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Legal modernism and the politics of expertise : American law's crisis of knowledge and authority, 1870-1930.

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LEGAL MODERNISM AND THE POLITICS OF EXPERTISE: AMERICAN LAW'S CRISIS OF KNOWLEDGE AND AUTHORITY, 1870-1930

A Dissertation Presented

by

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To the memory of my father and brother,
Wilson D. Rose, Sr. and Wilson D. Rose, Jr.

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Writing a dissertation is a rather strange experience. The process is, in turns, filled with anxiety and an emerging confidence in one's work; pure dread and something tantamount to joy. Needless to say, it becomes so intertwined with one's life that any sense of boundaries soon enough slips away. All in all, however, my experience has been a very positive one; this owing to the people who have been with me on my way. My dissertation advisor, John Brigham, has been extraordinarily patient and supportive. More importantly, however, he has introduced me to the world of socio-legal scholarship that, hopefully, I will spend the rest of my career exploring. And, in addition, he has remained a friend. So, too, the other members of my committee, Tom Dumm and Peter d'Errico. It would be hard to think of two finer scholars to have worked with on this project; I have been very lucky indeed and I wish to thank them for their participation.

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ABSTRACT

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In this dissertation, I explore the relationship between legal theory and legal practice. My focus is on the response of late nineteenth and early twentieth century American jurisprudence to a perceived crisis in American legal doctrine, a crisis that threatened to undermine the legitimacy and authority of the American legal profession. Uncertainty and complexity in the law were dominant characterizations of this historical moment, more generally understood as a time of rapid social and economic growth, producing a sense of chaos and fragmentation. I read formalism and realism (both broadly construed) as forms of legal modernism which provide alternative discourses of professional authority, emerging not necessarily as reactions to one another so much as to the perceived problems of expertise entailed by such historical transformations. My principal aim is to explore and articulate those dimensions of modernist legal thought which serve as the foundation for this new juridical discourse of professional authority, and to suggest some of the possible implications of failing to look at the early tradition of

realist jurisprudence from this perspective. In this sense, I seek to lay the foundation for a more general critique and reconstruction of this tradition.

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CHAPTER 1

INTRODUCTION

In what follows, I will argue from a perspective that draws a conceptual link between legal thought and legal practice. That is, I will approach each from the perspective of the other. My principal concern is with legal theory; yet I will engage with particular legal theorists through questions raised by problems of and for legal practice – specifically, the response of American legal theory to a perceived crisis in the legitimacy of the American legal profession.

It has been observed, in another context, that "theoretical discourses can be read as responses to historical crises, to unsettling economic and technological developments, and to social and intellectual turbulence produced by the disintegration of previously stable or familiar modes of thinking and living" (Best and Kellner 1991, ix). And, in their important study, *Law and Society in Transition*, Philippe Nonet and Philip Selznick contend that "legal theories are built upon implicit theories of authority. Many concerns and controversies of contemporary jurisprudence have their roots in the crisis of authority that has shaken public institutions" (1978, 4). While Nonet and Selznick were concerned with the contemporary socio-legal landscape, in the following study of the relationship of legal theory and legal practice, I return to the earlier period of the late nineteenth and early twentieth centuries. It was in that period of rapid social and economic change that a distinctly American jurisprudence was born, one which continues to shape our understanding of law and politics. As such, it remains important to our understanding of

contemporary legal thought and practice. Although the dominant jurisprudential movements of the time – formalism, sociological jurisprudence, realism – have been well-documented, I believe that the 'vision of practice' each contains has been less well understood. It is to that effort, the attempt to explore the connection between legal theory and justifications of legal expertise, that I wish to make a contribution.

The status of American law, during the historical period under investigation, was often characterized by the twin themes of uncertainty and complexity. Such a characterization simultaneously raised the specter of a *politicized* (or potentially 'politicizable') judicial system. My concern is with how these developments might threaten to undermine the legitimacy of that professional class (i.e., lawyers), whose authority and power rest on its monopoly over a highly technical language comprising a system of determinate legal rules which, theoretically, derive their meaning independent of a prior political context.[1] More specifically, I am interested in specific theoretical responses to this perceived *threat*, on behalf of the legal profession's claims to expert authority and, to explore the theoretical implications of these responses.

As Tocqueville understood, and contemporary sociologists of the professions have maintained, the legal profession's authority clearly seems to derive from an asserted mastery of a politically neutral and objective body of knowledge. In his classic work, *Democracy in America*, Tocqueville observed, "[s]tudy and specialized knowledge of the

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[1]For example, professions traditionally have been distinguished from other occupations by the fact that they require a specified level of formal academic training; maintain control over entry into the profession; are self-regulating; and, make the claim that they possess a monopoly over, or special access to, a discrete body of knowledge.

law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class. The exercise of their profession daily reminds them of this superiority; they are the masters of a necessary and not widely understood science" (1969/1988, 264). And, Magali Larson has pointed out that professions characteristically justify their special status by claiming "cognitive exclusiveness": a unique access to some area of knowledge that is deemed crucial to the well-being of society (1977, 15). The exact nature, or content, of this "cognitive exclusiveness" is another matter however. We might assume that it consists of technical procedural and doctrinal knowledge. Yet, any extended contact with members of the profession suggests, at best, that this is insufficient. Lawyers are exceedingly cynical people when it comes to an assessment of the legal system; perhaps with good reason. From the 'inside', the legal system's flaws are glaringly apparent. A government of laws and not of 'men' seems, for the most part, less an ideal, and more a naive wish. Judicial decisions often are revealed to be the product of personal bias or political ideology, rather than the neutral, objective application of the law to the facts. First-year law students soon enough learn that legal doctrine can be manipulated to support virtually any position in a given dispute. Uncertainty, or doctrinal indeterminacy, seems unalterably the state of affairs. This, we are told, is the lesson of legal realism.

We are all *realists* now, or so it is often said. "Realism," says David Luban, is "the dominant school of jurisprudence in twentieth-century America. This view so pervades the culture of lawyers that one law school dean described it as the 'ordinary religion of the law-school classroom'. It is not a gross exaggeration to say that some version of realism is believed by every practicing lawyer." (1988, 19). What all of that might mean, however,

is not entirely clear. In this dissertation, I examine the critical insights of a line of legal analysis – what I shall sometimes refer to as 'legal modernism'[2] – that has its origin in the work of Oliver Wendell Holmes, Jr., and extends through the sociological jurisprudence of Roscoe Pound, Benjamin Cardozo, and the legal realists of the 1920s and 1930s, to the present day. Throughout this dissertation, I use the term 'realism' to designate a style of thought -- at once sociological and instrumental -- that begins with Holmes and is developed by Pound and others. Realism grew out of a dissatisfaction with aspects of accepted legal doctrines and practices; it had both critique and reform as its basic aims.

I do not wish to deny many of the important differences between what we know as American Legal Realism and its intellectual forerunners. However, for my purposes, the similarities are more important. In this regard, I agree with Morton Horwitz's suggestion that we emphasize the continuities in thought between Holmes, Pound and the Realists, rather than their differences. (Horwitz 1992, 5). Horwitz views the development from Holmes through Pound and other Progressive thinkers, to the Realists, as the continuation of a challenge to legal orthodoxy's (Langdellian formalism) separation of law and politics. This emphasis, according to Horwitz, combined with a thorough-going "cognitive relativism," constitute realism's lasting contribution to American legal thought. (1992, 6).

In contrast to Horwitz, there are some scholars, such as Laura Kalman (1986), who argue that legal realism simply 'failed' as a jurisprudential movement. While others have suggested that realism emerged as a jurisprudential analogue of the New Deal; with

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[2]I borrow this term from David Luban (1994).

the passing of this period in American history, so too went realism.[3] Finally, Grant Gilmore maintained that realism emerged as "the academic formulation of a crisis through which our legal system passed during the first half of this century." (Gilmore 1961, 1037). The crisis was due to an overload on legal doctrine, with the result that "our case-law system was beginning to break down of its own weight." According to Gilmore, "[t]oward the end of the nineteenth century the rate of acceleration in printed case reports became nightmarish....This flood set in during the last quarter of the nineteenth century....This phenomenon strikes at the root of a case-law system." (Gilmore 1961, 1041). Yet, on Gilmore's reading, the problem has been solved and the crisis has passed; the system worked itself pure; "[w]ithout anyone quite knowing how, the broken-down machine was put back in running order – as if by an inspired job of tinkering." (Gilmore 1961, 1048).

Against those who argue that realism failed, or passed into history when the social and political circumstances that gave rise to it came to an end, I would suggest that the fundamental problem for realism remains: the indeterminacy of legal rules and the unconstrained nature of judicial decision-making. This is Horwitz's contribution to our understanding of the place of realism in American legal thought. However, against

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[3]Ronen Shamir (1995) offers a unique version of what is, otherwise, a fairly common interpretation of the emergence of realism. Shamir appropriates Bourdieu's concept of the "legal field" to suggest that certain academic lawyers deployed realist jurisprudential arguments, during the crisis posed by the New Deal for certain segments of the elite bar, in order to gain dominance within the field. Nonetheless, Shamir's analysis still leads to the conclusion that realism was tied to a specific social and political context (i.e., the New Deal), and not more general problems in the development of American law, as I wish to argue.

Horwitz, I will argue that realism is not simply a challenge to legal orthodoxy, but that both the conflation of law and politics, and cognitive relativism (or at least some of its theoretically derived effects), are important to a reconstituted discourse of legal authority and professional expertise.[4] That is, realism is the principal discourse of 'legal modernism'.

Contemporary legal academics with a critical perspective, such as Horwitz and others involved with the Critical Legal Studies Movement, argue for the need to resurrect the realist project,[5] while sociologists and political scientists seem genuinely puzzled by an intellectual program that seeks to resurrect something which they believe has never disappeared. For example, Harry Stumpf wryly suggests that "[t]he political jurisprudent can read most of critical legal thought with a big yawn, concluding that law professors, or at least a vocal minority of them, have finally joined the club." (Stumpf 1988, 37).

Nevertheless, despite important differences, most legal academics and social scientists share the view that realism has shaped our current understanding of the socio-legal world. And, while the interpretations of realism's impact vary, I would suggest that the dominant perspective views realism as a positive step beyond a (willfully) naive formalist understanding of the law; that is, whatever its own shortcomings, realism was a

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[4]I do not mean to suggest that Horwitz ignores this aspect of progressive or realist legal thought; indeed, he explicitly situates it within the context of modernism. My disagreement with Horwitz concerns his apparent disregard for the realist reconstruction of a discourse of professional authority within, and as a response to, the perceived crisis of modernism.

[5]Contemporary critical legal theorists are sometimes divided over which aspects of realism warrant our attention. For example, John Henry Schlegel (1995) seeks to emphasize the empirical work of the realists, while Gary Peller (1985) and Joseph Singer (1984) emphasize the role of indeterminacy and cognitive relativism.

helpful development that moved us beyond the glaring inadequacies of legal formalism as an explanatory framework, particularly in its Langdellian form.[6] As John Brigham and Christine Harrington note, "[s]ocio-legal scholars, particularly in the United States, have understood law through a version of realism for some time.... At least since the 1930s, the view that judges and legal scholars are naive and trapped in a formal orientation to rules has grown progressively more influential until it may now be described as the framework of the legal establishment." (1989, 41).

Working from a perspective that emphasizes the constitutive power of law, a view that sees law as producing effects in the world rather than as merely reflective of a larger social world, Brigham and Harrington seek to develop a post-realist approach that "incorporates the insights of realism" with their own concerns for understanding the importance of institutions and "grounding socio-legal research in social relations." (1989, 42). Brigham and Harrington's analysis is an original and important contribution to our understanding of realist and post-realist socio-legal scholarship. Their principal aim, however, is to highlight the paradoxical aspects of the latter body of work. Unlike Stumpf, who welcomes critical legal academics to the fold with little more than a yawn, Brigham and Harrington discern something more in the realist-inspired work of CLS and the judicial behavioralism of social scientists such as Harold Spaeth and Jeffrey Segal. Brigham and Harrington understand realism itself as a form, both institutional and discursive, of legal authority.

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[6]For example, the judicial behavioralists, Harold Spaeth and Jeffrey Segal, locate the "genesis" of their "attitudinal model" in the work of the legal realists of the 1920s. (Spaeth and Segal 1993, 65).

They observe that an "interesting paradox about legal realism today is that, although it is treated as a given by legal academics and social scientists, it is also continually advanced as a vanguard project." (1989, 41). This paradox veils a lacuna in the realist perspective -- the absence of any sustained discussion of the institutional sources of legal power. Brigham and Harrington argue that this absence results from the fact that "the institutional power of a legal community is, in part, linked to the continual assertion of *realism*." (1989, 41). As a system of authority, according to Brigham and Harrington, realism possesses three interrelated aspects: it recreates a naive formalist vision of law; it institutionalizes realism in the legal academy; and, it asserts that law is indeterminate. (1989, 43). They maintain that "[r]ealism as legal authority promotes the view that law is indeterminate but leaves intact social arrangements and institutions determined by law." (1989, 42). That is, legal rules (the 'law') do not determine legal outcomes; rather, individual interests and behavior do determine outcomes in court.

Brigham and Harrington's work is richly suggestive and offers many possible avenues for future scholarship. Of particular importance here is the argument regarding the relationship between legal indeterminacy and the constitution of institutional authority. However, their explication of indeterminacy is underdeveloped in terms of its historical context, suggesting at one point that indeterminacy critique is a relatively recent characteristic of "modern legal scholarship." (1989, 44). Moreover, they seem primarily concerned to identify realism as a system of authority of socio-legal scholarship, especially in terms of its production within the contemporary legal academy.

This dissertation seeks to elaborate and develop Brigham and Harrington's original insights by historically situating the emergence of legal indeterminacy as a legal and professional *problem*. Further, I want to more carefully develop the reciprocal relationship between indeterminacy and modern legal authority. Indeterminacy critique is not an artifact of modern legal scholarship, but can be traced to the earliest extra-judicial writings of Oliver Wendell Holmes in 1870. To that end, I will suggest a relationship between realist theoretical work -- realist jurisprudence -- and the larger legal profession. I will argue that, viewed historically, realism can be seen as a discourse of professional expertise and legal authority that emerges in response to specific social and historical conditions. It stands as an adjunct to, and in some sense a replacement of, formalism as the principal legitimating discourse of legal authority. This, in turn, suggests a further point: the jurisprudential 'response' to the crisis of legal modernism (uncertainty, or doctrinal indeterminacy) emerged, in large part, from within an institutional space created by the legal profession to deal with this very problem; that is, the law school.

While I do not wish to diminish the genuine insights of realism in terms of its contributions to socio-legal scholarship, I will also suggest the need for a heightened awareness of the internal and external dimensions of realism. By 'internal', I mean an epistemological framework and corresponding discourse that originates within the legal profession itself.[7] We are most familiar with its theoretical articulation through the jurisprudential writings of a number of scholars working within the American legal academy. By 'external', I am referring to the work of scholars who have appropriated

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[7]By 'legal profession', I mean the bench, practicing bar, and the legal academy.

certain key insights of realism in order to analyze the legal profession and the larger socio-legal world. In my opinion, it is difficult to disentangle the two. Realism is, in its origin, a representative mode of thought -- a discourse of expertise and professional power -- that gains full definition only when situated against a larger historical backdrop. To incorporate the insights of realism into contemporary socio-legal analysis, then, is a more problematic enterprise than it might at first seem.

With this in mind, I will attempt to provide a decidedly different analysis of the nature and development of the engagement between realist legal thought, broadly understood, and its assumed point of critical departure -- Langdellian formalism. Simply stated, my argument is that both formalism and realism are jurisprudential languages of power -- discourses of expertise which function to produce forms of social or professional closure. To defend such a claim, I will adopt a critical perspective *external* to the jurisprudential debates themselves.[8] This is not a work *of* jurisprudence, but a theoretical analysis of the social conditions in which particular types of jurisprudential discourse have emerged. In another context, Steven Best and Douglas Kellner have suggested the importance of engaging with theoretical discourse. They point out that, "[n]ew theories and ideas articulate novel social experiences and a proliferation of emergent discourses

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[8]For example, I would juxtapose my use of jurisprudence with that of Ronald Dworkin, who views legal theory as providing the first and best defense of 'law's empire'; Dworkin's engagement with jurisprudence is designed to defend law's integrity while demonstrating theory's central and lasting significance to law. (See: Dworkin 1986). In *The Politics of Jurisprudence*, Roger Cotterrell criticizes Dworkin, correctly in my view, for ultimately limiting the production and knowledge of law to legal 'insiders'. (1989, 10).

therefore suggests that important transformations are taking place in society and culture." (1991, ix).

Although I wish to argue for a close link between legal thought and legal practice, I am mindful of the fact that such an analysis always risks being misunderstood for the claim that legal development is simply a struggle of competing ideas. As Morton Horwitz urges, we need to cease discussing legal theory in an historical vacuum, and relocate our analyses in social and historical context. Nonetheless, I believe jurisprudential discourse provides important insight into the nature of social and legal change. For example, following Weber, we can look to jurisprudence to see how it serves as a mechanism of legal closure by legitimating the profession's status and authority.

Consequently, throughout much of this work, I engage with the texts of specific legal theorists on a purely exegetical level, albeit not in an ahistorical manner. However, following Pierre Bourdieu's injunction, my ultimate aim is to articulate a line of analysis free "from the dominant jurisprudential debate concerning law, between *formalism*, which asserts the absolute autonomy of the juridical form in relation to the social world, and *instrumentalism*, which conceives of law as a reflection, or a tool in the service of dominant groups." (Bourdieu 1987, 814). Specifically, I will argue that instrumentalism, or realism, should not be understood simply as a *reaction* to Langdellian-inspired formalism; but, that *both* can be understood as emerging in response to the same phenomenon -- a perceived crisis of legal and professional authority deriving from a condition that I describe as 'legal modernism'. To ignore this aspect of realism risks

eliding its role in the constitution of the authority of modern law and its carriers, the legal profession.[9]

In laying out a partial history of this development, focusing on certain key texts from that history, I do not wish my argument to be understood as calling for the return to a pre-realist, or formalist, grounding for professional authority. Nothing could be further from the case. Rather, in suggesting that realism should be understood not so much as a critique of formalism, but as another attempt to ground professional authority, I wish to call into question the very conflation of law with the legal profession. I wish to do this in order that we might lay claim to the ethical project of law – justice – a project that otherwise seems secondary to the processes of professional closure.

The dissertation unfolds as follows: In Chapter Two, I briefly discuss the concepts of professional autonomy and closure. The claim of specialized knowledge and expertise is the principle by which professionals are typically siad to secure their socio-economic advantages in society. In the case of the legal profession, the language of law constitutes the knowledge base of lawyers. Attempting to establish the theoretical link between professional knowledge and legal closure, I suggest the need to be sensitive to the different strategies used by both formalist and realist approaches to effect closure. I argue that the emergence of formalism was inspired, in large part, by a perceived threat to the epistemological structure of legal doctrine, thereby threatening the legitimacy of the legal profession as a whole. I give some attention to the rise of Langdell and his attempt to

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[9]For an important essay, representative of the 'realism as reaction' view, see Thomas Grey (1983, 3), where he notes that "classical orthodoxy [Langdellian formalism] is the thesis to which modern American legal thought has been the antithesis."

construct a scientific and autonomous legal system for the common law. Langdell is seldom considered as a serious intellectual influence on the development of American law; rather *Langdellianism* is given attention mainly as that mode of thought which inspired a realist reaction. My argument is that such an analysis misses the fact that Langdell is really the first *legal modernist*, anticipating many of the concerns that would later be developed by Holmes and his intellectual progeny.

