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Essay

THE DEVELOPMENT OF REALISM IN LAW AND LITERATURE DURING THE PERIOD 1883-1933: THE CULTURAL RESEMBLANCE*

JAMES D. HOPKINS†

[The Editors of Pace Law Review have received a literary work retrouvé. After fifty years of repose in its author's library, this piece re-emerges as an enlightening historical perspective. We are pleased to present this archetype of legal and literary intellectualism, fittingly published in this volume of distinguished scholars.]

I

In our culture the literary artist occupies a somewhat anomalous position. By a certain few the author is regarded as an interpreter and, indeed, a creator of ideological movements; at the least, a significant telltale as to the march of ideas within society. By a vast majority he is conceived of as more a court jester, with cap and bells, earning his pay with amusing stories and glinting wit; or even more darkly as a parasite obtaining sustenance without giving in return any comparable contribution to society. An artist, it is thought, is not a practical man. As the Beards put it: "And by way of reciprocity practical men are sometimes wont to speak of artists and writers as mere luxuries (frightfully near the lunatic fringe) to be tolerated in the name

* The term "literature" is used at times in a broad meaning of writing in general. Thus, a letter or a patent medicine advertisement may be equally thought of as literature. No such meaning is intended here; rather, literature means simply fiction.

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of respectability."¹

The lawyer, despite his training in the printed word, has not escaped the tendency to treat the literary man with gentle disdain. That he deals with fact, and the artist with pure fancy, is his belief.² To an extent, he echoes with the English humorist the sentiment of "O Spirit! Spirit of Literature, Alien to Law!"³ without probing too deeply into its truth. Perhaps this may be exaggeration: the older jurists held a keen appreciation for the genius of the romantic novelists and poets of their time. Indeed, it is written that Coke used Chaucer to illustrate points in his opinions.⁴ But as the impact of the Industrial Revolution thrust against the then decaying walls of an agricultural society, and the lawyer was forced from the leisurely life of a country squire or the broad and selfless activities of the statesman into the hurried and struggling movements of a commercial community, inevitably his ideals and standards were transformed. Reading, if indulged, was solely for profit: a pragmatic test overlay all the lawyer's interests, as it overlay the entire philosophy of industrialism. Though a lawyer's craft resembles that of a literary artist in so far as its emphasis lies upon the arts of reading and writing, its effect is more tangible, its results give more material satisfaction. By the use of his pleadings, by the interpretations of opinions, the lawyer gains for his client a money judgment, or the ejection of an undesirable tenant. On the other hand, less ostensible are the benefits of the work of the writer; and even though his influence on the mind of his reader may be insidious and overriding, infrequent are the instances in which concrete change comes about as a result.⁵

1. C. BEARD & M. BEARD, *THE RISE OF AMERICAN CIVILIZATION*, at x (1930).

2. Compare this to: "I am told by friends that a judicial opinion has no business to be literature." B. CARDOZO, *Law and Literature*, in *LAW AND LITERATURE* 3 (1931). Cardozo is evidently using literature in the sense of art.

3. I. BROWNE, *LAW AND LAWYERS IN LITERATURE* 330 (reprint 1982, original 1883) (citing *The Dilly and the D's*, *PUNCH* (c. 1851)).

4. See J. GEST, *THE LAWYER IN LITERATURE* 162-63 (reprint 1982, original 1913). Cardozo comments charmingly on this custom: "In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed." B. CARDOZO, *supra* note 2, at 29.

5. An example of the effect of a book upon current practices is Upton Sinclair's 1905 novel entitled *The Jungle*, which was a factor in the passage of the Pure Food and Drug Act. Charles Dickens' *Bleak House* is commonly said to have founded the initiation of

Still another consideration affords the lawyer cause for disregarding the value of literature. His is a mind that deals with a system of symbols and concepts quite separate from the world he inhabits. The all-embracing nature of these symbols and concepts casts a shadow which dwarfs the artist's works into insignificance. Cardozo, surely not to be counted among the illiberal of our jurists, admits the widespread tendency among the legal profession to depreciate the value of fiction:

But I overemphasize and exaggerate if I seem to paint the picture of any active opposition that is more than sporadic and exceptional to so amiable a weakness as a love of art and letters. A common attitude with lawyers is one, not of active opposition, but of amused or cynical indifference.⁶

Even with Holmes, one feels a trace of the "amused or cynical indifference" of which Cardozo speaks. In one place Holmes exclaims:

To the lover of the law, how small a thing seems the novelist's tales of the loves and fates of Daphne and Chloe! How pale a phantom even the Circe of poetry, transforming mankind with intoxicating dreams of fiery ether, and the foam of summer seas, and glowing greensward, and the white arms of woman.⁷

True, in Holmes' utterances one discerns a species of mysticism, of awe for the mighty reaches of the law; yet in part, at least, his words imply the same attitude of disdain and indifference.

The antagonism between the literary man and the lawyer may be partially due to the criticism which reform-waging authors have visited on lawyers in general;⁸ in a kind of retribu-

the reform of English Chancery practice; but see J. GEST, *supra* note 4, at 29.

6. B. CARDOZO, *supra* note 2, at 4.

7. SPEECHES BY OLIVER WENDELL HOLMES 16-17 (1891) (delivered February 5, 1885). Further he says: "Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers." *Id.* at 22.

8. The following is a common enough view:

Lawyers in the main were intellectual mercenaries to be bought and sold in any cause. It amused him to hear the ethical and emotional platitudes of lawyers, to see how readily they would lie, steal, prevaricate, misrepresent in almost any cause and for any purpose. Great lawyers were merely great unscrupulous subtleties, like himself, sitting back in dark, close-woven lairs like spiders and awaiting the approach of unwary human flies.

T. DREISER, *THE FINANCIER* 328 (1912).

tion, the lawyer heaps an equal amount of contempt upon the writer. It may be partially due to the industrial age in which life is now immersed, and with which the lawyer has become affiliated; the artist finds this atmosphere alien and unfruitful to himself.⁹ It may be partially due to the reluctance (which appears to be traditional with the legal profession) of the lawyer to admit the interdependence of the law with the other social disciplines;¹⁰ he equally refuses to accept the realistic novel as any evidence of the life against which these social disciplines must be thrown into relief. But whatever the reason, the conflict in essence is based on unsubstantiated assumptions, premises not too closely queried.

Law and literature are connected not tenuously, but intimately: as branches of our culture they are subject to the same forces and they react jointly to them. The cultural force which has pervaded and dominated the intellectual phases of American life more thoroughly than any other trend of thought is that movement which is, for the lack of a better adjective, called "realistic." In philosophy and literature, the term has had a somewhat more expansive meaning than it has possessed as applied to legal writing.¹¹ In the United States, the vogue of realistic fiction sprang into prominence by 1880 and was strongly embedded by 1900; it has held full sway to the present time. The traces of realistic thought in all fields of intellectual endeavor are plainly marked — in economic theory through the writings of Thorstein Veblen, in philosophy through the pragmatism of William James and John Dewey, in government through Charles

9. As Brookes noted:

No one who is in touch with the world today will affirm too confidently that the breach (industrialism) between the artist and society is likely to be healed in our generation But of one thing we can be sure: if the breach is not healed, it will mean the death not only of the artist but of society itself as we have known it.

V. BROOKES, *SKETCHES IN CRITICISM* 141 (1932).

10. See Harno, *Social Planning and Perspective Through Law*, 19 A.B.A. J. 201 (1933).

11. Realism is used here in the literary sense, that is, as the description of a method of approach, and not in the philosophical sense of the term. Empiricism, pragmatism, instrumentalism, and utilitarianism are all related in meaning to "literary" realism if one wishes philosophical parallels. A possible definition of realism in this sense is the discussion of materials with the absence of unconscious illusion. Compare this with the definition of empiricism in G. SANTAYANA, *SCEPTICISM AND ANIMAL FAITH* 3 (reprint 1955, original 1923).

Beard and John Burgess, in history through Breasted and Robinson and the Beards. The spread of realism as the fundamental attitude toward the problems besetting each of the social disciplines was complete by the early part of the twentieth century; it has invaded, if not thoroughly overcome, the positions of the older approaches looking toward European sources. In literature, of course, the development of realism has had a more obvious course, owing undoubtedly to the fact that the term was first affixed to its manifestations in fiction. In law, though its path has been more obscure; nevertheless, the common signs lie imprinted on modern legal theory. The realistic influence has affected both law and literature with virtually the same result. The parallel development in point of time is astounding in the face of the apparent cultural lag in the law. A review of the American scene during the last fifty years will serve to demonstrate how close a resemblance there exists between literary realism and legal realism.

