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LOGIC AND LEGAL REALISM: THE REALIST AS A FRUSTRATED IDEALIST

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American legal realism has had a tremendous impact, and a beneficial one, on our legal institutions and on legal study. It has taught us that we must look at what the Law does as well as at what it says; that Law is a social process and is to be understood by using a variety of available empirical techniques; and, finally, it has taught us that our Law embodies social policies which must constantly be re-examined if the Law is to continue to serve its purpose as an instrument of social order and social justice.

Having made this obeisance to the Realist achievement, I turn to my subject, a critique of one of the errors it spawned. As has happened on other occasions in our intellectual history, the Realists pursued their quarry with such vigor that, in some instances, they overshot their mark. In destroying one dogma, they substituted another in its place.

The school of thought against which the Realists directed their attack was one which looked upon the Law as a complete and systematically ordered set of rules and looked upon a judicial decision as a form of deduction.[1] Holmes said of the view he opposed, "the official theory is that each new decision follows syllogistically from existing precedents."[2] And Frank described it in these words:

> [T]raditional jurisprudence is founded upon the erroneous notion—sometimes expressed but more often implicit—that there are self-evident truths about the judicial process which must not and cannot be questioned, from which self-evident truths a legal system can be worked out logically as the ancient geometers had worked out their system from self-evident geometrical axioms.[3]

Traditional jurisprudence regarded the Law as a closed system of rules, in which there was to be found a clearly applicable rule for every issue which might conceivably be brought before a court. And a judicial decision of a case involved no more than deducing the rights and liabilities of the parties from the appropriate authoritative rule as applied to the given facts. The only doubt possible within the system was doubt as to which authoritative rule fit the case and that doubt could always be

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[1] I assume, for the purpose of this article, that the Realists did not erect a straw man. Actually, there is, to my mind, some doubt on this point.

[2] Holmes, The Common Law 1 (1881).

[3] Frank, "Mr. Justice Holmes and Non-Euclidean Legal Thinking," 17 Cornell L.Q. 568, 571 (1932).

conclusively resolved by reference to the rules themselves as embodied in prior decisions of other courts or in statutes.

The Realist attack on this theory of Law and judicial decision took many forms, of course.[4] I shall only examine one aspect of it, however, an argument which may be called the argument from the logical indeterminacy of precedent.

The traditional theory of precedent made use of the Aristotelian syllogism. In most simple form, the theory was this: In order to determine what proposition a case stands for, it is necessary to identify a general rule such that from it and the facts of the given case the decision or judgment can be logically inferred.[5] In other words, to find the rule established by a case, one has to find the major premise of a syllogism such that together with the facts as the minor premise, the decision or judgment in the case can be deduced demonstrably.

The Realist challenge to this theory of precedent consisted in demonstrating that numerous syllogisms with numerous major premises can be logically derived from any decided case and that each of these major premises has the same logical warrant to be considered the rule established by that case. Stone states the position forcefully in these terms:

> In the logician's sense . . . it is possible to draw as many general propositions from a given decision as there are possible combinations of distinguishable facts in it. By looking at the facts it is impossible *logically* to say which are to be taken as the basis for the *ratio decidendi.* If there are ten facts, 1, 2, 3, etc., to 10, as many general propositions will explain the decisions as there are possible combinations of those facts. The question—What single proposition does a single case establish? is, it has been said, "strictly nonsensical, that is, inherently incapable of being answered."[6]

The consequence of the Realist argument is this: If every decided case can provide the logical basis for an infinite variety of authoritative rules, the closed and conclusive character of the system of Law disappears. A judge about to decide a case, who has before him a multitude of rules which may all be considered equally authoritative for the given case, is not bound by precedent at all. Free to choose between

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[4] Thus, for instance, besides the argument I examine in this article, the Realists contended (a) that judicial opinions took the form of logical deductions, but, in reality, this form was but a facade for the true reasons which explained the decision; (b) that "gaps" in the law—cases covered by no statute or decision—proved the traditional theory wrong; (c) that past decisions could only become law if applied by a court in determining rights of particular litigants and that, therefore, although past decisions were "sources" of law, they were not themselves legally binding.

[5] See, e.g., Allen, Law in the Making ch. 3 (5th ed. 1951); Black, Law of Judicial Precedents 40-41 (1912); Gray, The Nature and Sources of the Law § 55 (1st ed. 1909); Wambaugh, The Study of Cases ch. 2 (2d ed. 1894); Salmond, "The Theory of Judicial Precedents," 16 L.Q. Rev. 376 (1900). Also, compare Goodhart, "Determining the Ratio Decidendi of a Case," 40 Yale L.J. 161 (1930).

