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The Myth of Legal Realist Skepticism

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The Myth of Legal Realist Skepticism

Dan Priel*

Abstract: Here are some things everyone knows about the legal realists: They didn't believe in legal rules, they thought—and demonstrated—that law is inherently indeterminate, and they taught us that it is the personality of the judge that decided cases. To the extent that they studied legal doctrine, it was in order to demonstrate its incoherence. This is why they “vociferously objected” to the Restatements. It is the victory of their ideas that killed the doctrinal legal treatise as a respectable form of scholarship in the United States. In addition to this jurisprudential radicalism, the legal realists were also politically radical. Their work burst the myth of legal objectivity by mercilessly exposing the political ideology of *Lochner v. New York*. More generally, their skepticism about legal rules exposed the inherent contradictions of liberal legalism.

Now for some inconvenient facts: Most legal realists believed legal rules existed and mattered for legal decisions, they believed the law is mostly determinate, and worked to make it more so. Most of them *never* mentioned *Lochner* in their writings; the few who did dismissed the idea that the majority was driven by *laissez faire* ideology. What did they stand for, then? I argue in this Article that one way of getting a sense of what the realists believed is by looking at who they considered their intellectual allies. This exercise yields some surprising results. Rather than seeing the writing of a legal treatise as inconsistent with legal realism, they praised Arthur Corbin's treatise *for* its realism. Benjamin Cardozo was described as one of the most sophisticated “anti-realist” judges of the last century, and yet virtually all the legal realists admired him. The realists similarly admired the work of Wesley Hohfeld, not because it revealed law's reactionary politics, but because, as Llewellyn put it, it “cuts very close to the atomic structure of the law on its conceptual side.” Almost all legal realists spoke in favor of the Restatements, and many were involved in them.

Does this mean the familiar narrative of the realists' opposition to the ideas of Langdell and Beale is also mistaken? Not quite. The realists did object to their ideas, but—and here comes another surprise—theirs was not a modernist challenge to the “classical” ideas of their predecessors. Rather, legal realists like Llewellyn and Frank were traditionalists who sought to revive old ideas being lost due to the modernistic project spearheaded by Langdell's Harvard.

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INTRODUCTION

Described by Richard Posner as “the worst book ever written by a professor at a major law school,”¹ Fred Rodell’s *Woe Unto You, Lawyers!* suggested, among other things, that the practice of law be made a crime.² When it was first published, some readers considered it an elaborate satire,³ but Rodell insisted he meant it all in earnest. And so, when in 1957 he was about to publish a second edition of the book, he looked for someone to give the book some heft, and he turned to Jerome Frank to write a few introductory remarks.

The rules of the foreword for someone else’s book are unwritten but familiar. The invitation to write such a piece carries with it an implicit acknowledgement that its recipient is a Famous Person, invariably more so than the author of the book; it typically also implies that Famous Person had been “an inspiration” for the book. In consideration for being so recognized, the foreword author is required to explain to prospective readers just how groundbreaking is the book they are about to venture into.

Frank was a well-known federal appeal judge and a prolific author. He published in both academic journals and in general-interest magazines; he even made it to the cover of *Time* magazine.⁴ He somehow also managed to have a bit of a bad-boy reputation, and had been a role model of sorts for Rodell.⁵ Like Rodell, Frank published books that scandalized some of the academic establishment, including the very same establishment where Rodell was a tenured professor.⁶ To top it all, a few years earlier Frank recommended the republication of the book.⁷ When Jerome Frank agreed to write a short

¹ See RICHARD A. POSNER, *OVERCOMING LAW* 2 (1995). Posner is not alone. When published, the book elicited generally hostile reactions. See Neil Duxbury, *In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique*, 11 OXFORD J. LEGAL STUD. 354, 373 (1991). See also note 10, *infra*, and accompanying text.

² FRED RODELL, *WOE UNTO YOU LAWYERS!* 178 (2d ed. 1957) (1939).

³ Not least among them was Karl Llewellyn. See K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 613 (1940).

⁴ See TIME, Mar. 11, 1940, <http://content.time.com/time/covers/0,16641,19400311,00.html>. The issue contained a sympathetic profile. See *Intellectual on the Spot*, TIME, Mar. 11, 1940, <https://content.time.com/time/subscriber/printout/0,8816,789708,00.html>.

⁵ Rodell admitted his admiration for Frank in Fred Rodell, Book Review, 25 IND. L.J. 114, 114 (1949) (reviewing JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949)).

⁶ On the debate over the hiring of Frank at Yale see LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 138–39 (1986).

⁷ See Jerome Frank, Book Review, 5 J. LEGAL EDUC. 223, 224 n.11 (1952).

introduction for his book, Rodell must have thought he had the right man for the job.

With the foreword he produced, Frank indeed proved himself an iconoclast. Ignoring the rules of the genre, he was rather circumspect in his praise for Rodell's book. He welcomed its republication, but he "certainly [did] not"⁸ agree with all Rodell's views on lawyers: Rodell, Frank said, "repeat[s] popular misconceptions of lawyers and judges";⁹ he "unfairly ascribes to the legal profession too much selfishness and hypocrisy; he ignores the many lawyers who have espoused unpopular causes, and those who have unostentatiously devoted their lives to contriving valuable social inventions designed to meet the crises of their times."¹⁰ As for the book's reform proposals, Frank thought them "too glib," "hopeless," "naive," and "unworkable."¹¹ Not exactly a ringing endorsement from someone with a reputation of a nihilist who thought the law was an elaborate cover for judges' personal preferences.

Here is another anecdote, this one about Karl Llewellyn. Everyone who knows something about legal realism knows that its existence as a "movement" has much to do with Llewellyn's essay *Some Realism about Realism*, which was written in response to a critical essay by Roscoe Pound.¹² In his reply, the closest thing the realists ever got to a mission statement, Llewellyn named twenty scholars as legal realists and identified several common themes found in their works. This exchange is responsible, in part, for the popular image of the legal realists as young upstarts fighting a powerful old guard, of radical critique challenging staid conservatism, of Yale and Columbia taking on Harvard.

Six years after this exchange, Pound published another essay. In it, he celebrated the common law "as a tradition of taught law," which relies on "principles and doctrines" to organize the law in a way that "makes for certainty of application, taking care of the need for stability." At the same time, the application of these general principles to particular cases "takes care of the need for change."¹³ He praised the common law's ability to achieve

⁸ Jerome Frank, *Introduction* to *RODELL*, *supra* note 2, at xi, xii.

⁹ *Id.* at xiv.

¹⁰ *Id.* at xiii.

¹¹ *Id.* In line with this essay's thesis, I note that other legal realists were also critical of Rodell's book. See Max Radin, *Woe Unto You Lawyers: A Review*, 38 MICH. L. REV. 504 (1940). Karl Llewellyn was slightly more friendly but concluded that Rodell's book "leaves the reader emotionally and esthetically confused." Llewellyn, *supra* note 3, at 613.

¹² See Roscoe Pound, *The Call for Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

¹³ See Roscoe Pound, *What Is the Common Law?*, in *THE FUTURE OF THE COMMON LAW* 3, 10 (Roscoe Pound ed., 1937).

balance the two, “the general security, which calls for stability, and the individual life, which demands change.”¹⁴ He mentioned the common law’s age as one of its strengths,¹⁵ but also extolled its enduring “vitality.”¹⁶ Pound went on to warn of “the attacks upon the common law...which are going on in every corner,”¹⁷ and their “challenge [to] the rational and historical methods on which we had built our faith in the last century.”¹⁸ But in his concluding words, he reassured readers that common law decisions will continue to be a “quarry for English-speaking judges and lawyers and lawmakers and law teachers for generations to come.”¹⁹

Anyone familiar with standard accounts of legal realism will tell you these are the kind of vacuous banalities that the legal realists set themselves against, especially when coming from the former Dean of Harvard Law School, the law school many of the realists saw as the enemy. Now for the reality: Llewellyn described Pound’s essay as “[t]he best and most rounded discussion [he] ha[d] seen in print on what ‘our’ common law is today.”²⁰ Llewellyn acknowledged some differences “in emphasis and even in substance,” but praised the “care and balance” with which Pound identified the “real and vital things which do make up the essence of our common law.”²¹ When a few years later he published his own essay on the American common law tradition, he said many similar things.²²

These are minor tidbits in the history of legal realism, but they are illustrative of a bigger point this Article aims to establish: For the most part, the legal realists were not radical; they were not rule skeptics; they respected legal doctrine; and they were friendly to, often admirers of, the common law. They believed law was real and thought it was a means for improving society.

All this does not match the prevailing understanding of legal realism, which sees them as radicals in two distinct but related ways. The first sense is political: In this sense, the realists are said to have held views that were at odds with mainstream political values and even inconsistent with democracy. In the second sense, the realists were radical in a more narrowly legal or

¹⁴ *Id.*

¹⁵ *See id.* at 20 (“a tradition with its roots in the Middle Ages is not without advantages”).

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 23.

²⁰ K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance* (pt. 1), 48 YALE L.J. 1, 2 n.1 (1938).

²¹ *Id.*

²² *See* K.N. Llewellyn, *American Common Law Tradition, and American Democracy*, J. LEGAL & POL. SOC., Oct. 1942, at 14, 30–33.

jurisprudential sense, as they denied basic tenets of mainstream legal thought. In this sense, the realists were skeptics of law's ability to guide conduct, they denied that law could have any determinate content, and denied the existence of legal rules.

Though claims to realist radicalism in either of these senses predate the rise of critical legal studies in the middle of the 1970s, I believe it is their writings that solidified this now-standard image of the legal realists.²³ Interpreting the legal realists in their own image, many critics saw the realists as their 1930s precursors, and shaped the prevailing understanding of legal realism. It is probably thanks to their frequent drawing of a link between legal form and political substance, that it is common these days to see the two versions of realist radicalism, the political and the legal, as closely intertwined. In the words of James Boyle,

[t]he realists started off by pointing to the vacuity, circularity, and medieval silliness of legal reasoning and by stressing the role of policy rather than rules in judicial decisions....The implications of their critique were more corrosive than they imagined...and seemed to undermine belief in the "rule of law" and thus destabilize the whole story on which the liberal state depended.²⁴

Despite the demise of CLS as an intellectual movement, suggestions that the realists had a radical political agenda are not entirely a thing of the past and may even be making something of a comeback.²⁵ Moreover, as the words just

²³ For a small sampling see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* ch. 7 (1992); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 477–503 (1988) (reviewing KALMAN, *supra* note 6); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1219–59 (1985); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 23, 33–35 (David Kairys ed., 3d ed. 1998). In Kalman's original account of legal realism, see KALMAN, *supra* note 6, politics played a small role. After being criticized for its absence, see Singer, *supra*, at 476–77, Kalman chastised herself for missing it. See Laura Kalman, *Eating Spaghetti with a Spoon*, 49 STAN. L. REV. 1547, 1558–59 (1997) (reviewing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)). I think Kalman had the better view the first time around.

²⁴ James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 692 (1985); accord William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, at 266, 284 (Michael J. Lacey & Knud Haakonssen eds., 1991) ("the conception of adjudication that dominates most Realist writings is inconsistent with a truly democratic system of government"). This reading was accepted even by critics of CLS. See, e.g., Owen M. Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1, 9 (1986).

²⁵ The idea now seems to get a new lease of life with the emergence of the law-and-political-economy perspective. See, e.g., Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J.

quoted show, it is not easy to disentangle the two senses of radicalism. According to a standard critique, mainstream political ideology (sometimes called “legal liberalism”) is premised on the rule of law, which in turn depends on law having sufficiently clear meaning that people may be guided by. If the latter is the myth, then the political foundation for state authority collapses with it. Therefore, even though the focus of my essay is on the realists’ jurisprudential claims, I will spend a few pages arguing against the suggestions that the realists were advancing a radical, let alone nihilist, political agenda.²⁶

All available evidence suggests that most of the realists were standard-fare New Deal Democrats, which, as demonstrated by Roosevelt’s four consecutive election victories (followed by one more by Truman), aligned them with the majority of Americans of their time. Many of them held senior positions in various federal agencies during the Roosevelt administration, some became federal judges.²⁷ To the extent that they expressed themselves politically, virtually all were well within the political mainstream.²⁸ Contrary to claims that they held views inimical to democracy, liberal values, or the rule of law, most of the legal realists were cheerleaders for American democracy and saw law as a beneficent tool for the improvement of society. Law, Frank wrote, “is one of the best means worked out by human society for the adjustment of its many difficulties.”²⁹ Charles Clark praised the realists’ work for

1784, 1796, 1818–19 (2020); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1331, 1337 (2016). See also Samuel Aber, *Legal Realism: An LPE Reading List and Introduction*, <https://lpeproject.org/wp-content/uploads/2020/07/Legal-Realism-Primer.pdf>.

²⁶ For a different argument for a similar conclusion see Neil Duxbury, *The Theory and History of American Law and Politics*, 13 OXFORD J. LEGAL STUD. 249, 265–67 (1993) (reviewing HORWITZ, *supra* note 23).

²⁷ See Roy Kreitner, *Biographing Realist Jurisprudence*, 35 LAW & SOC. INQUIRY 765 (2010) (book review).

²⁸ I know of only one clear exception. See Felix S. Cohen, *The Socialization of Morality*, in AMERICAN PHILOSOPHY TODAY AND TOMORROW 83, 91–94 (Horace M. Kallen & Sidney Hook eds., 1935) (comparing Soviet communism favorably to the United States). Unlike some of Cohen’s law review articles, this article was (and remains) virtually unknown, and so has had very little impact on subsequent assessment of legal realism.

²⁹ Jerome N. Frank, *Women Lawyers*, WOMEN LAWYERS J., Winter 1945, at 4, 4; Jerome N. Frank, *Experimental Jurisprudence and the New Deal*, 78 CONG. REC. 12412, 12413 (1934); Jerome Frank, Book Review, 38 CALIF. L. REV. 351, 355 (1950). For a defense of the regulatory state as a means of protecting democracy see JEROME FRANK, IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY 7–8, 148–89 (1942); Llewellyn, *supra* note 22. See also note 136, *infra*, and accompanying text.

providing a “cleansing” perspective on the actual work of legal institutions that was necessary for “democratic progress.”³⁰

There is also little basis for the view that the realists interpreted common-law doctrines through a political lens of class interest.³¹ Though many realists acknowledged that judges’ background (including their political views) affected their understanding of the law,³² they did not analyze law in political terms. Llewellyn, for example, described much of commercial law, his main area of interest, as “largely non-political in character.”³³ It is also difficult to find in realist writings any hints of “structural” or systemic thinking about how one’s place in society shapes one’s ideology, a staple of CLS scholarship. It is likewise rare to find in realists’ works the suggestion that lawyers or judges use the law to promote their own (class or professional) interests.³⁴ On the contrary, many legal realists who encountered this idea dismissed it out of hand.³⁵ Llewellyn called it a “dead horse,” and urged

³⁰ See Charles E. Clark, *The Function of Law in a Democratic Society*, 9 U. CHI. L. REV. 393, 395 (1942); *id.* at 405 (“the trend of law and jurisprudence has been healthy, sound, and most deserving of encouragement”).

³¹ *Contra* William W. Fisher III et al., *Introduction* to AMERICAN LEGAL REALISM, at xi, xiv (William W. Fisher III et al. eds., 1993) (“the fascination with the ideological functions of legal doctrine manifested in most Critical Legal Studies writings—are all traceable to the contentions of the Realists”); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61, 96 n.154 (2009) (“The old legal realists and their immediate predecessors generally associated the common law with reactionary doctrine”).

³² See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 113 (6th prtg. 1949); Llewellyn, *supra* note 3, at 592–93; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881 & n.35 (1931); Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 13 & n.15 (1937). For some this personal aspect extended to allowing for some influence of their health. See Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Subject*, 68 BUFF. L. REV. 899, 906–18 (2020).

³³ WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 580 (2d ed. 2010) (quoting from an unpublished memorandum by Llewellyn written in 1940). Even more significantly, in an assessment of Benjamin Cardozo’s judicial career, legal realist Walton Hamilton noted with approval that in cases dealing with New Deal legislation, Cardozo kept the legal questions separate from the political ones. See Walton H. Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 17–19 (1938). What matters here is not whether one accepts this view, but that in the course of highly laudatory assessment, a realist praised Cardozo for keeping politics outside of his legal analysis. This is inconsistent with the CLS mythologizing of the legal realists as an attack on any meaningful distinction between law and politics. See HORWITZ, *supra* note 23, at 170.

³⁴ This prominent theme in some CLS writing was subjected to withering criticism. See POSNER, *supra* note 1, at 271–72, and the sources cited there.

³⁵ Interestingly, one exception is in RODELL, *supra* note 2, at 129–32. But Rodell was largely ignored and dismissed by other academics, including legal realists, even at his own law school. See Duxbury, *supra* note 1, at 357–58, 378, 382, 384.

readers to ignore the “naivetés” of an author who advanced such ideas.³⁶ Likewise, in a letter to Harold Laski (a socialist scholar who had advanced something like this view in some of his writings), Frank expressed skepticism of what he described as “the class-struggle interpretation of legal decisions.”³⁷ One of Frank’s reasons for rejecting this view was that many cases pitted members of the same class against each other, making it impossible for courts to carve a consistently pro-ruling class doctrine: “The great majority of cases which come before the average judge today in this country are of this character. (Many of them are cases involving disputes between two members of the working class.)”³⁸ Several decades later, Richard Epstein, not quite the radical leftist, made a similar point.³⁹

The critique of lawyers, especially those coming out of the top law schools, for contributing their talents to maintaining and strengthening a structurally unjust system, is a familiar one among critical scholars.⁴⁰ It existed also in the days of the legal realists. In an address delivered in 1935, legal realist Charles Clark, by then serving as dean of Yale Law School, acknowledged the charge that lawyers “make[] the business structure yet more amenable to the tyrant rule of the captains of industry.”⁴¹ Clark was not there to denounce this reality. He proclaimed to be somewhat troubled by it, although evidently not very much:

³⁶ See Llewellyn, *supra* note 5, at 598 n.15. The author in question was Brooke Adams. Though Llewellyn did not cite anything by him, it is clear from the context that Llewellyn was attacking Adams’s view that the “dominant class” shapes the law in its favor. See, e.g., Brooks Adams, *Law under Inequality: Monopoly*, in *CENTRALIZATION AND THE LAW: SCIENTIFIC LEGAL EDUCATION* 20, 45 (1906).

³⁷ See letter from Jerome Frank to Harold J. Laski, April 15, 1931, at 1 [hereinafter Frank letter]; cf. Karl N. Llewellyn, *Humanity in Action*, 26 *SURVEY GRAPHIC* 101, 101 (1937) (book review) (“[Laski] tends, with characteristically superb disregard for either precision of thinking or bothersome detail, to identify ‘liberalism’ with ‘bourgeois capitalism uncontrolled.’”).

³⁸ See Frank letter, *supra* note 37, at *Id.* at 2 (emphasis omitted). For other realists rejecting such ideas see Edward S. Robinson, *Psychology and the Law*, 1 *J. SOC. PHIL.* 197, 212 (1936) (“naturalistic jurisprudence will not confine itself...to flippant guesses about the digestion of the judicial breakfast nor will it reduce the judicial process to that oversimple theory of class struggle”); K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 *U. CHI. L. REV.* 224, 239 (1942) (refusing to accept “the semi-conspiracy theory” that formalism is “best fitted to rapacity”). For Frank’s critique of historical determinism, including its Marxist guise, see *JEROME FRANK, FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* (1945).

³⁹ See Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 *HARV. L. REV.* 1717, 1727 (1982).

⁴⁰ See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 *J. LEGAL EDUC.* 591 (1982).

⁴¹ Charles E. Clark, *Legal Education in Modern Society*, 10 *TUL. L. REV.* 1, 4 (1935).

In an organization emphasizing individualistic activities and with the motive of private profit largely unrestrained, it is but natural that lawyers should aid the activities of the strong and predatory buccaneers who have been the arch prototype of American success. It is the lawyer's function to aid people to live together more easily but nevertheless *according to their present habits and desires*.⁴²

Another strand of the familiar view of the realists as radicals is the oft-made claim that the realists challenged political economic ideas that dominated the legal arena. In particular, again and again one finds statements such as, "realism was... a reaction against Supreme Court decisions that had invalidated progressive regulatory legislation favored even by many business leaders."⁴³ Despite the frequency with which this claim is made, there is little evidence to support it. Search through the works of the most dominant legal realists—Karl Llewellyn, Jerome Frank, Leon Green, William Wheeler Cook, Max Radin, and so on—and you will not find in them any serious critique of laissez faire economics or its most famous legal manifestation, *Lochner v. New York*.⁴⁴ In fact, as far as I could find, most of them *never* mentioned *Lochner* in any of their writings.⁴⁵ On the rare occasion one finds the case mentioned, the discussion is quite different from what the prevailing view about the legal realists would have you believe. In one of his articles, Llewellyn has a brief discussion of Holmes's "suggestion that [the] expansion [of 'due process'] might well reflect a fear of socialism." Without citing *Lochner* (or any other case), Llewellyn replied:

I am quite unwilling to "explain" [the cases] by the mere philosophy of laissez-faire. I am ready to hook it up with such a philosophy, if I can find the way; the fact of relation is, I think, perceptible. But to see that the two fit well together is not to solve the problem of *process*, the problem of how it happened.⁴⁶

⁴² *Id.* at 5. Clark also praised law schools for legal training that makes them "so valuable to the great law firms specializing in matters of finance." *Id.* at 2.

⁴³ Mensch, *supra* note 23, at 32; accord HORWITZ, *supra* note 23, at 195; STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 110, 112 (2000); Gary Minda, *Denial: Not Just a River in Egypt*, 22 CARDOZO L. REV. 901, 903–04 (2001); see also note 25, *supra*. I ignore here a different challenge to this narrative, which argues that there never was a *Lochner* era. See, e.g., William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377 385–91 (2010).

⁴⁴ 98 U.S. 45 (1905).

⁴⁵ Walton Hamilton discussed *Lochner* briefly in a few articles, but only after its demise. See Walton H. Hamilton, *Common Right, Due Process and Antitrust*, 7 LAW & CONTEMP. PROBS. 24, 32 (1940); Walton H. Hamilton, *The Path of Due Process Law*, 48 ETHICS 269, 290–91 (1938)

⁴⁶ Llewellyn, *supra* note 38, at 240.

In other words, Llewellyn preferred to explain trends in the Supreme Court's jurisprudence by appeal to changes in adjudicative style that he identified in state courts. In his account, in the late nineteenth century American courts shifted from one "style" of adjudication (he called it the "grand style") toward a more "formal style." Roughly speaking, the grand style is open, sensitive to context, and flexible, whereas the formal style is closed and rigid. For Llewellyn, *Lochner* represented the Supreme Court's rather late adoption of the formal style that had taken over state courts decades earlier.⁴⁷ Llewellyn also identified (and celebrated) the re-emergence of the grand style a few decades later. Once again, he interpreted the move away from *Lochner* as part of this more internal jurisprudential change, rather than as a reflection of changing political-economic ideologies.

When attributing to the realists a critique of anti-regulatory economic or legal ideology, it is not uncommon to find only citations to works interpreting the realists rather than the writings of the realists themselves, thus perpetuating the myth. When citing someone from the heyday of realism, it is almost invariably one person, Robert Hale, lionized in CLS writings as a leading realist,⁴⁸ and someone whose writings greatly influenced other legal realists.⁴⁹ In fact, there is scant evidence for these claims. Hale was not part of the list of twenty legal realists that Llewellyn compiled for *Some Realism about Realism* (although he was part of the longer list he considered in the course of drafting the article).⁵⁰ More significantly, both socially and

⁴⁷ See *id.* Llewellyn mentions *Lochner* and explains it in a similar way in Carl [sic] N. Llewellyn, *Impressions of the Conference*, 14 U. CIN. L. REV. 343, 345–46 (1940). As far as I know, this is only of only two times, both brief, that Llewellyn mentioned *Lochner* by name in his written work. The other is KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 57 n.1 (Paul Gewirtz ed., Michael Ansaldi trans., 1933). Neither criticized the decision's politics.

⁴⁸ See, e.g., HORWITZ, *supra* note 23, at 195–98; Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991); Singer, *supra* note 23, at 491–93. Another name often mentioned in this context is Morris Cohen, whose relationship to the realists was complex. He clearly expressed "realist" ideas and did so before the legal realists. See Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 632 (1916). But he was also critical of the legal realists. See Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 357–67 (1931).

