

# The Legacy of American Legal Realism

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As is known, American legal realism developed from World War I to World War II in reaction against the formalism distinctive to the traditional theory of law that had established a foothold in the United States beginning in the latter half of the 19th century, especially through the work of Ch. C. Langdell.

The formalists, as is equally known, understood law as a science based on logic, meaning a conceptual system – ordered, formal, and complete – capable of providing unique and correct answers for each case brought under consideration. Making up the foundation of Langdell’s case method were some legal definitions and concepts held to be incontrovertible and serving as premises on which basis logic would enable one to deduce legal conclusions.

Gary Minda observes that “the reduction of law to concepts systematized by Langdell’s case method of instruction rendered legal apprenticeship obsolete as a means for professional law training, since it was no longer necessary to study law as a practice; all that one needed to learn the law was a classroom, casebooks, and a teacher trained in the Socratic method of instruction.”<sup>1</sup>

In law, the revolt against formalism<sup>2</sup> came from sociological jurisprudence (Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo) and from legal realism understood in its strict sense<sup>3</sup> (the two wings of it, namely, the moderate

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<sup>1</sup> Minda, Gary, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End*, New York: New York University Press, 1995, p. 16.

<sup>2</sup> This famous expression made its way into the title of Morton Gabriel White’s *Social Thought in America: The Revolt against Formalism*, New York: Viking Press, 1949.

<sup>3</sup> The expression *legal realism* is used in reference to the United States in a broad sense as well as in a narrow sense, on the one hand to designate all the anti-formalistic currents of the late 19th and early 20th centuries, thereby grouping under the same banner sociological jurisprudence and the movement led by Llewellyn and Frank, and on the other hand to designate only this latter movement. This is what I mean by “legal realism understood in its strict sense.” Note also that Robert Summers, in *Instrumentalism and Legal Theory*, Ithaca: Cornell University Press, 1982, suggests using the label *pragmatic instrumentalism* to designate the exponents of sociological jurisprudence and legal realism as forming a single group with some pragmatist philosophers, notably John Dewey. But this usage has not gained currency and has been objected to even

wing of rule sceptics, led by Karl Llewellyn, and the radical wing, led by Jerome Frank): this push metamorphosed the Langdellian method and wore away at its foundation.

The realists' battle cry, as M. J. Horwitz calls it, was Holmes's famed remark that "the life of the law has not been logic, it has been experience."<sup>4</sup> Driven by this conviction (albeit without any systematism, and with marked differences of opinion), the realists operated along three lines of attack: they directed their criticism against systematic concepts and the idea of "system," against dogmatic concepts and legal conceptualism, and against legal argumentation.

Horwitz points up how the realist critique was awash in potential contradiction.<sup>5</sup> Thus, from some quarters came the charge that classical jurisprudence had become too politically motivated, masquerading these preferences in a process toward abstraction and systematisation of legal categories: they therefore advocated, in remedy, a less formalistic jurisprudence more grounded in context.

But then other realists charged classical legal thought, not with being political when it shouldn't have, but with being political in the wrong direction. This difference courted contradiction from the outset: on the one hand the point of legal realism was to set straight the distortion caused by biased juristic methods, and hence to frame legal concepts within a purer, more neutral system; on the other hand, the point was instead to see law for what it is – inescapably political – and hence to work for a sounder system of political values.

There was, further, a potential contradiction – observes Horwitz – in the realist claim that law had fallen out of touch with life. This criticism was aimed at the autonomy of law, a central tenet of all classical legal ideas. There was no doubt among realists that law had to steer closer to life, forging legal categories more aligned with social reality and better able to reflect its complexity. But some understood this critique of autonomy as calling for an effort to ground legal questions in the discourse of moral and political philosophy and to design laws on this basis. Other realists, in contrast, understood this critique, and hence the task of bringing law back in touch with reality, as entailing that law needed to turn to the social sciences in an effort to mirror social relations.

From these two opposite critiques of the old order, Horwitz concludes, there sprang two different streams of realism, the one critical and the other reformist and constructive. The former prevailed the first phase; the latter became a leitmotif of realism with the enactment of the New Deal policies of 1933. We should not forget, in this regard, that many of the exponents of legal realism worked in different roles in the Roosevelt administration, thereby taking active part in the process of transforming the American legal system.