[6] Stone, The Province and Function of Law 187 (1946).

the equally available rules, he can and must exercise the choice on what the Realists have called "ethical," rather than logical, grounds.[7] Thus, if the Realist argument is true, a judge is logically free to legislate his concepts of social policy, rather than being bound by logic and precedent.[8]

Two cases may be used to illustrate the traditional position as well as the Realist critique of it. In the classic case of *MacPherson v. Buick Motor Co.*,[9] the plaintiff was injured while riding in a car which he had bought from a retail auto dealer who, in turn, had bought it from the defendant automobile manufacturer. The cause of the injury was a defective wheel supplied by a subcontractor and the defect was such that it could have been discovered had the manufacturer exercised due care. On these facts, the New York Court of Appeals affirmed a jury verdict for the plaintiff.

Twenty years after the *Buick* case was decided—it was not overruled or reversed in the interim—the case of *Hoenig v. Central Stamping Co.*,[10] came before the courts. The plaintiff, a caterer employed by a social organization, had attempted to pick up a coffee urn full of hot coffee and he was scalded because the urn had a defective handle. At trial, it was shown that the urn had been negligently manufactured, but, rather than having been sold to the plaintiff, it had been sold to the social organization which had employed his services.

Most common law lawyers reading the opinion in *Buick* would, I am confident, immediately regard it as controlling the decision in the *Coffee Urn* case. As in *Buick*, the manufacturer knew that the coffee urn was a thing of danger if negligently manufactured. Furthermore, the manufacturer, like the manufacturer in *Buick*, must have been aware that the organization which had bought the urn would cause other people to use it. Having been negligent in the manufacture of the urn, the defendant in the *Coffee Urn* case must be held liable to the plaintiff on the very same grounds that the manufacturer in the *Buick* case was held liable. In other words, the *Buick* case is a logical reason for deciding in favor of the plaintiff in the *Coffee Urn* case and, as a matter of fact, the court which decided the *Coffee Urn* case cited *Buick* as a controlling precedent.[11]

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[7] See, e.g., Stone, supra note 6, at 189; see also, Cohen, "The Ethical Basis of Legal Criticism," 41 Yale L.J. 201, 217 (1931).

[8] See, e.g., Holmes, supra note 2, at 1, the famous passage beginning, "The life of the law has not been logic: it has been experience." See also Frank, Law and the Modern Mind 128-30 (1930).

[9] 217 N.Y. 382, 111 N.E. 1050 (1916).

[10] 247 App. Div. 895, 287 N.Y. Supp. 118 (2d Dep't 1936), aff'd, 273 N.Y. 485, 6 N.E.2d 415 (1936).

[11] Ibid.

Along comes the sceptic, the Legal Realist, however, and says the decision in the *Buick* case is not a logical reason for deciding the *Coffee Urn* case for the plaintiff; to paraphrase Stone, "logically there was no compulsion" in the *Coffee Urn* case for the court to follow *Buick*.[12] It would involve no breach in logical consistency, no departure from the principles of logical reasoning, to decide the *Coffee Urn* case for the defendant, even though the *Buick* case was decided for the plaintiff. Although there may be other reasons—perhaps of policy or ethics—for citing the *Buick* case and deciding in favor of the plaintiff, the logic of the law, legal reasoning, does not require this result.

Radin argues one form of the Realist position, using the *Buick* case as an example.[13] He begins by setting forth the following four rules:

1. A manufacturer is liable to a user if his product is obviously and necessarily dangerous;
2. A manufacturer is liable to a user if his product is potentially dangerous if defectively made;
3. A manufacturer is liable to a user if his product could possibly cause injury;
4. A manufacturer is liable to a user for any product of manufacture.

Radin goes on to say that every one of these rules bears the same logical relationship to the facts and the decision of the *Buick* case; namely, the decision may be deduced from each of the rules together with a statement of the facts. Therefore, he concludes, in terms of the traditional theory of precedent, that each of these rules has an equal claim to be the precedent which the *Buick* case establishes.