⁴⁹ See John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195, 209 n.70 (1980). Although see note 51, *infra*, which suggests that Schlegel changed his mind on this matter.

⁵⁰ See N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 345–46 (1997). Horwitz expressed frustration with Llewellyn's list of realists for its "de-emphasis of the substantive political commitments of the Realists." HORWITZ, *supra* note 23, at 172, 182. For my part, I see this as further evidence that legal realism, at least as Llewellyn understood it, did not have strong political commitments.

intellectually he seems to have had relatively little contact with the legal realists.⁵¹ Whatever else one thinks of citation counts, they give a good indication of intellectual interests. No matter how impressed the realists may have been with Hale's ideas, their citations indicate they were preoccupied with different questions and not particularly interested in Hale's ideas: The *combined* citations of Hale's work in articles published by Llewellyn, Frank, and Underhill Moore can be counted with one hand;⁵² and that is one more hand than is needed for counting citations to Hale in the writings of Walton Hamilton, Thurman Arnold, Walter Wheeler Cook, Leon Green or Max Radin.⁵³ In any event, Hale, though a critic of laissez-faire economics, was hardly a political radical.⁵⁴

It is also worth noting the almost complete absence from the realists' scholarly work of any apparent concern with the discrimination or oppression of minorities. Women were enfranchised in 1920 but still faced pervasive discrimination, including at the legal realists' bastion at Yale, where they were not admitted to the undergraduate program until 1968. (The law school did admit women, from 1919.) Throughout the country, African Americans were still facing openly racist laws and policies. Yet, it is very rare to find any recognition of such issues in the writings of the legal realists.⁵⁵

⁵¹ See BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN JURISPRUDENCE* 18–19 & n.19 (2007); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421, 440 (1990); John Henry Schlegel, Book Review, 63 MOD. L. REV. 152, 154 (2000) (noting that Hale's correspondence shows he had little contact with the legal realists).

⁵² Frank did cite and discuss Hale's ideas favorably in some of his judicial opinions. See *Standard Brands v. Smidler*, 151 F.2d 34, 38–40 (2d Cir. 1945) (Frank, J., concurring); *M. Witmark & Sons v. Fred Fisher Music Co. Inc.*, 125 F.2d 949, 963 (2d Cir. 1942) (Frank, J., dissenting).

⁵³ Felix Cohen, whose political views were indeed outside the political mainstream, cited Hale and other critics of capitalism more frequently. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 816 n.20, 821 n.32 (1935). But Cohen's scientism and utilitarianism, fairly common left-wing positions in the 1930s, made him unattractive to critical legal scholars, who by the 1970s came to be highly skeptical of the use of the methods of natural and quantitative social sciences in human affairs.

⁵⁴ See Duxbury, *supra* note 51 at 442–43; Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and Separation of Law and Economics*, 84 MINN. L. REV. 805, 855–57 & n.172 (2000).

⁵⁵ A rare exception is Hamilton, *supra* note 33, at 20 (criticizing Cardozo for failing the cause of civil liberty with respect to "the vote of the black man"). The entire discussion takes up one paragraph. In this respect the realists were of their era. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 116 (2004) ("racial equality was not an important component of the interwar liberal agenda").

All this suffices, I think, to dispose of the idea that the legal realists were politically radical. However, those defending claims to the realists' political radicalism may be making a more subtle argument. They may concede that the realists were part of the political mainstream but still argue that their jurisprudential views had radical ramifications about the possibility of liberal democracy and the rule of law. While the realists may not have been aware of the full implications of their views, later scholars recognized them and brought them to light.

The argument leading to this conclusion is quite straightforward. On the standard understanding, the realists believed there are no legal rules or principles; or that if there are rules, they provide little or no guidance because standard techniques of legal reasoning allows us to give these rules any content we want; or they thought legal doctrine is nothing more than *ex post* rationalization for decisions arrived at based on intuition, personality, or what the judge had for breakfast. Regardless of the precise formulation, these are all versions of the widely held view of the realists' alleged "radical skepticism about general propositions of law."⁵⁶ At its narrowest, this view implies that there is little point in studying "the law"—a body of legal rules, principles, and doctrines—because it is not what decides cases. To the extent that a functioning liberal democracy depends on stable law that provides people with clear guidance, the realists' jurisprudential skepticism has shown these to be a pipe dream. And so, whether they realized it or not, the realists' arguments have exposed the hollowness of the theoretical assumption necessary for any viable version of political liberalism.

With or without this further political step, the view that the realists were jurisprudential radicals remains widely accepted. For example, Brian Leiter has been scathing in his criticism of CLS scholarship, and particularly their claims about the legal realists' political radicalism. However, Leiter still identifies legal realism with quite radical claims about law. What he called "the Core Claim" of legal realism is the idea that "judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law."⁵⁷ This amounts to the view that legal rules are largely epiphenomenal, that they play little to no role in determining the outcomes of cases. That this is no exaggeration of Leiter's views is affirmed by the fact that he argued that the realists were mostly "quietists" about normative questions on law. His rationale: There is little point in proposing normative reforms to the law if judges do not decide cases by

⁵⁶ Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW & PHIL. 619, 656 (2003).

⁵⁷ See LEITER, *supra* note 26, at 21–22.

following legal rules.⁵⁸ Hanoch Dagan presented a very different understanding of legal realism, which also eschewed claims to realist political radicalism. Yet he too attributed to the realists the claim that legal doctrine is thoroughly and irredeemably indeterminate, thus rendering its capacity to constrain largely an illusion.⁵⁹

These views are broadly in line with each other in seeing the realists as skeptics, or at least minimalists, about legal doctrine. They also broadly fit the casual usage of the term “legal realism” in academic discourse. In countless works, scholars with different interests and of widely divergent intellectual orientations take “legal realism” to mean a skeptical view about legal rules and legal doctrine. It is now often taken for granted that legal realism was a “wholesale assault on the jurisprudence of forms, concepts, and rules,”⁶⁰ that the legal realists believed that “judges decide cases in whatever way ‘seems good to them,’”⁶¹ that they believed “legal doctrine is meaningless,”⁶² or that it was “mere window dressing.”⁶³

My central claim in this Article is that just like the alleged political radicalism of the realists, these claims are also serious distortions. There are different ways of demonstrating this, but the examples I began with illustrate the method I employ in this essay. It may be called “the Cervantes approach” after the well-known aphorism attributed to the author of *Don Quixote*: Tell

⁵⁸ See Brian Leiter, *American Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 249, 263–64 (Dennis Patterson ed., 2d ed. 2010).

⁵⁹ HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 19–22 (2013).

⁶⁰ David Kennedy & William W. Fisher III, *Introduction* to THE CANON OF AMERICAN LEGAL THOUGHT 1, 10 (David Kennedy & William W. Fisher III eds., 2006).

⁶¹ ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 215 (1993).

⁶² George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 2–3 (1984) (attributing this view to Llewellyn).

⁶³ Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 519 (2006). One could fill pages with statements of this kind. For a small sampling of recent works associating realism with skepticism about law or legal doctrine (some describing the realists as “radical”) see FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 124, 134 (2009); Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 634 (2020); Philip C. Bobbitt, *The Age of Consent*, 123 YALE L.J. 2334, 2365 & *passim* (2014); Kari Tuori, *American Legal Realism and Anthropology*, 42 LAW & SOC. INQUIRY 804, 807, 824 (2017); Shyamkrishna Balganesh, *Foreword: The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843, 1844 (2015); William J. Novak, *Legal Realism and Human Rights*, 37 HIST. EUR. IDEAS 168, 172 (2011); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195, 195–97 (2011); Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 AM. J. JURIS. 295, 306 (2018).

me who your friends are and I will tell you who you are.⁶⁴ Against still-familiar claims that the realists were “radicals,” “iconoclasts,” and “skeptics” about law and legal doctrine, I suggest we look at the realists’ intellectual friends and heroes, at those that the realists admired and why they admired them, as a way of getting a better sense of who the realists were. The results of this exercise, I argue, yield surprising findings.

The Article proceeds as follows. In Part I, I consider several scholars, judges, and scholarly projects that one would expect the realists to disapprove of, if they had been radical skeptics about law and legal doctrine. In fact, each of these has been described by some commentators as opposed to realism. Yet, as I show, the realists themselves were largely supportive, at times even admirers, of these supposed opponents. To give just one example, in the familiar narrative virtually all legal realists “vociferously objected” to the project of restating American common law launched by the American Law Institute in 1923, often described as the legal establishment’s response to the advent of realist ideas.⁶⁵ I show that this is not true. The majority of legal realists supported the Restatements project and many of them were involved in it. Many of the realists praised the results; to the extent that they criticized the Restatements, most of their critiques were constructive, affirming the value of the enterprise but seeking its expansion. In fact, realists often criticized the Restatements for paying *insufficient* attention to it. Part II then proceeds by seeking to explain what the realists’ view was. It approaches this question by considering a possible challenge: if the realists’ views were so standard, was there anything novel in any of their claims? A negative answer to this question was made by Brian Tamanaha in a book he published a few years ago. Tamanaha argued that many of the ideas nowadays attributed to the realists and considered intellectual innovations, were said by their predecessors. Based on these historical findings, he went on to argue that there was nothing novel about the realists’ ideas and that there is no meaningful distinction between legal realism and legal formalism.⁶⁶

My argument in Part I may seem to support this conclusion, but Part II explains why it is unwarranted. It begins by outlining a distinction between two realist camps. Briefly, one group was realistic in that it wanted greater connection between law as studied and taught at university and law in practice; for the other group, realism meant greater ties with the natural and social

⁶⁴ See MIGUEL DE CERVANTES, DON QUIXOTE 620 (Oxford World’s Classics, Charles Jarvis trans., 1992) (1615) (“Tell me your company, and I will tell you what you are”) (internal quotations omitted).

⁶⁵ KALMAN, *supra* note 6, at 26.

⁶⁶ See BRIAN TAMANAH, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 68, 162 (2010).

sciences. Focusing on the first, more dominant group, I then explain in what way the practice-oriented group was challenging Langdellian formalism. My argument there again challenges the received narrative. Against the view that sees the realists as a modernist challenge to “classical” legal thought, I argue that the realists put forward a traditionalist reaction against modernistic trends.

Before proceeding, let me preface my argument with two methodological clarifications. First, some of the historical scholarship on the legal realists has tended to minimize debates over ideas at the expense of what Natalie Hull called the “human story,”⁶⁷ or by telling us that intellectual history is “the history of intellectuals.”⁶⁸ Scouring university archives where the papers of the legal realists and their contemporaries are stored, historians found rich troves for behind-the-scenes stories of friendships and betrayals, of fights over faculty hires and resignations, even of failing marriages and alcoholism. Armed with these, historians have retold the story of legal realism. The results are often entertaining and sometimes illuminating, turning names in footnotes into human lives. However, too many times, such an approach has led to over-emphasis of the personal or psychological over the ideological. Specifically, proponents of this approach have occasionally suggested that biographical information can show that what may appear from academic writings as disagreement over ideas, was actually motivated by more earthly concerns such as a personal crisis, or the pursuit of a better job.

A full discussion of these methodological suppositions has to wait for another occasion, so here I will just assert that I disagree with the view that implies that we cannot really understand thinkers thought until we gain access to their private papers and that there is much to be gained in debates over ideas by turning them into clashes of personalities. Especially when it comes to individuals whose professional life involved writing, sometimes in copious amounts, for public consumption, it is in these works that we can expect to find their most worked out thoughts. It is true that freedom from the constraints imposed by academic conventions and publicity can sometimes result in a clearer and more forthright statement of a scholar’s ideas than what is found in his or her published works. But such an approach still uses archival materials to get a better sense of scholars’ ideas, not as a means for discovering their ulterior motives. Furthermore, while writing for publication may

⁶⁷ HULL, *supra* note 50, at 15.

⁶⁸ JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 260–61 (1995). This book is full of fascinating information and Schlegel’s arch way of telling his story is a delight to read. But I share the sentiment expressed in Neil Duxbury, *Legal Realism for Legal Realists*, 9 *RATIO JURIS* 198, 201–02 (1996) (reviewing SCHLEGEL, *supra*) (worrying about the loss of ideas in all the personal stories).

hide some things, archival material is also “edited”: both in the sense that people may not say everything they think (especially if they start thinking about their posterity and their future donation of their papers), and in the sense that they may remove some items from the materials that the public is given access to. A separate reason for paying less attention to archival material is that the private information found in it rarely affects public discourse. Even if a scholar was motivated to write something for personal gain or due to personal animus, these considerations, if truly private, cannot affect subsequent public debate. Thus, whatever influence the legal realists’ ideas have had, it was in the form they took in their publicly available scholarship.

A different reason for turning to the archives may be the thought that by now, everything the realists said in their published works has been carefully read and analyzed. Therefore, any hope of finding anything novel about the legal realists could possibly only come from examining their unpublished materials. This, however, turns out not to be the case. Or so, at least, I will argue. There is enough in the realists’ published works to show that much of what “everyone knows” about them is not quite true. Part of the problem is that much of the prevailing image of legal realism today is the legacy (the most lasting legacy?) of critical legal scholars, who have read the realists through a particular ideological lens. To be sure, like everyone else, I have my own lens and it would be preposterous of me to claim to be presenting the “view from nowhere” of legal realism. My point is that the lens is there, with or without access to private materials.

My second methodological comment is about which of the realists’ writings to use. I will largely, although not exclusively, base my arguments on the realists’ earlier writings, from the 1920s and 1930s. There is a tendency to think of the realists as young angry men, who mellowed with age.⁶⁹ Alternatively, it is sometimes argued that in later writings the realists retreated from their earlier radicalism after witnessing the horrors of World War II.⁷⁰ Whatever the reason, it is common to argue that in their later writings, the realists embraced the values of liberal democracy they had previously scorned. For this reason, it is common to treat the realists’ writings from the 1940s and onwards as less representative of “true” legal realism found in the early writings. Thus, an author of a book on Jerome Frank awkwardly acknowledged

⁶⁹ See POSNER, *supra* note 1, at 280–81; see also William C. Hefferman, *Two Stages of Karl Llewellyn’s Thought*, 11 INT’L J. SOC. L. 134, 147 (1983) (suggesting Llewellyn shifted from an initial critical stage to a more constructive stage around 1940).

⁷⁰ See G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282–83 (1973); John Henry Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing Its Tail?*, 12 GERMAN L.J. 67, 87 (2011).

that in his later writings, Frank “paid at least lip service to the importance of legal rules.”⁷¹ Another commentator, in a book that placed the realists’ skepticism at its core (as well as in its subtitle), was incensed by the way Llewellyn himself characterized legal realism late in his career, since it “reduce[d] a rich and vital movement to something of almost trivial importance.”⁷²

Like other narratives of sin and redemption (or is it rise and fall?), it makes a good story. But it rests on flimsy evidence. While it is not unheard of for people to change their views with age and for youthful fiery energies to calm, I think there is a tendency to exaggerate the extent to which the realists changed their tune. Generally, I find in the realists’ early writings broadly similar views to those they expressed in later ones. There are some changes, to be sure, but there are no ideological U-turns. Given that this is my view, I could have used the realists’ later writings just as much as the early ones, but this would require me to make good on claims to continuity between early and late writings. By focusing on the realists’ earlier works, I get around this possible challenge to my argument. I will argue that from the start the realists were neither skeptics nor radical.

I. THE REALISTS’ UNEXPECTED HEROES

In this Part, I hope to upend many of the common understandings about the legal realists. The strategy I employ is considering the realists’ reactions to certain scholars, projects, and ideas that we would expect the realists to disapprove of if they were skeptics about law, but which they in fact supported. This may look like a rather roundabout way of examining the views of the realists. Why not examine the realists’ views more directly? In part, this is because this article complements other works where I do exactly that.⁷³ There are, however, two independent reasons for the approach taken here. First, I mentioned already the natural tendency to see our intellectual heroes as speaking to us, if not “for the ages.” Part of being realistic about the legal

⁷¹ ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW* 129 (1985). Glennon acknowledged that Frank himself denied that his recognition and respect for legal rules reflected a change in his views. *See id.* at 233 n.2. And indeed, it is not difficult to find Frank affirming the reality and value of legal rules, even in his earliest writings. *See, e.g.,* Jerome Frank, Book Review, 40 *YALE L.J.* 1120, 1123 (1931).

⁷² WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* 35 (1968). Rumble was referring to KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 508–10 (1960). Admittedly, if I focused on this book, my task would have been easier as it is explicitly dedicated to explaining to the cynic or skeptic how the common law can provide guidance and certainty. *See id.* at 11–16, 53–56.

⁷³ *See* Dan Priel, *The Return of Legal Realism*, in *THE OXFORD HANDBOOK OF LEGAL HISTORY* 457, 465–69 (Markus D. Dubber & Christopher Tomlins eds., 2018) [hereinafter Priel, *Return*]; Dan Priel, *Rival Legal Realisms* (unpublished manuscript) [hereinafter Priel, *Rival*].

realists is recognizing that, like the rest of us, they were debating their contemporaries, engaging with the intellectual battles of their time, and responding to problems of their day.⁷⁴ This does not mean that there is nothing in what people in the past say that is relevant for us, but it does mean that to get a sense of what the realists, we need to understand their environment, their intellectual friends and foes. The other reason for trying to understand the realists through their heroes is that doing so will help us get a better sense of those figures. I will consider below the views of Arthur Corbin, Wesley Hohfeld, and Benjamin Cardozo. Each of them has been discussed in the past both as a legal realist and as an opponent of legal realism. Though my aim here is not to determine who merits the label “legal realist” as though it is some kind of honorific title, my discussion inevitably says something about this question. If I succeed in revising perceptions about the realists, I also make it easier to see why there is no difficulty in seeing Corbin, Hohfeld, and Cardozo as legal realists.

A. Arthur Corbin’s Treatise

Arthur Corbin was deeply involved in the *Restatement of Contract*, and later served as the Reporter for the *Restatement (Second) of Contract*.⁷⁵ He was opposed to the New Deal and objected to the appointment of Jerome Frank to a professorship at Yale Law School.⁷⁶ When Llewellyn was compiling his list of legal realists, Corbin refused to be included.⁷⁷ To add to his sins, Corbin’s scholarly work looks diametrically opposed to the standard image of the legal realist. Corbin’s most significant scholarly achievement is his treatise on contract law.⁷⁸ Spanning eight volumes, of which one is dedicated to a table of authorities listing tens of thousands of cases, it is not the kind of work we would expect a legal realist to produce. Could someone like him be considered a legal realist? For John Schlegel, the answer was clear: “Corbin and Hohfeld were simply not Realists; their science was a doctrinal,

⁷⁴ Cf. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 16–17, 51–52 (1969).

⁷⁵ See Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19 (1929) [hereinafter Corbin, *Common Law*]; Arthur L. Corbin, *The Restatement of the Law of Contracts*, 14 A.B.A. J. 602 (1928) [hereinafter Corbin, *Restatement*].

⁷⁶ See KALMAN, *supra* note 6, at 138–39. Kalman offers evidence that Corbin’s motivations were partly antisemitic. See *id.* Frank was not appointed.

⁷⁷ HULL, *supra* note 50, at 207–08. Both personally and intellectually, Corbin was close to Llewellyn, see text accompanying note 100, *infra*, but he did not wish to be associated with any “school.”

⁷⁸ See ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW* (1950).

analytical science and their politics, conservative.”⁷⁹ Against the familiar understanding of legal realism, this answer is difficult to resist. In the standard narrative, it was the realists who killed the legal treatise as a major scholarly endeavor in the United States.⁸⁰ Anyone whose most significant scholarly work was a mammoth legal treatise could not have been a legal realist.

The problem with this view is that the *realists* themselves considered Corbin a realist. In fact, in *Some Realism about Realism* Llewellyn mentioned an essay Corbin published in 1914 as one of the earliest examples of “the realist attitude.”⁸¹ For someone reading this essay with today’s understanding of legal realism in mind, this statement may seem surprising. In fact, one such reader saw this very essay as evidence of Corbin’s alliance with Langdell.⁸² How could this essay be read in such divergent ways? In this essay, Corbin acknowledged that judges make law, but this was not by any stretch a novel point when he made it. Jeremy Bentham, not an unknown writer, spoke of “judge-made law” well over a century earlier.⁸³ Corbin’s more significant point was that both descriptively and normatively judges did not make law freely. As a descriptive matter, judges are influenced by public opinion in a manner that tends to keep law “within hailing distance of advancing civilization.”⁸⁴ Corbin thought that was good thing, for law just “represents the average of all opinions, the compromise of conflicting ideas.”⁸⁵ The view underlying this sentence is law derives its authority from the people, and therefore should reflect the accepted values of the people.

In explicating this idea Corbin invoked the notion of *Sittlichkeit*, which he borrowed from a then-recent address by Richard Haldane, the British Lord

⁷⁹ Schlegel, *supra* note 49, at 295 n.620; *see also* G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 22 & n.64 (1997). We will get to Hohfeld too in due course. *See* Part I.B., *infra*.

⁸⁰ *See* A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 677–78 (1981); *cf.* John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in WHAT ARE LAW SCHOOLS FOR? 1, 4 (Peter Birks ed., 1996) (blaming the legal realists for the demise of doctrinal scholarship in the United States).

⁸¹ *See* Llewellyn, *supra* note 12, at 1227 n.17 (citing Arthur L. Corbin, *The Law and the Judges*, 3 YALE REV. (n.s.) 234 (1914)). In later writings, Llewellyn continued to champion Corbin’s scholarship. *See, e.g.,* K.N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1258–59, 1265 (1938).

⁸² *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF AMERICAN LEGAL EDUCATION 146–47 (1994).

⁸³ *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 274 (2d ed. 2019). For authors closer in time to the realists *see* TAMANAHA, *supra* note 66, at 19–20.

⁸⁴ Corbin, *supra* note 81, at 242.

⁸⁵ *Id.*

Chancellor.⁸⁶ In Haldane's words *Sittlichkeit* was "the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is 'bad form' or 'not the thing' to disregard."⁸⁷ For Haldane this was the normative foundation of society, what holds it together.⁸⁸ Corbin took this notion of *Sittlichkeit* and made it the key idea to his account of law: "The judge, if honest, lays down either a rule that has been approved or acquiesced in by the community in the past, or a rule to which he believes the community will in the future give approval and acquiescence."⁸⁹ It is here, says Corbin, where one should look for the source of certainty in the law. Wherever the values and customs of the community, trade customs and business rules are certain, so is the law; wherever they are not, "there the law is uncertain, and uncertain it must be."⁹⁰

There is not a hint of radicalism or skepticism in this view. On the contrary, it is a rather conservative view that sees the foundation of law in the prevailing attitudes of the majority. It does not call for dismissing legal materials: Though not sufficient for grasping a nation's law, they contain a nation's past legal history, which must be a guide for the future. Though not infallible, they "contain wisdom."⁹¹ Thus, this normative foundation of law justifies law its authority and is also the main guide for determining its content. This view insists that the judge must be independent in the influence of money, politicians, as well as from "the desires of small minorities," but must follow the *Sittlichkeit*.⁹²

It is the fact that the good judge reflects the community's sense of justice that turns judicial reliance on intuition that might otherwise look like a bad thing into a good one. In that case, the judge is not appealing to his subjective value preferences, but conveying the shared values of the particular community he is a member of. This view also explains how the seemingly radical idea of judge-made law can be domesticated, turned from a usurpation of democracy into a means for upholding it. Indeed, to the extent that the judge

⁸⁶ It was published as Richard Burdon Haldane, *Higher Nationality—A Study in Law and Ethics*, 47 AM. L. REV. 801 (1913).

⁸⁷ *Id.* at 812. The term, sometimes translated as "ethical life," originated in Hegel's critique of Kant's philosophy, which Hegel perceived as too individualistic. See CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 99–107 (1987).

⁸⁸ Haldane, *supra* note 86, at 814–15.

⁸⁹ Corbin, *supra* note 81, at 240. For Haldane too, law was "the outward side" of *Sittlichkeit*. See Haldane, *supra* note 86, at 814.

⁹⁰ Corbin, *supra* note 81, at 243.

⁹¹ See *id.* at 246.

⁹² See *id.* at 250 (should a judge be "[i]ndependent of the considered and expressed desires of the great common majority? Never!").

succeeds in capturing the values of the community better than the legislature, the common law may have greater democratic legitimacy than statutes.