The examination then moves on to Holmes in Chapter Three. At the heart of Holmes' work lies the central problem of judicial subjectivity: the judge's power is *legally* unconstrained – that is, indeterminate – and hence, potentially *political* in nature. This suggests important implications for the theoretical foundations of professional authority; the manifestations of which may be found at both the level of individual lawyer/client relationships and, correspondingly, through concerns for the legitimacy of the legal profession as a whole. Chapters Four and Five, respectively, deal with Pound and Cardozo. Both, I argue, fill out the vision of legal practice suggested by Holmes' jurisprudence, and add new layers of meaning to the space of law it suggests. Pound, in his imaginative defense of the common law during a period of rapid social and economic change, and Cardozo's elaboration of a modernist form of common law adjudication that recognizes the inevitability of chaos and flux, provide important adjuncts to the initial Holmesian vision. Together, they provide the foundation for what may be referred to as American legal modernism, the central insights of which were then rearticulated by the legal realists during the 1920s and 1930s, and which now may be viewed as an orthodoxy for certain elements within the contemporary American legal academy and practicing bar.

I conclude, in Chapter Six, on a contemporary note, by looking at the work of several important post-realist theorists who have addressed the relationship between legal theory and practice.

CHAPTER 2

LAW, POLITICS, AND THE AUTHORITY OF EXPERTS

Uncertainty and Complexity in the Law

In a compelling discussion of the epistemic properties of the common law, Tim Murphy notes that, "[t]he dominant image of law in Western thought is of something written down and fixed, so that, fixed, it can be the object of informed interpretation, systematic (or at least orderly) exposition, explicit critique and purposive alteration. The common law emerged from this general image...." (Murphy 1994, 73). In late nineteenth century America, however, the common law was a rather messy place. With the breakdown of the 'writ' system and forms of action, the common law had lost its internal structure. Further, an explosion in published case reports, exacerbated by West Publishing Company's development of a national reporter system, illustrated inconsistencies and contradictions between (and sometimes within) jurisdictions.

Such a situation threatened to reveal a crisis of doctrinal uncertainty that would ultimately undermine the authority of the judicial process. Calls to organize or 'arrange' the common law, or for codification, were increasingly common, both within the newly resurgent professional associations and legislative assemblies. For example, if one reads public statements by members of the elite bar during the late nineteenth and early twentieth centuries, one recognizes that lawyers believed they faced something tantamount to a 'legitimation crisis' in the foundational principles of liberal legalism -- neutrality, objectivity, and the rule of law. There was an articulated sense of fragmentation, of a

threat to the possibility of 'legal truth'. Such concerns culminated in the formation of the American Law Institute in 1923, whose founders identified the growing uncertainty and complexity of the law as undermining popular respect for the law and, thereby, threatening the authority of the legal profession. (See ALI 1923).

Langdellian formalism may be understood as one response to this situation. It represented a desire to purge the law of the taint of 'politics'; to take the idea of an autonomous legal system seriously, thereby making law 'scientific'; and, thus, to resituate legal knowledge on firmer epistemological foundations. Although reformist in nature, realism is less commonly understood as a direct response to a legitimacy crisis of the law and the legal profession, however, and more as a reaction *against* formalism.[10] For example, this basic opposition serves as a principal organizing theme for legal historian Morton Horwitz's second volume on the history of American legal development. (Horwitz 1992). Horwitz's focus is on the struggle of legal formalism -- in his terminology, 'Classical Legal Thought' -- to maintain and defend the separation of law and politics.[11]

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[10]For a more general history from this perspective, the classic work is Morton White (1949/1975). For a more specifically *legal* analysis, see Ronen Shamir (1993). Shamir interprets the development of American law in terms of a dialectical movement between styles of thought that display formal or substantive rationality; one always in response to, or reaction against, the other. Compare Neil Duxbury (1995, 2); Duxbury challenges this 'pendulum swing' understanding of the history of American jurisprudence. In its place, Duxbury argues that "American jurisprudence since 1870 is characterized not by the pendulum swing view of history but by complex patterns of ideas. Jurisprudential ideas are rarely born; equally rarely do they die."

[11]'Classical Legal Thought', a term which Horwitz borrows from Duncan Kennedy, includes the Langdellian formalists of the late nineteenth and early twentieth centuries, as well as the 'legal process' school of thought which emerged in the 1950s and continues to hold a place of importance in the legal academy today.

Arrayed in opposition to Classical Legal Thought, Horwitz situates 'Progressive' legal thinkers from Holmes, through Pound and the Legal Realists to CLS, all of whom are characterized by their reaction against formalism in terms of an attempt to undermine the formalist separation of law and politics.

Horwitz's argument suggests four stages in the evolution of American law since 1870. Classical Legal Thought, which aspired to construct a system of scientific jurisprudence, dominated American law between 1870 and 1905. The second stage of Horwitz's analysis is characterized by the development and consolidation of the Progressive critique of Classical Legal Thought and the rise of Legal Realism. The distinguishing feature here is the rejection of the law/politics distinction. The third and final stages of the development of American law are marked by the decline of Realism in the post-war period and the rise of the legal process school in the period from 1945 to 1960. In response to the revived formalism of the process school of jurisprudence, which attempted a reconstruction of the law/politics distinction, Horwitz documents a resurgence of challenges to this distinction in the post-realist work of Law and Economics, and CLS.

To support his argument, Horwitz identifies some of the theoretical mechanisms Classical Legal Thought deployed to maintain the separation of law and politics: the public/private distinction; the creation of abstract and general legal categories which could be mechanically applied in particular cases; and the introduction and development of a formalistic mode of legal reasoning. Horwitz observes that Classical Legal Thought was fraught with inherent contradictions which became only more pronounced during a period of increasing modernization and industrial development, and which made attempts to

defend the autonomy of the law increasingly more difficult. Horwitz focuses on the emergence of "institutional and ideological changes" in contract and corporate law which, he claims, "triggered the crisis of legitimacy at the turn of the century." (Horwitz 1992, 109).

A substantial portion of Horwitz's argument is devoted to the work of Oliver Wendell Holmes and his influence on the later Progressive critique of Classical Legal Thought. Horwitz characterizes Holmes's extra-judicial writings between 1870 and 1897 as an important manifestation of the emergence of a crisis in Classical Legal Thought. Horwitz suggests that Holmes's "own intellectual journey from *The Common Law* in 1881 to "The Path of the Law" in 1897 parallels a major change in American social, economic and legal thought and in the structures of legitimacy in the two periods." (Horwitz 1992, 110). Horwitz supports this claim by advancing an interpretation of Holmes's work that finds an 'early' and 'late' Holmes. The former was marked by a type of formalism which sought external and objective standards for adjudication. The 'late' Holmes, according to Horwitz, abandoned all such efforts. The publication of "The Path of the Law" established

> the moment at which advanced legal thinkers renounced the belief in a conception of legal thought independent of politics and separate from social reality. From this moment on, the late-nineteenth-century ideal of an internally self-consistent and autonomous system of legal ideals, free from the corrupting influence of politics, was brought constantly under attack. (Horwitz 1992, 142).

There is much to agree with in Horwitz's analysis; however, I believe it is important to emphasize that *formalism* itself emerged, in large part, as a response to a perceived crisis of legal and professional authority, and was not simply a doctrinal instrument of capitalist interests. Further, Horwitz's supporting claim that the shift from

an 'early' to a 'late' Holmes tracks larger developments in the legitimating structures of American legal thought, is, I will contend, somewhat misleading. Certainly, Holmes matured and developed as a legal theorist. And, there is a conceptualistic element evident in his early work. Nevertheless, from his essays in the early 1870s to the 'watershed' address of 1897, Holmes articulates a vision of law which emphasizes concepts of perspectivism and legal indeterminacy. Moreover, Holmes' work, although cognizant of the inadequacy of formalism as an explanatory framework, is equally concerned to articulate the foundations of a new discourse of professional authority. Often written from the perspective of the lawyer, Holmes's work can be seen as marking a parallel development, with formalism, and in response to a larger crisis of legal and professional authority, of a new language of professional expertise and power. Horwitz's interpretation fails to acknowledge this and thus ignores the ways in which realism is itself complicit in the development of the legal profession's power through the construction of a professional rhetoric grounded in the indeterminacy of legal doctrine. The weaknesses of Horwitz's interpretation are evident in his characterization of Holmes' 'external standard' of liability as a type of formalism. As I will argue in Chapter Three, such a view misses the theoretical foundations of a new discourse of professional authority grounded in the management of legal uncertainty.

The political scientist, James Foster, provides an analysis that is, in some ways, more similar to my own. In *The Ideology of Apolitical Politics (1986)*, Foster focuses on the concept of liberal legalism as a hegemonic ideology. He argues that the legal profession in the late nineteenth and early twentieth centuries was preoccupied with the

need to respond to a 'legitimation crisis'. What was at stake, according to Foster, was the legitimacy of the capitalist system itself. Conflating the interests of capitalism and the legal profession, he notes that, "[c]onsequences flowing from the private ownership of production for profit were causing growing numbers of people seriously to question capitalism,.... Government by lawyers was being challenged." (Foster 1986, 52). In response, conservative lawyers attempted a resurrection of forgotten 'truths' and patriotic values -- the virtues of the American constitutional republic, veneration of the rule of law and its guardians, lawyers. Moreover, Foster documents legal conservatives' role in reviving the bar association movement, arguing for its instrumental role as the protector of threatened American virtues.

What is interesting in Foster's analysis, however, is that he avoids an interpretation that finds only elite, or conservative lawyers complicit in this process of ideological production. A progressive wing of the legal profession, according to Foster, maintained that the conservative response was reactionary and, ultimately self-defeating. The legal progressives acknowledged problems in the administration of justice, particularly as a result of the bar's connections to large-scale capitalist interests. However, their calls for reform remained relatively modest and failed to challenge the prevailing capitalist structure. More importantly, legal progressives championed the emergent bar association movement as a vehicle to articulate the virtues of 'professionalism', as opposed to patriotism. And, for the legal progressives, professionalism was defined by an apolitical technical competence.

Foster's analysis is compelling on one level. Yet, by arguing that the legal profession's activities were solely in response to a crisis of capitalism, he seems to oversimplify the full nature of the response. Foster's account characterizes law and its principal carriers simply as instruments in the maintenance of capitalist domination, thereby denying any possibility for a relatively autonomous legal system. As a result, Foster never acknowledges that the 'crisis' which both legal conservatives and progressives were responding to might have been an epistemological crisis threatening the legitimacy and authority of the profession itself.

Shifting the focus from the more immediate problems of capitalist organization and production, to more overarching epistemological problems allows us to see what Foster misses -- that the practicing bar and legal theorists alike were struggling with the legitimacy of the intellectual foundations of the law and, as a result, with the legitimacy of a profession whose authority was dependent on a monopoly over this knowledge base. This struggle was engaged in by both formalist and realist legal theorists. And, while I do not want to suggest that realism was not, in large part, constituted by a reaction to perceived inadequacies in formalism, I do believe that a different perspective reveals aspects of realism that have, for too long, been ignored. The perspective that I adopt in this dissertation is to situate both formalism and realism within the context of 'legal modernism'.

(Legal) Modernism and the Crisis of Authority in American Culture

Modernism is generally understood as an aesthetic category. That is, the term 'modernism' is most often understood to refer to a particular literary period, one which emerged sometime around 1890 and ended roughly in the early 1930s. Surely, however, modernism was more than simply an aesthetic phenomenon; and more than simply a discreet historical era. Yet, it does seem to have had certain defined characteristics, one of which is said to be the desire for order through the visual arts or literature. According to Margaret Davies, "[t]he basic idea of modernism was that art was a way of transcending the political and social chaos of the times, of attaining a higher significance than that which was apparent in the lived world. Art became a search for aesthetic unity, order, and universality – outside history, and outside social contexts." (Davies 1994, 221). For many modernist writers, suggests Davies, "[b]eneath the chaos of texts, there [was] an underlying 'universal book'."

My claim is that to properly understand the development of modern American legal thought, we must situate it within the larger social and cultural context of modernism. Rather than viewing the work of Holmes and his intellectual progeny simply as a reaction against formalism, we must instead see both formalism and realism as jurisprudential responses to the perceived crisis of modernism. Obviously, the responses took different forms; but, our reading of the difference must be understood within a larger historical and cultural context. According to James Kloppenberg, "[t]he culture of modernism springs from the unsettling but liberating experience of uncertainty. When knowledge is recognized as contingent, standards that seemed stable start to wobble,

convictions that felt solid start to crumble, and revolutionary forms of expression emerge." (Kloppenberg 1995, 69). It is my argument that formalism and realism emerged as competing jurisprudential strategies to meet the uncertainty of *legal* modernism. The former may be understood as a strategy of 'transcendence' -- a search for, and an appeal to overarching universal legal principles which would resolve the doctrinal indeterminacy and chaos of the moment. The latter may be understood as a strategy of 'immanence', based on a recognition of the inevitability of uncertainty; a recognition which resulted in efforts not to transcend legal uncertainty, but to *manage* it from within a space of professional expertise.[12]

To better situate the concept of modernism as an explanatory frame of reference for the development of American legal thought, we can gain some insight from historians of American cultural and intellectual life. Robert Wiebe, for example, has described the United States during this period as a "distended society," where many felt that, as a people, we had lost our way. He writes:

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[12]This idea was initially inspired by a reading of Karl Llewellyn's *The Common Law Tradition - Deciding Appeals* (1960), where, in the opening pages, he describes a "loss of faith" among lawyers in the work product of the appellate courts. Llewellyn sets out as his purpose the project of debunking what he believed to be the "myth" of uncertainty which had, he conceded, contributed to this crisis of confidence among members of the practicing bar. While he did not believe there existed a logical certainty that allowed for *scientific* prediction of judicial decision-making, he did believe "that the work of our appellate courts all over the country is reckonable." (1960, 4). More importantly, perhaps, was the influence of Ronen Shamir's *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (1995), directly from which I borrow the notion captured in his title. Nonetheless, my own analysis differs in important respects from his interpretation of the relationship between formalists and realists. Specifically, Shamir views the development of American legal thought to move in a 'pendulum-like' fashion, with realism emerging as a direct reaction against formalism. For the reasons given above, I disagree.

> America in the late nineteenth century was a society without a core. It lacked those national centers of authority and information which might have given order to such swift changes. American institutions were still oriented toward community life where family and church, education and press, professions and government, all largely found their meaning by the way they fit one with another inside a town or a detached portion of a city. As men ranged farther and farther from their communities they tried desperately to understand the larger world in terms of their small, familiar environment. They tried, in other words, to master an impersonal world through the customs of a personal society. They failed, usually without recognizing why; and that failure to comprehend a society they were helping to make contained the essence of the nation's story. (Wiebe 1967, 12).

And, in his recent book, the American intellectual historian John Patrick Diggins rebukes American pragmatism for its alleged failure to resolve the 'crisis of modernism'. For Diggins, modernism can be defined in terms of the problem of belief and the limits of cognition. In a post-Darwinian world of rapid industrial expansion and social dislocation, we have "lost our belief in the possibility of objective truth and have lost our faith in the traditional modes of acquiring knowledge." (Diggins 1994, 7). The resultant crisis is the product of a recognition of the loss of these traditional foundations for legitimate authority. Diggins' critique is grounded in his assertion that pragmatism, because itself a consequence of modernism, has failed to make good on its 'promise' of a resolution to the crisis over the loss of foundations for legitimate authority. For Diggins, pragmatism merely served as an apology for the acceptance of the modernist condition. While this dissertation deals with work that was either instrumental to the development of the pragmatist tradition (Holmes), or with work that emerges from it (i.e., Pound and Cardozo), I am not interested in developing a critique along Diggins' line of analysis; that is, a straightforward critique of pragmatism.

Rather, I am more concerned to situate both formalism and realism as responses to this crisis of modernism. There are, I believe, a number of implications to be drawn from this point having to do with the legitimation of legal/expert authority. That is, by looking more directly at the contours of realist expertise and authority, by not viewing realism simply as a 'reaction' against formalism, we avoid the limitation of understanding realism only as a critical analysis of systemic distortions or breakdowns. Viewing realism principally as a reaction to formalism provides a decidedly truncated analysis which veils the emergence of realist 'expertise' -- a reconstituted legitimation of legal authority. Realism as 'reaction' suggests something almost *ad hoc* in nature, rather than a socially constructed discourse of legal authority. As a corrective, I would suggest that a full account of the 'cognitive exclusiveness' that Magali Sarfatti Larson (1977) identified as important to professional authority, must more seriously evaluate the constitutive elements of the relationship between realism and legal uncertainty or doctrinal indeterminacy.[13] But, what does this new rhetoric of power look like -- a realist discourse of professional authority?

Legal Modernism and the Problem of Trust

David Luban suggests that modernism can be understood by reference to the metaphor of the 'Copernican Revolution'. Copernicus, Luban notes, "taught us to mistrust common sense, to view it as merely a belief system resting on criticizable

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[13]Larson defines this as a unique access to some area of knowledge that is deemed crucial to the well-being of society. (See Larson 1977, 15).

presuppositions." (Luban 1994, 19). The implication of 'Copernicanism' for the legal mind is that "[t]he truth about legal structures must be radically different from the way they manifest themselves in practice." (Luban 1994, 3). Luban's insight here is profound and compelling; and much of the work that follows relies on the simple image that he conveys with this metaphor. The realist introduction of such concepts as uncertainty or indeterminacy, and the concomitant emphasis on 'perspective' serve to define the contours of the legal manifestations of Luban's post-Copernican world. It is a jurisprudential position pregnant with possibility -- one which critical legal theorists, from the turn of the century to the present day, have made great use. Specifically, it would seem to create a more democratic space for social and political contestation over legal meaning, thereby suggesting an indeterminate juridical future subject to progressive transformation, rather than a closed set of limited alternatives.

However, even as it informs a style of legal reasoning and practice, the emphasis of realism on legal uncertainty, and the professional knowledge deployed to 'manage' it, pose new problems amenable to normative intervention. In her important essay, "Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law," Marianne Constable (1994) laments the gradual expulsion of justice from modern law. The 'expulsion' is brought about by the 'wedding' of law and social science, a union first suggested by Holmes, and ultimately brought to fruition in the work of Legal Realism and its contemporary intellectual heirs: 'Law and Economics', and Critical Legal Studies.

Constable's analysis is prompted by an imaginative reading of Nietzsche's *Twilight of the Idols*; specifically, his six-stage history of Western metaphysics: "How the 'Real

World' at Last Became a Myth." Her purpose is to show "how 20th-century legal thought -- a legal thought that, fragmented though it may be, often traces its impetus, if not its origins, to the insights of Oliver Wendell Holmes -- corresponds to the final stages of Nietzsche's history of metaphysics." (Constable 1994, 555). According to Constable,

> the first five stages of Nietzsche's history can be taken to sketch the way in which jurisprudence, like metaphysics, has, through reason, long sought its foundations in truths residing in a 'real world' outside of, beyond, and even in opposition to, 'life' in this world. Justice lies, respectively, in the virtue of the wise citizen of the polis, in the natural law of the divinity of the unattainable world beyond, in the moral law of Kant's categorical imperative, in the positive law of the empiricists and utilitarians, and in the social policy and distributive justice of economists and philosophers. Striving for such justice signifies to Nietzsche a need and desire to escape one's condition, as one turns to an illusory better world that is believed to be 'real'. (555).