The reason four rules, rather than only one may be derived from the *Buick* case, according to Radin, is that it is logically possible to characterize the facts of the case in at least four ways. Thus, although an automobile is a product which is "obviously and necessarily dangerous," it is also "potentially dangerous." Furthermore, the automobile may also be characterized as a "possible cause of injury" and a "product of manufacture." Depending upon how you categorize or characterize the car, one or another of the general rules stated can constitute the major premise of a syllogism in which, given the facts, the judgment of the case necessarily follows. Each of the rules or generalizations, therefore, may be said to be the precedent established by the *Buick* case. And "as far as logic is concerned, the decision to stop at any particular generalization certainly is not derived" from any past decision itself.[14] "A single prece-

[12] Stone, supra note 6, at 188.
[13] Radin, "Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika," 33 Colum. L. Rev. 199, 207 (1933).
[14] Ibid.

dent, however binding, is merely the initiation of a process of generalization."[15]

Oliphant gives a similar example.[16] Suppose a court had held that a father was not liable for inducing his daughter to breach her contract of marriage. The precedent established by this decision could equally well be one of, at least, four different general rules:

1. Fathers are not liable for inducing daughters to breach promises of marriage;
2. Parents are not liable for inducing daughters to breach promises of marriage;
3. No one is liable for inducing a breach of a marriage contract;
4. Parents are not liable for inducing a breach of any kind of contract.

Depending upon how you characterize or structure the facts, each of these rules, as well as numerous others which may be formulated with ease, could serve as the precedent established by the case because each, together with a statement of the facts, logically implies the judgment concerned.

Cohen puts the Realist argument in general form. He states:

> [E]lementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules .... Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case.[17]

Thus, according to the Realists, it is logically possible to take the fact that the accident in the *Buick* case occurred in 1915 as one of the distinguishing facts of the case.[18] The rule the case stands for, in terms of such an analysis, might be taken to be that manufacturers are liable for negligence to retail purchasers who were injured in 1915. This rule, together with the facts of the case, generates the judgment of the case with the same logical necessity as any number of other possible rules and it must, therefore, be taken to have the same logical warrant to be considered the authoritative rule of the case as any other such possible rule.

Similarly, a rule can be conceived which would logically support the judgment of the case by focusing upon the fact that MacPherson was injured by the breaking of a wheel, or the fact that the defendant was an automobile manufacturer. Each of these general rules could then be regarded, within the traditional theory of precedent, as the precedent estab-

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15 Id. at 209.
16 Oliphant, "A Return to Stare Decisis," 14 A.B.A.J. 71, 72-73 (1928).
17 Cohen, supra note 7, at 216.
18 Stone, supra note 6, at 188:
Moreover, even should a subsequent case have arisen identical in all other particulars it would still be logically not necessarily within [the earlier case's] . . . principle since one of the facts would ex hypothesi be different, namely, the time of the occurrence.

lished by the case, because each could serve as a major premise of a syllogism from which the judgment could be implied.

The point of the Realist argument is to show that there is really no logical basis for concluding that any decided case must stand for one rather than another general proposition of law and that, therefore, no court is ever logically bound by a prior decision. From this they infer that the process of decision is not a logical one, but rather one based on will and policy.[19]

Legal reasoning seems to dissolve under this criticism for it implies that the fact that the *Buick* case was decided for the plaintiff is not a logical reason for deciding the *Coffee Urn* case for the plaintiff. And yet, for any lawyer who is not a metaphysician, the two cases are almost "on all fours"; the *Buick* case is the very prototype of a logical reason for deciding the *Coffee Urn* case. If the Realist argument were true there would seem to be no room for logical reasoning in Law and Frank's conclusion that "*whenever a judge decides a case he is making law*"[20] would necessarily follow.

Having stated the Realist contention as forcefully as I am able to, I now turn to a critical examination of it. The fundamental error of the Realists is that they confuse a *logical reason* in Law with a *logically necessary reason.* They suppose that to be a reason at all means to be a logically necessary reason. This is the same fallacy the philosopher, David Hume, was guilty of when he denied the possibility of rational knowledge of matter of fact.[21] It rests on assuming that all knowledge and all reasoning must be of the character of mathematics, and must involve conclusions which are logically demonstrable or certain. The fact is, however, that our legal reasoning, like our reasoning about matter of fact, is not of the same character as our reasoning in mathematics and to measure the two sorts of reasoning by the same standards invites confusion.[22]

To contend that the *Buick* case can never provide a logical reason for deciding any other case is to say something which is either trivial or plainly false. It is trivial if "logical reason" is taken to mean "logically necessary reason,"[23] since I would doubt that any common-law lawyer

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19 See notes 7-8 supra.

20 Frank, supra note 8, at 128. [Emphasis added.]

21 See Hume, An Enquiry Concerning Human Understanding, in the English Philosophers From Bacon to Mill 585 (1939). One of the most famous passages of Hume's argument bears a striking resemblance to the Realist argument.

22 See Toulmin, The Uses of Argument (1958); Moore, Hume's Philosophy, in Philosophical Essays (1922); Edwards, "Russell's Doubts About Induction," Mind, April 1949, p. 30; Dewey, "Logical Method and Law," 10 Cornell L.Q. 17 (1924).