It is already in this early essay that one can discern how the myth of realist skepticism about determinate legal rules was born. The realists' legacy involved both a negative critique and a positive agenda. The critique was that a particular understanding of law—where legal rules alone decide cases—is wrong. The legal realists were indeed critical of this view, and for many this is where the realists' argument ended. Many have thus erroneously drawn the mistaken conclusion that the realists dismissed legal rules altogether and more generally were skeptical of legal authority. But Corbin's essay suggests that from the start the realists had a positive agenda as well, and it was one that saw law is valuable and binding, if only we understand it differently. Legal rules are important when understood as given meaning and constraint by community values. As we shall see, no less than the critique, this was part of the realist story.⁹³

After Corbin's early jurisprudential piece, for the rest of his career his work focused almost exclusively on contract law, and here too there was nothing skeptical or radical about his work. One topic that Corbin wrote extensively on was contracts for the benefit of third parties, and it is a good illustration of what legal realism meant for Llewellyn. In two articles, one dedicated to American law and the other to English law, Corbin sought to show that despite judicial and academic statements to the contrary, such contracts were recognized by the common law under different guises.⁹⁴ Formally, no such contracts were recognized, because such contracts were inconsistent with the foundational doctrine of privity, which insisted that only the parties to the contract could enforce rights and obligations arising from the contract. The doctrine rests on the sound idea that people should not be allowed to change the rights and obligations of those not party to the contract and who had no control over its design. Corbin argued that this modest and reasonable idea had "bec[o]me a fetish," which often led to unjust results according to the existing mores of the society.⁹⁵ Sensing this injustice, courts developed workarounds. Though they did not think it was within their powers to launch a direct attack on the doctrine of privity, Corbin argued that courts came up

⁹³ See LLEWELLYN, *supra* note 72, at 122. Like Haldane and Corbin, Llewellyn drew here on related German ideas. See James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987). For further discussion see Part II.B., *infra*.

⁹⁴ See Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 YALE L.J. 1008 (1918) [hereinafter Corbin, *Third Persons*]; Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 46 LAW Q. REV. 12 (1930) [hereinafter Corbin, *Third Persons (II)*]. Corbin wrote four additional articles on this topic.

⁹⁵ Corbin, *Third Persons*, *supra* note 94, at 1008.

with creative solutions that functioned as near equivalents to contracts for the benefit of third parties.

In the course of his discussion, Corbin made three important points. First, it did not matter whether these doctrinal solutions fit some grand theory of contracts; to be justified, all these decisions needed was to match the prevailing moral sense. The normative justification for contract law, just like all other law, is its acceptability by the community and correspondence with its underlying values. Second, Corbin made the positive point that when social need called for it, the “living law” adapted to it by developing functionally equivalent doctrines to contracts for the benefit of third parties. The message was that to know the law meant looking beyond oft-repeated general statements (“contract law does not allow for contracts for the benefits of third parties”) and consider what courts actually did.⁹⁶ Third, Corbin also argued that to know what legal rights we must look to the remedies the law provides. If the law grants a remedy to someone outside the contract, then for all practical purposes, she has a legal right.⁹⁷

These ideas would later become staples of realist thinking,⁹⁸ and not one of them is remotely skeptical. None of them implies we should ignore legal doctrine, that legal rules don’t exist, that law is deeply indeterminate, or that judges are more-or-less free to decide cases any way they wanted. On the contrary, Corbin’s point was that a realistic view of the law calls for *far closer* attention to court decisions, because only in this way one can discover the actual legal rules and legal rights in operation.⁹⁹ These rules are “real” in the sense that they formed relatively clear and predictable patterns that people can use as guides for action. Corbin’s target was thus not legal rules, but grand statements about the law, which were often repeated like mantras even when they no longer matched a changing practice. More philosophically, he was attacking the idea that legal rules must fit some grand theoretical scheme. The law was not random, but in the end, it needed to work for the people who used it, not the other way around. It is these ideas that made Llewellyn consider Corbin an important legal realist.

⁹⁶ See Corbin, *Third Persons (II)*, *supra* note 94, at 14.

⁹⁷ See *id.* at 15.

⁹⁸ See Karl N. Llewellyn, *One “Realist’s” View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 6 (1938) (making the first point); Llewellyn, *supra* note 12, at 1236, 1244 (making the second and third points).

⁹⁹ This is the essence of Llewellyn’s distinction between “paper rules” and “working rules.” See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 439 n.9, 444–45 (1930).

Corbin and Llewellyn were so close to each other they referred to each other as “dad” and “son,”¹⁰⁰ so to call their relationship intimate is something of an understatement. This makes it impossible to argue that Llewellyn did not know Corbin or his views; it also means that Llewellyn’s judgment on his mentor’s work may have been clouded by personal affection. Llewellyn, however, is not alone among the realists who admired Corbin. After Corbin’s eight-volume treatise on contract was published in 1950,¹⁰¹ the *Yale Law Journal* divided the task of reviewing it among seven commentators, which included legal realists Jerome Frank, Edwin Patterson, Charles Clark, and Harold Havighurst.¹⁰² Book reviews can be a tricky endeavor, particularly in a small academic community when reviewer and reviewed author know each other.¹⁰³ One gets the sense that the little symposium was organized more as an occasion for celebrating the conclusion of a mammoth project by one of Yale’s most illustrious professors than as an attempt at real critical engagement with his ideas. The reviewers were probably carefully chosen and understood what kind of pieces they were expected to produce.¹⁰⁴ Nonetheless, these reviews are still revealing. What stands out even more than the uncommon praise these authors heaped on Corbin, was the explanation given for it. Many of the reviewers thought Corbin’s doctrinal treatise was so significant *because* it was a superb example of legal-realist scholarship. This is most evident in Havighurst’s review:

[Corbin] recognizes the realities of the judicial process, the non-legal elements that often share in producing a given decision, the pragmatic development of

¹⁰⁰ See TWining, *supra* note 33, at 95; Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 470 n.17 (1987); Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805 (1962). In print, slightly more restrained, Llewellyn called Corbin “my father in the law.” Llewellyn, *supra* note 81, at 1243 n.†.

¹⁰¹ ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW (1950). The treatise has six volumes of text (with two additional volumes for a table of cases and an index), but two participants in the symposium (Jerome Frank and Edwin Patterson) reviewed half of volume three.

¹⁰² Frank, Patterson, and Clark were part of Llewellyn’s original list of twenty legal realists. See Llewellyn, *supra* note 12, at 1226–27 n.18. Havighurst is also often considered a realist. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1217 (2006); cf. KALMAN, *supra* note 6, at 53 (Havighurst adopted the realist functional approach). Another reviewer, Yale’s Friedrich Kessler, was also supportive of realist ideas. See Friedrich Kessler, *Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking about Law and Justice*, 19 TUL. L. REV. 32, 52 (1944).

¹⁰³ Cf. George Orwell, *Confessions of a Book Reviewer*, in ESSAYS 367 (Bernard Crick ed., 1994).

¹⁰⁴ The least positive review is from Malcolm Sharp, a younger scholar from the University of Chicago, who indicated in his review that he did not know Corbin. See Malcolm Sharp, *Volume Four*, 61 YALE L.J. 1119, 1132 (1952).

doctrine, often in curious ways, somehow to make possible results that square with life and yet do not break with a traditional rule that has served its day but has not quite ceased to be. He does not, as many scholars do, insist that there is only one correct meaning for every legal term. For him all generalizations are tentative working rules; courts are human; and facts, not legal doctrines, play the major role in judicial decision.¹⁰⁵

These methods, Havighurst added, “embody many of the tenets of the movement we have come to know as legal realism.” He went on to qualify his assessment in that the book presents a simpler statement of the law than some writers who “broaden the scope of the relevant inquiry.”¹⁰⁶ But still concluded that the book reflected “the spirit of modern legal thought.”¹⁰⁷

Others made related points. For Clark, the aspect of Corbin’s work that stood out was the “common sense and practicality” with which he approached the topic of remedies, something he considered “a model for all teachers of substantive law to follow.”¹⁰⁸ Many of the reviewers pointed out that Corbin rejected the view that rules decide cases deductively and was sensitive to the “partly rational and partly intuitive process of evaluation.”¹⁰⁹ That should not lead to a skeptical or radical conclusion. As Frank explained, legal rules are important, as they give the judge “strong hints he must never disregard,” although they should not be followed slavishly for that would lead to injustice.¹¹⁰ This is a far cry from any suggestion that the realists were skeptical of the idea of legal justice, or of the possibility of achieving it.

Beyond these remarks, Corbin’s treatise is valuable for explaining the dominant attitude among legal realists to legal doctrine. These realists did not think Corbin filled thousands of pages with discussions of tens of thousands of cases all in order to show that doctrine was contradictory, oppressive, or meaningless. What made Corbin a realist was that, as Llewellyn put it in a different context, “Corbin...never lets go of the cases” but uses them “to tear down or challenge over-statements” of “flat and absolute pseudo-rules.”¹¹¹ Rather than trying to fit the cases into a preconceived schema and dismissing the cases that did not fit as mistakes, Corbin let the cases lead. The result was

¹⁰⁵ Harold C. Havighurst, *Volume Six*, 61 YALE L.J. 1138, 1138–39 (1952) (footnotes omitted).

¹⁰⁶ *Id.* at 1139.

¹⁰⁷ *Id.* at 1146; see also Friedrich Kessler, *Volume One*, 61 YALE L.J. 1092, 1095 n.10 (1952) (noting briefly Corbin’s legal realism).

¹⁰⁸ Charles E. Clark, *Volume Five*, 61 YALE L.J. 1132, 1134 (1952).

¹⁰⁹ Edwin W. Patterson, *Part IV: Construction and Legal Operation of Contract—Conditions of Legal Duty* §§ 662–771, 61 YALE L.J. 1113, 1114 (1952).

¹¹⁰ Jerome Frank, *Volume Three*, 61 YALE L.J. 1108, 1113 (1952). Frank’s review is almost embarrassing in its praise of Corbin. See *id.* at 1108–09.

¹¹¹ Llewellyn, *supra* note 81, at 1265.

less perfectly coherent, perhaps less aesthetic than what one found in other treatises, but for precisely this reason Corbin's work was, well, more realistic.¹¹² Law emerges from this view looking less like perfectly conceived scheme of rules, and more a series of local solutions to problems. These solutions may not fit a single philosophical theory, but then so what? The same is true of our lives, and especially common-sense morality. Laws have their authority over us because they are molded from our lives, so we should not expect more—we should not *want* more—from them.

B. Wesley Hohfeld's Analytics

Even more than with Corbin, certain assumptions about the realists have influenced the way people have read Wesley Hohfeld. Hohfeld achieved posterity with his enormously influential analysis of legal rights. Hohfeld showed that the term “right” is multiply ambiguous, and—more importantly—presented in diagrammatic form an analysis of the logical relations among its different senses.¹¹³ Especially in CLS commentary on Hohfeld's work, there is a sense that something like the following syllogism at play: The realists were radicals; Hohfeld was admired by the realists; to earn their admiration, Hohfeld must have been a realist and therefore a radical as well. Without something like this thought in the background, it is difficult to understand the lengths to which some critical scholars have gone to find in Hohfeld's work the radicalism they attribute to the realists. Consequently, their treatment of Hohfeld has a hint of Leo Strauss's esoteric readings of the works of great thinkers of the past.¹¹⁴ Read Hohfeld superficially, they suggest, and he looks like a purely analytic and apolitical scholar, precisely the kind of legal scholar that the dominant narrative tells us the realists railed

¹¹² Contrast this with realists' reviews of Samuel Williston's treatises. Though impressed with their scale and erudition, realists expressed the worry that Williston forced cases to match his theory, sometimes at the expense of the descriptive accuracy of what the cases actually said. See Walter Wheeler Cook, *Williston on Contracts: Revised Edition*, 33 ILL. L. REV. 497, 504–05, 509 (1939) (book review); K.N. Llewellyn, Book Review, 34 YALE L.J. 454, 455 (1925); cf. Arthur L. Corbin, Book Review, 29 YALE L.J. 942, 943–44 (1920). It should be added these points were made quite gently in the course of largely favorable reviews.

¹¹³ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). A century after publication, this work continues to generate further discussion and analysis. See, e.g., THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyam Balganesh et al. eds., 2018); Hurd & Moore, *supra* note 63.

¹¹⁴ See LEO STRAUSS, PERSECUTION AND THE ART OF WRITING 22–24, 36 (1952).

against. Read between the lines, and a secret Hohfeld emerges, one who surreptitiously dismantled the received wisdom of his day.¹¹⁵

In a representative piece of the genre, Joseph Singer argued that Hohfeld's supposed radicalism consisted of recognizing that not all instances of causing loss to others are actionable, because the law requires a showing of a wrong.¹¹⁶ Though this is something that Hohfeld discussed only very briefly, Singer put the wrong-loss distinction at the heart of Hohfeld's work, and then further considered it to be a radical idea that upset mainstream common-law thought. The fundamental problem with Singer's argument is that he takes the distinction between wrongs and losses to be a late nineteenth-century development, and as such, a contested and challenging idea when Hohfeld stated it.¹¹⁷ In reality, the distinction appears in fifteenth-century cases and was discussed in eighteenth century legal texts. There is nothing remotely radical about it.¹¹⁸

Others find Hohfeld's radicalism in showing that the determination of what counts as a wrong is a matter of policy, not logic.¹¹⁹ I do not think this idea is found in Hohfeld's work, but even assuming it is, it was far from new when it appeared: Oliver Wendell Holmes made it in a well-known article he published a couple of decades earlier.¹²⁰ As Holmes was probably the most famous lawyer in the United States at the time, it is hard to see how reiterating his view could be seen as a major intellectual innovation. (It also takes some effort to see Holmes as the purveyor of left-wing radicalism.)

Horwitz more loosely suggests that Hohfeld's analytic framework gave the legal realists the terminology and analytical tools necessary for

¹¹⁵ See HORWITZ, *supra* note 23, at 153–56, 201; Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975; see also Pierre Schlag, *How to Do Things with Hohfeld*, LAW & CONTEMP. PROBS., no. 1–2, 2015, at 185, 187, 216–17 (suggesting that the political implications of Hohfeld's work eluded him); cf. White, *supra* note 79, at 28 (suggesting Hohfeld's analysis exposed law as reflecting “the preferences of the powerful”).

¹¹⁶ See Singer, *supra* note 115, at 1053–54.

¹¹⁷ See *id.* at 1055.

¹¹⁸ See Peter Birks, *Negligence in Nineteenth-Century Common Law*, in NEGLIGENCE: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF TORTS 173, 198 (Eltjo J.H. Schrage ed., 2001). These days the distinction between wrongs and losses is central to the thinking of tort scholars who see themselves as opponents of legal realism. See ROBERT STEVENS, TORTS AND RIGHTS 2–3, 306–07 (2007); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 920–28 (2010).

¹¹⁹ See GONÇALO DE ALMEIDA RIBEIRO, THE DECLINE OF PRIVATE LAW: A PHILOSOPHICAL HISTORY OF LIBERAL LEGALISM 255 (2019); Hurd & Moore, *supra* note 63, at 306–07.

¹²⁰ Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

articulating their critique of legal orthodoxy.¹²¹ But this assumes that the realists were radicals themselves, which is precisely what this Article disputes. Even if it were true, this radicalism-by-association would be no more persuasive than the claim that mathematics is politically conservative because it was used by some conservative economists' models.

A straightforward ground for doubting the view of Hohfeld was a secret radical is reading his own words. Hohfeld saw the value of analytical jurisprudence in its power to provide "an accurate and intimate understanding of the fundamental working conceptions of all legal reasoning."¹²² He added that this could help provide a better organization of the law's different branches "considered as an integral, harmonious and symmetrical body of doctrine."¹²³ Not quite the words of someone out to deconstruct legal doctrine and uncover its internal contradictions. After declaring himself one of the "greater adherent[s]" of *stare decisis*, because of the utmost significance he placed in "uniformity, equality, stability, certainty and knowability of the law,"¹²⁴ Hohfeld stated that his aim was "to bring order out of chaos and develop something like a real system out of our present conglomerate of judicial precedents and piecemeal statutes."¹²⁵ Critical scholars searching for quotes of the "classical legal thought" that the legal realists supposedly destroyed, would have had a hard time finding better specimens.

Given all this, denying the minor premise of the syllogism may appear more attractive: Hohfeld was not a legal realist; he was an analytical scholar, politically neutral, or possibly even a conservative. This, as we have seen, was Schlegel's view, and more recently others advanced it as well.¹²⁶ Proponents of this view accept that the characterization of the legal realists as jurisprudentially, and possibly also politically, radical. Not finding a hint of radicalism in Hohfeld, they scratch his name off the walls of the realist pantheon. Though this solves the problem at one end, it creates a problem at the other, for it cannot explain why the realists thought so highly of Hohfeld. It

¹²¹ See HORWITZ, *supra* note 23, at 154–56.

¹²² Wesley Newcomb Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 1914 PROC. AM. ASS'N L. SCH. 76, 96.

¹²³ *Id.* at 97.

¹²⁴ *Id.* at 100.

¹²⁵ *Id.* at 97.

¹²⁶ See note 79, *supra*, and accompanying text; David Frydrych, *Hohfeld vs. the Legal Realists*, 24 LEGAL THEORY 291, 332–33 (2018); Andrew Halpin, *The Value of Hohfeldian Neutrality When Theorising About Rights*, in NEW ESSAYS ON THE NATURE OF RIGHTS 1, 15–16 (Mark McBride ed., 2017).

is not easy to dismiss all this as a misunderstanding of his ideas,¹²⁷ since some of Hohfeld's greatest realist champions (Cook and Llewellyn, as well as Corbin) knew him personally.¹²⁸

I propose a different solution to the puzzle. It recognizes that many of the legal realists found Hohfeld's work illuminating and valuable, and it uses this fact to rethink what our views about *them*: The realists appreciated Hohfeld's work because they were not the legal skeptics they are often portrayed as. Of course, just as I criticized above the attempts at radicalism-by-association, it would be wrong to infer the opposite. It is possible that the realists used Hohfeld's purely analytic studies for radical ends he did not envision or may have even opposed. But when we look at what the realists said when discussing Hohfeld's work, we just don't find this. On the contrary, their remarks provide further support for rejecting the major premise of the syllogism: the realists were not jurisprudentially radical. They accepted and respected legal doctrine and found Hohfeld's analysis valuable precisely because it helped make better sense of it. It turns out that if Hohfeld was indeed a secret radical, he hid it so well that the legal realists missed it.

In a short entry on Hohfeld in the *Encyclopedia of Social Sciences*, Llewellyn explained Hohfeld's significance: Others have analyzed rights before, he said, but "it remained for Hohfeld to turn into an everyday working tool what had been a plaything of jurisprudence."¹²⁹ Llewellyn further elaborated the "pragmatic value" of Hohfeld's work:

While it can obviously solve no cases, [Hohfeld's analysis] makes for clarification and cuts very close to the atomic structure of the law on its conceptual side. It was a happy accident that the same thinkers who from 1914 to 1925 were influenced by Hohfeld were influenced also by Holmes' realism and by the pragmatic synthesizing approach of modern science.¹³⁰

Here is Llewellyn speaking with no scare quotes about the conceptual structure of law, treating its clarification as practically valuable.¹³¹ That, and not

¹²⁷ So powerful is the hold of the view that Hohfeld was a secret radical, that some historians have argued that Hohfeld's friends *missed* this political aspect of his work. See HULL, *supra* note 50, at 105–06 (arguing that Corbin and other of Hohfeld's "closest allies" "overlooked" his progressive politics and its impact on his scholarship). Even if this it were true, this would affirm that the realists themselves were not radicals.

¹²⁸ In addition to the realists discussed in the text, Schlegel quotes from letters sent by Frank and Oliphant to Cook following Hohfeld's death, both noting the latter's significant contributions. See SCHLEGEL, *supra* note 68, at 285 n.177.

¹²⁹ K.N. Llewellyn, *Wesley Newcomb Hohfeld*, in 7 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 400, 400 (Edwin R.A. Seligman & Alvin Johnson eds., 1937).

¹³⁰ *Id.* at 401.

¹³¹ For similar remarks see Herman Oliphant, *Legal Research in Law Schools*, 5 *AM. L. SCH. REV.* 293, 295 (1924); Arthur L. Corbin, *Terminology and Classifications in Fundamental Jural Relations*, 1920 *HANDBOOK ASS'N AM. L. SCH.* 184, 193.

some agenda of deconstructing the hidden foundations of the law, is why he found Hohfeld's analysis so useful. It brought clarity to an otherwise muddled concept like "right" and could thus be used to clarify many legal doctrines.¹³²

For the legal realists with a scientific orientation, there was a slightly different reason to be excited about Hohfeld's analysis. For them, his work showed the possibility of developing a quasi-scientific analysis of legal concepts, exhibiting the rigor and precision found in mathematics and of the natural sciences. Citing Hohfeld, Cook spoke of "the absolute necessity for both an exact, scientific analysis of fundamental legal conceptions and an equally exact and scientific terminology."¹³³ Just as science relied on logic and mathematics, the empirical science of law needed its precise and well-defined building blocks. Hohfeld's work was thus a tool, "a means to an end—the solution of legal problems and the development of our law so as to meet the human needs which are the sole reasons for its existence."¹³⁴ Thus, for scientific legal realists, Hohfeld's analysis, like the rest of the law, was valuable because it was a means to improving life. All this presupposes, of course, that law is, or at least can be made, determinate and properly designed for the promotion of concrete ends.

Though Hohfeld's analysis of legal relations is the main reason why the realists read and admired him, some of them also appreciated him for ideas he spelled out in another essay, entitled *A Vital School of Jurisprudence and Law*,¹³⁵ sketching out his vision for what a proper law school should look like. There is magisterial grandeur to this piece that is lacking from Hohfeld's dense and technical analytical studies of legal relations. In this essay, Hohfeld analogized the university study of law to the study of the natural sciences, although not so much in terms of adopting their methods. Instead, Hohfeld identified law, along with science, as one of the great pillars of human civilization; he considered law specifically as an institution dedicated to the

¹³² That was Hohfeld's own rationale for his analysis. See Hohfeld, *supra* note 113, at 20; accord Corbin, *supra* note 131, at 188. In his introductory book on law, Llewellyn spent several pages explaining Hohfeld's analysis without a hint that it had any radical implications. See K.N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 83–88 (1930). He did say it provided "nicer tools of thought," that promised to "pull the issue into clarity." *Id.* at 88.

¹³³ Walter Wheeler Cook, *Alienability in Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449, 453 & n.10 (1917).

¹³⁴ Walter Wheeler Cook, *Hohfeld's Contribution to the Science of Law*, 28 YALE L.J. 721, 738 (1919); Herman Oliphant, *The Future of Legal Education*, 6 AM. L. SCH. REV. 329, 331 (1928) ("[Hohfeld] discovered the digits. The science of mathematics is still to be built, but, when built, it will be a tool; a means, not an end"); cf. Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 613 (1923) (book review) (translating Hohfeld's terminology to behaviorist language).

¹³⁵ See Hohfeld, *supra* note 122.

betterment of humanity. Against the backdrop of the Great War waging in Europe at the time, the essay's concluding paragraphs spoke of the need to develop the "spirit of legalism among the masses at large" as a necessary step for the development of international law as "the only substitute for war."¹³⁶ In this vein, Hohfeld advocated for "the fundamental, conservative and permanent betterment of our legal institutions."¹³⁷ It is this optimistic vision—sharply at odds with the pessimistic and even angry tone of so much CLS scholarship, which often described law as a tool of oppression—that many legal realists rallied behind.¹³⁸ Moreover, despite advocating for more interdisciplinary approaches to the study of law, Hohfeld did not think that lawyers should turn to economists or moral philosophers for normative guidance. Hohfeld's view of law was that at bottom it should reflect the prevailing attitudes in society.¹³⁹ Beyond the clarificatory value of his analysis of rights, this idea, which many legal realists shared with him, is another reason why so many of them found his work congenial.

C. Thomas Scrutton's Commercial Sense

Karl Llewellyn was a colorful character of with some eccentric habits and unusual passions. One of them, by no means the strangest, was his unbridled admiration for Thomas E. Scrutton. I suspect most readers of this article, especially if they are American, will stare blankly at this name and wonder, "Who was he?" Scrutton was an English judge who specialized in commercial law. Despite considerable reputation for brilliance, for remembering every case he had ever read, and for knowing the facts of cases he adjudicated better than the lawyers arguing before him, he was never elevated to the House of Lords. One reason seems to have been that he was something of a curmudgeon: cutting, critical, and often cynical. When he thought someone—witness, lawyer, or even a more senior judge—was lacking in intelligence, he did not keep his opinion a secret.¹⁴⁰

Llewellyn considered Scrutton "the greatest English-speaking commercial judge of a century," and in his list of all-time greats ranked him higher

¹³⁶ Hohfeld, *supra* note 122, at 138.

