

# Re-Reading Legal Realism and Tracing a Genealogy of Balancing

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For it is not difficult to show that the legal order has always been and is a system of compromises between conflicting and overlapping human claims or wants or desires in which the continual pressure of these claims and of the claims involved in civilized social life has compelled lawmakers and judges and administrators to seek to satisfy the most they might with the least sacrifice.—Roscoe Pound<sup>1</sup>

Dean Pound has talked for many years of the “balancing” of interests, but without ever indicating which interests are more important than others or how a standard of weight or fineness can be constructed for the appraisal of “interests.”—Felix S. Cohen<sup>2</sup>

Genealogy is gray, meticulous, and patiently documentary. It operates on a field of entangled and confused parchments, on documents that have been scratched over and recopied many times. On this basis, it is obvious that Paul Ree was wrong . . . in describing the history of morality in terms of a linear development . . . . He assumed that words had kept their meaning, that desires still pointed in a single direction, and that ideas retained their logic; and he ignored the fact that the world of speech and desires has known invasions, struggles, plundering, disguises, ploys.—Michel Foucault<sup>3</sup>

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1. Roscoe Pound, *The Theory of Judicial Decision (III): A Theory of Judicial Decision for Today*, 36 HARV. L. REV. 940, 954-55 (1923).

2. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848 (1935).

3. MICHEL FOUCAULT, THE FOUCAULT READER 76, 76 (Paul Rabinow ed., 1984).

## INTRODUCTION

The conventional history of American legal thought conflates the Progressive movement and Legal Realism. In this well-worn account, the progressives mounted the first critique of Classical Legal Thought (CLT)<sup>4</sup> with the Supreme Court case *Lochner v. New York*<sup>5</sup> as the triggering event<sup>6</sup> and the second wave of critique by the realists in the 1920's and 30's brought the formalist era to a close. Any differences between the progressives and realists are seen as minor compared with their joint effort in undermining CLT. And yet, there is a feeling of uneasiness about our understanding of realism. For example, one history both states confidently that realism should “be regarded as the continuation of a particular trend—namely, the growing dissatisfaction with legal formalism—rather than as the beginning of something substantially new,”<sup>7</sup> but adds a hesitant note, “[r]ealism, quite simply, remains as elusive as it has been influential.”<sup>8</sup>

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4. For the origins of the term Classical Legal Thought to describe the era beginning in the mid-nineteenth century and extending into the twentieth century, see DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT*, at vii–viii, xxxi (2006).

5. 198 U.S. 45 (1905). In *Lochner*, the Supreme Court struck down a New York statute as an unconstitutional infringement of employers' contract rights. *Id.* at 64. The statute had limited the number of hours employees could work in bakeries and confectionaries. *Id.* at 53.

6. *E.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 3 (1992).

7. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 77 (1995). For other instances of conflation, see WILLIAM W. FISHER III, MORTON J. HORWITZ & THOMAS A. REED, *AMERICAN LEGAL REALISM*, at xiii–xiv (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (“The heart of the [Legal Realism] movement was an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence.”); HORWITZ, *supra* note 6, at 171 (“both intellectual movements [Progressive jurisprudence and Legal Realism] should be understood as subcategories of pre- and post- World War I Progressive legal thought, and Legal Realism needs to be seen primarily as a continuation of the reformist attack on orthodox legal thought.”).

8. DUXBURY, *supra* note 7, at 65.

This Article argues that the standard reading of Legal Realism is seriously flawed and a source of endless confusion in contemporary legal thought. Many academics who view themselves as heirs of the realists because of their anti-formalism are in fact modern day progressives, having missed the main points of realism. Legal realism was primarily a critique of progressive thought.<sup>9</sup> Of course the realists continued to assail formalism, but what makes their work interesting and important is their attack on the progressives.

Potential sources of our misreading of legal realism include its premature end<sup>10</sup> and the ongoing debate about who qualifies as a realist. This debate dates to early days with Karl Llewellyn's 1931 publication of a list of twenty realists and his remark, "[t]here are doubtless twenty more."<sup>11</sup> Any attempt to generate a list of realists leads to odd results. For example, Lon Fuller, who would not be on anyone's list, has been called the author of "perhaps the single most influential piece of Realist doctrinal work."<sup>12</sup>

This Article abandons the effort to decide who should be included in or excluded from the list of legal realists and

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9. The source of this idea is found in Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U.L. REV. 631, 636 (2003) ("I depart from current fashion by treating legal realism as the critical devastation of sociological jurisprudence . . . rather than as 'essentially' an extension of the sociological jurists' critique of CLT.").

10. Legal Realism was in full retreat by the late 1930's. See Curtis Nyquist, *Llewellyn's Code as a Reflection of Legal Consciousness*, 40 NEW ENG. L. REV. 419, 421 (2006). Karl Llewellyn, after publishing six realist contract articles in the 1930's, abandoned his more radical thought and turned his attention to production of the Uniform Commercial Code. *Id.* For a summary of the reasons underlying the decline of realism, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 323 (1997) (discussing the twin threats of fascism and Stalinism, and the realists forgoing critique "in favor of the more pressing task of managing the new liberal, regulatory, interventionist state.").

11. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226–27 n.18 (1931). For a discussion of the exchange between Llewellyn and Pound about the list of realists, see N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN 202–18, app. at 343–46 (1997).

12. HORWITZ, *supra* note 6, at 184.

reframes our understanding of legal realism. It divides the early twentieth century into two eras; a Progressive Era from 1905 to 1923 and a Realist Era from 1923 to 1941. While the dates are somewhat arbitrary and there are precursors, remnants, and significant overlap,<sup>13</sup> the legal thought of these two eras display stark differences and the world of the Realist Era was dramatically different from the Progressive Era. *Lochner* was decided in 1905 and in that same year, Roscoe Pound published *Do We Need a Philosophy of Law?* the first of his path-breaking pre-World War I articles.<sup>14</sup> The year 1923 was a pivotal transitional moment. Benjamin Cardozo's *The Nature of the Judicial Process*<sup>15</sup> published in 1921 seemed a full flowering of Progressive Era thought, but trouble lurked on the horizon. In 1922 a French lawyer Pierre Lepaulle published a devastating critique of Pound in the *Harvard Law Review*, declaring, "[s]ociological jurisprudence, like all human creations, is not a permanent thing: it may represent the best forces of the present generation; it will certainly dissatisfy the next."<sup>16</sup> His prophecy would come true, perhaps more quickly than he realized, in the following year when Underhill Moore published *Rational Basis of Legal Institutions*<sup>17</sup> signaling a profound turn in legal thought. The years 1923 to 1941 would witness a rich flowering of legal thought unprecedented in our history. The publication in 1941 of Lon Fuller's *Consideration and*

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13. For discussion of Oliver Wendell Holmes, Jr. as a precursor of the Realist Era and Roscoe Pound as a Progressive Era remnant, see *infra* notes 333–35, 413–20, 391, 428, 475, 510 and accompanying text.

14. *Lochner v. New York*, 198 U.S. 45 (1905); Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339 (1905).

15. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

16. Pierre Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 850 (1922).

17. Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 612 (1923) ("Human experience discloses no ultimates. Events are related to events so that each is at once an end and a means. Ultimates are phantoms drifting upon the stream of day dreams.").

*Form*<sup>18</sup> brought the Realist Era to a close.

Furthermore, in the Realist Era, balancing, which has become the “default method of legal reasoning in Western legal systems,”<sup>19</sup> both moves to center stage and begins to divide. There is a teleological view of balancing, dominant in the Progressive Era and still the prevailing approach, and an attack on teleological balancing, which this Article calls “conflicting considerations.” Unfortunately, both sides used a single term “balancing” and the parchments of the Realist Era are “entangled and confused” as balancing unravels as a unitary concept. Exposing the double meaning of balancing requires a close reading of Realist Era scholarship. Furthermore, the most striking work in the Realist Era displays a cognitive relativism, not found in the legal thought of any prior era. This relativism was central to the rise of conflicting considerations balancing. Our failure to recognize a link between a conflicting considerations concept of balancing and cognitive relativism creates the false hope that balancing provides a determinate method of resolving legal disputes.<sup>20</sup>

Part I of this Article provides a quick summary of CLT, its critique in the Progressive Era, and the progressive’s proposals for reconstruction of legal thought. Part II is a close re-reading of the literature from the Realist Era in support of the argument that the principal target was the Progressive Era.<sup>21</sup> Part III traces the genealogy of our ambiguous view of balancing and connects this genealogy

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18. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

19. DUNCAN KENNEDY, *Thought on Coherence, Social, Values, and National Tradition in Private Law*, in LEGAL REASONING: COLLECTED ESSAYS 175, 186 (2008).

20. *See id.* at 189 (“The weakness of proportionality [balancing] from my point of view is not that it is unprincipled, but that it is excessively principled. The universalization requirement for principles . . . impose[s] restrictions on the judge that I think he should be ready to discard when they conflict with his intuition of justice”).

21. Part II of this Article relies on original sources while secondary literature is generally relegated to footnotes.

with the Realist Era critique of the Progressive Era. Part IV is a conclusion.

## I. CLASSICAL LEGAL THOUGHT AND THE PROGRESSIVE ERA

### A. *Classical Legal Thought*

Law, considered as a science, consists of certain principles or doctrines . . . Each of these doctrines has arrived at its present state by slow degrees . . . [t]his growth is to be traced in the main through a series of cases [but] . . . [t]he vast majority are useless and worse than useless for any purpose of systematic study . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.<sup>22</sup>

The rise of CLT in the second half of the nineteenth century created a sharp break with pre-classical thought and completely reordered the judicial universe.<sup>23</sup> Public law was separated from private law with the will theory providing a high level, abstract ordering principle.<sup>24</sup> Public law reflected the will of the state while private law reflected the will of the individual and the “key image was of powers and rights that were ‘absolute within their spheres.’”<sup>25</sup> In *Lochner*, for instance, both the majority and the dissent by Justice Harlan share an understanding that the state of New York has a “public” police power to protect health and safety while employers have a Fourteenth Amendment “private” right to freely contract with their employees. In their view, the court’s role is limited to policing the border between public and private to insure each party acts only

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22. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi-vii (1871).

23. KENNEDY, *supra* note 4, at xi.

24. *Id.*

25. *Id.*

within its own sphere. New York, it determined, had invaded the employers' sphere. Under CLT judges were "commit[ed] to finding a determinate legal actor to obey, a refusal to interject himself or to arbitrate."<sup>26</sup>

Furthermore, CLT viewed law as a science of legal categories with nineteenth century geometry being the closest analogy.<sup>27</sup> Within private law, private law subjects were seen as not only distinct from public law, but also as separate from each other with courts policing the boundaries between contract, tort, restitution, and other private law subjects. Decisions like *Britton v. Turner*,<sup>28</sup> an opinion from the first half of the nineteenth century, disappear from the reports. *Britton* awarded \$95 to a farm laborer who had been working under a one-year contract.<sup>29</sup> He was to be paid \$120 at the end of the year, but left his employment after nine and one-half months.<sup>30</sup> The court pondered the policy consequences of its decision and allowed the plaintiff to recover in *quantum meruit*—the award "will leave no temptation . . . to drive the laborer from his service, near the close of his term."<sup>31</sup> In addition, the court pointed out that if the plaintiff had breached the contract before performance was to begin, the defendant's damages would have been negligible. Therefore, a judgment for the defendant would have an odd consequence: "the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract."<sup>32</sup> Under CLT, *Britton* would be categorized as a

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26. *Id.* at 209. For an extensive discussion of *Lochner* as a reflection of CLT, see *id.* at 8–16.

27. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16–20 (1983); Curtis Nyquist, *Single-Case Research and the History of American Legal Thought*, 45 NEW ENG. L. REV. 589, 591 (2011).

28. 6 N.H. 481 (1834).

29. *Id.* at 483.

30. *Id.* at 482.

31. *Id.* at 486–87, 494.

32. *Id.* at 487. To illustrate the court's point, had the laborer never shown

case in contract, not restitution—in contract, a party who breaches is not allowed to recover. The categorical scheme constructed by CLT would demand judgment for the defendant and instruct a court to ignore the policy consequences of the particular result.<sup>33</sup>

This Article focuses on contract, which was considered the core of CLT. Important markers were the introduction of the case method in Langdell's contract course (fall of 1870),<sup>34</sup> Langdell's "guide" to his contract casebook published as an appendix to the second edition (1880),<sup>35</sup> Oliver Wendell Holmes's lectures *The Common Law* (delivered in the fall of 1880 and published in 1881),<sup>36</sup> and Samuel Williston's casebook and scholarship in contract and sale of goods.<sup>37</sup> Thomas Grey summarizes the goal of CLT as for "the legal system [to] be made complete through universal formality, and universally formal through

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up he would have been liable for the difference between the contract price and the market price (or the cost of hiring a substitute). That amount likely would have been just a few dollars or \$0. In the actual case he works nine and one-half months, foregoing alternative employment. *Id.* Had the court not awarded damages he would have lost \$95.

33. Grey, *supra* note 27, at 15 (discussing how policy under CLT was relevant in establishing high level principles, but should not be used in determining particular rules or deciding cases).

34. LANGDELL, *supra* note 22, at v–vii.

35. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS, app. at 255–77 (photo. reprint 1980) (2d ed. 1880).

36. OLIVER WENDELL HOLMES, THE COMMON LAW 3, 195–264 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). Holmes participated both in the construction of CLT and in its demolition. *The Common Law* was his principal work of construction while Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894) [hereinafter Holmes, *Privilege*] signaled his turn toward critique.

37. Williston was on the faculty at Harvard Law School from 1890 to 1938 and published extensively in contract and sale of goods throughout this period. SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 183, 264, 265, 266, 334 (1941). In Grant Gilmore's view, Williston's contribution to CLT provided "meticulous, although not always accurate, scholarly detail." GRANT GILMORE, THE DEATH OF CONTRACT 15 (1995).



conceptual order.”<sup>38</sup> CLT’s science of legal categories combined induction and deduction.<sup>39</sup> From the core cases in a field of study, the legal scientist would induce the high level principles that were central to the field.<sup>40</sup> From these principles the scientist would then deduce the lower-level rules to be applied by courts.<sup>41</sup> In contract, for example, one of the core cases was *Mills v. Wyman*, which helped establish the bargain theory of consideration.<sup>42</sup> From the bargain theory, numerous particular rules were thought to follow as a matter of logic: offers could be revoked unless there was some consideration to hold the offer open; reliance and benefit were insufficient grounds for promise enforcement unless they had been bargained for; in negotiating contracts, parties could do or say anything short of lying, without liability, as long as they refrained from issuing or accepting an offer; and so on.<sup>43</sup>

By the late nineteenth century, CLT had become the dominant system of thought for lawyers, judges, and law faculty. It derived much of its power through its linkage with *laissez faire* classical economics, utilitarian philosophy, and the “survival of the fittest” social theory of Herbert Spencer. In a 1926 retrospective on the era, John Maynard Keynes captured the power of this interlocking system, “[t]o the philosophical doctrine that Government has no right to

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38. Grey, *supra* note 27, at 11.

39. *Id.* at 40.

40. *Id.*

41. *Id.* at 40.

42. 20 Mass. (3 Pick.) 207 (1825). In *Mills*, the plaintiff cared for the defendant’s son who had fallen ill. *Id.* After the son’s death, the defendant learned of the plaintiff’s action and promised to pay his expenses. *Id.* at 209. When the defendant failed to perform the plaintiff sued for breach of contract. *Id.* at 207. The opinion held the promise unenforceable and explained that since the act was performed prior to the promise, it could not be consideration. *Id.* at 209, 212. For further discussion of *Mills* see Nyquist, *supra* note 27, at 610–16; Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749 (1997).

43. GILMORE, *supra* note 37, at 21–24, 36; Nyquist, *supra* note 27, at 596.

interfere, and the divine miracle that it has no need to interfere, there is added a scientific proof that its interference is inexpedient.”<sup>44</sup>

### B. *The Progressive Era*

For nearly a generation the leaders of the bar with few exceptions have not only failed to take part in any constructive legislation designed to solve in the interest of the people our great social, economic and industrial problems, but they have failed likewise to oppose legislation prompted by selfish interests. They have often gone further in disregard of public interest. They have, at times, advocated as lawyers legislative measures which as citizens they could not approve.<sup>45</sup>

The consequences for society of CLT and nineteenth century thought were generally apparent by the turn of the twentieth century—industrial strife, the urban poor, unprotected immigrant communities, child labor, and an unsafe food supply, to name but a few. Efforts to address these ills started piecemeal but soon coalesced into the progressive movement. Jane Addams founded Hull House in 1889<sup>46</sup>—the first of nineteen urban settlement houses providing a wide variety of services to immigrant communities including education, housing, and employment.<sup>47</sup> In 1889, John Dewey published *The School and Society*, calling for reforms in education.<sup>48</sup> “Dewey’s school was to be socially minded,” observes Morton White,

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44. JOHN MAYNARD KEYNES, *THE END OF LAISSEZ FAIRE* 11 (1926), *quoted in* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT*, 305 (1979).

45. Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 560–61 (1905), *quoted in* MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 204 (2009).

46. LOUISE W. KNIGHT, *CITIZEN: JANE ADDAMS AND THE STRUGGLE FOR DEMOCRACY* 179, 198 (2005).

47. *See id.* at 274–75.

48. JOHN DEWEY, *THE SCHOOL AND SOCIETY* (1899), *reprinted in* 1 JOHN DEWEY: *THE MIDDLE WORKS, 1899–1924*, at 5 (Jo Ann Boydston ed., 1976).

“imbued with the values of community life.”<sup>49</sup> In the 1890’s, intellectuals in a wide range of disciplines including philosophy, economics, and political science “had been convinced that logic, abstraction, deduction, mathematics and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life.”<sup>50</sup>

The attack on formalism in law arrived relatively late. Central figures in the Progressive Era critique of CLT and proposals for reconstruction include Roscoe Pound (of particular note, four law review articles published between 1905 and 1909),<sup>51</sup> Louis Brandeis (litigation strategy first deployed in *Muller v. Oregon*),<sup>52</sup> Wesley Newcomb Hohfeld (two-part law review article published in 1913 and 1917),<sup>53</sup> and Benjamin Cardozo, whose judicial philosophy as expressed in the *Nature of the Judicial Process*<sup>54</sup> and reflected in his opinions over twenty-five years<sup>55</sup> established him as the primary *judicial* figure of the progressive movement.

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49. MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 97 (1949).