II

Fifty years ago: 1880; the time when Holmes was engaged in writing his immortal *The Common Law*;¹² when William Dean Howells was first mulling over the daring new theories of the art of Flaubert and Balzac and de Maupassant and Tolstoi: two years but pass, and Howells brings forth one of the first realistic novels (*A Modern Instance*)¹³ produced in America. The air is stirring with the breath of scientific thought: twenty years ago Darwin had stunned the world with his theory of evolution; and the reverberations are still sounding throughout the channels of human learning — indeed, the word science comes to mean all knowledge, instead of a mere division of learning.¹⁴

It is this expansion of the theory into literature and law and economics and politics alike that is truly amazing. Through Darwin's theory of evolution (doubtless because it touched so fundamentally on man's beliefs) is popularized the concept of the scientific method, and this offspring has in large measure

12. O.W. HOLMES, *THE COMMON LAW* (M. Howe ed. 1968).

13. W. HOWELLS, *A MODERN INSTANCE* (1881).

14. See generally More, *The Pretensions of Science*, in *HUMANISM AND AMERICA* 3 (N. Foerster ed. reprint 1967, original 1930).

dominated the intellectual world since.¹⁵ Consider the implication of the scientific method in the invention of the casebook system at Harvard Law School about 1870: Langdell hoped to trace the growth of a doctrine from its beginnings in a stray case until it was firmly embedded into the corpus of the law.¹⁶ The philosophy of Herbert Spencer endorses it wholeheartedly; in the United States, the scientific method has captivated William James and Charles Peirce, and a "truly American philosophy," pragmatism, is born.¹⁷ American literature, likewise, feels its appeal: Howells dimly falls under its shadow when he admires the writings of Leo Tolstoi and Gustav Flaubert. Yet, let us not overestimate. Though in the late 1800's the theory of evolution is in full bloom within the world of philosophical thought, in the law it has no foundation save the blessings of Langdell, and American literature is still under the insensible sway of European romanticism.

In 1880 the American legalist still clung to the traditional notion of law as a self-sufficient organism, prepared to solve the most novel problem by means of deductive logic.¹⁸ The law was certain and immutable, it was held, for it consisted of principles, very broad and generalized in scope, which by the use of inference fitted any case arising; the judge became merely an artisan

15. "To be sure, in strict logic, this work in biology (*Origins of Species*) does not apply to inorganic things; nevertheless when added to developments in other fields it has had a tremendous influence in altering men's views of logic and of what we call the 'laws of nature.'" Cook, *Scientific Method and the Law*, 15 *JOHNS HOPKINS ALUMNI MAG.* 213, 222 (1927).

16. See Turner, *Changing Objectives in Legal Education*, 40 *YALE L.J.* 576, 583 n.19 (1931); see also Dickinson, *The Law Behind Law*, 29 *COLUM. L. REV.* 113, 141 (1929); cf. Cook, *supra* note 15, at 1.

It is noteworthy that Langdell considered law a *science*, and believed that the materials for its study might be found in books alone. See Frank, *What Constitutes a Good Legal Education?*, 19 *A.B.A. J.* 723 (1933).

17. James and Peirce appear to have caught the germ of the idea almost at the same time — in January, 1878. Thus, see Sellars, *Current Realism*, in *PHILOSOPHY TODAY* 19 (E. Schaub ed. reprint 1968, original 1928).

18. The attitude is best expressed by Chief Justice Gray in *Norway Plains Co. v. Boston & M.R.R.*, 67 *Mass.* 263, 1 *Gray* 266 (1854). The analogy between the domination of American literature by Europe — England, particularly — and the domination of legal theory in United States by the English Blackstonian philosophy seems complete. On the literary aspect, see V. CALVERTON, *THE LIBERATION OF AMERICAN LITERATURE* 286 (1932); on the juristic aspect, see R. POUND, *THE SPIRIT OF THE COMMON LAW* 150 (reprint 1931, original 1921).

at his craft, skilled in applying solid principles of law. It is in this stultifying and illusion-bearing atmosphere that Holmes was educated into the law; he did not, however, allow it to overcome his skeptical outlook. In 1872, one sees the initial stage of Holmes' revolt in his realistic treatment of the role played by grain elevators in commerce and the legal rights and duties of their owners.¹⁹ Furthermore, he had associated himself with men who were likewise dissatisfied with the old concepts, and who were destined to build anew within the interstices of knowledge.²⁰ It is put clearly by Felix Frankfurter:

But the *Zeitgeist* moved also through O. W. Holmes, Jr. He came to maturity when Darwin had upset men's most ancient beliefs. The evolutionary doctrines worked as ferment beyond their immediate scope. If Genesis had to be "reinterpreted," the texts of the law could hardly claim sanctity. . . . We now see the kinship of Whitman and Melville and Holmes. All three express man's passionate effort in the face of illimitable mystery of the universe — Whitman and Melville as artists, Holmes as thinker.²¹

And this "ferment," by a slow but ceaseless process, at last led to a magnificent explosion in juridical thought in which Holmes is the principal actor, beginning with *The Common Law*²² and ending with the essay, *Law in Science and Science in Law*²³ in 1899.

It is Holmes' now celebrated definition of law, as that which happens to the bad man, which created the foundation for all realistic thinking in the law.²⁴ This definition dismisses the essentially romantic theory established by Blackstone and the early American jurists for a juridical test secured on occurrence, rather than on the prevailing legal rule. Even in his first juridical

19. Holmes, *Grain Elevators*, 6 AM. L. REV. 464 (1872). For another strikingly realistic article, see Washburn, *Lecture on the Study and Practice of the Law*, *id.* at 135.

20. For instance, Holmes associated with Charles Peirce and William James. See Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717, 721 n.5 (1931).

21. *Id.* at 722-23.

22. O.W. HOLMES, *THE COMMON LAW* (M. Howe ed. 1968).

23. Frankfurter, *supra* note 20, at 210.

24. Llewellyn has traced the course of the development of the definition in Holmes' writings and finds it coming to full flower in 1897 in O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 169 (reprint 1952, original 1920). Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 YALE L.J. 704, 717 n.39 (1931).

writings, Holmes implies a lack of certainty in the law.²⁵ He assails vigorously the illusion that words in themselves contain just solutions to the cases before the court.²⁶ Holmes' view is that law is not dogma, an ancient wisdom which no man may doubt; it is flexible; it grows as man grows: "It is perfectly proper to regard and study the law simply as a great anthropological document."²⁷ Nor can law be conceived of as a science as mathematics is a science; the judge in more ways than one is the master of the rights of the parties — there need be no inevitable outcome.²⁸ "Holmes says that law is not pure mathematics; that the so-called self-evident truths of the traditional jurisprudence are not self-evident; and that many of the axioms of legal thinking do not appear on the surface but are concealed and must be dug out for inspection."²⁹ In place of the traditional method of the eighteenth century jurist, Holmes substituted the scientific spirit shaped to the demands of the law, for the experimental system could not be imported wholesale into the technique of the judge. Holmes' writings of this period are saturated with the "science-as-savior" notion; time and again he dwells on the importance to jurisprudence of adopting the laboratory method.³⁰ Against the

25. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7 (1894).

26. "It is not the first use but the tiresome repetition of inadequate catchwords which I am observing — phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years." O.W. HOLMES, *Law in Science — Science in Law*, in COLLECTED LEGAL PAPERS 230-31 (reprint 1952, original 1920).

27. *Id.* at 212.

28. Holmes noted:

The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.

Id. at 225-26.

29. Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 571 (1932).

30. Holmes stated in 1886: "The new work is now being done. Under the influence of Germany, science is gradually drawing legal history into its sphere. The facts are being scrutinized by eyes microscopic in intensity and panoramic in scope." SPEECHES BY OLIVER WENDELL HOLMES 34 (1891) (delivered November 5, 1886).