¹³⁷ *Id.* at 137.

¹³⁸ For realists' praise for the article see Cook, *supra* note 134, at 722; Hessel E. Yntema, *The American Law Institute*, 12 CAN. B. REV. 319, 319 (1934); Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 648 (1933).

¹³⁹ Hohfeld, *supra* note 122, at 128–30; *see also* Cook, *supra* note 134, at 738 (attributing to Hohfeld the view that it is the task of the legal profession to adjust law "to the *mores* of the times").

¹⁴⁰ *See* DAVID FOXTON, *THE LIFE OF THOMAS E. SCRUTTON* 169–73, 215–17, 298 (2013).

than another one of his judicial heroes, Lord Mansfield.¹⁴¹ Llewellyn opened one of his articles with three-page encomium to Scrutton, saying that he was not just “a matchless commercial lawyer” but also an “oak. Uncompromising, sturdy, straight-directed, earth-grown, as an ex-hewn oaken roof-tree.” He added that whenever he sent a student to read any of Scrutton’s decisions, the student came back “bubbling—and dreaming of a trip to England, and to that man,” a dream that Llewellyn admitted to having as well.¹⁴² Even Scrutton’s reputation for being difficult received from Llewellyn a positive spin: “*He* saw so clearly. *They* did not.”¹⁴³ It was not Scrutton’s fault for losing patience with the mediocrities surrounding him.

Scrutton is valuable for the present discussion because for Llewellyn, Scrutton was the ultimate realist judge. What impressed Llewellyn most about Scrutton’s judicial opinions was not stylistic flair, nor was it interdisciplinary forays into philosophy or economics. It was definitely not any sign of political radicalism or seat-of-the-pants intuitionism. For Llewellyn, Scrutton was the ideal commercial law judge because he understood the world of commerce and considered it his role as a judge to facilitate business. He succeeded in his role because he had a sense of the expectations and needs of businesspeople and how to shape legal doctrine to help them.¹⁴⁴

This focus on the needs of business, which Llewellyn shared with Scrutton and was the touchstone for his work on the Uniform Commercial Code,¹⁴⁵ is yet another indication that promoting radical left-wing politics was not quite a central concern for many leading legal realists. As for

¹⁴¹ See K.N. Llewellyn, *On Warranty of Quality, and Society* (pt. 1), 36 COLUM. L. REV. 699, 702, 707–08 (1936) [hereinafter Llewellyn, *Warranty*]; see also Karl Nickerson Llewellyn, *From the Point of View of the Economist and Business Man*, 10 PROC. ACAD. POL. & SOC. SCI. CITY N.Y. 331, 339 (1923) [hereinafter Llewellyn, *Point of View*].

¹⁴² See Llewellyn, *Warranty*, *supra* note 141, at 699. It apparently never happened, although the two corresponded. In January 1930 (i.e., at the height of his supposedly most critical period), Llewellyn was instrumental in inviting Scrutton to deliver a series of lectures at Columbia. See FOXTON, *supra* note 140, at 315. Citing his age, Scrutton declined.

¹⁴³ See Llewellyn, *Warranty*, *supra* note 141, at 699–701; see also K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 160 n.* (1938); cf. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646 (1958) (remarking on an “imaginary Scrutton” who “has the misfortune...to live under a supreme court which he considers woefully ignorant of the ways and needs of commerce”).

¹⁴⁴ FOXTON, *supra* note 140, at 267–72, 277–78, 281–82, 286; Llewellyn, *Point of View*, *supra* note 141, at 339. By contrast, attempts to fit Scrutton into the mythical, present-day understandings of legal realism do not succeed. See Andrew Phang, *A Legal Giant Revisited—Thomas Edward Scrutton and the Development of English Commercial Law*, 32 J. CONTRACT L. 119, 144–46 (2015) (reviewing FOXTON, *supra* note 140).

¹⁴⁵ See TWINING, *supra* note 100, at 581 (reproducing an address Llewellyn gave in 1940, in which Llewellyn said his aim was to create law that businesspeople would not see as complex and confusing but “as a helpful device”). For more on this see Part II.D, *infra*.

jurisprudential radicalism, anyone coming to Scrutton's opinions with today's understanding of legal realism will expect him to be an extreme intuitionist, someone who ignored past cases, or treated them in a way that showed he had no real respect for legal doctrine. This is not at all what one finds. On and off the bench, Scrutton distanced himself from "that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'" ¹⁴⁶ Scrutton's biographer, after a careful examination of his judgments, concluded that he was not a "caricature realist": He cared for the development of legal principles, and was critical of the idea of "decid[ing] each case as you think right without regard to principled laid down in previous similar cases." ¹⁴⁷ When he found himself in disagreement with a higher court, he explained in detail his reasons, but then dutifully followed precedent. ¹⁴⁸ This was Llewellyn's judicial idol.

D. E Pluribus Unum: The Restatements and the Uniform Commercial Code

In the familiar mythology on the legal realists, the Restatements hold a special place. In a narrative of Good versus Evil, the American Law Institute and its Restatements are designated the forces of darkness, a reactionary attempt to keep alive the false ideas from which the realists came to save us. Resorting to necromantic imagery, Lawrence Friedman once wrote of those involved in the Restatements, that they "took fields of living law, scalded their flesh, drained off the blood, and reduced them to bones." ¹⁴⁹ If there was a "theory of sorts" underlying their efforts, it was that "[a] legal order [that] is clear, orderly, systemic (in its formal parts), which has the most structural beauty...is also the best and the most efficient." ¹⁵⁰

¹⁴⁶ *Holt v. Markham*, [1923] 1 K.B. 504, 513 (C.A. 1922); see also T.E. Scrutton, *The Work of the Commercial Courts*, 1 CAMBRIDGE L.J. 6, 8 (1921) ("We are not trying to do justice, if you mean by justice some moral standard which is not the law of England"); but cf. Llewellyn, *Warranty*, *supra* note 141, at 708 n.30 (assuring us that his hero cared about justice).

¹⁴⁷ See FOXTON, *supra* note 140, at 291–92 (quoting *Hill v. Aldershot Corp.*, [1933] 1 K.B. 259, 264 (C.A. (Eng.))).

¹⁴⁸ See *id.* at 281 (discussing *Hillas v. Arcos*, 40 Lloyd's L. Rep. 307 (C.A. (Eng.) 1931)). Incidentally, someone else who acted in a similar fashion is Judge Jerome Frank. See GLENNON, *supra* note 71, at 114–15.

¹⁴⁹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 582 (1973) [hereinafter FRIEDMAN, *HISTORY* (1973)]; accord WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 199 (1998) (for the realists the Restatements were "a futile yet dangerous attempt to mummify legal doctrine and impose it as the central ordering project of American law").

¹⁵⁰ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 304–05 (3d ed. 2005). It seems that with every successive edition of his book, Friedman has tempered his criticism of the Restatements. The latest one still contains some critical remarks, but its tone is far milder.

Such imagery makes the realists' bitter opposition to the Restatement all but inevitable. As "living law" was something of a realist mantra,¹⁵¹ it is obvious why they would oppose these attempts at legal mummification. Furthermore, as skeptics about legal rules and their role in deciding cases, they would have nothing positive to say about a project dedicated to "restating" the common law in the form of blackletter rules. At best, this was a waste of time; more likely, it was worse, the killing of a thriving area of law.

This is indeed what one finds in histories of legal realism.¹⁵² In Laura Kalman's telling the Restatements project was "the final effort to realize Langdell's ideal of a science of law."¹⁵³ And as in her account Langdell stands for her everything the realists hated—formalism, conservatism, Harvard—Kalman argued that the realists "vociferously" opposed the Restatements.¹⁵⁴ She conceded that Corbin, who is central to her narrative of the rise of legal realism at Yale, was part of the team that worked on the *Restatement of Contract*, but she considers him an outlier. The realists' "skepticism about legal rules, doctrines, and certainty ensured that most realists would be less supportive than Corbin."¹⁵⁵ For Edward White, the Restatements reveal the fault line between sociological jurists of an older generation (such as Pound and Cardozo) who supported them, and the younger legal realists who feared they would stifle serious legal reform. Like Kalman, White argued that the Restatements were premised on a view of law and legal rules that was at odds with the realists' skeptical credo: The Realists saw the Restatements, "as symbols of nineteenth-century conceptualism."¹⁵⁶

See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 386–87 (4th ed. 2019) [hereinafter FRIEDMAN, *HISTORY* (2019)].

¹⁵¹ See, e.g., Walton H. Hamilton, *The Living Law*, 26 SURVEY GRAPHIC 632 (1937); K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934).

¹⁵² Probably the first to contrast legal realism with the Restatements was Grant Gilmore. See GRANT GILMORE, *THE DEATH OF CONTRACT* 65 (1974); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1044–45 (1961) [hereinafter Gilmore, *Legal Realism*].

¹⁵³ KALMAN, *supra* note 6, at 14, 26; see also FRIEDMAN, *HISTORY* (1973), *supra* note 149, at 582 (the Restatements were "perhaps the high-water mark of conceptual jurisprudence").

¹⁵⁴ See KALMAN, *supra* note 6, at 116, 244 nn.107–08.

¹⁵⁵ *Id.* at 26.

¹⁵⁶ G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 80 (expanded ed. 2003); White, *supra* note 115, at 35 ("Realist scholars used the appearance of the Restatements to expand their critique of the coherence of rules themselves"). For a small sampling of similar statements see FELDMAN, *supra* note 43, at 111 ("the Restatement movement can be understood as a Langdellian reactionary response to realism"); JUSTIN ZAREMBY, *LEGAL REALISM AND AMERICAN LAW* 10, 12 (2014); DUXBURY, *supra* note 23, at 147; Schlegel, *supra* note 70, at 85; see also note 172, *infra*.

More than just affirming the familiar story of the realists as opponents of legal doctrine and skeptics about legal rules, this narrative dramatizes it into a set-piece of young versus old, radical outsiders versus conservative establishment, Yale versus Harvard. Once again, however, too many overlooked facts do not fit this neat narrative. Faced with an ever-growing mass of law reports, far greater than anything found in any other common law country, there was a sense among the leaders of the American legal profession and prominent legal academics that American common law was becoming impossible to master; there was simply too much of it. There was also the related worry that with each state developing its own jurisprudence, the formerly unified common law was getting too divergent and fragmented. All this threatening making legal research and legal education impossible. Explicitly drawing on Hohfeld's call for a "conservative and permanent betterment of our legal institutions," the A.L.I. was founded in 1923 with the aim of bringing about greater clarity and uniformity in the law by issuing general "restatements" of various areas of law.¹⁵⁷

When that happened, many of the scholars who would later be called legal realists wrote in support of the new project; and some got involved. Walter Wheeler Cook published a friendly comment on the A.L.I. in *The New Republic*;¹⁵⁸ Llewellyn and Herman Oliphant did the same in a less conspicuous venue. Both noted the enormity and difficulty of the project but were clearly supportive.¹⁵⁹ Hessel Yntema published two articles dedicated to the A.L.I., both praising its mission of providing a clearer and more unified account of American law.¹⁶⁰ In one of them, he called the creation of the A.L.I. "one of the most hopeful events in the recent legal history of this country."¹⁶¹ Though he noted some problems with the Restatement project, he concluded

¹⁵⁷ See *Foreword* to 1 A.L.I. PROC. pt. 2, at 1, 1 (quoting Hohfeld, *supra* note 122, at 137). Beyond this programmatic statement, Hohfeld's analysis of rights was also used, in varying degrees, in the work on the Restatements. See George R. Farnum, *Terminology and the American Law Institute*, 13 B.U. L. REV. 203, 208–17 (1933).

¹⁵⁸ Walter Wheeler Cook, *The American Law Institute*, NEW REPUBLIC, Mar. 21, 1923, at 87.

¹⁵⁹ See Herman Oliphant, *The Problem of Logical Methods, from the Lawyer's Point of View*, 10 PROC. ACAD. POL. SCI. CITY N.Y. 323, 330 (1923); Llewellyn, *Point of View*, *supra* note 141, at 332; see also LLEWELLYN, *supra* note 47, at 105 (praising the A.L.I. for improving respect for legal academics' work).

¹⁶⁰ See Yntema, *supra* note 135, at 345, 348–49; Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461 (1936) [hereinafter Yntema, *What*]. In a later essay, he described the Restatements as a "great enterprise, the first comprehensive and sustained effort, co-ordinating the best minds on the bench, among the bar, and in the law schools, to codify the unwritten Common Law." Hessel E. Yntema, *The Jurisprudence of Codification*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 251, 255 (A. Reppy ed., 1949).

¹⁶¹ Yntema, *What*, *supra* note 160, at 461.

that those were a “healthy symptom” of the valuable work being done, namely that “the decisions in particular states...are being studied with a care and on a scale not hitherto envisaged.” For this reason alone, he said, the Restatements project was “abundantly justified.”¹⁶² Not only was Yntema not critical of the Restatements, he wanted to see the project expanded to cover legal procedure, the administration of justice, and statutory law.¹⁶³

Realist support went beyond cheering from the sidelines. As mentioned earlier, Corbin was deeply involved in the *Restatement of Contract* from the start, and initially Oliphant was too (although he left the project after two years);¹⁶⁴ Joseph Bingham was part of the team that produced the *Restatement of Conflict of Laws*.¹⁶⁵ As detailed below, other legal realists were part of the drafting teams of various Restatements, and still others were life members of the A.L.I.¹⁶⁶ After adding up all these names, it seems easier to name those realists who had no connections with it.

It is worth reviewing some of this involvement in the Restatements, both to bolster my claim that most of the realists supported the project, but also to demonstrate how the narrative of realists-versus-Restaters has been constructed for the sake of brandishing the radical reputation of the realists. For a start, take the case of Francis Bohlen. Though not part of Llewellyn’s published list of realists, he was at least realist adjacent: Llewellyn’s drafts and correspondence preceding the publication of *Some Realism about Realism* show that he considered Bohlen for inclusion in the list of legal realists.¹⁶⁷ And with good reason, as Bohlen was sympathetic to the realists’ ideas: When Jerome Frank published *Law and the Modern Mind*, the book generated controversy and some hostile reactions,¹⁶⁸ but not from Bohlen. He reviewed

¹⁶² See Yntema, *supra* note 135, at 349.

¹⁶³ Yntema, *What*, *supra* note 160, at 465, 466.

¹⁶⁴ See Corbin, *Restatement*, *supra* note 75, at 605.

¹⁶⁵ See RESTATEMENT OF THE LAW OF CONFLICT OF LAWS, at iii (Am. Law Inst. 1934). Bingham, one of the scientific legal realists, used an analogy with the natural sciences to explain the importance of articulating law’s conceptual apparatus: “Should a natural scientist contemptuously banish algebra from his workshop? Of course not. Then why should a jurist consign all the painfully devised systematic logic of his profession to the limbo of futilities?” Valid criticisms of this “traditional legal logic,” he added, should not detract from “just appreciation of its purport.” Joseph W. Bingham, *The American Law Institute vs. The Supreme Court: In the Matter of Haddock v. Haddock*, 21 CORNELL L.Q. 393, 394–95 n.2 (1936).

¹⁶⁶ See, e.g., 8 ALI Proc. at 389–400 (1930) (listing Joseph Bingham, Leon Green, Ernest Lorenzen, Charles Clark, Herman Oliphant, Walter Wheeler Cook, Thomas Swan, as well as Carodozo and Corbin). Realists involved in the drafting of Restatements are mentioned in notes 176, 184, and accompanying text.

¹⁶⁷ See HULL, *supra* note 50, at 364–66.

¹⁶⁸ See, e.g., Mortimer J. Adler, *Legal Certainty*, 31 COLUM. L. REV. 91 (1931) (reviewing FRANK, *supra* note 32).

Frank's book enthusiastically and urged all lawyers to read it. He praised Frank for "prov[ing] to the hilt" that there are no eternal and immutable legal principles, a view Bohlen said was still widely accepted.¹⁶⁹ A few years later, in an article revealingly entitled *The Reality of What the Courts Are Doing*, Bohlen unreservedly embraced realist critiques of "'Bealeistic' conceptualism."¹⁷⁰ He concluded his essay with boilerplate realism: "when the need arises, [judges should] tell the real reasons for their decisions and not conceal them beneath legalistic and often meaningless phrases."¹⁷¹ All the while, Bohlen was also the Reporter for the *Restatement of the Law of Torts*.¹⁷²

By now, such a combination of views need not appear surprising: The legal realists did not dismiss legal doctrine as chimera, nor did they object to attempts to clarifying or improving it. Bohlen pointed out that to ignore "[t]he desire for symmetry, for consistency" is something that judges strive for, which is why "it is the reverse of 'realism' to exaggerate the field in which [judicial] judgment or 'hunch' operates."¹⁷³ If one takes seriously that judges are human, then—no more, but also no less, than other humans—they may seek order and symmetry in the field they are working in. Put differently, just as there were "formalist" law professors, there are formalist judges, who will seek to shape the law in light of their ideas. A "realistic" legal education that aims to teach future practitioners how to construct and present winning legal arguments, would do a disservice to its students if it ignored the existence of such judges.¹⁷⁴ Realism about an object does not mean chaos unless the object described is chaotic. And of course, even if law is disorganized, there is nothing unrealistic in wanting to make it less so.

Bohlen's reference to hunches was an allusion to Judge Joseph Hutcheson's provocative article which extolled the role of intuition in

¹⁶⁹ See Francis H. Bohlen, Book Review, 79 U. PA. L. REV. 822, 822 (1931) (the book "should be read by every judge, practitioner, and law teacher").

¹⁷⁰ Francis H. Bohlen, *The Reality of What the Courts Are Doing*, in LEGAL ESSAYS: IN TRIBUTE TO ORRIN KIP MCMURRAY 39, 39 (Max Radin & A.M. Kidd eds., 1935) [hereinafter Bohlen, *Reality*]. With a few small changes, the article was reprinted as Francis H. Bohlen, *Old Phrases and New Facts*, 83 U. PA. L. REV. 305 (1935). The reference here is to Joseph Beale, discussed in text accompanying notes 307–308, *infra*.

¹⁷¹ Bohlen, *Reality*, *supra* note 170, at 49.

¹⁷² For an illustration of the kind of knots proponents of the realism-versus-Restatement narrative end up tied in, consider this: On the very same page Horwitz said that the Restatements were "an attempt to reassert the formalism and conceptualism...of the old order," he also criticized Llewellyn for leaving Bohlen out of his list of legal realists. See HORWITZ, *supra* note 23, at 183.

¹⁷³ Bohlen, *Reality*, *supra* note 170, at 46.

¹⁷⁴ For a similar view see Max Radin, *The Education of a Lawyer*, 25 CALIF. L. REV. 676, 680 (1937); see also Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1273 (1942).

adjudication.¹⁷⁵ Some of what Hutcheson said in that article sounded as though he arrived at his decision through a process of mystical divination, which not even he could explain. Such an account did not seem to have much room in it for the influence of legal rules. This one-hit wonder was enough to earn Hutcheson a place in Llewellyn's list of realists and guarantee for him a supporting role in the realist firmament. Possibly more than any other realist work, Hutcheson's article seems to support the view that the realists were skeptical of legal rules or their role in legal reasoning. If what decides cases are gut feelings, then the legal reasons provided in written decisions look like after-the-fact rationalizations, which suggests that legal rules have very little influence on the outcomes of cases. If there is anyone who would criticize the Restatements as a useless waste of time and effort, surely it would be Hutcheson.

Except he didn't. In a short essay on the A.L.I. and its work, Hutcheson wrote that "[t]he Restatement gives that which we have never had before, a reasonably authoritative expression of the present law."¹⁷⁶ He acknowledged that he thought "judges must have a reasonable freedom of decisions, and liberty of choice as between one suggested rule and another," but he still considered the Restatement "an inestimable value to us all." He reiterated his faith in the power of the judicial hunch for its ability to show the path for the law to follow, the Restatement "give[s] us firm starting points for new departures."¹⁷⁷ Hutcheson drew the standard distinction between cases where "the decided law has already gone along [a certain] way" and acknowledged that in such cases the Restatement can relieve the judge "from resorting to [the 'little small dice' of intuition]."¹⁷⁸ It is only in the "really unprovided cases," that judges need to turn to intuition, and the Restatement provides guidance for these cases as well.¹⁷⁹

¹⁷⁵ See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). Despite its occasional mystical tone, the essay's message is more moderate than it is often taken to be. This is, of course, consistent with the argument of this article, and helps explain Hutcheson's views discussed below.

¹⁷⁶ See Joseph C. Hutcheson, *Work of the American Law Institute*, 24 A.B.A. J. 723, 725 (1938). Hutcheson was a member of the Council of the A.L.I. See 3 RESTATEMENT OF THE LAW OF TORTS, at iii (Am. Law Inst. 1938).

¹⁷⁷ Hutcheson, *supra* note 176, at 725.

¹⁷⁸ *Id.* (alluding without citation to Joseph C. Hutcheson, *Lawyer's Law, and the Little, Small Dice*, 7 TUL. L. REV. 1 (1932)).

¹⁷⁹ *Id.* Incidentally, Llewellyn once wrote that having "studied Judge Hutcheson's opinions long and hard" he found them to "run with gratifying and even uplifting consistency," and that they were no less predictable than those of other judges. See Llewellyn, *supra* note 47, at 347-48. Not only were consistency and predictability possible, Llewellyn considered them desirable and was gratified to find them in unexpected places.

It is true that when the Restatements began to be published, some of the realists were not entirely happy with the results. It would be incredible if that were not so. The Restatements were a new genre of legal writing: an attempt to cover whole areas of the common law in the form of a code which was not quite a code. Each Restatement was a significant undertaking spanning hundreds of pages, the joint enterprise of many people, themselves trying to synthesize the law of dozens of related but independent jurisdictions. Inevitably, to achieve any kind of result necessitated compromise; inevitably, the final product could not perfectly match the views of any academic who formed some views about “his” subject. Anyone who expects anything other than disagreement has not paid enough attention to what happens in their faculty workshop.¹⁸⁰

It is thus completely predictable that when the individual Restatements were completed and published, some legal realists had grave disagreements with the result.¹⁸¹ However, in the rush to depict the realists as opponents of the whole project due to its “conceptualist” ideology, commentators have often missed this point. It is one thing to welcome the idea behind the Restatements and be disappointed with the results; it is quite another to think that the project is fundamentally flawed from the start. It is only critiques of the second kind that fit the narrative of the realists’ skepticism, but in reality most realists’ critical remarks on the Restatement were resolutely of the first kind. In fact, many times these criticisms turn out to be the opposite of what one would expect them to be. A frequent realist complaint about the Restatements was that their statement of the law was inaccurate because they did not pay sufficient attention to legal materials.

One kind of criticism came from the more scientifically oriented realists and was in accordance with their naturalistic outlook. To use modern parlance, they wanted the Restatements to be more “evidence based,” they wanted to see the Restatement take on policy questions more openly, they hoped to see the project aided by experts from other disciplines that employ “objective [research] methods,” and they wished to see greater use of factual surveys.¹⁸² These criticisms were always offered as friendly amendments by those seeking to improve on an already valuable enterprise.

¹⁸⁰ Cf. Pierre Schlag, *The Faculty Workshop*, 60 BUFF. L. REV. 807 (2012).

¹⁸¹ For these reasons, we find that even those who worked on a particular Restatement did not always agree with every aspect of the project they were involved in. For an example, see note 204, *infra*.

¹⁸² Cook, *supra* note 158, at 89; Oliphant, *supra* note 159, at 326–29; Yntema, *What*, *supra* note 160, at 465. By contrast, the traditionalist Corbin did not think there would be much value in such data collection as social changes relevant for the Restatement would need to be reflected in the cases first. See Corbin, *Common Law*, *supra* note 75, at 28.

