American Legal Realism

(EXCERPTS)

Brian Leiter
The University of Texas School of Law

Forthcoming in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY

This paper can be downloaded without charge from the Social Science Research Network electronic library at:
http://ssrn.com/abstract_id=339562
American Legal Realism was the most important indigenous jurisprudential movement in the United States during the 20th-century, having a profound impact not only on American legal education and scholarship, but also on law reform and lawyering. Unlike its Scandinavian cousin, American Legal Realism was not primarily an extension to law of substantive philosophical doctrines from semantics and epistemology. The Realists were lawyers (plus a few social scientists), not philosophers, and their motivations were, accordingly, different. As lawyers, they were reacting against the dominant "mechanical jurisprudence" or "formalism" of their day. "Formalism," in the sense pertinent here, held that judges decide cases on the basis of distinctively legal rules and reasons, which justify a unique result in most cases (perhaps every case). The Realists argued, instead, that careful empirical consideration of how courts really decide cases reveals that they decide not primarily because of law, but based (roughly speaking) on their sense of what would be "fair" on the facts of the case. (We shall refine this formulation of the "core claim" of Realism shortly.) Legal rules and reasons figure simply as post-hoc rationalizations for decisions reached on the basis of non-legal considerations. Because the Realists never made explicit their philosophical presuppositions about the nature of law or their conception of legal theory, one of the important jurisprudential tasks for Realists today is a philosophical
reconstruction and defense of these views, especially against the criticisms of legal philosophers, notably H.L.A. Hart.

But Realism also bore the marks of an intellectual culture which it did share with its Scandinavian cousin. This culture—the dominant one in the Western world from the mid-19th century through at least the middle of the last century—was deeply "positivistic," in the sense that it viewed natural science as the paradigm of all genuine knowledge, and thought all other disciplines (from the social sciences to legal study) should emulate the methods of natural science. Chief among the latter was the method of empirical testing: hypotheses had to be tested against observations of the world. Thus, the Realists frequently claimed that existing articulations of the "law" were not, in fact, "confirmed" by actual observation of what the courts were really doing. Also influential on some Realists was behaviorism in psychology—John Watson's version, not the later, and better-known, brand associated with B.F. Skinner—which was itself in the grips of a "positivistic" conception of knowledge and method. The behaviorist dispensed with talk about a person's beliefs and desires—phenomena that were unobservable, and thus (so behaviorists thought) not empirically confirmable—in favor of trying to explain human behavior strictly in terms of stimuli and the responses they generate. The goal was to discover laws describing which stimuli cause which responses. Many Realists thought that a genuine science of law should do the same thing: it should discover which "stimuli" (e.g., which factual scenarios) produce which "responses" (i.e., what judicial decisions). This understanding of legal "science" is most vivid in the work of Underhill Moore, to whom we return below. For most of the Realists, however, the commitment to "science" and "scientific methods" was more a matter of rhetoric and metaphor, than actual scholarly practice: one sees it, for example, in the common Realist talk about
the necessity of "testing" legal rules against experience to see whether they produced the results they were supposed to produce.

American Legal Realism claimed Oliver Wendell Holmes, Jr. as its intellectual forebear, but emerged as a real intellectual force in the 1920s at two law schools in the Northeastern United States, Columbia and Yale. Karl Llewellyn, Underhill Moore, Walter Wheeler Cook, Herman Oliphant, and Leon Green were among the major figures in Legal Realism associated with these two schools (though Green ultimately spent most of his career at Northwestern and Texas, while Cook soon departed Columbia for Johns Hopkins). Not all Realists, however, were academics. Jerome Frank—who has had a disproportionate impact on the long-term reception of Realism—was a lawyer with considerable trial experience, who (like many Realists) later worked in President Franklin D. Roosevelt's "New Deal" Administration during the 1930's, and eventually served as a federal judge; he never held an academic appointment. Among legal theorists, the Realists are certainly notable for the sizable number who also enjoyed distinguished careers in the practice of law, including, for example, William O. Douglas (appointed to the U.S. Supreme Court by Roosevelt), and Thurman Arnold, founder of a prominent Washington, D.C. law firm that still bears his name.

Legal Indeterminacy

The Realists famously argued that the law was "indeterminate." By this, they meant two things: first, that the law was rationally indeterminate, in the sense that the available class of legal reasons did not justify a unique decision (at least in those cases that reached the stage of appellate review); but second, that the law was also causally or explanatory indeterminate, in the sense that legal reasons did not suffice to explain why judges decided as they did. Causal indeterminacy entails rational indeterminacy on the assumption that judges are responsive to applicable (justificatory) legal reasons.
to include not only statutes and precedents, but also broader moral and political principles. The Realists, consistent with their positivist intellectual culture, largely presumed that moral principles were subjective and malleable. There are certainly reasons to think the Realists were right, and Dworkin wrong, in this regard (cf. Leiter 2001a), but the topic is, unfortunately, unaddressed by the Realists themselves.

One final point about the Realist indeterminacy thesis bears emphasizing: For unlike the later Critical Legal Studies writers, the Realists, for the most part, did not overstate the scope of indeterminacy in law. The Realists were (generally) clear that their focus was indeterminacy at the stage of appellate review, where one ought to expect a higher degree of uncertainty in the law. Cases that have determinate legal answers are, after all, less likely to be litigated to the stage of appellate review. Thus, Llewellyn explicitly qualified his indeterminacy claim by saying that, "[i]n any case doubtful enough to make litigation respectable the available authoritative premises...are at least two, and...the two are mutually contradictory as applied to the case at hand" (Llewellyn 1931: 1239). And Max Radin noted that judicial "decisions will consequently be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact that makes the entire body of legal judgments seem less stable than it really is" (1942: 1271).