Similar to Luban's understanding of legal modernism, Constable understands the 'social scientification' of the law -- which corresponds to Nietzsche's final stages of Western metaphysics -- as taking up "the task of grasping the so-called reality of phenomena or appearances. As it does so, its knowledge comes to constitute the 'truth' about perceptions and beliefs. And as sociology looks to appearances, justice disappears." (Constable 1994, 555). The ideal of justice – in Nietzsche's reversal, what is *real* – is rendered *unknowable* on its own terms. The apparent world, or what is observable – a world of surfaces and behavior – now constitutes the basis for knowledge of the socio-legal world. Sociology merges with law, assumes its discursive space, and now "provides access to a law disengaged from justice and attached to 'social realities', which [sociology] simultaneously renders problematic;" (Constable 1994, 556) or, in other words, "sociology simultaneously provides and becomes the law of society." (Constable 1994, 589).

The problem for Constable, a problem which this dissertation seeks, in part, to engage with, is that the social scientification of law is the product of, and in turn seeks to describe, a "social world [which] presents itself in terms of the regularities or laws that comprise the domain of knowledge of the social sciences, which knowledge in turn informs the social policies of government." (Constable 1994, 563). Realism purports to demystify the ideological constructs of the various manifestations of legal formalism in order to rehabilitate law's instrumental capacity to serve the ends of social and economic justice. However, as Austin Sarat notes in his commentary on Constable's essay, "[i]nstead of enabling a new legality engaged in the process of building a more humane world, realists and their intellectual progeny have been, albeit unintentionally, the handmaidens of an expanded state power whose regulatory effects are more insidious precisely because they are more informed by knowledge of the social world." (Sarat 1994, 563).

Constable's appropriation of Nietzsche is both provocative and suggestive. Such a perspective is useful for my analysis of the nature of a realist discourse of expertise. Her identification of an "actuarial" justice, as the product of a jurisprudence of risk and social interest, is, in many ways, similar to my own emphasis on a realist discourse of socio-legal uncertainty and doctrinal indeterminacy. It is a discourse that embodies new forms of legal closure, while reconstituting the legitimation of expertise through which the legal profession can articulate and justify the law of the modern state. The seeds of this discourse can be discerned in the jurisprudential writings of that line of critical legal work, from Holmes forward, which stands in apparent opposition to legal formalism. The

'opposition' is real. However, it is misleading to simply focus on its repeated unfolding. By doing so, we ignore the parallel development of this new (realist) discourse of expertise. Subsumed within the rhetoric of realism is the simultaneous 'recognition' of uncertainty and the production of new forms of legal knowledge to manage it. A central thesis of this dissertation is that the authority of modern law, and its carriers, is largely grounded in this conjunction.

To clarify these points, it is necessary to elaborate on what is meant by a realist discourse of expertise. I will attempt to accomplish that task in the following chapters. My analysis is motivated both by empirical and normative concerns and is well captured in the seminal study from the 1930s on the professions by Carr-Saunders and Wilson. They contend that "[t]he association between scientific inquiry and the art of government has become a prime necessity. Knowledge is power. Authority without knowledge is powerless. Power dissociated from knowledge is a revolutionary force. Unless the modern world works out a satisfactory relationship between expert knowledge and popular control the days of democracy are numbered." (Carr-Saunders and Wilson 1933, 485-86). In modern society, the professions[14] are the principal sites for the production of knowledge; consequently, they assume an ever greater importance to the state in terms of its capacity to govern.[15] Carr-Saunders and Wilson go on to argue that against the

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[14]Again, I include both the legal academy and practitioners, along with the judiciary, in my definition of the legal profession..

[15]This is a central concern of Terrence Halliday's work, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (1987). One can also usefully compare here, the recent work of Anthony Giddens; see, in particular, *The Consequences of Modernity* (1990).

professions, "stands the democracy in need of an expert. The establishment of a right relationship between knowledge and power is the central problem of modern democracy." The professions "are not the only repositories of knowledge, but they are the repositories of a very special kind of knowledge; and the problem of the establishment of proper relations between them and the democratic state is one of the urgent problems of the day." (Carr-Saunders and Wilson 1933, 486).

The questions Carr-Saunders and Wilson confronted were, of course, not new. As Stephen Esquith has noted, "Max Weber was the first" to grapple with "identifying the central place of expert authority" in modern society. (Esquith 1994, 41). Esquith locates his discussion of Weber's work in a larger examination of the modern problem of liberal political education. For Esquith, this is a situation characterized by the attempt to go "beyond the traditional problem of teaching private citizens to respect the rights of others and do their duty; it has been one of creating an appropriate system of trust and expert authority." (Esquith 1994, 41). According to Esquith, Weber's importance, was to argue

> that the dominant form of authority in modern liberal societies has become the authority of those who have organized the production of scientific and technical knowledge and have retained exclusive jurisdiction over its interpretation and deployment. One of the keys to this enterprise has been the development of specialized languages and methods--principles, laws, and rules. These abstractions have become the coin of the realm. This is why Weber called modern expert authority 'rational-legal' authority. According to Weber, it is through compliance with the judgements of experts, rationally articulated in formal terms, that the modern secular values of security, procedural fairness, and wealth have been better realized. (Esquith 1994, 41).

Given the complexity of modern society, the problems of access to, and trust in expertise become all the more important for us to engage with. In this dissertation, I focus

on the jurisprudential constructions of legal expertise; the response of legal theory to a crisis for the legal profession as a whole. Delineating the characteristics of an important component of legal professional knowledge – realism – is, then, a goal of this work. It is motivated by the desire to democratize the space in which we provide answers to the question: what is law?

Formalism and the Constitution of Legal Autonomy

In his classic work, *The Promise of American Life*, Herbert Croly characterized political power in the United States as "government by lawyers." (Croly 1909/1965, 131-37). This certainly was not an observation new to Croly. More than seventy years earlier, Alexis de Tocqueville identified the central role of the legal profession to American social and political life. Indeed, Tocqueville described a popular reverence for the virtues of legalism that inevitably elevated its professional carriers to a place of prominence as well: "So in the United States there is no numerous and perpetually turbulent crowd regarding the law as a natural enemy to fear and suspect. On the contrary, one is bound to notice that all classes show great confidence in their country's legislation, feeling a sort of paternal love for it." (Tocqueville 1966/1988, 241).

From a somewhat different perspective, the contemporary sociologist of the professions, Magali Larson, suggests that the primary aim of the legal profession is to secure its position in the hierarchy of a given order, not to change this order in any fundamental way. The livelihoods of lawyers, says Larson, "depend on the stability and legitimacy of a given institutional and legal framework. In the wider sense of the word,

the legal mind is therefore inherently conservative." (Larson 1977, 168). Lawyers' stake in stability, in turn, is a "powerful source of conformity with the existing social order." (Larson 1977, 229). Larson is clear, however, to highlight the uniqueness of the modern professions. She maintains that any suggestion of an historical "continuity of older professions with their pre-industrial past [Tocqueville's point of reference] is more apparent than real." (Larson 1977, xvi). For Larson, the modern professions are relatively recent social products whose emergence coincides with industrialization. Modern professions, she explains, are quite different from their historical predecessors. The modern legal profession arose in a social, economic, and cultural setting vastly different from the one that sustained the traditional legal profession and its ideology of a gentlemanly profession – the 'lawyer-statesman' that Anthony Kronman (1993) pines for. The source of professional power in pre-industrial society derived not from training or credentialling, but from social position and association with elite patrons. Yet, as social conditions changed with the onset of industrial society, so too did the bases for professional power: "From dependence upon the power and prestige of elite patrons or upon the judgement of a tightly knit community, the modern professions came to depend upon specific formal training and anonymous certificates." (Larson 1977, 4). Moreover, while the modern legal profession undoubtedly incorporated some pre-industrial status criteria and ideological orientations, it also faced the need to develop new sources of professional authority.

Terence Halliday reminds us that "[t]he politics of expertise are contingent on an authority that can be constructed only through assiduous and persistent effort." (Halliday

1987, 59). Beginning in the 1870s, the American legal profession once again turned to bar associations as the central mechanism to assert its professional mandate and construct that authority. This development followed over three decades in which lawyers as a group were not active in pursuing professional goals collectively, and in which bar associations fell into disrepute between the 1830s and 1870s – largely as a result of the egalitarian pressures of the Jacksonian era. This period has been characterized by Roscoe Pound and others as an era of professional "decadence." (Pound 1953, 223).

But bar associations were not the only institutional source of professional power. In fact, by the mid-nineteenth century, bar associations had been eclipsed in many respects by the development of the modern law school. As part of their efforts to elevate professional status and authority, bar associations had quite consciously drawn on an earlier ideological model of gentlemanly status and authority. Through bar associations, the legal profession modeled legal education in a manner befitting such gentlemanly status. This often consisted of a requirement for a 'liberal' education followed by training in a system of apprenticeship monitored by the associations themselves. Yet, some segments of the profession realized that there was considerable power to be derived from viewing law as a scientific system rather than a disjointed set of rules, and they attempted to construct the institutional base appropriate for reshaping legal education along these lines: the university-affiliated law school.[16]

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[16]For a history of the development of American legal education, see: Anthony Chase (1979), Robert Stevens (1983), and William LaPiana (1994).

The emergence of the law school, of a university-based legal education, was the product of the legal profession's desire for intellectual legitimacy. Vying with the other professions for cultural authority, the legal profession had grown uncomfortably familiar with the inadequacies of the apprentice method. As Robert Stevens observed: "Legal education had failed, in an earlier period, to produce the aristocracy that Tocqueville had purported to see." (Stevens 1983, 41). On the other hand,

> [t]he law schools were offering...a systematic, academic experience designed to upgrade the intellectual quality of law and lawyers and thus enhance their professional status. There had been, so it was claimed by the 1870s, a 'downward tendency', and law had gone from 'a liberal science to a mechanical trade'. Yet 'the science of law was the science of mankind', and lawyers were being urged to 'help solve the moral problems upon which the progress of the law depends.' (Stevens 1983, 24).

But, the effort to reconstruct the intellectual foundations of the law and the legal profession was motivated by larger social and cultural concerns. Where Tocqueville had observed a remarkable absence of 'fear' of the law in the 1830s (however correctly or incorrectly), the leaders of the American bar, in the 1870s and 1880s, perceived a radically different situation. Indeed, as James Foster suggests, lawyers during this period were responding to what amounted to a *legitimation crisis.* (Foster 1986, 9-11). According to Foster, "[d]uring these years, the cumulative impact of a whole century's social trends and economic transformations unleashed its considerable turmoil upon the nation. Far-reaching modifications in the organization and ownership of production, in the character of work, in the structure of income and wealth, and in the composition of society occasioned fundamental tensions throughout American life." (Foster 1986, 10). Although the influence and authority of the bar was certainly in question, in Foster's analysis, at

issue was the legitimacy of capitalism itself: "Consequences flowing from the private ownership of production for profit were causing growing numbers of people seriously to question capitalism. Government by lawyers was being challenged." (Foster 1986, 52). Foster argues that elite lawyers of both progressive and conservative perspectives, responded to this crisis of capitalism by rearticulating their own versions of the ideology of "apolitical politics."

Foster's underlying assumption is that the ideology of capitalism and the ideology of legalism are synonymous; that a crisis of capitalism subsumes a crisis of legalism. The notion that liberal legal ideology somehow supports the capitalist system is not a provocative claim in and of itself, and Foster provides lengthy quotes from several leaders of the bar to support his argument. Foster's claim that the late nineteenth and early twentieth-century bar confronted a legitimation crisis is important and I want to pursue it; however, I would suggest that his conflation of the ideologies of capitalism and legalism is somewhat problematic. Most simply, for my concerns, it fails to explain the emergence and continuing dominance of realism, both within the legal academy and the profession. Moreover, I believe it more profitable to locate the profession's *perception* of a crisis within the larger context of modernism – that the crisis was cultural and cognitive – everything was in flux and the law provided no refuge. For example, in 1887, at the same time that Christopher Columbus Langdell was delivering his "Harvard Celebration Speech," the highly influential jurist, Thomas M. Cooley spoke to the Georgia Bar Association on the "uncertainty of the law." Responding to the bar's concerns that it was becoming the object of ridicule due to the public's perception that the law was uncertain,

Cooley defiantly asserted: "I shall affirm and endeavor to show by this paper that there is no substantial foundation whatever for these reproaches, these gibes and jeers. It is not true in any sense that the law is uncertain; it is in fact so far from being true that, on the contrary, the law will be found on investigation to have more elements of certainty about it, and to be more worthy of trust than anything else." (Cooley 1887, 110).

Yet, as Wayne Hobson has observed:

> To recognize that lawyers thought they faced such a crisis, however, is not the same thing as saying that they were describing objective reality. *Something* was happening to the public perception of law and lawyers in these years, but it may have more to do with the general revolt against formalism in social thought and with broad shifts in public culture from Victorian to modern than with a 'mere' delegitimization of law and lawyers....There was no out-and-out attack on lawyers and the rule of law. Rather, law suffered a major challenge to its position as the leading profession in American life as the medical profession assumed that role. In addition, the rise of the social sciences and the transformation of politics and business generated new ideas and new cultural authorities in domains lawyers had come to believe were their own. (Hobson 1987, 138).

My argument, then, is that the 'crisis' of legal modernism created a set of *perceived dangers* to which legal theorists responded because they perceived the continued legitimacy of the profession was at stake. The sense of chaos and flux, the indeterminacy of legal doctrine, threatened the authority of law and, by implication, the authority of a legal profession whose prestige, power, and wealth, depended upon the claim to a legitimate monopoly over a determinate and autonomous body of law. Formalism, particularly in its Langdellian mode, initially provided an appealing response to the chaos and uncertainty: transcendence through an appeal to a body of neutral, objective and scientific legal principles, uniquely discoverable by a professionally trained class of experts. But, it was only one response, one that would ultimately prove incapable of

explaining the processes of legal development in the wake of external social and intellectual developments.

Accordingly, I would argue as well, that the role of lawyers cannot be adequately grasped without a concurrent study of the law and legal theory that characterize a given economic and political order. For example, as Alan Norrie has suggested, intellectual and social developments are inextricably intertwined; the production of *theory* is already a 'social process', because "it occurs within a tradition provided by a community of intellectuals." (Norrie 1993, 1-2). The 'intellectual' is 'social' because "the production of ideas occurs within given socioeconomic conditions, at two different but connected levels;" Norrie writes:

> One the one hand, the movements of legal theory respond to the inner logic of earlier positions within [a] field. Theory orients itself, or rather is oriented, within an already established set of intellectual practices and paradigms, which it works to repeat or change. Theory responds to what already exists, revealing, with the benefit of hindsight, an inherent logic, whether of continuity or discontinuity....At the most fundamental level, the basic ideas of a tradition are historical products emerging out of a particular social period....At a more specific level, the ideas of a period are social and historical in that the basic intellectual structures, which are handed down from the past and engaged with in the present, are mediated and redirected according to the preoccupations of the here and now. History provides the structure and the color of theory, but it is the intellectual who works on the material and produces the accomplished product. (Norrie 1993, 2).

Students of the legal profession sometimes underestimate the impact of legal ideas on the practices of lawyers (whereas jurists and legal historians sometimes describe the changes in legal thought as struggles of ideas). The history of lawyers and the organization of the legal profession should not be studied independently of the history of legal thought. Law is not only a system of abstract ideas 'out there', but also a concrete

mechanism of social closure. According to Roger Cotterrell, when viewed sociologically, "*legal* closure can be treated primarily as a means by which various forms of legal or political practice attempt to enhance their own legitimacy." (Cotterrell 1993, 175).

The classic Weberian notion of social closure, says Frank Parkin, refers to "the process by which social collectivities seek to maximize rewards by restricting access to resources and opportunities to a limited circle of eligibles." (Parkin 1979, 44). While traditional principles of social closure are class, race, religion, and nationality, the claim of specialized knowledge and expertise is the principle by which professionals secure their own market advantages. In the case of lawyers, the language of law constitutes the knowledge base of the profession. The claim of lawyers to have a specialized expertise in the law allows them to restrict entry to the profession and to insist on a right of self-regulation. A monopoly of expertise enhances the social status of lawyers, increases the dependency of clients on their services, and allows them to control the pace and scope of legal development. In Cotterrell's view, "professional claims of special expertise are significantly underpinned by the idea that there is a distinctive, autonomous legal knowledge; or a special logic of law to be understood only through specialised training and experience; or, more broadly, that there is a certain indefinable style of thought, a manner of marshalling and of working with ideas, which constitutes 'thinking like a lawyer'." (Cotterrell 1993, 176).

Law, however, is not simply another currency of professional closure but also the principal 'language of the state'. Lawyers' use and treatment of legal principles have immediate bearing on social, economic, and political issues at large, and seems to situate

lawyers in a potentially powerful social position. Recognition of this fact compels us to determine what the collective role of lawyers has been in the exercise and distribution of power in the United States. Certainly, to some extent at least, this territory has already been covered in classical social thought; for example, Weber considered the role of legal experts in the development of 'formal-rational' law. He argued that the development of capitalism, the bureaucratic state, and the legal system, were interdependent processes of mutual affirmation and consolidation. A capitalist market 'needed' a particular type of legal order to satisfy its demands for predictable and calculable economic transactions in an impersonal system of production and exchange. The bureaucratic state apparatus, as a distinct type of political authority, 'needed' an institutionalized and centralized system of law in order to satisfy its interest in an orderly normative control of fragmented and geographically dispersed social and economic units. In both cases, law served not only as a normative system of regulation, but also as a legitimation mechanism that objectified economic and political relations of domination and rationalized them by invoking an 'impartial' logic of rules and doctrines.

In Weber's scheme, the role of legal experts, as a group that could assert at least some independence from political and economic groups, was crucial for the development of law as a heuristically consistent and self-referential system: "The increased need for specialized legal knowledge created the professional lawyer," Weber argued, and lawyers, in turn, had considerable influence on the "formation of law through legal invention." (Weber 1978, 775).

An important aspect of both the Weberian and Marxian traditions of socio-legal studies has concentrated, respectively, on law as a legitimation mechanism, and on law as an ideological system. In particular, the study of law as ideology has produced a rich literature whose main purpose has been to "explore the connection between ideas, attitudes, and beliefs, on the one hand, and economic and political interests, on the other." (Hunt 1985, 13). From this perspective, law as an ideology has the function of "cementing together the social formation under the aegis of the dominant class." (Poulantzas 1978, 88).

Within this tradition, the main object of studying the law is to unmask the seemingly autonomous, neutral, and class-free nature of law, and to unravel the mechanisms by which law becomes a vehicle in the legitimation and reproduction of a given social order. Depending on the particular object of study, law is critiqued either as a system of rules which directly reflects capitalist interests and protects the privileges of the capitalist class, or, in more sophisticated versions, as a system of rules whose form, if not content, reconstructs capitalist interests as universal values and protects the ability of the economically and politically powerful to defend the status-quo. (Hunt 1985). In both the crude and sophisticated legitimation argument, the idea of autonomous law is taken seriously. While there is an ongoing effort to unravel the correspondence between autonomous law and a given social order, there is also the acknowledgment that it is precisely this appearance of autonomy that enables law to legitimize a given social order. As Cotterrell observes:

> legal closure refers to the multifaceted but ubiquitous idea that law is, in some way, radically autonomous, self-reproducing or self-validating in relation to an environment defined as 'extralegal'....To adopt an idea of legal closure is to claim that law is self-standing and irreducible or has an independent integrity which is normally unproblematic, natural or self-generated, not dependent on contingent links with an extralegal environment of knowledge or practice. (Cotterrell 1993, 175).

