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## A Review of Legal Realism

### Cover Page Footnote

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# A REVIEW OF LEGAL REALISM

WALTER B. KENNEDY†

"The waters of the law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clearer that decisions are functions of some juristic philosophy."<sup>1</sup>

So wrote Professor Felix Frankfurter in 1931 and his figurative appraisal of juristic weather in terms of agitated water and whirling wind accurately pictured the jurisprudential flux of a decade ago. If it is permissible to continue the learned jurist's appraisal of law in symbolic terms, we may observe that the jural barometer has since registered all degrees of atmospheric disturbance—from soothing zephyr to howling hurricane—from temperate legal reforms to frigid farewells to all law.

Yes, there is action aplenty in the legal order and we meet to attempt to catch the temper and tempo of the times. Certain it is that jurisprudence has taken on new life and healthy vigor; has deigned to descend to earth and to walk and talk with the common man; and is even enveloped in a new literary dress, shaking off the heavy paragraphs and somber sentences of older jurisprudence. We occasionally detect a flash of humor or touch of irony as our modernists pierce an opponent's thesis with a pungent pen, or execute an adversary legalistically in a painless, even pleasurable, manner.

I speak briefly of form before substance because I hold with the scholarly Cardozo that form and substance of jurisprudence are closely interlocked. "They are tokens of the thing's identity. They make it what it is."<sup>2</sup> One misses the depth of modern juristic revolt if one fails to note the realistic form, the language of the laboratory, the effervescence of youth and the skeptical tone which characterize current legal literature.

In the juridical processes of the Canon Law, since the 16th century, there exists an official known as the *Advocatus Diaboli* whose chief function is to interpose all possible objections, weighty or slight, against the pending petition of canonization or beatification.<sup>3</sup> I suspect that my friends of the functional persuasion will see more than a fleeting resemblance to the Devil's Advocate in my presence on the program today.

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Address, revised for publication, delivered at the Section on Jurisprudence, Eighth American Scientific Congress, Washington, D. C., May 17, 1940.

1. Frankfurter, *The Early Writings of O. W. Holmes, Jr.* (1931) 44 HARV. L. REV. 717.

2. CARDOZO, *LAW AND LITERATURE* (1930) 6.

3. *Advocatus Diaboli*, 1 CATHOLIC ENCYC. (1907) 168.

But I know that their antagonism will be somewhat lessened when I recall that the seemingly paradoxical title of the Devil's Advocate in ecclesiastical law is Promoter of the Faith. The paradox, of course, fades away when one realizes that the diabolical attack is meticulously framed solely in the interest and honor of the Church lest one be beatified without juridical proof of sanctity.

It is in this spirit that we propose to examine the tenets of Legal Realism. We are met today for one purpose and in a common cause—to endeavor to bring about a better and nobler body of Jurisprudence. Labels of Realism or Conceptualism, Functionalism or Scholasticism, are but tags and tickets which mark representatives of the warring schools, but there is no warfare penetrating enough to destroy our faith in and allegiance to the Lady of the Law. Our joint contributions concern movements and not men, programs and not personalities. As a token of this spirit of cooperation, I accept without qualification the finely phrased words of a realist in his current attempt to restate the realist position: We are all "searching for the true issues and the true guiding principles"<sup>4</sup> of law; all else becomes secondary and unimportant.

While my remarks will be generally critical, but I hope constructive, this will be because, like the Devil's Advocate, my search is for the flaws in the mosaic and patterns of present-day Realism. But let me make my position clear. I do not deny that Realism has made many worthwhile contributions to the science of law. Concededly, it has a place in the legal order provided that it keeps its place.

