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# The Triumph of Legal Realism

Kevin Mackey

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"Woe unto you, lawyers! For ye have taken away  
the key of knowledge: ye entered not in yourselves,  
and them that were entering in ye hindered." - Luke. XI, 52

## ***I. Introduction***

Legal Realism was and is an engine of change. It was engendered during, and because of, great unrest and change in almost every aspect of American life. The industrial age brought new and wonderful technologies into our homes and businesses, vast railroad systems, and the automobile, causing vast changes in the everyday lives of average people. New philosophies advocated “radical” ideas such as universal suffrage and the “scientific method.” Rapid growth and the new prosperity it brought ushered in new problems. Repeated periodic depressions were more and more severe, causing massive unemployment and upheaval. Our monetary system was in a shambles, and cried out for change.<sup>1</sup>

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<sup>1</sup> For the surprising and eye-opening story of the formation of the Federal Reserve System, see G. Edward Griffin, *The Creature from Jekyll Island*, American Media; 4th edition (June 2002).

And the lawyers of the age also had a huge problem. Our legal system was not only not keeping up with the changes in society; it was frequently an impediment to progress.<sup>2</sup> The pressure to change our laws to reflect the realities of our changing situation caused Legal Realism to be invented and developed into a tool for programmatic change in our laws and legal systems.

It is my belief that adherents of Legal Realism have been a, if not the, dominant force in the transformation and development of our society through changes in the law and legal system since the advent of the New Deal. In conjunction with and as politicians, these Realistic philosophers/academics/lawyers were involved in a great many major and minor accomplishments that either aimed our society in a particular direction, or directly changed it, not infrequently in a radical fashion. In this paper I will attempt to define Legal Realism as an instrumentalist tool, identify some important Legal Realists, and finally underscore the achievements of two of the most prominent and well known Legal Realists.

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<sup>2</sup> Prior to the actions of those whom I call the proto-Realists, all law was essentially judge-made. Judge-made law “looked backwards,” in that decisions based on precedent and stare decisis looked at the past, and that the more rapid the change in society, the less relevant older decisions might become to new situations. “[J]udicial decision making is indeed among the most conservative and inflexible...[s]uch is its fixity that it almost always impedes other social change.” Karl Llewellyn, *The Case Law System in America*, 88 Colum. L. Rev. 989, 996. (1988).

## **II. Towards an understandable theory and definition of Legal Realism.**

Before attempting to define a Realistic Jurisprudence, I turn first to the difficulty of defining Jurisprudence itself. “Neither fish nor fowl nor good red meat,” it is a topic that I approach with apprehension.<sup>3</sup> Roscoe Pound was able to define Jurisprudence, but it took him 5 volumes and more than 3,000 pages!<sup>4</sup> *Black’s Law Dictionary 7<sup>th</sup> Edition* devotes seven enumerated definitions, sixteen sub-headings, and six block quotes in the editors’ attempt at clarity accompanied by brevity.<sup>5</sup> I use these examples as an expression of the breadth of the topic.

For my purposes here, I turn to *Black’s* 15<sup>th</sup> sub-heading:

“[S]ociological jurisprudence. A philosophical approach to law stressing the actual social effects of legal institutions, doctrines, and practices. This influential approach was started by Roscoe Pound in 1906 and became a precursor to legal realism.”<sup>6</sup>

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<sup>3</sup> I have been unable to attribute this saying. I had always thought it was Shakespeare’s.

<sup>4</sup> Roscoe Pound, *Jurisprudence*, St. Paul, Minn. 1959.

<sup>5</sup> Bryan A. Garner, Editor in Chief, *Black’s Law Dictionary 7<sup>th</sup> Edition*, West Publishing, St. Paul, Minn., 1999.

<sup>6</sup> The claim of Pound’s invention of Sociological Jurisprudence is hardly correct, except perhaps in the labeling of it. Many commentators refer to Holmes as ascribing to Sociological Jurisprudence prior to Pound, and Rudolf von Jhering expressed a similar instrumentalist philosophy in 1877. See Rudolf von Jhering, *Der Zweck im Recht (Law as a Means to an End)*, Boston Book Co., (1913).

While the definition is arguably incorrect, in that sociological jurisprudence can be traced back at least to Rudolf von Jhering, this particular definition is useful to my discussion here precisely for its brevity, and to carve a narrow, simplistic interpretation applicable to a discussion of Legal Realism. It is also useful to segue into the origins of Legal Realism and an attempt to determine what actually constitutes Legal Realism.

## **Defining Legal Realism**

Trying to define Legal Realism reminds me of the parable of the blind men and the elephant.<sup>i</sup> In it, 6 blind men try to describe an elephant while each touches a different part of the elephant's body. Each in his own context was right, and yet all were wrong because their contexts were too limited to perceive the whole elephant. The ultimate consequence of such a disjointed analysis is the inability to ever reach a consensus on the true nature of the matter at hand. This is precisely the case with Legal Realism, and a concise definition of Legal Realism that is generally accepted by the legal academy is apparently lacking, even to the point of being unable to agree upon who are and are-not Legal Realists. There appears to be as many theories of Legal Realism as there are authors on the topic. However, even in the absence of agreement upon what constitutes Legal Realism, I will attempt to synthesize a starting-point definition.<sup>7</sup>

Legal Realism has been characterized as a philosophy, a school, a movement, and an approach. Each of these descriptive tags has baggage in the form of a connotation that

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<sup>7</sup> My primary resources for this are Llewellyn, *A Realistic Jurisprudence, the Next Step, Some realism About Realism*, both reprinted in Karl Llewellyn, *Jurisprudence*, (University of Chicago Press, 1962), and N.E.H. Hull, *Roscoe Pound and Karl Llewellyn, Searching for an American Jurisprudence*, (University of Chicago Press, 1997).

attaches orderliness and cohesion of thought to Legal Realism that really does not exist on a large scale.<sup>8</sup>

Legal Realism is in reality (no pun intended) an approach to thinking about and studying the results of the application of law, and subsequent social engineering through systematic and purposeful change of the law.<sup>9</sup> It is not only concerned with the origins and bases of law, but also with its practical application and results. In my mind, Legal Realism (and its immediate progenitor, Sociological Jurisprudence) is inextricably intertwined with the Enlightenment, the progressive movement, and the then newly-emergent social sciences at the time of its earliest inception.<sup>10</sup> The common theme throughout all of these related philosophies is a belief in the potential for improvement of human society (and therefore the human condition) through purposeful change imposed via politics and law.<sup>11</sup> Legal Realism is the jurisprudential offshoot of this root philosophy.<sup>12</sup>

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<sup>8</sup> Llewellyn, *Some Realism About Realism* 53. Also, a simple search on Westlaw or Lexis produces literally hundreds of articles either about or mentioning Legal Realism.

