Cornell Law Review

Volume 73
Issue 2 *January 1988*

Article 11

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Recommended Citation
Anthony Kronman, *Jurisprudential Responses to Legal Realism* , 73 Cornell L. Rev. 335 (1988)
Available at: http://scholarship.law.cornell.edu/clr/vol73/iss2/11

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JURISPRUDENTIAL RESPONSES TO LEGAL REALISM

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The intellectual movement we call legal realism is today, I think, most often thought of as having an exclusively negative or critical character. But while this movement historically has had a strongly negative component, it has also had a positive or constructive side as well. It is that aspect of legal realism on which I would like to concentrate in my remarks this morning. But before I get to the positive or constructive side of realism let me just briefly remind you about the other side of realism, the iconoclastic side of the movement, as Karl Llewellyn characterized it many years ago.[1]

In the late twenties and early thirties the realists attacked a certain conception of legal science which they associated primarily with the great Harvard treatise writers of the late nineteenth and early twentieth centuries, Beale and Langdell being the particular objects of their intellectual ire. The realists claimed that the Langdellian project, the project of working out in detail in each branch of law a comprehensive and rigorously structured doctrinal science, was impossible to achieve. The law in each of its particular branches is too filled with conflict, with incompletenesses of one sort or another, it leaves too much open, too much to be decided in the particular case, for it ever to be exhaustively controlling in the way that Langdell and his followers assumed it was or hoped it might be made to be.

This critical attack immediately opened up an important intellectual problem for the realists, one they were themselves aware of from the very outset. This was the problem, as it might be called, of arbitrariness in adjudication. Among the various forms of lawmaking, the realists were interested primarily in adjudication. From their critical attack on Langdellianism, they drew the conclusion that there is—most obviously in hard cases, but in the easy cases that judges decide as well—a space or gap between all of the available legal materials that might be brought to bear in the decisional process (rules, principles, policies, and so on) and the decision itself. There would always be, the realists said, some slippage between the normative materials the law gives judges to work with and the case

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1 K. LLEWELLYN, THE COMMON LAW TRADITION 11-15 (1960).

at hand. That space, they said, can only be filled by an arbitrary exercise of judicial will—by a choice, a decision, a judgment which is not constrained or controlled by the relevant legal rules and other norms but that must be free, even radically free, on certain views of the problem.

This conception of adjudication raised two important difficulties. The first might be described as the problem of intelligibility. If it is indeed true that every adjudication is at its heart an exercise of unconstrained will, as the realists' attack on Langdellianism seemed at times to imply, then it is difficult to know how one can either explain past judicial behavior or predict its future course. As the gap between decisional materials and outcome widens, the possibility of understanding judicial behavior, either in a backward or forward looking sense, becomes more and more problematic.

The second difficulty concerns the justification of adjudicative decisions. If judges do indeed make decisions in an arbitrary way, what basis can there be, from within the resources that the law itself provides, for justifying their decisions or criticizing them? If the decision in a case is undetermined by the available legal materials, how can the judgments that a judge makes in a case be meaningfully evaluated from a strictly legal point of view?

So these were the two problems—the problems of intelligibility and justification as I have called them—which the negative side of realism dramatized. Now to these problems the realists themselves offered a pair of responses. What I want to emphasize is the difference between these two responses and the implications of this difference for contemporary legal theory.

The first response, which I will for convenience's sake call the scientific response, is exemplified in some of the early work of Karl Llewellyn[2] and in those interminably long behavioral studies that Underhill, Moore, William Douglas, Charles Clark, and others conducted in the early thirties.[3] Its most perfect expression is to be found in the mature policy science of Harold Lasswell and Myres McDougal,[4] which assumed its definitive shape in the late thirties and early forties. The second response to the problems of intelligibility and justification I shall call the conventionalist response. It is exemplified most clearly in the late work of Karl Llewellyn.

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2 Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Llewellyn, *A Realist Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431 (1930).

3 *See* Schlegel, *American Legal Realism and Empirical Social Science: the Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

4 Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

The scientific branch of realism itself had two phases, each of which dealt with one of the two problems I have identified. Early on, some of the realists who saw and appreciated the consequences of their negative attack on Langdellianism concluded that a measure of intelligibility could be restored to the judicial process if behavioral laws were identified through empirical research that would explain the past conduct of judges and provide a basis for predicting how they would behave in the future. So these empirically-minded realists set off in search of the social, psychological, anthropological, economic, and other rules of judicial behavior that would describe what judges do in fact, even if the rules in question bear little relation to the norms that judges purport to be following in the actual decision-making process itself. The behavioral rules which these scientific realists claimed to have discovered are hidden regularities that lie below the doctrinal surface and which do not form a part of the law judges consider themselves obligated to apply. It is not the point or function of the law, these realists maintained, to describe the behavioral rules in question. This is the office, instead, of the social scientific disciplines from which they drew encouragement and support, the office of psychology, economics, and so on. The hope of the realists who took up the methods and insights of these other disciplines in an effort to rediscover patterns of regularity in adjudication was that by doing so they could restore the credibility of the old idea of a science of law (which of course Langdell had celebrated) but on a fundamentally different and more secure foundation—on extra-disciplinary or extra-legal premises. In doing so they struck a Faustian bargain, saving the old Langdellian idea of legal science by abandoning the claim that law is an autonomous discipline. From this point on, the intelligibility of adjudication was something to be understood, not from within the law, but from without, from the standpoint of some other discipline.