50. *Id.* at 11.

51. Pound was incredibly prolific throughout his career. Between 1905 and 1909 he published thirty-nine articles, addresses, reviews, editorials, and reports. See FRANKLYN C. SERATO, *A BIBLIOGRAPHY OF THE WRITINGS OF ROSCOE POUND* 5–8, 56–8 (1942). This Article focuses on the four articles that would become the core of Progressive Era thought.

52. See *Muller v. Oregon*, 208 U.S. 412, 415–16 (1908).

53. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917) [hereinafter Hohfeld, *Judicial Reasoning*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913) [hereinafter Hohfeld, *Fundamental Legal Conceptions*].

54. See CARDOZO, *supra* note 15, at 9.

55. For a description of Cardozo’s years on the bench, see generally ANDREW L. KAUFMAN, *CARDOZO* 117–45, 491–565 (1998).

## i. Roscoe Pound

Pound's scholarship introduced the themes that would frame the Progressive Era. He published *Do We Need a Philosophy of Law*<sup>56</sup> in May of 1905, a month after the decision in *Lochner* was announced.<sup>57</sup> Pound's article does not mention *Lochner*—presumably in April the article's publication process was well underway—but the decision galvanized support for Pound's ideas. *Do We Need* contains both a critique of CLT and a proposal for reconstruction. This critique/reconstruction structure, while not a Pound innovation, was deployed in all of his scholarship from the Progressive Era and has become embedded in post-CLT scholarship.<sup>58</sup> His critique focuses on the common law which “for the first time . . . finds itself arrayed against the people.”<sup>59</sup> It exhibits “too great a respect for the

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56. Pound, *supra* note 14. Pound had been appointed Dean of the University of Nebraska College of Law in 1903, but his ultimate goal was joining the faculty at Harvard Law School where he had been a student for the 1889–90 academic year. See DAVID WIGDORE, ROSCOE POUND: PHILOSOPHER OF LAW 46, 103 (1974). In 1890 he had returned to read law in his father's firm in Lincoln, Nebraska and was admitted to the bar the same year. See HULL, *supra* note 11, at 40. Pound served as dean at Nebraska for four years, was a faculty member at law schools in Chicago for three years (two years at Northwestern and one at the University of Chicago) and then joined the Harvard law School faculty in the fall of 1910. See WIGDORE, *supra*, at 130; HULL, *supra* note 11, at 72, 76–77. He became dean at Harvard in 1916. See WIGDORE, *supra*, at 204. For discussions of the pre-1910 period in Pound's life, see generally *id.* at 31–159; HULL, *supra* note 11, at 36–75.

57. *Lochner v. New York*, 198 U.S. 45 (1905); DAVID E. BERNSTEIN, REHABILITATING LOCHNER 33 (2011).

58. Duncan Kennedy provides a summary of the scholarship legacy of the Progressive Era:

They often invented critical techniques as part of ground-clearing operations for their “reconstructive” efforts . . . To this day, their posterity includes the scholar who develops an elaborate critique of earlier attempts to rationalize a field, and then offers his or her own alternative. The alternative sinks without a stone, but the critique not only effectively does in its object but survives as a model for future destructive operations.

KENNEDY, *supra* note 10, at 82.

59. Pound, *supra* note 14, at 344.

individual”<sup>60</sup> and “too little respect for the needs of society.”<sup>61</sup> He enumerates nineteen state court decisions striking down employee protectionist legislation on the grounds of unconstitutional infringement of freedom of contract.<sup>62</sup> Some particularly egregious results nullified statutes fixing pay periods, prohibiting fines in cotton mills, prohibiting wage deductions to establish hospital and relief funds, regulating the measurement of coal in determining wages, and prohibiting payment of wages in store orders.<sup>63</sup> The common law “knows individuals only” treating questions of the “highest social import as mere private controversies between John Doe and Richard Roe.”<sup>64</sup> Pound has little to offer by way of a remedy other than a suggestion that law schools train students in the “social, political and legal philosophy abreast of our time.”<sup>65</sup>

*The Need of a Sociological Jurisprudence*<sup>66</sup> from 1907 continues the critique of the common law’s application of individual standards “in the teeth of the collective standard which is or ought to be expressed in the law,”<sup>67</sup> while Pound’s ideas for reconstruction are more fully developed. He also provides a name, “Sociological Jurisprudence,” which would become a catch-phrase in the Progressive

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60. *Id.*

61. *See id.* at 344–45.

62. *See id.*

63. *See id.* at 345.

64. *Id.* at 346.

65. *Id.* at 352. Pound had been a transformational dean at Nebraska but the same cannot be said for his deanship at Harvard. *See* WIGDORE, *supra* note 56, at 108–10. In stark contrast to teaching and curricular innovations at Columbia, Yale, and Johns Hopkins in the 1920’s and 30’s, there were no significant changes to the Harvard curriculum or teaching methods during Pound’s twenty years (1916–36) as dean. *See id.* at 251–54. For details of Pound’s deanships, *see generally id.* at 103–31, 234–40, 244–54; HULL, *supra* note 11, at 51–55, 117–24, 160–66.

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

67. *Id.* at 607.

Era.<sup>68</sup> He points to Continental Europe where “the sociological tendency, is already well-marked”<sup>69</sup> and calls for “a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of to-day.”<sup>70</sup> In other words, law should be based on the study of social conditions,<sup>71</sup> and should be “in the hands of a progressive and enlightened caste whose conceptions are in advance of the public and whose leadership is bringing popular thought to a higher level.”<sup>72</sup> Pound finds some signs of progress, citing legislation imposing obligations on “classes of persons and classes of subjects”<sup>73</sup> as making inroads on freedom of contract and pointing out that even the common law regards certain contracts (*e.g.*, insurance) as specialized and, therefore, not subject to common law contract rules.<sup>74</sup>

Pound’s *Mechanical Jurisprudence*<sup>75</sup> from 1908 calls for a new jurisprudence which will allow an escape from “the domination of the ghosts of departed masters”<sup>76</sup>:

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

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68. *Id.*

69. *Id.* at 609.

70. *Id.* at 611.

71. Pound had become friends with University of Nebraska sociologist Edward A. Ross and was profoundly affected by his work. *See* WIGDOR, *supra* note 56, at 111–13; HULL, *supra* note 11, at 55–56. In 1906 he would write to Ross, “I believe you have set me in the path the world is moving in.” WIGDOR, *supra* note 56, at 112. In Chicago, Pound was introduced to Jane Addams, delivered lectures at Hull House, and served on its Juvenile Court Committee. *See* HULL, *supra* note 11, at 72; WIGDOR, *supra* note 56, at 141.

72. Pound, *supra* note 66, at 612.

73. *Id.* at 613

74. *See id.*

75. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

76. *Id.* at 606.

position as an instrument.<sup>77</sup>

Law must be judged by results, “not by the niceties of its internal structure.”<sup>78</sup> Pound argues that courts cannot provide solutions to the issues confronting society and that other institutions are better suited to the task.<sup>79</sup> Legislatures and administrative agencies can hold hearings, commission studies, and sponsor conferences; and bar associations have the expertise to propose procedural reforms.<sup>80</sup> Pound calls for common-law lawyers to abandon their hostility to legislation, cites instances of jurists’ support of legislation in Roman Law and contemporary Continental Europe, and concludes, “[i]t is only a lip service to our common law that would condemn it to a perpetuity of mechanical jurisprudence through distrust of legislation.”<sup>81</sup>

Pound’s *Liberty of Contract*<sup>82</sup> is his most sophisticated and penetrating work from this pre-1910 period, both as a critique and as a proposal for reconstruction. He attacks the “liberty of contract” principle on two fronts. First, he argues the concept never existed in its pure form as equity has always intervened to protect “weak, necessitous, or unfortunate promisors.”<sup>83</sup> The phrase is of recent origin; the first case using it as a basis for a decision is from 1886 and there is no thorough discussion of it as a fundamental

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77. *Id.* at 609–10.

78. *Id.* at 605.

79. *See id.* at 621–23. It is ironic that *Mechanical Jurisprudence* was published in the same year Louis Brandeis filed his legendary brief in *Muller v. Oregon*, 208 U.S. 412 (1908). The 113 page brief contained two pages discussing legal principles and about 100 pages of medical texts, factory reports, and other sociological data. *See* UROFSKY, *supra* note 45, at 216. For further discussion of the Brandeis Brief, see *infra* notes 108–18 and accompanying text.

80. *See* Pound, *supra* note 75, at 621–22.

81. *Id.* at 622–23.

82. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

83. *Id.* at 482.

natural right in the literature prior to 1891.<sup>84</sup> In other words, “liberty of contract” was an invention of the late nineteenth century created to defeat protectionist legislation. Second, in many contracts there is in fact no equality of bargaining power. In industrial employment contracts courts ignore conditions of inequality and “force upon legislation an academic theory of equality in the face of practical conditions of inequality.”<sup>85</sup> In *Adair v. United States*,<sup>86</sup> for example, the Supreme Court struck down federal legislation prohibiting employers in the railway industry from requiring that employees not join a labor union as a condition of employment.<sup>87</sup> Pound’s article begins with a lengthy quote from the majority opinion in *Adair* including the following:

So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee . . . . In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land.<sup>88</sup>

Pound cites a sociologist who refers to any discussion of equal rights in these contracts as “utterly hollow” and he castigates the court for ignoring the “actual industrial conditions” of such contracts.<sup>89</sup>

In *Liberty of Contract*, Pound discusses the political consequences of the common law’s distrust of legislation which reflects the maxim, “government governs best which governs least,”<sup>90</sup> and he spells out its disastrous

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84. *Id.* at 455 (citing *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886)).

85. *Id.* at 454.

86. 208 U.S. 161 (1908).

87. *Id.* at 179–80.

88. Pound, *supra* note 82, at 454 (quoting *Adair*, 208 U.S. at 174–75).

89. *Id.*

90. *Id.* at 462.



consequences for society: lawlessness, industrial discord, and loss of respect for courts.<sup>91</sup> The judiciary is ill equipped to address changes in society and Pound points to Supreme Court Justice Stephen J. Field as an illustration.<sup>92</sup> Field had a Puritan background and a career “upon the frontier in the time and at the place where the individual counted for more and the state-imposed law for less than at any other period in our history.”<sup>93</sup> No wonder, then, that courts treat employment contracts “as if the parties were individuals—as if they were farmers haggling over the sale of a horse.”<sup>94</sup> A study of the underlying conditions in New York bakeries finding employees working “unreasonable hours under unsanitary conditions” demonstrated that “the legislature was right and the court [in *Lochner*] was wrong.”<sup>95</sup> Jurisprudence has been the last science to move “away from the method of deduction from predetermined conceptions”<sup>96</sup> and has “decay[ed] into technicality” becoming a “mechanical jurisprudence.”<sup>97</sup> CLT’s attempt to deduce legal rules from general principles has produced a “cloud of rules that obscures the principles from which they were drawn.”<sup>98</sup> As a remedy, Pound repeats his earlier call for a sociological movement in law, based on the study of

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91. Pound quotes Jane Addams, referring to her as “an acute and well-informed observer:”

From my own experience, I should say, perhaps, that the one symptom among workingmen which most definitely indicates a class feeling, is a growing distrust of the integrity of the courts, the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is on the corporation side.

*Id.* at 487.

92. *Id.* at 470.

93. *Id.*

94. *Id.* at 454.

95. *Id.* at 480.

96. *Id.* at 464.

97. *Id.* at 462.

98. *Id.* at 457.

the underlying conditions leading to society's ills and adds that included in that movement is "pragmatism as a philosophy of law."<sup>99</sup>

ii. Louis Brandeis

Louis Brandeis is a significant figure in the Progressive Era as a lawyer advocating in the public interest<sup>100</sup> and through his numerous speeches and articles. His appointment to the U.S. Supreme Court in 1916 installed progressive thought on the court. "[H]is judicial opinions," comments Edward A. Purcell, Jr., "frequently articulated the values of Progressivism and nourished the activism of others."<sup>101</sup>

Brandeis had anticipated one of the principles of progressive thought when, in 1891, he addressed the Massachusetts legislature on a reform issue: "[n]o law can be effective which does not take into consideration the conditions of the community for which it is designed."<sup>102</sup> In a speech from 1905 before Harvard undergraduates, repeated later for law students, Brandeis delivers a blistering attack on the leaders of the bar holding them responsible for the decline in the prestige of the profession.<sup>103</sup> He accuses them of failing to take part in constructive legislation and expending their efforts "almost wholly in opposition to the contentions of the people."<sup>104</sup> In

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99. *Id.* at 464.

100. Brandeis practiced in St. Louis, Missouri, for seven months and then in Boston from 1879 to 1916; for details of his career as a lawyer, see PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 26–41, 54–113 (1984); UROFSKY, *supra* note 45, at 40–102, 201–227.

101. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 118 (2000).

102. UROFSKY, *supra* note 45, at 209.

103. See Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559–60 (1905).

104. *Id.* at 560–61.

litigation, they have primarily represented the side of corporations while “the people have been represented in the main by men of very meager legal ability.”<sup>105</sup> He foresees an intensified struggle between “those who have and those who have not” and concludes, “people are beginning to doubt whether in the long run democracy and absolutism can co-exist in the same community.”<sup>106</sup> The speech apparently had a profound impact on its audiences, which included law student Felix Frankfurter.<sup>107</sup>

The innovation of the “Brandeis brief,”<sup>108</sup> first deployed in *Muller v. Oregon*,<sup>109</sup> would become an important part of Brandeis’s litigation strategy.<sup>110</sup> In subsequent cases he participated in preparing briefs with hundreds of pages of factual material.<sup>111</sup> He fully intended the Brandeis brief to be a direct attack on CLT: “[i]n the past the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts.”<sup>112</sup> Brandeis brought

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105. *Id.* at 560.

106. *Id.* at 562.

107. UROFSKY, *supra* note 45, at 205. Brandeis later commented to his wife, “I am meeting here & there men who heard my lecture at Brooks house years ago & say it wholly changed their point of view.” *Id.*

108. The Brandeis brief combined many of the essential principles of Pound’s sociological jurisprudence. *See, e.g., id.* at 217 (discussing how the Brandeis brief reflected “the need for facts; education of bench, bar, and public; the relationship of law to the economic, social, and political realities of the day; the need to mitigate some of the harsher aspects of industrialization; and the use of law as an instrument of social policy.”).

109. 208 U.S. 412, 419 (1908). Interestingly, Pound never changed his view that legislatures were better positioned than courts to investigate facts. *See* WIGDOR, *supra* note 56, at 229. Pound’s briefs focused on legal argument and did not use extra-legal information. *Id.*

110. *Muller*, 208 U.S. at 419.

111. UROFSKY, *supra* note 45, at 225. Brandeis’s briefs in two cases were four-hundred and six-hundred pages in length and in a third case, 1,021 pages. *Id.*

112. Ernest Poole, *Brandeis*, AM. MAG., no. 71, Nov. 1910–Apr. 1911, at 493; *quoted in* STRUM, *supra* note 100, at 124–25.

the strategy with him to the bench. He thought lawyers often failed to produce sufficient factual data to support their arguments and he asked his clerks to perform the necessary background research.<sup>113</sup> In *Jay Burns Baking Co. v. Bryan*,<sup>114</sup> for example, the majority struck down a Nebraska statute regulating the weight of loaves of bread.<sup>115</sup> In dissent, Brandeis notes:

The determination of these questions involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of bread-making and the usages of the trade, with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws.<sup>116</sup>

Brandeis then provides those facts in thirty-six footnotes detailing the production of bread, surveying weight regulation at the federal, state, and local level, and citing arguments in favor of regulation published in *Bakers' Weekly*.<sup>117</sup> Brandeis admits that some of these facts were not known at the time of the lower court judgment, but he is not deterred since "experience gained under similar legislation, and the result of scientific experiments"<sup>118</sup> is relevant whenever produced.

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113. BRANDEIS ON DEMOCRACY 16 (Philippa Strum ed., 1995).

114. 264 U.S. 504 (1924).

115. *Id.* at 517.

116. *Id.* at 519–20.

117. *Id.* at 519–34.

118. *Id.* at 533.

## iii. Wesley Newcomb Hohfeld

Wesley Newcomb Hohfeld is perhaps the most significant obscure figure in American legal thought. He died in 1918 at the young age of thirty-eight, but his ideas lived on through two law review articles<sup>119</sup> and through the influence of his Yale Law School colleagues and students.<sup>120</sup> On an initial read, Hohfeld seems to be a formalist but in fact his work is a devastating critique of CLT and the classical analytical jurisprudence of Jeremy Bentham, John Stuart Mill, and John Austin. Hohfeld's system is a unified field theory of law, sorting legal relations into four (and only four) types and is now seen as "a landmark in the history of legal thought."<sup>121</sup> His system has proven to be remarkably durable. Several attempts to expand or contract the number of relations, and attacks on the legitimacy of some of the relations were—and remain—unconvincing.<sup>122</sup>

Hohfeld's central insight is that certain terms critical to legal analysis are used in a variety of ways and have no

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119. See *supra* note 53 and accompanying text.

120. Faculty colleagues Arthur Corbin and Walter Wheeler Cook were particularly important in persuading others of the importance of Hohfeld's work. Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 238 (2002). Karl Llewellyn was a student who deployed Hohfeld's scheme and vocabulary throughout his career. See N.E.H. Hull, *Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910–1919*, 45 J. LEGAL EDUC. 235, 263 (1995). Two examples of Hohfeld's influence are Llewellyn's narrow issue approach to law (evidenced in his drafting of Article 2 of the Uniform Commercial Code) and the "bundle of rights" theory of property. Nyquist, *supra*, at 238 n. 3, 241. For detailed discussion of Hohfeld's work see also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982).

121. Singer, *supra* note 120, at 978. Classical analytical jurisprudence of the early nineteenth century was a critical component in the construction of CLT. It combined *laissez faire* economic theory, utilitarian philosophy, and individualistic social theory. See ATIYAH, *supra* note 44, at 324–25, 353–55, and accompanying text.