<sup>9</sup> Llewellyn calls Legal Realism a “concept to be used as a thinking tool.” Llewellyn, *A Realistic Jurisprudence*, 3. See also Hayman, Levit, Delgado, editors, *Jurisprudence Classical and Contemporary* 156, West Publishing, St. Paul, Minn., (2002).

<sup>10</sup> Horwitz makes a similar argument, and says: “for many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism.” Morton J. Horwitz, *The Transformation of American Law, 1870-1960*, 169 (1992).

<sup>11</sup> “Karl Llewellyn, who believed that law should reflect the reality of society, was influenced by contemporary social science. Llewellyn and his contemporaries, collectively referred to as “Legal Realists,” were a group of elite academics, from Yale, Harvard, and Columbia. These Legal Realists

## The Roscoe Pound and Karl Llewellyn Debate

Here, I must introduce two giant figures of the Realist movement into the discussion.

Roscoe Pound (1870-1964), was considered one of the nation's leading legal scholars. He taught at the University of Nebraska, Northwestern, the University of Chicago, and at Harvard Law School, where he became dean. His theories of sociological jurisprudence influenced several New Deal programs. He was gifted with a photographic memory, and was fluent in many languages, including Mandarin Chinese, which he taught himself.

Karl Nickerson Llewellyn, (1893-1962), enjoyed one of the most stellar careers of any 20th century American lawyer. He taught at the law schools of Yale, Columbia, and the University of Chicago, and was probably the most vocal proponent of Legal Realism, and he is detailed later in this article.

In the years 1930 and 1931, Pound and Llewellyn carried on a lively debate in a series of law review articles about what constituted Legal Realism, its origin, and who in

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were generally modernist, leftist, reform-oriented, and influenced by anthropology and institutional economics.” Allen R. Kamp, *Between the Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 *Al. L. Rev.* 325 (1995).

<sup>12</sup> For a *relatively* concise overview of 99 years of Sociological Jurisprudence and its relation to Realism, see generally Thomas C. Grey, *Modern American Legal Thought*, 106 *Yale L. J.* 493, (1996), Oliver Wendall Holmes Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897), and Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *Harv. L. Rev.* 591 (1911).

the legal community were Realists.<sup>13</sup> Llewellyn's articles written in the course of this debate are a gold mine of information about what he and his contemporaries believed Legal Realism to be.<sup>14</sup> I draw on these articles, along with some of Llewellyn's earlier work, for the basis of my definition of Legal Realism.

## **Llewellyn's Legal Realism**

Karl Llewellyn's philosophy of Legal Realism can be traced all the way back to 1925 when he was a new associate professor at Columbia University School of Law, in an essay in which he evidently first coined the term "realistic jurisprudence." In the essay, Llewellyn enumerated seven points that he claimed indicated that the "shifting emphasis from rule and precept to the effect of law ha[s] taken us out of a study of words into a study of deeds."<sup>15</sup> These points, which Llewellyn derived from previous writings of Roscoe Pound, are as follows:

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<sup>13</sup> See Karl Llewellyn, *A Realistic Jurisprudence, the Next Step*, 30 Colum. L. Rev. 431 (1930), *Some realism About Realism*, 44 Harv. L. Rev. 1222 (1931), and Roscoe Pound, *The Call For a Realistic Jurisprudence*, 44 Harv. L. Rev. 697 (1931).

<sup>14</sup> While his articles are rich sources, they are frequently very challenging to read. Because he tended to assign meaning to words or word combinations that did not have universal meaning to his readers, and which he did not expressly define, his work has to be parsed carefully. An example is his use of the term "immanent" law. He never explained the concept (perhaps he thought he did), and it is still puzzling legal scholars today. See James Whitman, *Commercial Law and the American Volk: a Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 Yale L. J 156, 158 (1987).

<sup>15</sup> Hull, *Roscoe Pound and Karl Llewellyn*, 140, quoting unpublished paper "New Trends in Jurisprudence" KLP, B.I.6.a-c.



## The 1925 List

1. Study of the actual social effects of legal institutions and legal doctrines.
2. Sociological study in preparation for lawmaking.
3. Study of the means of making precepts effective in action.
4. Study of juridical method.
5. A sociological legal history; study of the background and social effects of legal precepts, legal doctrines, and legal institutions in the past, and of how these effects have been brought about.
6. Recognition of the importance of individualized application of legal precepts.
7. In English-speaking countries, a ministry of justice.<sup>16</sup>

This “1925 List” was evidently one of the earliest expressions of Llewellyn’s views about Legal Realism, and I have found no clearer statement that could be called his basic philosophy of Legal Realism than these prototypical seven points. Although he continually expanded, attempted to clarify, and expounded upon Realism until his death in 1962, in basic form and substance his conceptualization of Legal Realism stayed the same.

Several years later, in his 1931 article *Some Realism About Realism*<sup>17</sup> Llewellyn wrote, “There is no school of realists... [t]here is however, a *movement* in thought and work about law.” (Emphasis in original.) Once again, Llewellyn played off of Roscoe Pound, this time in the midst of the previously mentioned public debate with Pound about the nature of Legal Realism and the identity of Legal Realists.<sup>18</sup> Here, Llewellyn gave us

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<sup>16</sup> Llewellyn never explained what the existence of a ministry of justice has to do with this topic, and I find no additional reference to it by Llewellyn.