Then, in 1897, he wrote:

But in that field, as in the other, I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to

facts — particularly against the changing conditions of society — the legal rule must be tested; and the true transformation of the rule, if in fact any has taken place, can only be ascertained by sifting and by investigation. There rests the worth of science: that it has evolved a way to deal accurately and coldly with the facts. "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics,"³¹ Holmes prophetically assures the lawyer of the period. Though his prophecy has not wholly come true, save as the figure of Brandeis arises to fulfill it, it is clear that he singles out the disciplines of statistics and economics, because of all the social "sciences" he considers them to reflect more closely the use of the scientific method in their construction of formulae and theorems based on data gathered by samplings and compilation.

Yet Holmes, to be sure, would reject indignantly the conclusion that he is the founder of a school of legal philosophy, even though today the legal realists claim him as their master.³² His indignation would be understandable, for he is at heart a skeptic, and not a creator of a system of values or a master of metaphysical subtlety.³³ He distrusts the simple acceptance of the old and the tried; without more, he distrusts as well the construction of any elaborate theory, for he believes that in time, it too must topple. Not rigid theories, but working hypotheses are needed: they must be experiments, "as all life is an experiment."³⁴ If he were to approve any principle, it would be the skepticism of the immutable principle. Thus, though he is in attitude and association related to James and Peirce, he cannot entertain their philosophical concept of pragmatism.³⁵ He remains free of any strict

insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy.

O.W. HOLMES, *supra* note 26, at 242.

31. O.W. HOLMES, *supra* note 24, at 187.

32. Thus Frank implies that Holmes' work is the basis on which all realistic trends in modern juristic thinking rests. See Frank, *supra* note 29, at 576.

33. "Holmes, almost alone among lawyers, adopts that skeptical attitude upon which modern science has built, that modern skepticism which looks upon thought as instrumental and acknowledges the transient and relative nature of all human thought-contrivances." J. FRANK, *LAW AND THE MODERN MIND* 259-60 (1930).

34. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

35. That Holmes' thinking nears pragmatism, there can be no doubt. Cf. O.W.

principled system bending him to its dictates; it is he who sights the line of demarcation in the individual case and wields the principle along it.

It cannot be disputed that Holmes' iconoclasm does not pass beyond the bounds of intellectual inquiry. In politics and in economic theory, he stays basically conservative. In socialism, as in other panaceas for ills, he finds little favor. By nature a skeptic, he is at the same time, an individualist. On the bench, the method which he adopted to uphold statutes tending toward socialism and attacked as unconstitutional did not involve the question of their wisdom; indeed, he might have doubted their efficacy to deal with the evils they were supposed to cure, but he considered his opinion as purely personal, and the legislation as representative of the will of the people.³⁶ It was not so much that he supported the more liberal approaches to socialized remedies as that he tolerated them. The new realism was a part of his juristic skepticism, but it did not change his beliefs outside the bounds of the law.

The fictional literature of the period reflects the impact of similar forces. It is not a happy period in our literary history: Walt Whitman still is reviled for his "sensual" poetry; Mark Twain is not understood save as a humorist commenting on the rude customs of the frontier; the Victorian morality of the times dominates the novel and the short story. Illusions abound in the current fiction: virtue is ever triumphant, the just cause is always victorious, and true love runs its sweet and righteous way.³⁷ No wonder, then, that Howells, who has travelled in Europe and has acquaintance with the works of Tolstoi and Flaubert, grows

HOLMES, *supra* note 26, at 224-25.

That pragmatism is related directly to all attempts to struggle free from traditions and to establish the experimental methods as a basis of approach, see C. TAEUSCH, *POLICY AND ETHICS IN BUSINESS* 42 (1931). Compare this to William James' definition of pragmatism: "[T]he attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking toward last things, fruits, consequences, facts." W. JAMES, *PRAGMATISM* 47 (reprint 1963, original 1907). This aspect of pragmatism is discussed in J. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* 305 (reprint 1953, original 1916).

36. An indication of his conservatism is seen in Holmes' habit of dissenting once on a particular issue from the majority opinion; the second time the issue arrives before the court, he accepts as his attitude the attitude of the majority and concurs.

37. It is significant that most of the stories by Horatio Alger were written at this time.

restive in this cloying milieu. He perceives the frontier spirit imbuing the West to be a natural effusion of the veritable American character; he finds it free and democratic, and of a new and significant flavor.³⁸ On the other hand, he finds the older spirit to be less robust and more precious, proceeding from the Victorian influence and the similar Bostonian tradition. Surrounding the then literary capital of America, the older spirit had imprinted its values upon the current literary scene.³⁹ To Howells, the older standards possess little of the American outlook; they falsely represent the stream of life flowing in the nation. He felt keenly that the true art of the novelist lay in a realistic approach, in getting down on paper the speech of the people in common conversation, in describing everyday affairs as they actually occurred. "Realism," said Howells, "is nothing more and nothing less than the truthful treatment of material."⁴⁰ In a number of novels, the most prominent of which were *A Modern Instance*,⁴¹ *The Rise of Silas Lapham*,⁴² and *A Hazard of New Fortunes*,⁴³ he utilized his method to portray contemporary American life.

This naturalistic treatment of material involves in essence the acceptance of the scientific spirit into literature. Its application requires the patient and sustained observation of the facts upon which the fictional counterpart is to be based. It entails probing into the conditions of life even as Holmes' realism in the law entails probing into the conditions of life.⁴⁴ Only the pur-

38. Compare the frontier spirit in the law at the same time. See Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 385, 397-98 (1910). The spirit of disillusionment issued from the collision of the frontier ideal with the older traditions and urban life; thus: "That life is good, that human nature is excellent, that man's fate can be molded like the potter's clay, that democratic progress is the law of evolution—these conceptions no longer seemed so self-evident as they had seemed to an earlier generation." Parrington, *The Development of Realism*, in *THE REINTERPRETATION OF AMERICAN LITERATURE* 153 (N. Foerster ed. 1959). Cf. Frank, *supra* note 29.

39. "[W]e even felt that we failed in so far as we expressed something native quite in our own way. The literary theories we accepted were New England theories, the criticism we valued was New England criticism, or, more strictly speaking, Boston theories, Boston criticism." W. HOWELLS, *LITERARY FRIENDS AND ACQUAINTANCE* 115 (1901).

40. See Parrington, *supra* note 38, at 145.

41. W. HOWELLS, *A MODERN INSTANCE* (1881).

42. W. HOWELLS, *THE RISE OF SILAS LAPHAM* (Modern Library ed. 1951).

43. W. HOWELLS, *A HAZARD OF NEW FORTUNES* (1890).

44. Cf. R. BLANKENSHIP, *AMERICAN LITERATURE* 478-79 (1931). The author states:

pose for which the investigation is made differs. To be sure, Howells owes allegiance directly to Tolstoi and Flaubert, and not to Darwin and Huxley, but indirectly, and under analysis as to result, the assimilation is unmistakable. Thus, with Howells as leader, a school of realistic writers slowly grew; Hamlin Garland and Edward Eggleston became ardent disciples.

Howells' realism was, however, not pure realism. As he himself admitted, it was "reticent realism."⁴⁵ Truthful representation was desired, yes, but it must not pass beyond the limits of propriety. That is, Tolstoi's realism, because it was "moral," and certainly "Christian," was for Howells the correct form of realism. Howells abhorred Zola's realism because it was vulgar, and in parts obscene. For Howells, sexual matters rested under an absolute taboo. As for politics and the rising strife over industrialism, he remained for the most part silent.⁴⁶ Like Holmes, his iconoclasm was never carried from the conflict of intellectual inquiry into the more tangible struggle on which men's existence depended. Yet, from him, as does legal realism from Holmes, stems the literary realism of our own day.

The two men are impressively alike in the parallel positions which they maintain in their respective fields. For both, their realism consists of an iconoclastic attitude toward illusion: illusion in the law, illusion in the writing of literature.⁴⁷ For both, their thinking begins the movement of the realistic influence in America, which (with pragmatism) affects current philosophical outlooks. For both, their realism does not extend beyond intellectual boundaries; it remains tightly closed to the conditions of

Science is one of the immediate ancestors of realism in that it gave a method of procedure to the new school of novelists. . . . One of the chief requisites of a scientist is the ability and patience to carry out sustained observation and experimentation. . . . It was from the procedure of such men that the realist derived his new method of writing fiction.

Id.; see also Foerster, *Factors in American Literary History*, in *THE REINTERPRETATION OF AMERICAN LITERATURE* 23 (N. Foerster ed. 1959).