122. The efforts of Albert Kocourek, for instance, to modify and improve Hohfeld's system have been largely ignored. See Singer, *supra* note 120, at 992.

generally agreed meaning.<sup>123</sup> “This invites confusion,” Llewellyn comments, “it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable.”<sup>124</sup> In particular, the word “right” is used in four different ways. At times it means a person has an effective claim against another.<sup>125</sup> At other times, it means a person is not subject to an effective claim by another.<sup>126</sup> A third possible meaning is that “right” means a person has an ability to change a legal relation of another.<sup>127</sup> At other times, the word “right” means a person is not subject to having a legal relation changed by the sole act of another.<sup>128</sup>

Hohfeld creates a vocabulary that distinguishes the four uses of the word right; “right,” “privilege,” “power,” and “immunity.”<sup>129</sup> Further, he points out that legal relations

123. See K.N. LLEWELLYN, *THE BRAMBLE BUSH* 95 (1960).

124. LLEWELLYN, *supra* note 123.

125. In the sentence “A party to a binding contract has a right to the other party’s performance,” the word right means that if a party fails to perform the other party to the contract has an effective claim for breach. See Nyquist, *supra* note 120, at 239–40.

126. In the sentence “Since flag burning is protected speech, a person has a right to burn a flag,” the word right means the state does not have an effective claim. See *id.*

127. In the sentence “The state of Massachusetts has a right to call me to jury duty (since Massachusetts is my domicile),” the word right means that my privilege of not reporting for jury duty could be changed to a duty to report if Massachusetts sends me a summons. See *id.* at 239–41

128. In the sentence “I have a right not to be called to jury duty in Rhode Island (since Rhode Island is not my domicile),” the word right means my privilege of not reporting for jury duty could not be changed even if Rhode Island sends me a summons. See *id.* at 239–40.

129. In Hohfeld’s scheme the sentences in footnotes 125 through 128 would read:

“A party to a binding contract has a right to the other party’s performance.”

“Since flag burning is protected speech, a person has a privilege to burn a flag.”

“The state of Massachusetts has a power to call me to jury duty (since Massachusetts is my domicile).”

are always between two persons and he provides terminology for the other end of the relation; “duty,” “no-right,” “liability,” and “disability.” In other words, a legal relation is like two people holding the opposite ends of a stick.<sup>130</sup> Hohfeld uses the term correlative to describe the opposite ends of legal relations; right is always linked with duty, and so on.<sup>131</sup> In his 1913 article he provides a table of correlatives, depicted in Table 1.

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“I have an immunity from being called to jury duty in Rhode Island (since Rhode Island is not my domicile).”

See *id.* at 240. Joseph Singer defines the legal relations as follows:

“Rights” are claims, enforceable by state power, t[h]at others act in a certain manner in relation to the rightholder. “Privileges” are permissions to act in a certain manner without being liable for damages to others and wit[h]out others being able to summon state power to prevent those acts. “Powers” are state-enforced abilities to c[h]ange legal entitlements held by oneself or ot[h]ers, and “immunities” are security from having one’s own entitlements changed by others.

Singer, *supra* note 120, at 986. The only term in Hohfeld’s vocabulary that is potentially misleading is “liability” which in general has a negative cast. That is not Hohfeld’s intention and he is careful to point out that a “liability” can be a good thing; in his system liability only means that another can change one of your legal relations:

Thus X, the owner of a watch, has the power to abandon his property . . . and correlatively to X’s power of abandonment there is a liability [to become the new owner] in every other person. But such a liability instead of being onerous or unwelcome, is quite the opposite.

Hohfeld, *Fundamental Legal Conceptions*, *supra* note 53, at 54 n.90.

130. See Nyquist, *supra* note 120, at 240. In *The Bramble Bush* Llewellyn summarizes the idea of legal relations:

There is a person on *each* end, always. A has a right that B shall do something. I repeat, when, should B fail to do it, A can get the court to make trouble for B. But the right has B on the other end. *The right is indeed the duty*, a duty seen other end to. The relation is identical; the only difference is in the point of observation.

LLEWELLYN, *supra* note 123, at 96.

131. See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 53, at 30.

TABLE 1. Jural Correlatives<sup>132</sup>

Right	Privilege	Power	Immunity
Duty	No-Right	Liability	Disability

Hohfeld's system undermines CLT and classical analytical jurisprudence in several ways. The classics focused their work on privileges (they used the term liberties) and rights.<sup>133</sup> Hohfeld points out that they were blending two different legal relations.<sup>134</sup> Moreover, they assumed a privilege imposed a duty of non-interference on others.<sup>135</sup> In the classics' scheme, once the state had decided an act was privileged, it meant both that others have no effective claim against the person exercising the privilege and also that others have a duty of non-interference.<sup>136</sup> Hohfeld establishes that the issues are separate; sometimes the state imposes a duty of non-interference and sometimes not.<sup>137</sup> There are many instances in law where privileges conflict.<sup>138</sup> In other words, A may be privileged to perform an act while B is privileged to interfere with the act.<sup>139</sup> The classics' assumption that duties can be logically derived from privileges was shown to be erroneous.<sup>140</sup> The question of imposing a duty raises a policy issue and cannot be decided "without fresh exercises of ethical judgment."<sup>141</sup>

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132. *Id.*

133. Nyquist, *supra* note 120, at 253–54.

134. *Id.* at 252 n.45.

135. *Id.* at 253–54.

136. *Id.*

137. *Id.* at 251–52.

138. *Id.* at 253–54.

139. *Id.* at 254.

140. *Id.* at 251–52.

141. See Frank I. Michelman, *Commentary*, in Fred R. Shapiro, *The Most Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1511–12 (1991).



The case *Ploof v. Putnam*<sup>142</sup> illustrates a court falling into the error of deducing duties from privileges.<sup>143</sup> While the plaintiff was sailing, a storm arose and he tied his boat to the defendant's dock.<sup>144</sup> The defendant untied the boat causing personal injuries and damage to the boat.<sup>145</sup> The court held the defendant liable because of the doctrine of necessity.<sup>146</sup> It cited *Proctor v. Adams*,<sup>147</sup> among other necessity cases, in support of its decision, "the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass."<sup>148</sup> But that is not the issue in *Ploof*. The issue in *Ploof* is whether, when a boat is moored to a dock because of the doctrine of necessity, a court should impose a duty on the dock owner to allow it to remain or grant a privilege to untie. In such a case, the court faces a policy choice. There would be no logical inconsistency in saying the plaintiff is privileged to tie his boat to the dock and the defendant is privileged to untie.<sup>149</sup>

Furthermore, the classics' system purported to create a clear test by which privileges and duties could be determined. Joseph Singer observes:

The classical analytical jurists . . . invented a meta-theory based on the distinction between self-regarding and other-regarding acts . . . . People were free to do anything that did not hurt others. To the extent a person's acts were conceived to be harmful to others, they were prohibited . . . . The actions that were permitted

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142. 71 A. 188 (Vt. 1908).

143. Nyquist, *supra* note 120, at 248–49.

144. *Ploof*, 71 A. at 188.

145. *Id.* at 188–89.

146. *Id.* at 189.

147. 113 Mass. 376 (1873).

148. *Ploof*, 71 A. at 189.

149. See Nyquist, *supra* note 120, at 248–49, for further discussion of the consequences of Hohfeld's system for case analysis.

were also thought to be protected against interference by others.<sup>150</sup>

Under this system, injury without compensation (*damnum absque injuria*) was virtually invisible. Hohfeld's critique focuses attention on *damnum absque injuria* and we now realize that instances of injury without compensation are not just tolerated by our legal system, but reflect fundamental policies.<sup>151</sup> Just as duties cannot be derived from privileges, duties cannot be derived from injury since many injuries do not lead to compensation.

Classical analytical jurisprudence defined law as the command of the sovereign, but Hohfeld points out that their theory of law focused only on right/duty. In Corbin's words "society not only commands but also *permits* and *enables* and *disables*."<sup>152</sup> CLT also assumed that *laissez faire* did not implicate the state. One of the consequences of Hohfeld's critique is that we now see that *laissez faire* was a regulatory system; once the state has come into existence, regulation is inevitable. Using contract as an illustration, in a sale of goods by a merchant under *laissez faire* there was no implied warranty of merchantability. That system has been replaced by Article 2 of the Uniform Commercial Code which creates an implied warranty.<sup>153</sup> But we have not moved from an unregulated market to regulated; we have merely changed how we regulate.<sup>154</sup>

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150. Singer, *supra* note 120, at 984.

151. For instance, in contract the requirement that damages be established within a reasonable degree of certainty means that many injuries caused by breach of contract are *damnum absque injuria*. See RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981). The rule reflects policies of preventing judges and juries from speculating on damages, encouraging efficient breach, and an overarching goal that contract damages should compensate the victim, not punish the party in breach. See Nyquist, *supra* note 120, at 254, for further discussion of *damnum absque injuria* in contract law.

152. Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 237 (1921).

153. U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM'N 1999).

154. For further discussion of *laissez faire* as a regulatory system, see J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV.

Hohfeld's 1913 article expresses the hope that once his system has clarified legal analysis, the greater "become[s] one's perception of fundamental unity and harmony in the law."<sup>155</sup> American legal thought has not followed the path he anticipated. Hohfeld's system continues to serve as an important source of critique<sup>156</sup> but his reconstructive side is largely ignored.

#### iv. Benjamin Cardozo

Benjamin Cardozo counts as an important figure in the Progressive Era not due to his contributions as an academic (he never joined a faculty) but because of his twenty-five years on the bench<sup>157</sup> and his lecture series *The Nature of the Judicial Process* reflecting on the role of the judge.<sup>158</sup> Cardozo held a philosophy of law in stark contrast to CLT; his jurisprudence reflects a movement from rules toward standards, from individualism toward altruism, and from a mechanical view of judging toward a dynamic view.<sup>159</sup> In 1921 Cardozo noted, "[w]e are getting away from . . . the conception of a lawsuit either as a mathematical problem or as a sportsman's game"<sup>160</sup> and "[w]e are thinking of the end which the law serves, and fitting its rules to the task of

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1119, 1124–25 (1990); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 754–57 (1980).

155. Hohfeld, *Fundamental Legal Conceptions*, *supra* note 53, at 59.

156. Hohfeld is often cited in the literature of critical legal studies. *See, e.g.*, KENNEDY, *supra* note 10, at 82–92, 276; ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 6–7 (1986); Balkin, *supra* note 154, at 1131, 1133, 1141; Singer, *supra* note 120, at 1058–59. For a recent article continuing the critical perspective see Pierre Schlag, *How to do Things With Hohfeld*, 78 L. & CONTEMP. PROBS. 185 (2015).

157. Cardozo was elected as a New York trial court judge in 1913 but after only five weeks filled a vacancy on the New York Court of Appeals where he sat until 1932. KAUFMAN, *supra* note 55, at 126. He was then appointed to the U.S. Supreme Court and served until 1938. *Id.* at 471, 566–67.

158. CARDOZO, *supra* note 15.

159. *See id.* at 101–02.

160. *Id.* at 101–02.

service.”<sup>161</sup>

Under CLT judges were seen as sorting through the facts of a case and mechanically applying a rule which dictated the result.<sup>162</sup> The preferred form of law was rules rather than standards.<sup>163</sup> *Rules* are bright-line statements of law that appear to give a judge or jury little, if any, discretion. The archetypal example is the minimum age for voting: a person is eligible to vote when they reach their eighteenth birthday and not a moment before. *Standards*, on the other hand, are open-ended statements of law that appeal to a general policy and permit wide discretion. Instances in contract include unconscionability<sup>164</sup> and good faith.<sup>165</sup> *Individualism* holds that it is acceptable for each person to look out only for his or her own interests, there is no obligation to share gains or contribute to losses, and legal duties should be reduced to a minimum.<sup>166</sup> The opposed vision, *altruism*, argues it is not acceptable to consider your own interests only, the community is more important than the individual, and if the individual is unwilling to share gains or losses, the legal system should impose duties to do so.<sup>167</sup>

Cardozo’s judicial philosophy was fully evident in *Wood*

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161. *Id.* at 102.

162. *See, e.g.*, *Boone v. Coe*, 154 S.W. 900 (Ky. 1913) (rejecting a tenant farmer’s claim for reliance damages because of his failure to comply with the Statute of Frauds).

163. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (discussing the distinction between rules and standards).

164. U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2014); RESTATEMENT (SECOND) OF CONTRACTS § 208.

165. U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM’N 2014); RESTATEMENT (SECOND) OF CONTRACTS § 205.

166. For further discussion of individualism and altruism, see Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065, 1121–25 (1985); Kennedy, *supra* note 163, at 1713–22.

167. *See supra* note 166.

*v. Lucy, Lady Duff-Gordon*.<sup>168</sup> In *Wood*, the defendant had agreed to give the plaintiff exclusive rights to place her name on dress designs with the parties splitting “all profits and revenues.”<sup>169</sup> The defendant entered into an agreement in violation of the contract and the plaintiff sued to recover his share of the proceeds.<sup>170</sup> The defendant argued that since the contract did not specify any duties on the part of the plaintiff, it was unenforceable for lack of consideration. Cardozo held the contract enforceable since it was “instinct with an obligation”<sup>171</sup> and a “promise is fairly to be implied.”<sup>172</sup> *Wood* is one of the cases that established the contemporary contract principle of good faith and “displace[s] . . . one image of contract by another. The consequence of that displacement is a greater involvement by courts in policing the performance of contracts.”<sup>173</sup>

Cardozo’s lecture series “The Nature of the Judicial Process,” delivered at Yale Law School over four days in 1921, was a stunning success.<sup>174</sup> A judge publically reflecting on his role was unprecedented in American law and Cardozo’s persona insured the occasion would be unforgettable. Forty years later Arthur Corbin reflected on the event:

[E]ach day at 6 p.m. the ritual of the first day was exactly repeated—the rising of the audience, the continuous applause, the smile of pleasure, the appreciative bow, and the leaving with the

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168. 118 N.E. 214 (N.Y. 1917).

169. *Id.* at 214.

170. *Id.* at 214. Research by Walter Pratt has established that Duff-Gordon’s agreement was with Sears, Roebuck and Company. Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 439–40 (1988).

171. *Wood*, 118 N.E. at 214.

172. *Id.*

173. Pratt, *supra* note 170, at 415. For further discussion of *Wood*, see *id.* at 420, 429–32, 438–43, 457–64.

174. Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 195 (1961).

faculty while all others stood and cheered. Both what he had said and his manner of saying it had held us spell-bound on four successive days . . . . Never again have I had a like experience.<sup>175</sup>

As Cardozo's lectures were relatively late in the Progressive Era, it is not surprising he primarily focused on reconstruction rather than critique. He emphasized core Progressive Era values: the importance of policy,<sup>176</sup> the movement from individualism to interdependence,<sup>177</sup> inductive reasoning rather than deductive reasoning,<sup>178</sup> the sociological method,<sup>179</sup> and although "logic and history and custom have their place . . . [t]he end which the law serves will dominate them all."<sup>180</sup>

Cardozo's view of American society has been aptly summarized by his biographer Andrew Kaufman:

Cardozo shared the optimism that characterized the political philosophy of progressives like Theodore Roosevelt, and his attitude was related to what became known later as the consensus view of American history: What unites Americans as a people is more important than what divides them; society's dominant interest groups accepted a broad common framework of social and

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175. *Id.* at 198.

176. *See, e.g.,* CARDOZO, *supra* note 15, at 73 ("It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance.").

177. *See e.g.,* KAUFMAN, *supra* note 55, at 214 (quoting BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 19 (1928) ("growing altruism, or if not this, a growing sense of social interdependence.")).

178. CARDOZO, *supra* note 15, at 22–23 ("The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.").

179. *See, e.g., id.* at 94 ("I pass to another field where the dominance of the method of sociology may be reckoned as assured. There are some rules of private law which have been shaped in their creation by public policy, and this, not merely silently or in conjunction with other forces, but avowedly, and almost, if not quite, exclusively. These, public policy, as determined by new conditions, is competent to change.").

180. *Id.* at 66. *quoted in* KAUFMAN, *supra* note 55, at 208.

economic values.<sup>181</sup>

Furthermore, Cardozo saw the judge as playing a central role in adapting law to address the needs of society.<sup>182</sup> In an article published in December 1921 he called for the establishment of a governmental agency that would communicate to courts the need of society as identified by legislatures.<sup>183</sup> He creates an image of legislators as workers in a mine, discovering society's ills, but unable to communicate with courts who could act as rescuers: "We must have a courier who will carry the tidings of distress to those who are there to save when signals reach their ears."<sup>184</sup>

## II. THE REALIST ERA

By 1923, progressive legal thought provided a powerful alternative to CLT. It had demonstrated that general principles were not operative to determine particular rules or dictate results in particular cases. It viewed CLT as appropriate to the nineteenth century but its rigidity and formality had proven inadequate to respond to changes in society. Law had failed to rethink its individualistic foundations as American culture had moved from independence to interdependence. On the reconstruction side, progressive legal thought proposed that law should respond to society's ills. Legislatures should study the issues facing society and through legislation (with the support and assistance of courts) address those issues. "The key to . . . sociological jurisprudence," notes Duncan Kennedy, "was the idea that the 'is' of sociology would engender a legal 'ought,' with the social scientist in the role

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181. KAUFMAN, *supra* note 55, at 216–17.

182. See Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113–14 (1921).

183. *Id.*

184. *Id.* at 113.

of midwife.”<sup>185</sup>

The conservative response to the critique of CLT continued throughout the 1923 to 1941 era, so there was still much work to be done. For example, the restatement project, in the opinion of Grant Gilmore, “may be taken as the reaction of a conservative establishment, eager to preserve a threatened status quo.”<sup>186</sup> Realist Era critics of the Restatements include Thurman Arnold,<sup>187</sup> Hessel Yntema,<sup>188</sup> Walter Wheeler Cook,<sup>189</sup> and Felix Cohen.<sup>190</sup> Standard histories of this era focus on the critique of CLT, and there is no question this was an important theme. For instance, a review of Herbert Goodrich’s 1927 *Handbook on the Conflict of Laws*,<sup>191</sup> by Hessel Yntema,<sup>192</sup> applies the

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185. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”*, 100 COLUM. L. REV. 94, 120 (2000).

186. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 73 (1977).

187. Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, 800 (1931) (“But if such abstractions [principles, rules, and standards] are applied to an assorted group of dissimilar situations, involving different problems, they begin to cut across the cases in zigzag lines which are impossible either to follow or predict, without endless refinement, reclassification, and qualifying abstractions.”); *Id.* at 823 (“[Professor Scott’s] unquestioned skill shown in the attempt to restate trusts as a philosophy is the best proof that it cannot be done.”).

188. Hessel E. Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183, 185 (1936) (“In other words, aside from more obvious difficulties of restating this subject, there is some reason to apprehend that both the theoretical and the practical bases of this *Restatement* are shifting under foot.”).