<sup>17</sup> Llewellyn, *Jurisprudence*, 53-4.

<sup>18</sup> Llewellyn is responding here to Pound’s *A Call for a Realistic Jurisprudence*, 44 Harv. L. Rev. 697 (1931).

another list, this time of beliefs that he claimed were the “characteristic marks of the [Realist] movement.”

### The 1931 List

1. The conception of law in flux.
2. The conception of law as a means to an end and not an end itself.
3. The concept of a society in flux faster than the flux in the law.
4. The temporary divorce of Is and Ought for purposes of study.
5. Distrust of traditional rules to describe what courts or people are actually doing.
6. Disbelief that prescriptive rules are *the* heavily operative factor in producing court decisions.
7. The belief in the worthwhileness (sic) of grouping cases and legal situations into narrower categories than...in the past.<sup>19</sup>
8. [I]nsistence on evaluation of any part of law in terms of its effects.
9. Insistence on *sustained and programmatic attack* on the problems of law along any of these lines.

Note that in the 1931 list, numbers 1, 3, 5, 6, and 7 can be generally characterized as the philosophical underpinnings or justification of Legal Realism, whereas 2, 4, 8, and 9 are more like methodology. Notice also that in the “1925 List” above, numbers 1 through 6 (and where number 7 appears to be an anomaly) are also strictly methodological in nature. While the philosophical underpinnings of Realism and its methodology to

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<sup>19</sup> Llewellyn here means grouping pending cases into narrower categories for adjudication.

He argued that by having a properly narrow category of “fact-situation” a rule would be applied with more certainty. Llewellyn, *Jurisprudence*, 60.

*determine* “needed” change are expressed rather clearly in both lists, Llewellyn leaves us to infer the method in which we are to apply the knowledge that is gleaned thereby.<sup>20</sup>

If items 2 and 9 in the 1931 List are looked at together, we can deduce the intended practical application of Realistically derived knowledge. First, “[t]he conception of law as a means to an end and not an end itself” quite evidently means that law is to be used to alter behavior instead of being a mere reflection of society’s accepted behavior. “Insistence on *sustained and programmatic attack* on the problems of law” refers to systematic use of the law to address perceived problems. Thus, Llewellyn was telling the legal community all along that Realistic methods were *law-shaping*, not merely law-determining and reporting. Llewellyn also said, “a Realist’s interest in fact, and in the meaning of people to law and of law to people, in no measure impairs interest on his part for better law.”<sup>21</sup> When Llewellyn wrote about Legal Realism he assumed that Realists were ready and willing to apply Realistic methods to change the law, and thereby change society.<sup>22</sup>

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<sup>20</sup> “[The law] might be a potent instrument of reform.” Llewellyn, *The Effect of Legal Institutions upon Economics*, quoted in Hull, Roscoe Pound and Karl Llewellyn, 139.

<sup>21</sup> Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. Q. Rev. 159, 162. In a footnote to the quote above, he groused about the realist’s critics not “perceiving this, [that Realism] either paves the way for better law or presents a portion [of a solution].” *Id.* at 162.

<sup>22</sup> “Karl Llewellyn and his contemporaries were more reformist than is generally believed. These Legal Realists drew on a reservoir of contemporary social thought that supported reform intended to combat the conditions of the Depression.” Allen R. Kamp, *Between the Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 Al. L. Rev. 325 (1995).

Professor Michael Schutt argues effectively that 19<sup>th</sup> century instrumentalism was the progenitor of Sociological Jurisprudence, and that instrumentalism was taken for granted by most judges and scholars after 1920. He says, “after Holmes, the law was a tool for social engineering, and the bench and bar constituted the primary social engineers.” And further, “pragmatic legal philosophy today bears the identifying mark of all instrumentalist movements since Holmes: (1) the law is merely an instrument for social ends; and (2) the law is not grounded in permanent principles.”<sup>23</sup> Accepting his argument, nearly all modern American legal philosophies are permutations of Realism with differing core special-interest groups.

## **Society and Legal Systems as Observable Phenomena**

If we accept Legal Realism as an instrumentalist tool, then we can begin to understand the scope of the successes of the Realists. By leaving out the metaphysics (the system of principles underlying the study) of legal philosophy and approaching the law heuristically (via a study/ trial and error /feedback loop) on a macro scale by viewing the society in toto as a closed system, Realists were able to, and did, predict and engender changes in law and society.<sup>24</sup> Theoretically, if a change is made in the input (laws) of the system (society), there will be an observable change in output (behavior), this is the practical

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<sup>23</sup> See Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 Rutgers L.J. 143, 159, 175 (1998).

<sup>24</sup> But see Shutt, 202. He also vehemently denies that it is possible to “trace cause-effect relations of social phenomena.”

view of the Realist. This is also the general view of sociologists and economists in their respective fields, in that even though each individual member of the system is able to act not in conformity with the desired outcome, or indeed, may act in a random, incoherent fashion, the system when observed as a whole (on a macro level) responds predictably according to observable rules,<sup>25</sup>

In my view, this also pretty much negates criticism that claims rules are either unknowable or not followed by individual judges. The fact that the vast majority of members of our society conform to the laws and rules without ever being subjected to court proceedings, and the fact that 95-98% of court cases never proceed to trial, should be proof enough of the existence and validity of rules. Unfortunately, much of the academic writing on the subject of Realism is mired in the “deeper” theories- the origin and validity of laws, and with epistemology (the nature and grounds of knowledge), rather than with the practical effects of the application of law.<sup>26</sup> The academics are frequently focused on the margins of the law, i.e. the outcome of individual cases in the higher courts, which are a very small fraction of the total number of cases, which is a

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<sup>25</sup> I must differentiate here between “rules” that are the observable phenomena that relate to the ability to predict changes in a system because of external inputs to the system, and “rules” meaning laws that are themselves the instruments of change that *are* put into the legal system to induce change.