"The most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists and content with nothing less than revision to its very roots of the method of judicial decision which is part of the classical tradition."<sup>5</sup> Predominantly American in its origin and personnel,<sup>6</sup> possessed of brilliant writers and able advocates, it stands forth as our most active school of jurisprudence. Despite a decade of vigorous and spectacular pamphleteering and oral attacks upon the traditional law, Realism has not captured the fancy or aroused the sustained interest of the Bench and Bar. Pronouncements that "the age of the classical jurist is over"<sup>7</sup> or that "the experimental attitude [of Realism] has spread everywhere"<sup>8</sup>

4. Llewellyn, *On Reading and Using the New Jurisprudence* (1940) 26 A. B. A. J. 301.

5. Cardozo, *Address Before New York State Bar Association*, 55 REPORTS OF NEW YORK STATE BAR ASS'N. (1932) 264.

6. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW (1940) 58-59.

7. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 833.

8. Frank, *Realism in Jurisprudence* (1934) 7 AM. L. SCHOOL REV. 1066.

are somewhat premature in tense; they may be promissory of the future; they do not record accurately the events of the present or past. Why has Realism failed to catch hold? One defender of the New Jurisprudence answers: "Our thinking is tradition-bound; our thoughts pace within the walls of a prison."<sup>9</sup> True, unquestionably true, but certainly not the only explanation of the halting progress of a jurisprudential movement vibrant with the fighting faith and verve of Youth on the march.

Running through the pages of realist literature is the unrelenting insistence that traditional law fails because it is unwilling or unable to look at itself from the outside, to submit to the observational and diagnostic techniques of the scientist.<sup>10</sup> May it not be in order to suggest that the time is ripe for a similar objective and observational analysis of Realism "from the outside"? It may well be that Realists, immersed in the ruthless pursuit of facts and the grim realities of life, are too close to their favored philosophy to observe its defects in operation.

I propose to consider four fundamental failures of Realism which are closely interlocked and spell out possible reasons for the slowing down of the realist machine. These defects are:

- (1) Lack of consistent application of the scientific approach in its criticism of traditional law.
- (2) Overemphasis upon fact-finding and consequent submersion of principles and rules.
- (3) Absence of skepticism regarding the hypothetical theories of the social sciences.
- (4) The creation of a new form of word magic and verbal gymnastics.

My first question is: Is Realism really scientific? The query is a timely one in a Congress which meets to pay tribute to the men and women of science. I am sure that my realist friends will not object when I invoke here and in later sections of my paper the words of the venerable Justice Oliver Wendell Holmes, father of real realism, who gave purpose and direction to their philosophy. Writing under the pertinent title of "Law in Science and Science in Law," Justice Holmes says: "The man of science in the law is not merely a bookworm. To a microscopic eye for detail he must unite an insight which tells him what details are significant. *Not every maker of exact investigation counts, but only he who directs his investigation to a crucial point.*"<sup>11</sup> Surely in a philosophy of law that makes science the core of its focal at-

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9. Harno, *Ideas and the Law* (1940) 26 A. B. A. J. 651.

10. ROBINSON, *LAW AND THE LAWYERS* (1934) 62.

11. HOLMES, *COLLECTED LEGAL PAPERS* (1920) 224. Italics inserted.

tack against the common law, we may expect to find "exact investigation" directed to a crucial point. But reformers, who pride themselves on their skepticism regarding classical law, exhibit an amazing faith in unscientific and experimental hypotheses which are still being gravely debated and seriously doubted by skilled scientists in their respective disciplines.

Realism frequently discloses an unscientific attitude before it even enters the Halls of Science. Realists demand the integration of social and economic facts into the legal order—the infiltration of psychology, economics, sociology, anthropology and all other natural and social sciences. Mark you, we are not now concerned with the *value* of such extra-legal data but merely with the *method* of acquiring such information and doing it in a satisfactory and scientific manner. What degree of skill and proficiency does the legal realist demand in order to use such non-legal material intelligently and wisely in the improvement of legal rules and principles? One prominent realist suggests that modest mastery suffices, mastery sufficient to read critically, and to evaluate the findings read and the methods out of which they came.<sup>12</sup> But the proposal to widen the frontiers of the law by a leisurely excursion into the realms of adjoining fields demands some consideration. It has been wisely said that "as the diameter of our knowledge increases, so also does the circumference of our ignorance." And the circumference of our ignorance does not decrease with a "modest mastery" of many disciplines.