Other criticisms focused on the content of the Restatements themselves. It is here that it is crucial to pay attention to the distinction between two kinds of criticism mentioned above. Charles Clark's review of the contracts Restatement is a good illustration of this point. It is especially valuable because both Kalman and White discussed it in some detail, and both used it as an evidence of the realists' fundamental opposition to the Restatements and their underlying philosophy.¹⁸³ Clark's review was nothing of the sort. Significantly, both Kalman and White omitted from their discussion the fact, mentioned prominently in the review, that at the time of writing Clark was part of the team working on the Restatement of Property.¹⁸⁴ Not only that, Clark took pains to make it clear his criticisms would not be misunderstood as denunciation of the enterprise. As he put it, rather dramatically, he had "done all in [his] power to further the objects of the Institute,"¹⁸⁵ chief among them "the objective of making [as] a clear statement of existing rules of law as is possible."¹⁸⁶

Clark acknowledged that his criticisms of the contracts Restatement reflected a philosophical difference among members of the A.L.I., which manifested itself in disagreements over form. In line with this view, he proposed was "a shift in emphasis," not the abandonment of the project.¹⁸⁷ Clark had his doubts about organizing the material in the form of a code consisting of numbered sections, an approach that he worried had a tendency to give an oversimplified presentation of the law.¹⁸⁸ This difference over form reflects a philosophical disagreement over the proper way to design the law in order to ensure its ability to deal with a wide range of situations and the needs of a changing society. It reflects debates, familiar at the time, over the desirability of codifying the common law. Long before the legal realists, opponents of codification feared that it would stultify the vitality and organic development of the common law.¹⁸⁹ There is no shred of skepticism or radicalism in this

¹⁸³ See KALMAN, *supra* note 6 at 27; White, *supra* note 115, at 36–37; see also DUXBURY, *supra* note 23, at 147–48.

¹⁸⁴ See Clark, *supra* note 135, at 643 n.*, 645.

¹⁸⁵ *Id.* at 645.

¹⁸⁶ *Id.* at 653; see also Clark, *supra* note 30, at 398. It is also notable that in addition to his work on the property Restatement, Clark was among the chief architects of the Federal Rules of Civil Procedure, which he justified in terms of the need for greater conformity. See Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448 (1936).

¹⁸⁷ Clark, *supra* note 135, at 664, 667.

¹⁸⁸ See *id.* at 646 & n.6 (noting others sharing his view), 653–54.

¹⁸⁹ For an example of how this debate played out in late nineteenth-century New York see Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Code*, 37 AM. J. COMP. L. 95 (1989); see also Dan Priel, *Conceptions*

view; if anything, the anti-codification view has more than a tinge of conservatism to it, preferring the “organic” development of the law from below to the top-down imposition more characteristic of a legislative code.

Clark’s support for the project coupled with criticisms over execution is representative of the reaction of many realists. What is even more surprising is that in many cases, the realists’ criticisms go against expectations. Many of the realists pointed out that the Restatements gave an incorrect account of the state of legal doctrine. For example, Edwin Patterson worried that the Restatement of Contract did not distinguish clearly between those propositions that were “well-supported by cases” and those for which “authorities are scanty or dubious.”¹⁹⁰ Of course, this is the kind of concern can be voiced only by someone who believed that cases generally create solid, real, recognized legal rules, and that it is possible to draw a meaningful distinction between issues on which the law is settled and those on which it is not. All this is very different from the suggestion that the realists’ criticisms of the project were motivated by skepticism about legal rules themselves.

Leon Green provides another illustration. In the period that the Restatements were in still development, he wrote favorably about how helpful the work of the American Law Institute has been “and will continue to be” for legal scholarship and the administration of law.¹⁹¹ When the torts Restatement was finally published, Green reviewed it and repeated his praise for the A.L.I., and predicted that “for centuries to come [American lawyers] will profit by its work.”¹⁹² All this seems genuine and is consistent with his other comments on the A.L.I. There is no denying, however, that he was deeply dissatisfied with the torts Restatement. Part of the disagreement undoubtedly grew out his philosophical differences about tort law with the torts

of Authority and the Anglo-American Common Law Divide, 65 AM. J. COMP. L. 609, 648 (2017) (highlighting the jurisprudential presuppositions of this debate).

¹⁹⁰ Edwin W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 401 (1933); see also Edwin W. Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223 (1936) (a favorable assessment of the *Restatement of Restitution and Unjust Enrichment*); Edwin W. Patterson, *Logic in the Law*, 90 U. PA. L. REV. 875, 882 (1942) (“The *Restatement of the Law*...has its chief value in providing a more stable terminology than is commonly found in legal literature”). For another example see Harold C. Havighurst, *The Restatement of the Law of Contract*, 27 ILL. L. REV. 910 (1933). Havighurst hailed the Restatements a “great project,” although he worried it might increase the uncertainty of the law. See *id.* at 917, 922.

¹⁹¹ See LEON GREEN, JUDGE AND JURY 46 (1930).

¹⁹² Leon Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 607 n.33 (1935); see also Leon Green, *The Administrative Process*, 21 A.B.A. J. 708, 709 (1935) (praising the work produced by the A.L.I. and the Commissioners on Uniform Laws acknowledgement of the “supremacy of law to which we as a people, and especially the lawyers of this country are committed”).

Restatement's Reporter, Francis Bohlen.¹⁹³ Once again, however, much of his criticism is at odds with what we would expect a legal realist to say. One of Green's main complaints was the cumbersome and verbose language adopted in the torts Restatement,¹⁹⁴ not a likely critique from someone who thought the whole endeavor of restating the law was misguided, but a very sensible criticism if one accepts the Restatement's goal of provide a clear summary of the law. Another one of Green's complaints, on "how little importance has been attached to analysis and classification" in preparing the Restatement, is likewise difficult to reconcile with the realists' supposed skepticism about the analysis and classification of law.¹⁹⁵ One example Green gave was that some of the material was organized based on the interest protected by the tort (physical integrity, property, reputation), while some material was organized around a kind of behavior (specifically, negligence) which can infringe different kinds of interests. This is not very different from the criticism about the taxonomy of torts made *today* by those who distance themselves from legal realism in its contemporary, skeptical sense.¹⁹⁶

The real embarrassment for those who argue for the fundamental opposition between the realists and the A.L.I. is that one of the best known and most significant realists also led the A.L.I.'s most significant project. As Chief Reporter of the Uniform Commercial Code from 1937 to 1951, Llewellyn dedicated much of his time to drafting a model code which was developed and published under the auspices of the A.L.I. and the National Conference of Commissioners on Uniform State Laws.¹⁹⁷

Attempts to reconcile the purported legal radicalism and rule skepticism of the legal realists with Llewellyn's well-known involvement in the UCC take two forms. One approach distinguishes between two stages in Llewellyn's work, contrasting Llewellyn's early rebellious and critical period with his later, more constructive work, often attributing a retreat from more radical

¹⁹³ This difference can also be seen, from the other side, in Francis H. Bohlen, Book Review, 80 U. PA. L. REV. 760 (1932) (reviewing GREEN, *supra* note 191). In this lengthy review, Bohlen complained of "grave faults" in Green's book, which make the book "dangerous" if its ideas were adopted by those without sufficient understanding of the subject. *Id.* at 782. Given Bohlen's sympathies for realist ideas, *see* notes 167–174, *supra* and accompanying text, this review along with Green's review of the Restatement, show that there was no realist party line on tort law.

¹⁹⁴ *See* Green, *Restatement*, *supra* note 192, at 591–93, 595–96.

¹⁹⁵ *Id.* at 587.

¹⁹⁶ *See* STEVENS, *supra* note 118, at 291–92.

¹⁹⁷ In addition to Llewellyn, Kessler was on the UCC's editorial board and Corbin served as an advisor. *See* ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION 85 (2013).

ideas in the aftermath of the horrors of World War II.¹⁹⁸ But if I am right, there was no radicalism to retreat from, because Llewellyn held a broadly similar, constructive view throughout his career. I mentioned already that shortly after the A.L.I. was founded in 1923, Llewellyn published a paper sympathetic with the Institute and its mission. Three years later, Llewellyn became a Commissioner of the National Conference of Commissioners on Uniform States Laws and held this role until the end of his life, throughout his supposedly critical period.¹⁹⁹ Nor is there any indication of a dramatic change in his outlook on the law. While there are some shifts in emphasis and changes in perspective, the non-skeptical, even slightly conservative, bent is evident from early on. Consider one example: “Compared with other social phenomena, the institution of judicial decision making is indeed among the most conservative and inflexible.” This is not Langdell or Beale; this is Llewellyn from his book *The Case Law System in America*, published in Germany in 1933 and based on lectures he delivered in 1928–29.²⁰⁰ To be fair, Llewellyn contrasts there the fixity of law at wholesale with the freedom available at retail, which is where most lawyers operate. But there is never a hint in this book that rules don’t matter or that they can be manipulated to reach any desired outcome, or that the outcomes of cases depend exclusively (or even predominantly) on personal traits of the judge. A similar message emerges from Llewellyn’s contemporaneous book, *The Bramble Bush*, which he used to accompany a set of introductory lectures for first-year students.²⁰¹

The other way of reconciling Llewellyn’s supposed skepticism with his years-long work on the UCC takes the opposite approach to reconciling the seeming conflict. It is not that Llewellyn became conservative, it is that the Code is a jurisprudentially radical product. To achieve this conclusion, the UCC is described as a kind of anti-code which challenges the very idea of a code as a set of prescriptive, guiding legal rules. In one formulation of this idea, the UCC told judges to keep doing what they were doing anyway,

¹⁹⁸ See Hefferman, *supra* note 69, at 147. More generally, on the supposed retreat from radicalism see notes 69–70, *supra*, and accompanying text. For similar reasons, I reject the opposite suggestion made in White, *supra* note 79, at 46, that having lost the battle with realism, the A.L.I. decided to join them by recruiting legal realists for the second series of Restatements.

¹⁹⁹ See STEIN, *supra* note 197, at 227.

²⁰⁰ See LLEWELLYN, *supra* note 47, at 12. Those thinking I lifted this sentence out of context are welcome to look elsewhere in the book. See, e.g., *id.* 76–78.

²⁰¹ See, e.g., LLEWELLYN, *supra* note 132, at 80 (sensible legal critique recognizes “courts must move within the framework of the given rules. The rules, however socially unjust they seem to him or others, still are there. The court is but their mouthpiece.”). Consider also that Llewellyn’s admiration for Scrutton, discussed in Part I.C, *supra*, also began in the 1920s.

namely decide according to their intuitive response for the facts of the case, unencumbered by any legal rules.²⁰² A somewhat different formulation of this idea accused the UCC of normative “passivity” in following trade customs, which the author linked to the realists’ supposed “indifference to any moral imperative.”²⁰³ Neither claim is accurate.

There is no doubt that the UCC was shaped in light of Llewellyn’s vision—how could it not?²⁰⁴—and that vision departed in some ways from earlier commercial codes. But the fundamental goals of the UCC were entirely conventional. Like the Restatements, the Uniform Commercial Code was conceived of as a response to the felt need for greater clarity and uniformity in the commercial law of the different states.²⁰⁵ In Llewellyn’s own words, the commercial world needed “[s]impler, clearer, and better adjusted rules, built to make sense and and to protect good faith, make for more foreseeable and more satisfactory results both in court and out.”²⁰⁶ And this is precisely what Llewellyn sought to offer: The drafters of the UCC, he said, were working on “ironing out discrepancies, filling gaps, meeting new needs” all with the ultimate aim of “immediate usability.”²⁰⁷ On another occasion, Llewellyn explained the Code’s aim both in terms of making the purpose of the law clearer for the layperson, and in providing “to the counsel and to the court a sharper and more predictable guidance.”²⁰⁸ All this indicates that Llewellyn had a conventional understanding of what a code should do.

The UCC was conventional also in another sense. The Restatements, though written in the form of a statute (complemented by commentary and illustrations) were not meant to be the basis for legislation. By contrast, from its inception the UCC was designed as a model code to be enacted across the

²⁰² See Brian Leiter, *American Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 249, 264 (Dennis Patterson ed., 2d ed. 2010).

²⁰³ Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 *STAN. L. REV.* 621, 627 (1975).

²⁰⁴ However, like the Restatements, the UCC was joint work and Llewellyn was not entirely satisfied with the results. See Wiseman, *supra* note 100, at 467–68.

²⁰⁵ See, e.g., Karl Llewellyn, *Why a Commercial Code?*, 22 *TENN. L. REV.* 779, 779–80 (1953) (uncertainty in commercial law “costs the business man”); see also note 145, *supra*. As such, the UCC was subjected to the same criticism voiced by opponents of the Restatements who objected that it ignored the possibility that different regions may legitimately favor different rules. See FRIEDMAN, *HISTORY* (2019), *supra* note 150, at 745.

²⁰⁶ K.N. Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 *COLUM. L. REV.* 167, 178 (1946).

²⁰⁷ Llewellyn, *supra* note 206, at 178.

²⁰⁸ Llewellyn, *supra* note 38, at 261.

United States.²⁰⁹ In this, the UCC was conceived of as an update of the earlier Uniform Sales Act, which was largely the work of Samuel Williston, the Langdellian contract scholar from Harvard.

As for the Code's underlying normative message, it neither reflects indifference to moral questions, nor does it tell judges to just do what they have been doing all along. Its underlying normative guideline is for judges to decide cases according to the prevailing values of the community. It is what Llewellyn called "lawyer's Natural Law," premised on the idea that "[g]uidance for a particular society must plant its feet in that society."²¹⁰ This is the same *Sittlichkeit* that Corbin endorsed in the essay Llewellyn considered a foundational piece of legal realism,²¹¹ and a view that Llewellyn used to draw a link between American common law (in the grand style) and American democracy.²¹²

For Llewellyn, what this meant for commercial law, his main area of interest, was trying to identify the commercial practices and values of businesspeople, in order to align commercial law with prevailing commercial standards.²¹³ If all judges had been like Scrutton, Llewellyn's judicial idol, the UCC might not have been needed. But judges as informed of, and sensitive to, the needs and expectations of business were few and far between. For the more commonplace judges, there was a need for a commercial code that would tell them, or force them to learn about and then apply, the norms of the business community.²¹⁴ The Code thus did have a normative agenda of facilitating the needs and expectations of business by creating institutional mechanisms that would incorporate them into the law.

There are many possible criticisms of this view, starting with the idea that commercial law should be developed based on the idea of facilitating

²⁰⁹ The creation of a uniform law across the United States is one of its stated guiding principles. See U.C.C. § 1-102(2)(c) (AM. LAW INST. & UNIF. LAW COMM'N 1951). This aim has been largely successful, as the Code has been adopted (with some modifications) in every state.

²¹⁰ Karl N. Llewellyn, *One "Realist's" View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 6 (1938).

²¹¹ See note 81, *supra*.

²¹² See Llewellyn, *supra* note 22, at 16, 40, 45; see also Priel, *supra* note 189, at 632–34.

²¹³ See generally Karl N. Llewellyn, *On Law and Our Commerce*, 1949 WIS. L. REV. 625. Though the essay is, characteristically, far from pellucid, two themes are evident from it: That law should be aligned with commercial practice, and that the commercial practice in question should be "our" (i.e., American) commercial practice.

²¹⁴ But see Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1151–60 (1985) (challenging this view, arguing that despite Llewellyn's professed desire to incorporate trade customs, much of the UCC was his own invention).

business. Even accepting it, some have questioned the means by which Llewellyn has sought to bring it about, either on factual grounds (there are no stable trade customs) or normative ones (businesspeople may follow certain rules during an ongoing business relationship but will want different, formal rules to deal with commercial conflict).²¹⁵ Whatever their merits, these criticisms all presuppose that Llewellyn had a wholly traditional normative vision, which he tried to imbue into a wholly traditional legal instrument, a legal code.

To conclude the discussion so far, I have argued that contrary to the familiar narrative, the majority of the realists were supportive of the Restatements. Even when critical about the execution, the criticism is not based on skepticism about legal rules. I must acknowledge that this overwhelming support for the Restatements and the UCC was not shared by all legal realists. A small minority objected, not coincidentally consisting almost entirely of the few legal realists who were hostile to the common law and wanted to see it replaced by the methods of modern natural science.²¹⁶ Since the Restatement were not an attempt to reform the law with the aid of the methods of the natural sciences, these realists saw them as a misguided enterprise that seeks to perpetuate lawyers' outdated methods and the products of these methods. In line with these criticism, Felix Cohen described the Restatements as "the last-drawn-out gasp of a dying tradition," which was adamant on keeping alive "the dogmas of legal theology."²¹⁷ These legal realists did not share the more traditionalist legal realists' admiration for the common law as reflecting community values; for this reason, they did not consider valuable the exercise of putting the mass of common law cases into a coherent system. True legal reform had to be grounded in finding the needs of society by way of formulating and testing empirical hypotheses. It is not too far to suggest that from this perspective, the Restatements may be seen as worse than nothing, because they stood in the way of real (i.e., scientific) law reform.²¹⁸

²¹⁵ See Richard Craswell, *Do Trade Customs Exist?*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 118 (Jody S. Kraus & Steven D. Walt eds., 2000); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

²¹⁶ For a discussion of this group, which I call "scientific legal realists," see Part II.B, *infra*.

²¹⁷ Cohen, *supra* note 53, at 833; see also EDWARD STEVENS ROBINSON, LAW AND THE LAWYERS 35–38 (1935); see also Myron S. McDougal, Book Review, 32 ILL. L. REV. 510 (1937) (reviewing RESTATEMENT OF THE LAW OF PROPERTY (1936)). Kalman also mentions critical comments in the private correspondence of Jerome Frank and Thomas Reid Powell. See KALMAN, *supra* note 6, at 244 n.109.

²¹⁸ See Felix S. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 202–03 n.7 & *passim* (1931).

These ideas received their sharpest expression in an essay by Thurman Arnold.²¹⁹ Arnold drew a distinction between the insiders “priests” who participate in the theology of law and outsider “observers” who assume a social scientific stance toward the practice.²²⁰ Though the Restatements were a sincere effort by dedicated insiders, Arnold argued they were blinded by their own perspective from seeing both how their efforts made the problem worse, and that another way was possible. Arnold acknowledged that from the inside, the Restatements were as good a product as one could hope for. But Arnold further argued, if the problem it sought to solve was the “inflation” of legal materials, it was not the solution. Rather than replacing the growing mass of legal materials, the Restatements just became yet another source lawyers had to consult. Even worse, in short order, they generated their own secondary literature consisting of additional commentaries, defenses and critiques.²²¹ As such, the Restatements were brilliant efforts of explaining away the inconsistencies of the Ptolemaic system when what was needed was a Copernican revolution.²²²

Have we finally found here the realist skeptics, the ones who doubted the very idea of rules and their determinacy, who were skeptical of all values and whose writings challenged democracy and the rule of law? Hardly so. Arnold’s distinction is the familiar one between internal and external perspectives—between “science of law” and “science about law”—and his preference for the external perspective is to be expected from those who adopt a

²¹⁹ See Thurman Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811 (1936). Overall, Arnold resists easy classification. See Neil Duxbury, *Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD. J. LEGAL STUD. 11, 14, 17, 19 (1990). Partly, this is because he changed his mind quite frequently. When he wrote this essay, he was under the sway Edward Robinson’s naturalistic jurisprudence. See Arnold, *supra*, at 813, 824.

²²⁰ Arnold, *supra* note 219; see also Thurman Arnold, *The Jurisprudence of Edward S. Robinson*, 46 YALE L.J. 1282, 1286 (1937). Interestingly, a few years earlier, presumably before Arnold met Robinson, Arnold had reviewed the trusts Restatement. See Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931). Arnold was critical of aspects of this Restatement, and challenged the conceptual approach it adopted, which he considered circular. See *id.* at 806, 811–12. However, at the time, Arnold was far more receptive to the project itself. Rather than dismissing it wholesale, he suggested that it be rethought “in light of its utility in solving modern problems.” *Id.* at 803. In this constructive spirit, Arnold even drafted alternatives to some of the Restatement’s sections. See *id.* at 814–16. Arnold’s change in perspective is perhaps reflected by the fact that he did not mention this earlier review in his later critique.

²²¹ See Arnold, *supra* note 219, at 822–23.

²²² See *id.* at 823.

naturalistic, scientific perspective on law.²²³ Even in the 1930s, this approach already had a substantial history. The simplest way of describing legal realists who favored this external, scientific perspective is as modern-day Benthamites, something that many of them acknowledged.²²⁴ Seen in this light, even their critique of the Restatements resembles Bentham's critique of what can be described as the restatement project of his day, William Blackstone's *Commentaries on the Laws of England*.²²⁵ Like their intellectual forebear, these legal realists disliked the common law and its methods, and for similar reasons. The common law appeared to them, as it did to Bentham, as an outdated method for making law, and more broadly, for solving society's problems. If the Restatements came to solve the proliferation of legal materials and their growing disorder, they were, at best, a short-term fix that did not address the root cause of the problem, which was the common law itself, a technique of legal regulation and a form of legal practice that had run its course and should be abandoned.

These realists were critical of the common law, a particular way of organizing law and of a particular approach to consolidating and analyzing it. Rejecting it was the opposite of skepticism; it was an attempt to put law and legal reform on what they thought is a firmer foundation. It is in this Benthamite spirit that Arnold stated: "When men begin to examine philosophies and principles as they examine atoms and electrons, the road to discovery of the means of social control is open."²²⁶

E. The Real(ist) Benjamin Cardozo

I left for last my discussion of Benjamin Cardozo. I do so partly due to his stature as one of the United States' most celebrated judges, partly because these days Cardozo has become something of a hero figure for a group of scholars who define themselves in overt opposition to legal realism and its

²²³ See *id.* at 813 ("An objective or naturalistic attitude toward human institutions is one that can be taken only by one writing about them from the outside"). For a broadly similar contemporary statement see Daniel C. Dennett, *The Fantasy of First-Person Science*, in *THE MAP AND THE TERRITORY: EXPLORING THE FOUNDATIONS OF SCIENCE, THOUGHT AND REALITY* 455 (Shyam Wuppuluri & Francisco Antonio Doria eds., 2018).

²²⁴ See ROBINSON, *supra* note 217, at 17; Felix S. Cohen, Book Review, 42 YALE L.J. 1149, 1149 (1933) (reviewing C.K. OGDEN, *BENTHAM'S THEORY OF FICTIONS* (1932)).

²²⁵ See JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* (J.H. Burns & H.L.A. Hart eds., 1977) (partly published in 1776). Just as Arnold acknowledged the "internal" value of the Restatements, in the midst of his ferocious attacks on Blackstone, Bentham acknowledged the elegance of Blackstone's work and the "enchanted harmony of its numbers." *Id.* at 469.

²²⁶ Arnold, *supra* note 219, at 824. For Bentham's similar views see Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 WASH. U. JURIS. REV. 269, 290–91 (2012).

supposed skepticism about legal doctrine.²²⁷ To them, Cardozo's judicial opinions and extrajudicial writings are a model of a sensible approach that takes the law seriously.²²⁸ Responding to the suggestion that Cardozo was a legal realist,²²⁹ John Goldberg retorted that Cardozo "one of the most sophisticated and accomplished *anti*-realist judges," because he sought to "understand, articulate, and apply" legal concepts rather than "deconstruct or hide behind" them.²³⁰ For those who hold this view, Cardozo's opinions demonstrate better than any theoretical argument, the falsity of the realists' skeptical claims about legal doctrine.

In a way, this depiction of Cardozo as an anti-realist follows a pattern encountered before, only in reverse. Starting from the assumption that the realists were skeptics about legal doctrine and seeing Cardozo as the consummate common-law judge, the stage is set for seeing them as intellectual polar opposites: He was moderate where they were radical, he was respectful of legal doctrine where they were dismissive of it. Even on a personal level, the image of the "saintly" Cardozo as conciliatory and gentle looks very different from the image of the realists as brash and confrontational.

Following the strategy of this Article, I hope to reassess both Cardozo and the realists. If we consider what the realists thought of Cardozo *given these facts about him*, this gives us reason to re-evaluate *them*; and in turn, this might also teach us something about Cardozo as well. Once we strip the realists of their supposed radicalism, it becomes far easier to see commonalities between his views and theirs.

That Cardozo was a thoroughgoing anti-realist judge and thinker would have surprised the legal realists. There can be little doubt that they admired Cardozo and more-or-less uniformly considered him an uncommonly great judge.²³¹ In fact, with the possible exception of Holmes, it is difficult to find

²²⁷ See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 11–12 (2020); Ernest J. Weinrib, *Restoring Restitution*, 91 VA. L. REV. 861, 863 (2005) (book review) (describing his own view as "anti-realist a standpoint as is imaginable").

²²⁸ See John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1453 (1999) (reviewing ANDREW KAUFMAN, *CARDOZO* (1998)).