<sup>26</sup> The philosophical arguments about the basis of our law seem to have been decided. The rejection of natural law in our legal system seems to be nearly complete, especially among the academy. The law, therefore, is nothing more than what the people enforcing it say it is. This is what Llewellyn claimed sixty-some years ago. See Karl Llewellyn, *The Bramblebush* [1930] (New York, 1960).

very small number in relation to the population as a whole.<sup>27</sup> This focus is indeed important, in that judge-made law is created there, and as such affects the interpretation, validity, or enforcement of that particular law in the greater society. However, by being so myopically focused on such minutiae, the big picture of the practical successes of the pragmatic Realists is frequently denied or overlooked.

### ***III. Legal Realists***

The focus of this article is not the dissection of each purported Realist's views or writings. Instead, I have chosen to rely upon Llewellyn's ability to characterize Realism and to identify fellow Realists, allowing me to focus on their accomplishments and successes.

During the debate between Llewellyn and Pound mentioned above, there was private correspondence between them in addition to the public discussion being carried out in the legal journals. These letters provide us with lists of who Llewellyn believed to be Realists.<sup>28</sup> The list below was sent by Llewellyn to Pound in a letter dated April 6, 1931. Llewellyn formed the list based upon the contents of the writings of the purported Realists, in that all of them had expressed views that were in varying degrees of agreement with Llewellyn's definition of a Realist. I have appended brief biographical

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<sup>27</sup> For example, see Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America-Major Themes and Developments*, *Journal of Legal Education*, 441, (December 1986).

<sup>28</sup> See N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: the Newly Uncovered Private Correspondence, 1927-1931*, 1987 *Wis. L. Rev.* 921, 966.

comments to the majority of the names, and I have written more comprehensive sections for Llewellyn and Berle.<sup>29</sup>

## **A Realist's Realists: a Constellation of Bright Stars**

### ***I. Realists Who Went to Washington***

**Walter W. Cook:** Professor of Law at the Universities of Missouri, Wisconsin, Chicago, Yale, Columbia, Johns Hopkins, and Northwestern. He worked at the U.S. Treasury Dept., 1934-43. Cook propounded the application of scientific methods to law.

**Jerome Frank:** Judge of the U.S. Court of Appeals, 2<sup>nd</sup> Circuit 1941-57. Served F.D.R. in the Agricultural Adjustment Administration Federal Surplus Relief Corporation, Reconstruction Finance Corporation, Commissioner and Chair of the SEC, and at the National War Labor Board.

**Underhill Moore:** Yale Law Professor, special representative of the National War Labor Board with Jerome Frank.

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<sup>29</sup> I am not going to attribute all of the comments I have appended to the list, as it would be both onerous to write, onerous to read, and, I believe, unnecessary. Much of the data came from *The Dictionary of American Biography*, and from [www.biography.com](http://www.biography.com). A brief search on the internet or in a university library catalog will produce readily available biographical facts on virtually every name, usually in abundance.

**Herman Oliphant:** law professor at Columbia, Johns Hopkins, and University of Chicago. General Counsel at the Farm Credit Administration, in 1934 became the first General Counsel of the U. S. Treasury Department.

**Samuel Klaus:** Legal advisor to F.D.R., Special representative of the U.S. State Dept. to Joint Intelligence Objective Agency, Special Assistant to the General Counsel of the Treasury Dept., Special Assistant, Foreign Economic Administration, convicted communist spy.

**Wesley Sturges:** Dean of Yale Law, served in the Department of Agriculture, chief representative of the Office for Economic Warfare for French North and West Africa, during WWII, wrote an instrumental 100-page treatise on commercial arbitration, Executive Director of the Distilled Spirits Institute.

**Joseph C. Hutcheson:** Chief legal advisor, City of Houston, Mayor of Houston, Federal Judge for the Southern District of Texas, South Texas College of Law founder and first dean.. Appeals Judge for the 5th Circuit, chief judge of the 5th Circuit. He was an advisor to the National Commission on Law Observance and Enforcement (Wickersham Commission) concerning Prohibition, and later American Co-Chairman of the “Anglo-American Committee of Inquiry concerning Jewish problems in Palestine and Europe.”



**Thomas Reed Powell:** Law and Political Science Professor, taught at University of Vermont, State Agricultural College, University of Illinois, Harvard , Suffolk University, New School of Social Research, University of California, Berkeley; and Columbia. Special assistant to Attorney General of U.S., 1936, 1941, Member of F.D.R.'s five man President's Emergency Board on National Railway Strike, 1941.

**Thurman Arnold:** Law professor and dean at Yale, member of F.D.R.'s "brains trust," Assistant Attorney General of the United States and F.D.R. appointed head of the Antitrust Division of the Justice Department.  
U.S. Court of Appeals Judge.

**William O. Douglas:** Professor at Yale and Columbia Law,  
Commissioner of the SEC  
Chairman of the SEC  
Justice of the U.S. Supreme Court for 36 years.

**Felix Frankfurter:** child prodigy, graduated college at 17,  
Professor, Harvard Law  
Founding member of the ACLU.  
Assistant U.S. Attorney under Henry L. Stinson.<sup>30</sup>

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<sup>30</sup> Jordan A. Schwarz, *Liberal, Adolph A. Berle and the Vision of an American Era, 17*, The Free Press, New York (1987)

Supreme Court Justice, from 1939 until 1962.

**Justin Miller:** Taught English, economics and history at Stanford and the University of California, Law at the University of Montana, Professor of Law, University of Ore., University of Minn., Stanford University, University of California. Dean of the School of Law, University of Southern California; Visiting Professor of Law, Columbia University; Dean, School of Law, Duke University.

District Attorney, Kings County, California, 1915-18;

Attorney and Executive Officer, California State Commission of Immigration and Housing, 1919-21

Special Assistant to Attorney General of U.S., 1934-36

Chairman, Attorney General's Advisory Comm. on Crime, 1935-36.

**Edmund M. Morgan:** Professor of Law, taught at Yale, Harvard, Columbia, Vanderbilt, North Carolina, Kansas, Colorado, Texas, Washington, Stanford, and Southern California. Acting Dean of the Harvard Law School.

Editorial director for the Foundation Press, a major publisher of legal scholarship and teaching materials from 1935-62.