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within the United States. See Moore, M. S., *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, Cornell Law Review 11 (1984) p. 988 ff., and Summer's reply, *On Identifying and Reconstructing a General Legal Theory: Some Thoughts Prompted by Professor Moore's Critique*, Cornell Law Review 11 (1984) p. 1014 ff.

<sup>4</sup> Horwitz, Morton J., *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*, Oxford: Oxford University Press, 1992, p. 187–8. This book and Minda's *Postmodern Legal Movements* are excellent sources for an overview of American legal thought.

<sup>5</sup> Horwitz, *Transformation of American Law*, p. 208–9.

These considerations, all counted up, make it especially difficult to say what the legacy of American legal realism is. Indeed, on the one hand, this movement seems deeply rooted in the American experience from the 1920s to the 1940s, a period marked by the Great Depression of 1929 and the New Deal. So much is this true that in the critical literature, American legal realism is widely presented as coming to an end in mid-century, having brought about the change and reforms it set out to achieve, in matters of practice, doctrine, and legal training.

In a broad sense, Brian Leiter observes, “the legacy of American legal realism consists of phenomena like these: lawyers now recognize that judges are influenced by more than legal rules; judges and lawyers openly consider the policy or political implications of legal rules and decisions; law texts now routinely consider the economic, political, and historical context of judicial decisions. In this sense it is often said that ‘we are all realists now’.”<sup>6</sup>

But on the other hand, we saw the realists’ more specific theoretical concerns and ideas crop up again in the 1970s, partly on account of the rise of neo-pragmatism in philosophy, with movements such as critical legal studies, feminist legal theory, and the economic analysis of law, all of which connected with or invoked legal realism – however much in different ways, and by placing different emphases – and even declared themselves its legitimate heirs.<sup>7</sup>

Critical legal studies, as is known, make central the idea that law, far from being rational, coherent, and fair, is in reality arbitrary, incoherent, and profoundly unjust. The rights and liberties presented as essential to the individual’s fulfilment are in reality functional to the political and economic ends of liberalism. A typical example is the concept of freedom of contract: presented rhetorically as a right, it only serves in reality the ends of the market economy and capitalism. The same holds for the principle of *stare decisis*, under which judges, in virtue of the tie that binds them to precedent, will act according to law rather than according to politics: on closer inspection, this principle, too, reveals itself as simply a device for masquerading the political nature of the judges’ decisions.<sup>8</sup>

In seeking to unmask and pull out the politically oriented message encapsulated in legal discourse, the exponents of critical legal studies resort to a method they have termed “trashing.” Trashing, according to Robert Gordon,<sup>9</sup> makes it possible to expose the contradictions of legal discourse and the ideology nested into it, thereby bringing to light the ideological tendency underlying legal structures, which last are always historically embedded and influenced. Liberal conceptions rest instead on the idea that there exists an abstract, disenchanted humanity removed from concrete relationships and from the economic, political, and social fabric.

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<sup>6</sup> Brian Leiter, “Legal Realism,” in *A Companion to Philosophy of Law and Legal Theory*, ed. by D. Patterson, Oxford: Blackwell, 1996, p. 261.

<sup>7</sup> Minda, *Postmodern Legal Movements*, p. 59.

<sup>8</sup> For an overview, see Michael Brint and William Weaver (eds.), *Pragmatism in Law and Society*, Boulder: Westview Press, 1991, and in it Richard Posner’s contribution, “What Has Pragmatism to Offer Law?” p. 29–46. See also Posner, *Law, Pragmatism, and Democracy*, Cambridge-Mass., 2003

<sup>9</sup> Robert Gordon, “Law and Ideology,” *Tikkum* (1987) p. 19.

In working out these themes, Minda points out, the exponents of critical legal studies developed and “pushed to the limit” the deconstructivist line of legal critique previously pursued by the realists and now enriched by drawing on the thought of philosophers like Jacques Derrida.<sup>10</sup>

The debt owed to realism is acknowledged from within critical legal studies; thus Gordon describes realism as a politically progressive and intellectually liberating force that has done away once and for all with the formalistic conceit by which a universal scheme of neutral and general norms will equitably and impersonally control the free movement of every class and faction in civil society.<sup>11</sup>

Legal liberalism and its rationalistic and universalistic assumptions become an object of criticism in feminist legal theory as well. Feminist thinkers, despite the remarkable differences that set them apart, are all together in finding the classic conceptualisations of legal theory to be nothing if not devices for mystifying the substantive inequality and power relations that centre around gender discrimination and that determine the way social relations are in practice regulated.