A crucial question, therefore, is how such autonomous law is produced and sustained? Who are the actual producers of law, and how, and why, do they insist on its autonomy? Obviously, this is not a function that is directly carried out by capitalists or state managers, but by a specialized class of experts in the law. When the role of legal experts is considered, critical students of law (e.g., realism and CLS) tend to focus on the judiciary.[17] Yet, it seems that, traditionally, little attention has been given to the role of lawyers in private practice, and to the relationship between practitioners discursive constructions of the law and dominant theoretical representations of the legal system.. Moreover, little attention has been given to the fact that courts are merely a part, albeit a highly important part, of the legal profession. One might suggest that courts are reactive institutions that only act after a concrete 'case' is brought before them. The construction of disputes in legal terms and the channeling of certain types of cases to the judicial arena, therefore, are tasks that are performed by lawyers. Thus, by transforming social and economic issues into a discreet legal language, lawyers would seem to play an important role in the construction of law as an autonomous and 'neutral' system of specialized

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[17]For example, James Herget locates the source of this perspective in Holmes' work: "[Holmes'] early leadership placed a tilt on American jurisprudence from which it has not altogether recovered, that is, the limitation of legal theory to a theory of judicial decision-making." (Herget 1990, 46).

expertise. This would tend to explain the appeal of formalism; however it offers little to explain the emergence of realism in legal thought, its ultimate assimilation into the legal academy, or the deployment of realist tropes in actual practice.

Professional Knowledge and the Problem of Closure

In Stanley Fish's memorable phrase, "[t]he law wishes to have a formal existence." (Fish 1994, 141). What he means by this is "that the law does not wish to be absorbed by, or declared subordinate to, some other --nonlegal-- structure of concern; the law wishes, in a word, to be distinct, not something else." (Fish 1994, 141). It means as well that "the law wishes in its distinctness to be perspicuous; that is, it desires that the components of its autonomous existence be self-declaring and not be in need of piecing out by some supplementary discourse." (Fish 1994, 141). What Fish is describing here is the law's (or, more concretely, the legal profession's) desire to achieve closure. I have suggested that the social conditions which constituted legal modernism compelled the legal profession to seek closure in a variety of ways -- principally through the jurisprudential regimes of formalism and realism. Borrowing an analytical distinction from Roger Cotterrell,[18] I will argue that formalism attempted a type of *normative* closure, whereas realism attempted a type of *discursive* closure. (Cotterrell 1993, 178-185). In the remainder of this chapter, I

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[18]Cotterrell equates "normative closure" with a type of positivism that emphasizes a sharp distinction between the legal and the non-legal. "Discursive closure," on the other hand, is "a conception of law as a distinct discourse, possessing its own integrity, its own criteria of significance and validation, *its own means of cognition and of constituting the objects of which it speaks*." (Cotterrell 1993, 183 emphasis added).

will elaborate on the former; I will discuss the contours of the latter in the chapters to follow.

In *The System of Professions* (1988), the sociologist Andrew Abbott provides a helpful analytical framework from which to theorize the link between professional knowledge and legal closure. Abbott's discussion of professional work revolves around its relative ability to assert 'jurisdiction'. According to Abbott, in order to make a successful jurisdictional claim, a profession must situate its practices within an overall system of knowledge which provides a profession with a special type of legitimacy. Hence the importance given by Abbott to forms of professional knowledge which are governed by academics:

> Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values. In most modern professions, these have been the values of rationality, logic, and science. Academic professionals demonstrate the rigor, the clarity, and the scientifically logical character of professional work, thereby legitimating that work in the context of larger values. (Abbott 1988, 54).

For Abbott, the prestige of academic knowledge is derived from the compelling legitimacy of *science* as a manifestation of rational activity geared towards the solution of human problems through the systematic reduction of uncertainty.[19] The more professional work may be attributed to science, the greater its ability to hold to its jurisdiction and to assert its autonomy. According to Abbott, the scientific producers that generate the profession's abstract knowledge are assigned with two main responsibilities: First, they are responsible for "the generation of new diagnoses, treatments, and inference methods."

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[19]For an interesting history of the concept of *legal* science, see M.H. Hoeflich (1986).

(Abbott 1988, 55). The institutional location of academics, away from practice, leaves them free to engage in the 'purely' rational activity of systematization and abstraction of incoming information. Second, academics are responsible for the selection and training of new professionals. Besides the important task of producing the profession's practitioners, this function creates the symbolic bond between practical work and scientific abstraction. The profession's scientific knowledge, therefore, constitutes the heart of a profession's jurisdiction and its ability to defend it. The stakes in the construction of a 'scientific' foundation for professional knowledge are, then, obviously quite high.

In the case of law and legal work, the rise of 'scientific' legal thought and its accompanying professional jurisdiction came about with the appearance of what Weber called 'formal-rational' law. (Weber 1978, 656). Weber described the essential properties of formal-rational law as consisting of five basic postulates:

> First, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that if must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be 'construed' rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof, since the 'gaplessness' of the legal system must result in a gapless 'legal ordering' of all social conduct. (Weber 1978, 657).

The idea that the legal order represented a 'gapless' system suggested that there was a legal solution to every problem and that the method at arriving at the 'correct' solution was determined by a distinct mode of legal reasoning. This did not mean that the solution to every legal problem could be known beforehand, but it at least ensured that the

'method' by which legal decisions were reached was predetermined. This was particularly evident in the procedural, rather than the substantive, aspects of law. According to Nonet and Selznick, the rise of autonomous law, therefore, was strongly associated with the maxim that "procedure is the heart of law" -- "regularity and fairness, not substantive justice, are the first ends and the main competence of the legal order." (Nonet and Selznick 1978, 54).

Weber associated the development of a formal-rational legal system with the civil law system of continental Europe. It was in civil law countries (most notably Germany), that formal-rationality developed as a result of the formal separation between legal practice and academic legal training. For Weber, it was the particular nature of academic legal thought that facilitated the development of formal-rationality: "The legal concepts produced by academic law-teaching bear the character of abstract norms, which, at least in principle, are formed and distinguished from one another by a rigorously formal and rational legal interpretation of meaning." (Weber 1978, 789). Where legal apprenticeship produced "law as a craft," academic training produced "law as a science." (Weber 1978, 787). Thus, Weber thought of the Anglo-American law as an "empirical art" which was based on precedents, analogies and distinctions. (Weber 1978, 890). It was essentially less rational than continental European law and could not develop into a more rational system as long as legal education had been in the hands of practitioners. (Weber 1978, 787).

For Weber, who was interested in the relationship between formal-rationality and capitalism, the irrationality of English law created the "English problem," since formal-rationality was part of a system that responded to and facilitated the capitalist market

demand for consistency, certainty and predictability. Nonetheless, Weber recognized that England saw the emergence of a full capitalistic system and explained himself 'out' of the problem by arguing that capitalism developed 'in spite of' the absence of formal-rational law.

Weber's emphasis on the idea of "application of 'legal propositions' logically derived from statutory texts" may have caused him to underestimate the degree to which Anglo-American law, through different means, gradually evolved towards a similar rationalized system. In fact, American law moved in the same direction that Weber conceived as possible only in the civil law world. As Alan Hunt suggests, Weber's own analysis implied that a process of 'internal rationalization' took place within the common law system as well. 'Empirical' fact finding evolved into a rational system consisting of abstract and general rules and principles: "So great has been this process of internal rationalization that English jurists in the modern period have been able to conceive of English law in terms of 'pure law', of it consisting of a gapless, rigorously deductive system of abstract rules which Weber would have considered possible only in a codified system." (Hunt 1978, 124).

The Weberian notion of formal-rationality is practically identical with the jurisprudential concept, *autonomy of law*. The autonomy of law rests on the claim that law is separated not only from other systems of knowledge but, in particular, from the normative influence of politics. The autonomous qualities of legal thought and practice are based on the assertion that legal thought is scientific, in the sense that it is internally consistent, abstract, systematic, and '*a* political'.

In order to develop and maintain their position of cultural and political authority, American lawyers have traditionally asserted the existence of, and monopoly over, an abstract system of knowledge, which served as the foundation of their exclusive expertise. The construction of autonomous law ensured the status of lawyers as impartial experts, allowed them to speak authoritatively about the law, and, ultimately, enabled lawyers to use legal knowledge as a principle of normative closure.

Legal Autonomy and Normative Closure

The idea of autonomous law developed in the United States in the second half of the 19th century with the emergence of what is often referred to as Classical Legal Thought.[20] The rise of Classical Legal Thought marked the development of concepts that became key values in both American jurisprudence and the American political culture: the rule of law, the autonomy of law, and law as a 'science'. The main effort of legal thinkers and practitioners was to portray the legal system as distinct from the pulls and pressures of politics on the one hand and the economic market on the other. As Ronen Shamir has observed, "[t]he rise of classical legal thought was marked by an effort to portray the legal system as an autonomous and scientific system." (Shamir 1993, 51). This was done by shifting the focus from the substantive aspects of law to its purely *formal* qualities. That is, law was portrayed as a systematic elaboration of concepts, rules, and norms that determined legal results independently of the surrounding social context.

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[20]See, for example, Duncan Kennedy (1980), and Morton Horwitz (1977, 1992).

According to Horwitz, the emergence of an autonomous system of law marked a transformation in its social functions as well. Rather than being an 'instrument' in the hands of groups who used the law to mold social relations in light of their self-interests, the transformation of the law objectified these relations and cloaked them in a neutral, class-free, and formal discourse, that provided a rational justification for the existing social order. The formalization of law, says Horwitz, meant that capitalist interests could not be automatically assured of judicial protection. The 'price' capitalists had to pay, however, was worth paying. The occasional cases in which the legal system failed to meet capitalist demands were far outweighed by the fact that key legal propositions and doctrines were formalized in a particular point in time where "the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society." (Horwitz 1977, 254). Further, as Horwitz and others have suggested, it is possible that cases in which capitalist expectations were disappointed by the law only served to highlight the law's autonomous nature and ensured its overall legitimizing capacity.

A classic example that is often given to demonstrate the manner in which formal law secured capitalist interests is the way courts interpreted the concept of 'freedom of contract.' In the case of *Coppage v. Kansas*, the Supreme Court invalidated state legislation that outlawed yellow-dog contracts. The State of Kansas defended its enactment by arguing that yellow-dog contracts were entered under conditions of coercion because the weak market position of employees prevented them from refusing to enter into such contracts. Thus, the defense of the law was based on the argument that yellow-

dog contracts should not have enjoyed the protection of the 'freedom of contract' doctrine. The Supreme Court rejected these arguments.

The important point about this ruling was that it was decided on grounds of rigidly formalistic reasoning. The court found that the common law excused nonperformance of contracts in cases where they were entered under conditions of duress, but it ruled that the definition of duress did not include economic pressure. Arguments concerning the coercive nature of yellow-dog contracts, therefore, could not be accepted. Thus, as Elizabeth Mensch has observed, the result was reached, not because the court failed to acknowledge the substantive economic inequality between employers and employees, but because legal reasoning 'compelled' it to apply formal legal criteria. (Mensch 1990, 13-37). The court took the side of employers not because it was substantively biased against employees; such a view of the court, says Mensch, "trivializes the underlying power of the classical conceptual scheme." Rather, the court adopted an 'objective' position which was derived from its commitment to the form of law, and not to its substantive content.

It is precisely because of the distinct features of such legal reasoning that law became a legitimating vehicle for existing economic relations. Discussing the economic consequences of formal-rational law, Weber noted that "the parties interested in power in the market thus are also interested in such a legal order." (Weber 1978, 730). Similarly, Morton Horwitz observed that: "If a flexible, instrumental conception of law was necessary to promote the transformation of the post-revolutionary American legal system, it was no longer needed once the major beneficiaries of that transformation had obtained the bulk of their objectives. Indeed, once successful, those groups could only benefit if

both the recent origins and the foundations in policy and group self-interest of all newly established legal doctrines could be disguised." (Horwitz 1977, 254).

Kennedy, Horwitz and others maintain that the appearance of an autonomous and scientific legal system provided the most powerful 'disguise' with which to veil the self-interested origins of the prevailing judicial doctrines of the day. Moreover, capitalist groups were not the only beneficiaries from the emergence of autonomous law. No less important was the formal separation between law and politics. Again, Weber's theory of law established the crucial link between law and political authority in the modern state. The rise of an autonomous legal system was enhanced by, and in turn affected, the emergence of the modern bureaucratic state. While previous modes of authority, according to Weber (i.e., charismatic and traditional), rested on the belief in the legitimacy of a particular law-giver, the rational bureaucratic state referred to the belief in the "legality of enacted rules and the right of those elevated to authority under such rules to issue commands," as the source for its legitimacy. (Weber 1978, 215).

In Weber's analysis, the ability of political authority to derive its legitimacy from the legal order depended on two essential conditions. First, that the legal system was formal and rational and hence capable of demonstrating its internal consistency and procedural autonomy. Second, in conformity with the first condition, that the level of abstraction and generality of legal rules ensured that "the typical person in authority, the 'superior', was himself subject to an impersonal order by orienting his actions to it in his own dispositions and commands." (Weber 1978, 217).

It is clear, therefore, that in order for the legal system to legitimize authority, it had to be clearly distinguished from political power. Further, if we accept the basic Weberian postulate that every system of authority "attempts to establish and to cultivate the belief in its legitimacy" (Weber 1978, 213) we can understand why the establishment of the 'rule of law' was especially important in the "building of the new American state." (Skowronek 1982). According to Stephen Skowronek, in comparison to the European states, the American governmental structure in the mid-nineteenth century was "so peculiar that many have refused to consider it a state at all." (1982, 5). Early America, says Skowronek, was a "state of parties and courts" which were the only nationally integrated institutional systems. Further, according to Skowronek, while American parties came to represent different social agendas, the perceived legitimacy of court decisions provided some measure of coherence to the national system: "The only institutions that could stand, at least partially, outside direct party domination and claim to complement the parties in the performance of... basic constituent tasks were the courts," writes Skowronek; and they have done so by "binding the legal apparatus of government," shaping the boundaries of "intergovernmental relations," defining relations between state and society, and, in general, by filling "a governmental vacuum left by abortive experiments in the administrative promotion of economic development." (1982, 27).

The autonomy of law thus became a principle of legitimation which provided credibility to political and economic forces in search of stability during a period of rapid industrial and administrative expansion. The search by capitalist groups for an order that would 'freeze' their economic advantages (Horwitz's emphasis), and the search by state

managers in the progressive era for a *legitimacy of expertise* (Skowronek's emphasis), were highly conducive to ideas that rested the foundations of law on the values of science and formal impartiality. In fact, the elaborate legal procedures that accompanied legal autonomy have led Nonet and Selznick to argue that the autonomy of law rested on a 'historic bargain': "Legal institutions purchase procedural autonomy at the price of substantive subordination." (1978, 58).

The idea of autonomous law, however, also legitimated the efforts of lawyers to secure their own claims to professional authority. Certainly, as Horwitz has argued, the transformation of American law had to do, in large part, with the fact that the instrumental approach to law had exhausted itself as far as commercial and industrial groups were concerned. Yet, the instrumental approach to law also led to ideas that undermined the authority of courts and the cognitive foundation of the common law and its principal 'guardians' – lawyers.

The overthrow of the old order after the American revolution was accompanied by the popular perception that the legitimacy of law was not derived from the natural order of things but from the conscious will of a sovereign that represented the will and power of the people. In the first decades that followed the revolution, this perception led jurists to insist that the common law expressed the popular will; a perception that in fact facilitated the instrumental approach to law that characterized the legal system in the first half of the century. In the 1820s and 1830s, however, the conception of law in terms of will and power led to a codification movement that sought to replace the court-centered common

law with formal legislation.[21] The codification movement posed a direct threat to the prerogatives of courts and jurists because "any special claims of the profession to determine the nature and scope of legal development [were] undermined." (Horwitz 1977, 257).

The more laws are formally articulated and presented as concrete 'packages' of rules and stipulations, the more law can be commented upon and interpreted by people who are not trained in the law, the lesser the ability of professionals to engage in 'mystification' practices that create a social distance between professionals and their clients.[22] It was the threat of legislation as an alternative source of law that gave a decisive push to the idea of law as a science. The emphasis on the scientific nature of law, in turn, allowed jurists to advance towards full professionalization. A scientific law, they argued, could only be grounded in a judge-made law which was based on distinct modes of legal-scientific reasoning. Thus, in response to the codification movement, the "underlying conviction held by all nineteenth century legal thinkers [was] that the course of American legal change should, if possible, be developed by courts and not by legislatures." (Horwitz 1977, 256).

In applying abstract principles to concrete cases, and in drawing distinctions between pre-established legal categories, judges were to apply strict rules of legal reasoning that de-contextualized the cases on which they were to pass judgment. The

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[21]For an extensive discussion of this period, see Charles Cook (1981).

[22]Peter Goodrich (1986) provides a fascinating discussion of the nature and problems of legal *writing* and *reading*.

application of a distinct formal legal reasoning, therefore, was an integral part of the general assertion that the legal system has evolved into an autonomous system whose 'closedness' had been daily demonstrated in the application of legal rules to particular cases. Legislation, on the other hand, was portrayed as a flow of arbitrary acts of power that exposed the law to an uneven development and unpredictable and abrupt changes. Law had to be separated from politics, and this separation could only be assumed by a judiciary that disengaged itself from other systems of knowledge.

According to this view, legislation threatened to blur the fragile line that separated law from politics, while the judicial process ensured this separation. With the growing emphasis on the formal aspects of law, therefore, came a strong anti-legislative trend and an "upsurge in judicial review of legislation." (Horwitz 1977, 259). In short, the idea of law as a science was linked to the insistence on the unchallenged supremacy of the courts to articulate legal doctrines; the preservation of this judicial supremacy, and the accompanying fear of legislation constituted the primary orientation of the legal profession in years to come.

The separation between law and politics and the assertion of the autonomy of law would seem to converge with the professional concerns of lawyers. To a greater extent than perhaps any other profession, lawyers' basic interest are to establish mechanisms that will distinguish them from, on the one hand, other systems of ideas, and, on the other hand, from their clients. The inherent nature of law, more than other systems of knowledge that solve 'human problems', is that it purports to solve problems that are in themselves subjectively construed by the legal system. This is particularly evident in the

difficulty of separating law and politics, a separation that is essential for the legal profession's ability to ground its claims to professional authority in an expertise that derives from a neutral and objective production of knowledge. Importantly, then, the vulnerability of law to external interference (i.e., 'politics'), results in the legal profession's unstable 'cognitive basis', and in a constant search for *transcendent* values that will legitimize the profession's authority. A system of law that could be convincingly described as a scientific system demonstrated the transcendent aspects of law as an unbiased and objective system of knowledge.