Member of the Advisory Committee of the U.S. Supreme Court on Rules of Civil Procedure, drafting the original set of rules adopted by the Committee.

Chairman of the War Shipping Panel of the War Labor Board.

Chaired the committee that drafted the Uniform Code of Military Justice,

Consultant for the territory of Puerto Rico and the State of Israel, developing their codes of civil procedure.

**Milton Handler:** Law Professor, taught antitrust and trade regulations for 45 years at Columbia. He authored the country's first Trade Regulations casebook, and in various advisory roles he had significant influence on government antitrust policies.

Drafted the postwar amendments to the Social Security Act that later became Medicare.

General counsel to the National Labor Board under F.D.R.

Helped draft the National Labor Relations Act of 1935, the Federal Food, Drug and Cosmetic Act of 1938, and the GI Bill of Rights.

Helped set up the War Refugee Board of 1944.

Also worked at the U.S. Department of Agriculture, the New York State Law Revision Commission, the U.S. Treasury Department, the Lend-Lease

Administration, and the Attorney-General's Commission to Study Antitrust Laws.

**James M. Landis:**

J.S.D. Harvard; law clerk to Justice Brandeis, U.S. Supreme Court.

Assistant Professor of Law, Harvard University. 1926 – 1928

Member, Federal Trade Commission. 1933 – 1934

Member, Securities and Exchange Commission; 1934 – 1937

Chairman, SEC 1935 – 1937.

Dean, Harvard University Law School. 1937 – 1946

Regional Director, U.S. Office of Civil Defense. 1941 – 1942

Director of American Economic Operations and Minister to the Middle East.

1946 Member of Board of Trustees, Roosevelt Presidential Library. 1943 – 1945

Chairman, Civil Aeronautics Board. 1946 – 1947

Special Counsel to President Kennedy. 1/20/61 - 9/25/61

Appointed to Council of the Administrative Conference of the United States

(established by Executive Order, 4/13/61).

## ***II. Realists Who Stayed Home***

**John Hanna:** President of M.S.U., Professor of Law, Columbia, Reporter for the First Restatement of the Law of Security, 1936, Consultant on UCC Article 9 for the New York Law Revision Commission 1952-55.

**Joseph W. Bingham:** Professor of Law, Univ. of Michigan, wrote the first theories of what later became Realism in his article *What Is the Law?*, 11 Mich. L. Rev. 1, 109 (1912).

**Arthur L. Corbin:** Professor of Law and Yale, *Corbin on Contracts*.

**Max Radin:** Law Professor, Univ. of California, delegate to the Democratic National Convention, 1940, and bitter enemy of Earl Warren, who defeated his appointment to the California Supreme Court.

**Walton Hamilton:** Law Professor at Yale and Dean of the Northwestern University Law School.

**Ernest Lorenzen:** Law Professor at Yale.

**Charles E. Clark:** Judge of the U.S. Circuit Court of Appeals, he was the moving figure in crafting the Federal Rules of Civil Procedure.

**Leon Green:** Dean of the Northwestern University Law School.

**Edwin W. Patterson:** Law Professor, Columbia.

**Hessel E. Yntema:** Law Professor, University of Michigan, Editor-in-Chief *The American Journal of Comparative Law*.

**Young B. Smith:** Dean, Columbia Law School.

**Alexander Marsden Kidd:** Professor of Law, later Dean, University of California, Berkley for 44 years. Concurrently, he was Lecturer in Legal Medicine and Chairman of the Legal Medicine Division. He was also a Visiting Professor of Law at Columbia University.

**Leon A. Tulin:** Professor at Yale, died 1932.

**Robert Maynard Hutchins:** Professor, then Dean, Yale Law School. Two years later, at the age of 30, he became president of the University of Chicago; and later chancellor. He introduced the study of the “Great Books.” He was active in forming the Committee to Frame a World Constitution (1945), led the Commission on Freedom of the Press (1946), and opposed faculty loyalty oaths in the 1950s. Served as associate director of the Ford Foundation, president of the Fund for the Republic, and founded the Center for the Study of Democratic Institutions. From 1943 until 1974 Hutchins was chairman of the Board of Editors of *Encyclopædia Britannica* and a director for Encyclopædia Britannica, Inc.

**Joseph Francis:** an enigma, of all this list I could only find references to his name.

**James C. Bonbright:** Professor of Economics and Political Science at Columbia. Author of *Principles of Public Utility Rates*, which continues to influence every federal and state regulatory commission in the United States as well as many foreign countries. He was heavily supportive of institutionalism, an economic school of thought that emphasizes the role of social institutions in influencing economic behavior.

**Edgar Noble Durfee:** Professor and Dean, University of Michigan Law.

**George G. Bogert:** Law Professor, Univ. of Chicago, chairman of NCCUSL committee on drafting the Uniform Common Trust Fund Act, 1938.

**Sam Bass Warner:** Harvard Law Professor, reporter for the Uniform Arrest Act.

**Sheldon Glueck:** Sol Sheldon Glueck and his wife Eleanor were criminologists and researchers at Harvard Law School whose studies of criminal behavior ‘profoundly influenced criminal justice, both legislatively and administratively.’”

**Richard R. Powell:** Law Professor, Columbia, reporter for Restatement 1, Property, *Powell on Real Property*.

**Edson Read Sunderland:** Professor of Law at the University of Michigan, University of Florida.

**Charles T. McCormick:** Law Professor and Dean, University of Texas, Dean, University of North Carolina School of Law, Law Professor, Northwestern, member of the first United States Supreme Court Judicial Conference Advisory Committee on Rules of Civil Procedure.

**Robert Lee Hale:** “lawyer/economist”, taught at Columbia Law School.

**Roscoe Steffen:** Law Professor, Yale.

**Orin Kip McMurray:** Law Professor, Columbia, and University of California.

**Francis Bohlen:** Law Professor, University of Pennsylvania, Columbia. The Reporter for the Restatement (First) of Torts, “the most famous torts professor in America.”