Let us consider some of the results of the superficial examination of scientific theories without the critical analysis or skeptical approach which Justice Holmes marks out for "every maker of exact investigation." The danger is that the "lump concepts" of traditional law, concededly in need of revaluation, may be displaced by an unscientific assortment of "lump facts." By "lump facts" I mean a conglomerate pile of so-called scientific data, statistics and theories (frequently untested and unverified) collected second-hand from the social sciences, welded into a loose generalization and offered under the label of science to contest the validity or utility of a legal formula or doctrine.<sup>13</sup> We submit that traditional legal doctrine is entitled to a day in court before eviction; and that the evidence tendered must satisfy the burden of proof that it is both scientific and factual.

Lack of time forbids more than a dogmatic listing of some of the variant evidences of the unscientific approach. I have in mind the full

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12. Llewellyn, *On What Is Wrong With Legal Education* (1935) 35 COL. L. REV. 671.

13. Kennedy, *Realism, What Next?* (1939) 8 FORDHAM L. REV. 73-75.

sweep of realistic probing beneath the surface of judicial minds into the dark alleys of subconscious behavior;<sup>14</sup> the complete dismissal of formal judicial opinions with the flourish of a pen;<sup>15</sup> the confident use of economic determinism to explain one hundred year old opinions; the gastronomical approach which urges the advocate to take a sly glance at the judge's breakfast menu;<sup>16</sup> the distortion of judicial decisions by the use of economic statistics which would not be accepted by a single economist or statistician;<sup>17</sup> and the easy shift from the assumptions of Freudian psychoanalysis or Watson's behaviorism to an authoritarian attack upon the certainty of law. True indeed, in the words of Justice Cardozo, "the process of psychoanalysis has spread to unaccustomed fields."<sup>18</sup>

Note again: I am not at all concerned at the moment with the values of extra-legal data when scientifically examined and collated. My point is made if I convince you that the realistic approach in the stated situations is not the scientific method; and that Realism, which worships at the altar of Scientism, has departed from the basic, essential practices of true scientific research.

Closely related to the first contention is the belief that our realist reformers have overemphasized fact-finding as a method of attacking classical law. Realists say that they "want to check ideas, and rules, and formulas by facts, to keep them close to facts."<sup>19</sup> A very com-

14. Kennedy, *A Required Course on Jurisprudence* (1940) 9 AM. L. SCHOOL REV. 593. See also my forthcoming paper, *Psychologism in the Law*, to appear in the GEO. L. J., November 1940.

15. For example, see Nelles, *Commonwealth v. Hunt* (1932) 32 COL. L. REV. 1151. Cf. Pound, *Economic Interpretation and the Law of Torts* (1940) 53 HARV. L. REV. 365.

16. Llewellyn, *supra* note 4, at 305.

Llewellyn does not claim that the inquiry into the "state of the judge's digestion" is very apt to be fruitful largely because it is difficult to "find adequate evidence to justify attributing any particular decision to any such factor." (*Id.* at 306 n.) He insists, however, that the task of the counselor is to guard against such possible factor.

The critic of Realism is not convinced that the item of the "state of the judge's digestion" is important even if the abdominal distress is known by both advocates participating in the trial of the case. So far as I am aware, realists have not indicated just *how* this juristic diagnosis is to be handled in the subsequent conduct of the case at bar. Concededly the attorneys will proceed sympathetically and tenderly with the trial in order not to irritate the court. "A soft answer in such a situation is always effective." SHIENTAG, TRIAL OF A JURY ACTION IN NEW YORK (1938) 37. But surely Realism must offer more than common sense conduct in this situation. What effect will this gastronomical disturbance have upon the manner of presentation of evidence or the form of the brief?