189. *See generally* Walter Wheeler Cook, *Williston on Contracts*, 33 ILL. L. REV. 497 (1938–39) (reviewing the second edition of Williston’s contract treatise which Cook views as explanatory of the contract restatement, applying a Hohfeldian analysis, and arguing that Williston fails to distinguish factual components of agreements and the resulting legal relations).

190. Cohen, *supra* note 2, at 833 (“The age of the classical jurists is over, I think. The ‘Restatement of the Law’ by the American Law Institute is the last long-drawn-out gasp of a dying tradition.”).

191. HERBERT F. GOODRICH, *HANDBOOK ON THE CONFLICT OF LAWS* (1927).

192. Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).



fundamental principles of the Progressive Era critique; Goodrich's work is too abstract,<sup>193</sup> overemphasizes logic at the expense of experience,<sup>194</sup> and is obsessed with rules.<sup>195</sup>

Lon Fuller's work from the 1930's shows how the Progressive Era's critique of CLT was imbedded in and taken for granted by Realist Era scholarship. In 1934, he published an attack on legal realism,<sup>196</sup> and yet his 1939 review of a revision of Williston's contract treatise shares many of the assumptions of the Realist Era.<sup>197</sup> Williston's treatise draws a clear line between contract and other subjects which can be maintained only "if one does not press too far an inquiry into the underlying bases of legal liability."<sup>198</sup> If one asks the reasons "contract or tort liability is imposed, one discovers that the underlying 'why', or rather, the underlying 'whys', cut across compartmental divisions of the law."<sup>199</sup> In commenting on cases, the treatise has "too strict a sense of what is normal . . . [and] ha[s] rejected as freaks far too many cases which are really significant."<sup>200</sup> And the fundamental principles of contract "are nowhere in his work critically examined in the light of the social interests they serve."<sup>201</sup> In other words, in the Realist Era both self-described realists and their critics shared many assumptions about law that had been

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193. *Id.* at 477.

194. *Id.* Yntema borrows Holmes' aphorism "The life of the law has not been logic, it has been experience" to punctuate his point. *Id.* ("If the realm of law were like mathematics . . . no one could object to peopling the legal world with principles, rights or other juristic constructions. But law is not logic, however usefully logic may be made to serve the ends of law.").

195. *Id.* at 479.

196. L. L. Fuller, *American Legal Realism*, 82 U. PA L. REV. 429 (1934).

197. See generally Lon L. Fuller, *Williston on Contracts: Revised Edition*, 18 N.C. L. REV. 1 (1939).

198. *Id.* at 2.

199. *Id.*

200. *Id.* at 3.

201. *Id.* at 9.

established in the Progressive Era. But Realist Era scholarship was engaged in a more significant project: critiquing the Progressive Era.

A. *The Realist Era and Cognitive Relativism*

Realist Era thought was centered at Columbia Law School, Johns Hopkins University Institute for the Study of Law (1928–33), and Yale Law School. Principal participants included Thurman Arnold (Yale),<sup>202</sup> Felix Cohen (Department of the Interior),<sup>203</sup> Walter Wheeler Cook (Yale, Johns Hopkins, and Northwestern University School of Law),<sup>204</sup> Jerome Frank (private practice and Securities and Exchange Commission),<sup>205</sup> Leon Green (Yale and Northwestern),<sup>206</sup> Karl Llewellyn (Columbia),<sup>207</sup> Underhill Moore (Columbia and Yale),<sup>208</sup> Herman Oliphant (Columbia, Johns Hopkins, and United States Treasury Department),<sup>209</sup> and Hessel Yntema (Columbia, Johns Hopkins, and University of Michigan Law School).<sup>210</sup>

The critique of the Progressive Era is intertwined with and based on a cognitive relativism derived from science.

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202. HORWITZ, *supra* note 6, at 311 n.56.

203. DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE, FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 4 (2007).

204. HORWITZ, *supra* note 6, at 313–14 n.85; *Guide to the Walter Wheeler Cook (1873–1943) Papers*, NORTHWESTERN UNIV. ARCHIVES, <http://www.finding aids library/Northwestern.edu> (last visited May 14, 2016).

205. ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 9, 18–21, 27–30 (1985).

206. HORWITZ, *supra* note 6, at 317 n.104.

207. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 102–03 (1973).

208. *Id.* at 42, 53.

209. HORWITZ, *supra* note 6, at 313 n.85.

210. TWINING, *supra* note 207 at 46, 60; *See also Hessel E. Yntema*, UNIV. MICH. LAW SCH. FACULTY, [http://www.law.umich.edu/historyandtraditions/faculty/Faculty\\_Lists/Alpha\\_Faculty/Pages/HesseLEYntema.aspx](http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/HesseLEYntema.aspx) (last visited April 7, 2016).

An article from 1933 would begin, “[t]he spirit of the times is scientific.”<sup>211</sup> Although the Progressive Era also highlighted science “[w]hen pre-war Progressives spoke of a ‘scientific’ approach to social problems,” explains G. Edward White, “they normally analogized to one of the social sciences [statistics, ethnology, economics, and sociology].”<sup>212</sup> Realist Era thinkers, on the other hand, were drawn to psychology, physics, mathematics, chemistry, and geometry.

*Thinking About Thinking*,<sup>213</sup> a book published in 1926 by Columbia mathematics professor Cassius Keyser, proved to have enormous influence. Jerome Frank refers to *Thinking About Thinking* as “an invaluable aid to his non-mathematically trained mind in understanding the nature of non-Euclidean thinking.”<sup>214</sup> Keyser surveys the history of “autonomous thinking,”<sup>215</sup> which he also calls “postulational thinking,” particularly with reference to Euclidean and non-Euclidean geometry.<sup>216</sup> He says of Euclidean geometry, “when it was produced it was so incomparably superior to any other product of human thinking that men were dazzled by it, blinded by its very brilliance.”<sup>217</sup> It held the field for two thousand years until the work of Bolyai and Lobachevski established non-Euclidean geometries, equally

211. Hessel E. Yntema, *The Implications of Legal Science*, 10 N.Y.U. L.Q. REV. 279, 279 (1933).

212. G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1014 (1972).

213. CASSIUS J. KEYSER, *THINKING ABOUT THINKING* (1926).

214. Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Thinking*, 17 CORNELL L.Q. 568, 572 n.10 (1932).

215. KEYSER, *supra* note 213, at 22–23. Keyser describes “autonomous thinking” as taking the “if-then” form. *Id.* (“What *is* asserted and what is true is that, *if* the postulates are true, *then* their implicates are true. It is important to grasp the fact that this *if-then* assertion is true both when the postulates are true and when they are false.”).

216. *Id.* at 31.

217. *Id.* at 26.

valid, but based on different postulates and “[t]here ensued a revolution in the theory of knowledge, the philosophy of science was greatly advanced, and postulational thinking was henceforth to play increasingly a double role, that of builder and that of critic or judge.”<sup>218</sup> Keyser points out it is a “grave mistake” to believe postulational thinking is limited to mathematics: “[t]he method is available in every field of thought, in the physical sciences, in the moral or social sciences, in all matters and situations where it is important . . . to have logically organized bodies of doctrine.”<sup>219</sup> Keyser would publish in law reviews<sup>220</sup> stressing the importance of applying postulational thinking to law and the necessity that “hidden determinants . . . be dragged forth from their hiding places into the light.”<sup>221</sup>

Walter Wheeler Cook was an assistant professor in mathematics at Columbia and from 1895 to 1897 held the John Tyndall Traveling Fellowship in Physics which allowed him to spend those years in Germany.<sup>222</sup> Math and physics would provide a foundation for his critique of the Progressive Era. Cook’s *Scientific Method and the Law*,<sup>223</sup> published in the *American Bar Association Journal*, summarizes recent developments in physics, chemistry,

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218. *Id.* at 31–32.

219. *Id.* at 35.

220. See, e.g., Cassius J. Keyser, *On the Study of Legal Science*, 38 YALE L.J. 413 (1929); see also Cassius J. Keyser, *The Nature of the Doctrinal Function and its Role in Rational Thought*, 41 YALE L.J. 713 (1932) [hereinafter Keyser, *Nature*].

221. Keyser, *Nature*, *supra* note 220, at 744.

222. NORTHWESTERN UNIV. ARCHIVES, *supra* note 204. See also JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 28 (1995). (“Inexplicably, while in Germany he studied not just the sciences but also philosophy and law . . . and psychology . . . . This deviation did not seem to bother the Department of Mathematics, which, on his return in late fall 1897, hired him as an assistant for two more years.”).

223. Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927) (The article was based on Cook’s 1927 commencement day address at Johns Hopkins.).

geometry, and mathematics.<sup>224</sup> In physics, for example, he discusses nineteenth century physics when it was believed “finality had been reached.”<sup>225</sup> Cook then summarizes the transformation of physics over the past thirty years: “the abandonment of the doctrines of the conservation of mass, of matter, and of energy as principles of universal applicability, the refusal of electrons to obey the accepted laws of mechanics; the quantum theory—all these and others have left modern physical science gasping for breath.”<sup>226</sup> In expanding the analysis beyond physics he quotes Cassius Keyser: “the old cosmic absolutes—absolute space, absolute time, absolute matter, absolute natural law, absolute truth—are gone. The reign of relativity . . . is destined to work a corresponding revolution, deep, noiseless it may be, but inevitable, in all the views and institutions of man.”<sup>227</sup> In the physical sciences, Cook concludes, “[w]e have reached the era of relativity” and he characterizes relativity as “a point of view which . . . seems destined to remain as a permanent achievement in human thought.”<sup>228</sup>

In law, Cook points out, where the profession is confronted with situations even more complex than the physical sciences, we find it “the more insistent . . . as to the prior existence of fixed and universal principles or laws which can be discovered and directly applied and followed.”<sup>229</sup> Cook castigates Pound and legal education generally for teaching the “‘traditional and known technique of the common law,’ [which] is as grotesquely inadequate for legal purposes as the childish mechanical notions of the nineteenth century have shown themselves to

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224. *Id.* at 305–06.

225. *Id.* at 304.

226. *Id.* at 305.

227. *Id.* at 306.

228. *Id.*

229. *Id.* at 307.

be in the field of physics.”<sup>230</sup> Cook’s plea for a different type of law school, “a community of scholars, devoted to the scientific study of law as a social institution and to the training of other scholars for the same pursuit,”<sup>231</sup> would result in the establishment of the Institute for the Study of Law at Johns Hopkins.<sup>232</sup> The Institute closed in 1933 for lack of funding, but the point is not whether Cook’s call for reform of legal education was a success or failure.<sup>233</sup> His 1927 article was a call to take the lessons of science seriously and thinkers in the Realist Era responded.

The 1920s and 30s would be a particularly rich period in science with developments in quantum theory (*e.g.* Heisenberg’s uncertainty principle), discussion of the observer effect (*i.e.* how observing reality affects reality), and so on. In March of 1927, Werner Heisenberg published an article that was “simple, subtle, and startling.”<sup>234</sup> It challenged the scientific assumption that the natural world could be studied and understood.<sup>235</sup> David Lindley summarizes the uncertainty principle:

You can measure the speed of a particle, or you can measure its position, but you can’t measure both. Or: the more precisely you find out the position, the less well you can know its speed. Or, more indirectly and less obviously, the act of observing changes the thing observed . . . . In the classical picture of the natural world as a great machine, it had been taken for granted that all the working parts of the machinery could be defined with limitless precision and that all their interconnections could be exactly

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230. *Id.* at 308.

231. *Id.*

232. See SCHLEGEL, *supra* note 222, at 147, 153. Cook had joined the Johns Hopkins faculty in 1926 primarily to develop a proposal for a school of jurisprudence. *Id.* at 147–48. His *Scientific Method and the Law* address was part of that effort, and the Institute was founded in 1928 with four faculty (Cook, Herman Oliphant, Hessel Yntema, and Leon Marshall) and closed in 1933. See *id.* at 147–210.

233. *Id.* at 209–10.

234. DAVID LINDLEY, UNCERTAINTY: EINSTEIN, HEISENBERG, BOHR, AND THE STRUGGLE FOR THE SOUL OF SCIENCE 1 (2007).

235. *Id.* at 1.

understood . . . . Heisenberg, it seemed, was saying that you couldn't always find out what you wanted to know, that your ability even to describe the natural world was circumscribed. If you couldn't describe it as you wished, how could you hope to reason out its laws?<sup>236</sup>

Jerome Frank developed a deep interest in psychology that would provide a lifelong trajectory for his work.<sup>237</sup> He had been so impressed with his daughter's treatment with psychiatrist Bernard Glueck he decided to undergo analysis himself and convinced Glueck to compress a year's treatment into six months.<sup>238</sup> Frank and Glueck met twice a day and during this treatment Frank began *Law and the Modern Mind*.<sup>239</sup> And apparently most, if not all, of the Realist Era thinkers read scientific literature. Even the titles of several articles betray their interest; *Mr. Justice Holmes and Non-Euclidean Thinking*,<sup>240</sup> *The Rational Basis of Legal Science*,<sup>241</sup> *The Implications of Legal Science*,<sup>242</sup> *Can Law Be Scientific?*<sup>243</sup> and two articles entitled *Scientific Method and the Law*.<sup>244</sup>

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236. *Id.* at 4. Recent research has established that the uncertainty principle does not depend on the observer effect, although Heisenberg connected the two; the uncertainty principle still holds even when the observer effect is eliminated. See Aya Furuta, *One Thing Is Certain: Heisenberg's Uncertainty Principle Is Not Dead*, SCIENTIFIC AMERICAN (Mar. 8, 2012) <http://www.scientificamerican.com/article/heisenbergs-uncertainty-principle-is-not-dead/>. But the development is irrelevant to the point of this Article which focuses on the impact on law of the 1920's and 30's versions of science and other disciplines.

237. See HOROWITZ, *supra* note 6, at 176.

238. HOROWITZ, *supra* note 6, at 176 (quoting ROBERT J. GLENNON, THE ICONOCLAST AS REFORMER 21(1985)).

239. JEROME FRANK, LAW AND THE MODERN MIND (1930); HOROWITZ, *supra* note 6, at 176.

240. Frank, *supra* note 214.

241. Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1931).

242. Yntema, *supra* note 211.

243. Edwin W. Patterson, *Can Law Be Scientific?*, 25 ILL. L. REV. 121 (1930).

244. Cook, *supra* note 223; Max Radin, *Scientific Method and the Law*, 19 CAL. L. REV. 164 (1931).

Beyond science, the period between the world wars was an era of upheaval in the visual arts, literature, political theory, ethics, and many other disciplines.<sup>245</sup> In *The Ages of American Law*, Grant Gilmore refers to this period, when the very foundations of thought were open to question, as “the age of anxiety.”<sup>246</sup> He characterizes the jurisprudence of Wesley Sturges, who was dean at Yale Law School and “revered as the greatest of teachers,”<sup>247</sup> as “[bearing] a striking resemblance to the more despairing novels of Franz Kafka.”<sup>248</sup> Sturges produced little scholarship and focused on topics like the case law of mortgages in North Carolina “a subject of no conceivable interest to Sturges or anyone else.”<sup>249</sup> Gilmore characterizes the goal of the study as an attempt “to demonstrate that the North Carolina law of mortgages made no sense and could most charitably be described as a species of collective insanity on the march.”<sup>250</sup>

In a review of Frank’s *Law and the Modern Mind*, Bruce Ackerman comments on the Realist Era:

Without straining too hard, one can discern parallels to the thought of Frank and his fellow Realists in twentieth-century art and science. Stravinsky, Picasso, Joyce, Einstein, and Freud each radically challenged the effort to structure objective reality into a single determinate rationalizable order. Moving beyond this, each inaugurated a search for a new kind of order consistent with their attack upon the simpler conception of rationality held by their predecessors—a search which has led many fields of inquiry to turn inward upon themselves until the very idea of a common

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245. See, e.g., EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 115–78 (1973) (describing the 1930s threat to democratic theory from totalitarian forms of government.).

246. GILMORE, *supra* note 186, at 68–69.

247. *Id.* at 80–81.

248. *Id.* at 81.

249. *Id.*

250. *Id.*



cultural tradition has become problematic.<sup>251</sup>

### B. *Realist Era Critique of the Progressive Era*

Although the Realist Era continued the critique of CLT, fundamentally it was the Progressive Era being attacked. Of this, Pound had no doubt. In *The Formative Era of American Law*,<sup>252</sup> published in 1938, he wrote:

Today rationalism is under attack from another quarter. A psychological realism is abroad which regards reason as affording no more than a cover of illusion for processes judicial and administrative which are fundamentally and necessarily unrational. But merely destructive so-called realism makes neither for stability nor for change since it gives us nothing in place of what it would take away.<sup>253</sup>

The critique was sometimes linked with an acknowledgement of a debt to the Progressive Era: “Pound’s work . . . is full to bursting of magnificent insight”;<sup>254</sup> “Cardozo, it would seem, has reached adult emotional stature”;<sup>255</sup> “[Pound’s] vast erudition has enabled him to find hidden significance in various aspects and items of legal development”;<sup>256</sup> and “Pound has done good pioneering here.”<sup>257</sup> The compliment is invariably followed by a devastating critique. Although Pound provides magnificent

251. Bruce A. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119, 125–26 (1974).

252. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

253. *Id.* at 27–28.

254. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930).

255. FRANK, *supra* note 239, at 253. This *could* have been high praise indeed from Frank whose psychological analysis of law viewed “paralyzing father-worship [as] one of the hidden causes of men’s belief in a body of infallible law.” *Id.* at 261. Notice, however, the “it would seem” qualifier. *Id.* (emphasis added).