#### ***IV. Karl Llewellyn and the application of Legal Realism within the legal system.***

I have already drawn heavily on Llewellyn’s writings for the bones of this paper, and I now turn to him as my first detailed example of a successful Realist, successful in that he was able to use his Realistic instrumentalism to effect concrete change in the business law of the entire country. I speak, of course, of the Uniform Commercial Code.

Llewellyn was not only the Chief Reporter of the Code from 1942 until his death in 1962; he was the author of Article 2, Sales.<sup>31</sup>

Llewellyn’s authorship of the Uniform Commercial Code and the effects that his Legal Realism had on it has been, and continues to be, a popular topic of legal scholars

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<sup>31</sup> Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Uniform Commercial Code*, 71 U. Colo. L. Rev. 541, 542 (2000), and Hull, *Roscoe Pound and Karl Llewellyn*, 296.



for fifty years. The Code has been praised, reviled, and humorously derided as Lex Llewellyn and Karl's Kode.<sup>32</sup>

Llewellyn's path to developing the Uniform Commercial Code began in 1937, when he authored a still-born attempt to modernize the Uniform Sales Act.<sup>33</sup> Llewellyn subsequently worked on an equally unsuccessful attempt to draft and promulgate a Federal Sales Act. These faltering attempts were actually the beginning of Llewellyn's long journey that ultimately resulted in the Code. Llewellyn started working with the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L) on the Code proper in 1940,<sup>34</sup> and the American Law Institute (A.L.I.) became involved in 1943.<sup>35</sup> It ultimately took 10 years, the cooperation of 3,000 people, and \$350,000 in

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<sup>32</sup> John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 Wm. & Mary L. Rev. 341,354 (1988).

<sup>33</sup> The extensively revised and expanded Uniform Sales Act eventually became Article 2 of the Code. Gedid, *U.C.C. Methodology*, FN 62, 353; see also Whitman, *Commercial Law and the American Volk*, 170; Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules* 100 Harv. L. Rev. 465, 478, (1987).

<sup>34</sup> Karl Llewellyn, *Statement to the Law Revision Commission, Report of the Law Revision Commission*, Albany, New York State Law Review Commission, (1954) 25.

<sup>35</sup> The N.C.C.U.S.L is the child of the practitioners, and was the source of the original seven Uniform Acts. The A.L.I. is an organization of legal academics, and which promulgated the Restatements of Law. The N.C.C.U.S.L had the practical experience and the A.L.I. members contributed the theoretical knowledge and had more time to devote to the project. Evidently, the consequence was that the original drafts of the code were heavy on theory, and the subsequent reviews by the commissioners put the brakes on any radical proposals. See Llewellyn, *Why a*

1940's dollars to produce a first draft. Llewellyn then worked tirelessly for years to get it enacted.<sup>36</sup> The Code went through several more revisions, taking until 1968, 6 years after Llewellyn's death, before it was adopted by 49 of the states.<sup>37</sup>

Llewellyn had devoted at least 37 years of his life working to change commercial law, from prior to 1925 until his death in 1962. His ceaseless struggle finally and triumphantly culminated in the universal enactment of the Uniform Commercial Code, but sadly not until after his death. It was, literally, his lifework.

The Code is a long-lasting monument to Llewellyn, and has been characterized as being the "apogee of the Legal Realist's Practical accomplishments."<sup>38</sup> It may be the "most monumental piece of legislative drafting that has ever been undertaken by American Lawyers," according to Joe Barret in 1953, then a Commissioner of N.C.C.U.S.L. Or perhaps the Code is "the most monumental work that has ever been undertaken in the last quarter of a century," said Walter Chandler, Chairman of N.C.C.U.S.L. at the same time.<sup>39</sup> The Code is all of this, and yet more. I am convinced that it is above all probably the most effective and widely-known application of Legal Realism.

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*Commercial Code?*, 22 Tenn. L. Rev. 775,783 (1953); see also Whitman, *Commercial Law and the American Volk*, 174.

<sup>36</sup> Llewellyn, *Why a Commercial Code?*, 775; and *Report of the Law Revision Commission*, Albany, New York State Law Review Commission, (1954) 25.

<sup>37</sup> Maggs, *Karl Llewellyn's Fading Imprint on the Uniform Commercial Code*, 548.

<sup>38</sup> *Ibid*, 544.

<sup>39</sup> Quoted by Walter Armstrong, *The Uniform Commercial Code- the Effect of its Adoption in Tennessee*, 22 Tenn. L. Rev. 775, (1953).

## ***V. Adolph A. Berle and the application of Legal Realism through political participation.***

The introduction of Adolph A Berle, Jr. requires a more biographical approach, as this “Uber - realist”<sup>40</sup> was a truly remarkable man. Berle was a famous child prodigy, who went to Harvard when he was 14, and where he graduated in only three years with both bachelors’ and master’s degree in history. He was subsequently (and remains so), the youngest graduate of Harvard Law School in history at the age of 21.<sup>41</sup> At that young age, and right after graduation, he went to work for Louis Brandeis, a personal friend of his father’s, in Brandeis’ New York City law firm.

Just before the Great War, Berle enlisted in the Army Signal Corps as a private, but was soon commissioned a Lieutenant.<sup>42</sup> He almost immediately began doing intelligence work for the chief of military intelligence in Washington at the War College, and was shortly thereafter in the Dominican Republic.<sup>43</sup> This was to be his first brush with Latin America, which unforeseeably led to his becoming tied to Latin American diplomacy for much of his career. He went to Paris in 1919 under Army orders that were

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<sup>40</sup> I here play on Nietzsche’s “Übermensch” from his *Thus Spake Zarathustra*. To become an Übermensch one had to deny God, reject absolute ideals, establish new ideals, and base one’s entire existence in the temporal world.

<sup>41</sup> See Schwarz, *supra*, at 15.

<sup>42</sup> See Adolph A. Berle, *Navigating the Rapids 1918-1971*, Beatrice Berle, editor, Harcourt Brace, New York, (1973) at 5.

<sup>43</sup> Schwarz, at 16-20.

a ruse to place Army intelligence officers in Paris as part of the American delegation to the Paris Peace Conference. He was extremely unhappy with the terms the Allies imposed on Germany in the Versailles Treaty, and correctly predicted it meant more war with Germany. Resigning his commission in protest against the treaty, Berle returned to the practice of law in New York City and in 1927 became professor of corporate law at Columbia.