17. Kennedy, *Realism, What Next?* (1939) 8 FORDHAM L. REV. 45, 58-71.

18. Cardozo, J., dissenting opinion in *United States v. Considine*, 296 U. S. 287, 299 (1935).

19. Llewellyn, *Some Realism About Realism* (1931) 44 HARV. L. REV. 122, 123.

mendable objective. But out of this laudable program is emerging a fact-fetish that tends to make facts alone important. Ideas and rules are not being rechecked; they are virtually submerged in a welter of finely spun distinctions of facts. Facts and functions are key words to unlock the real law. What utility remains in legal rules and formulas when we are advised by a distinguished scholar that the judges' "*real reasons are locked within their own minds*—or within judicial council chambers—even if they are known to themselves. Their good reasons—or at least the best they can command for the occasion—are displayed in the reports."<sup>20</sup> How much value should be given to judicial precedents when a learned dean advises us that "an opinion is but the smoke which indicates the grade of mental explosive employed."<sup>21</sup> Our constant fear is that the same legalistic smoke may blur the clear-visioned fact analysis of our functional friends. But more about optical impediments in a moment.

It does not suffice to recall that Justice Holmes once said, "We need to think things and not words." Let it also be remembered that he held that "One mark of a great lawyer is that he sees the application of broadest rules."<sup>22</sup> You may recall his amusing story about the Vermont Justice of the Peace who was asked to adjudicate the issue arising between two farmers regarding the alleged destruction of a butter churn. In the words of Justice Holmes: "The Justice (of the Peace) took time to consider and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant."<sup>23</sup>

But we need not go to the verdant hills of Vermont for examples of the current overinflation of fact-finding. One ambitious young lawyer in my own state recently reduced the New York law of torts to homeopathic factual capsules so that by the use of his alphabetically arranged treatise a lawyer, facing the vexatious question, let us say, of legal liability for an injury traceable to a defective door, may find the pertinent law neatly packaged under the subdivisions, "swinging doors, revolving doors and slamming doors."<sup>24</sup> Let us beware lest we supplant the "hair-splitting machine of logic" with a fact-splitting device which is infinitely worse. Now do not misunderstand me. I am not quarreling with the use of descriptive word indices, but I say that they are at best approaches to the law and not the law itself.<sup>25</sup> If time permitted, I think we could

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20. Hamilton, *The Living Law* (1937) 26 SURVEY GRAPHIC 632. Italics inserted.

21. GREEN, JUDGE AND JURY (1930) 53.

22. HOLMES, COLLECTED LEGAL PAPERS, *supra* note 11.

23. *Ibid.*

24. JACOBS, NEW YORK LAW OF ACCIDENTS (1934) 574-575.

25. Kennedy, Book Review, N. Y. L. J., April 27, 1934.



dissect some of our more extreme types of functional case books and prove that they are not functioning.<sup>26</sup> I recall the critical words of John Chipman Gray at Harvard Law School thirty years ago when he dismissed abruptly the inutility of what he called "plumbers' jurisprudence." There is some warrant, I fear, even today for Professor Gray's curt dismissal of the advantages of appending realistic adjectives to the law.<sup>27</sup>

Lest it be thought that I am erecting a juristic straw man overstuffed for the occasion, may I recall that we have eminent scholars of the functional persuasion who are content with nothing less than the wholesale ouster of such legal concepts as Corporation, Property and Title because, they argue, conceptual thinking blurs our pursuit of the all important economic and social facts.<sup>28</sup> Others argue that opportunism and compromise, pragmatically tested in terms of facts alone, should be, and frequently are, the real guiding forces of judicial decisions.<sup>29</sup>