256. William L. Grossman, *The Legal Philosophy of Roscoe Pound*, 44 YALE L.J. 605, 605 (1935).

257. K. N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 594 (1940).

insight, “these brilliant buddings have in the main not come to fruition . . . [and his work is] at times on the level of bedtime stories for the tired bar.”<sup>258</sup> Although Cardozo *seems* mature, “he is not ready to abandon entirely the ancient dream” and “the absence of mathematical legal exactness is what Cardozo laments.”<sup>259</sup> Although Pound displays vast erudition, since he provides no standard for choosing among desiderata outside the scale of the desiderata itself, “[n]ever was there a more obvious attempt to lift oneself by one’s own bootstraps.”<sup>260</sup> And Pound’s pioneering scholarship, his discussion of ideal elements in law and “the stabilizing force of ‘taught traditions’” are interesting ideas “but what these mean in detail, when one gets down to cases, lies still unexplored.”<sup>261</sup>

The critique was based on five ideas: sociological jurisprudence betrayed an unmerited confidence in rules; it viewed fact-finding by courts as unproblematic; it failed to notice the observer effect; it was unwilling to examine its postulates; and in attempting to derive law from studying society, it fell into the same conceptualist error as Classical Legal Thought.<sup>262</sup>

#### i. Rule Skepticism

Rule skepticism has been recognized as a hallmark of the Realist Era for many years, but the point here is that the critique included both CLT and the Progressive Era. The Progressive Era displayed an underlying confidence in the ability to categorize, manipulate, and deploy law. Pound divides statements of law into two types: “rules” to govern “conveyance of land, inheritance and succession, and

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258. Llewellyn, *supra* note 254, at 435 n.3.

259. FRANK, *supra* note 239, at 254.

260. Grossman, *supra* note 256, at 610.

261. Llewellyn, *supra* note 257, at 594.

262. See Kennedy, *supra* note 9, at 671–73 (“The critique of is-to-ought included a move similar to the abuse-of-deduction critique of CLT.”).

commercial law”<sup>263</sup> and flexible statements of law (*i.e.* standards) for “the social interest in the individual human life and with individual claims to free self-assertion.”<sup>264</sup> Security of transactions in “the economic side of human activity . . . call[s] for rule or conception authoritatively prescribed in advance and mechanically applied.”<sup>265</sup> In cases of “individual self-assertion . . . administrative justice is tolerable and that judicial justice must always involve a large administrative element.”<sup>266</sup> CLT had “insisted on one machine, [*i.e.* rules] set up with reference to the work to be done in one field, for all the work to be done in all fields.”<sup>267</sup> But the rule/standard dichotomy allows jurists “to rationalize the process of judicial decision for the purposes of today.”<sup>268</sup> Standards play a central role in Cardozo’s jurisprudence.<sup>269</sup> In his lecture series *The Growth of the Law*,<sup>270</sup> he speaks of standards as “capable of being individualized to meet the needs of varying conditions”<sup>271</sup> and to be balanced with rules in “apportionment of the relative value of certainty on one side and justice on the other.”<sup>272</sup>

In an article from 1928, Leon Green takes a nihilistic view of standards, using negligence as an example.<sup>273</sup> In a negligence case, the “pertinent factors . . . are beyond classification and statement.”<sup>274</sup> The possible combinations

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263. Pound, *supra* note 1, at 956.

264. *Id.* at 957. *See also supra*, notes 162–65 and accompanying text.

265. Pound, *supra* note 1, at 957.

266. *Id.*

267. *Id.*

268. *Id.* at 958.

269. *See supra* notes 158–73 and accompanying text.

270. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924).

271. *Id.* at 82.

272. *Id.* at 83.

273. *See* Leon Green, *The Negligence Issue*, 37 *YALE L.J.* 1029, 1029 (1928).

274. *Id.* at 1029.

of individuals' personality and conduct are "literally infinite, as infinite as space and time."<sup>275</sup> Instances of conduct are "beyond the limits of any catalog the law can make."<sup>276</sup> Juries consider an array of factors not expressed in the negligence standard including qualities and characteristics of the parties, lawyers, and witnesses.<sup>277</sup> How a jury reaches its conclusion "is perhaps unknown even to themselves."<sup>278</sup> There is no "table or key" provided to the jury by the negligence standard; "[t]he law recites its ritual and stops."<sup>279</sup> The judgment "is only the law's judgment in the particular case."<sup>280</sup> The law of negligence "defies the efforts of legal scientists to bring it under more definite control."<sup>281</sup> Green concludes in a final footnote, "[i]n other words, we may have a process for passing judgment in negligence cases, but practically no 'law of negligence' beyond the process itself."<sup>282</sup>

Green's article is nothing less than the Heisenberg uncertainly principle of law. In the next few years the principle would be extended beyond standards to all law. In 1931, Jerome Frank published a critique of the work of Pound and John Dickinson attacking the Pound division of law.<sup>283</sup> Frank poses an eviction hypothetical and asks if

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275. *Id.*

276. *Id.* at 1029–30.

277. *Id.* at 1044 (Green's list includes "[a]ge, sex, color, temperament, indifference, courage, intelligence, power of observation, judgment, quickness of reaction, self control, imagination, memory, deliberation, prejudices, experience, health, education, ignorance, attractiveness, weakness, strength, poverty, and any of the other possible assortments . . .").

278. *Id.* at 1043.

279. *Id.*

280. *Id.*

281. *Id.* at 1046–47.

282. *Id.* at 1047 n.37. See also LEON GREEN, RATIONALE OF PROXIMATE CAUSE 2 (1927).

283. Jerome Frank, *Are Judges Human? Part Two: As Through a Glass Darkly*, 80 U. PA. L. REV. 233, 233 (1931).

there a clear answer to the client's question whether or not the tenant will be evicted.<sup>284</sup> "According to the Pound-Dickinson notion, the answer is simple," explains Frank, "[y]our client's rights are to be found in the well settled rules relating to leases."<sup>285</sup> But this is misleading, argues Frank.<sup>286</sup> In a contested case there is as much uncertainty in a court applying a rule as a standard. "Court decisions . . . are functions of many unknown and *unknowable* variables," argues Frank, "the fact that only one of the components is a constant [*i.e.* the rule] does not sufficiently stabilize the ingredients to make possible stabilization of the decisions."<sup>287</sup> Even in cases involving negotiable instruments, although promissory notes may be "precisely like another [and] although the rules governing negotiability may be as rigid as a steel ingot,"<sup>288</sup> the decisions are not certain. Frank bolsters his argument with quotes from *Law and the Modern Mind* published the year before:

Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them . . . . There is no rule by which you can force a judge to follow an old rule or by which you can predict when he will verbalize his conclusion in the form of a new rule, or by which he can determine when to consider a case as an exception to an old rule, or by which he can make up his mind whether to select one or another old rule to explain or guide his judgment. His decision is primary, the rules he may happen to

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284. *Id.* at 233.

285. *Id.* (citing Part One of Frank's article, Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17 (1931)). John Dickinson graduated from Harvard Law School in 1921, and held positions as Lecturer in the Department of Government at Harvard (1925–27), Assistant Professor of Politics at Princeton (1927–29), and Professor of Law at the University of Pennsylvania Law School (1929–48). See George L. Haskins, *John Dickinson: 1894–1952*, 101 U. PA. L. REV. 1, 4–6 (1952).

286. Frank, *Are Judges Human? Part Two*, *supra* note 283, at 234.

287. *Id.* at 234 (emphasis added).

288. Frank, *Are Judges Human? Part One*, *supra* note 285, at 36.

refer to are incidental.

The law, therefore, consists of *decisions*, not of rules. If so, then *whenever a judge decides a case he is making law*.<sup>289</sup>

Rule skepticism is a central theme for Llewellyn and he refers to Pound's view that commercial law and property provide certainty as "silly."<sup>290</sup> Pound often used the word "precepts" to refer to both rules and standards.<sup>291</sup> Llewellyn argues that precepts are *central* to Pound's thinking about law and he is "partially caught in the traditional precept-thinking of an age that is passing."<sup>292</sup> Precepts are "merely verbal formulae"<sup>293</sup> and it is misleading to think of "Rules as Things."<sup>294</sup> In *The Bramble Bush*, Llewellyn writes of all precedents as ambiguous, "Janus-faced",<sup>295</sup> and subject to interpretation "according to what may be the attitude of future judges."<sup>296</sup> *On Philosophy in American Law*<sup>297</sup> laments Pound's "mere listing and description of our apparently inconsistent jurisprudential trends in the latter 19th century"<sup>298</sup> and never asking why. While we may have one system of precedent, "it works in forty different ways."<sup>299</sup> In a speech on the Constitution to the Pacific

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289. *Id.* at 40 (emphasis added).

290. K. N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 174-75 n.24 (1938). Frank refers to Pound's apportionment of law into rigid rules and flexible standards as "delusive exactness." FRANK, *supra* note 239, at 226. In *Law and the Modern Mind* Frank devotes an entire appendix to a critique of Pound. *See id.* at 312-26.

291. Llewellyn, *supra* note 254, at 434.

292. *Id.*

293. *Id.*

294. K. N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 722 (1936).

295. LLEWELLYN, *supra* note 123, at 68.

296. *Id.* at 71 (emphasis omitted).

297. K. N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205 (1934).

298. *Id.* at 205.

299. *Id.*

Coast Institute of Law, Llewellyn contrasts words with practice, “[w]hen you are trying to find out what is the Constitution of the United States you look fundamentally to the practice of the government of the United States . . . [a]nd if the practice does not square with the words of the Document, the words of the Document are dead.”<sup>300</sup> When the Supreme Court refers to its interpretations of the Constitution, “I think myself about one time in ten they are interpretations; the other nine times they are acts of creative statesmanship, and have been since the time of Marshall.”<sup>301</sup>

In 1931, Pound had published *The Call for a Realist Jurisprudence*<sup>302</sup> in a volume of the *Harvard Law Review* celebrating Oliver Wendell Holmes’s ninetieth birthday. Llewellyn considered the article an attack on realism. His defense of the movement included *Some Realism About Realism—Responding to Dean Pound*, which elaborates on rule skepticism.<sup>303</sup> Realists “[d]istrust . . . traditional rules and concepts insofar as they purport to *describe* what either courts or people are actually doing.”<sup>304</sup> Innumerable factors influence court decisions: the personality of the judge, the facts of the case, business practice and ideology, the skill of the attorneys, and so on.<sup>305</sup> Rules are not “*the* heavily operative factor.”<sup>306</sup>

In *The Hornbook Method and the Conflict of Laws*, Hessel Yntema deploys an approach that draws on

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300. Karl N. Llewellyn, *The Constitution as an Institution*, 14 OR. L. REV. 108, 114 (1934–35).

301. *Id.* at 115.

302. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

303. Llewellyn, *supra* note 11. For discussion of the exchange between Pound and Llewellyn, see HULL, *supra* note 11, at 190–222; TWINING, *supra* note 207, at 72–73.

304. Llewellyn, *supra* note 11, at 1237.

305. *Id.* at 1242–47.

306. *Id.* at 1237.

semiotics and evokes, to the contemporary mind, the “interpretative communities” theory of Stanley Fish<sup>307</sup>:

The history of codes and of legislation, or even of language, should have taught us long since that rules and principles are empty symbols which take on significance only to the extent that they are informed with the social and professional traditions of a particular time and place. Those who disbelieve may regard the manner in which the greatest of our codes has been interpreted, the Constitution of the United States. It is not the symbols but the habits of thought that control interpretation and decision.<sup>308</sup>

Judicial decisions are “emotive experience[s] in which principles and logic play a secondary part . . . seem[ingly] . . . like that of language, to describe the event which has already transpired.”<sup>309</sup>

In *The Ethical Basis of Legal Criticism*,<sup>310</sup> Felix Cohen creates a striking image of rule skepticism drawn from geometry:

But elementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules, just as an infinite number of different curves may be traced through any point or finite collection of points. Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case.<sup>311</sup>

Cohen argues that legal decisions involve ethical judgment, but “[o]ne looks in vain in legal treatises and law

307. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141 (1989) (explaining that an interpretative community is “a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members . . .”); Yntema, *supra* note 192, at 479–80.

308. Yntema, *supra* note 192, at 479–80.

309. *Id.* at 480.

, 310. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 *YALE L.J.* 201 (1931–32).

311. *Id.* at 216.



review articles for legal criticism conscious of its moral presuppositions.”<sup>312</sup> To logic “the difference between the names of the parties in the two decisions bulks as large as the difference between care and negligence.”<sup>313</sup> The essence of judging is not logic but making ethical decisions. Pound has “put[] forward evolutionary schemes of legal history in answer to strictly ethical questions . . . [but this] is intellectually indefensible—however gratifying emotionally it may be to feel that cheering for the winning side is the substance of morality.”<sup>314</sup>

## ii. Fact Skepticism

One of the consequences of “rule-worship,” to borrow a phrase from Jerome Frank, is that it “conceals the prime importance of adequate fact-finding.”<sup>315</sup> Several of the realists combined their rule skepticism with fact skepticism. In a preface to the sixth printing of *Law and the Modern Mind*,<sup>316</sup> Frank describes those who join him in fact skepticism:

Their primary interest is in the trial courts. No matter how precise or definite may be the formal legal rules, say these fact skeptics, no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits, not yet begun or not yet tried.<sup>317</sup>

In Frank’s view, not just a jury, but also a trial court judge is unable to assess facts with certainty as he is a

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312. *Id.* at 202.

313. *Id.* at 217.

314. *Id.* at 203 n.9.

315. Frank, *Are Judges Human? Part Two*, *supra* note 283, at 242.

316. Jerome Frank, *Law And The Modern Mind* (Anchor Books ed. 1963).

317. *Id.* at xi. Frank lists those who qualify in his judgment as fact skeptics, “This group . . . includes, among others, Dean Leon Green, Max Radin, Thurman Arnold, William O. Douglas (now Mr. Justice Douglas), and perhaps E. M. Morgan.” *Id.*

“fallible and variable witness of the witnesses.”<sup>318</sup> CLT, the Progressive Era, and legal education are all guilty of focusing on appellate decisions, creating a misleading picture of legal certainty and predictability. Cardozo, for instance, paints a “relatively placid picture of the judicial process” as he spent “most of his days [as] an appellate court lawyer or appellate court judge.”<sup>319</sup> A trial is a dramatic event “full of interruptions, is turbulently conducted, punctuated by constant clashes” while in the appellate court “those clashes appear only in reposeful, silent, printed pages.”<sup>320</sup> Cardozo, a victim of “appellate-court-itis,” has written books completely focused on appellate courts that “helped to distract public attention from our tragically backward trial practices.”<sup>321</sup>

With images drawn from geometry, Frank encapsulates the differences between mere rule-skeptics and those who are both rule and fact-skeptics.<sup>322</sup> Rule-skeptics live in an artificial two-dimensional world, while rule *and* fact-skeptics occupy a three-dimensional cosmos which is “out of sight, and therefore out of mind, in the rule skeptics’ cosmos.”<sup>323</sup>

In a book review from the late 1930’s, Walter Wheeler Cook, in discussing a contract issue, notes, “the complexity in question is merely a reflection of the complexity of life itself.”<sup>324</sup> Cook then draws an analogy between the complexity of the “legal universe” of the 1930’s and quantum mechanics where the “data are so confusing and new data are accumulating so fast that present day science has not yet succeeded in building a completely satisfactory

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318. Frank, *Are Judges Human? Part One*, *supra* note 285, at 28.

319. FRANK, *supra* note 316, at xxix.

320. *Id.*

321. *Id.*

322. *Id.* at xi–xii.

323. *Id.*

324. Cook, *supra* note 189, at 514.

picture.”<sup>325</sup> To illustrate the point, he provides a list of subatomic particles from a then-recent essay in the magazine *Science*; “electrons, positrons, neutrons, neutrinos, deuterons, mesotrons, *and all the rest.*”<sup>326</sup>

Although not included in Frank’s list of fact-skeptics, Llewellyn held a view of “facts” dramatically different from Progressive Era thinking. In understanding rules in operation, he drew attention not only to the importance of factual issues addressed in the rule, but also facts outside the rule. In a discussion of the absence of rescission for breach of warranty in English law, for instance, he says rescission “will not be understood in its operation until we learn how far the English retail trade has developed extra-legal practice, akin to that of our department stores, of permitting return of goods by special clause or by courtesy.”<sup>327</sup> Furthermore, it is not only misleading when we think of rules as things, but also when we “forget the tremendous extent to which the operation of any form of words depends upon *some person’s* classification of the facts in cases.”<sup>328</sup> In certain sale of goods transactions, for instance, there are three possibilities: cases of conditional acceptance, sale or return or sale on approval, and financing agreements disguised as sales. Although “[t]he relevant contradictory legal categories are clear . . . nobody knows what facts belong in which.”<sup>329</sup>

Despite their skepticism, thinkers in the Realist Era continued as members of law faculties, were appointed to positions in federal agencies, and served as judges. Perhaps the best explanation of this apparent inconsistency is found in a letter from Jerome Frank to Justice Felix Frankfurter. Frankfurter wrote to Frank saying he was wrong in

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325. *Id.*

326. *Id.* at 515 n.32.

327. Llewellyn, *supra* note 294, at 731.

328. *Id.* at 722.

329. *Id.* at n.76.

thinking “most of the law is bunk.”<sup>330</sup> Frank replied:

I don't say that “most law is bunk.” You remember the farmer who was asked if he believed in baptism and who replied, “Believe in it? Hell I've seen it.” I think “law” is damned real. But I do not believe that it works the way it appears, on the surface, to work.<sup>331</sup>

### iii. Sociological Jurisprudence Unwilling to Examine Its Assumptions

Non-Euclidean geometry and the work of mathematician Cassius Keyser were central to this critique of the Progressive Era. In *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, Jerome Frank sets out the parameters of the critique and credits Holmes with creating non-Euclidean legal thought.<sup>332</sup> Holmes's bad man theory of law;<sup>333</sup> his statement in *The Path of the Law*, “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”;<sup>334</sup> and his total rejection of theories of law based on general axioms of conduct provide a foundation for the critique. Sociological jurisprudence was based on questionable postulates or axioms, but it was “unwilling to examine [its] own assumptions . . . ousting one set of sacred or tyrannical axioms in order to install another such.”<sup>335</sup>

Frank sets out the basic axioms of sociological jurisprudence: a judge's personality has little impact on

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330. GLENNON, *supra* note 205, at 88.

331. *Id.* at 89.

332. Frank, *supra* note 214, at 572.

333. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”).

334. *Id.* at 461.