While at Columbia, he coauthored the book *The Modern Corporation and Private Property*, whose thesis was that large business corporations no longer served the public interest and therefore the government should control them.<sup>44</sup> This (in)famous tome is still available and widely read in business schools around the country.

Because he was a specialist in corporate law and finance, during the 1932 Presidential campaign, Berle was picked as one of the first three members of Franklin Delano Roosevelt's "Brains Trust."<sup>45</sup>

The Brains Trust outlined what became the foundation for the New Deal in a May 19, 1932 memorandum to Roosevelt. In one section titled "Corporate Surpluses," Berle put the much of the blame for the stock market crash and the ensuing Great Depression on "a greater accumulation of [corporate] surpluses than were ever before realized in

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<sup>44</sup> Adolph A. Berle, *The Modern Corporation and Private Property* (with G. C. Means, 1933, rev. ed. 1968).

<sup>45</sup> "The Brains Trust, a term coined by James Kieran, a *New York Times* reporter, refers to the group of academic advisers that FDR gathered to assist him during the 1932 presidential campaign." See The Columbia Electronic Encyclopedia, *Adolph A. Berle*, Columbia University Press, (2003). Found online at: <http://reference.allrefer.com/encyclopedia/B/Berle-Ad.html>

economic history," by which he meant excess undistributed capital. By failing to make distributions, Berle believed that the corporations were too speculative and reckless with the money. This memo eventually led to the enactment of the Revenue Act of 1936.<sup>46</sup> Provisions of this Act intended to reduce the perceived excess accumulation of capital made corporate earnings fully subject to both the corporate and individual income taxes for the first time.<sup>47</sup> Such double taxation is still with us today.

Even though Berle didn't hold a full-time position in the federal Government until he became an Assistant Secretary of State in 1938, he and the other Brains Trusters wrote Roosevelt an economic plan that became the foundation of the New Deal. They influenced Roosevelt's New Deal policies for regulation of banking and securities, railroads, large scale relief, and public works programs.<sup>48</sup> Amazingly, during Roosevelt's first one hundred days in office, the Brains Trust helped enact fifteen major laws, including the Banking Act of 1933, which is credited with ending the banking panic.<sup>49</sup>

Between the presidential election of 1932 and his appointment to the Department of State in 1938, Berle worked in a similar advisory capacity for Fiorello LaGuardia in his successful third-party run to be the mayor of New York City.<sup>50</sup> After his election,

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<sup>46</sup> See Steven A. Bank, *Corporate Managers, Agency Costs, and the Rise of Double Taxation*, 44 Wm. & Mary L. Rev. 167, 184, (October, 2002).

<sup>47</sup> Ibid. 228.

<sup>48</sup> See Robert Higgs *A Tale of Two Brain Trusts*, published online at <http://www.independent.org/tii/news/021000Higgs.html>.

<sup>49</sup> See The Eleanor Roosevelt Papers, *The New Deal Years*, online at <http://www.gwu.edu/~erpapers/abouteleanor/q-and-a/glossary/brains-trust.htm>.

<sup>50</sup> Schwarz, *supra* at 91.

LaGuardia appointed Berle as Chamberlain to New York City, a position he held until 1937. During his reign as the last Chamberlain, Berle fought corruption in the city government and used his expertise in finance and his connections with the Roosevelt administration to successfully battle the city's incipient bankruptcy.<sup>51</sup>

Berle's appointment as Assistant Secretary of State for Latin American affairs in 1938 forged the first links that eventually bound him to the Federal Government for the rest of his active life. In 1944 he was appointed Ambassador to Brazil, where he stayed for two years. After he resigned Berle went back to a reputedly civilian life at Columbia, when he also became chairman of the Twentieth Century Fund.<sup>52</sup> Concurrently, he was an "advisor" to the Central Intelligence Agency and Radio Free Europe, and eventually became a board member of the CIA funded parent agency of RFE, the National Committee for a Free Europe.<sup>53</sup> One interesting blot occurs on Berle's record at this time. Although he was an avowed anti-communist, and had spoke out about the dangers of the Soviet Union since its inception, Whitaker Chambers had first told Berle of Alger Hiss' spying activities in 1939, 9 years before Hiss' conviction for lying under oath. If

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<sup>51</sup> Ibid. at 101.

<sup>50</sup> "Since 1919, the Twentieth Century Fund, a nonpartisan foundation, has been at the forefront researching and writing about progressive public policy. We produce books, reports, and other publications and convene task forces of citizens and experts — all with an eye toward finding fresh approaches to the major issues of the day. We are a resource for journalists, policy makers, academics, and anyone else who wants to make use of the Fund's findings and policy recommendations." From the Fund website, circa 1996, found online at the University of Iowa website, <http://www.uiowa.edu/~policult/politick/smithson/tcf.htm>.

<sup>53</sup> Schwarz, at 283, 307.

Hiss had been charged in 1939, the statute of limitations would not yet have run on the espionage charges. For reasons Berle never disclosed, he never told anyone else of Chambers' allegations in 1939.<sup>54</sup> In light of the revelations about the truth of Hiss' betrayal, it looks today like a grievous error.

Berle went on to advise in varying degrees every administration through Kennedy's, where he was a one-man Latin American policy team "perched somewhere between the State Department and the White House."<sup>55</sup>

Interestingly, during the Viet Nam war, Berle was accused by an anti-war organization of being a CIA operative. They went so far as to identify some foundations that were funding Berle through Harvard as CIA fronts. Looking at his record of intelligence activities stretching back to 1919 and forward to his involvement in the Bay of Pigs fiasco, it seems at least possible. But in 1961, after the disaster at the Bay of Pigs that he had helped plan, Berle again, and finally, retired from his government work. He went back to New York and Columbia, from which he finally retired in 1966. Berle died in 1971, after completing his last book, *Power*.