Concluding the second point, it seems to be clear that the defect of fact fetish is not necessarily permanent or basically inherent in the realist formula. Let fact-finding go forward without limit, but let us realize that the utterance of a catchword, whether it be "fact-finding" or "scientific approach", is not a solving word in itself.<sup>30</sup> Even science has its comptometers to count the units of machine-made goods moving from automatic assembly lines. Is it unscientific to suggest that the task of the legal scholar is not complete with the piling up of facts? He must have a weighing machine with which to evaluate such definitely found facts.<sup>31</sup>

We need not peer into the future, however immediate, to witness the devastating effects of surrealism running riot in the fine arts. Even the naturalist school of jurisprudence must stand aghast at some of the verbal and pictorial contortions passing current under the title of surrealism in art, literature and the drama.<sup>32</sup> Excesses are actually abroad

26. It has been said that the factual classification of a functional case book brings to mind once more Justice Holmes' story about the Vermont Justice of the Peace (note 23 *supra*). Gregory, Book Review (1940) 34 YALE L. J. 632, 634.

27. For a streamlined and modernistic advocacy of a new form of "plumber's jurisprudence" see RODELL, *WOE UNTO YOU, LAWYERS* (1939) ch. XI.

28. Cohen, *supra* note 7, at 820-821.

29. ARNOLD, *FOLKLORE OF CAPITALISM* (1937).

30. Kennedy, *Principles or Facts?* (1935) 4 FORDHAM L. REV. 53.

31. Hutchins, *The Autobiography of an Ex-Law Student* (1934) 7 AM. L. SCHOOL REV. 1051, 1065.

32. "Never in the history of civilized art has humanity cut so poor a figure. Whatever is base, whatever is open to derision, whatever is ugly in human existence, is made a major theme not only by the most significant fiction of our time, but by its art as well.

today in adjacent cultures which undermine reason and offer intellectual nightmares as the true inspirational sources of esthetic beauty. I know that I voice the judgment of every jurisprudential scholar—regardless of his legal philosophy—when I say that we want no such surrealism in the law. Nevertheless it must be regretfully stated that the outriders of Legal Realism, with their emphasis upon sub-vocal behavior, emotional explosions of the judiciary, and the curt dismissal of the “thinking man”, are fostering a movement somewhat similar to the “monotonous pessimism of contemporary art.”

There are two particular trends of modern realism which deserve special treatment, namely, Psychologism and Semanticism. The trends in question are admittedly inclinations or tendencies—mental pathways sufficiently grooved to be discernible and yet not marked with the same exact metes and bounds which define the thoughtways of traditional law.

By psychologism I mean much more than a particular type of psychological theory. Under the catch-all title we include the current tendencies to account for judicial decisions, wholly or in part, in terms of personal impulses, economic factors, hunches, or institutional compulsives; and in corresponding degree to dismiss or minimize the authority of law, the exercise of reason and the impartiality of the judicial process. Ample authority exists for the statement that realists accept in substantial degree the utility of modern psychology and economics as positive sciences which offer substantial aid and assistance to the distressed Lady of the Law.<sup>33</sup> Not alone have modern realists endorsed the value of current psychological theories, but they have accorded one brand of psychology a dominant place in their program of juristic reform. The pages of legal literature disclose a surprisingly generous acceptance of a mechanistic psychology which tends to minimize intellect as the governing agency in the fabrication of judicial opinions, unseats reason and substitutes a train of such terms as “behavior” and “personal impulses” as descriptive of the ways of judicial thinking. For example, we read that “every (judicial) opinion necessarily is the justification of the personal impulses of the judge”,<sup>34</sup> and that “man’s conduct is shaped by factors which are not within his control.”<sup>35</sup> Each succeeding phase

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Portraits without personality, amorphous figures that are the drab accessories of city or country slums, men and women painted or carved to represent the mere unthinking creatures of circumstance—these are the renderings of humanity by the monotonous pessimism of contemporary art.” Address by Dr. Charles R. Morey, Marquand Professor of Art, University of Pennsylvania, New York *Herald Tribune*, Sept. 17, 1940.