There is a twofold objective that, with some simplification, feminist theory can be said to follow: on the one hand to unveil what these mystifications conceal, and at the same time to develop, for the theory and practice of legal interpretation, instruments enabling the “nonrational” modes of comprehension and reasoning that are proper to the feminine experience.

In particular, feminist theory sees in the notion of a single subject of law – the basis of legal thought – a process of forced homogenisation of differences concealed under the pretence of neutrality advanced through the principle of equality: for this reason a transition is urged toward a “soft,” and hence a flexible law capable of accounting for individual and gender specificities. Martha Minow recognises among the merits of realism that of exposing “the limits of liberal rights that presumed and reinforced existing distinctions between the public and the private spheres,” and she credits the realists for considering law “a pragmatic tool for advancing social purposes rather than a self-contained abstract, conceptual system for generating incontestable answers. They argued that judges are simply human beings struggling with competing goals and personal predilections rather than oracles capable of discerning the one true path; they sought to expose the ways in which particular legal rules and conceptions unfairly privilege certain economic and social interests.”<sup>12</sup>

Minow traces to the realists’ teaching the analyses of the feminist scholars who during the 1970s explore private power’s threats to liberty and the government’s implication in the private spheres of both family and private employment. She argues that these developments could be understood as an application of the realist insights to the social construction of difference: private power threatens liberty to the extent that it implements structures of domination

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<sup>10</sup> Minda, *Postmodern Legal Movements*, p. 110.

<sup>11</sup> Gordon, Robert, *Critical Legal Histories*, Stanford Law Review (1984) p. 69.

<sup>12</sup> Minow, Martha, *Making All the Difference: Inclusion, Exclusion, and American Law*, Ithaca: Cornell University Press, 1990, p. 279 ff.

and discrimination based on social and historical meanings of particular traits of difference such as gender, age, race, and religion.

As was observed earlier, feminist legal theory seems to also bring into the theory and practice of legal interpretation certain “nonrational” instruments and modes of understanding held to be distinctive to the feminine experience. Consider, by way of example, Carol Gilligan’s theorisations whereby there is a distinctively feminine way of tackling moral and legal dilemmas, a mode of thought that this American psychologist has famously defined the “ethic of care” and set against the “ethic of principles,” the ethic typical of men.<sup>13</sup> Thus, while men typically make choices on the basis of principles of justice, equality, fairness, and the like, women base their decisions on the moral capacity to perceive and recognise the different needs of each person and to meet these needs.

These theorisations have given place to legal solutions alternative to those institutionally settled (thus, the ethic of care has inspired, for example, the practice of family mediation, conceived as a more flexible way of solving family problems and conflict) – and they find an interesting forerunner in the work of Jerome Frank. For Frank, as is known, judging is an art rather than a logical process, and as such it uses channels that cannot be accounted for by way of rational canons. The activity of judging, therefore, must become an equitable procedure: we need to “remove the bandages from justice” and proceed to individualize controversies. But equity, writes Frank, requires replacing a “law-as-father,” stern and unable to adapt to reality, with a motherly and fluid regulation: “The mother does symbolize equity.” The law-as-mother calls for a judge who, in addition to being aware of the discretionary power wielded in that role, is also capable of empathy for the people subject to judgment. “Clemency, charity, understanding, respect for the uniqueness of men and women summoned to our courts – these seem to be the elements a civilized legal system cannot do without.”<sup>14</sup>

A linkup with realism exists as well through a movement much different from the previous ones, and indeed politically antithetical to them, namely, the economic analysis of law. The exponents of this movement recognise their historical antecedent in the utilitarianism of Bentham and Mill, but at the same time they view themselves as the direct descendants of pragmatism, which they understand as embodied especially in Holmes, whose famous formula they invoke: “For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”<sup>15</sup> The economic analysts of law understand themselves as carrying forward as well the social engineering of Roscoe Pound and the work of the realists strictly so called.

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<sup>13</sup> Gilligan, Carol, *In a Different Voice: Psychological Theory and Women’s Development*, Cambridge: Harvard University Press, 1982.

<sup>14</sup> Frank, Jerome, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949) p. 385 ff.

<sup>15</sup> Holmes, Oliver Wendell, *The Path of the Law*, Harvard Law Review 10 (1897) p. 457 ff. Note that the expression “black letter man” refers to doctrinal law: the basic rules and principles of law, which were often placed in bold black letters in law treatises.”