45. See V. CALVERTON, *supra* note 18, at 380; cf. L. MUMFORD, *THE GOLDEN DAY* 167-70 (1926).

46. He did, however, play a vigorous part in the defense of the Haymarket anarchists. See V. CALVERTON, *supra* note 18, at 379 n.33. In regard to his prudishness, see G. DE MILLE, *LITERARY CRITICISM IN AMERICA* 188-89 (reprint 1967, original 1931).

47. Romanticism in art may be thought of as wilful illusion. Compare Frank Norris' conception as a variation from the norm. See F. WALKER, *FRANK NORRIS: A BIOGRAPHY* 82-83 (1932).

the American scene. Their realism was only tentative, conditional: this marked the first stage in the development.

III

If Holmes and Howells did not find themselves embroiled into the bitter struggle resulting from the increasing dissatisfaction with the new industrial order which had evolved since the Civil War, and the rapid ascension of the United States toward the top rank of world nations, younger and more easily inflamed writers did. Capitalism as a practice of commercial organization never had more fertile ground: corporations had extended dominance over an entire industry, had monopolized the supply of single and allied products. The small entrepreneur had no chance of competing with these Titans; they engulfed him without knowing of his presence. To be sure, the signs of a critical discontent were not lacking in the 1880's. True, Henry George's *Progress and Poverty*,⁴⁸ Henry Adams' *Democracy*,⁴⁹ and Edward Bellamy's novel, *Looking Backward*⁵⁰ were early portents of discontent, but the chorus of voices raising protest did not gain strength until nearly the beginning of the twentieth century. In the meantime, the course of realistic fiction had swung to the left, away from the conditional realism of Howells toward the impressionism of Stephen Crane, and the hardy naturalism of Frank Norris.⁵¹ The authors of *Maggie: A Girl of the Streets*⁵² and *Vandover and the Brute*⁵³ broke through convention to tear the veil from the actual misery and brutality of life. In these

48. H. GEORGE, *PROGRESS AND POVERTY* (1880).

49. H. ADAMS, *DEMOCRACY* (1880).

50. E. BELLAMY, *LOOKING BACKWARD* (1882). Cf. T. DICKINSON, *THE MAKING OF AMERICAN LITERATURE* 635 (1932). *Looking Backward* was hardly in the realistic manner, but rather was in a romantic vein: a description of the occurrences of the twentieth century from the standpoint of an observer living in the twenty-first century.

51. Naturalism is used interchangeably in a broad sense with realism, but essentially it connotes pessimistic realism (close to determinism). *Id.* at 511. In modern legal realism, naturalism is apparently equivalent to realism. Compare Frank's comment on Holmes: "Holmes, with his never-to-be-forgotten bad man, began naturalistic legal thinking." Frank, *supra* note 28, at 570.

52. S. CRANE, *MAGGIE: A GIRL OF THE STREETS* (reprint 1966, original 1893).

53. F. NORRIS, *Vandover and the Brute*, in *5 COMPLETE WORKS OF FRANK NORRIS* (1928).

novels (and in *A Red Badge of Courage*⁵⁴ and *McTeague*⁵⁵) the tide of realism overflows the narrow confines in which Howells would have held its channel and escapes forever. During the decade prior to 1900, however, the realistic novel was not employed as a weapon against social ills: it remained, as it had with Howells, merely a theory of artistic expression.

The discontent was further enhanced by the percolation into this country of the economic determinism of Marx on the philosophical side, and of the force of socialism on the political side.⁵⁶ Realism was slowly transformed into naturalism:

From the efforts to find the law of causation there developed two schools of thought, the biological determinists who followed the leadership of Darwin, and the economic determinists who followed Karl Marx. Zola's theory and practice of fiction developed from his knowledge of these two schools of scientific and economic thought.⁵⁷

And Zola's novels were the admiration of Frank Norris: he thought the novelist could make enlarged case studies revealing "the Truth" by learning the social, biological, and economic laws controlling mankind.⁵⁸ Note the objective purpose which Norris held in mind: there is no hint of the reform of mankind in his message. The allegiance of the novelist to his art is still unaffected by the evils in society.

It is in the twentieth century, however, that the flame uneasily burning among the liberals bursts into a conflagration. The novel, still realistic in form, becomes a social document, an article of blatant propaganda for a change in the social order. So, Frank Norris writes his protests against the Railroad Trust and the speculators in *The Octopus*⁵⁹ and *The Pit*,⁶⁰ Robert Herrick his criticism of Big Business in *The Real World*⁶¹ and

54. S. CRANE, *A RED BADGE OF COURAGE* (1894).

55. F. NORRIS, *McTEAGUE* (reprint 1971).

56. Thus emerged the Knights of Labor and Granger movements in the Middle West.

57. R. BLANKENSHIP, *supra* note 44, at 512.

58. F. WALKER, *supra* note 47, at 253-54; *cf.* R. BLANKENSHIP, *supra* note 44, at 283.

59. F. NORRIS, *THE OCTOPUS* (1901).

60. F. NORRIS, *THE PIT* (1910).

61. R. HERRICK, *THE REAL WORLD* (1900).

The Memoirs of An American Citizen,⁶² and Upton Sinclair exposes the Beef Trust in *The Jungle*,⁶³ with a resultant scandal that so shocks the nation that a presidential investigation is ordered, and the Pure Food and Drug Act is a direct consequence. Moreover, during this era the muckraker reveals the corruption of the political machine, and the alliance between Big Business and politics. No novelist of any importance in the whirling turmoil of the times avoids the call to the conflict; all joyously forget their erstwhile occupation with the ends of art for the ends of society.⁶⁴ The era runs its reformist career within the limits of fifteen years: from 1900 to 1915.⁶⁵ The beginning of the World War terminates the liberal protestations; it is not until 1932 that one sees the re-emergence of a similar liberal emphasis — after a hiatus of another fifteen years.⁶⁶ Most notable is the essentially reformist character of the realism in the literature of the period — a realism no more pure “realism” than Howells’ realism, though pure “realism” had its moment with Norris and Crane (and perhaps with Dreiser at a later date) in the 1890’s. Norris’ sociological novel, designed to be an impartial research for truth, for the capture of laws governing mankind, is changed into a crusading pamphlet; “the sociological novelist was a reformer, seeking particular ends, rather than a critical analysis of life; and not until the appearance of a generation familiar with the

62. R. HERRICK, *THE MEMOIRS OF AN AMERICAN CITIZEN* (1905).

63. U. SINCLAIR, *THE JUNGLE* (1906).

64. The first muckraking article seemingly appeared in 1902. See V. CALVERTON, *supra* note 18, at 386 n.47.

65. As Parrington noted:

Few writers in the years between 1903 and 1917 escaped being drawn into the movement — an incorrigible romantic, perhaps, like the young James Branch Cabell, or a cool patrician like Edith Wharton; and with such popular novelists as Winston Churchill, Robert Herrick, Ernest Poole, David Graham Phillips, Upton Sinclair, and Jack London embellishing the rising liberalism with dramatic heroes and villains, and dressing their salads with the wickedness of Big Business; with such political leaders as Bob La Follette and Theodore Roosevelt and Woodrow Wilson beating up the remotest villages for recruits; with such scholars as Thorstein Veblen, Charles A. Beard, and John Dewey, and such lawyers as Louis Brandeis, Frank P. Walsh, and Samuel Untermyer, the movement gathered such momentum and quickened such a ferment as had not been known before in the lands since the day of the Abolition Controversy.

3 V. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 405-06 (1927).

66. Compare Parrington’s observation that realistic periods coincide with periods of depression. Parrington, *supra* note 38, at 140.

teachings of the laboratory did realism in America come of age."⁶⁷ Thus, "sociological" realism succeeds "reticent" realism.

The developments in the law still follow the general cultural trend of the times; the connecting link is embodied in the person of Roscoe Pound. Pound, following in Holmes' footsteps, attempts what the master refused to essay: to erect a definite, workable legal philosophy in place of the outmoded and inadequate ideology of the ancient (a hundred years past) juridical theory. Pound's theme, in short, is sociological jurisprudence. The coincidence in the use of the adjective "sociological" to describe the type of novel popular at the time, and to identify this particular legalistic approach is not accidental; basically, the philosophy behind each movement is similar. First of all, Pound exhibits favor for socialism rather than for individualism. He exclaimed in one of his earliest articles, "How shall we lead our law to hold a more even balance between individualism and socialism"⁶⁸ in deploring the emphasis that the then doctrines of law placed upon the individual. Furthermore, like Norris and Crane, Pound is moved by European writers; if not Zola, it is Von Ihering and Stammler.⁶⁹ He sounds a call to arms to all lawyers; he is hardly the armchair philosopher musing over the injustices of mankind, but rather a militant reformist bent on transforming legal thinking. Pound calls for a sociological jurisprudence, for the law is outgrown by the new customs and by the change in habits and points of view.⁷⁰

Pound sees, as Holmes has seen, that the law must be bridled to reality, but where Holmes could not bring himself to a direct remolding of its rules to shape conditions, here Pound cries that the remedy lies in study — study of the facts, and

67. *Id.* at 142.

68. Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 352 (1905).

69. See Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911) (Part I) [hereinafter cited as Pound (Part I)]; *id.* at 25 HARV. L. REV. 140, 149 (1912) (Part II) [hereinafter cited as Pound (Part II)].

70. Pound stated:

It is their task to create in this country a true sociological jurisprudence, to develop a thorough understanding between the people and the law, to insure that the common law remain, what its exponents have always insisted it is — the custom of the people, the expression of their habits of thought and actions as to the relations of men with each other.

Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907).

then of the theory to be employed in applying the facts to the theories' pattern.⁷¹ He has discovered what Holmes has known, but has been none too sure of its ultimate value — the consequence of the acceptance of the theory of evolution upon all thought. In one place he says of the lawyer:

It is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it.⁷²

The procedure to be used is the scientific method developed in the physical sciences; an adaptation of an empirical, pragmatic theory to the law.⁷³ Already has that movement bestirred the social sciences, and since law is so closely related to economics and government, it should not await an enforced reform. "[W]ith the rise and growth of political, economic, and social science, . . . the time was ripe for a wholly new tendency, and that tendency, which may be called the sociological tendency, has become well established in Continental Europe."⁷⁴

Together with the pragmatic method, Pound believes the new jurist must be equipped with all the learning evoked by the companion social sciences, and with their aid to transform legal rules to the extent required a greater perspective. A unification of the social sciences is ultimately desired, and law must look to this grand union for guidance, and indeed must join with it as sovereign to regulate social phenomena.⁷⁵ But what Pound en-

71. "Before we can have sound theories here we need facts on which to build them. Even after we get sound theories, we shall need facts to enable us to apply them." R. POUND, *THE SPIRIT OF THE COMMON LAW* 213-14 (1921).

72. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 36 (1910).

73. Pound stated:

The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.

Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609-10 (1908).

74. Pound (Part I), *supra* note 69, at 614.

75. "Summarily stated, the sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them

deavors to impress most strongly on the minds of the contemporary lawyer is the need for study of the present social state with relation to the law. The lawyer, he considers, is essentially conservative, reluctant to change: "[A]fter philosophical, political, economic and sociological thought has given the eighteenth-century [the] law of nature, it is still the premise of the American lawyer."⁷⁶ This persistent attitude the lawyer must shed: he must become receptive to new thought and to new ways of action. Pound recognizes expressly what Holmes said implicitly: the influence of the Darwinian evolution in scientific thinking is the mainspring in his appeal for a sociological jurisprudence.⁷⁷

In general, Pound is promoting reform, pleading for an active crusade against "the dead hand of the past." Particularly is his reformist zeal shown in his assaults on the then existing criminal law,⁷⁸ and on antiquated procedure.⁷⁹ In this role he falls entirely within the spirit of the era; but his fervor transports him not beyond the confines of the law. Though he calls for legal reform, his voice is not raised for reform in existing business practices: he does not join with Sinclair, Herrick, and Churchill in advocating a change in governmental or economic control. Nor does he accept the Marxian concept of class struggle,⁸⁰ though he notes its possible effect on legalistic thinking,⁸¹ and is aware of the attitude of Brooks Adams, who explains juridical decision by its tenets.⁸² Unlike Holmes, Adams leads the

with respect to their relation to social conditions and social progress." Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 516 (1912) (Part III). Compare this quotation with the following:

While Professor Moore tells us that the time has come 'in the development of the pragmatic movement for systematic and detailed applications of pragmatic conceptions and methods to specific problems, rather than further discussion of general principles,' unhappily discussion of general principles goes on, and a pragmatist philosophy of law is yet to come.

Id. (quoting the preface to *Pragmatism and Its Critics*).

76. Pound, *supra* note 72, at 25.

77. Pound (Part III), *supra* note 75, at 496.

78. Pound, *Enforcement of Law*, 20 GREEN BAG 401 (1908).

79. Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 491 (1910).

80. The perception is not that he should have, but rather that he *did not*, while Sinclair and Norris *did*.

81. Pound (Part II), *supra* note 69, at 162.

82. Adams, *The Modern Conception of Animus*, 19 GREEN BAG 12 (1907). The conservative reply to Adams is given by F.M. Burdick. Burdick, *Is Law the Expression of Class Selfishness?*, 25 HARV. L. REV. 349 (1912).

way for reform within the law; like Holmes, he is quiescent as to rumblings outside the strictly legal field.⁸³ Here the complete analogy falls short; but the resemblance to literary realism remains.

If Pound were looking for the appearance of a sociological jurist, he did not have to await the coming long. Louis Brandeis was appointed to the Supreme Court in 1916 (note the designation occurred at the end of the second era of realism), and swiftly became known as the "Sociological Jurist." No wonder that conservative forces fought bitterly his approval by the Senate: he is one of the rebels who strikes for economic as well as political independence for the small merchant.⁸⁴ His attack is vigorous, not indirect:

Politically, the American workingman is free — so far as the law can make him so. But is he really free? Can any man be really free who is constantly in danger of becoming dependent for mere subsistence upon somebody and something else than his exertion and conduct? Financial dependence is consistent with freedom only where claim to support rests upon right, and not upon favor.⁸⁵

His is the large sympathy with the small businessman in opposition to the oppression of the trusts, just as with Sinclair; his writing prior to 1916 was one vast dissent against the rise and practices of huge corporations.⁸⁶ It is to be noted, however, that Brandeis does not attack capitalism as an economic device altogether; he attacks the skullduggery, the evil influence which capitalism carries in its wake when its practice is abused.⁸⁷ Even

83. Cf. R. POUND, *CRIMINAL JUSTICE IN AMERICA* (1930); see also R. POUND, *supra* note 71, at 195.

84. Cf. *supra* note 65.

85. Brandeis, *Industrial Democracy*, in *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* 369 (A. Lief ed. 1930).

86. Brandeis stated:

The (the trusts) have crushed it (industrial liberty) out among large groups of our people so completely, that it will require years to restore our industries to a condition of health. This social unrest is really what is the matter with business. Well-founded unrest; reasoned unrest; but the manifestations of which are often unintelligent and sometimes criminal.

Id. at 394.

87. Compare Max Lerner's comment:

Justice Brandeis' animus, as has been noted above, is directed not at the normal

though in judicial opinion he is ever solicitous of the cause of the worker,⁸⁸ his bias never draws him so far to the left that he is unable to see the employer's point of view for the angle:⁸⁹ his efforts are directed toward keeping the balance even.⁹⁰

Thus, Brandeis' preoccupation with class struggle distinguishes him at once from Pound. In method, however, their attitudes coincide. The brief of *Muller v. Oregon*,⁹¹ written by Brandeis must have sent Pound into an ecstasy of delight, for it illustrated precisely his sociological approach to the law. Here was no delicate structure of abstract legalistic theory to support a statute, but the collation of impressive facts and statistics buttressing the legislature's ground for statutory reform. The brief is a milestone in the development of realism in the law: as a symbol, it far outweighs Pound's efforts toward reform, important though they be. The method of Brandeis is indeed that of Pound, but it gains in his hands the halo of an advocate's art. Brandeis bases his argument on reality; as Beard says:

Above all he seeks to draw his jurisprudence out of the realities of life — its work, its economy, and its social arrangements. For the copious citation of more or less dubious precedents, which are seldom exactly apposite, he has little affection, preferring, it seems, to substitute for the show of authority a display of stubborn and irreducible facts knit closely together in a pattern of thinking.⁹²

Especially does Brandeis use his realistic approach in regard to economic problems coming before the court; his strength as a judge lies in his effective command over economic theory and

functioning of a capitalistic society but at its pathology. . . . There is an almost idyllic freshness about the way in which he clings to the original content of economic institutions whose current form most of the rest of us accept in a somewhat jaded fashion.