33. See note 14 *supra*.

34. Shroeder, *Psychologic Study of Judicial Opinions* (1917) 6 CALIF. L. REV. 89, 93.

35. Swetlow, *Anti-Social Behavior and the M'Naghten Rule* (1938) 72 U. S. L. REV. 652.

of realism tends to show that there is more than rhetoric in the statement that their favored psychologism leans toward a tropism-technique in evaluating judicial conduct.

Time forbids more than an abrupt summary of so-called psychologism in action. Evidence is at hand to prove that realists are beginning to invoke the aid of pseudo-psychologism in the interpretation of judicial opinions. One form of psychologism is appearing wherein the judges are confidentially informed that external stimuli control their decisions even when they are not aware of these sub-vocal factors.<sup>36</sup> Judges are acting behaviorwise even when they do not say so; they are *doing* the right thing a lot of times when they are not *saying* the right words. Under this system it is possible for the juristic surgeon to probe beneath the surface of any judicial opinion and to pull forth latent reasons for the decision.<sup>37</sup> The unfortunate and unscientific consequence of such procedure is that anyone else, gifted with a lively imagination, can extract from the same opinion absolutely variant and antagonistic inferences.

I submit that this entire process is endangered by a superabundance of "wishful thinking" which lacks substantially any degree of certainty or scientific conclusion. Time marches on and we speak only of the present. Today it appears that one of the many drawbacks of surrealism in jurisprudence is that it is burdened with a heavy load when it selects and endorses psychologism as its favorite *Is*m in the study and evaluation of judicial opinions; and tries to apply its confusing formulas in the solution of concrete legal problems.

One of the latest excrescences of Legal Realism is the renewed emphasis upon the science of semantics, the study of the meaning of words. There is warrant for an attack against inexact terminology and the slippery meaning of words and I do not mean to intimate in any way that semantic research is objectionable in itself. Concededly it is a laudable study and is particularly profitable in the legal order.

But I propose to examine just two phases of current semanticism which tie up definitely with the foregoing critique of Legal Realism and indicate that streamlined semantic reform has been carried too far.

What does Realism propose by way of reformation of language, particularly legal language? One realist says: "When law deals with words, (realists) want words to represent tangibles which can be got at beneath

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36. Yntema, *The Horn Book Method and the Conflict of Laws* (1928) 37 YALE L. J. 468; Oliphant, *A Return to Stare Decisis* (1928) 14 A. B. A. J. 159; Moore, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 1219.

37. See note 15 *supra*.

words and observable relations between these tangibles."<sup>38</sup> Realists are insisting that "things are the sons of heaven, but words are the daughters of men."<sup>39</sup> Give us concrete things, things that we can see and grapple with! All abstractions, symbols and concepts are taboo and should be replaced by "it-words." Another devotee of word surgery proposes in effect that we eliminate all words without a tangible external referent and argues that scientists alone are equipped with a vocabulary which meets with his approval.<sup>40</sup> We do not pause to criticize, but merely to observe that the full sweep of semantic revision removes practically every legal concept of the common law—Trusts, Contract, Torts, Corporation, Property—for not one of these familiar abstractions possesses a definite, concrete, tangible referent. Likewise, it may be noted that the same "thingifying" of non-legal terminology would reduce Webster's dictionary to the proportions of a pocket notebook.

One final observation may be made regarding the breadth of attack upon legal and non-legal terminology. Delete from our language all words without definite referents of tangible character and our modern semanticists could hardly frame a sentence without violating their own rule.<sup>41</sup> I wonder if they realize that in framing their broad critique against abstractions, they have merely substituted abstractions of their own making. Restating the familiar words of Holmes: "It is not the first use but the tiresome repetition of inadequate catchwords which I am observing."<sup>42</sup> Are we not somewhat surfeited with such hackneyed words in the new semantic vocabulary as "behavior", "background" and "function." Background has been so frequently used that we are beginning to lose sight of the fact that legal problems involve foreground as well. Every opinion, even every act, of the judiciary is explained in terms of judicial "behavior." A count of one law review article disclosed that the writer used the favorite word "function" over sixty times.<sup>43</sup> Applying the test of modern semanticism, I ask: What is the tangible referent of "behavior", "background" or "function"?