The Core Claim of American Legal Realism

All the Realists agreed that the law and legal reasons are rationally indeterminate (at least in the sorts of cases that reach the stage of appellate review), so that the best explanation for why judges decide as they do must look beyond the law itself. In particular, all the Realists endorsed what we may call "the Core Claim" of Realism: in deciding cases, judges respond primarily to the stimulus of the facts
of the case, rather than to legal rules and reasons. It is possible to find some version of the Core Claim in the writings of all the major Realists.

Oliphant, for example, gives us an admirably succinct statement when he says that courts respond to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outdated abstractions in opinions and treatises" (1928: 75). Oliphant's claim is confirmed by Judge Joseph Hutcheson's admission that "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause" (1929: 285). Similarly, Frank cited "a great American judge," Chancellor Kent, who confessed that, "He first made himself 'master of the facts.' Then (he wrote) 'I saw where justice lay, and the moral sense dictated the court half the time; I then sat down to search the authorities...but I almost always found principles suited to my view of the case'' (1930: 104 note). Precisely the same view of what judges really do when they decide cases is presupposed in Llewellyn's advice to lawyers that, while they must provide the court "a technical ladder" justifying the result, what the lawyer must really do is "on the facts...persuade the court your case is sound" (1930a: 76). Similarly, Frank quotes approvingly a former ABA President to the effect that "the way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination" (1930: 102).

Several points bear noting about how we should understand the Core Claim of Realism.

First, it is not simply the trivial thesis that judges must take account of the facts of the case in deciding the outcome. Rather, it is the much stronger claim that in deciding cases, judges are reacting to the underlying facts of the case, whether or not those facts are legally significant, i.e., whether or not they are relevant in virtue of the applicable legal rules. Second, the Core Claim is not the thesis that legal rules and reasons never affect the course of decision; rather it is the weaker claim that they
generally have no (or little) effect, especially in the sorts of cases with which the Realists were especially concerned: namely, that class of more difficult cases that reached the stage of appellate review.

Llewellyn is representative when he asks, "Do I suggest that...the 'accepted rules,' the rules the judges say that they apply, are without influence upon their actual behavior?" and answers, "I do not" (Llewellyn 1930b: 444). The Realist approach, says Llewellyn, "admits...some relation between any accepted rule and judicial behavior" but then demands that what that relation is requires empirical investigation, since it is not always the relation suggested by the "logic" (or content) of the rule (id.). As he puts the point elsewhere: Realists deny that "traditional...rule-formulations are the heavily operative factor in producing court decisions" (1931: 1237, emphasis added). But to deny only this claim is to admit that rules play some causal role in decisions.

Third, many of the Realists advanced the Core Claim in the hope that legal rules might be reformulated in more fact-specific ways: this, more than anything, accounts for the profound impact Realism had on American law and law reform. Thus, for example, Oliphant spoke of a "return to stare decisis" (1928), the doctrine that rules laid down in prior cases should control in subsequent cases that are relevantly similar. Oliphant's critique was that the "legal rules," as articulated by courts and scholars, had become too general and abstract, ignoring the particular factual contexts in which the original disputes arose. The result was that these rules no longer had any value for judges in later cases, who simply "respond to the stimulus of the facts in the concrete case before them rather than to the stimulus of over-general and outworn abstractions in [prior] opinions and treatises" (1928: 75). Oliphant argued that a meaningful doctrine of stare decisis could be restored by making legal rules more fact-specific. So, for example, instead of pretending that there is a single, general rule about the enforceability of contractual promises not to compete, Oliphant suggested that we attend to what the courts are really
doing in that area: namely, enforcing those promises, when made by the seller of a business to the
buyer; but not enforcing those promises, when made by a (soon-to-be former) employee to his
employer (1928: 159-160). In the former scenario, Oliphant claimed, the courts were simply doing the
economically sensible thing (no one would buy a business, if the seller could simply open up shop again
and compete); while in the latter scenario, courts were taking account of the prevailing informal norms
governing labor relations at the time, which disfavored such promises. (The 2nd Restatement of
Contracts, produced by the American Law Institute, later codified something very close to Oliphant’s
distinction.)

Two Branches of Realism

Although all Realists accepted the Core Claim, they parted company over the question of how
to explain why judges respond to the underlying facts of the case as they do. The “Sociological” Wing
of Realism—represented by writers like Oliphant, Moore, Llewellyn and Felix Cohen—thought—that
judicial decisions fell into predictable patterns (though not, of course, the patterns one would predict
just by looking at the existing rules of law). From this fact, these Realists inferred that various “social”
forces must operate upon judges to force them to respond to facts in similar, and predictable, ways.

The “Idiosyncracy Wing” of Realism, by contrast—exemplified most prominently by Frank and
Judge Hutcheson—claimed that what determines the judge’s response to the facts of a particular case
are idiosyncratic facts about the psychology or personality of that individual judge. Thus, Frank
notoriously asserted that “the personality of the judge is the pivotal factor in law administration” (1930:
111). (Note, however, that no Realist ever claimed, as popular legend has it, that “what the judge ate
for breakfast” determines her decision!) Or as Frank formulated the point elsewhere: the “conventional
theory” holds that “Rule plus Facts = Decision”, while his own view is that “the Stimuli affecting the