Lerner, *The Social Thought of Mr. Justice Brandeis*, in MR. JUSTICE BRANDEIS, 35 (F. Frankfurter ed. reprint 1972, original 1932).

88. See, e.g., *Duplex Co. v. Deering*, 254 U.S. 443 (1921) (Brandeis, J., dissenting).

89. Compare *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) with *American Column Co. v. United States*, 257 U.S. 377 (1921).

90. Compare Pound's attitude. See Pound, *supra* note 68 at 345-47.

91. 208 U.S. 412, 415-16 (1908).

92. Beard, *Introduction to THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* at xx (A. Lief ed. 1930).

sociological material.⁹³ It is this marshalling of the facts supposedly underlying all juristic theory that sets Brandeis off from Holmes in both the practice of a realistic, pragmatic approach to the facts and in the sociological philosophy which he espouses. Brandeis differs from Holmes almost precisely as Upton Sinclair differed from Howells: in both law and literature, the contrast between the two kinds of realism is thus rendered distinct.

The realism of Brandeis and Pound and of Norris and Sinclair possessed the common characteristic of reformist zeal. Realism, both in literature and law, ceased to remain artistic theory, and became a method of attack. At the same time the tendency to treat law as a science remote from the hurly-burly of life slowly disappeared, and a recognition of the kinship of all the social sciences slowly grew; the novel simultaneously began to draw its plots and characters from actual occurrences. The marked resemblance in both legal and literary spheres lies in the pronounced demand for thorough and careful study of the facts out of which the legalistic or artistic situation arose. Of course, this type of realism can hardly be considered pure "realism": an impersonal setting-down of the facts under observation. Where there is a thesis to be propounded, the prism of observation may be affected by the bias: the wish may father the "reality."⁹⁴

IV

The World War terminated the second period of development. For the length of six years, during the stress and abnormal pressure on intellectual pursuits, literary and legal realism remained in a suspended state. It is not until 1920 that a renaissance may be observed. To be sure, what a renaissance it is! The novelist is thrust into a world of disillusionment, into a distorted, ravaged environment, into a society where pre-war ideals and attitudes are totally bankrupt. F. Scott Fitzgerald at this time wrote *The Other Side of Paradise*⁹⁵ and *The Beautiful and*

93. "Mr. Justice Brandeis' realism is chiefly economic: his thought evinces a mastery of the facts and processes of economic life hitherto unsurpassed on the Court." Lerner, *supra* note 87, at 25.

94. *Id.* at 23.

95. F. FITZGERALD, *THE OTHER SIDE OF PARADISE* (1920).

Damned,⁹⁶ depicting the bewilderment of young people living in a wearied and sickly world. The realism of Frank Norris before his obsession with the social conflict of his era is once more revived, approaching the impressionism of Stephen Crane,⁹⁷ but presented in a barer and stripped form. The war novels depicted scenes at once brutal and revolting, without a trace of sentimentality to dilute the impersonal recounting. The blood, the terror, the havoc wrought by the new methods of warfare are portrayed unemotionally and without embroidery.⁹⁸ In a sense, realism comes to resemble the old naturalism of Zola and Balzac. There is the same note of despair, of complete cynicism in the fiction of the early twenties, as if the novelist cried: what is truth, what is loyalty, what is devotion in the face of what has happened in the War? The fine faith of the liberal struggling for reform only six or seven years before has been lost in the face of the terrible results of large scale and mechanistic combat. The attitude is strikingly summed up in the title of a book which has appeared late in the period: *Farewell to Reform*.⁹⁹

The debacle of pre-war ideals and criteria created for the liberal an intellectual chaos. New standards perforce had to be rebuilt; but since the previous standards had so dismally failed, seemingly the new edifice could not be constructed on the lines, or even on the foundations of the structure only then destroyed. This spirit pervaded the literature of the 1920's: a spirit of experimenting, of searching, of probing anew. Gertrude Stein and Ezra Pound in Paris became the nuclei of the most extreme groups. Thus, Stein considered that words were not sufficient to satisfy all the demands which the conveyance of meaning placed upon them; she believed that words had implications in their sound and in their use and position in a sentence, beyond their usual intent. James Joyce sought to reproduce the thoughts of characters in his fiction in their disjointed, obscure, and dis-

96. F. FITZGERALD, *THE BEAUTIFUL AND THE DAMNED* (1920).

97. The analogy gains significance when one notes the parallel free verse movement sponsored by Amy Lowell, Carl Sandburg, and Harriet Monroe, which was definitely impressionistic.

98. See, e.g., J. DOS PASSOS, *THREE SOLDIERS* 1921; E.E. CUMMINGS, *THE ENORMOUS ROOM* (1922). Later manifestations of this may be seen in W. MARCH, *COMPANY K* (1956) and E. HEMINGWAY, *A FAREWELL TO ARMS* (1929).

99. J. CHAMBERLAIN, *FAREWELL TO REFORM* (1932).

torted form. Throughout the literature of that day, the reckless endeavor to describe moods by the aid of opposite word-phrases was evident; the artists attempted to capture fleeting sensations by the net of language; perhaps to expect words to convey more than they can.¹⁰⁰ While associated with Joyce and Stein in Paris, Ernest Hemingway developed the terse, naked style which possibly, as expression, conforms more closely to the realistic ideal than any other created hitherto.¹⁰¹ John Dos Passos was another of this exploring coterie; from his experiments in writing he distilled entirely unique and novel devices for fiction: "the camera eye" — a subjective comment — and "the news-reel" — the social and political background.¹⁰² Perhaps these artists were more prominent; other writers, not as prominent but fully as engrossed in experimental expression, filled the pages of the literary magazines with their work. But this movement was not reformist; rather, it was blind and purposeless, trying to raise from the ashes of the old standards a satisfying new order. Indeed, in Europe, one group, the Dadaists, with whom some Americans were connected, made it their purpose to have no purpose: art, they said, consisted in being artless.

Naturally, with the failure of standards, the morality of the first part of the century collapsed as well. Sexual matters became the subject of frank discussion; novels were written in this time which would have been banned ten years previous.¹⁰³ Intermingled with the candid treatment of sexual immorality, the new Freudian psychology entered the pages of the new fiction. Sexual perversion became a topic or a common explanation of the actions of characters.¹⁰⁴ Against the background of complexes, neuroses, and psychopathology must be placed Watson's behaviorism, since it amounted to the strictest realism, realism

100. Compare the later publication by Virginia Woolf. V. WOOLF, *THE WAVES* (1931).

101. See, e.g., E. HEMINGWAY, *MEN WITHOUT WOMEN* (1927).

102. See, e.g., J. DOS PASSOS, *Nineteen Nineteen*, in 2 U.S.A. (1930)

103. Cf. F. DELL, *MOON-CALF* (1920); G. ATHERTON, *BLACK OXEN* (1923); E. HEMINGWAY, *THE SUN ALSO RISES* (1926).

104. Marcel Proust's vast novel, *Remembrance of Things Past*, written before this period but not published and read in America until 1920 or thereafter, comes most quickly to mind. Cf. R. HALL, *THE WELL OF LONELINESS* (1928); E. O'NEILL, *STRANGE INTERLUDE* (1928).

bared to the bone.¹⁰⁵ Together with the experimental novel, the psychological novel had a wide and thought-provoking vogue. Nor did the revolt against old standards cease here. Sinclair Lewis in his novel *Main Street*¹⁰⁶ headed the procession for a series of novels embodying a profound and bitter criticism of American life, particularly life in the American village.¹⁰⁷ Moreover, the tendency to localize comment, to study, to analyze, to criticize the people of one particular area characterized the new realism after 1920. Novelists devoted their talents to one section: thus, Ruth Suchow and Sinclair Lewis restricted themselves in the main to the middle west; William Faulkner, Erskine Caldwell, and Maristan Chapman to the hillbilly and poor-white south; Eugene O'Neill, in his plays, to New England. In a sense, these regional novels and plays were related to the studies of psychologists, being large-scale case histories of the inhabitants of a particular area.