Adolph A. Berle, Jr. was a genius and a reformer who was in the right places at the right times to make innumerable contributions to the development and change of American and international society through the application of Realist methodology. He taught law at Columbia off and on for 39 years, writing influential texts that are still studied today.

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<sup>54</sup> Ibid, at 298.

<sup>55</sup> Ibid. at 328

He was intimately involved with the highest levels of the governments of our most populous and important city and of the federal government for 29 years, frequently in a low-key and amorphous manner, often while wearing at least two hats.

Berle was:

Instrumental in what I consider to be a bloodless revolution, the New Deal.

Influential in setting American foreign policy while serving four presidents.

The president of a large and rich foundation dedicated to “progressive” causes.

An enigma, a social liberal that abhorred communism, a professor who spent years in Washington and abroad, a lawyer, a statesman, and an intelligence officer. His remarkable and little-told story is surely that of an amazingly successful and effective Legal Realist.

## ***VII. Where have all the realists gone?***

I can tell you in two words what became of the Realists: National Socialism. Once the Nazis seized power, they made effective use of Realistic instrumentalism (or their brand thereof), and put it to work for them with great effect. After all, it was a home-grown product. And so, the Realist movement in America fled before National Socialism, distancing themselves ere its horrors and evils were associated with them. It seems that once Natural Law is wiped from the slate, and moral bases for law are done away with, all that remains are varying degrees cultural relevancy. Logically and theoretically, if all cultures’ values are deemed to be of equal validity, then whatever culture is in control over a particular society would have a perfect right to impose whatever laws it needed to



engineer a “perfect society.” The law in Nazi Germany demonstrated graphically what happens if a monster makes the rules, and this understandably upset the theoreticians in the American legal academy, and the policy planners in the government.

Consequently, this intellectual flight to prevent guilt by association resulted in a lot of writing about the purported demise of Realism, or that 1931 was the “high water mark of Realism”, and that it was “on the wane in 1933.”<sup>56</sup> Numerous authors have written that Realism is dead.<sup>57</sup> More are aware that Realism is alive and well, but may be living under an assumed name.<sup>58</sup> And finally, many members of the academy agree that “we are all Realists now.”<sup>59</sup>

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<sup>56</sup> Dennis J. Hutchinson, *Centennial Tribute Essay: Elements of the Law*, 70 U. Chi. L. Rev. 141, (Winter, 2003) 146.

<sup>57</sup> See Ernst-Ulrich Petersmann, *Realism is Dead*, 17 NW. J. Int'l L. & Bus. 398, (Winter, 1996 / Spring, 1997), quoting Ethan B. Kapstein, *Is Realism Dead?*, *The Domestic Sources of International Politics*, in *International Organization* 751-74 (1995), and Barry Cushman, *The end of realism: Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, (Fall 2000).

<sup>58</sup> “The Critical Legal Studies movement is best understood as a return to the primary intellectual insights of Realism, unaffected by the political diversions that led many Realists to the New Deal and its aftermath.” Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 Stan . L. Rev. 623,628 (1984).

<sup>59</sup> All of these authors (and many others) have made the statement that “we are all Realists now”: Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986), Peller, *The Metaphysics of American Law*, 73 Calif. L. Rev. 1152 (1985), Joseph William Singer, *Review Essay, Legal Realism Now*, 76 Cal L. Rev. 465, 467(1988), Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 Vill. L. Rev. 1195, (2000).

## ***VIII. Conclusion***

### ***The Effective Realists***

The Realist's Realists were each outstanding in their own way, as educators, practicing lawyers, philosophers, and politicians, and every one had what could at a minimum be described as illustrious careers. In the writings detailing their lives and accomplishments the adjective most frequently used to describe their minds was "brilliant," their memories "encyclopedic", and their politics "radical" or "progressive." I have no doubt that every one of them was a genius.

    Their catalogue of achievements is great: Out of 43 Realists on Llewellyn's list, fully 16 of them had significant, high level participation in our government, chiefly through their participation in the New Deal. Two became Justices of the U.S. Supreme Court, and 4 were judges in federal circuit or appeals courts. All of them taught in law schools and/or universities, where they had opportunities to affect legal scholarship and form a whole generation of legal thinkers into Realists of varying degrees. Many have been the subject of books, some of them several books. Every one of these effective Realists has authored books themselves, many of which still affect legal scholarship yet today. The Realists reach through time is impressive, and their effect on our country profound. This article cannot begin to do them or the topic of Realism the attention they deserve.

## *The Realists' Effects*

The Realist's Realists as individuals were amazing, and in the aggregate, they were powerful and effective. It would take many hundreds of pages and many hundreds of hours of research just to accurately detail each of their exploits and accomplishments, all of which add up to an immense effect on our lives in America today. As a group, they envisioned changes they thought wise for society, they drafted the legislation to implement the changes, and they then enforced and adjudicated the resulting laws. The Realists invented a modern version of instrumentalism using the new tools of the social sciences, and then they used them to great effect. One doesn't have to agree with their politics, or approve of their viewpoints, to appreciate what they have accomplished.

A good example is the explosion of the Federal bureaucracy brought on by and through the New Deal, and with which many Realists were intimately involved. I believe that the delegation of power to the Federal agencies by Congress, and the subsequent explosion of administrative rules, was an extremely negative development. It drastically decreased the accountability of our elected officials while bloating our federal government out of all reasonable proportion. However, one doesn't have to like the outcome to have an appreciation for the men and the processes used to accomplish what were arguably the most radical changes in the United States government in the history of the nation. Indeed, I regard the New Deal as a bloodless revolution, one that changed the face of our nation nearly overnight.

In spite of some vocal and prominent natural law adherents, natural law has been substantially wiped from our legal scholarship today. Our law classes, statutes, and casebooks all resound with respect for "public policy." Every special interest legal

group, whether made up of feminists, Critical Legal Studies theorists, homosexuals, or animal rights supporters, is instrumentalist, whether knowingly or not. This is the true legacy of Legal Realism - the demand for social engineering in our philosophies of law, and the technical abilities to accomplish the desired changes, using the schools, legislatures, bureaucracies, and courts.

This, for better or for worse, is the Triumph of Realism.

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