The proposal born of these premises – a suggestion of Richard Posner, the main exponent of this movement – is that of setting up a legal theory capable of working together a liberal normative ethic, a pragmatic philosophy, and an economic method of analysis.

The first of these elements, the liberal normative ethic, amounts to subscribing to the principle of the greatest freedom for each compatible with an equal freedom for all, and to the principle, inspired by Mill, whereby the state should not make it its business to hold in check or repress ideas or behaviours when these cause no damage to third parties; rather, the state should confine itself to securing equality of opportunity and the economic measures needed to ensure such equality.

The second element, the pragmatic philosophy, takes up the instrumentalist attitude on the view that in facing legal problems we must avoid all recourse to metaphysical and abstract notions, and should rather proceed to work out possible solutions on the basis of their predictable consequences, both in the short term and in the long run. Posner says, too, that it is necessary to consider these consequences or effects in relation to the individual as well as in relation to the system, and that these have to be empirically grounded, weighing costs against benefits and taking into account the criterion of means-end rationality. Thus, in the first place, the interpreter will have to single out all the possible meanings ascribable to a given provision, and then proceed, in a second phase, to work out all the possible consequences to flow from such interpretations; in the third and last phase, the solution will have to be selected that will afford the greatest benefit: “The essence of an interpretive decision consists in considering the consequences of alternative solutions [...] there are no ‘logically’ correct interpretations: interpretation is not a logical process.”<sup>16</sup>

This identification of effects brings into play the third element, requiring an economic method of analysis that imports into law the tools used in microeconomics.

Posner distinguishes two aspects of the economic analysis of law, a normative one and a positive one. He observes how the normative branch “can be viewed as a direct descendant of legal realism by way of Guido Calabresi,” whereas “the positive branch comes from outside the law, from the work of economists such as Ronald Coase and Gary Becker.”

Calabresi’s branch of normative economic analysis of law,” says Posner, “shares with legal realism a desire to perform radical surgery on the common law. For example, Calabresi wishes to do away with fault as the basic guide to allocating liability in accident cases.”<sup>17</sup>

Without taking account of these two faces of realism – the critical face and the reformist, constructive face – and of those internal contradictions referred to earlier in this essay with Horwitz, it might strike one as odd that movements so different from each other as critical legal studies and the economic analysis of law should both appeal to legal realism. The point is made by Posner in his observation that “law and economics and critical legal studies are sometimes

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<sup>16</sup> Posner, Richard, *The Present Situation in Legal Scholarship*, *The Yale Law Journal* (1980–81) p. 1113 ff.

<sup>17</sup> Posner, Richard, *ibidem* p. 1120.

thought to be contending for the mantle of legal realism. The affinity between critical legal studies and legal realism is undeniable. Both are debunking predominantly left-of-centre attacks on the legal establishment of their respective times. [...] The relation between law and economics and legal realism, however, is equivocal. Many of the leading figures are economists [...] who probably have never heard of legal realism. The law and economics movement is not left wing or hostile to legal doctrine or, for that matter, to logic. Economic analysis of law resembles legal realism primarily in claiming that legal rules and institutions have functional, social explanations and not just an internal, lawyer's logic; in this it is profoundly antiformalist.”<sup>18</sup>

Posner's inside assessment coincides, all told, with that coming from critical legal studies by way of Horwitz.<sup>19</sup> For the latter there is a condition on which we can accept the claim that the economic analysis of law inherits the legacy of realism insofar as it, too, takes an instrumentalist or consequentialist approach to law: this condition is that legal realism be considered, as K. Llewellyn says, a methodology or technology completely independent of all connections with progressive ends, moral or political.

Thus, Critical Legal Studies and feminist theory, on the one hand, and the economic analysis of law on the other, are keeping alive, in the contemporary debate, the dialectic existing between a more radical wing and a more moderate one; both wings owe much to legal realism, which, far from having run its full course in the role it played during the Roosevelt era, has spurred a debate on questions such as legal interpretation and argumentation, that marks a “point of no return” for philosophy and theory of law in the present day.

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<sup>18</sup> Posner, Richard, *The Problems of Jurisprudence*, London, 1990, pp. 441-42.

<sup>19</sup> Horwitz, *Transformation of American Law*, p. 514.