335. Frank, *supra* note 214, at 598. Frank directs his attack both on “[t]hose who advocated the exclusively economic interpretation of all decisions” and sociological jurists. *Id.*

legal rights;<sup>336</sup> the requirement that judges announce decisions in terms of legal rules protects against arbitrariness;<sup>337</sup> in litigation, the “Truth-Will-Out” axiom protects against bias and mistakes;<sup>338</sup> decisions are easily criticized since the findings of facts are reported in the record;<sup>339</sup> precise rules in commercial transactions make decisions predictable;<sup>340</sup> clear rules prevent litigation;<sup>341</sup> decisions result from applying law to the facts;<sup>342</sup> juries are better at finding facts and determining policies, but do not decide cases;<sup>343</sup> and upper courts are inherently better than lower courts.<sup>344</sup> Many of the axioms are drawn from Pound, “who advance[s] no proof of the factual truth of these propositions.”<sup>345</sup> Frank offers a list of alternative axioms (e.g., “[t]he human element in the administration of justice by judges is irrepressible.”<sup>346</sup>) and asks:

Try them out. See if they are not more accurate, more adequately adjusted to what exists, to what occurs every day in court houses. If they are, or as far as they are, they are true. Perhaps they are false, or partly false. Perhaps there needs to be inserted in those postulates such words as “sometimes” or “more often than not”, or the like. They are suggested assumptions, tentatively formulated. If they are more serviceable than the old assumptions, good; if not, then away with them.<sup>347</sup>

In *Law and the Modern Mind*, Frank analogizes the

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336. *Id.* at 579.

337. *See id.* at 580.

338. *Id.* at 587.

339. *Id.* at 588.

340. *Id.* at 590.

341. *Id.* at 592–93.

342. *Id.* at 593.

343. *Id.* at 595–96.

344. *Id.* at 597.

345. *Id.* at 580.

346. *Id.*

347. *Id.* at 581–82 (footnote omitted).

Progressive Era thinker to a Piaget child:

[T]he child is singularly non-introspective. He has, according to Piaget, no curiosity about the motives that guide his thinking. His whole attitude towards his own thinking is the antitheses of any introspective habit of watching himself think, of alertness in detecting the motives which push him in the direction of any given conclusion. The child, that is, does not take his own motives into account. They are ignored and never considered as a constituent of thinking.<sup>348</sup>

In the Realist Era critique, one of the consequences of the failure of Progressive Era thinkers to examine their postulates is that they often asked meaningless questions. In *Transcendental Nonsense and the Functional Approach*, Felix Cohen attacks opinions by Cardozo and Brandeis as nonsense, as turning on questions identical in status to the theological question “How many angels can stand on the point of a needle?”<sup>349</sup> In *Tauza v. Susquehanna Coal Co.*,<sup>350</sup> the New York Court of Appeals faced the issue whether a corporation chartered in Pennsylvania could be sued in New York.<sup>351</sup> Cohen views the issue as “thoroughly practical,” implicating a factual inquiry into the difficulties to the plaintiff from denying jurisdiction, hardship to the defendant from defending actions in many states, and so on.<sup>352</sup> Cardozo’s opinion discusses none of this—none of the “economic, sociological, political, or ethical questions.”<sup>353</sup> Instead the result turns on the question, “Where is a corporation?”<sup>354</sup> Cohen regards this question as meaningless, as approaching the issue in supernatural terms, since “[n]obody has ever seen a corporation” and it

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348. FRANK, *supra* note 239, at 126.

349. Cohen, *supra* note 2, at 810.

350. 115 N.E. 915, 916 (N.Y. 1917).

351. *Tauza*, 115 N.E. at 915–16.

352. Cohen, *supra* note 2, at 810.

353. *Id.*

354. *Id.*

would “thingify” a corporation to assume it travels from state to state.<sup>355</sup>

Cohen mounts a similar critique of *Bank of America v. Whitney Central National Bank*,<sup>356</sup> where the Supreme Court held that the defendant, a Louisiana banking corporation, was not subject to suit in New York.<sup>357</sup> An opinion by Brandeis, “the great protagonist of sociological jurisprudence,”<sup>358</sup> takes a similarly transcendental approach: “[t]hat the defendant was not in New York and, hence, was not found within the district is clear.”<sup>359</sup> The authors and the readers of such opinions are “apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.”<sup>360</sup> The opinions, indeed the thought of many courts and legal scholars, are “trapezing around in cycles and epicycles without coming to rest on the floor of verifiable fact.”<sup>361</sup>

#### iv. The Observer Effect

In the spring of 1935, Llewellyn launched a research project into dispute resolution among the Cheyenne Indians. He had the wisdom to work with an anthropologist (E. Adamson Hoebel) who would become coauthor of *The Cheyenne Way*,<sup>362</sup> a landmark in the anthropological study of the law of indigenous tribes.<sup>363</sup> Llewellyn’s prior work had discussed the dangers of the observer effect:

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355. *Id.* at 811.

356. 261 U.S. 171 (1923).

357. *Id.* at 171.

358. Cohen, *supra* note 2, at 811.

359. *Bank of Am.*, 261 U.S. at 173.

360. Cohen, *supra* note 2, at 812.

361. *Id.* at 814.

362. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

363. *See, e.g.* TWINING, *supra* note 207, at 111. For a discussion of *The Cheyenne Way*, see generally *id.* at 153–69.

[e]thnographers have discovered that the ethical preconceptions of the missionary darkened his observation of simpler cultures";<sup>364</sup> "to classify is to disturb"; and "categories and concepts . . . tend . . . both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories."<sup>365</sup> In *The Cheyenne Way*, Llewellyn devotes an entire chapter to methodology.<sup>366</sup> He allowed Hoebel to conduct the majority of the fieldwork while Llewellyn provides the theoretical framework for the project.<sup>367</sup> Llewellyn is explicit in explaining the reasons for his careful explanation of the methodology:

The best one can do is to try to make his own conceptual structure somewhat explicit, so that the reader may be warned by it . . . . But our own approach to the material requires to be set out. General theory guides inquiry. It conditions not only interpretation but recording. It conditions the very seeing of the data. It also lends data their significance. The data react upon it, in turn, and remodel it; but that merely means that they are then presented in the frame of a more adequate conceptual framework, and so with a modified significance.<sup>368</sup>

In correspondence between Llewellyn and Pound, Llewellyn charges Pound with insensitivity to the observer effect. In Llewellyn's view, Pound's history of jurisprudence was ahistorical, writes N. E. H. Hull, as he "imposed a design of conscious causal processes on what was undoubtedly an unconscious practical evolution."<sup>369</sup>

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364. KARL N. LLEWELLYN, *Legal Tradition and Social Science Method – A Realist's Critique*, reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 84 (1962). The essay was originally published in 1931 by the Brookings Institution. *Id.* at 77.

365. Llewellyn, *supra* note 254, at 453.

366. LLEWELLYN & HOEBEL, *supra* note 362, at viii.

367. *Id.*; TWINING, *supra* note 207, at 155.

368. LLEWELLYN & HOEBEL, *supra* note 362, at 19.

369. HULL, *supra* note 11, at 146.



Others in the Realist Era cautioned against the observer effect. Frank's fact skepticism was based, in part, on the "inherently subjective nature of the so-called facts of any 'contested case.'"<sup>370</sup> Cook warns that initial assumptions provide a template for selecting data, "what one does not expect to see he either does not see, or, if he 'sees' it at all, he passes it over in silence as unimportant or irrelevant."<sup>371</sup> One of the most profound discussions of the consequences of the observer effect is found in Morris Cohen's *The Basis of Contract*.<sup>372</sup> CLT had deployed a public law / private law dichotomy to sort substantive areas within law (e.g. contract law was private while criminal law was public) and logically derive results in particular cases (e.g. in *Lochner v. New York*,<sup>373</sup> the state must lose since it had violated the employer's constitutionally protected "private" right to freely contract with its employees).<sup>374</sup> Cohen argues the dichotomy was imposed on the cases in the process of the construction of CLT. Cohen collapses the public/private distinction by reframing the issue. If a contract is "generally devoid of all public interest," he asks, "why enforce it?"<sup>375</sup> He maintains that contract is an important public institution because the state is involved in enforcement, interpretation, supplementing the language of the agreement, and so on.<sup>376</sup> "From this point of view," he concludes, "the law of contract may be viewed as a

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370. Frank, *supra* note 214, at 598.

371. Cook, *supra* note 189, at 514.

372. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

373. 198 U.S. 45 (1905).

374. For discussions of *Lochner v. New York* as a reflection of CLT's deployment of the will theory and its view that public and private occupy different spheres, with parties exercising powers "absolute within their spheres" see KENNEDY, *supra* note 4, at 8–16; Nyquist, *supra* note 10, at 426–27; *supra* notes 25–26 and accompanying text.

375. Cohen, *supra* note 372, at 562.

376. *Id.* at 586.

subsidiary branch of public law.”<sup>377</sup>

v. Deriving Law From Studying Society or From an Intuition About Society’s Goals

Sociological jurisprudence argued law should be founded either on a study of society’s ills or a legal scientist’s intuition about a policy goal. Pound celebrates social workers who have “accumulated a mass of data and have developed methods and technique[s] which the lawyer must study and must learn how to utilize.”<sup>378</sup> He calls for universities to organize their departments of law, arts, and philosophy to provide “research in preparation for legislation.”<sup>379</sup> In an article from 1912, Pound anchors his view of legal progress in a quotation from a journal of sociology: “[e]very beneficent change in legislation comes from a fresh study of social conditions and of social ends, and from some rejection of obsolete law to make room for a rule which fits the new facts.”<sup>380</sup>

An illustration of an intuition-based policy is found in Hohfeld’s discussion of the negotiability principle (the power of a transferor of property to deliver an interest greater than her own):

Such powers are created by the law on various grounds of policy and convenience,—the teleology underlying each particular instance not being difficult to discover. In this place a bare enumeration of some of such powers must suffice: 1. The power of sale in market overt to a *bona fide* purchaser; 2. The power of even a thief having possession of money but not, of course, the “ownership” thereof, to create a good title in a *bona fide* “purchaser” . . . . The foregoing and others that might be mentioned are cases depending on the public policy of securing freedom of alienation and circulation of property in the business

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377. *Id.* at 586. For a brief history of the public/private dichotomy, see Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

378. Roscoe Pound, *Law and Social Work*, 3 IND. L.J. 183, 193 (1927).

379. *Id.* at 194.

380. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence Part III*, 25 HARV. L. REV. 489, 507 n.73 (1912).

world.<sup>381</sup>

Notice how the legal principle (negotiability) is logically derived from the policy goal (securing freedom of alienation and circulation of property).

The Progressive Era view that law could be logically derived from a policy goal is a central theme throughout the Era. “Pound was forever neatly fitting rules to situations,” observes Duncan Kennedy, “through a straightforward identification of single purposes.”<sup>382</sup> In his 1924 lectures, Cardozo cites the opinions of Justice Brandeis as “an impressive lesson in the capacity of law to refresh itself from external sources . . . contemporary conditions, social, industrial, and political, of the community affected.”<sup>383</sup> Cardozo illustrates legal progress “in obedience to the promptings of a social need”<sup>384</sup> by pointing to the change from riparian rights to appropriation rights in the water law of western states. The appropriation rule reflects a policy of encouraging beneficial use of water resources. The Realist Era critique emphasized conflict between policies. Logically deriving law from one policy completely ignores the conflicting policy.

The Realist Era mounted its critique on two fronts. The Progressive Era failed to separate their views of what *is* from their views of what *ought* to be (the Is/Ought critique). Second, the Progressive Era failed to acknowledge conflicting counter-policies (*e.g.* protection of the *bona fide* purchaser in a negotiability case is in direct conflict with protection of the original owner).

The Is/Ought critique is an application of Realist Era sensitivity to the observer effect.<sup>385</sup> Felix Cohen accuses

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381. Hohfeld, *Judicial Reasoning*, *supra* note 53, at 756–57.

382. Kennedy, *supra* note 185, at 120.

383. CARDOZO, *supra* note 270, at 117.

384. *Id.* at 119.

385. This critique is often discussed in the secondary literature although it is

Dickinson of “confus[ing] normative and descriptive science”<sup>386</sup> and Frank states the postulates of sociological jurisprudence are a “confused mixture of (a) ‘There should be;’ and (b) ‘There is.’”<sup>387</sup> “Pound and Dickinson are confusing the desirable and the existent,” comments Frank, “They slide back and forth (without being aware of it) from stating ‘what I would like to see happen in the future’ to ‘what is now happening.’”<sup>388</sup> Llewellyn complains about the “*fusion or confusion of the realms of Is and Ought*”<sup>389</sup> and argues for the “temporary divorce” of Is and Ought,<sup>390</sup> citing the “more accurate description of Is”<sup>391</sup> as a hallmark of realism.

### III. BALANCING

The concept of balancing dates at least to Blackstone<sup>392</sup> but in American courts balancing was not deployed generally until the 1930’s.<sup>393</sup> Although there are radical differences between teleological balancing and conflicting considerations, balancing is permeated with “endless ambiguity”<sup>394</sup> and for many, balancing equals teleological

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seldom linked to the observer effect. *See, e.g.*, Kennedy, *supra* note 185, at 121 n.91 (“Pound’s generation of an ‘ought’ from an ‘is’ is . . . common to pragmatism and institutional economics in their early stages, as well as to sociological jurisprudence . . . . A major realist complaint against sociological jurisprudence was its blurring of the fact/value distinction.”)

386. Cohen, *supra* note 310, at 204 n.12.

387. Frank, *supra* note 214, at 584.

388. *Id.*

389. LLEWELLYN, *supra* note 364, at 84.

390. Llewellyn, *supra* note 11, at 1254.

391. *Id.* at 1255.

392. *See e.g.* DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 97 (1941).

393. For a history of balancing in American constitutional cases, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 948–54 (1987).

394. Pauline Westerman, *Interview met Duncan Kennedy*, 3 *NEDERLANDS TIJDSCHRIFT VOOR RECHTSFILOSOFIE & RECHTSTHEORIE* [NETH. J. LEGAL PHIL.]

balancing with conflicting considerations only dimly understood. One of the goals of this Article is to bring clarity to the issue. In the literature, the fragments that would be used to construct our two views of balancing can be ferreted out in the Realist Era. This Part traces a genealogy of balancing—it is not a history. Traditional history tends to focus on origins, linear development of ideas, and searches for the “root of what we know and what we are.”<sup>395</sup> Genealogy focuses on accident, singularity, and disparity instead of identity, and sees that essences, if any, were “fabricated in a piecemeal fashion from alien forms.”<sup>396</sup> Duncan Kennedy’s work on legal consciousness is an apt illustration of a genealogy: “We study the history of a consciousness by the genealogical method . . . looking not for origins, but for the pre-existing elements that actors combine at moments of change to produce a new version of . . . consciousness.”<sup>397</sup>

A force field approach to picturing balancing clarifies the difference between teleological balancing and conflicting considerations. The image of both types is a field constructed by courts with opposed interests positioned at either end (marked “+” and “-”). Courts draw a line in the field based on a statute or case law, and particular cases, depending on the outcome, are positioned by courts on one side of the line or the other. A judge can change the outcome by moving a case from one side to the other. As an example, consider the 1935 case *Webb v. McGowin*.<sup>398</sup> The plaintiff suffered grievous injuries in the process of saving the defendant’s life by diverting the fall of a heavy wooden

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258, 264–65 (2004) (“The critics of formalism . . . were ambivalent as to whether to replace formalism with a teleological jurisprudence or with a jurisprudence of proportionality. In both European and American legal thought there is endless ambiguity about this.”).

395. FOUCAULT, *supra* note 3, at 81.

396. *Id.* at 78.

397. KENNEDY, *supra* note 19, at 202.

398. 168 So. 196 (Ala. Ct. App. 1935).

block.<sup>399</sup> In gratitude, defendant promised to pay the plaintiff \$15 every two weeks for the remainder of plaintiff's life.<sup>400</sup> The defendant made the payments for almost ten years, but, upon his death his estate discontinued the payments.<sup>401</sup> The suit was brought *in assumpsit*. Applying a force field approach to the opinion, the case involves a conflict between the policies supporting promise enforcement (the morality of promise performance, the fairness of paying for benefits received, and so on) versus the policies supporting non-enforcement (people should be able to change their minds, promises made under extreme circumstances may be inconsiderate, and so on). In 1935, consideration theory and promissory estoppel (the only promise enforcement mechanisms available) drew a line in the field separating liability from non-liability. The court clearly felt enormous sympathy for the plaintiff but was faced with facts that seemed to position the case on the non-liability side. The court moved the case to the liability side by characterizing the defendant's promise as "an affirmance or ratification of what [the] appellant had done raising the presumption that the services had been rendered at McGowin's request."<sup>402</sup> In other words, it became a contract consideration case because the court was willing to reshape the facts into a bargain.<sup>403</sup>

Teleological balancing is objective, either/or, purposive, and filled with confidence that balancing leads to a correct result. The familiar image of the scales of justice supports

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399. *Id.* at 196.

400. *Id.* at 197.

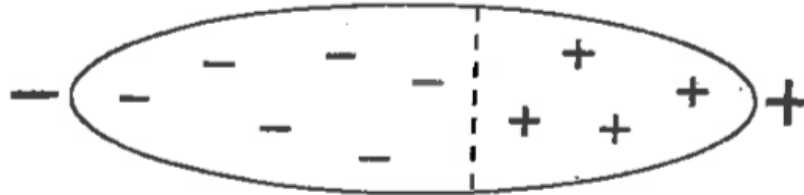
401. *Id.*

402. *Id.* at 198.

403. *Id.* The court treats the case as if, at the moment when the plaintiff is in the process of dropping the wooden block (which is done in the usual and ordinary course of his employment), and notices the defendant standing beneath, he shouts "if I divert the fall of this block, saving your life, and I'm horribly injured, do you promise to pay me \$15 every other week for the rest of my life?" In reply the defendant shouts "yes" and then the plaintiff falls. *See id.* at 196-99.

notions that a court decides a case by placing the weight of each interest on the scales and the result settles the matter. The loser's interest retreats and harmony is restored. "Force Field A" is an image of teleological balancing, seen in Figure 1.<sup>404</sup>

FIGURE 1. Force Field A (Teleological Balancing)



Notice how the competing interests operate only up to the line with no overlap.

In contrast, conflicting considerations balancing sees interests as perennially in conflict. The defeated interest is not neutralized but survives to fight another day. Conflicting considerations views law as contingent and mutable; made and not found. The operation of the conflicting policies throughout the field is *the* critical difference between conflicting considerations and teleological balancing.<sup>405</sup>

Applying a conflicting considerations understanding of policy to the negotiability principle in Article 3 of the Uniform Commercial Code, imagine a case where a purchaser of a promissory note sues the maker. The maker raises a failure of consideration defense (the widgets were

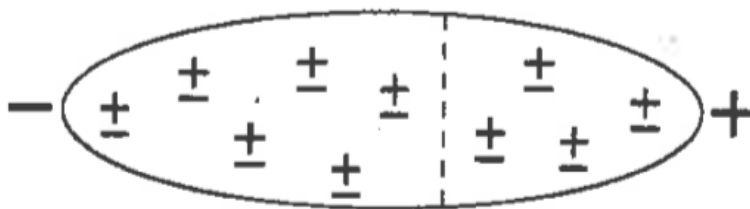
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404. For further discussion of a force field approach to policy see DUNCAN KENNEDY, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, in LEGAL REASONING: COLLECTED ESSAYS 11, at 36–41, 44–50 (2008); Curtis Nyquist, *A Force Field Approach to Policy*, 13 LAW TCHR. 1, 12–13 (2005).