The realistic novel, in brief, turned from a novel of sheer propaganda as that of the Sinclair-Herrick type toward the novel of Howells and Crane, but transcended their realism, since no bar of reticence was recognized. In contrast, complete frankness became both the ideal and the method. The novel had characters, but usually no hero; many times the fiction was a narrative without an apparent thesis —merely an individualistic performance. The difference between these hero-less novels and Sinclair's novels, where socialism (as a force) is the hero and capitalism is the villain, rose to sharp distinction in the early 1920's. Thus, the pendulum had swung back and beyond. Realistic fiction entered its third transition: a stage which extends to the end of the period.

In the law, the same forces were present. Almost at the end of the liberal-reformist era, the signs of a mode of thought at variance with Pound had arisen. As early as 1912, Joseph Bingham had embarked upon an inquiry as to "What is the Law?"¹⁰⁸

105. An example of behaviorism can be seen in Hemingway's work. See *supra* note 101.

106. S. LEWIS, *MAIN STREET* (reprint 1946, original 1920).

107. Joined with this movement were the biographies "debunking" popular American heroes. See R. HUGHES & W. WOODWARD, *GEORGE WASHINGTON — THE IMAGE AND THE MAN* (1926).

108. Bingham, *What is the Law?*, 11 MICH. L. REV. 1 (1912) (Part I); *id.* at 109 (Part

He considered that although the law might be thought of either as a science or an art, it partook more of the nature of a practical science.¹⁰⁹ In this conception he differed not, of course, from Pound; but he continued to say that he deplored the binding force of precedents — a step a good deal further than Pound had ever gone.¹¹⁰ Indeed, he distrusted all generalization, all deductions; he asked whether we should not embrace a philosophy that places the emphasis on knowledge of the truth relating to concrete phenomena which are relevant both to lawyers and laymen, and place generalizations and language in their proper perspective as the requisite tools to develop this knowledge.¹¹¹ This approach was perhaps not too clear a manifestation of a changing attitude, but it was at least a straw in the wind.¹¹²

The new "legal realism" has appeared in the law reviews from 1924 onward, with the movement blossoming into full flower from 1928 to date. At the beginning of the movement the term "legal realism" is first used as a description of the new philosophy;¹¹³ Frank and Llewellyn lead the assault upon all that has been accepted in the law without too great an examination. It must be emphasized that no "school" of legal realists will be found existing. As Llewellyn himself concedes, "There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed . . . They are related, says Frank, only in their negations, and in their skepticisms, and in their curiosity."¹¹⁴ Tendencies alone exist; true, there is a certain common core of beliefs which inhere in their writings, i.e., in (1) a recognition of legal rules as means rather than ends in themselves; in (2) the study of the process of decision in appellate courts; and in (3) investigations into the actions of lower courts;¹¹⁵ but each exponent has his peculiar, special theory. These men, however,

II).

109. *Id.* at 15 (Part I).

110. *Id.* at 112-14 n.33 (Part II).

111. *Id.* at 119 (Part II).

112. *Cf.* Corbin, *The Law and the Judge*, 3 YALE L.J. 234 (1916).

113. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930).

114. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233-34 (1931). This is by far the best article on legal realism.

115. *Id.* at 1250.

do not spring totally into print without the background of Holmes and Pound. Holmes they expressly hail as their leader;¹¹⁶ and though Pound attacks some of their premises, they are more in accord with him than in disagreement.¹¹⁷ When Pound describes the basic thought in their cause thus: "By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be . . . ,"¹¹⁸ they agree at once with the characterization.¹¹⁹ In principle, they are doing exactly what Pound advocates:¹²⁰ they are studying in detail the mechanism of the law in relation to the conditions existing in the market place.

Where their point of view diverges from Pound's, however, it diverges widely, and it is on the divergence that an appreciation of their kind of realism rests. Pound is still the reformist; what these realists are doing, he says, is merely portraying, faithfully enough, perhaps, how courts act. But that is not sufficient in his view: the test should not be *Is*, but *Ought*. In other words, ethical considerations should motivate criticism.¹²¹ To this view, the new realists take immediate exception; more likely, they reply, it is "[w]hen writers of realistic inclination are writing in general, they are bound to stress the need of a more accurate description, of *Is* and not of *Ought*. There lies the common ground of their thinking; there lies the area of new and puzzling development."¹²² Moreover, as with Hemingway and the modern fictional realists, the legal realist is disillusioned and inclined toward skepticism, if not cynicism. Ideals and standards are but of passing moment, for status and opinion equally change. The parallel between Hemingway and Frank lies precisely in that common attitude.¹²³

116. Llewellyn, *supra* note 24, at 704 n.*.

117. Pound assails the movement in his work, *The Call for a Realist Jurisprudence*. Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). His disciple John Dickinson also declares against the new realists. Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931) [hereinafter cited as Dickinson]; Dickinson, *The Law Behind Law*, 29 COLUM L. REV. 113, 285 (1929).

118. Pound, *supra* note 117, at 697.

119. Llewellyn, *supra* note 114, at 1224.

120. Llewellyn, *supra* note 113, at 435 n.3.

121. Pound, *supra* note 117, at 700-03.

122. Llewellyn, *supra* note 114, at 1255.

123. There is a second group of critics which has assailed the realistic movement in

The development of new methods of research and presentation has proceeded at almost as fast a pace as has occurred in literary realism. Llewellyn's casebook on sales stands as a conspicuous example;¹²⁴ from his novel arrangement many casebooks followed in tacit approval. In the matter of pedagogics, somewhat of a revolution has occurred in the acceptance of Llewellyn's theory of arranging legal materials according to function rather than to the traditional divisions of causes of action and legalistic concepts. Another telling parallel is the creation of a new technique to aid in research into the institutions of society. Through the use of this technique of utilizing data accumulated in field studies, the significance of trade customs and the direct effect of the action of lower courts on the litigant and lawyer have been the topic of a number of articles relying on such data.¹²⁵ These investigations, localized, covering a small area intensively, represent for the legalist the provincialism in literary realism which marks the work of William Faulkner and Maristan Chapman.

Together with that technique is the inclination of the realists to question minutely the value of legal rules and to analyze the part that the judge plays in the judicial process. Llewellyn thus queried the utility of the legalistic tool of the contract in our society;¹²⁶ a realistic judge in a burst of confidence confesses that for him intuition and not cold analysis is often the motivating force behind a decision;¹²⁷ and one skeptic even suggests that the judge's past life and upbringing, his present position in the social scale, and his political and economic philosophy are factors influencing his decisions.¹²⁸ It is argued vigorously by the

the law, namely, the formal logicians. See Adler, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 91-108 (1931).

124. See Turner, Book Review, 30 COLUM. L. REV. 904 (1930) (reviewing K. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930)).

125. See Carey, Jr., Smith & Lansden, *Studies in Foreclosure in Cook County, I*, 27 ILL. L. REV. 476 (1933); Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929).

126. Llewellyn, *supra* note 24. Compare this with Patterson's view that legal realism was similar to the philosophy behind the *Restatement of the Law of Contracts*. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 413 (1933).

127. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

128. Haines, *Effects of Personal, Political and Economic Influence in the Decision of Judges*, 17 ILL. L. REV. 961 (1922).

realist that precedents should be binding only as they are persuasive: that prior decisions should not be regarded as sacred. The premise that law is not certain in its operation runs throughout realistic writing; it is argued that between appellate court theory and lower court decision there often exists a wide and irreconcilable gap. These common beliefs evidence the skepticism of the realists' outlook, and the sharpness of their attack — surely as sharp on the complacency of the older legalistic theory as were Sinclair Lewis' thrusts against mid-western culture in *Main Street*.¹²⁹

The free ventilation of sexual matters mirrored in contemporary literature is likewise reflected, though to a lesser degree, in the writing of the legal realist.¹³⁰ Behaviorism and the Freudian psychology of the personality have been adapted and rationalized to explain or to suggest the revision of legal rules, particularly in the field of contract formation,¹³¹ and as a description of the factors underlying juristic ratiocination.¹³² Indeed, Jerome Frank ingeniously contends, after demonstrating the lack of certainty in the law, that the reason men look to law for certainty is on account of a psychological complex, a remnant of the time the child looks to his father for authority. One day, said Frank, the breach occurs: the child finds his father is not the governor, the arbiter of the universe. The child carries, however, in growing to adulthood the longings for stability in an uncertain world; this longing he fastens upon the law: it becomes the father-substitute.