23 By definition, proposition X is a logically necessary reason for proposition Y, if it would involve self-contradiction to assert the truth of X and the falsity of Y. See, e.g., Beardsley, Practical Logic 278 (1950); Cohen & Nagel, An Introduction to Logic and Scientific Method 56 (1934).

ever supposed the *Buick* case was a *logically necessary reason* for any other decision. It is false if "logical reason" is used in the ordinary sense in which it is used in law since the *Buick* case is, by definition, a logical reason for deciding for the plaintiff in the *Coffee Urn* case. *Buick*, in other words, is the very model of a "logical reason" for deciding the *Coffee Urn* case, a model law teachers would use to teach a student what a logical reason in law is. And it is as bizarre and wrong to deny this as it would be for any one to tell me that the piece of furniture I am writing this manuscript on is not really a desk because it has no drawers.

My point can, perhaps, be made even more forcefully by using a hypothetical. Let us suppose that a week after the *Buick* case was decided another person was injured under the same circumstances as existed in *Buick*, the only difference between the two cases being that in the one the plaintiff's name was MacPherson while in the other it was MacDougal. Would any common law lawyer deny that, despite the fact that it is, in the Realists' sense, "logically possible" to decide otherwise, *Buick* would provide an absolutely convincing legal argument for the plaintiff MacDougal's recovery? Would any common-law lawyer contend that it would be necessary or even relevant to offer reasons of social policy or ethics to reach this result? Is not the decision in *Buick* a sufficient reason for deciding in favor of MacDougal?

And, yet, the Realists would tell us that, "to the cold eyes of logic the difference between the names of the parties in the two decisions bulks as large as the difference between care and negligence."[24] The *Buick* case, they tell us, does not logically dictate a decision for the plaintiff in our hypothetical case of *MacDougal v. Buick* because, in the first place, the holding in *Buick* concerns the rights of MacPherson and a legal conclusion about MacPherson's rights is *logically* independent of a legal conclusion about MacDougal's rights. Secondly, there is no more logically compelling reason to say that the *ratio decidendi* of the *Buick* case is that a manufacturer of a dangerous article is liable to plaintiffs for whose use the product was intended, than to say that its *ratio decidendi* is that plaintiffs named MacPherson may recover against manufacturers of dangerous articles.

What the Realists tell us seems provocative because it seems that when they deny that the *Buick* case is a "logical reason" for deciding for the plaintiff in *MacDougal's* case they are using "logical reason" in the same sense a law teacher would use it in saying the *Buick* case is the best reason in the world for deciding in favor of MacDougal. But, in fact, all the

[24] Cohen, supra note 7, at 217.

Realists mean, as we can tell by examining the evidence they offer, is that *Buick* is not a *logically necessary* reason for deciding in favor of MacDougal.

The fact is that *Buick* would surely control and dictate a decision for MacDougal and this conclusion is the very prototype of legal reasoning. Furthermore, the *Buick* case is decisive of MacDougal's rights despite the fact that the two cases are logically independent, in the sense that it would involve no self-contradiction to award damages to the plaintiff in *Buick* and deny them in *MacDougal's* case. Legal reasoning differs from mathematical reasoning in a way similar to that in which inductive reasoning differs from mathematical reasoning; both legal reasoning and inductive reasoning lack logical certainty.

The root difficulty with the Realist position may be traced to their assertion that any case can logically support an indefinite number of rules of law or precedents, to their belief that "it is possible to draw as many general propositions from a given decision as there are possible combinations of distinguishable facts in it."[25] In what sense, if any, is this true?

It is true only in the limited sense in which it is *possible* that the sun might not rise tomorrow morning; namely, the sense in which it is *logically possible* that it will not rise, the sense in which it does not involve self-contradiction to assert that it will not rise. But this sense of what is "possible" should not be confused with "empirical possibility" or "legal possibility."

It is *logically possible* to say that the *Buick* case supports the proposition that manufacturers under the circumstances involved in the case are only liable to plaintiffs named MacPherson. But is this a *legally* possible proposition of law to be derived from the *Buick* case? Hardly, because the rule that a plaintiff's name is irrelevant in a negligence suit is as authoritative as any rule can be! In general, of the many *logically* possible propositions of law the *Buick* case may be said to support, only some small number of them are *legally* possible. And an examination of the lists of possible propositions which the Realists say can be derived from given decisions of law,[26] makes it apparent that these lists contain numerous propositions which, although logically possible, are legally impossible, because they fly in the face of well-established legal principles or precedents.