405. Duncan Kennedy has been the principal architect of our understanding of conflicting considerations. See KENNEDY, *supra* note 10, at 99–100; Kennedy, *supra* note 185, at 94–96, 104–05, 108–15.

defective) while the plaintiff claims holder in due course (HIDC) status. The force field looks like that shown in Figure 2.

**FIGURE 2.** Force Field B (Conflicting Considerations Balancing)



The policies in support of the HIDC (encouraging markets in negotiable instruments including maximizing the price purchasers are willing to pay) are represented by “+” while “-” represents the policies in support of the maker’s defense (ensuring sellers deliver a quality product and the unfairness of forcing buyers to pay for shoddy goods). The conflicting policies operate throughout the field.<sup>406</sup> The line in the field is the Article 3 rule regarding personal defenses (*i.e.*, a HIDC takes free of personal defenses while a non-HIDC takes subject).<sup>407</sup> In cases to the left of the line, the plaintiff has failed to establish HIDC status and, therefore, the defense prevails. In cases to the right, the plaintiff is a HIDC and takes free of the defense.

Pound and Holmes serve as patriarchs of the divergent views of balancing. Pound’s approach was formulated early in his career and became a mantra he repeated for more than forty years: “the satisfaction of everyone’s wants so far

406. See KENNEDY, *supra* note 404, at 39 (“[W]e have to add to our model of the field of law the notion that, at every point in the field, contradictory policies exert different levels of force.”).

407. U.C.C. § 3-305 (2014).



as they are not outweighed by others' wants."<sup>408</sup> In the Realist Era, Pound's view would be influential in the genealogy of teleological balancing. For Pound, balancing was about "reasonable adjustment," "rational reconciling,"<sup>409</sup> and interests being "harmonized or compromised."<sup>410</sup> In the inventory of social interests, "first place must be given to . . . general security,"<sup>411</sup> and Pound cites the negotiability principle as a reflection of "how far recognition of the social interest in the security of transactions went in the maturity of law."<sup>412</sup>

Holmes was an early prophet of conflicting considerations. A premonition of the path he would follow dates to the 1870's:

Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other.<sup>413</sup>

In articles from the 1890's, Holmes elaborates on his view of policy: "a line must be drawn between the conflicting interests";<sup>414</sup> "[t]he two advantages run against

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408. Pound, *supra* note 66, at 612. In 1954 he wrote "I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice." ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1954). *See also supra* note 1 and accompanying text; *infra* text accompanying note 451. Others in the Progressive Era would cite Pound's refrain as a fundamental principle of the Era. *See, e.g.* CARDOZO, *supra* note 177, at 55.

409. Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943).

410. *Id.* at 17.

411. *Id.*

412. *Id.* at 20.

413. Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 654 (1873).

414. Holmes, *Privilege*, *supra* note 36, at 3.

one another, and a line has to be drawn";<sup>415</sup> "[v]iews of policy . . . are fields of battle";<sup>416</sup> "[i]t is a question of degree at what point the combination becomes large enough to be wrong";<sup>417</sup> "judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage";<sup>418</sup> "[s]uch matters really are battle grounds where the means do not exist for determinations that shall be good for all time"; and "[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds."<sup>419</sup>

In *Hudson County Water Company v. Robert H. McCarter*,<sup>420</sup> Holmes creates a striking image of conflicting considerations:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.<sup>421</sup>

Realist Era views of the two forms of balancing were not necessarily either/or, as demonstrated by the work of both Morris Cohen and John Dickinson. Cohen and Dickinson come down primarily on the teleological side<sup>422</sup> but they also have something to contribute to conflicting

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415. *Id.* at 6.

416. *Id.* at 7.

417. *Id.* at 8.

418. Holmes, *supra* note 333, at 467.

419. *Id.* at 466.

420. 209 U.S. 349 (1908).

421. *Id.* at 355.

422. See *infra* notes 428, 447–50 and accompanying text.

considerations.<sup>423</sup> Furthermore, no one in the Realist Era offers a fully developed theory of conflicting considerations but rather, in the process of critiquing the Progressive Era and teleological balancing, they offer fragments as they groped toward a new understanding of balancing. Years later, the fragments would be used to assemble the contemporary theory.

One of the dynamics was a spirit of collaboration as ideas were shared, argued about, and accepted, rejected, or transformed. For example, Llewellyn says of Morris Cohen, “his insistence on a phenomenon in law akin to ‘fields’ of force and strain-in-a-given-direction in physics, advanced the ball here.”<sup>424</sup> Llewellyn is referring to Cohen’s “principle of polarity” which Cohen introduces in *Reason and Nature*.<sup>425</sup> Cohen describes the principle as opposites (e.g., unity and plurality, ideal and real) working in tandem like two blades of a scissors: “Both are necessary and intimately connected, but neither can absorb or, by a process of sublimation (*Aufhebung*), transcend the other.”<sup>426</sup> Any attempt to separate the two must fail since “[i]n actual life real freedom to do anything, in art as in politics, depends upon acceptance of the rules of our enterprise.”<sup>427</sup> Cohen’s principle was sufficiently murky that it would be subject to various interpretations and it did not necessarily lead to conflicting considerations, as it would in the work of Llewellyn and Felix Cohen. Roscoe Pound saw the principle of polarity as contributing to the spread of natural law.<sup>428</sup> Peter Read Teachout argues the principle would act as *the*

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423. See *infra* notes 424–26, 466–67 and accompanying text.

424. Llewellyn, *supra* note 257, at 602.

425. MORRIS R. COHEN, *REASON AND NATURE* (1931).

426. *Id.* at 385.

427. Cohen, *supra* note 372, at 591.

428. Roscoe Pound, *Fifty Years of Jurisprudence* (pt. 3), 51 HARV. L. REV. 444, 471 n.84 (1938) (“See also for America, the ethical-rationalist natural law of Morris R. Cohen . . . [i]f we are to have a fundamental principle, Professor Cohen’s ‘principle of polarity’ would satisfy me very well.”).

organizing principle of Fuller's jurisprudence.<sup>429</sup>

A genealogy of teleological balancing and conflicting considerations finds all of the elements of each type surfacing in the Realist Era.

#### A. *A Genealogy of Teleological Balancing*

Teleological balancing grew out of the Progressive Era concern that legal principles should reflect goals and purposes either logically derived from a study of society or based on intuition.<sup>430</sup> In a discussion of the social utilitarians, Pound refers to the work of Rudolph von Jhering as “of enduring value for sociological jurisprudence”<sup>431</sup> and characterizes Jhering's philosophy as teleological: “[s]ince life is governed by purpose, he held that the science of collective life must employ primarily a teleological method.”<sup>432</sup> For Jhering, law should be based on the search for human ends and once those ends are discovered, they should be “fashioned consciously into laws.”<sup>433</sup> When Progressive Era thinkers noticed conflicting policies, they assumed a teleological, purposive balancing would resolve the conflict.

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429. See Peter Read Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073, 1082, 1105–12 (1986).

430. See *supra* notes 378–84 and accompanying text. G. Edward White's summary of Sociological Jurisprudence provides further context for teleological balancing:

[Progressive Jurisprudence's] philosophical premises—the inevitability of change, ultimate confidence in the ability of governmental mechanisms to respond to change . . . a belief in the violability of common social ends and shared moral values, and a faith that moral and ethical “rights” could be perceived and distinguished from “wrongs”—were those of Progressivism at large.

White, *supra* note 212, at 1024.

431. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 2), 25 HARV. L. REV. 140, 146 (1911).

432. *Id.* at 140.

433. *Id.* at 141.

In his lectures, Cardozo emphasizes the teleological basis of law and teleological balancing.<sup>434</sup> In 1924 he notes, “some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations”<sup>435</sup> and “all methods are to be viewed not as idols but as tools . . . [t]hus viewing them we shall often find that they are not antagonists but allies.”<sup>436</sup> Cardozo’s 1928 *The Paradoxes of Legal Science* contains a veritable library of teleological balancing concepts: “values of expediency or of convenience or of economic or cultural achievement . . . are to be ascertained and assessed and equilibrated”;<sup>437</sup> in “the task of judging . . . [w]e seem to see the workings of an Hegelian philosophy of history”;<sup>438</sup> and “gaps in the system will be filled, and filled with ever-growing consciousness of the implications of the process, by a balancing of social interests.”<sup>439</sup> In judging, Cardozo laments the difficult case, but “[t]hen, suddenly, the fog has lifted. I have reached a stage of mental peace . . . . All the more precious is the final peace for the storm that went before it.”<sup>440</sup>

Brandeis fashions an early statement of a balancing test in an opinion from 1918. The Chicago Board of Trade had promulgated a rule prohibiting “call” trades of grain

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434. See CARDOZO, *supra* note 270, at 102.

435. *Id.*

436. *Id.* at 103.

437. CARDOZO, *supra* note 177, at 54.

438. *Id.* at 62. Hegel’s philosophy purported to discern a direction and purpose in the flux of history. Apparent contradictions are seen as thesis and antithesis which are ultimately resolved in a synthesis. See, e.g., CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 56–66, 65 (1979) (“[I]n his introductory lectures to the Philosophy of History, Hegel speaks of the principles ‘that Reason rules the world’ and that the final purpose of the world is the actualization of freedom, as having to be presupposed in the study of history, but as having been ‘proved in philosophy.’”).

439. CARDOZO, *supra* note 177, at 77.

440. *Id.* at 80–81.

during certain hours of the day.<sup>441</sup> The Department of Justice filed suit alleging the rule violated the Sherman Act.<sup>442</sup> The District Court excluded evidence offered by the Board of Trade about the purposes of the rule and enjoined enforcement of the rule.<sup>443</sup> The Supreme Court reversed, holding the evidence should have been admitted and finding that the rule was a “reasonable regulation of business consistent with the provisions of the Anti-Trust Law.”<sup>444</sup> Brandeis spells out the test to be applied:

To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>445</sup>

Although much maligned, Brandeis’s balancing test, known as the “Rule of Reason,” still dominates anti-trust jurisprudence.<sup>446</sup> Brandeis provides only a rough sketch of how balancing should work, but his view is entirely consistent with teleological balancing.

John Dickinson’s work reflects the view that a need for balancing arises not from a perennial conflict between interests, but from changes in society. Were society static, law would be certain and unchanging “[b]ut the difficulty is

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441. *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 236 (1918). Chicago Board of Trade “call” trades occurred during special sessions following the close of the regular trading day. *Id.* The special sessions generally lasted about 30 minutes. *Id.*

442. *Id.* at 232–33.

443. *See id.* at 231.

444. *Id.* at 239.

445. *Id.* at 238.

446. *See, e.g.*, Maurice Stucke, *Discussion: Does the Rule of Reason Violate the Rule of Law?*, 22 *LOY. CONSUMER L. REV.* 28, 30 (2009) (“The rule of reason has been criticized for being inaccurate, its poor administrability, its subjectivity, its lack of transparency, and its yielding inconsistent results.”).

that the contemporary view of public policy shifts with successive generations, and what was once the goal of policy ceases in time to be so.”<sup>447</sup> Since law is “a system of abstract logic, it spreads a net of allaying oil over the controversies of the moment.”<sup>448</sup> Dickinson pictures balancing as a process “of drawing a line somewhere between two opposing general principles and saying that each shall be valid only up to the line and that beyond it the other shall prevail.”<sup>449</sup> If Dickinson were to draw his view of balancing it would undoubtedly look like Force Field A in Figure 1.<sup>450</sup>

The concluding paragraph of Pound’s 1943 *A Survey of Social Interests* may be seen as the archetypal statement of teleological balancing:

Such in outline are the social interests which are recognized or are coming to be recognized in modern law. Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly or immediately, or through securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.<sup>451</sup>

### B. *A Genealogy of Conflicting Considerations Balancing*

While the Progressive Era assumed a harmony view of

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447. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 131 (1927) [hereinafter DICKINSON, ADMINISTRATIVE JUSTICE]. See also John Dickinson, *The Law Behind Law* (pt. 1), 29 COLUM. L. REV. 113, 132 (1929) (“The customary theory of law breaks down in a complex society . . . . There is therefore continually raised for the law the problem of selecting between those customs which it will ratify and those which it will not.”).

448. DICKINSON, ADMINISTRATIVE JUSTICE, *supra* note 447, at 141.

449. John Dickinson, *The Law Behind Law* (pt. 2), 29 COLUM. L. REV. 285, 299 (1929).

450. See *supra* note 404 and accompanying text.

451. Pound, *supra* note 409, at 39.

society, conflicting considerations views society as fragmented. Felix Cohen argues that the idea that the goal of law “is simply to secure adequate enforcement for the expressed demands of society . . . derives from a dangerous metaphor.”<sup>452</sup> He adds: “Society is not vocal. The expressed demands of society are the demands of vocally organized groups, and a discreet deference to the power of such groups should not lead us to confuse their demands with ‘social welfare.’”<sup>453</sup> In Walter Wheeler Cook’s call for a different type of law school, one of the aims was the study not just of society’s goals but “research into the conflicts of interest which arise in the community.”<sup>454</sup> *Laissez faire* economic theory viewed the wants of the community as being satisfied under a democratic approach with voting in dollars. “But what is ‘the community’ whose wants are thus satisfied?” asks Robert Hale, “[i]t is not a single sentient being, but a name given to various individuals who have wants.”<sup>455</sup>

A teleological view of balancing is peaceful; balancing spreads an “allaying oil” over conflict. The language of conflicting considerations is violent; “[s]uch matters really are battle grounds,”<sup>456</sup> “taking sides upon debatable and often burning questions”<sup>457</sup> like “[s]hall we have war?”<sup>458</sup> “clashing human rights . . . on pitched fields,”<sup>459</sup> and in international relations and industrial relations “we find

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452. Cohen, *supra* note 310, at 207 n.20.

453. *Id.*

454. Cook, *supra* note 223, at 309.

455. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 490–91 (1923).

456. Holmes, *supra* note 333, at 466.

457. *Id.* at 468.

458. LLEWELLYN, *supra* note 123, at 116.

459. Joseph C. Hutcheson, Jr., *Lawyer’s Law and the Little, Small Dice*, 7 TUL. L. REV. 1, 4 (1932).



[the] war of all against all.”<sup>460</sup>

The Progressive Era held the view that the need for balancing was caused by changes in society. Conflicting considerations regards balancing as arising from a collision between interests that is fundamental and perennial. An unpublished 1934 manuscript by George Gardner, included in Lon Fuller’s 1947 edition of *Basic Contract Law*, captures the spirit of conflicting considerations.<sup>461</sup> He summarizes the four elementary ideas of contract (tort, bargain, promise, and quasi-contract), sorts the ideas into two categories (justice known before the event *versus* justice known after the event), and concludes:

These ideas, which at first seem trite and wholly harmonious, are in fact profoundly in conflict . . . . The conflict between these two standpoints is perennial; it can be traced throughout the history of the law of contracts and noted in nearly every debatable contract question; there is no reason to think that it can ever be gotten rid of or to suppose that the present compromises of the issue will be any more permanent than the other compromises that have gone before.<sup>462</sup>

Felix Cohen urges judges not to be fooled by general concepts that lead only to circular reasoning, but instead to “assess the conflicting human values that are opposed in every controversy.”<sup>463</sup>

Under conflicting considerations, force fields are dynamic and courts are seen as actively involved in constructing the fields, drawing the line of demarcation, and positioning cases in the field. “Creative legal thought,” argues Felix Cohen, “will . . . seek to map the hidden springs of judicial decision and to weigh the social forces

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460. Cohen, *supra* note 2, at 837.

461. George K. Gardner, Observations on the Course in Contracts (1934) (unpublished).

462. LON L. FULLER, BASIC CONTRACT LAW 151 (1964) (quoting GARDNER, *supra* note 461). For further discussion of Gardner’s remarks, see Kennedy, *supra* note 185, at 166.

463. Cohen, *supra* note 2, at 842 (emphasis added).

which are represented on the bench . . . '[s]ocial policy' will be comprehended . . . as the gravitational field that gives weight to any rule or precedent."<sup>464</sup> In an article from 1937, Felix Cohen elaborates on his view of force fields, writing, "conflicting interests [are] diversely organi[z]ed and pitted against each other in an ever shifting battle line."<sup>465</sup> Morris Cohen observes that issues of the rights of property owners and economic freedom "argue[] for a regime where every one has a definite sphere of rights and duties, but it does not tell us where these lines should be drawn."<sup>466</sup> In a later article, Morris Cohen draws an analogy between law and geometry. Results in particular cases are points while a series of cases create a line: "No point by itself can determine the position of a line completely; for many lines can be passed through it."<sup>467</sup> Llewellyn's article on warranty of quality, after emphasizing the importance of "*some person's* classification of *the facts* in cases,"<sup>468</sup> discusses how the legal concepts of warranty are often arrayed on "opposing pole[s]"<sup>469</sup> and lawyers' arguments are really "combat between systems."<sup>470</sup> Judges and lawyers have a sense of how cases are positioned and can be repositioned within the force field. Cases nearer the poles are seen as "easier" than cases nearer the line dividing the outcomes.

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464. *Id.* at 833–34.

465. Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 22 (1937). For a similar idea in the work of John Dickinson, see Dickinson *supra* note 449, at 302–03 (Rejecting the idea that it is possible to generalize particular policy judgments into a coherent system: "A later case arising on a different state of facts may thus be validly decided on a completely contradictory presupposition. 'A case is only authority for what it decides,' said Lord Halsbury." *Id.* at 303 (footnote omitted)).

466. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 19 (1927).

467. Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 364 (1931).

468. Llewellyn, *supra* note 294, at 722 (emphasis in original).

469. *Id.* at 728.

470. *Id.* at 730.

All of this, of course, exists only in the minds of judges and lawyers—force fields are not “out there” in any sense.