²²⁹ See KAUFMAN, *supra* note 228, at 203, 457–58. Others treating Cardozo as a legal realist include DAGAN, *supra* note 59, at 3; Richard D. Friedman, *Cardozo the [Small r] realist*, 98 MICH. L. REV. 1738, 1760 (2000) (reviewing KAUFMAN, *supra*) ("Cardozo emphasized the need to make legal results conform to a practical, realistic understanding of the situation").

²³⁰ Goldberg, *supra* note 228, at 1423, 1452. The "no" camp also includes White, *supra* note 79, at 34.

²³¹ See Llewellyn, *supra* note 22, at 35; Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 308 (1927); Leon Green, *Benjamin Nathan Cardozo*, 33 ILL. L. REV. 123 (1938); Hessel E. Yntema, Book Review, 25 AM. POL. SCI. REV. 749, 749 (1931)

any judge that the realists as a group praised more consistently than Cardozo. This was not the begrudging respect of the “most eloquent spokesperson for the wrong view” kind; most of the legal realists considered him an ally to their cause.²³² Llewellyn, at the height of his supposedly critical phase, praised Cardozo for “remaking the judicial theory of the country.”²³³

That the legal realists thought of such a moderate judge as their hero is itself a strong indication that claims about realists’ radicalism are exaggerated and were not skeptics about law of legal rules. Granted, it is possible that they misunderstood him, reading him more radically than he was. Just as I have argued that CLS scholars misread the realists, it is possible that the realists misread Cardozo, whose sinuous yet elusive writing style lends itself to multiple interpretations. But the realists were Cardozo’s contemporaries. They knew his judicial opinions much better than most of us today. Some of them

(reviewing, among others, BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS* (1931)) (“one of our greatest and most revered judges”); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 205, 210 (1933) (book review); Charles E. Clark, Book Review, 40 YALE L.J. 1011 (1931) (reviewing CARDOZO, *supra*); Charles E. Clark, Book Review, 57 YALE L.J. 658 (1948) (reviewing SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (Margaret E. Hall ed., 1947)); Edwin W. Patterson, *Cardozo’s Philosophy of Law* (pt. 1), 88 U. PA. L. REV. 71, 71 (1939); Hamilton, *supra* note 33, at 21, *passim*. A more personal story about Llewellyn’s excitement over meeting Cardozo is told in James J. Connolly et al., *Alcoholism and Angst in the Life and Work of Karl Llewellyn*, 24 OHIO N.U. L. REV. 43, 66–67 (1998).

Frank is an interesting case. In his first book, Frank listed Cardozo among the “enlightened” lawyers and called him “[o]ne of the greatest American judges.” See FRANK, *supra* note 1, at 5 n.*, 153, 236–39. In later writings, possibly influenced by what he perceived as an unfair treatment of his ideas by Cardozo, discussed in text accompanying notes 266–269, *infra*, Frank’s changed his tune. In these writings, Frank often singled out Cardozo for his excessive attention to the appellate adjudication, even though (as Frank acknowledged) many others, including most legal realists, had a similar focus. See Jerome Frank, *Cardozo and the Upper Court Myth*, 13 LAW & CONTEMP. PROBS. 369 (1938). A later essay captures Frank’s ambivalence towards Cardozo in a single sentence: “Cardozo was infected with appellate-courtitis, his description of the judicial process, superlative with respect to upper courts, is astonishingly misdescriptive of the much larger and more important part of that process which goes on in the trial courts.” Jerome Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle* (pt. 1), 25 NOTRE DAME LAW. 207, 245 (1950). I would be remiss if I did not also mention that a few years after Cardozo’s death, Frank published anonymously a critique of Cardozo’s writing style. See Anon. Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943). Even here, however, Frank prefaced his remarks by expressing his “deepest admiration for [Cardozo’s] greatness as a judge, a philosopher [and] a scholar.” *Id.* at 629.

²³² For example, In *The Case Law System in America*, Llewellyn mentioned Cardozo more than any other person and was invariably favorable in his remarks. See LLEWELLYN, *supra* note 47, at 16, 47 n.2, 56–57 n.1, 98. He also dedicated the book to him. See *id.* at xxxi.

²³³ LLEWELLYN, *supra* note 132, at 132. For additional examples of effusive praise see note 265, *infra*.

heard him deliver the lectures that would later become his books,²³⁴ some of them corresponded with him and spoke with him in person. While they undoubtedly read him (as we all do) through the lens of their background and opinions, it is unlikely they got him so completely wrong that they did not see that he stands against everything they believed in.

The more straightforward explanation for the legal realists', especially those of a traditionalist orientation, esteem for Cardozo is that on many fundamental issues he held views that were remarkably similar to theirs. Cardozo was possibly the first to use the term "formalism" as a label for the approach to adjudication that many of the realists warned against: the pursuit of coherence at all costs, the disregard for social context, and the appeal to abstract principles.²³⁵ In one of his best-known decisions he charged the lower court of falling prey for the "jurisprudence of conceptions."²³⁶ This term was Roscoe Pound's translation for *Begriffsjurisprudenz*, a German jurisprudential approach, whose adoption (real or imagined) at Langdell's and Ames's Harvard was the target of the realists.²³⁷ When Cardozo wrote that "[r]ules derived by a process of logical deduction from pre-established conceptions of contract and obligation have broken down before the slow and steady and erosive action of utility and justice,"²³⁸ he was making the exact same points that the legal realists would make a decade later.

The similarity extends beyond Cardozo's critiques to his positive ideas. On many issues, big and small, Cardozo said things that aligned him with

²³⁴ For extraordinarily laudatory recollections of these events see Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 197–98 (1961); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 267–68 (1946).

²³⁵ See *Wood v. Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921) ("the demon of formalism [that] tempts the intellect with the lure of scientific order"). It has been argued that the term "formalism" was not used by the realists to describe the view they opposed. See TAMANAHA, *supra* note 66, at 59–60; Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2077 (1995). It is true that the term was not in common currency at the time, but realists used it occasionally to describe their opponents. See ROBINSON, *supra* note 217, at 37; Jerome Frank, *What Courts Do in Fact* (pt. 1), 26 ILL. L. REV. 645, 663 (1932); Llewellyn, *supra* note 38, at 239. That makes Cardozo's use of the term more than a decade earlier even more historically significant.

²³⁶ *Hynes v. New York Cent. R. Co.*, 131 N.E. 898, 900 (N.Y. 1921); see also *Schubert v. August Schubert Wagon Co.*, 164 N.E. 42, 42 (N.Y. 1928); CARDOZO, *supra* note 235, at 46 (calling the excessively logical approach that dominated European jurisprudence "evil").

²³⁷ See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908), cited in *Hynes*, 131 N.E. at 900. Incidentally, unlike the realists, Cardozo did criticize *Lochner* as an example of a case premised on a discredited philosophy of promoting individual liberty above all else. See CARDOZO, *supra* note 236, at 78–80.

²³⁸ CARDOZO, *supra* note 235, at 99–100.

what the realists said. (Incidentally, on many of these issues Cardozo's views are quite different from those of his present-day admirers.) Like the realists, he spoke of "living law" that responded to "social interests."²³⁹ Like them, he recognized the importance of the "structure" of legal doctrine, but argued that law existed to serve "social welfare," so that when the two clash, structure should yield to its functional goals.²⁴⁰ Like them, he suggested that the aesthetic of legal structure was functional and that excessive focus on internally coherent solutions is undesirable when it comes at the expense of improving the law to serve the ends of the people.²⁴¹

Cardozo believed that law was influenced by changing social ideas. He quoted Theodore Roosevelt approvingly for the view that when judges decide cases dealing with "economic and social questions," their judgments "depend upon their economic and social philosophy."²⁴² This was true of private law than to public law. In the former no less than in the latter, judges rightly considered the implications of their choice of rule for the rest of society.²⁴³ Cardozo went one further and rejected any sharp distinction between the two. Unlike many of his present-day admirers, who insist that private law is completely separate from both public law and politics, Cardozo rejected the idea that legal categories reflect unchanging conceptual or metaphysical truths or that they were neatly separate from each other. "Classification," he said, "must be provisional, for forms run into one another."²⁴⁴ But even if such metaphysical truths existed, that would not matter, because the common law is not a "a replica of nature's forms."²⁴⁵

Individually, and especially when taken together, all these similarities explain why there was so much that the realists liked in Cardozo. Perhaps more than any specific idea, what made Cardozo appealing to the realists was his candor—or, to use another word, his realism—about adjudication.

²³⁹ Compare *id.* at 9, 42 with the sources cited in note 151, *supra*.

²⁴⁰ Compare CARDOZO, *supra* note 235, at 66–67 with Llewellyn, *supra* note 38, at 229.

²⁴¹ Compare CARDOZO, *supra* note 235, at 75 and Benjamin N. Cardozo, 55 PROC. N.Y. ST. B. ASS'N REP. 263, 288 (1932) (Cardozo's address did not have a title) [hereinafter Cardozo, *Address*] with Llewellyn, *supra* note 38, at 229 ("Structural harmony, structural grandeur, are good to have, they add, they enrich; but they are subsidiary. So is ornament. Legal esthetics are in first essence functional esthetics") and LLEWELLYN, *supra* note 47, at 92.

²⁴² *Id.* at 171 (quoting 43 CONG. REC., pt. 1 at 21 (1908) (statement of President Theodore Roosevelt)); see also BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 18–19 (1928) (discussing the influence of changing social attitudes on the law).

²⁴³ CARDOZO, *supra* note 235, at 24–25, 94–97. For examples of cases where he invoked such considerations see *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

²⁴⁴ Benjamin N. Cardozo, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339, 342 (Margaret E. Hall ed., 1947).

²⁴⁵ CARDOZO, *supra* note 235, at 105.

Cardozo opened and closed his best-known book, *The Nature of the Judicial Process*, by acknowledging that it was an inescapable fact that judges' personality and background will influence their judicial outlook.²⁴⁶ In a later book, Cardozo spoke openly about the influence of intuition on adjudication, making the point a few years before Hutcheson's scandalous article.²⁴⁷ Cardozo did not even shy away from the suggestion that doctrinal formulas were sometimes a cover for outcome-driven reasoning. Describing one of his own decisions, Cardozo wrote:

I am not greatly concerned about the particular formula through which justice was attained. Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust. A constructive trust is nothing but "the formula through which the conscience of equity finds expression."²⁴⁸

When the legal realists pronounced such views, they were often seen as advancing skeptical views about law, legal rules, or legal reasoning. Based on such claims the realists were thought to deny the authority of law, as they showed that judges were free to decide cases any way they wanted, and therefore to deny that law could have any objectively determinable content. From here, it is but a small step to skepticism about the very possibility of the rule of law and with it the legitimacy of legal coercion. Despite Cardozo making similar points, he was not seen in this way, perhaps because Cardozo's writings offer an answer to this challenge. But at its core, Cardozo's answer is no different from the answer, mentioned several times already, given by many legal realists: The law derives its authority from its correspondence with the values of the community.²⁴⁹ For both Cardozo and traditional legal realists life was the ultimate test of law.²⁵⁰ And consequently, both dismissed any sharp distinction between law and non-law, between law and custom, between law and life.

Cardozo went some way toward explaining how this vague idea could have real-world bite. Just after the words he quoted from Roosevelt, Cardozo added to them a normative gloss: "My duty as judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my

²⁴⁶ See CARDOZO, *supra* note 235, at 10–13, 174–75.

²⁴⁷ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 89–92 (1924); CARDOZO, *supra* note 242, at 60–61. Hutcheson acknowledged this with a long and appreciative quotation from Cardozo. See Hutcheson, *supra* note 175, at 281–82.

²⁴⁸ CARDOZO, *supra* note 235, at 42 (quoting *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919) (Cardozo, J.)) (footnote omitted).

²⁴⁹ See generally John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990).

²⁵⁰ CARDOZO, *supra* note 235, at 112–13; Llewellyn, *supra* note 22, at 37–38.

time.”²⁵¹ Thus, the idea that law’s ultimate aim was to promote social welfare,²⁵² did not mean ceding the law to economists or philosophers. It meant checking the law against the mores of the community.²⁵³ As Cardozo put it, “[t]he standards or patterns of utility and morals will be found by the judge in the life of the community.”²⁵⁴ It is this simple idea that purports to explain how a judge may be human (and as such influenced by her background), and yet can produce objective decisions that are not merely an expression of her personal preferences.²⁵⁵ The process of “translating” the values of the community into concrete legal rules is what gave judge-made law its legitimacy.

To some, this view may appear obvious and even banal; to others, it may sound hopelessly romantic and naïve; still others may find in it an attempt to create a false sense of unity over social values and perhaps also an elitist attempt of one social group to impose its value judgments on the rest of society. This view, then, is not free from criticism, but it is clearly not skeptical or nihilist. It is somewhat conservative, and by now should be familiar. It is Corbin’s *Sittlichkeit*.²⁵⁶ It is Llewellyn’s notion of natural law arising from the views of the people. In fact, Cardozo himself used the very same term, “natural law,” in precisely this sense to describe his own views. Properly understood, he said, natural law should not be understood as unchanging verities but as what is “fair and reasonable men, mindful of the habits of life of the community” and based on the “standards of justice and fair dealing prevalent

²⁵¹ CARDOZO, *supra* note 235, at 173. Compare this remark to MAX RADIN, STABILITY IN LAW 21 (1944) (“there is nothing subjective about applying a standard of conduct which the overwhelming majority of people brought up as we are, would at once recognize”).

²⁵² CARDOZO, *supra* note 235, at 73.

²⁵³ *See id.* at 65–66, 72.

²⁵⁴ *Id.* at 105. Realists expressed similar views. *See, e.g.*, RADIN, *supra* note 251, at 23 (“The justice which courts must use as the yardstick of the rightness of their decision is created by a communal development”); Arthur L. Corbin, *The Restatement of the Law of Contracts*, 14 A.B.A. J. 602, 603 (1928) (the ultimate guide in designing laws is promoting human welfare, and “[t]he best evidence as to the efficiency of a rule is to be found in the number and the types of cases in which it has been applied”).

²⁵⁵ *See* CARDOZO, *supra* note 235, at 173 (for the judge to “objectify the law” means deciding cases according to the “aspirations and convictions and philosophies of the men and women of my time”).

²⁵⁶ *See* Corbin, *supra* note 81, at 240 (“The judge, if honest, lays down either a rule that has been approved or acquiesced in by the community in the past, or a rule to which he believes the community will in the future give approval and acquiescence”); Arthur L. Corbin, *Principles of Law and Their Evolution*, 64 YALE L.J. 161, 161 (1954) (“the [legal] decision, whether well-reasoned or merely instinctive, is evidence of the prevailing mores that underly [sic] our ever-growing law”).

among them.”²⁵⁷ This is, said Cardozo, what prevented judge-made law from being “intolerable in its oppression.”²⁵⁸

All this shows that the supposed deep intellectual opposition between the radical skepticism of the legal realists and the constructivism of Cardozo is not there. The realists admired Cardozo because in writings that often preceded theirs, he expressed views that were in line with theirs. If there are any remaining differences, they are over nuance, emphasis or tone, not substance.

This broad alliance between Cardozo and traditional legal realists is confirmed when considering his most direct engagement with their works. In 1932 Cardozo delivered an address before members of the New York State Bar Association, which was published shortly afterwards. In the familiar narrative, this address is presented as another example of the fundamental rift between the legal establishment and the young radicals. Thus, White described this lecture as an “attack” on the realists, made worse by the fact that Cardozo did not name any of them.²⁵⁹ Having delivered it in the aftermath of the testy exchange between Pound and Llewellyn, White drew the battle lines with Pound and Cardozo as representative of the older establishment on one side, and the legal realists as the radical vanguard on the other.

I think Cardozo’s address shows the opposite. Cardozo’s lecture was dedicated to then-recent jurisprudential ideas and paid special attention to the work of “a group of scholars styling themselves realists.”²⁶⁰ He cited many of their works (unlike Pound’s attack that contained no citations) and showed remarkable familiarity with many of their works—books, articles, even book reviews—especially with the writings of Frank and Llewellyn. Though Cardozo was critical of aspects of the realists’ work, accusing them of some obscurity of style and exaggerations, he acknowledged that “these extravagances are not of the essence of the faith.”²⁶¹ Overall, however, his assessment was measured and the unquestionably friendly. He distanced himself from suggestions that adjudication is purely an emotional reaction to the case, that there are no legal rules that guide the judges or that the law is purely

²⁵⁷ CARDOZO, *supra* note 235, at 142; *accord* Llewellyn, *supra* note 98, at 3–4 (drawing a similar distinction between the philosopher’s natural law and the lawyer’s natural law).

²⁵⁸ CARDOZO, *supra* note 235, at 142. Cardozo added another, more institutional, mechanism for overcoming the biases each judge inevitably has: the balancing of different judges. *See id.* at 177.

²⁵⁹ *See* White, *supra* note 79, at 34.

²⁶⁰ Cardozo, *Address*, *supra* note 241, at 267.

²⁶¹ *Id.* at 272; *accord id.* at 269 (after “prun[ing] away” some excessive statements, there remains a “core of truth”); *id.* at 273 (the realists’ occasional exaggerations should “not deafen us to the message and to the truth that lies within it”). Cardozo specifically singled out Llewellyn, *supra* note 12, as an example of a “temperate and withal a wise summary of neo-realist tendencies.” *Id.* at 273 n.2.

subjective, but also said he was “wholly one” with the realists in their criticism that the pursuit of coherence at the expense of other goals and in their belief that law was a means to an end.²⁶²

It is notable that Cardozo used the term “neo-realists,” because, as he pointed out, many had expressed similar ideas before them. One such earlier realist Cardozo mentioned was the nineteenth-century German legal scholar Rudolf von Jhering. This is significant because a decade earlier, Cardozo described the idea that law is a means to and end as “Jhering’s great contribution to the theory of jurisprudence,” and something that “must be ever in the judge’s mind,” an idea he wholeheartedly embraced as part of a pragmatic, functional approach to law.²⁶³ None of this was an attack on the realists, and evidently most of the legal realists did not understand it as such, as they did not waver in their admiration for him. Only a year after the publication of Cardozo’s address, Llewellyn published in Germany his book on American common law and dedicated it to Cardozo.²⁶⁴ When some fifteen years later Cardozo’s address was republished in a collection of his works, Llewellyn’s enthusiastic review, which described Cardozo as “one great man of our law,” praised the address as a “careful study” that lawyers must read to understand the doubts that come with adjudication.²⁶⁵

It is true that one realist reacted differently. After reading Cardozo’s published article, Frank sent Cardozo a lengthy letter complaining about the way Cardozo had described his views. Cardozo responded disarmingly, but Frank proved difficult to appease.²⁶⁶ (One wonders if Frank’s later ambivalence toward Cardozo has its roots in this incident.) Given the gentle tone of Cardozo’s treatment of the realists’ work, Frank’s reaction seems rather odd. But it was typical of Frank, who was something of a repeat offender when it came to responding to his critics with letters far longer than their critique.²⁶⁷

²⁶² *Id.* at 292. He explained that *if* realists dismissed order and rational coherence as unimportant, then he disagreed with them. *See id.*

²⁶³ CARDOZO, *supra* note 235, at 102–03.

²⁶⁴ *See* LLEWELLYN, *supra* note 47, at xxxi. The other dedicatee was a German judge.

²⁶⁵ K.N. Llewellyn, Book Review, COLUM. L. SCH. NEWS, Oct. 24, 1947, at 2. For another example, see Llewellyn, *supra* note 22, at 35 (describing Cardozo as one of the “transcendent single figures” that “can go far to shape a legal epoch”).

²⁶⁶ For an account of this exchange see KAUFMAN, *supra* note 229, at 458–60.

²⁶⁷ I know of at least two additional occasions in which Frank responded in similar fashion. One case was a rather obsessive exchange with Roscoe Pound following the publication of Pound, *supra* note 12. *See* HULL, *supra* note 50, at 197–200. Yet another example, which as far as I know has not been recounted in past scholarship, is Frank’s response to a short newspaper review of his book, *Law and the Modern Mind*. *See* Max Radin, *Giving Away the Legal Show*, N.Y. HERALD TRIB. BOOKS, Dec. 21, 1930, at 5 (book review). Though critical of aspects of the book, Radin recommended the book “warmly.” *Id.* Frank was

He did this often enough that a *Time* magazine profile noted his habit of writing letters to “unfriendly newspapers...always defending his views.”²⁶⁸ He was particularly incensed when he thought the critique to be based on a misrepresentation of his ideas.

However, when considered attentively this exchange does not support the narrative of a fundamental difference between Cardozo and the realists; it undermines it. The point of Frank’s letter was not to try to argue with Cardozo’s views, to try and convince him to adopt a more radical or skeptical position. As with his other epistolary outbursts, Frank complained that Cardozo presented the realists’ views as more extreme than they actually were.²⁶⁹ It turns out that already then, Frank—invariably described as the most nihilist and extreme of the realists—complained that his views were being misinterpreted.

II. THE REALITY OF LEGAL REALISM

So far, my aim has been to challenge those who claimed, as Horwitz once did, that “[t]he Legal Realist movement...represents the one real example in American history of a sharp break in prevailing legal thought,” because it “challenged the premises of reigning legal orthodoxy in ways so fundamental” that the full implications of its attack had yet (at the time of writing) been recognized.²⁷⁰ This hyperbolic claim has little relation to what one finds in the work of the realists, and appears more like a critical scholar’s projection of his own views onto others. Concretely, my arguments have been directed at the more the familiar claim that the realists were jurisprudential radicals who “stressed the uselessness of legal rules and concepts.”²⁷¹ Though familiar, it turns out that such claims are simply not supported by the evidence. Most of the legal realists were mainstream lawyers, who recognized the reality of legal rules and their importance, and wrote scholarly works analyzing

nevertheless unhappy with the review and sent Radin a seventeen-page letter explaining why. See letter from Jerome Frank to Max Radin, Dec. 29, 1930.

²⁶⁸ *Intellectual on the Spot*, *supra* note 4.

²⁶⁹ See KAUFMAN, *supra* note 228, at 460. (Another point Frank made, something that would become an obsession throughout his life, was that most discussions of adjudication were faulty for focusing only on appellate adjudication. See *id.* at 459.) For another example, this time in published work, see Frank, *supra* note 71. Ostensibly a review of Llewellyn’s *Bramble Bush*, much of this short piece was dedicated to arguing that the realists were more moderate than presented by their critics.

²⁷⁰ Morton J. Horwitz, Book Review, 75 J. AM. HIST. 299, 299 (1988) (reviewing KALMAN, *supra* note 6); *accord* Mensch, *supra* note 23, at 33. Interestingly, Kalman who helped create the narrative summarized by Horwitz’s words, said something very different only a few years later. See LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 29 (1990) (“Jurisprudentially, there was little new in legal realism”).

²⁷¹ KALMAN, *supra* note 6, at 3.

them. It is true that they insisted that law was more than legal doctrine, but it is a gross misrepresentation of their view to think that they did not consider legal doctrine an important part of the law. They knew it, they taught it, and they wrote about it. Judging by their footnotes, they read *many* more cases than most contemporary legal academics, and they took them seriously. (And they didn't even have Westlaw.)

Most of them saw their role as preparing young people (mostly men) to legal practice. Given the law schools most of them were based in, they knew this meant preparing these budding lawyers to work in Wall Street law firms. Most of them were evidently untroubled by this fact, to say the least.²⁷² They had little time for the idea that law was a tool for oppression; on the contrary, many of them considered law as one of the primary means for improving society. They did not seek to show that law was irrational. As Frank, the realist accused most frequently of holding such a view, put it: "By pointing out how much of our thinking is based on the non-rational, it may be possible for us to increase the scope of the rational."²⁷³

There may be one snag to my argument. Jerome Frank himself said of the realists that they are skeptics, distinguishing between "rule skeptics" and "fact skeptics."²⁷⁴ Here is the unforced admission, by one of the best-known legal realists, that they were skeptics. The easiest way of responding to this challenge is to say that this was just Frank's view, which need not have reflected accurately the views of other realists. But this response is too easy. The more significant point is that if we look at what Frank meant by these terms, we see that he gave them a more moderate meaning than the labels would suggest. With respect to rules, Frank's point was that the realists dismissed some *presentations* of existing rules as false. At the same time, the rule skeptics, he said, were trying to identify the "'real rules' [which were] descriptive of uniformities or regularities in actual judicial behavior."²⁷⁵ To believe that there are "real rules" is to believe that rules exist, that they can be identified, described, and followed. Nothing stops us from calling the totality of these patterns "the law." This view need not deny that the legal materials are relevant for determining the content of the law, only that they are insufficient. The legal realists acknowledged all this. They repeatedly acknowledged that with respect to most cases, the law is predictable, and not one of them denied that the information contained in "standard" legal

²⁷² See text accompanying note 42, *supra*.