These stated defects of unscientific approach, excessive emphasis upon fact-finding, glorification of the experimental hypotheses of science and a

38. Llewellyn, *Some Realism About Realism* (1931) 44 HARV. L. REV. 1222, 1223.

39. Johnson, *Preface to the English Dictionary*, reprinted in (1909) 39 HARVARD CLASSICS 191.

40. CHASE, *TYRANNY OF WORDS* (1938).

41. It is submitted that Stuart Chase, who starts out to deflate the airy words of our language which have no definite referent, violated his own formula in framing the very title of his book, *Tyranny of Words*. Tyranny, the key-word of his title, has no referent; the name refers to numberless types of tyranny or oppression, political, social, racial, etc.

42. BENT, *JUSTICE OLIVER WENDELL HOLMES* (1923) 197-203.

43. Cohen, *supra* note 7.

new form of word-jugglery may be traceable in part to the exuberance of a new movement driving forward with the laudable enthusiasm of youth. But the anchor of age and experience—and the nature and the power of man to reason and to think and to idealize—must not be lost in the dizzy speed which characterizes modern life. Nor is the critic quite content with the conciliatory explanation that the current over-emphasis upon behavior, opportunism and sheer power is merely a temporary excess; the adherent to the traditional common law believes that a legal philosophy which begins in doubt and ends in despair<sup>44</sup> is not merely overdone; it needs to be done over.

There are optimistic grounds for the belief that Realism is being done over. Observe the current appraisal of the "New Jurisprudence" by a leading realist who pays tribute to the importance of idealism, natural law, zeal for justice and the necessity for a fixed goal to be consciously sought by all;<sup>45</sup> the disappearance of the blue prints of "social engineering" with nimble cogs and wheels but with no place in its machinery for the rationality and faith of mankind; the abandonment by legal realists in practice of their written proclamations that law is a series of symbols and myths and that the law is basically uncertain now and forever.

But more pertinent than any of these facial evidences of a conciliatory spirit among the adherents to the various kinds of realistic philosophy is the unanimous rebuke presently directed against the advocates of surrealism who propose not revision of the classical law to the roots, but rather the uprooting of all law.<sup>46</sup> Building ruthlessly but logically upon the skepticism and pessimism of earlier writers, they propose not radical legal reform but the complete ouster of all law. To the credit of moderate realists, let it be clearly stated that they have joined anti-realists in the vigorous dissent.

Surrealism is the pendulum-swing of antagonism to law reaching the zenith point. Here is the culmination of psychological skepticism and economic determinism. Here at long last is the American pattern of the European philosophies of "no law."

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44. It is interesting to observe the mounting evidence that Realism, beginning in doubt and skepticism regarding traditional law, is now reaching the stage of absolute despair regarding the utility of a legal order. Kennedy, *supra* note 14.

45. Llewellyn, *supra* note 4.

46. The general condemnation of *RODELL, WOE UNTO YOU, LAWYERS* (1939) is significant. See the adverse book reviews in Book Notes (1939) 53 HARV. L. REV. 363; Book Review (1940) 74 N. Y. L. R. 48; Book Review (1940) 25 WASH. U. L. Q. 296; Radin, *Woe Unto You, Lawyers—A Book Review* (1940) 38 MICH. L. REV. 504; Llewellyn, *supra* note 4, at 425.