Under conflicting considerations, each policy operates throughout the field, not just up to the line of demarcation.<sup>471</sup> In *Law and the Modern Mind*, Frank critiques Pound’s division of human conduct and economic conduct.<sup>472</sup> Not only is Pound’s division irrational, but when he attempts to balance them it becomes apparent “these two phrases are not antithetical but hopelessly overlap.”<sup>473</sup> French law Professor René Demogue speaks to the point in a work from 1916:

In the opposition which ideas cause to arise at a given moment, the law of simplicity of the mind discloses a conflict bound to end in the death of the vanquished. This is an error . . . . [R]ejected ideas must retake, sooner or later, a part of their lost ground; whence comes that satisfaction, to a certain extent, of contradictory desires which is completed by illusion and hope.<sup>474</sup>

Under conflicting considerations, cases are particular and resist general categorization. Holmes stressed the importance of particularity. “When the question of policy is faced it will be seen to be one which cannot be answered by generalities,” he comments, “but must be determined by the particular character of the case.”<sup>475</sup> Herman Oliphant cites the empiricism of physical sciences as a model to counteract the speculative thinking of social science where we have

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471. One of the few contemporary works on the history of balancing hints at this idea, but when the point is raised it is quickly dropped. See Aleinikoff, *supra* note 393, at 946 (“The Court employs a different version of balancing when it speaks of ‘striking a balance’ between or among competing interests . . . . One interest does not override another; each survives and is given its due.”).

472. See FRANK, *supra* note 239, at 212.

473. *Id.*

474. René Demogue, *Analysis of Fundamental Notions*, in MODERN FRENCH LEGAL PHILOSOPHY 345 at 567–68 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., 1916). Kennedy refers to Demogue as one of the founders of conflicting considerations. See Kennedy, *supra* note 185, at 113.

475. Holmes, *Privilege*, *supra* note 36, at 3.

become accustomed to “handling drafts on thought of rather large denominations.”<sup>476</sup> “[T]he experimental physicist or chemist, who does not spend his days worrying about the absence of ultimate and absolute rational structures,” he elaborates, “but who sees that his and many lifetimes will be occupied on investigations markedly particular.”<sup>477</sup> Leon Green states a jury’s judgment in a negligence case “is only the law’s judgment in the particular case; it has no further currency.”<sup>478</sup> Underhill Moore’s analysis of group habits, including the habits of legal institutions, argues that “each institution is a complex aggregate of many specific group habits” and general concepts like property are “simply generic names for aggregates of minute channels of conduct.”<sup>479</sup> In balancing social values the value to be preferred, observes Edwin Patterson, “can only be determined in particular, not in general.”<sup>480</sup>

In a stunning 1950 retrospective look at the Realist Era, Felix Cohen integrates force field theory and physics.<sup>481</sup> In discussing the common law system he applies the “guiding thread in Einstein’s general theory of relativity” and finds that just as matter warps the “space-time structure,”<sup>482</sup> so too “the force and direction of a precedent vary with the field in which it is observed.”<sup>483</sup> To illustrate, he hypothesizes a “series of precedents that

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476. Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 136 (1932).

477. *Id.*

478. Green, *supra* note 273, at 1043.

479. Moore, *supra* note 17, at 613.

480. Patterson, *supra* note 243, at 144.

481. Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950).

482. *Id.* at 250.

483. *Id.* at 249. Cohen argues that there are many and varied “value regions” and as a component of law (*i.e.* relevant facts, rules, precedents) moves to a different region, it “changes its weight, its shape, and its direction in accordance with ‘the lay of the geodesics’ of the region.” *Id.* at 250.

shows a straight line when the judgments range from \$1,000 to \$100,000” and argues that the line “may swerve . . . sharply when a case involves a twenty million dollar judgment against a government or other public institution.”<sup>484</sup> Furthermore, “the shape of a precedent, as well as its size, will vary with the selectivity-grid through which it is viewed” so that cases in a series “which look[] like a straight line from one value standpoint may look like a very crooked stick from another.”<sup>485</sup> Just as in physics, where the idea of absolute space has become antiquated, so too “[t]he absolute space of unchanging rules and unmoving precedents . . . [of] traditional jurisprudence is gone.”<sup>486</sup> After more than sixty years, jurisprudential force field theory has yet to address Cohen’s insights.

#### IV. CONCLUSION

Philosopher David Wood emphasizes an idea he calls the “step back.”<sup>487</sup> When concepts become too familiar, we stop thinking about them; we reduce them to “something that we’ve known all along.”<sup>488</sup> Wood encourages us to step back from the familiar to develop new ways of seeing. Wood participated in the 2000 Collegium Phenomenologicum, a colloquium on Martin Heidegger’s *Beitrage*. His reflection on the experience illustrates the step back:

[W]e spent three weeks in Italy trying to make sense of this book, and also, I think it would be fair to say, trying not to make sense of

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484. *Id.* at 249.

485. *Id.* at 248.

486. *Id.* at 250.

487. DAVID WOOD, *THE STEP BACK: ETHICS AND POLITICS AFTER DECONSTRUCTION* (2005). Wood is a professor of philosophy at Vanderbilt University. Although his philosophical training was in the British analytic tradition much of his work is in the continental tradition. He has written on Jacques Derrida, Martin Heidegger, and Emmanuel Levinas among others.

488. Darren Hutchinson, *Thinking Against the Grain: An Interview with David Wood*, VAND. PHILOSOPHY DEP’T (Fall 2000), <https://as.vanderbilt.edu/philosophy/people/faculty/davidwoodinterview.php> (last visited Mar. 15, 2016).

it, that is trying to keep it at a certain distance, trying to allow it to continue to work on us. Because, of course, the temptation in reading the book, or any book, even the *Beitrage*, is to come out at the end of the day saying, "This is what it's about," and to the extent that I've done that I may have mislead you. And the real trick, in some sense, is to keep it intact, keep it operating at a distance.<sup>489</sup>

Wood encourages us to retreat "from the fantasy of a 'final solution' . . . [and] the seemingly attractive idea of reaching an end, never having to struggle again."<sup>490</sup> He finds the step back concept at work in philosophy, the arts, and many other disciplines.<sup>491</sup> A painting can be more than just an object hanging on a wall; "sometimes you get the sense that the painting itself looks out onto the world, that the painting is not just in the world but it actually opens up a world. It reveals a whole way of thinking and seeing and experiencing."<sup>492</sup> We are constantly tempted to look for easy answers, but as Wittgenstein comments, "[w]e want to walk: so we need *friction*. Back to the rough ground."<sup>493</sup>

The goal of this Article is to encourage us to take a step back from the conventional history of American legal thought and from our established view of balancing. The hope is that these two areas will be made unfamiliar, new, and interesting; so that "we don't quite know what to say; we haven't got all the concepts ready made."<sup>494</sup>

The traditional account of American legal thought divides the period from 1870 to 1941 into two eras: Classical Legal Thought from 1870 to the 1920's and a Progressive/Legal Realist critique of CLT from the 1920's to 1941. This Article complicates and enriches that story by

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489. *Id.* at 5–6.

490. WOOD, *supra* note 487, at 7.

491. Hutchinson, *supra* note 488.

492. *Id.*

493. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 107, at 46e (G. E. M. Anscombe trans. 2d ed. 1958) *quoted in* WOOD, *supra* note 487, at 1.

494. Hutchinson, *supra* note 488.

claiming there were three eras; CLT from 1870 to the 1920's, a Progressive Era from 1905 to 1923, and a Realist Era from 1923 to 1941. This three era approach has several consequences. It provides a more accurate historical account of the Realist Era. Reading Realist Era scholarship demands careful attention to the target of critique: is it CLT, or the Progressive Era, or both? It multiplies the number of available theories of law which undermines the possibility of any of them being ultimately persuasive.<sup>495</sup> And it acknowledges the enormous debt the Realist Era owes to cognitive relativism in science, social science, and the arts.

Similarly, our view of balancing is too facile with teleological balancing being the default setting: conflicting considerations is rarely discussed in the literature or even seen as an alternative. Like Pound we always know what to say about balancing but find ourselves unable to say anything new. Conflicting considerations is one of the most significant innovations of the Realist Era and there is a danger that it will be lost to history.

Recognition of the two radically different forms of balancing opens up new ways of thinking and seeing. For example, Martha Nussbaum discusses the insight from Greek tragedy that life often offers choices where even a good person has no alternative but to inflict harm.<sup>496</sup> She uses a scene in Aeschylus's *Agamemnon* to illustrate her point.<sup>497</sup> Agamemnon's fleet is becalmed and he learns in a prophetic utterance that the winds will not return until he

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495. See e.g., KENNEDY, *supra* note 10, at 82 (discussing the critique/reconstruction structure of American legal theory which has been embedded in our scholarship since the Progressive Era with the consequence that the critique side is so fully developed that many weapons are available to attack any attempt at reconstruction which then "sinks like a stone").

496. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 25 (2001) ("Tragedy . . . shows good people doing bad things, things otherwise repugnant to their ethical character and commitments, because of circumstances whose origin does not lie with them.").

497. *Id.* at 32.

sacrifices his daughter.<sup>498</sup> In weighing the decision he realizes that if he does not sacrifice her, everyone on the voyage, including her, will perish.<sup>499</sup> As Agamemnon decides to make the sacrifice, the Chorus criticizes him not for the decision, but for his attitude toward the decision.<sup>500</sup> He displays neither regret nor remorse; he “did not struggle against it.”<sup>501</sup> Although at first he is horrified at the thought of sacrificing his daughter “[f]rom the moment he makes his decision, itself the best he could have made, he strangely turns himself into a collaborator, a willing victim.”<sup>502</sup> Philosophy from its earliest days has denied the existence of such conflicts and there is a long tradition purporting to offer an escape from the dilemma. In *Euthyphro*, Socrates argues that the idea of competing moral claims is illogical.<sup>503</sup> In R.M. Hare’s philosophy, when two general rules appear to conflict, create an exception.<sup>504</sup> Or, as in Kant’s philosophy, it is argued that “it is part of the very notion of a moral rule or principle that it can never conflict with another.”<sup>505</sup>

Joseph Singer elaborates on the consequences of Nussbaum’s insight for jurisprudence. In the divide between liberal theories of law (*i.e.* legal process, rights theory, and law and economics) and critical theories (*i.e.* critical legal studies, feminist legal theory, and law and society), it is critical theory that avoids falling back into formalism:

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498. *Id.* at 33.

499. *Id.*

500. *Id.* at 35–36.

501. *Id.* at 36.

502. *Id.* at 35.

503. *Id.* at 25.

504. *Id.* at 31 (R.M. Hare argues that “inconsistent principles . . . must [be] modif[ied]. . . in the light of the recalcitrant situation.” In a time of war with lives at stake, “[d]on’t lie’ is reformulated . . . as the more adequate principle, ‘[d]on’t lie, except to the enemy in time of war.’”).

505. *Id.*



[Critical theory] sees decision procedures as illegitimate attempts to evade responsibility for moral choices about justice, and is skeptical about the possibility of identifying a single common viewpoint from which claims of justice may be judged. Moreover, it sees the elaboration of contradictory principles, value, and perspectives as itself a constructive part of normative argument. Contradiction all the way down is the route to a responsible, moral formulation of social justice.<sup>506</sup>

Just as Greek tragedy “depicted people who were placed in situations in which they were pulled, morally, in two different directions,” judges should recognize they face “hard choices in the face of contradictory moral impulses.”<sup>507</sup>

The Nussbaum/Singer understanding of tragedy captures an essential difference between teleological balancing and conflicting considerations. A judge applying a teleological view of balancing can slip easily into formalism, separating herself from the result, thinking that the rule decides the case and since the opposed policies occupy different regions in the force field, a decision one way or the other does not inflict harm.<sup>508</sup> A judge with a conflicting considerations understanding of policy realizes, as each opposed policy operates throughout the field,<sup>509</sup> she has no choice but to impose harm.

In Realist Era scholarship there is a clear recognition of the consequences of conflicting considerations for judges. Once again Holmes is at the forefront:

I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often

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506. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 537 (1988).

507. *Id.*

508. See *supra* note 404 and accompanying text.

509. See *supra* notes 405–07 and accompanying text.

burning questions.<sup>510</sup>

Felix Cohen argues that “every case presents a moral question to the court” and the classical theory “hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions.”<sup>511</sup> A theory of the judge’s role, which Cohen calls the “slot machine doctrine,” while it might provide “aid and comfort” to judges deciding difficult cases, distances judges from the ethical consequences of their decisions.<sup>512</sup> Morris Cohen argues that abstract theories of law and the application of empty phrases like “liberty of contract” to justify a decision operate “to the detriment of any thorough-going analysis of the actual social situation.”<sup>513</sup>

Jerome Frank admits the judge’s role “if well done, is no simple one.”<sup>514</sup> Judges must balance conflicting interests, determine if a case should be controlled by an old rule or “legislate’ by revising and adjusting the preexisting rules,” and when explaining the decision, judges “need all the clear consciousness of their purpose which they can summon to their aid.”<sup>515</sup> Frank summarizes both the temptations facing judges and the opportunity offered them:

[T]he pretense, the self-delusion, that when they are creating they are borrowing, when they are making something new they are merely applying the commands given them by some existing external authority, cannot but diminish their efficiency. They must rid themselves of this reliance on a non-existent guide, they must learn the virtue, the power and the practical worth of self-

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510. Holmes, *supra* note 333, at 468.

511. Cohen, *supra* note 2, at 840.

512. Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 35 (1934–35).

513. Cohen, *supra* note 467, at 354.

514. FRANK, *supra* note 239, at 130.

515. *Id.*

authority.<sup>516</sup>

For a contemporary example of conflicting considerations consider *Sullivan v. United Dealers Corp.*<sup>517</sup> The Sullivans entered into a contract with Memory Swift Homes, Inc. for construction of a prefabricated home and in payment, issued a promissory note to Memory Swift in the amount \$18,224.64.<sup>518</sup> Memory Swift then transferred the note to United Dealers.<sup>519</sup> After making a few monthly payments the Sullivans defaulted on the note claiming the construction was defective.<sup>520</sup> United sued for enforcement of the note and the trial court found that since United qualified as a holder in due course, the Sullivans were obligated to pay despite the defective construction.<sup>521</sup> The appellate court affirmed although there were strong arguments for the Sullivans.<sup>522</sup> The court emphasized the policies in support of holder in due course status (*e.g.*, “. . . to encourage the supplying of credit . . . by insulating the lender from lawsuits over . . . quality.”) but did not mention the conflicting policies (*e.g.*, forcing the defendant to pay for shoddy construction which will undermine the quality of construction in the industry).<sup>523</sup> Overlaying the facts of

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516. *Id.* at 130–31.

517. 486 S.W.2d 699 (Ky. Ct. App. 1972).

518. *Id.* at 700.

519. *Id.*

520. *Id.*

521. *Id.* at 701.

522. *Id.* (“[T]estimony shows that the appellee [the finance company] was cognizant and knew about this contract. The appellee had done around \$500,000 with Memory Swift Homes, Inc., over a period of . . . years . . . [and] also knew at the time they purchased th[e] note and mortgage no work had been performed.”).

523. *Id.* *Sullivan* is just one of many pre-1976 cases where consumers’ claims or defenses were cut off by the purchaser’s holder in due course status. A Federal Trade Commission regulation effective May 14, 1976 required that any consumer credit contract with a seller of goods or services contain a notice stating any holder of the contract is subject to claims and defenses “which the debtor could assert against the seller of goods or services.” See F.T.C.

Sullivan onto Force Field B in Figure 2, it seems the court views the case as close to the line but positioned on the positive side. The harm is inflicted on the Sullivans who were undoubtedly stunned to learn of the intricacies of Article 3 of the Uniform Commercial Code. It would be relatively easy to move the case to the other side inflicting the harm on United. For example, the court could have held that because of the volume of business between Memory Swift and United they were too closely connected. Under the “close connection” doctrine United would be considered a co-originator of the note and therefore subject to the Sullivan’s defense.<sup>524</sup>

The stark difference between teleological balancing and conflicting considerations raises in a profound way the more general question of a judge’s role and her responsibility in deciding cases. David Wood describes responsibility in its most fundamental sense as the ability to respond to a situation. In the philosophy of Husserl, for example, “responsibility . . . is . . . not particularly ethical, or epistemological, or metaphysical . . . [It is] a condition for any of these things to have any kind of value.”<sup>525</sup> The court in *Sullivan v. United Dealers*, to the extent it thought about balancing, probably held a teleological view. Had it instead understood the case as raising conflicting considerations with policies colliding throughout the field, it would not have justified the result with a glib reference to the holder in due course policy. Perhaps the outcome would have been the same but the court would have struggled with the decision, realizing it had no choice but to inflict harm. Joseph Singer summarizes the essence of responsible

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Consumer-Credit Regulations, 16 C.F.R. § 433.2(a) (2015). This regulation changes the result in *Sullivan*. It is worth noting, however, that if the Sullivans’ contract had been for construction of a commercial building or if the Sullivans had issued a check, the regulation would not apply.

524. For an example of a case applying the close connection doctrine, see *Jones v. Approved Bancredit Corp.*, 256 A.2d 739 (Del. 1969).

525. Hutchinson, *supra* note 488.

decision making: “[t]he better response is to recognize the competing moral claims, to feel them pressing upon you at the moment you act.”<sup>526</sup>

Applying conflicting considerations to an issue with more gravitas than the U.C.C., from 1995 to 2002 Colorado law mandated sentencing in capital cases by a three-judge panel. Judge Leland Anderson, now retired, sat on two such cases voting in favor of the death penalty in one and against in the other.<sup>527</sup> He reflects on the experience:

Those cases continue to haunt me even to this day, many years after having signed off on the decisions with a trembling heart. In the interim, I have struggled emotionally and morally with the issue of the death penalty. I know these decisions remain with one the rest of one’s life . . . . This is a wounding experience.”<sup>528</sup>

Judge Anderson sounds like a good person torn between alternatives where either of the options would inflict harm and who brought to the cases a deep sense of responsibility. The death penalty is a “burning question”<sup>529</sup> and Judge Anderson displays his wounds openly and candidly. Holmes would approve.

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526. Singer, *supra* note 506, at 538.

527. Leland Anderson, *Abandon the Death Penalty, Retired Judge Urges*, DENVER POST (Mar. 7, 2013, 3:02 PM) <http://blogs.denverpost.com/opinion/2013/03/07/abandon-the-death-penalty-retired-judge-urges>.

528. *Id.*

529. *See supra* note 510 and accompanying text.