led him into further confusion in the use of terminology, for in his later writings, Frank employs such terms as "legal actualism," "legal observationism," "pragmatic jurisprudence," "experimental jurisprudence," and "possibilism." (2) As I understand the scientific method, a detached empirical bent does *not* imply commitment to any particular set of values (except those

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[40] *Who Watches the Watchman? supra* note 35, at 602. For Cohen and Cardozo, a legal system in flux demands some signposts; if not fixed points, at least directional signals.

[41] *Experimental Jurisprudence and the New Deal,* 78 CONG. REC. 12412 (1934), originally given as an address at the 31st annual meeting of the Association of American Law Schools, repr. also under the title *Realism in Jurisprudence,* 7 AM. L. SCHOOL REV. 1063 (1934). For bibliographical materials on American legal realism, see GARLAN, LEGAL REALISM AND JUSTICE (1941) and Llewellyn, *Some Realism About Realism—Responding to Dean Pound,* 44 HARV. L. REV. 1222, 1257-1259 (1931). For the best critical assessment of American legal realism in article form, see Kantorowicz, *Some Rationalism About Realism,* 43 YALE L.J. 1240 (1934).

of the scientific method itself, which serve as methodological and not ethical norms). As Morris R. Cohen said:

> "To subordinate the pursuit of truth to practical considerations is to leave us helpless against bigoted partisans and fanatical propagandists who are more eager to make their policies prevail than to inquire whether or not they are right. . . ."[42]

Yet, Frank openly asserts that the "experimentalists" are *men of action,* which raises a number of questions regarding the relationship of the scientist (as scientist) to the problems of social reform, and particularly the question of value-judgments.[43] Perhaps Frank is implying that "oughtness" has now been replaced by "ifness" (what is possible is the *tentative* mid-point between the "is" and the "ought").

How can a detached empirical attitude be created by the "experimentalists" if their primary interest is the "immediate"? Is science the objective study of reality (within the limits set by human knowledge and fallibility), or is it what Frank calls the search for "a better future"? Without answering these questions, Frank then turns to a discussion of the experimentalist approach to the study of the judicial process:

> ". . . It has frequently expressed its doubt as to the efficacy of legal thinking which purports to begin with so-called 'legal principles.' It inclines to the belief—and here, for lack of time, I am talking sketchily—that many judges, confronted with a difficult factual situation, consciously or unconsciously, tend to commence their thinking with what they consider a desirable decision and then work backward to appropriate premises, devising syllogisms to justify that decision. They see that many judges phrase the two vague variables—the so-called "facts" of the case and the so-called "rules of law"—so as to produce opinions aesthetically and logically satisfactory in support of

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[42] REASON AND NATURE; AN ESSAY ON THE MEANING OF SCIENTIFIC METHOD 350 (1931).

[43] See my article, *The Sociology of Japanese Relocation,* 7 Etc.: A REV. OF GEN. SEMANTICS 222 (1950), where I discussed some recent attempts to arrive at scientifically-sound research in the social sciences. *Cf.,* on the problem of the scientific method and its practical applications: ". . . This is not to deny that compassion for human suffering and the desire to mitigate some of its horrors may actuate the social scientists. But the social reformer, like the physician, the engineer, and the scientific agriculturist, can improve the human lot only to the extent that he utilizes the labour of those who pursue science for its own sake regardless of its practical application." MORRIS R. COHEN, REASON AND NATURE 349-350.

judgments and decrees in accord with what they think just and right."[44]

It is the hope of this writer that some of Holmes' "cynical acid" will help the reader to wash away some of the trivia that is ever present in much of the realist and anti-realist literature.[45]

Jerome Frank has been a trail-blazer in the area of the relations between law and the social sciences. Especially in his early espousal of psychological theory, he has been a man who refused to be tied to the parochial "every man to his own" frame of reference. For Frank, as for poet Robert Frost, good fences do not make good neighbors. If this has not always culminated in accurate and systematic research on his part,[46] it has at least resulted in the desire on the part of others to venture forth into unknown areas outside of jurisprudence.

Although many writers in the field of American jurisprudence have agreed with some of Frank's ideas, he has not attempted to create a special school of thought or to entice slavish followers to his point of view. But many men have followed him in his quest for a more thorough understanding of the relationships between law and the other areas of man's knowledge of himself. In this sense, I feel that he is a figure of considerable importance and one who deserves the serious attention of any student interested in the legal development of our day.

Facts and values are both an integral part of the legal order, and in an era of rapid social, political, and legal change which this past century has witnessed, no student of jurisprudence can afford to act as though the area of values did not exist.[47]

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[44] *Experimental Jurisprudence and the New Deal,* 78 CONG. REC. 12412, 12413 (1934).

[45] ". . . You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law." Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461-62 (1897); repr. in his COLLECTED LEGAL PAPERS 167, 174 (1820). Some of the fervent anti-realists would feel that "trivia" is very weak language, if cynical acid is needed, for their purposes, legal realism, at its worst, is miasmal.

[46] Frank has consistently qualified his use of psychological theory and has expressed grave doubts about the excessive use of psychological materials by other writers. See his extremely critical book review of F. R. Bienenfeld's *Rediscovery of Justice,* 38 CALIF. L. REV. 351 (1950).

[47] See Pound, *The Lawyer as a Social Engineer* in *Law and Medicine—A Symposium,* 3 J. PUB. L. 292 (1954); Morris R. Cohen, AMERICAN THOUGHT: A CRITICAL SKETCH (1954), esp. The Realist School 169-176.

The functional school of modern jurisprudence (and particularly legal realism) has done much to liberate jurisprudence from the mechanistic dogmas of the past century, but theories that have themselves become dogmatic entrenchments for one idea or another merely impede progress, for monism is not the road to liberations from the sterile ideas of the past. To move forward, jurisprudence must utilize the findings of many schools of legal thinking as well as the contributions of other fields of thought. Some kind of integration, short of complete eclecticism, is perhaps the tentative answer.[48]

[48] See Jerome Hall, *Integrative Jurisprudence,* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 313-331 (Sayre ed. 1947), and *Unification of Political and Legal Theory,* 69 POL. SCI. Q. 15 (1954); and *Integrating Law and Other Learned Professions; A Symposium,* 32 VA. L. REV. 695 (1946). For a more thorough discussion of the subject of this article see PAUL, THE LEGAL THINKING OF JEROME FRANK: A STUDY IN CONTEMPORARY AMERICAN LEGAL REALISM (unpublished doctoral dissertation, Department of Political Science, The Ohio State University (1954).