The second phase of the scientific branch of realism sought to supply, again from a point of view outside the law, the normative guidance which the critical or negative side of realism had made clear was unavailable from within the law itself. McDougal, for example, adopted exactly this strategy.[5] In deciding cases, judges have all sorts of legal norms on which to draw, but often (perhaps, indeed, in every case) these norms run out; they fail to provide the guidance they pretend to. We must therefore look elsewhere for instruction. Where should we look? We should look, McDougal said, to the higher and more comprehensive discipline of political philosophy. There we will find the foundational principles that we

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[5] *Id.*

need—and that judges need—in order to decide which of the many incomplete and conflicting legal rules available to us ought to be applied in any particular case. In its normative aspect, as in its purely descriptive one, the scientific branch of realism sought to realize Langdell's vision of a science of law, but by abandoning the idea of law as an autonomous or independent discipline. Here, too, the foundation for the re-establishment of a genuine legal science was to be found not in the law itself, but outside it, in the extra-legal discipline of political philosophy.

I now want to shift to the conventionalist response to the problem of arbitrariness in adjudication, a response that took a very different turn. This branch of realism, as I have said, is exemplified most clearly in Llewellyn's later work, and in particular, in his masterful essay on the common law tradition.[6]

Llewellyn also began by assuming that the law is underdeterminative of decisions in particular cases. There is always, he acknowledged, some free room for the judge to move; indeed, if there were not, presumably we would not need judges to decide cases, but could do it in some more mechanical way. But the existence of this interpretative space or gap should not, Llewellyn argued, lead us to conclude that adjudication is radically arbitrary in the way that some of the more iconoclastic realists like Jerome Frank suggested.[7] The process of adjudication is constrained, Llewellyn said, by all sorts of conventional understandings, by local traditions, and by shared professional norms, which guide the interpretation of rules, policies, and principles and give their application a predictability—an orderliness, rigor, and professionalism—which the negative side of realism overlooked.[8]

Of course, the rigor in question is not perfect, it is not as exact or scientific as one might properly expect in certain other disciplines, but it is pragmatically sufficient. It is enough to do the job and that, Llewellyn said, is all we can reasonably demand of a humane discipline like the law.[9] The conventional, professional understandings on which Llewellyn placed such emphasis offered, in his view, a perfectly adequate solution to the problem posed by the discovery of freedom in adjudication. They provided a basis both for prediction and for normative criticism, for assessing the quality of the work that judges do and for saying something intelligible about how judges are likely to decide cases in the future.

The distinction between these two responses to the problem of

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6 K. LLEWELLYN, *supra* note 1.
7 J. FRANK, LAW AND THE MODERN MIND (1930).
8 K. LLEWELLYN, *supra* note 1.
9 *Id.*

arbitrariness in adjudication—what I have called the scientific and conventionalist responses—is not, I think, merely of historical interest. In fact it marks what is perhaps the deepest division in contemporary jurisprudence—the division between, on the one hand, those who embrace one or another of the extra-legal disciplines to which the early realists themselves turned in their effort to put the law back on a scientific footing, and, on the other hand, those who stress the stabilizing force of convention, tradition, and habit in the process of adjudication.

I would put on the scientific side of this divide both the practitioners of Law and Economics and the adherents of Critical Legal Studies, the two best-organized and most influential movements in American academic law today. It seems to me that these two movements, despite their obvious differences, share in common an aspiration to re-found the discipline of law on something deeper, more secure, and ultimately less subjective than the law itself. In this respect, there is a striking similarity between some of Dick Posner's work and certain aspects of Roberto Unger's.

On the other side of the divide there is no identifiable movement, only a scattering of individuals. As examples I would name Stanley Fish and Owen Fiss, and listening to Charles Fried, I would have to place him on that side of this particular dispute as well. Perhaps I should also include Ronald Dworkin, who in his latest book puts very heavy emphasis on the notions of interpretive community and tradition as elements in a general theory of adjudication.[10]

The question to which all of this leads, and with which I would like to conclude, is the question of the ultimate compatibility of these two responses to the problem of arbitrariness in adjudication, a problem the realists placed at the center of jurisprudential attention and which has remained there ever since. Are they in fact compatible strategies? And what are the implications of adopting one of these strategies rather than the other? The scientific strategy is today unquestionably in the ascendency. What is the significance of this fact for the shape of our profession as a whole? I do not propose to answer these questions, but I ought in candor to confess my own allegiance to the conventionalist side in this controversy and to suggest that for those who feel drawn to the ideals of scientific realism, a question must inevitably arise as to whether the dignity of our profession can be maintained if its foundation is placed on something that lies outside it. The scientific realists struck, as I have said, a Faustian bargain: they sought to redeem the promise of Langdell's science of law but in doing so gave up the idea of law as an

10 R. DWORKIN, LAW'S EMPIRE (1986).

autonomous or local discipline. They thereby placed themselves in the service of external ideals, making it impossible for those who follow their lead to think of the law as an enterprise which is valuable for its own sake and not merely because it is a reflection of something else—something deeper and better and truer than the law itself.