The sense of chaos and uncertainty brought about by rapid socio-economic change, and the corresponding cultural and intellectual developments characterized as 'modernist', with their attendant dangers for the continuing authority of the legal profession because of the apparent threat to undermine its claims to expertise -- the condition of legal modernism -- argued for the paramount importance of the construction of a scientific and autonomous law. Peter Goodrich describes the situation well:

> The intellectual and cultural climate of the late nineteenth century was...strongly imbued with the atmosphere of radical transition. The Industrial Revolution had, with unprecedented speed, begun to destroy the traditional agriculturally based communities and customary orders....The widespread cultural sense of dispossession, disinheritance and disorder received striking expression in the political philosophies of the period. The radical, rapid and uncontrolled economic and social change threw up the mildly apocalyptic sense that everything was possible, that the world would soon be either lost or gained, destroyed or saved. (Goodrich 1986, 210).

The task of transcending this chaos, of finding refuge in the certainty of legal principle by advancing the idea of law as a science, was initially assumed by academic scholars and found its earliest expression in the effort to arrange legal materials in

treatises. Whereas *Blackstone's Commentaries* were practically the only such source at the beginning of the century, a number of legal scholars contributed to the systematization of law towards its end. Numerous treatises sought to rearrange the law along functional lines or, more boldly, to offer general theories of particular areas of the law. Lawrence Friedman estimates that 1,000 treatises were published between 1850 and 1900. (Friedman 1973, 541-46). The treatises covered the important legal subjects of the day: torts, evidence, contracts, and so forth. Others were less ambitious and dealt with more discreet areas of the law. Nevertheless, the declared purpose of most treatises was to restate the common law in a systematic manner and in ways that would help the practicing lawyer. Beyond their functional purpose, however, lay the deeper conviction that the systematization of law reflected its self-contained nature and demonstrated the *certainty* of law. In contrast to statutes that threatened to undermine the certainty and continuity of law, the gradual development of law on a case-by-case basis ensured its consistency and predictability. The systematic arrangement of these cases, and the formalization of legal categories ensured that the method by which legal decisions were reached were scientific. The treatises, therefore, shared common ground in their attempt to render the law more certain, generalized, formal and, ultimately, scientific.

It was not coincidental that the emphasis on the scientific nature of law corresponded to the rise of the modern law school as an alternative to legal apprenticeship. As law became more 'scientific', its study required a more systematic approach than the one that could be offered by a law office. In 1800, fourteen of the nineteen jurisdictions in America required apprenticeship to enter the bar. By 1860, only

nine out of thirty nine jurisdictions required it. On the other hand, "starting about the middle of the nineteenth century, law schools began to proliferate [and] the number of law schools doubled in the twenty years between 1889-90 and 1909-10, while the number of law students increased more than fourfold." (Abel 1989, 41).

The link between science and the rise of academic legal education was explicitly articulated by Christopher Columbus Langdell in his "Harvard Celebration Speech," where he sought to justify the law school's place within the newly emergent university. Langdell's statement merits quoting at length:

> [I]t was indispensable to establish at least two things-- that law is a science, and that all the available materials of that science are contained in printed books. If law be not a science, a university will consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it. If it be a science, it will scarcely be disputed that it is one of the creates and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can only be learned and taught in a university by means of printed books....But if printed books are the ultimate sources of all legal knowledge,--if every student who would obtain any mastery of law as a science must resort to these ultimate sources, and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have traveled the same road before him,--then a university, and a university alone, can afford every possible facility for teaching and learning law....We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists. (Langdell 1887, 124).

Langdell's efforts on behalf of a new science of law must be understood within a "broader crisis of Western culture and society" (Ross 1995, 1), the crisis of knowledge and authority -- modernism -- against which, formalism responded. Historians such as Kennedy and Horwitz offer compelling indictments of formalism, or Classical Legal

Thought. But, to focus on formalism as little more than a 'disguise', under which a newly emergent capitalist class could conceal its prior instrumental approach to the legal system, and thereby stabilize its current position, still seems to miss an important element of this period. As the historian Dorothy Ross observes, the "new uncertainty" which modernism produced (or responded to), "led to efforts to reconstruct knowledge, value, and representation." (Ross 1995, 1). For the legal profession, at least, formalism seemed to offer a way out of the chaos of modern times; it presented the means by which to transcend it. And, Langdell provided an early and enthusiastic, albeit truncated, defense of the formalist understanding of law as science; however confused he ultimately may have been.[23] In this regard, Langdell's efforts to enable the 'scientific' discovery of legal principles were, in some ways, as much a denial of legal uncertainty, as a desire to transcend it.

The rise of academic legal education was coupled with the development of the case-method as the embodiment of a scientific method of legal thought and education.[24]

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[23]Langdell has been universally criticized for holding an oudated and/or simpleminded conception of science. (See, e.g., Stevens 1983, 52-53). For my interests, however, whether or not Langdell *understood* scientific method is largely beside the point. Rather, what *is* important is how Langdell constructed a response to a perceived crisis – how he perceived that crisis, and why that response was important to considerations of professional expertise and authority.

[24]Whether Langdell's peculiar understanding of law as science and the case method are one and the same is contested territory. For example, Paul Carrington (1995) argues that we can, and should, preserve the latter but that we must get rid of the former. But, William LaPiana (1995) maintains that the two are far more intertwined, and rightfully so. Indeed, LaPiana does not seek to apologize for the simplicities of Langdell's 'legal science', but finds much to admire in it. In his own time, Langdell's early disciples seemed to opt for Carrington's strategy. That is, they found Langdell's understanding of science to be, at best, anachronistic; and, at worst, reactionary and misguided. Yet, they saw real

The case-method was based on the perception of law as a unique science which contained certain principles and doctrines that could be discovered through a systematic analysis of appellate court decisions. It developed and matured during the terms of Langdell and Ames, from 1870 to 1910. According to this view, which came to dominate American legal thought and education, law was a science – and materials of this science were appellate court decisions. The bound and published appellate reports, the materials necessary to fully engage this science, could be found in the law library. Thus, the apparent chaotic mass of judicial opinions could be rendered certain, their underlying principles expertly drawn out. For Langdell, "[t]o have such a mastery of these [principles] as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a *true lawyer*." (Langdell 1871, vi).

The idea of autonomous law, then, was developed and advanced by legal academics, but at the same time the reliance on judicial cases strengthened the centrality of courts as the principal producers of legal knowledge. Accordingly, an important element of this new scientific system was to insist that judges did not make laws, they only found and applied existing laws that were implicit in previous precedents; they *discovered* the law. The distinction between law-finding and law-making was fundamental because it was only the former view that could legitimize the idea of law as a science, whereas the latter exposed its potentially arbitrary nature. Indeed, legal rules were produced by judges in the

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value in the case method. Thus, they sought to liberate the case method from Langdellian legal science. One would no longer use the case method to scientifically discover universal legal principles. Instead, in experienced hands, the case method was a valuable heuristic to teach law students how to *think like a lawyer*. (See, e.g., Keener 1888, iii-iv; and Ames 1907, 1012-1027).

course of the judicial decision-making process, yet over time, with the compelling force of time immemorial and tradition, these rules had become objectified, as if they had always been 'out there', and subsequently constrained the ability of judges to shape the law simply as they pleased.

The claim that law was a science and that it had to be treated as an autonomous system was based on the centrality of the court in producing and developing legal knowledge. Courts, and not the academy, were the source from which the profession derived its legitimacy. For Langdell, the academy was a mere adjunct, albeit an extremely important and influential one. Its function was to find a rational conceptual structure inherent in the law that would make it possible for judges to be transmitters of a content already contained in the law.

The courts, and especially appellate courts, according to this legal structure, were the undisputed center of legal authority and the principal site for the production of new legal knowledge. The ideology of Langdellian formalism thus, not only portrayed law as a science, but also situated the judiciary as the producers of this scientific knowledge. The idea of judgeship as an authoritative symbol, says Stephen Botein, "loomed large in the process by which lawyers articulated ideology to establish their professional authority in modern American society." (Botein 1983, 49). Yet, by focusing on appellate opinions as he did, Langdell exposed a problem inherent in the very 'writteness' of law and, thereby, ultimately threatened to undermine the status of law. As Susan Stewart has observed, in another context, such a focus points to "the irreducible fact that law is written and hence to the consequent fact that the law is subject to temporality and interpretation." (Stewart

1991, 3). That is, Langdell called attention to, but could not solve the core problem for modernist jurisprudence: indeterminacy arises because the [written] law requires application, and application requires judicial interpretation. Although the problem seemed inherent to the very fact of law, Langdell apparently believed if could be solved *within* the law as well – through an appeal to the transcendent nature of legal writing. However, Langdell's contemporary, Holmes, did not share this faith in law's ability to solve its own problems. Finding no real solution to the problem of indeterminacy in the law itself, Holmes (and his intellectual heirs) turned instead to the observable facts of judicial power.

Thus, the aspirational ideas of transcendence and legal certainty comprise the core of the formalist response to the crisis of legal modernism. Autonomous law through a process of normative closure was the goal that was sought. This can be contrasted with the realist response. An approach, I will argue, that emphasizes *immanence*[25] – the attempt to manage legal uncertainty and its effects, rather than striving for transcendence through the discovery of legal principle. And, instead of attempting to produce legal autonomy, a type of heteronomy would prevail. The result was the development of new strategies of intellectual and professional closure: a discursive, or experientially mediated system of closure.

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[25]I am using this in a fairly underdeveloped way, and it should not be confused with the concept of 'immanent critique' associated with the Frankfurt School of critical theory.

CHAPTER 3

HOLMES, INDETERMINACY, AND THE LOGIC OF EXPERIENCE

Holmes' contemporary, Christopher Columbus Langdell thought that the judicial opinions of a common law system could provide the basis for a scientific approach to the study and practice of law. Holmes found Langdell's approach ultimately appealing on pedagogical grounds, recalling his own legal education as consisting of a "ragbag of details", but, as he would with Austin, Holmes disagreed with Langdell's essentially formalist approach to legal reasoning. Langdell, who Holmes would describe as our greatest living "legal theologian", located the source and authority of the law within the textual artifacts of judicial decision-making – published appellate opinions. The key to resolving confusion in the law was to isolate and identify the fundamental legal principles by properly ordering and structuring these texts.

For Holmes, on the other hand, the source of the law would ultimately prove to be non-textual; resolution of uncertainty was to be achieved by strategies of containment external to the text and identified with the lawyer's perspective. Nevertheless, Holmes' early scholarly efforts appeared to come from the same conceptualistic motivations as had Langdell's work. Yet, his conceptualism and his sympathetic reading of Austin's analytical jurisprudence existed in an uneasy tension with an importantly different perspective. David Luban characterizes Holmes as a "case study of the modernist predicament in law;" and for Luban, the core of modernism "consists in using the characteristic methods of a discipline to criticize the discipline itself." (Luban 1994, 38-39). In his first major

substantive piece of legal scholarship, "Codes, and the Arrangement of the Law," (1870/1995) and an important book notice published two years later (1872/1995), Holmes critically interrogated Austinian analytical legal theory and initially tested the concept of *prediction* as a theoretical corrective. Just where Holmes stood on Austin is a matter of some dispute among Holmes scholars,[26] the details of which are beyond the scope of this work. Rather, I am interested in identifying his earliest approximations of what today is understood as legal indeterminacy. I wish to then suggest a link between this notion and Holmes' critique of Austin's "command theory of law" and the development of "prediction" as a response. From this, I suggest we can glimpse the outlines of a new discourse of professional authority.

Holmes' choice of a title for his first major article is revealing. It expresses his initial predisposition toward the importance of conceptual clarity and a rigorous philosophical analysis of the law. Although critical of Austin's analytical jurisprudence, Holmes was, to some extent, working within an Austinian framework. Indeed, Holmes does not abandon his admiration for the Austinian analytical project without reluctance, despite the seriousness of his criticisms. It seems that his original motivation was to amend the Austinian model, not to undermine it. Nonetheless, all of his criticisms, in one form or another, take Austin's approach to task for being philosophically too narrow. And the underlying tensions between the two thinkers are soon enough revealed. In other words, Holmes merely flirts with the attraction of a philosophically sophisticated

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[26]See, for example, H.L. Pohlman (1984), who seems to suggest that, with some minor differences, Holmes was essentially carrying out an Austinian program.

arrangement of the law --- albeit one based on a common law model. Nonetheless, he always gives the impression that this is all rather beside the point.

What attracts Holmes to eodes is that they are supposed to be based on a philosophical arrangement that would make a "*corpus juris* possible." "The perfect lawyer," says Holmes, "is he who eommands all the ties between a given ease and all others. But, few lawyers are perfeet, and all have to learn their business." The virtue of a "well-arranged body of law" is its heuristic benefits and its expediency: Such a code "would not only train the mind of the student to a sound legal habit of thought, but would remove obstaeles from his path whieh he now only overcomes after years of experienee and refleetion." (Holmes 1870/1995, 214). Experienee is subsumed under doetrinal arrangement.

This, however, appears to Holmes, ultimately, to be a rather unrealistic goal for both legal education and legal praetice. Holmes therefore strives to come up with a more flexible and less philosophieally inelusive and eompartmentalized "method of arrangement." The problem is that however well arranged the code, it ultimately and inevitably ereates new obstaeles. Excessive relianee on the arrangements fixed in the past leads to the negleet of new experienee. The arrangements ean beeome so rigid that even if they originally were struetured by experience, they funetion, in faet, as if their boundaries were set independently of experienee.

In endorsing a eommon law model of classifieation, Holmes hoped to avoid the eonstraints imposed by eivil law systems and domestie eodifieation proposals. Quite apart from the obvious benefits to be derived from adopting as one's model, the outlines of a

system already in place, he favors the common law for more substantive reasons. Holmes begins his 1870 article with the statement that, "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards." (Holmes 1870/1995, 212). In resisting the attraction of codes, Holmes betrays his predilection for theorizing from the practicing lawyer's point of view.[27] Practicing lawyers are content to decide what to do with a given fact pattern "without being very clear as to the *ratio decidendi*." (Holmes 1870/1995, 212). It is not uncommon for them to decide on a particular course of action even if the principle does not speak to the facts of the case. Holmes cites the familiar authority of Lord Mansfield to bear witness to this phenomenon. The Mansfield quote refers to a neophyte judge who acts prudently if he states his conclusions without giving his reasons; his intuition will probably be right while his reasons wrong --- testifying to the fact that we correctly rely on extrarational or extralegal factors in the decision-making process. That is *experience* is required to correlate the facts with the rules of law.

Questioning "whether Austin did not exaggerate the importance of the distinctions he drew," Holmes complained of the narrowness of Austin's definition of the law, since, curiously, it "seems to be of practical rather than philosophical value." (Holmes 1870/1995, 215). If Holmes' identification of "distinctions" refers to an analytical ordering of a complex host of legal, moral, and political notions, their respective meanings and interrelationships, what does he mean by "practical" value, when its philosophical structure is what was supposed to recommend it in the first place? By practical, it seems

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[27]See Holmes' 1885 speech before the Suffolk Bar Association, where he asked, "[w]hat a court would be, unaided? The law is made by the Bar, even more than by the Bench." (1885/1920, 25).

Holmes means that it served the purposes of the working lawyer, who needs to pay attention to the fact that a "definite political superior", the Austinian "sovereign" which is the source of law, controls human conduct by the threat of force or sanctions, enjoining or permitting certain classes of actions. Does this simply represent a fundamental tension in Holmes' thought between his desire for a philosophically superior approach to legal analysis and his adoption of the practitioner's perspective? Perhaps, but, I would suggest that something more is at work here; a dissatisfaction with the Austinian conceptual categories, as well as the suggestion of a need for a revitalized discourse of everyday practice. Austin's definition may be consistent with the way lawyers currently approach the law, though not enough "substantial distinctions" have been drawn to make it analytically significant. For Holmes, it is too general, and legal activity in theory and practice is complicated in a concrete way: too much legal subtlety falls between the analytical cracks. The weaknesses surface precisely at the point where these distinctions are drawn, and the worry is that the outcome will show the analytical arrangement to be empty of content.

Rather than the problem of codes in and of themselves, however, Holmes is much more troubled by Austin's supposition that the validity of the law is a function of political authority. Under Austin's "command theory", the law is what the sovereign says it is. Every legal pronouncement is backed up by the threat of force originating, at least in theory, in the commands of the sovereign, who empowers others to enforce his will. Holmes directs his criticism to the concept of a sanctioning authority, the individual or body of individuals who qualify as the sovereign power. The problem, for Holmes, is the

difficulty of locating the force behind the law; determining where and with whom the power resides. His claim is that any attempt to identify the locus of sovereign power reveals the conceptual shortcomings of Austin's definition of the law. It is a difficult, if not impossible, task to pinpoint just who has the power to impose sanctions and compel obedience, and to determine precisely the source of this power, for "who has the sovereign power, and whether such a power exists at all, are questions of fact and degree." (Holmes 1870/1995, 215). Holmes resists Austin's attempt to locate the source of the law in a determinate political superior; rather, he implies here, and would emphasize later in the "Book Notice" of 1872, the role of indeterminate sources of power.

This is more than a simple form of legal pluralism. Rather, Holmes' point is that it is not at all clear what the law is and who enforces it. To make such a determination involves a knowledge and understanding of the gray, penumbral areas of the law. What *is* clear is "the definiteness of its expression and the certainty of its being enforced," which seems to suggest, that it is not as important to know who enforces the law, but that it is enforced. (Holmes 1870/1995, 215). And, here, Holmes explicitly situates lawyers, theorizing law from the lawyer's perspective, at the center of his reconfiguration of Austin's basic jurisprudential question: What is law? Glossing Austin, Holmes notes that,

> [a] sovereign or political superior secures obedience to his commands by his courts. But how is this material, except as enhancing the likelihood that they will be obeyed? Courts, however, give rise to lawyers, whose only concern is with such rules as the courts enforce. Rules not enforced by them, although equally imperative, are the study of no profession. It is on this account that the province of jurisprudence has to be so carefully determined. (1870/1995, 215).

As Herget observes, Holmes' expression of indeterminacy, although somewhat "incomplete," was not surprising for one steeped in a common law tradition that "recognized and accepted as authoritative, the proposition that judges make law." (Herget 1995, 64). However, to know those rules which will be enforced, and those which will not be enforced, is knowledge generally unavailable to the layman; rather, it becomes a new site (beyond the rules themselves) for the development and promulgation of professional expertise through a new language of power. Holmes suggests, then, that within the legal spectrum, rules serve their regulative function without necessarily coming from a uniquely determinate source of power. Instead, we must look at the purpose of a rule of law, for some less definite modes of regulating conduct are more effective than others that are more definite and official.

This leads Holmes to introduce the idea of "prediction" as it relates to the law in general and judicial decision-making in particular. Returning to a discussion of Austin in his book notice of 1872 (a summary of lectures on jurisprudence given at Harvard Law School), Holmes clarifies his position on the nature and sources of law. He notes that,

> [i]t must be remembered... in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely, the judges, by whom it is enforced, *say* is his will. The judges have other motives for decision, outside their own arbitrary will, beside the commands of their sovereign. And whether those other motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? (1872/1995, 295).

It is important to note here that, unlike the position of some of his later "realist" heirs, Holmes is thinking about something more than a crude judicial behaviorism.

Instead, he is careful to draw the distinction between motives which cannot be relied upon as a ground for prediction because of the extent of their arbitrariness and those which can because of their generality. The lawyer's task, the construction of professional legal knowledge, requires a higher level of analysis: "Any motive for [a judge's] action, be it constitution, statute, custom, or precedent, which can be relied upon as likely *in the generality of cases* to prevail, is worthy of consideration as one of the sources of law.... Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered." (Holmes 1872/1995, 295).