I must admit, as Hart has recently, that I am unable to provide precise criteria for "legal possibility" or "any fresh general description" of the

[25] See Stone, supra note 6, at 187.
[26] See, e.g., Oliphant, supra note 16; Radin, supra note 13; Stone, supra note 6, at 187-88.

theory of precedent.[27] While I reject the traditional theory of precedent found in Black, Wambaugh, and Allen,[28] for the very same reasons the Realists reject it, I am not prepared to conclude, as the Realists have, that the decision in *Buick* is not logically binding on the *Coffee Urn* court or on the court which is to decide the hypothetical case involving MacDougal. Nor am I prepared to say that every legal decision involves an ethical choice or a decision of social policy.[29]

I believe, as Cardozo did,[30] that in some cases—*MacDougal's* case, for instance, or the case of a man going sixty miles an hour in a thirty mile an hour zone for no other reason than that he had the urge to do so—the rule to be applied is absolutely clear and arguments of social policy are irrelevant. In other cases, whether because a statute is vague, or because the precedents are inapposite or in conflict, or because there is neither statute nor precedent to cover the case, the rule to be applied is not clear and resort must be had to other types or kinds of reasons—ethical, historical, etc.—to decide the case.

Even in this latter group of cases, where the rule to be applied is not certain, the range of logical choice is not as wide as the Realists seem to suggest. Precedent and legislative history give point to the vague statute and narrow the area in which reasons of policy may operate. Where the rule established by a decided case is not clear from the facts and decision of the court, the language of the court's opinion in the case, other decisions which apply the given decision, and other precedents and principles of law narrow the number of "legally possible" rules which a case may stand for and thereby limit the range of judicial law-making.

Hart, in criticizing the Legal Realists along similar lines, points out that "legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules."[31] Frustrated in their attempts to find logically necessary precedents, the Legal Realists overreacted by virtually abandoning, at least in theoretical terms, the system of precedent itself. If a precedent was not a logically conclusive determinant for the decision of a case, it could not serve as a logical reason for the decision at all.

The fact is, I think that we are not bound to accept either the traditionalists' view of the judicial decision as being determined with logical necessity by prior decisions or the Realists' view that prior decisions are in no sense logically binding on future decision. A more sensible theory

[27] See Hart, The Concept of Law 131 (1961).
[28] See note 5 supra.
[29] See notes 7-8 supra.
[30] See Cardozo, The Nature of the Judicial Process passim (1921).
[31] See Hart, supra note 27, at 127. For a similar point, see also Wasserstrom, The Judicial Decision ch. 2 (1961).

than either of these is the one which sits between them; namely, that a judge, in deciding a case, is bound to some degree by prior decisions, the degree differing depending upon the character of the precedents and the character of the legal issue before him.

Roughly speaking, we may distinguish at least three types of systems of rules. There are some systems of rules, in the first place, where every decision is covered by an available rule, where there is no doubt which is the appropriate rule, and where there is no doubt as to how the appropriate rule is to be applied. Such a system of rules is found, for instance, in the game of chess.

At the other extreme, we know of systems of rules which lack all fixity. New rules are constantly being established, without rhyme or reason, and it is never clear which rule applies or how it is to be applied. The wild, free-moving games of our youth—cowboys and indians, or war, for instance—in which we made the rules up as we went along fit this pattern. These games "grew like topsy," limited only by the imagination of the players.

Somewhere between these two types of systems of rules is the system of rules used in a game like sandlot baseball. Here there are rules but not a complete set of them. And, although some of the rules are crystal clear, others are so vague that in many instances we do not know how they are to be applied. Furthermore, new situations frequently arise during a game —say, the fact that someone is called home to dinner and now only 17 men are available to play—which require a new rule. Within such a system of rules, there is some fixity of rule and application, but not the kind of complete determination which is found in the rules of chess.

The traditionalists conceived of Law as a system like the rules of chess. The Realists, to their credit, convincingly demonstrated that this analogue was totally inappropriate. In its place, however, they attempted to fashion a model of the system of Law somewhat like the wild boyhood games described above, which have rules that never stand still, so to speak. This model or analogue, however, is as mistaken as was that put forward by the traditionalists.

Somewhere between these two mistaken models lies the truth; namely, that Law is, in respect of the logical character of its rules, like the game of sandlot baseball. It has rules, some vague and some precise, but as occasion demands, it modifies its rules or creates new ones to fit unforeseen contingencies. Once our generation overcomes the compulsions generated by the Realist dogma that there are no rules in Law we may be able to sit down and describe the bounds and character of the logic of the Law.