Thus the peak of a give-it-all-up philosophy of law has been reached. Out of the commendable beginning of realism with its objective of true scientific research came forth increasing doubt as to the utility of a rule by law, now terminating in absolute despair of a juristic order. The one ingredient which we need today and, I believe and hope, we are recapturing is the discovery of the futility of completely separating the law "as is" from the law "as it ought to be."<sup>47</sup> The fatal divorce of the actual from the ideal or the real from the abstract is a penetrating defect of realism which has ended in this unqualified rejection of rule by law. On this issue the coalition party of anti-realism stands united, and indeed has received considerable support from the conservative members of the realist group. Composed of many factions, not always in agreement on other jurisprudential problems, it is evident today that a mighty force is ready to oppose any legal philosophy which localizes law in a behavior-bound court or seeks for explanations of judicial opinions in unreliable economic or psychological theory, or in its more extreme forms explains law as "will"<sup>48</sup> or "force"<sup>49</sup>—or racial supremacy.<sup>50</sup>

But I would not conclude this paper with a prophecy of gloom and disaster. These extreme and somewhat fantastic definitions of law may be visible in the world about but they do not typify juristic thought in the Americas. Through the smoke screen of world war and the intellectual fog there gleams forth the beacon light of idealism; the belief in the courage of man to think through his problems to a definite goal; the imperishable concept of justice which is the six-century heritage of the common law.

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47. Pound, *The Church in Legal History* (1939) JUBILEE LAW LECTURES 1-97; FULLER, *LAW IN QUEST OF ITSELF* (1940); BODENHEIMER, *JURISPRUDENCE* (1940) ch. XIV.

48. "Also in the United States the realist and on the Continent a type of nationalist consider the idea of a state ruling according to law and not according to will as superstitious or as decadent. They scoff at the idea of a people solemnly covenanting by constitution or bill of rights to hew to announced principles of right and justice and to reason, and striving by continued adherence to judicial construction of their covenant to make it real in their political behavior." POUND, *THE FUTURE OF THE COMMON LAW* (1937) 19-20.

49. ". . . what we call law is actually a system of rules about force to be used by the members of an organization, the organization in question, the state, having achieved a practical monopoly of force within a certain territory." OLIVECRONA, *LAW AS FACT* (1933) 193. Radin, Book Review (1940) 53 *HARV. L. REV.* 507; Kocourek, Book Review (1940) 34 *ILL. L. REV.* 637.

50. "Law is what Aryan men consider as law; non-law is what they reject." Alfred Rosenberg, *Das Recht wurzelt im Volk* (1937) 4 *ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT* 610 cited in BODENHEIMER, *JURISPRUDENCE* (1940) 240n.

For an interesting discussion of the racial theories of law, see Bodenheimer, *supra* 239-243.

Empirical operations alone cannot solve our legal problems even in an age which has lifted man to the sky and hurled his voice around the world with the turn of a knob. Science, wond'rous and miraculous in its inventions, teaches a lesson to us in the law. While Science gave man the mechanism which permits him to ride the air, Science also wisely equipped the instrument board of the airplane with altitudinal and direction devices as well as with a speedometer. To reach our destination, height and direction are as important as speed lest, Corrigan-like, we find ourselves progressing backwards. The law may well borrow the apt scientific terms "vector" and "scalar" from the vocabulary of Science. Today, more than ever before, we need "vector" minds as well as "scalar" minds in the law—minds which sense the fact that true progress requires a consideration of plan and purpose as well as distance and speed.<sup>51</sup> Radio waves, vagrant and unconfined, spell confusion and chaos; they must be channeled and grooved to serve the cause of communication among men. So also with the law. It does not suffice in this world of change and experiment to announce, "we are on our way." A jural radio beam may give timely answer to the pertinent and ever present query: What goal are we seeking in jurisprudence today?

We believe that despite the frailties of humankind, despite the collapse of rule by law in the world about, we can and will find *justice under law* in the Americas today.

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51. Dickinson, *Legal Change and The Rule of Law* (1940) 44 DICKINSON L. REV. 149.

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†The Editorial Board of *FORDHAM LAW REVIEW* notes with deep regret the death of Miss Eleanor C. Shoemaker, Oct 20th, 1940.