The target of Holmes' growing skepticism revolved around Austin's formalism (as did his complaints with Langdell), the attempt to enlist a monolithic theoretical structure to justify the classification of legal concepts and relations in a self-consistent, deductively necessary, pre-determined way. Although he endorsed efforts to bring law within the orbit of scientific authority, he did so on the condition that the techniques employed did not force legal facts to fit within a fixed categorical framework or scheme to which they did not belong. Legal codes, new or old, did not, in the long run, satisfy this condition. For that matter, neither did the common law, when judges failed to exercise their power of review to meet changing social conditions and needs, inflexibly following, and further entrenching, established precedent for no other reason than its status as precedent. Holmes' attempt to shift the emphasis within legal theory and legal discourse, from a purely analytical 'method of arrangement' – the logic of the law – to an approach that privileges the language of *experience* was already evident in his first major jurisprudential work in 1870, however tentative the analysis.

Holmes and the Logic of Legal Experience: The Growth of the Common Law

In the Preface to *The Common Law*, Holmes describes the long intellectual gestation that would ultimately give birth to this most important document in the emergence of a distinctly new jurisprudence:

> This book is written in pursuance of a plan which I have long had in mind. I had taken a first step in publishing a number of articles in the American Law Review, but I should hardly have attempted the task of writing a connected treatise at the present time, had it not been for the invitation to deliver a course of Lectures at the Lowell Institute in Boston....I have made such use as I thought fit of my articles in the Law Review, but much of what has been taken from that source has been rearranged, rewritten, and enlarged, and the greater part of the work is new. (1881/1963, 3).

Indeed, throughout the book, Holmes interpolates and integrates material from his previously published articles. However, if we examine the text as a whole, we can discover a unifying thread which suggests that a general standard of liability, based on objective or external tests, has emerged from the stream of legal experience. This, itself, is a particular form of human experience which cuts across the traditional boundaries of substantive law, deploying both analytical and historical methods, with the ultimate goal of arriving at the same conclusions. To say that the stream of legal experience is a species of the stream of human experience neither means that the former is reducible to the latter nor that it is a compartmentalized aspect of it. In the interest of providing formal guidelines for human conduct and relations, all that is meant is that legal experience draws, to varying degrees, on the wellsprings of human experience, for the law is as much a product of extrarational and extralegal considerations as it is of distinctively legal considerations. Legal experience is constitutive of human experience.

Only when these extralegal considerations make their way into the law do lawyers and judges take heed, and, even then, seldom are they fully aware of the many forms and disguises these seemingly unavoidable undercurrents take. Legal fictions permeate the law, building layer upon layer of meanings that impede the search for understanding. Recognizing that the stuff of the law is a shifting configuration of meanings, Holmes' principal aim, in the first chapter, is to bring these undercurrents to the surface, to distinguish the extralegal from the legal, and to show how the evolution of the law and legal concepts have as their origin some of the constants of human nature and experience, constants which may change, but not so much that they are unrecognizable, in the face of changing conditions, circumstances, or situations.

Holmes focuses on the idea of vengeance as his interpretive device precisely because it is, according to him, one of the constants of human nature and conduct -- lurking in transmuted form, as the motivation behind the relations between human beings and other beings and objects. In response to suffering injury of one sort or another, human beings do what comes naturally, seeking relief in the form of the satisfaction of basic human desires. Their desire to seek relief is motivated at bottom by vengeance in one form or another, sometimes appearing as naked rage, and sometimes overlaid with cold, yet strangely comforting fictions. Holmes argues that an examination of the historical and anthropological sources will reveal that vengeance and not compensation or security is the determining factor in affixing the limits of liability.

A superficial reading of the first Lecture might leave the misleading impression that, as a whole, this will be a work of legal history, with a modest dose of general theory

thrown in for good measure. However, Holmes uses this 'history' more as the canvas on which he would paint his jurisprudential vision. Specifically, he is interested in how legal forms and concepts change and develop, perish and survive, are relegated to the dustbin of history, yet continue to operate under another name, retaining only traces of their past stature. These relics of the past are preserved, long after their original motivation has receded into the multilayered historical background, because they are convenient, legally, politically, morally, theologically, economically, metaphysically, and/or socially. According to Holmes, they often are paraded as a palatable smokescreen for the 'real' reasons and motivations behind the preservation or transformation of a legal concept or rule of law; legal justifications and explanations function as the legal tip of the extralegal iceberg.

The ringing opening lines of *The Common Law* are informed by a history not revealed in the text itself. This subtext is produced by Holmes' misgivings about Dean Langdell's thought -- already by 1881, assuming a dominant position within American legal education and the profession as a whole. Shortly after the publication of *The Common Law* in 1881, in a letter to Sir Frederick Pollock, Holmes characterized Langdellian legal science as representing "the powers of darkness." (1961, 16-17). As early as 1872, Holmes had suggested Langdell's 'case method' lacked sufficient intellectual breadth; however, such misgivings did not ultimately foreclose Holmes' own adoption of the Langdellian approach. In his 'Harvard Celebration Speech' of 1886, Holmes acknowledged its superiority as a pedagogical technique. Nevertheless, Holmes' final position on Langdellianism was something less than charitable. In particular, he

challenged Langdell's understanding of law *as* 'science' -- a science based on the relentless analytical effort to organize the principles underlying law in terms of that which is 'discovered' in books (i.e., case reports).

One year before the publication of *The Common Law*, Holmes published an unsigned review of the second edition of Langdell's casebook on contracts, where Holmes identifies Langdell as our "greatest living theologian." (1880, 233-234). This accusation rested on Holmes' belief that Langdell's system represented an updated and secularized version of a familiar story -- natural law theory masquerading as legal science. It is this feature of Langdellian formalism that incurred Holmes' biting irony, not the attempt to raise law to the level of general theory, and to argue that it could be scientific in a systematic way. More specifically, Holmes objected to the Langdellian notion of legal closure -- the self-sufficient, hermetic, deductively necessary system that it implied. Holmes urged a new approach to the problem of closure, opting for an open-ended system of law and a theory of adjudication that converged on an external standard of liability grounded in experience, one that respected the primacy of 'law in action' over 'law in books', without demanding that either be converted into, or reduced to the other.

According to Holmes, Langdellian formalism tended to make relevant matters irrelevant, and irrelevant matters relevant. What *mattered* for Langdell was the internal consistency of the postulated system, with a mass of details caught up in an unyielding logical embrace, and not that a closer look might show that this often leads to absurd and unjust results. Holmes did not reject the very idea of consistency; rather, he resisted the formalist notion that consistency must be had at all costs. On the contrary, according to

Holmes, a legal system, in institutionalizing certain aspects of social experience, may survive and even flourish while flirting with certain logical inconsistencies. This is because the law, as Holmes made clear, is not predominantly a logical affair, but an evolving human production in which consistency ultimately may be gained through professional experience.

Langdell's attempt to reduce the concrete facts of the existing system to logical axioms, from which certain consequences easily may be deduced, was, according to Holmes, nothing more than the unfortunate example in which the champion of legal science was in danger of becoming decidedly unscientific, "and of leading to a misapprehension of the nature of the problem and the data." (1880, 234). Holmes did not elaborate on this point, but the idea seems to be that the scientific method of the formalist was limited to analytical pronouncements, through which the integrity of the closed system could be saved, the consequence being that it turned up empty when confronted with the hard facts of experience which actually constituted the existing system. In other words, this sort of legal science had no empirical basis, no matter how analytically robust it may be. For Holmes, the poverty of Langdellian formalism stemmed from its failure to account for the richness and open-endedness of experience, its aversion to uncertainty and inconsistency, and its urge to cover up error and control the legal process through the invention of fictions found by expert readings of appellate opinions..

Holmes' critique of Langdellian formalism may be reduced to the fact that the latter did not do justice to the life of the law, the feelings, intuitions, desires, needs, and felt necessities, articulate and inarticulate, shaping the substance of the law, that, in a general

sense, give it its form. This explains Holmes' emphasis on the experiential side of the methodological and explanatory equation, and putative failure to give logic its proper due. Clearly, Holmes does not completely disavow the role of logic, yet, he seems not to have thought through the precise relation between logic and experience. Did he intend to give them equal billing or should logic take a back seat to experience, and if so, to what extent? What exactly would this 'logic' look like? Did he mean to reserve a place, with an independent base of operation, for the sort of logic generally characterized by demonstrative reasoning, namely, the logic of pure analysis or the method of deduction? Or, did he only mean to admit logic into his experiential framework as a supplemental tool at the disposal of the logic of experience or the historical method? Or is the only acceptable logic a logic reconstituted by the logic of experience? Which of these alternatives, then, best characterizes the view articulated in the famous first paragraph of *The Common Law*, where he announced:

> The object of this book is to present a general view of the Common Law. To accomplish this task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. (1881/1963, 5).

The two sentences preceding the famous 'life of the law' phrase make perfectly clear that Holmes left some room for logic, even if they only tell us that some "other tools besides logic" are needed to "present a general view," a philosophically and historically

grounded view of the common law. Yet, Holmes was careful to mark off the historical terrain he wished to cover. He maintained that sometimes common sense is sufficient to account for a particular rule, while others can only be understood by reference to their primitive antecedents. For example, he indicates that he "shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further." (1881/1963, 5). He points to two errors which the study of history will help prevent. First, the supposition that "because an idea seems very familiar and natural to us, that it has always been so." (1881/1963, 5). And, second, the supposition that history supplies us with very little information, the result being that we assume too much about human nature in lieu of providing an account, a sort of fallacy of both history and psychology. It is at this point that he launches into his examination of the general grounds of liability, civil and criminal, both of which are seen as "very much a study of tendencies." (1881/1963, 5). The lesson Holmes draws from this historical analysis is that the doctrine of liability without fault originates in the natural tendency of human beings to attach blame, or liability, to the offending object, whether it be a physical object, an animal, or a human being. Human nature ultimately cannot be separated from the history of human affairs, from the assorted markings left by legal forms in the channeling of the stream of legal experience.

After a lengthy historical analysis of the early forms of liability, Holmes picks up where he left off after the opening paragraph, and concludes that historical analysis "well illustrates the paradox of form and substance in the development of the law" of which "the merely logical point of view" is guilty. (1881/1963, 31). Legal forms seem to develop in a

logical way. From the outside at least, the law looks as if it follows a logical pattern, but appearances are deceptive, according to Holmes, as the law is not *merely* logical. He explains:

> The official theory is that each new decision follows syllogistically from the existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view. (1881/1963, 5).

Holmes does not maintain that the logical point of view must always fail. Rather, he suggests that through historical analysis, we can probe beneath the surface of the law and locate a legal form in relation to the substantive law undergirding, revealing it as the mere 'survivor' it has become. The law obeys the logic of its own internal development, a logic in large measure shaped by external forces or extralegal considerations.

The other side of the paradox, according to Holmes, is that "in substance the growth of the law is legislative." (1881/1963, 31). The courts' usual explanation of what the law is revolves around its logical form, but the 'deeper sense,' its normative thrust, involves its legislative grounds.

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they are transplanted. (1881/1963, 31-32).

Holmes' appeal to public policy is another way of stating the specific substantive function the external standard of liability represents. Public policy is a reflection of what the community, through its official representatives, thinks is in its best interests. As a practical matter, experienced officials are reluctant to reconstruct a whole legal system or area of law because the facts do not comport with the received explanation for a particular decision. Instead, they find or invent *new reasons* more accurately reflecting the times, and generally they are not so novel as to require anything more than constructive abandonment and revision. Change is more continuous than discontinuous. Gradual transformation of old forms into new ones takes place when new content is introduced. Form, in effect, follows content and function. The process is a function of both articulate and inarticulate tendencies, tendencies which translate into both judicial and legislative function, meaning that they both, in their own way, make the law.

The purpose of Holmes' historical inquiry into the nature and growth of the law is to gain the knowledge required for the revision of the law, not knowledge for the sake of knowledge but for the sake of satisfying some more or less definite social need. "The history of what the law has been is necessary to the knowledge of what the law is." Investigation into the grounds of policy often reveals that rules are justified by policies which are products of invention, fictions invented "to account for what are in fact survivals from more primitive times." (1881/1963, 33). In a compelling set of passages that illuminate his pragmatic epistemological tendencies, Holmes writes:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow....If truth were not

> often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified. (1881/1963, 32-33).

In part, the object of Holmes' investigation into the roots of modern law was to show that the various forms of liability spring "from the common ground of revenge;" but, it also was to show that the determination of liability was a *legal* matter, the object of which was to adjudicate conflicts according to a developing 'objective' (read professional) or external standard that distinguished legal from extralegal considerations, even though, as Holmes would concede, the law has a *moral* basis. The result is that,

> while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated. (1881/1963, 33).

In its preoccupation with the relation between language, law, morality, and meaning, this passage serves as a bridge to Holmes' most important work, "The Path of the Law" -- the source for Holmes' fullest statement of the predictive theory of the law, and the foundation for an actuarial jurisprudence which informs the discourse of legal modernism.

Holmes' landmark essay, "The Path of the Law," the fullest expression of his predictive theory of law, served as the primary source for that peculiarly American jurisprudence -- legal realism -- that was articulated from within the elite law schools during the 1920s and 1930s. Along with *The Common Law*, "The Path of the Law" remains the high water mark of Holmes' contribution to American legal thought. Defining the law in terms of *prediction* was, in some sense, another way of stating what Holmes had been saying all along about coming up with an external standard of liability that would

adequately account for the growth and development of the law and legal concepts. Prediction as such was not intended as a comprehensive theory of law but as *a* defining characteristic of the legal process, an explanatory touchstone of the perspectival process leading to the resolution of legal disputes, which, according to Holmes, was the main purpose of the law to begin with. Although Holmes would time and again invoke the notion of prediction in terms of how the public force was brought to bear through the instrumentality of the courts, the epistemological underpinnings of prediction are often overshadowed by his preoccupation with the search for an external standard anchored in legal practice.

Holmes delivered the address at Boston University in honor of the dedication of its new law building. It is probably fair to say that the occasion for the speech had considerable bearing on its style, organization, and content. The context offered Holmes the opportunity to situate many of his remarks in terms of the nature and problems of legal education, and the close proximity to his alma mater, allowed Holmes to focus his critical gaze across the river toward Langdell's Harvard. Holmes' preoccupation with legal education owed less to any lingering objections he might have had to Langdell's case method, than to the jurisprudence such a curriculum seemed to entail. Indeed, Holmes went to great lengths to make it clear that his acceptance of Langdell's case method in no way implied an endorsement of its underlying jurisprudential framework. As the most visible feature of Langdell's program of educational reform, Holmes' worry was that it unnaturally limited the reach of legal education at the same time that it raised the flag of a bogus legal science in the hope of creating the impression of the existence of a necessary

connection between legal education and legal philosophy. According to Holmes, the reach of Langdell's method was limited by its neglect of history as a way of understanding the law, and the supposition that the law could be reduced to a few ahistorical principles that paid little heed to its formal methodological presuppositions.

From the first line to the last, in its structure and its arguments, the underlying concern of "The Path of the Law" is with the theoretical and practical aspects of legal education in the United States.[28] Like Langdell, Holmes perceived certain threats to the legitimacy of the legal profession's authority; and, like Langdell, Holmes saw the important role of legal education in responding to this legitimation crisis. Unlike Langdell, however, Holmes understood legal knowledge and expertise as being grounded not in abstract principles, but professional experience.

The essay[29] may be understood as composed of two principal parts: the first part can be described as the 'limits of the law' argument, while the second concerns the forces which determine the growth and content of the law. We can think of the second part as being concerned with 'method' because it deals with the law -- on the negative side -- in terms of the failure of logical method, or what Holmes refers to as the "fallacy of logical forms;" (1897/1920, 184), and -- on the positive side -- in terms of the fruitfulness of the historical method. (1897/1920, 184-198). The first part of the essay is devoted to an

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[28]For a good discussion of this point, see William Twining (1973).

[29]The recent centennial anniversary of the address has produced a number of excellent interpretations. See: David Seipp (1997), and the individual contributions to "The Path of the Law After One Hundred Years" (*Harvard Law Review* 1997), and "The Path of the Law 100 Years Later" (*Brooklyn Law Review* 1997).

analysis of the 'first fallacy': the confounding of morality with law. The first part of the essay also include Holmes' fullest articulation of the predictive theory and the *bad man* argument. The second part of the essay contains Holmes' views on judging and policy, legal history and legal education in their theoretical aspects, and, the 'life-in-the-law' theme. Read in this way, the essay serves as a demonstration of Holmes' perspectival understanding of the law.

The predictive theory and the bad man argument are analytical instruments Holmes deploys to construct theoretical space for the external standard, a standard that has its roots in human nature and conduct. This standard is, in some sense ahistorical; but, unlike Langdell's ahistoricism, it is ahistorical not in the sense that it ignores social and moral values as contributing to the law and legal concepts and their development, but in the sense that morality and law should be *distinguished*. That is, they should, as far as possible, be kept distinct in matters of actionability and adjudication. When a case is brought, the action is taken with the expectation that the decision will rest on the relevant legal considerations and not on nonlegal or extralegal factors that may have something to do with shaping the law, but are not relevant in a purely legal sense. That morality is embedded in the law, that law's development is best illuminated against its social background, that the descriptive inevitably contains a normative element, does not mean, for Holmes, that a decision should be rendered by appealing to anything but narrowly legal considerations. Is this simply an example of a latent formalism emerging within Holmes' jurisprudence? Is this merely a more sophisticated rendering of Langdell's understanding that legal *science*, properly named, analytically separate the purely legal from extra-legal

considerations? Holmes' concerns are heuristic, and are developed with sensitivity to the importance of perspective. Again, his context is framed by pedagogical and professional concerns, and their interrelationship. Holmes' claim is that moral and legal considerations should not be confounded or confused; it is not a claim that they can be kept *separate* in any ultimate sense. That is, he is not arguing for a strict separation, but for the importance of maintaining distinctions for heuristic and analytical purposes.

The Logic of Legal Experience

I would like to begin my discussion of "The Path of the Law" by first turning to the second half of the essay. In an important passage, Holmes notes:

> You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found. (1897/1920, 179).

Holmes' fidelity to predictive theory and the claim that so far as the growth and content of the law are concerned, it makes no difference what the force behind the law is (i.e., who is empowered to determine legal validity), does not mean that the brand of sanctioning authority one subscribes to has no bearing on the shape of the law in all its aspects; rather, it means only that it has no particular bearing with respect to discovering some 'principle of growth.'

To explain how rules actually develop in light of the method of prediction is to affirm a rational method grounded in experience, rather than one grounded in 'transcendent' authorities. The place of logic in the law is a familiar story, but one worth retelling. Indeed, Holmes is quick to point out that the logical fallacy refers to "the notion that the *only* force at work in the development of law is logic." (1897/1920, 180. My emphasis). The crucial qualification 'only' leaves room for logic of a certain kind, meaning not only the logic experience but the logic that answers a rather global description, the sort of processes human beings display in reasoning, explanation, and inquiry, where a principle of order is assumed.

What Holmes objects to is the supposition that the law is an axiomatic system, from which judges unerringly can deduce the correct judgment once the facts and issues are identified. The law is not susceptible to such a logically exclusive analysis in which decisions are the logical outcome of predetermined rules of conduct. Holmes fondly recites the story of a judge who would not reach a judgment until he was certain it was right. Generalizing this strategy makes judicial reasoning a matter of simple *calculation* -- a Euclidean geometry. This is based on the familiar formalist notion that there is exactly one right answer; and that, given the requisite ability and provided with sufficient information, all the judge has to do is to persist and he eventually will reach the proper disposition. As Holmes understood it, the training of the lawyer and judge lent itself to this process: "the language of judicial decision is mainly the language of logic." (1897/1920, 181).