The trouble with legal thinking is not the mental inadequacies of the lawyers. It is in the very nature of law, its role as a father-substitute, that stirs up unconscious attitudes, concealed desires, illusory ideals, which gets in the way of realistic observation of the workings and significance of law.¹³³

129. S. LEWIS, *MAIN STREET* (reprint 1946, original 1920).

130. See Llewellyn, *Behind the Law of Divorce*, 32 COLUM. L. REV. 1281 (1932) (Part I), 33 COLUM. L. REV. 249 (1933) (Part II); May, *Experiments in the Legal Control of Sex Expression*, 39 YALE L.J. 219 (1929).

131. Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859, 867-69 (1928).

132. Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918).

133. J. FRANK, *LAW AND THE MODERN MIND* 91 (1930). Note the introduction to this work by J. Mack at page IX.

Agreement may not have been forthcoming for Frank's analysis, but the influence of Freudian psychology is apparent.

Less ponderable as an element in the realistic ferment in the law is the intellectual stir over the theory of relativity developed by Einstein, and the new physics of Jeans and Eddington. Several writers, notably Walter Wheeler Cook¹³⁴ and Huntington Cairns,¹³⁵ have suggested that the intellectual excitement thus aroused created the controversy between the traditionalists, or Bealists, to use Frank's term, and the realist. The possibility of Einstein's theory affecting the law may seem rather remote. But in respect to the new physics, a more direct inference to legal realism may be drawn. Eddington and Jeans assert that the universe is expanding. Surely certainty in all one considers secure would be shaken; that shaken confidence may have led to reflections over the oftstated certainty of the law.¹³⁶

Throughout the development of legal realism there is visible as a recurrent pattern the concept of pragmatism. The hand of John Dewey appears in almost all the newer realistic writing in the law. It may be remarked with Mortimer Adler (in speaking of Frank's *Law and the Modern Mind*¹³⁷), "It is no coincidence that Mr. Frank's discussion of certainty in law should appear roughly contemporaneous with John Dewey's *Quest for Certainty* [sic],"¹³⁸ and that "[l]egal realism is a name for pragmatic and empirical thinking about the law."¹³⁹ But we must not transfer philosophical realism bodily into legal realism; as Pound says, the legal realists use the term not in a philosophical but in an artistic sense — a *literary* sense.¹⁴⁰ It is not metaphysics the legal realist is discussing; it is the law, and it is the experimental

134. Cook, *Scientific Method and the Law*, 15 JOHNS HOPKINS ALUMNI MAG. 213, 224 (1927).

135. Cairns, *Law and Anthropology*, 31 COLUM. L. REV. 32 (1931); see also Dickinson, *supra* note 117; cf. Frank, *Are Judges Human?*, 80 U. PA. L. REV. 30 n.33 (1931).

136. Such explanation does not, of course, fit Holmes. Cf. *supra* note 35.

137. J. FRANK, *supra* note 133.

138. Adler, *supra* note 123, at 91 (citing J. DEWEY, *THE QUEST FOR CERTAINTY* (1929)).

139. Adler, *supra* note 123, at 91.

140. Pound, *supra* note 117, at 697. Pound states: "As I read them, the new juristic realists hardly use realism in a technical philosophical sense. They use it rather in the sense which it bears in art." *Id.* Surely pure realism is wholly lacking where tests have been observed; the results are the product of the reporting of what has been observed.

method together with the emphasis on true observation that he joins to law which put the stamp of realism upon his thought.¹⁴¹

The third transition in the development of realism is, therefore, one of disillusionment, of skepticism. Both in legal and fictional realism one discerns a return toward the primary realism of Holmes and Howells, but by a more direct route; there is no reluctance to face squarely, and, indeed, to make full use of, the significance of the term. The rise of new devices to glean startling effects, in the case of literature, or to obtain a deeper understanding of the working of the juristic processes, in the case of law, demonstrate the close parallelism that exists between these two cultural manifestations. Astonishing it is to observe the degree to which law and literature obey the influences playing upon our society.¹⁴² The transformation in the attitude of the lawyer in Holmes' period to the attitude of the lawyer of the present day may be striking;¹⁴³ but surely it is not abrupt. The course has been gradual, and considering the strength of these influences tending toward the formation of cultural patterns, even inevitable.

V

Conclusions are treacherous allies: the facts underlying their deductions are so often many-faceted, suggesting implications at every level. Moreover, a theory propounded may subtly twist the facts to the desired degree of compliance with the conditions of the theory, and thus the conclusions become the theory. These

141. Thus, whatever thinking Dewey has done in the strictly legal field is conditioned by the law. See Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1925). Cf. *supra* note 35.

142. Even in 1933, the influences remarkably coincide. Thus, compare the leaning toward collectivism with Max Lerner's article. Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668 (1933) (a frank study of the effect of Marxism on our highest Court). Compare, too, the shift of the financial center of the world from London to New York in the 1920's, and the vigor of American fiction over English fiction, with the emergence of legal realism as an American, as opposed to an English, movement. Cf. V. CALVERTON, *supra* note 18, at 432-33.

143. Some conception of the change may be shown forcefully by the contrast between Holmes' theory of vested rights and Cook's opposing theory of local law, as explanations for the court's behavior in conflict of laws situations. See *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914) (Holmes' theory); for Cook's theory, see Cook, *The Logical and Legal Bases of The Conflict of Law*, 33 YALE L.J. 457 (1924).

are dangers; yet they are dangers which must be accepted in any study.

It would be banal simply to conclude that literature and law have connections not slight, but close and concrete. It is more significant to remark upon the similar effects of the force of realism at parallel periods of time; that legal thinking, more formidably than might be suspected, is moved by the course of cultural movement.¹⁴⁴ The engaging interest for the lawyer is the method by which he may ascertain these elements in our culture which in the future may flower into grounds for the revision of rules, into new legal conceptions and into bases for new legal theories. Certainly, as a means of sighting the lines of new movements, fictional literature may be an easy and, in some instances, perhaps the only resort for the lawyer who seeks to discern cultural movements.¹⁴⁵ The literary artist is not entangled in the mesh of doctrines which by its very presence stands for a static world: in theory and practice he is independent from all other and prior writing. Thus, because he is apt to be looking forward as well as backward, the literary artist is equipped to observe emerging forces more acutely than the lawyer. When swift and tumultuous change is imminent, there is necessity for a knowledge of the forces tending toward transformation, and where transformation has already occurred, attack and defense usually follow.¹⁴⁶

Only for the traditionalist is the law a subject of strict legal inquiry. He does not concede that literature is of any aid to the lawyer; the taint of the word "fiction," implying a whimsical distortion of reality to suit the author's will, in his mind infects its value. This view is inescapably narrow; it sweeps outside of the

144. The exaggerated degree to which the cultural lag is said to exist in the law may be queried. Consider the solitary positions of Holmes and Howells in their respective fields during their advocacy of realism. To be sure, Howells attracted a greater proportion of writers to his cause than Holmes attracted lawyers; it is scarcely debatable that literary realism was much decried throughout the first years that Howells was its sponsor. Cf. Lerner, *supra* note 142.

145. This article does not touch upon other resources of literature upon which the lawyer might draw, as in the use of style and form in opinion and brief, for instance. Cf. Bachrach, *Reflections on Brief-Writers*, 27 *ILL. L. REV.* 374 (1932).

146. Cf. *O'Gorman & Young, Inc. v. Hartford Ins. Co.*, 282 U.S. 251 (1931); see also Cox, Book Review, 40 *YALE L.J.* 670, 672 (1931) (reviewing J. FRANK, *LAW AND THE MODERN MIND* (1930)).

law cultural material bearing upon the parties before the court; as Frank says, "More than that, there deserves to be studied the possible employment, throughout the field of law, of that method of patient investigation, by disinterested experts, of the facts, and background of individual cases now used by our more enlightened juvenile courts and courts of domestic relations."¹⁴⁷

To see law as a fragment of our culture, to see it framed against the cultural background, is hardly to belittle it; it rather introduces into its discipline a greater perspective. This Holmes saw clearly fifty years ago when he wrote:

For every fact leads to every other by the path of the air. Only men do not yet see how, always. And your business as thinkers is to make plainer the way from something to the whole of things; to show the rational connection between your fact and the frame of the universe. . . . To be the master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all.¹⁴⁸

Under such a point of view, it is not all strange to find legal realism and literary realism of the same parentage; instead, it would be queer if they were not.

147. J. FRANK, *supra* note 133, at 146.

148. SPEECHES BY OLIVER WENDELL HOLMES 23 (1891) (speech delivered February 17, 1886).