²⁷³ Letter from Jerome Frank to Walter Wheeler Cook, April 8, 1931, at 7; *see also* Jerome Frank, *Are Judges Human?* (pt. 2), 80 U. PA. L. REV. 233, 265 (1931). Entire shelves are now filled with books premised on this idea (some of them not written by Cass Sunstein).

²⁷⁴ See FRANK, *supra* note 32, at viii–ix.

²⁷⁵ *Id.* at viii.

materials (cases and statutes) was irrelevant for this ability to make predictions.²⁷⁶ In one of his earliest writings, Frank himself said that “no sane person would deny” that “doctrines or ‘rules’ found in previous cases ha[ve] some effect on decisions.”²⁷⁷ He also warned against misattributing to the realists the view “there are no rational or ethical factors in legal thinking.”²⁷⁸

Frank considered himself as belonging to the group of “fact skeptics.” Unlike the rule skeptics, who focused almost all their attention on appellate courts, the fact skeptics were (also) concerned with fact finding at trial. But this too was not really a skeptical view, in the sense of doubting the existence of reality or the possibility of knowing the truth. Frank’s down-to-earth worries were based on his observations on the unreliability of the methods of fact finding at trials. In alerting to this problem his motivation was that of a reformer worried about the injustice of judicial decisions based on a mistaken finding of facts. It is fair to say that in the time since Frank raised these issues, his concerns have been vindicated by countless empirical studies confirming his observations.

Those who have made it all the way to here may still have one remaining worry. In presenting the realists as so mainstream, I invite an obvious challenge. If all this is true, how did legal realism become a “thing”? If indeed the realists were so middle-of-the-road, both legally and politically, is it only a talent for self-promotion that allowed them to present themselves as novel and radical? Apart from this historical question, on a more theoretical plane one may wonder what use there is to “legal realism” as an idea. Brian Tamanaha made this point forcefully in his book *Beyond the Realist–Formalist Divide*. Though Tamanaha argued briefly that the realists were not skeptics about adjudication,²⁷⁹ his main strategy is the opposite to my own. Rather than focus on the realists’ works, he examined the work of their predecessors with the aim of showing that many ideas attributed to the realists were said by others before them. In some cases, he argued, these are found in the works of scholars nowadays considered leading formalists.

It is no surprise that in the period immediately preceding the realists not everyone expressed “formalist” views. As already mentioned, Cardozo called the realists “neo-realists” precisely because he found so many of their ideas

²⁷⁶ See CARDOZO, *supra* note 247, at 60; Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1271 (1942); Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 147 (1946) (“for the vast majority of the situations in which men get into relations which conceivably come into a court, the law is reasonably certain”); Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 421 (1943) (very few cases are unpredictable).

²⁷⁷ Frank, *supra* note 71, at 1123.

²⁷⁸ *Id.* at 1121 n.1

²⁷⁹ See TAMANAHA, *supra* note 66, at 68, 93–96.

similar to those of earlier scholars. Llewellyn himself openly acknowledged that most of the realists' ideas were not new.²⁸⁰ Nevertheless, Tamanaha's book is significant because the early recognition of the continuity of realists' ideas with work that came before them gave way to exaggerated claims about the epoch-making originality of the realists.²⁸¹ In this respect, Tamanaha's main goal (showing that realist-sounding ideas were made before the realists) and my own (showing that the realists were far less radical than they are often depicted) are different yet complementary.

However, Tamanaha drew two conclusions from his historical findings, and those are quite different from my own. First, he argued that the realists attacked a strawman, because their targets did not hold the views the realists attributed to them. Moving from history to theory, Tamanaha further argued that the distinction between realism and formalism is "empty" and could be dispensed with without loss.²⁸² I disagree with both claims. In explaining my view, however, I have to respond to a challenge I myself posed to Tamanaha. In another essay, I argued that a difficulty with Tamanaha's claim that there was nothing new to the realists' claims is that he cannot account for the fact that many of their contemporaries considered their ideas challenging.²⁸³ If, as I suggest, the realists were not the skeptical radicals of their popular image, the same question can now be directed at me.

As the main aim of this Article has been to revise popular views on the legal realists, here is not the place for a full discussion of their intellectual adversaries.²⁸⁴ Key to my answer to the challenge is that it does not lie in claims about adjudication or indeterminacy; it lies in competing views about authority. Once we see that, many of the issues addressed earlier no longer appear mysterious. We have no difficulty understanding why the legal realists

²⁸⁰ Cardozo, *supra* note 260, at 268; Llewellyn, *supra* note 12, at 1223, 1238.

²⁸¹ The historical claims in Tamanaha's book were challenged in Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383 (2013) (reviewing TAMANAHA, *supra* note 66). While I think Brophy scores some points against Tamanaha, the overall tenor of his review affirms the CLS interpretation of legal realism. He upholds the claim that the realists' critique of formalism was based on "real political differences," and that the realists turned to history "to delegitimize the law." *Id.* at 410–11. As I have argued in this Article, there is little evidence to support these claims. See also note 290, *infra* for further discussion of Brophy's views.

²⁸² TAMANAHA, *supra* note 66, at 162.

²⁸³ See Priel, *Return*, *supra* note 310, at 461. For examples of critical reactions to the realists by their contemporaries see EDWARD A. PURCELL, JR., THE SCIENCE OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 159–72, 176–77 (1973); Neil Duxbury, *The Reinvention of Legal Realism*, 12 LEGAL STUD. 137, 148–54, 164–68 (1992).

²⁸⁴ Part of a fuller discussion recognizes that what we call "formalists" involves different views. See Dan Priel, *Two Forms of Formalism*, in FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS 165 (Andrew Robertson & James Goudkamp eds., 2019).

admired Cardozo, why they were not skeptical about legal rules nor particularly troubled by indeterminacy. I focus on this issue not because it is the only difference between realists and formalists, but because it highlights once again the distorted image of the realists as rule skeptics. I will argue that at least when it comes to traditional legal realists, they did not pose—as often depicted—a modernist challenge to the “classical legal thought” of the previous era; on the contrary, their critique was a traditionalist reaction to the modernist innovations coming from Langdell’s Harvard.²⁸⁵

To get a sense of the intellectual scene, one must resist two tempting tendencies. The first is dividing history into neat packages, “ages” as they are sometimes called, each dominated by a certain intellectual outlook that most everyone shared. When it comes to American legal thought, this outlook is presented entertainingly but with little finesse in Grant Gilmore’s *The Ages of American Law*.²⁸⁶ All it takes to see the futility of this idea is to think of our time and see that there is no one governing idea that everyone accepts, and then recognize that there is no reason to think that our “age” is somehow special.²⁸⁷ When this is recognized, it is no wonder one can find legal realism before the legal realists.

This “spirit-of-the-age” thinking encourages a neat narrative of intellectual progress from the age of “legal formalism,” the era of “premodern” or “classical legal thought,” a time when most everyone believed that law was a matter of deduction from unchanging first principles,²⁸⁸ to a time dominated by the “quintessentially modernist jurisprudence” of the legal realists.²⁸⁹ This account has led, as detailed above, to mythmaking with respect to the novelty

²⁸⁵ This is not true of scientific legal realists, who can be seen as carrying forward Langdell’s modernist approach, and whose opposition to him was different. See Part II.B, *infra*.

²⁸⁶ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* (2d ed. 2014). For a more recent attempt to apply a similar approach to all of western law, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David Trubek & Alvaro Santos eds., 2006).

²⁸⁷ A point well made by Jerome Frank. See *M. Witmark & Sons v. Fred Fisher Music Co., Inc.*, 125 F.2d 949, 964 n.22 (2d Cir. 1942) (Frank, J., dissenting) (“there is usually, at any given moment, not one ‘spirit of the age,’ but many such spirits. The bias, conscious or unconscious of the particular historian will often explain why he chooses one special spirit for emphasis”).

²⁸⁸ See Kennedy, *supra* note 286, at 26; White, *supra* note 79, at 14.

²⁸⁹ G. Edward White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 489, 514 (1988) (book review); see also FELDMAN, *supra* note 43, at 109; Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 500 (1996) (reviewing DUXBURY, *supra* note 23); cf. White, *supra* note 79, at 14–16, 45–46 (depicting Langdell and the A.L.I. as adopting midway positions between premodern and modernism, before the arrival of legal realism as a thoroughgoing modernist view).

of the legal realists. It has also led to ignoring the fundamental opposition between the two strands of legal realism, which on “modernization,” as on many others issues, held opposing views.

The heart of the problem is the tendency to see the realists as Promethean figures who brought the gift of fire to humanity, there is a tendency to treat them as thinkers who challenged all legal thought that came before them.²⁹⁰ The reality is, I think, different. The realists had a more local, and more contemporary, target. They challenged a view that had some strong proponents in the legal academy *of their day*, and which they conveniently, if inaccurately, reduced to one place and the legacy of one man: Harvard Law School and its first dean, Christopher Columbus Langdell. The critique was in some ways unfair, as there is a good case to be made that Harvard was where the modern version of American legal realism was born.²⁹¹ But the attack on Harvard was not entirely spurious because there was a group of prominent and influential scholars based at Harvard, who advanced ideas that were different from the realists’. There was a point to targeting them even if their views were overall a minority, because their prominence meant that these ideas would likely spread elsewhere. Moreover, being the leading law school in the country meant that the critique was significant. If Harvard provided the wrong ideas to its students, it mattered, because many of them would go on to lead the country’s legal and political establishment.

This point is relevant also in the other direction. It is not a surprise that we find “realist”-sounding statements before the legal realists. If one thinks the legal realists were the first to come up with the ideas now commonly associated with “legal realism,” then the fact that many advanced “realist”

²⁹⁰ The need to capture all pre-realist thinking may be why, as Gordon has shown, the definition of their target, “formalism,” has been defined so ambiguously. See Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137, 154–55 (1994) (reviewing HORWITZ, *supra* note 23). Another example is Brophy’s critique of Tamanaha. In an attempt to demonstrate that the realists had a real target, Brophy cited cases and scholarship from the 1820s to the 1850s. See Brophy, *supra* note 281, at 401–06. The problem with this suggestion is that, to the best of my knowledge, there is no realist scholarship critical of antebellum law. Most of the realists showed no interest in the law from that era; and the one who did, Llewellyn, treated that period as the heyday of the “grand style” he celebrated, and openly called for a return “to the reasoned creative method of the early nineteenth century.” LLEWELLYN, *supra* note 72, at 431; see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950); cf. Corbin, *supra* note 81, at 244–45. The realists’ actual target was scholarship and an approach to adjudication from a much later period.

²⁹¹ This is another way in which the standard story of legal realism is mistaken. See BRUCE KIMBALL & DANIEL R. CONQUILLETTE, *THE INTELLECTUAL SWORD: HARVARD LAW SCHOOL, THE SECOND CENTURY* 227–31 (2020); Dan Priel, *Legal Realism at Harvard, 1893–1939* (unpublished manuscript).

ideas before them is a challenge to their supposed originality. If we understand their critique as directed at a particular yet powerful view advanced by some of their (near) contemporaries, we can see the historical significance of their views even if we don't see that they made points not made by anyone before them.

Now, to say that the legal realists targeted Langdell is hardly news. I nevertheless want to flip the narrative by arguing that the legal realists' attack on him—or more precisely, the attack of a group among them—was motivated by a desire to turn the clock back on modernist changes Langdell was partly responsible for.

A. *The Modernist Langdell*

Practicing law to Langdell meant the writing of briefs, examination of printed authorities. The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the “atmosphere” of a case,—everything: that is undisclosed in judicial opinions—was virtually unknown (and was therefore meaningless) to Langdell. A great part of the realities of the life of the average lawyer was unreal to him.²⁹²

This, from Frank, is one of the more favorable descriptions of Langdell. He comes off as a slightly pathetic, lifeless figure who only found solace in the company of books. Inevitably, the image law that such a person espoused was similarly lifeless. Harsh though this may seem, for later critics, this description was too kind. For them, Langdell was an “essentially stupid man,” a figure who deserves scorn and even hatred.²⁹³ It is very easy to take these descriptions and derive from them all the familiar clichés about legal formalism: Formalists believe that law as an unchanging set of rules, completely divorced from social reality, existing for its own sake regardless of its real-world consequences. Can someone holding such views be in any way redeemed?

²⁹² Jerome Frank, *Why Not Clinical Law Schools*, 81 U. PA. L. REV. 907, 908 (1933).

²⁹³ GILMORE, *supra* note 286, at 43; John Henry Schlegel, *Damn! Langdell!*, 20 LAW & SOC. INQUIRY 765 (1995); Laura Kalman, *To Hell with Langdell!*, 20 LAW & SOC. INQUIRY 771, 771 (1995) (“I hate Langdell”). In fairness to Schlegel and Kalman, their titles were quips on Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691 (1995). But her hatred seems genuine enough. Once again, the actual realists defy expectations. On at least two separate occasions, twenty-five years apart, Llewellyn called Langdell “a genius.” KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 377 (1962); K.N. Llewellyn, *On What Is Wrong with Our So-Called Legal Education*, 35 COLUM. L. REV. 651, 661 (1935) [hereinafter Llewellyn, *What*]. Radin included him in the group of the “brilliant” and “extraordinary” Harvard professors that established and innovatively executed the case method. See Radin, *supra* note 174, at 678.

To understand Langdell, we need to see him as part of the modernizing and professionalization effort of the university, no longer perceived as a finishing school for young gentlemen, but as a research institution dedicated primarily to the advancement of knowledge.²⁹⁴ Such a conception of the university raises a pertinent question: What place is there for a law school within such an institution? For some, none whatsoever. As late as 1918, economist Thorstein Veblen expressed the view that having law schools within a university made as much as having schools for fencing or dancing.²⁹⁵ This is a plausible challenge, and one deserving an answer: Trades are best learned at a trade school, and crafts are best at the workshop. Whether you think of law as one or the other, why teach it at a university?

Langdell's response to this challenge was a kind of confession and avoidance. Yes, universities should only focus on the study and teaching of science. Langdell made his position abundantly clear when he wrote: "If law be not a science," i.e., if law is but a "species of a handicraft," then "a university will consult its own dignity in declining to teach it."²⁹⁶ Of course, Langdell's point in saying this was that law was a science; in fact, he said, it was "one of the greatest and noblest of sciences...with which the most vital interests of the public and the State are closely bound up."²⁹⁷ Langdell's aim was thus to justify the teaching of law at a university by elevating it from its lowly status as a professional trade and showing it to be a grander calling. As his remarks show, thinking of it in this way was not meant to separate it completely from reality, but intimately bound with the public interest.

What kind of science was law? Civil law countries provided a model of legal science. It was Germany in particular, whose universities were the envy of the world in the nineteenth century, that showed the possibility of scientific study of law. But though influential, the German model of *Rechtswissenschaft* that was more "geometrical," beginning from axioms and proceeding from them, was difficult to transplant into the common law world where legal

²⁹⁴ See LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* ch. 3 (1965).

²⁹⁵ See THORSTEIN VELEN, *THE HIGHER LEARNING IN AMERICA* 211 (1918).

²⁹⁶ C.C. Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123, 123 (1887) [hereinafter Langdell, *Teaching Law*]; accord C.C. Langdell, *Report*, in ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1880–81, at 68, 84 (Cambridge, University Press, John Wilson & Son 1881) [hereinafter Langdell, *Report*] ("A law school which does not profess and endeavor to teach law as a science has no reason for existence"). Similar ideas were voiced in England around the same time. See Frederick Pollock, *Oxford Law Studies*, 2 LAW Q. REV. 453, 453–54 (1886) (distinguishing the science from the practical art of law and arguing that if university legal study aimed only to produce successful lawyers, "[t]he University would justly refuse approval to it"); cf. A.V. DICEY, *CAN ENGLISH LAW BE TAUGHT AT THE UNIVERSITIES?* 23–26 (London, Macmillan & Co. 1883).

²⁹⁷ Langdell, *Report*, *supra* note 296, at 83.

thinking was so connected to particular cases. Common-law style legal science was more inductive, treating the cases as botanical specimens to be classified. This is how we are to understand his notorious claim that the law library is the lawyer's laboratory.²⁹⁸

Often left out in denunciations of Langdell is that in insisting on the scientific status of law, he was not oblivious to the practical elements of lawyers' work. What he denied was that this "art" should be taught at a university. Science, for Langdell, was universal and timeless; the practical side of law was none of that: It was local and temporal, and as such, better learned in practice.²⁹⁹ Langdell's solution was, in effect, to divide legal knowledge into two—science and craft—and insist that law school focus exclusively on the former.³⁰⁰

There is a philosophical point underlying this view. It presupposes the epistemological distinction between two kinds of knowledge, theoretical knowledge or knowledge *that* something is the case, and practical knowledge or knowledge *how* to do something.³⁰¹ Knowing that a bicycle has two wheels is an example of the former; knowing how to ride a bicycle is an example of the latter. Langdell's view that law school should focus on advancing and imparting the theoretical knowledge of law was not the stupid idea that everything a lawyer can learn about law is to be found in the law library, but the modest idea that all that a *university* can, or should, teach is theoretical knowledge, the part that can be learned in a law library. Trying to teach the practical aspects of law at a university would be a like university course instructing on how to ride a bike by reading a book.

There are many ways of challenging these ideas. We no longer think that science as concerned only with the universal, or that only science is worthy of university study. More concretely, the botanical analogy is imperfect

²⁹⁸ See Langdell, *Teaching Law*, *supra* note 296, at 124.

²⁹⁹ See C.C. Langdell, *Report*, in ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1876–77, at 82, 92 (Cambridge, John Wilson and Son 1878) ("The art of the attorney, being in nature local, should be acquired in the place where it is to be practised....[T]he science of the advocate...may be best acquired...in the place where that system of law is studied and taught most exclusively as a science, *i.e.*, exclusively of every thing local, temporary, or arbitrary.").

³⁰⁰ Langdell, *Teaching Law*, *supra* note 296, at 123–24; *see also* Langdell, *supra* note 299, at 91 (the work of the counsellor and advocate is partly "a practical art" which is best learned in practice after university studies).

³⁰¹ This terminology originated in GILBERT RYLE, *THE CONCEPT OF MIND* 27–28 (1949). The distinction was challenged in Jason Stanley & Timothy Williamson, *Knowing How*, 98 J. PHIL. 411 (2001) (arguing that all knowledge how is reducible to knowledge that); Jason Stanley & Timothy Williamson, *Skill*, 51 NOÛS 713 (2017). The challenge has not gone unchallenged. *See, e.g.*, Ian Rumfitt, *Savoir faire*, 100 J. PHIL. 158 (2003). I will not review this debate here and will assume the original distinction is defensible.

because the Harvard legal scientists excluded as “mistakes” too many cases that did not fit their classificatory scheme; that would be like a botanist ignoring plants that did not fit the existing classificatory scheme as “biological errors.” There is also little doubt that Langdell’s personal characteristics, his apparent preference for the company of books than that of clients, inclined him to see the theoretical side of law as more worthy of academics’ attention.

But Langdell’s views were of his time and fit the then-emerging model of the research university and specifically the vision of Charles Eliot, Harvard’s president at the time.³⁰² More significantly, there is a solid core behind this picture that remains alive to this day. The idea of unifying a mass of disparate observations under a unifying explanatory scheme is widely accepted as the hallmark of scientific understanding.³⁰³ Many of the categories that got formulated by these late nineteenth-century legal scientists are still very much with us. Indeed, variations on this form of legal scholarship remains familiar and are practiced by many who may shudder at the suggestion they were in any way followers of Langdell.

This epistemological division of labor has a broader political point behind it. It is common to assume that the Langdellian view of law as a science rested on the assumption that law is completely separate from society, but the words quoted above from Langdell included his exhortation that law was the most noble of the sciences because it embodies the “most vital interests of the public and the State.” The project of organizing the common law must be understood in light of this idea. Though there have been numerous efforts to organize the common law before the late nineteenth century, it was still described by one legal scholar from that era as “chaos with a full index.”³⁰⁴ In that state, it could not serve the vital interests of the public properly. The project of identifying its principles was part of a modernizing, even modernistic, enterprise. David Garland gave a short summary of the main components of this modernist approach. It is

an ideology that believes social problems are best managed by specialist bureaucracies that are directed by the state, informed by experts, and rationally

³⁰² See Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 342–43 (1979).

³⁰³ See Michael Friedman, *Explanation and Scientific Understanding*, 71 J. PHIL. 5, 15 (1974) (the essence of scientific explanation is “reducing the total number of independent phenomena we have to accept as ultimate or given”).

³⁰⁴ THOMAS ERSKINE HOLLAND, *ESSAYS UPON THE FORM OF THE LAW* 171 (London, Butterworths 1870). Holland was speaking specifically of English law, but this impression was not unique to him. For other examples of this sentiments see Jeffrey A. Pojanowski, *Reading Statutes in the Common Law*, 101 VA. L. REV. 1357, 1386–87 (2015). For earlier organizing efforts see Michael Lobban, *Mapping the Common Law: Some Lessons from History*, 2014 N.Z. L. REV. 21.

directed towards particular tasks. This modernist attitude thinks in terms of technologically refined, top-down mechanisms that minimize the involvement of ordinary people and spontaneous social processes, and maximize the role of professional expertise and ‘government knowledge’.³⁰⁵

Writing more specifically about the law, Galanter proposed several identifying marks for the process of the modernization of law, which include efforts of making laws that are uniform and universalistic, rational, and managed by expert professionals.³⁰⁶ Not every characteristic of modernization fits the formalists’ ideas, but as Galanter himself noted, he was describing an ongoing process.

If one looks for a summary of the intellectual outlook of Langdell and his most dedicated disciple Beale,³⁰⁷ this is it. Law is conceived of as a body of theoretical knowledge to be organized according to scientific principles. The primary aim of law school was to educate carefully selected elites in this knowledge so they could they apply it for the betterment of society.

Such a view did not imply a lack of interest in the consequences of the law. On the contrary, the formalists clearly thought their efforts were ultimately directed at improving society:

[T]he common law which we teach and study in our schools, which we develop in our writings, which we laud as part of our heritage, and secure by constitutional provision; that living thing, embodied and vitalized, and imbued with a spirit all its own our lives are devoted to the study of it because it is worth study; and it is worth study because it is capable of scientific analysis. We American teachers of law have this new scientific task which is peculiarly ours. It is worth doing in itself. It is essential to progress and reform. It cannot be done for us by anyone else.³⁰⁸

Beale also believed—contrary to a view often attributed to the formalists—laws changed with time, and that they needed to adapted to changing

³⁰⁵ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 34 (2001), following JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 4–6 (1998).

³⁰⁶ See Marc Galanter, *The Modernization of Law*, in *MODERNIZATION: THE DYNAMICS OF GROWTH* 153, 154–56 (Myron Weiner ed., 1966).

³⁰⁷ When Frank needed a label for the view he attacked, he did not call it formalism or Langdellianism; he spoke of “Bealism.” See FRANK, *supra* note 32, at 48–56. Arnold wrote a little doggerel mocking Beale. See KALMAN, *supra* note 6, at 26. See also note 170, *supra*, and accompanying text.

³⁰⁸ Joseph H. Beale, *The Necessity for a Study of Legal System*, 1914 PROC. AM. ASS’N L. SCH. 31, 38–39. Americans are in a better position than the English to deal with the task of scientific common law, because they have more than one jurisdiction. See *id.* at 36.

circumstances. He even considered the sociological study of law to be of great value.³⁰⁹

In what sense, then, was he expounding views different from those of the realists? The answer is that the realists, or more precisely the better-known element within them, reacted against this modernistic, elitist conception of law. Theirs was a traditionalist, populist view.

B. The Realist Antimodernist Reaction

I have so far alluded a distinction between two strands among the legal realists. I now have to state the difference between the two more clearly. The two realist groups had rival philosophical outlooks about what gave law its authority, and these differences resulted in very different scholarly orientations and often to disagreements over prescriptions about legal reform, legal scholarship, and legal education.³¹⁰

The first group among the legal realists, I call “scientific.” This group includes Walter Wheeler Cook, Felix Cohen, Herman Oliphant, Edward Robinson, and Hessel Yntema. Scientific legal realists were deeply impressed by the spectacular progress of the natural sciences. They considered the methods of the common law primitive and compared them unfavorably to the methods of the natural sciences. They wanted lawyers to learn scientists’ methods of collecting data and testing hypotheses and implement into the law. Scientific legal realists thus were committed to pushing forward Langdell’s modernist agenda.³¹¹ They accepted Langdell’s scientific aspirations and used the term “legal science” with no hint of irony.³¹² Their main challenge to the conception of legal science of Langdell and Beale was that it did not go far enough. True legal science was not to be performed in the law library but in the real world.