According to Holmes, logical form was deployed as a useful (or necessary) shroud with which to conceal the *actual* reason on which a particular decision was based. Logical form epitomized the constructed virtues of impartiality, disinterestedness, and detachment; of treating all cases on their own merits, and like cases alike -- a form which served to deflect attention from the actual biases that drove the decision. Holmes explains as follows:

> Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self evident, no matter how ready we may be to accept it, not even Mr Herbert Spencer's 'Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.' (1897/1920, 181-182).

This implies that the law belongs to a continuum of experience, where the "principles governing other phenomena also govern the law." The desires, needs, interests, preferences, fears, and goals which make up these considerations, the other phenomena, shape the content of the law, giving the form its concrete, if at times seemingly arbitrary, direction.

The public policy dimension of the legal system is a shorthand for saying that the law must balance the preferences and needs of a community with the preferences and needs of its individual members, some of which stray from the norm for any number of

reasons; fiat, occupational hazard, and the like. Indeed, Holmes hints here, as elsewhere, that the law in general, and the ascription of liability in particular, may be modeled after actuarial science. The idea behind this actuarial jurisprudence -- what I have suggested comprises the discourse of legal modernism -- is that certain segments of the community assume greater risk than other segments precisely because they have something to gain by their actions or occupations. The assumption of these risks is permitted, sometimes even encouraged, because they increase the likelihood that the community as a whole also somehow will benefit. A cost-benefit analysis, marshaling available information resources, provided by the technology of the sciences, including the social sciences, presumably will be able to graph the relative risk incurred by pursuing a particular policy, job, or action; and, whether the risks outweigh the benefits or, whether the benefits outweigh the risks.

On one reading, our legal system is said to operate on the supposition that the public good is best served by free competition, politically, economically, and socially -- a state of affairs which Holmes seemed to endorse. The values ascribed to the judgments formulated on the altar of the public good are relative and not absolute, but this does not necessarily make them arbitrary or capricious, despite the fact that judges, juries, and legislators may set the course of public policy on the basis of political or economic bias. Indeed, such considerations have a large role in shaping public policy and setting legal requirements. Logical form cannot presume to incorporate these competing tendencies without the help of skillful lawyers and judges clothing their arguments and decisions in the appropriate legal dress. So, on the one hand, we find judges instructing juries that the only state of affairs in which an employer is justifiably liable for his employee's injury is if

the employer is deemed negligent -- a strict legal requirement for liability, where the restrictions are limited, favoring the efficient running of the free market system. On the other hand, despite these instructions, juries nevertheless tend to find for the plaintiff, the implication being that they presumably identify with the 'common' person, an individual member of the community such as themselves. According to Holmes, such a tension exists,

> because the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal. (1897/1920, 182).

The rationale behind these actions is that the community as a whole, in allowing dangerous or reasonably dangerous activities to proceed, will benefit, and that, from their perspective, the standard of negligence does not hold the employer (or other potential tortfeasor) sufficiently liable. Holmes' solution was to combine the traditional policy with the community's 'inclination'. That is, he was well aware that the standards of tort liability had changed from their primitive origins where the wrong attached to a particular offending object, and damages were assessed in an 'ungeneralized' way, to modern more inclusive versions, where a felt need to insist on a direct connection between tortfeasor and injured party was less likely to exist; especially since the former may now be an impersonal corporation, such as a factory or railroad, responsible for the tortious injury.

For Holmes, the analysis revolved around the calculation of social, economic, political and legal 'costs':

> The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if

> pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses. (1897/1920, 183).

Saddled with disproportionate economic burdens, one segment of the community might recommend one policy and another segment a different policy. At bottom, according to Holmes, what was at stake was the price the public was willing to pay for the benefits they derived from a particular policy.

Holmes' 'exposure' of the logical fallacy gives way to an examination of the present state of the law "and the ideal toward which it tends," though he never loses sight of the fact that it is a "philosophical reaction" to logical form. His topic is the path of the law, and the 'path' he traces has an organic and teleological cast. For example:

> We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrine which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should be so. (1897/1920, 185).

The inevitability of growth is not a matter of causal necessity, but a function of the law's dynamic character, that there must be a next step, whatever it may be. The teleology is evolutionary, relative to time and place, moving at a particular, if variable, rate. Progress is not decreed as a matter of form. A legal concept may be analyzed at any given moment in its development, but such an analysis by no means tells the whole story unless it is compared to other moments in its development within the context of its evolving uses and abuses, a task for historical analysis. As Holmes notes:

> [A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the

> grounds for desiring that end are stated or are ready to be stated in words....The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. (1897/1920, 186-187).

For Holmes, historical analysis allows us to discover why we have the rules we do. Our ability to identify reasons is a precondition for making evaluative or normative claims about those rules. That is, skepticism promotes reevaluation. Moreover, the future offers the possibility of a more sophisticated methodological arsenal in which the social sciences will supplement logical and historical analysis: "For the rational study of the law the *black-letter man* may be the man of the present, but the man of the future is the *man of statistics* and the master of economics." (1897/1920, 187).

According to Holmes, we are unlikely to replace or refine laws that are at variance with perceived public needs if we blindly accept what is handed down to us. The law will be unresponsive -- pressing problems cannot be addressed and appropriate remedies found without at least some sense of the force of these problems, where they come from and where they might be headed. Obedient acceptance of legal precedent does not serve a principal function of the law, its responsiveness to social problems. Holmes is clear on this point:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. (1897/1920, 187).

A rule of law seldom serves the exact social end for which it originally was articulated, owing its formal existence at least in part to the accretions of history. In recognition of

this, Holmes urges us to be aware of the inevitable judicial smokescreen offered in justification of these historical relics, which serve to cover important shifts in legal policy.

Nevertheless, Holmes also warns us against being too consumed by legal history. He does not valorize historical acumen for its own sake, but for the sake of understanding the law and making it more responsive to social needs and goals. To this end, Holmes cautions us to "beware of the pitfall of antiquarianism" and reminds us that "for our purposes the only interest in the past is for the light it throws on the present." To that end, Holmes looks "forward to the day when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." (1897/1920, 195).

Near the end of the address, Holmes makes what, initially at least, seem to be some rather puzzling remarks, given his emphasis on the importance of practical experience. He notes that:

> We have too little theory in the law rather than too much....Theory is my subject, not practical details....Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. (1897/1920, 198,200).

Yet, for Holmes, the theoretical focus seems to be on the study of legal history; again, its not for the sake of historical knowledge in itself, but because he thinks the minutiae of history, the "practical details," reveal some larger point about the evolution of legal concepts. Amidst the trees we have trouble seeing the forest; above the forest we have trouble seeing the individual trees. For Holmes, *legal* thickets are much like the trees in the forest -- virtually impenetrable to all but the expert, and even the expert often loses his

way, sometimes as the result of his own cleverness. In the law, this confusion takes the form of excessive distinction-drawing, the production of fictions, and the like, which are often born of practical necessity. The aim of theory is to unearth these legal distinctions and fictions in all their myriad forms in the attempt to divine a more coherent understanding of the law: "Jurisprudence," Holmes asserts, "is simply law in its most generalized part." (1897/1920, 195).

Meaning and Legal Discourse: Looking at the 'Bad Man'

An emphasis on 'theory' also animates the first part of the address. I wish now to turn my attention to Holmes' discussion there of the relationship between law and morality. In so doing, I am interested in exploring the principal target of the 'limits of the law' argument -- the relationship between legal discourse and its meaning as interpreted by legal experts working within the judicial process. In taking a perspectival approach to understanding how the law functions, and is perceived as functioning by the expert, Holmes searches for an external or objective standard of conduct where the test for evidential adequacy rests on a criterion of relevance determined by professional experience. This serves as the backdrop for the development of the predictive theory of law and the heuristic of the *bad man*. It is important to note that the bad man argument is not a necessary condition for the predictive theory, but may instead be better understood as a dramatic illustration of it. Although there is no necessary connection between them, they are related parts of the same story marking off the limits of the law by supposing theory is anchored in concrete practice and experience.

In the absence of limits, we cannot fathom where one thing begins and another ends. On the limits argument, the danger of confusing law and morality, of not strictly delimiting one from the other, of not adequately distinguishing between our beliefs about what the law is from our beliefs about what it ought to be, is due to a failure of inquiry. On order to overcome this failure, lawyers (and legal theorists), must hone their investigatory skills by identifying the proper subject of investigation, which Holmes conceived generally as distinguishing the legal from the extralegal. At their disposal are not only the traditional means of investigating the law, but techniques imported from history and the social sciences, political economy and statistics in particular.

This provides a clear demonstration of Holmes' focus on the legal profession -- the topic on which the address begins and ends. In the justly famous opening paragraph, Holmes notes:

> When we study law we are not studying a mystery but a well-known *profession*. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advice them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. (1897/1920, 167).

Here, although the bad man has not yet been mentioned, we can anticipate his arrival, suggesting the role of prediction by showing how the legal profession views the force behind the law in light of the legitimating function of the courts.

The assumption is that lawyers, informed by their professional experience and expertise, understand the nature of judicial behavior; that is, based on their training, they can make an informed estimate of the way judges think and decide. Potential litigants can confidently mine this knowledge to their own advantage in order to prevent some court-sanctioned harm from coming their way. Lawyers, in their capacity as legal advisors, are not necessarily the mediators of the public force, but they are supposed to be attuned to the sorts of responses the courts might make.

It is fair to assume as well that most of those in need of legal advice care little or nothing about various theories of adjudication, or the court's place within the legal system; but, they do care how the law will affect them. Yet, this does not really seem to be Holmes' focus. Rather, he seems more interested to generalize the lawyer's role as legal advisor prior to an action being brought or a trial conducted, and to link it, in as convincing a way as possible, with the bad man argument. Indeed, if he had set forth the prediction theory explicitly in terms of judicial behavior at trials, as Jerome Frank was to do more than thirty years later, then he would have had a much harder time in dramatizing the idea of prediction.

Holmes does not pay much attention to the fact that the calculation of judicial probabilities may not be an easy matter, with several obstacles to interfere with the reliability of particular predictions, such as the great variations in lawyer effectiveness. Even lawyers of comparable training and experience, with similar social backgrounds, will not necessarily arrive at the same outcome or prediction even when confronted with the same case, due to the use of different precedents, placing greater weight on certain facts,

different interpretation of rules, and so forth. The legal realists of the 1920s and 1930s emphasized this variability; Holmes' concern, however, was mainly confined to unraveling the relation between law and morality, and the confusion which resulted from ignoring what happens when the two are confounded.

Some of Holmes' critics have mistakenly interpreted his prediction to focus on the contingencies of what a particular judge will do in a particular case. (See, e.g., Luban 1988). Such a view is mistaken, however; rather, Holmes' theory focuses on what courts *in general* will do in that general type or class of cases, of which the particular is but an instance. For Holmes, prediction is possible, not so much because particular judges decide similar cases in predictable ways, but because judges, as a class, decide similar cases in predictable ways. By prediction he does not mean to exclude the prediction of the judical behavior of the individual judge, but to focus attention on how judges make decisions ranging over a generalized class of cases of a particular type.[30]

For Holmes, the law at its core, then, is defined as the power of the courts to channel the incidence of the public force in a reasonably authoritative and predictable way. Moreover, describing the law in terms of prediction simplifies the analysis of legal relations, encouraging legal theorists to ground their jurisprudence in actual legal practice:

> The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas...is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a

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[30]This was a point that Holmes had made more than two decades before; see Holmes (1870).

> man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right. (1897/1920, 168-169).

In confusing morality and the law, moral responsibility becomes confused with legal liability, the duty one person owes to another who has a justified claim on it. According to Holmes, duties and rights do not possess independent ontological status. Their standing is a function of the legal consequences they have or might bring into existence. In other words, there are no such things as preexistent rights or duties. For rights and duties to be valid, they must be defined in terms of the legal consequences which will follow their breach. Grounded in experience, legal duties and rights are in effect logically equivalent to the rulings of the courts in response to what individuals do and do not do with respect to the duties they owe and the duties owed to them.

We may note here that Holmes does not insist on the correlativity of duties and rights; instead, he takes each in turn. The idea, it would seem, is that it is the duty-relation and the right-relation, as such, that invites attention from the law, and it is this around which legal practice should and does turn. Further, we may understand Holmes' preoccupation with duty over rights to stem from his overriding insistence on the need to distinguish between law and morality. That is, for Holmes, to conceive the law in terms of duty, was to conceive it at its most distinctive, to select that aspect of the law which was both most concrete and generalizable. Rights, on the other hand, conjured up the specter of elusive abstract entities, existing independently of factual experience. The duty-relation provided, for Holmes, the analytical key to a theory of adjudication grounded in experience.

Does the lawyer, in his role as 'predictive theorist', give good advice when he bases his prediction on the distinctive legal requirements of a case rather than court behavior; or, must he take both factors into account? Further, just how far can we go in defining the 'law' in terms of what judges say it is, when we cannot be sure that the reasons they give for their decisions are what actually motivated them? It seems that, for Holmes at least, *prediction*, as a probabilistic method, was a reliable standard because it absorbed the element of contingency -- what was most arbitrary in predicting the probable legal response -- into a specifiable class of cases, whose identification could almost be taken for granted. It provided an immanent approach to the containment of juridical contingency, as opposed to the recourse to transcendent principles advocated by Langdell and his followers.[31]

Holmes' theory rests on the assumption that predictions, when generalized and reduced to a system, consist of a manageable number; otherwise, there would be little reason to suppose that they would have much predictive force, since on the behaviorist view, due to the contingent nature of the decision-making process, the number of predictions would be very large, and approximating that number would be very difficult. This is compounded by the fact that the institutional signature of the system of predictions

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[31]A classic critique of this position was made by Henry M. Hart, who maintained that Holmes' theory was ultimately reducible to an "uncompromising behaviorism." Hart insisted on conflating Holmes' prediction with positivism, concluding that he (Holmes) was unable to differentiate between the specifically *legal* requirements of a case, on which judges are supposed to ground their decisions, and *projected* court behavior. This is, however, an overly narrow understanding of Holmes' prediction theory. (Hart 1951, 932).

are constantly evolving. Precedent informs the present but does not close the door to change. From an analytical perspective, according to Holmes:

> The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of earlier reports is mainly historical. (1897/1920, 169).

Rights and duties, then, are analyzable in terms of prediction because they are reducible to strict legal requirements, unblemished by extralegal considerations for the purposes of arriving at dispositions. As a consequence, we are able to "see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law." (1897/1920, 174). His object is to define the parameters of the law, of rights and duties, in order to increase the accuracy of our predictions by specifying what is permitted and prohibited, as well as the penalties that may be expected in the event of noncompliance. The domain of considerations having to do with duties is wider than the domain of legal duties as such. What Holmes seems to set out to do with the limits argument, then, is to distinguish clearly the wider form the narrower domain. Extralegal considerations lurking behind the legal definition of duty are only irrelevant in a narrowly legal sense: they should have dispository bearing on the instrumentalities of the court, which is not to say that they do not make their presence felt, in some less articulate way, in the law.

The confusions engendered by the failure to distinguish these domains are felt at the level of general theory and practical detail. Such confusions may be attributed to the

difficulty of making the appropriate distinctions, intellectual laziness, or simple inability. Holmes set out his priorities early in his argument:

> The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. (1897/1920, 169-170).

One of the practical features of the limits argument, the one which held a special attraction for the later legal realists, was the recognition that what lies below the surface of the law may be just as motivationally efficacious or inefficacious as what lies above. Preferences or ideals that we secretly covet may make their appearance in ways unbeknownst to us. Since we do not know all the ways in which morality infiltrates the law, we are better off, or so the argument runs, by eliminating -- so far as it is within our powers to do so -- the distraction. In other words, we have enough trouble with specifically legal issues, without having to worry about the role morality plays in the legal process. Nevertheless, Holmes was equally wary of the dangers of taking this argument to its logical extreme, fixing limits in such a way that the law would be drained of every last drop of moral content:

> For my own part, I often doubt whether it would not be a gain if every work of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in clearness of our thought. (1897/1920, 179).

To be sure, there would be advantages and disadvantages, but the clear implication is that such a streamlined jurisprudence would leave the law in a scarcely recognizable state, and perhaps even of less use than before.[32]

Indeed, Holmes was well aware of the fact that the moral dimension of the law did not vanish conveniently, even for the purposes of adjudication. Holmes did not take the route Karl Llewellyn later would take, when he urged judges to effect a temporary divorce of the is and the ought. Although Holmes believed that for the purposes of adjudication judges should not make express appeals to moral ideals, he did not thing the normative could be taken out of the law, despite his insistence, on the one hand, that judges reach their decisions on the basis of the distinctive legal requirements of the case, and recognition of the realities of judicial legislation, on the other. The distinction between the claims that the normative can be removed from the law either permanently, temporarily, or, in some sense, not at all, is subtle but important, and it rests on a careful tracing of the various limits between law and morality.

It is more accurate to say that Holmes held a belief in the possibility, and utility, of *distinguishing* between law and morals, rather than in the belief of a strict *separation* between the two. It is a distinction that pointed to the linguistic and metaphysical confusions, the confusions of meaning, surrounding the relation between legal and moral ideas or propositions. That is, in conceding the "practical importance of the distinction between morality and law," Holmes does not actually call for their separation in any strong

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[32]The classic comparison here is to Karl Llewellyn (1931), where, following Holmes, he makes a strong case, for purely analytical reasons, of the desirability of effecting a separation of 'is' and 'ought'.

sense, but underscores the practical necessity of drawing the line for the purposes of adjudication. (1897/1920, 170). He explains himself as follows:

> When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law....I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider -- a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. (1897/1920, 170-171).

Almost as if he anticipated being misinterpreted as an unrelenting positivist, Holmes reaffirmed his position in no uncertain terms: "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men." (1897/1920, 170).

Holmes' insistence on the practical and pedagogical benefits of separating law and morality was rearticulated through the heuristic device of the 'bad man'. I believe we can understand Holmes' introduction of the bad man argument as a reflection of his perspectival and experience-oriented approach to the law and the relation between moral and legal considerations. The argument served to represent the fundamental nature of the intersection between citizens and their legal institutions. The bad man allowed Holmes to dramatically represent the violence of the state as it could be brought to bear on its citizens through the instrumentality of the courts -- the channeling of the public force in the form of legal sanctions.

The bad man represents a type, a self-centered individual whose primary concern is to reach his objective with as little hassle as possible. Systems of morality do not disturb the bad man's self-possession and desire to achieve his objectives without suffering unpleasant consequences, but systems of law do. The bad man, through the advice of his lawyer, picks out the characteristics of the law that concerns him. In a classic statement of the argument, Holmes touches on both the practical and theoretical reasons for adopting the bad man's point of view:

> You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will keep out of jail if he can....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, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. (1897/1920, 170-171).

The bad man does not care about morality because it does not figure in with his plans, and cares only about the law to the extent it may affect him. All this is with a view towards predicting the probable material consequences of the alternative courses of action open to him. A course of action is to be recommended if and only if it will bring about consequences favorable to the actor and avoid unfavorable ones so far as possible. A course of action, then, is right because it is good.