Though these realists were often dismissive of lawyers’ primitive methods, they were in not skeptical about legal rules and definitely not moral

³⁰⁹ See *id.* at 39. It is views like these that have led Tamanaha to argue that there was no real difference between the realists and the formalists. See TAMANAHA, *supra* note 66 at 16–17. Even Frank conceded that Beale was “not a consistent Bealist.” FRANK, *supra* note 32, at 55 n.*. My aim is to explain why there is still an important difference between traditional realism and formalism.

³¹⁰ This is a brutally short summary of a view I elaborate over many pages in Priel, Rival, *supra* note 73. For a short summary, see Priel, *Return*, *supra* note 73, at 465–69; cf. TWINING, *supra* note 33, at 54–55; KRONMAN, *supra* note 61, at 168–69.

³¹¹ Cf. Marcia Speziale, *Langdell’s Conception of Law as Science : The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 27 (1979).

³¹² See Hessel E. Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207 (1934); Walter Wheeler Cook, *Research in Law*, 65 SCI. 311, 314 (1927); Joseph Walter Bingham, in MY PHILOSOPHY OF LAW 7, 16 (1941); Edward S. Robinson, *Law—An Unscientific Science*, 44 YALE L.J. 235, 241 (1934).

nihilists. They believed that with by extending scientific methods to the study of law, in order to improve our ability to predict how judges other public officials would behave. With respect to normative questions, these realists were typically openly utilitarian. Some of these legal realists went so far as to argue that even disputes over values were factual disagreements, and as such could one day be resolved definitively by using the same scientific methods used for resolving other factual disagreements.³¹³ Like their intellectual hero, Bentham, they believed once law were reconstituted on scientific principles it would undergo significant change, but they all understood their enterprise as constructive and reformist.

The other group of legal realists included Karl Llewellyn and Jerome Frank, probably the best-known legal realists, as well as (among others) Max Radin, Walton Hamilton, Leon Green, and Joseph Hutcheson. (Following the discussion above, I would add Corbin and Cardozo to the list.) I call this group “traditionalists,” and in the remainder of this Section I will focus on these legal realists. I hope to show is that the views of realists who belonged to this group have often been misunderstood as legal skepticism or even moral nihilism were in fact something quite different, an affirmation of a tradition-bound approach to practical knowledge.

The first key to understanding the difference between these realists and the formalists is that they disliked the idea of law as a science, because they understood legal knowledge as practical. Law was an art, a craft, a practice, all the way down.³¹⁴ Consequently, “[n]ot rules, but doing, is what we seek to train men for.”³¹⁵ This view is sometimes misunderstood as “rule skepticism,” as a rejection of the very idea of legal rules. But the legal realists were clear and consistent that this was not their view. Rather, what they rejected was the view that legal rules *alone* decide cases, “rules-only skepticism” if you wish.

Traditional legal realists argued that one cannot understand legal rules outside the context of their factual setting, and that much that goes into the practice of law is sensitivity to complexity of facts. One cannot understand legal rules without paying attention to their context of application—the facts of the case—something that is missing by Langdellian efforts at formulating general principles in isolation. As Corbin put it in his early essay that

³¹³ See Felix S. Cohen, *The Subject Matter of Ethical Science*, 42 INT’L J. ETHICS 397, 399–400 (1932).

³¹⁴ See Karl N. Llewellyn, *The Crafts of Law Re-Valued*, 28 A.B.A. J. 801, 802 (1942) (the “essence of our craft” is being problem solvers); see also Frank, *supra* note 292, at 923.

³¹⁵ K.N. Llewellyn, *On What’s Wrong with Our So-Called Legal Education*, 35 COLUM. L. REV. 651, 654 (1935); accord Radin, *supra* note 174, at 683–84 (key to the “realistic” approach to law is that “law is not a matter of propositions at all but a part of the living order of society and must be taught as such”).

Llewellyn so admired, “[i]t is not difficult to learn a set of rules; but we now know that learning rules does not make a lawyer. A lawyer must know facts and judges as well as rules.” This is the practical knowledge, the knowledge how, that cannot be learned by “memorizing dogmas.”³¹⁶

We can now see that there are real differences between the realists and the formalists, even though they don’t correspond to the standard way the two views are described. It is not that there is no legal doctrine or legal knowledge more generally, and it is not that they do not matter. It is what kind of knowledge it is: is it like knowledge that water boils at 212 degrees Fahrenheit, or the knowledge how to bake a good cake. The problem with the formalists is that they thought it was possible, that it was, in fact, the essence of legal science to formulate legal knowledge exhaustively in the form of legal rules. Against this, Llewellyn’s emphasis that “[w]hat...officials do about disputes is...the law itself,” and specifically his contrasting what judges say with what they do,³¹⁷ are statements about the irreducibly practical nature of legal knowledge. Though this difference does not match the caricatures of either legal realism or legal formalism, we see that it cannot be resolved by adopting a-little-of-both “balanced realism.”³¹⁸

Even someone sympathetic to my argument so far may ask: So what? The epistemological distinction between theoretical and practical knowledge seems too remote, too abstract, to have any real-world significance. Why would lawyers, and especially lawyers who called themselves “realists,” care about it? The answer is that the distinction is not purely academic. It reflects competing normative conceptions of the authority of law which has real-world practical effects, and it is very much related to the modernistic project pushed by Langdell. For to understand the traditional legal realists is to understand why they rejected this project.

Traditional legal realists sought to revive a view of the common law, which they feared was being stifled by scholars who had an exceedingly

³¹⁶ Corbin, *supra* note 81, at 239; accord K.N. Llewellyn, *A Modern Law School*, 22 COLUM. U. Q. 316, 320 (1930); see also Frank, *supra* note 292, at 918; Frank, *supra* note 323, at 763–64.

³¹⁷ LLEWELLYN, *supra* note 132, at 3, 4. It is against this that one must read Llewellyn’s notorious remark that legal rules are nothing but “pretty playthings.” *Id.* at 5. On their own, legal rules can be made into the object of “academic” study. Llewellyn’s point is that this is but an intellectual game unless we subject it to the constraint of trying to answer the *practical* question of knowing what officials will do.

³¹⁸ TAMANAHA, *supra* note 66, at 6–7, 186–87. Proposals along these lines are also found throughout DAGAN, *supra* note 59. But see Dan Priel, *Legal Realism and Legal Doctrine*, in JUDGES AND ADJUDICATION IN CONSTITUTIONAL DEMOCRACIES: A VIEW FROM LEGAL REALISM 139, 145–48 (Pierluigi Chiassoni & Bojan Spaic eds., 2020) (criticizing “goldilocks jurisprudence”).

“theoretical” approach to the law. For these legal realists, the scientific aspirations of Langdell and Beale (and, importantly, also those of the scientific legal realists) were misconceived. These legal realists’ stance was a decidedly *antimodernist* reaction to Langdell, and they were often quite explicit in calling for turning back the clock and reviving older ways.

There are numerous illustrations of this. In an essay written late in his life, Llewellyn explained why he admired Cardozo’s famous judgment in *MacPherson v. Buick*.³¹⁹ It wasn’t for doing an “individual equity job” between the parties, nor even (as the “Torts boys” would have it) for its brilliant new doctrine. For Llewellyn, the most notable feature about Cardozo’s decision was its “beautiful *old method*.”³²⁰ Decades earlier when asked to provide a brief biographical sketch to accompany an article he published in a magazine, Llewellyn wrote this about himself:

He can be placed among the more recent thinkers as one of the few whose revolt against revolt against more word-making in the law has not kept them from realizing the power and value of legal doctrine and the past at the same time that they see the urgent need for using both as tools to shape a happier future.³²¹

³¹⁹ 111 N.E. 1050 (N.Y. 1916). Goldberg and Zipursky who dedicated an long article to the case, described *MacPherson* as “an exemplar of judicial craft,” contrasting it with “run-of-the-mill exercise in Realist law-skepticism.” See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1814 (1998). But legal realists praised the decision for this reason. See LLEWELLYN, *supra* note 72, at 431; Hamilton, *supra* note 13, at 10–11; Radin, *supra* note 231, at 210; see also Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1234 (1937) (praising the “masterly manner in which Judge Cardozo’s opinion cuts through fallacious and arbitrary distinctions and goes to the heart of the problem”).

³²⁰ Karl N. Llewellyn, *On the Current Recapture of the Grand Tradition*, 9 LAW SCH. REC. 6, 20 (1960); cf. K.N. Llewellyn, *On the Problem of Teaching “Private” Law*, 54 HARV. L. REV. 775, 808 (1941) (praising *Buick* for resorting to older cases “which still move in terms of reason consciously adjusting to need,” i.e. the grand style).

³²¹ *The Gist of It*, 25 SURVEY GRAPHIC 195, 196 (1936). See Figure 1. These striking words stand in sharp contrast with Gordon’s characterization of one of the intellectual currents of legal realism: “the irrelevance of the past to the solution of current problems.” Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9, 32 (1975).

WHEN we sent the customary query to Karl N. Llewellyn (page 233), asking what of his history he thought pertinent for this page, he answered with a self-portrait which quite outshines any efforts of our own. "If I were to write my own blurb as I should like to have somebody else write it it would argue something as follows: 'Mr. Llewellyn can be placed, among the general population, as a lawyer. He can be placed among lawyers as one of the more recent thinkers who when they talk to anybody but a judge—in a court—talk sense instead of words and legal doctrine. He can be placed among the more recent thinkers as one of the few whose revolt against revolt against more word-making in the law has not kept them from realizing the power and value of legal doctrine and the past at the same time that they see the urgent need for using both as tools to shape a happier future. He has taught for the past fifteen years at the law schools of Yale and Columbia.' "

Figure 1: Llewellyn's biographical note for *Survey Graphic*

As this revealing self-description shows, Llewellyn did not dismiss legal doctrine; he rejected certain *ideas* about legal doctrine. The "old method" he was yearning for, the legal doctrine of the past whose power and value he recognized, was what he called the "grand style" of adjudication, which he saw as the dominant approach to adjudication in the nineteenth century but was then supplanted by the "formal style" toward the end of it. Llewellyn was clear that he preferred the older style and was happy to report that after a few decades in decline, it was making a welcome return.³²²

The yearning for a return to a lost past manifested itself in legal education as well. Both Frank and Llewellyn wrote extensively on legal education reform. Both worried that legal education provided inadequate training for future practitioners. Intriguingly, both of them lamented the loss of the traditional way law used to be learned before universities took hold of legal education. As Frank put it, something of "immense worth was given up when the legal apprentice system was abandoned as the basis of teaching in the leading American law schools." He openly stated that improving legal education

³²² See Llewellyn, *supra* note 22, at 33–36. One of the reasons Llewellyn admired Cardozo was because he saw him as an agent of change, as one of the judges who helped revive the dormant grand style. See *id.* at 35.

called for executing an “about-face and return to...[the] 18th century apprenticeship method,” albeit updated for the twentieth century.³²³

Turning this suggestion into reality meant making university legal education resemble the way one would learn law in practice. Frank favored a much greater role for clinical legal education, and wanted it incorporated into the regular coursework. In addition, against Langdell’s proud innovation of appointing professors who had no legal practice experience, Frank urged law schools to employ professors with five to ten years of legal practice experience.³²⁴ Llewellyn, while more skeptical than Frank about the merits of clinical legal education, declared plaintively that “[w]e need an apprenticeship again.”³²⁵ He then suggested that some form of apprenticeship should follow university studies but that the two be considered integral for one’s legal education, so that the law degree only be awarded at the end of the apprenticeship.³²⁶

These concerns fit perfectly an antimodernist agenda. James Scott contrasts the modernistic program with what he considers a superior alternative. Its hallmarks are: fascination with community knowledge, admiration for contextual knowledge, an emphasis on “learning beyond the book,” a contrast between “scientific explanation” and “practical knowledge,” and an emphasis on those things that are known automatically (i.e., intuitively).³²⁷

This traditionalism manifests itself in other, more concrete places. Consider a question that divided the formalists and the realists: Are legal rights prior to remedies, or is it the other way around? For a Langdellian legal scientist, the answer was obvious: Our “secondary” remedial rights presupposed a violation of a primary right, which implied that the primary rights were logically prior to remedies.³²⁸ This is an example of law as theoretical

³²³ Frank, *supra* note 292, at 913; letter from Jerome Frank to Francis H. Bohlen, Oct. 7, 1931, at 3 (“legal education got off on the wrong foot when it abandoned the apprenticeship system”). Frank also stated that recent graduate from a top law school is likely to be a less good lawyer than someone who apprenticed at a firm and learned the law through “intimate contact with the actual doings of the courts.” Jerome Frank, *What Courts Do in Fact* (pt. 2), 26 ILL. L. REV. 761, 763 (1932).

³²⁴ See Frank, *supra* note 292, at 914. Contrast this with the novelty of hiring James Barr Ames as professor at Harvard Law School despite no previous practice experience. See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 100–03 (1997). If you, reader, are a law professor who never practiced law but hold a Ph.D. in a nonlaw discipline, you may consider yourself a legal realist for this very reason. But you may owe your job more to Langdell. For the details, see Priel, Rival, *supra* note 73, at Part III.

³²⁵ See Karl N. Llewellyn, *On the Why of American Legal Education*, 4 DUKE B. ASS’N J. 19, 23 (1936); Llewellyn, *supra* note 293, at 657.

³²⁶ Llewellyn, *supra* note 293, at 676.

³²⁷ SCOTT, *supra* note 305, at 316, 323, 328–31.

³²⁸ See 1 JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS 64 (1935).

knowledge. Against this view, the realist idea encapsulated in the phrase “precisely as much right as remedy”³²⁹ suggests that it is impossible to know what legal rights we have by armchair study of legal materials. What rights one has is not a matter of knowledge *that*, because it depends on winning your case, something that depends on a lot of know-how. If, for whatever reason, one cannot get a remedy for the violation of one’s right, it makes no sense to say that one has a right.

This prioritizing of remedies is sometimes presented as an intellectual innovation, or as an example of a progressive critique of the law.³³⁰ But once again, this is not what one finds in the realists’ writings. Instead, what one finds is a traditionalist reaction to the Langdellian modernistic tendency to think of the science of legal principles in isolation from their manifestation in reality. It reflected the practitioner’s no-nonsense response to legal science: Legal rights are not theoretical abstractions, they are meaningless unless you can see their effects.³³¹ This was a return to old common-law thinking.³³²

In the present context, it is yet another way of attacking the separation of the legal domain into a science of “knowledge that,” to which one later adds the realities of the practice. The only way one can speak of legal rights as the subject matter of library materials alone is as “pretty playthings.” As part of legal reality, the content of legal rights is determined by practices.

It is also important to see that this disagreement between traditional legal realists and Langdellian formalists has an important *political* angle. However, the political stance presupposed here by the realists is quite different from the one often attributed to them. In the standard story, legal realists’ works are depicted as posing a challenge to the very idea of the rule of law and democracy. Since they are also depicted as polar opposites to Langdell, he is inevitably depicted as conservative reaction. This view too needs reassessment.

For Langdell and his followers, law was a science to be disseminated to a selective and rigorously trained elite, who had technical expertise not

³²⁹ Llewellyn, *supra* note 12, at 1244 (internal quotations omitted).

³³⁰ See Mensch, *supra* note 23, at 33; cf. HORWITZ, *supra* note 23, at 184 (presenting the priority of remedies idea as derived from thinking about “the social purposes the remedy would serve”).

³³¹ See Llewellyn, *supra* note 99, at 436–38. It is similar to the attitude of a personal injury practitioner who said in an interview: “I was taught on my first day of practice there are three things: liability, damages, collectibility. I need collectibility first.” Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 222 (anonymous lawyer interviewed by Baker).

³³² Cf. Frederick Pollock, *Continuity of the Common Law*, 11 HARV. L. REV. 423, 424 (1898) (contrasting the “modern maxim” that rights precede remedies with the “early forms of law” where “‘no remedy no right’ would be nearer the truth”).

available to others.³³³ It sees the legal scientist as someone who possesses specialized expert knowledge, and as such someone to whose expert opinion society must defer, not because it is necessarily widely shared, but because it is superior to the views of most people. Democratic societies turn to experts to design their bridges; they should equally turn to legal scientists for the design of their laws. Peter Birks, a modern-day Langdellian, called this “the democratic bargain,” in which the people agree to cede some power to “unrepresentative experts” who administer the law independently of politics.³³⁴ Law developed in this way may not reflect people’s attitudes and that is exactly how it should be.

There is a striking but entirely unsurprising contrast between Llewellyn’s and Beale’s view of law in the early decades of the nineteenth century. For Llewellyn, as we have seen, this period was the heyday of the grand style, a time when judges embraced a porous conception of law, whose values were in tune with the people. Beale’s assessment of the same period was very different. During that period, he said,

even the Courts of common law, were still largely in the hands of people who had little, if any, knowledge of law. The genius of the people was against specialization. It was the triumph of pure democracy, which believed, as it still believes, than [sic] an expert is a dangerous thing, and that the best service is to be got out of the man in the street, who is taken out of the street and put in high places. It is to be remembered that there was no teaching of law except by apprenticeship in the lawyer’s office.³³⁵

When Beale described this era as the “triumph of pure democracy,” he did not mean this as a compliment. It was an example of law in its primitive stage of development, when law was guided by popular ideas instead of scientific principles. The development of a scientific conception of law implied for him (just as it did for Birks) a democratic bargain, in which some questions are taken from the political domain and are to be decided by scientific experts.

The realists’ opposition to this idea was at bottom political. It emphasized the embeddedness of law in the traditions of a particular community. Thus, for Llewellyn, when courts adopt the grand style, they voice “not only The Law, but...also the residual *non-expert* horse-sense of the community in

³³³ Langdell’s response to those who worried that there were too many lawyers was raising the standards of legal education. See Langdell, *Report*, *supra* note 296, at 82.

³³⁴ Peter Birks, *Equity in Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTL. L. REV. 1, 98 (1996) (against the “realist destruction of legal science” there remains a conception of law administered by experts in “complex systems of reasoning” who are “doing something different from the legislator and something that cannot be done by just any commuter on the Clapham bus”).

³³⁵ Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 23 (1921).

the whirl of this technologically baffling world.”³³⁶ Turning the law into a field of scientific expertise and insisting on a clear demarcation of law from nonlaw, would inevitably lead to a disconnect between the law and the community’s sense of right and wrong. Thus, contrary to the suggestion that the legal realists’ ideas were inconsistent with democracy, we can see how the central idea of traditional legal realists was that the common law was an example of democracy in action. The good judge, if she does a good job, embodies in the law the values of the community.

For traditionalists like Llewellyn, then, law’s authority came from below, from the people, and it reflects practical wisdom learned from experience which cannot be systematized without loss. Despite all efforts, “the particularistic mass of common law remains notably resistant to large-scale systematization or to clean logical structure....[I]t gropes out of the earthly rooted for better, but still earthy rooting.”³³⁷ It is not impossible to have law taught and practiced in the Langdellian style, but it would be alien from the community. What would be lost is the tacit knowledge that is not taught “but absorbed through the pores or through haphazard imitation, or it is reinvented, man by man, in the process of doing the job.”³³⁸ All this aligns traditional realists not with radical reform but with conservative political theorists like Michael Oakeshott.³³⁹

IV. CONCLUSION

In *Some Realism about Realism*, Llewellyn distinguished between the views attributed to the realists to those of the “real realists.”³⁴⁰ In a way, this Article aims to do the same. If I got things even roughly right, then much of the popular understanding of the legal realists’ ideas is inaccurate. They were not skeptics about the rule of law, they were not radicals who questioned the foundations of democracy, they did not even think the law was particularly indeterminate. In fact, the most famous and prominent among them were

³³⁶ Llewellyn, *supra* note 22, at 31; see also Max Radin, *Justice in Legal Education*, 2 NAT’L J. LEGAL EDUC. 23, 23 (1938) (“justice is a communal valuation and not the special function of a professional class”); cf. Jerome Frank, *The Place of the Expert in a Democratic Society*, 16 PHIL. SCI. 3 (1949) (advancing a fairly minimalist view about the role of experts in a democracy).

³³⁷ Llewellyn, *supra* note 22, at 30.

³³⁸ Llewellyn, *supra* note 3, at 602.

³³⁹ See MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS*, at Part I, *passim* (expanded ed. 1991); see also SCOTT, *supra* note 305, at 332, 424 n.13. An older thinker associated with this view is Edmund Burke. See POSTEMA, *supra* note 83, at 65–71 (tracing these ideas to Burke, and before him, to Matthew Hale).

³⁴⁰ See Llewellyn, *supra* note 12, at 1233.

traditionalists who were skeptical of modernist trends and sought to revive old conceptions of law.

Given the ubiquity of the term “legal realism,” and the place the legal realists occupy in legal history and legal theory, it is a good idea to have a clear sense of what the realists believed. But a skeptical reader may wonder why. By now the term “legal realism” has acquired a life of its own; its meaning exists (or rather, its multiple meanings exist) independently of the views of a fairly small group of individuals active in the early decades of the twentieth century who used this label to describe themselves. It is by now part of the mythology of American law, and probably beyond. This Article is not a call for legal realism originalism, seeking to limit contemporary usage to the original intent of those who coined it, or if it is different, to its original public meaning. Ideas, and the meaning of the words used to describe them, evolve. What happened to “legal realism” is not unique. Like other successful ideas—think “democracy,” “Enlightenment,” or (for a more controversial example) “originalism”—once “legal realism” became popular, many wanted in. To accommodate everyone, the meaning of the term had to become fuzzier.

Lawyers, always on the lookout for practical implications of a historical study, may then wonder: If the legal realists have no special authority over the meaning of legal realism, is there any reason to dwell now on the views of long-dead scholars? If legal realism has now acquired a meaning independent of the views of the legal realists, why should we care about what they meant by the term? My answer is that the views of Llewellyn, Frank, or the other realists are valuable not because they invented the term, but because they reflect a plausible understanding of what it means to be realistic about law. If we understand the term in its “textbook” sense—law is deeply indeterminate, legal rules don’t mean anything—then, despite its popularity, legal realism looks like a failure. In 1973, Lawrence Friedman was incredulous that something as pointless and ill-conceived as “restating (and rerepeating) [wa]s still going on.”³⁴¹ Half a century later, it’s still going strong. And it is not just the Restatements: A century after the realists, and half a century after CLS and law-and-economics, legal doctrine is still very much alive. Walk into most first-year classrooms and what you will observe is students learning legal concepts like “due care,” “expectation damages,” “adverse possession,” along with numerous multiple-prong tests. Learning to think like a lawyer is, apparently, still learning legal doctrine and legal reasoning.

Many academic lawyers are aware of this reality, and some feel a bit embarrassed by it. How can they teach their students legal doctrine in good conscience, when, as good legal realists, they know it is just a cover for

³⁴¹ See FRIEDMAN, HISTORY (1973), *supra* note 149, at 582.

something else? At times, legal academics sound almost apologetic for giving any credence to legal doctrine, for teaching it, or analyzing it.³⁴² Perhaps, if they were to learn something about the original legal realists, they might feel a bit better about what they are doing. It is realistic to note that there are numerous factors, some conscious, others less so, that motivate and shape legal doctrine, as well as the way it is applied in particular cases. It is realistic to note that courts use legal concepts and doctrinal “tests” and that lawyers who fail to understand or use them are very likely to harm their clients. It is also realistic—not least because judges themselves often say so—that the legal concepts and the “tests” they use are aid to thoughts, not mechanical substitutes for thought. It is also realistic to note that despite formidable intellectual efforts to displace it, legal doctrine (often not fundamentally different from the one in existence in the days of the legal realists) is still with us today. The legal realists help us understand why.

³⁴² See Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 BUFF. L. REV. 121, 123–24 (2016); cf. Steven D. Smith, *In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen*, 63 U. COLO. L. REV. 627, 627 (1992) (“doctrinal analysis isn’t something I especially enjoy doing or reading. But I do think that doctrinal analysis has a valuable and even central place in legal scholarship.”).