The confusion between law and morality shows up in another way, forging a link with the second fallacy which warns against the dangers of becoming embroiled in the deductive, reason-based systems of traditional common law jurisprudence. In the same passage Holmes manages to include the other crucial link between the bad man and

prediction; he concludes with what amounts to the closest he ever came to giving a definition of law:

> The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. (1897/1920, 172-173).

Not only is the bad man indifferent to moral theory as such, but he also is unmoved by the problems created by importing moral language into the law, for they are so many empty phrases to him. Moral vocabulary permeates the law, yet, we often overlook its presence. For Holmes, only if we keep the boundary between law and morality in plain sight can we avoid the inevitable terminological confusions and ambiguities of meaning stemming from uncritical acceptance of our working assumptions. This link between legal language and legal meaning is an important, albeit often overlooked, themes of the essay. Indeed, Holmes sets as his first order of business, the need to distinguish the moral from the legal language:

> The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. (1897/1920, 171).

Moral language, for Holmes, prevents the law from being interpreted in a distinctively legal way. However natural it may be for us to lapse into such language, it makes it that much harder to judge a case on its legal merits and requirements.

Sensitivity to the importance of perspectivism in the legal process is one of the main lessons to be drawn from Holmes' bad man. The idea is that it pays, in both theory and practice, to approach problems from different perspectives if the interested parties wish to select the plan of action that will maximize the positive practical consequences that reasonably can be expected to flow to them. We need not, however, resort to the stark metaphor of the bad man, whose only concern is with how the law will affect him, to appreciate the full impact of Holmes' perspectivism. The bad man is a way of dramatizing a purely legal perspective, one where the only value in sight is self-interest in its most naked form. Adopting the bad man's point of view makes it easier to identify law with the idea of prediction, but this should not necessarily imply that the bad man argument is identical with the predictive theory of law. Rather, the law is identified with prediction because the actors in the legal system observe that the public force is levied through the instrumentality of the courts. The predictive theory is not reducible to the litigants and their legal counsel's ability and concern with how individual judges will behave. Instead, I believe Holmes's argument is better understood to say that lawyers are concerned with making generalized predictions as to how the courts will treat cases and issues of a certain type; an approach ultimately determined by a belief that the real grounds for judicial decisions are not the "hollow deductions from empty general propositions," but policy decisions distilled from the give and take of experience. (1894/1920, 120).

By characterizing his theory of law in terms of prediction, Holmes is, in some sense, maintaining a consistent position vis-a-vis the common law. That is, for Holmes, the development of the common law may be understood by the search for an external standard of liability, a standard which appeals to the authority of experience for its grounding. The adjudication of liability becomes a function of an evolving standard grounded in experience that can be measured and foreseen, to a reliable degree, by external signs observable only by the experts within the legal system.

An external standard of liability that raises experience to the level of general theory benefits from a comparison with actuarial science. As Marianne Constable (1994) observed, when Holmes proclaimed that, "[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics," he was not just engaging in wishful thinking about the positive future effects social science might hold for the explanatory and predictive power of the law. Rather, he was making a plea for a certain conception of liability that imposed burdens according to how the distribution of risks was correlated to the public good; a system in which "the rational study of the law" could be defined in terms of a probability coefficient. In doing so, Holmes was providing the grounds for a reassertion of the status and authority of the legal profession as a whole. That is, Holmes was marking the contours for the future development of legal expertise, so that its professional carriers could situate themselves in positions of power in order to facilitate emerging strategies of governance through the management of risk. The distribution of risk is now understood to constitute part of the very fabric of the law, finding its expression through the

formulation of public policy within legal doctrine. The sphere of professional expertise and authority expands commensurately. This expansion, I would argue, is intertwined with Holmes' more fundamental claims about the indeterminacy of law manifest in a modernist legal space.

To help explain this, and why I think it is important to look at Holmes' work from this perspective, I would like to return to Tocqueville once more. Contrasting the common law and France's civilian codes, he observed: "The French codes are often difficult to comprehend, but they can be read by everyone; nothing, on the other hand, can be more obscure and strange to the uninitiated than [law] founded upon precedents....The French lawyer is simply a man extensively acquainted with the statutes of his country; but the English or American lawyer resembles the hierophants of Egypt, for like them he is the sole interpreter of an occult science." (Tocqueville 1969/1988, 264). It would be unsurprising to suggest that such complexity works to the benefit of both the individual lawyer and the legal profession as a whole, both in terms of preserving the legitimacy of expert authority and social status. Understanding the historically contingent nature of this constructed complexity is another matter however. In Tocqueville's *America*, the byzantine nature of the writ system was a principal contributing factor. In the modern era, we need to look elsewhere. Holmes' contributions in legal theory and its intimations of a new legal discourse – with a vocabulary emerging from the concepts of *experience* and *prediction* – laid the foundation for much later work, work that would represent the common law as complex, subtle, and ultimately unknowable on its own terms (at least to the outsider).

As I noted in Chapter Two, David Luban suggests that modernity can be understood by reference to the metaphor of the "Copernican Revolution." Copernicus, Luban points out, "taught us to mistrust common sense, to view it as merely a belief system resting on criticizable presuppositions." (Luban 1994, 19). The implication of "Copernicanism" for the legal mind (at least as understood by Luban) is that "[t]he truth about legal structures must be radically different from the way they manifest themselves in practice." (Luban 1994, 3). By emphasizing the importance of perspective, and introducing a conception of indeterminacy, or uncertainty, to the law, Holmes, I would suggest, best represents the early contours of legal modernism.

However, as informative of a style of legal reasoning and legal practice, indeterminacy poses certain risks.[33] While seeming to open up the legal world to multiple perspectives, ultimately, it privileges only one. That is, for indeterminacy to be meaningful in a *given* situation (for example, the lawyer/client relationship), it requires some external constraint inducing regularity in the underlying referential structure so as to allow probabilities to be assigned and *prediction* to have some efficacy. In other words, it requires that these regularities should be either experienced and/or understood by a *knowing subject* – the lawyer/expert.

As far as I know, Holmes was the first legal theorist to consciously develop a jurisprudential focus from the perspective of the practicing lawyer. This allows him to

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[33]Aside from those already detailed in the scholarly literature; that is, the dangers of relativism or nihilism illuminated by 'mainstream' legal academics, as well as the dangerous implications in the undermining of the tradition of the rights-based discourse of liberal theory that Critical Race Theorists have brought to our attention.

radically challenge Austin's answer to the fundamental question of jurisprudence: *what* is law? However, in providing his own alternative, Holmes elides the implications of the more important question: *who* can say?

CHAPTER 4

FROM INDIVIDUAL TO SOCIAL JUSTICE: POUND AND THE VALORIZATION OF THE COMMON LAW

In his important work on American legal realism, William Twining identified the basic problems which have dominated modern American jurisprudential thought: preserving the unity of the common law in the face of the multiplicity of jurisdictions; modernization of the law in the wake of the social and economic changes brought about by the development of industrial capitalism after the Civil War; and "simplification of the sources of law, as the legal profession and the courts became more and more swamped by the prodigious output of legislation, regulations and reported cases." (Twining 1973, 3-4).

Concern with these problems, however, does not necessarily lead to systematic legal reform. One of the unique features of the common law is that, in its day-to-day workings, the legal system undergoes constant change. Each published opinion of an appellate court, every interpretation and application by a trial court, contributes, however modestly, to the modification of the law. Over time, gradual evolution may lead to important change in legal doctrine. (See, e.g., Cotterrell 1989, 21-32). Indeed, one of the often-cited virtues of the common law system is its capacity to accommodate change and thereby alleviate the need for sudden and wholesale change. The concept of externally-imposed legal reform, on the other hand, suggests a much more dramatic process. Historically, the bar has viewed such mandates for legal reform as an unwarranted imposition on the autonomy of the profession.

As Twining points out, however, the basic conditions of material life changed dramatically after the Civil War. These socio-economic developments, along with the emergence of new technologies to meet a growing industrial society, brought new challenges to the law as well as to other areas of society. (Twining 1973, 4). Moreover, according to Twining, not only did these developments help to bring about basic structural change in American society, but they also transformed the way in which legal reform was understood. (Twining 1973, 4).

The influence of industrial and technological change was indirect. First, certain aspects of the law seemed to be out of step with the concrete reality in which average Americans lived and worked. And, second, the social and structural changes challenged the self-image of the legal profession in ways which helped to shape the sort of legal reform the profession put forward in an attempt to respond to the perceived disjuncture between social reality and legal doctrine.

The changes in American life brought about by the innovations Twining mentioned did not, of course, go unnoticed by those who lived through them. The facts of daily life had indeed changed and many self-conscious attempts were made to bring American society and government into line with the changed material conditions of life. The history of these attempts at change cannot be easily summarized, but are part of what is commonly referred to as the Progressive era, or as the historian Richard Hofstadter (1955) has called it, the "age of reform." It is also common, when referring to this period, to work from the assumption that the legal profession, or at least the elite segment of the bar, as well as the legal system as a whole, was to a great degree out of step with the

Progressive movement. Or, perhaps more strongly, the legal profession has been characterized as putting up obstacles to the most broadly accepted goal of Progressivism -- social justice.

Part of the quest for social justice in the Progressive era involved improving the situation of the common working person, finding expression in state statutes limiting the hours of work, improving working conditions, and in the creation of worker's compensation schemes to provide monetary remedies for workplace injuries. However, such laws met with severe opposition from both the elite segments of the bar, as well as from appellate judges who came from within its ranks.

Resistance was justified in the name of 'freedom of contract'. The growth of the doctrine of freedom of contract and its incorporation through the Fourteenth Amendment is by now a well-known story. One of its more infamous chapters includes the United States Supreme Court's decision in *Lochner v. New York.* (1905). The case involved a New York statute which ordered that "No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day...." (1905, 46). Writing for the majority, Justice Peckham held that,

> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being sui juris), in a private business, not dangerous in any degree to morals or in any real and substantive degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their

> employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution. (1905, 64).

Against this alleged expansion of the liberty provision of the Fourteenth Amendment, Justice Holmes articulated one of his most memorable judicial lines: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." According to Holmes, the case was "decided upon an economic theory which a large part of the country does not entertain." (1905, 64).

Lochner was only one of many clashes between the judiciary and the legislature during the Progressive era. Throughout this period, statutes designed to further Progressive reform were adamantly opposed by significant elements of the organized bar and the judiciary. (See, e.g., Paul 1969, 19-38). I do not wish to pursue here an examination of the reasons for this divergence between judiciary and legislature or its implications.[34] Rather, I wish only to note that its existence posed certain problems for the bar, the self-appointed guardian of American legal culture and the principles of justice, grounded in the rule of law. For many who were dedicated to reform in the name of social justice, the repeated failure of specific reforms in the courts, such as the legislation involved in *Lochner*, was to be blamed on the newly dominant element within the organized bar – the corporate lawyer – those who argued for wealthy clients' interests at the expense of the common working man. Even those who were otherwise friendly to the elite bar saw cause for concern in the increasing subjugation of influential elements of the

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[34]For an excellent discussion of this topic, which suggests that the issue is much more complicated than simply the reactionary measures of a conservative bench, see Gillman (1993).

legal profession to corporate wealth. This was viewed as detrimental to the profession's traditional claims to autonomy which were grounded in its claim to being a "public" profession which owed primary allegiance to the general interests of society over the particular interests of the individual client. This assertion of neutrality was quickly being pushed aside by the image of the "hired gun", linked to specific political and economic interests. The legitimacy of the legal profession's claim to guardianship of the law was threatened by these developments within the practice of law which challenged one of the cornerstones of the bar's claim of professionalism, autonomy. This was viewed as being detrimental to the profession's traditional independence born of a mastery of the intricacies of the "science of the law." As Holmes said in "The Path of the Law," "[t]o an imagination of any scope, the most far-reaching form of power is not money, it is the command of ideas." (1897/1920).

If these developments within the legal profession were not disquieting enough, an explosion in the reported opinions of appellate courts threatened to challenge the other cornerstone of the profession, mastery of a 'determinate' body of knowledge. Changes in society as a whole only exacerbated the problem. Moreover, the Progressive era was a time when the concept and role of the professional acquired new importance. (Wiebe 1967, 113-121). As the social structure changed and America became a national society, mastery over a politically neutral body of 'scientific knowledge' became an important way to make one's place in society respectable and secure. The politically charged atmosphere of the Progressive era and the legal profession's apparent complicity in resisting social

reform efforts, combined with the growing perception of doctrinal indeterminacy, made claims to 'scientific neutrality' highly problematic.

In February 1923, Justice Oliver Wendell Holmes wrote to Harold Laski:

> Some of the virtuous under the call of Elihu Root and William Draper Lewis meet here [in Washington,D.C.] next week to talk of restatement of the law (I believe).... I will try to [look in on them] but I will take no hand and won't believe till they produce the goods. You can't evoke genius by announcing a *corpus juris*. (1953, 482).

That meeting and the resulting institution -- the American Law Institute (ALI) -- were the outgrowth of forces which had been working for legal reform throughout the preceding two decades. As legal historian N.E.H. Hull has noted, "[t]he origins of the ALI lay in the vision of a group of 'progressive-pragmatic' legal academics, who wished to reform law and promote the influence of law professors in the wider world of legal practice." (Hull 1990, 56). This was accomplished through joining with powerful members of the organized bar in response to a perceived crisis in the adjudication of the common law. Citing to Roscoe Pound, the most influential jurist of the era, Hull notes:

> Pound articulated what many of his generation had begun to recognize: that the classical-formalist paradigm of how the law was applied in the courts--how judges discovered law-- had lost its explanatory power under the accumulation of contradictory data. The explosion in published reports of cases by the West Law Book Publishing Company had graphically illustrated inconsistencies between, and even within, jurisdictions. Complaints about the confusion of the law and the multiplicity of cases in the last decade or so of the nineteenth century was the manifestation of the cognitive dissonance of a generation groping with this increasing contradiction between data and paradigm. Older formalists futilely tried to ignore the contradiction by either attempting to reconcile cases or perfecting their schemas for legal classification. The progressive-pragmatist generation, through their spokesman, Pound, was the first to identify what the new case data was telling them: that the classical-formalist paradigm did not describe or explain the reality of what was happening in the courts. (1990, 57).

In 1906, Roscoe Pound had emerged at the center of national attention within the legal profession as a critic of the reactionary role then being played by the United States Supreme Court, and by the judiciary and bar more generally, with respect to the pressing social issues of the time. In that year he delivered an address to the national convention of the American Bar Association entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," in which he laid a long list of grievances at the doorstep of the judiciary and the legal profession. Somewhat surprisingly (at least to the contemporary observer), Pound was, as a result, bitterly denounced in conservative legal circles as a 'radical'.

This imputation was, of course, unfounded. Indeed, the essence of Pound's work throughout his active life was, I will argue, quite conservatively single-minded. While he advocated considerable innovation in all aspects of the American legal system, he did so only for the sake of preserving those components of the system which provided the legal profession with its most powerful privileges -- especially the common law technique and ideology which entails a peculiarly dominant role for the judiciary. His clashes with conservative forces early in his career are best understood as exhortations by him to a recalcitrant, parochial and backwards profession to adapt themselves to the changing social conditions of the early twentieth century, so as to avoid irrevocable 'damage' in terms of the loss of power and professional authority.

When Pound voiced his criticisms of the American legal system in 1906, his 'critical' tone reflected a groundswell of popular animosity against the legal profession. *Lochner* had been decided only months before, aggravating the already considerable public

resentment of the courts' persistent intervention into political controversies on behalf of the giant monopoly corporations. The *Lochner* case was the culmination of a long line of anti-labor decisions handed down by the United States Supreme Court over the two decades which preceded 1905. The doctrine of 'freedom of contract' articulated in these cases was the product of an ideological and discursive framework from which both state and federal courts acted to nullify or invert the purpose of the post-Civil War, anti-slavery constitutional amendments. Under the rubric of 'substantive due process', the courts construed the due process clause of the Fourteenth Amendment so as to protect primarily the liberties and property of the giant corporations from regulation by the government, rather than for the purpose for which they were enacted, namely, to protect the newly enfranchised African-Americans against discriminatory governmental actions.

The perception of anti-labor partisanship on the part of the state and federal courts evoked a deep and bitter popular reaction which was reflected in the political documents and statements of the *Lochner* era. The decade prior to 1905 was marked by repeated conflicts between capital and labor, and the side on which the courts had allied themselves in those conflicts seemed 'obvious' to many. Arnold Paul has depicted the era in the following manner:

> The deepening of the depression in 1894 and early 1895 had intensified the grievances of Southern and Midwestern farmers, labor unionists, the unemployed and partially employed, and thousands of bankrupt and failing businessmen. President Cleveland's handling of the financial panic of 1893-1895...and his vigorous suppression of the Pullman strike had alienated a large section of the Democratic party. While the silver miners flooded the country with free-silver propaganda...both the Populists and the left-wing Democrats gained strength, the latter preparing to capture the Democracy for silver and thoroughgoing antimonopolism in 1896. Into this seething political scene was thrown the *E.C. Knight* opinion emasculating the anti-trust act, the income tax decision, and the

> *Debs* ruling. A surge of resentment swept through the protesting forces everywhere, adding strength to the growing radicalism. Populist and Democratic members of Congress...arose to denounce the Supreme Court in the harshest terms. Farmers and merchants, already smarting under federal railroad receiverships and other judicial devices interfering with state regulation, were now sure the Supreme Court itself had succumbed to the plutocracy. And Illinois Governor, John Altgeld, who had bitterly denounced Cleveland's intervention in the Pullman strike as "government by injunction," added the Supreme Court to the list of people's oppressors and "lackeys of capitalism." He soon became perhaps the most powerful figure in the Democratic intraparty conflict. (1969, 224-225).

The popular resentment aroused by the *Lochner*-era decisions was not limited to the judiciary, but extended to the entire legal profession. Speaking at Harvard University in 1905, President Roosevelt reflected the public's attitude toward lawyers: "Many of the most influential and most highly remunerated members of the bar in every center of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth." Such lawyers, he suggested, were producing "a spirit of dumb anger against all laws and of disbelief in their efficacy." (Quoted in Auerbach 1976, 32-33).

Louis Brandeis also was moved to criticize the social role being played by the legal profession. Speaking to Yale law students in 1905, he predicted "a revolt of the people" if the bar did not take stock of the new social realities:

> 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, they have failed likewise to oppose legislation prompted by selfish interests....The leaders of the bar...have, with rare exceptions, been ranged on the side of the corporations, and the people have been represented in the main by men of very meager legal ability....The immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed....There will come a revolt of the people against the capitalists unless the

> aspirations of the people are given some adequate legal expression. (1905, 559-561).

By the turn of the century, the public had succeeded in identifying the leaders of the legal profession as the proponents -- or 'lackeys' -- of the large corporations. Indeed, this situation provided the organizing theme for Jerold Auerbach's influential study of the American legal profession in which he observed that,

> [o]nce the corporation became the object of public scrutiny and then the target of public hostility, as it increasingly did after the turn of the century, the new professional elite was vulnerable. The private corporation, a legal person entitled not to be deprived of its liberty or property without due process of law, owed its legal existence...to the innovative skills of lawyers and judges. (1976, 32).

Thorstein Veblen stated bluntly in 1899 that the legal profession was "immediately subservient to ownership and financiering...." (1899/1934, 231). And Woodrow Wilson seemed to be merely reflecting popular sentiment when he remarked before the American Bar Association in 1910 that "lawyers...have been sucked into the maelstrom of the new business system of the country," and that they had been "intimate counsel in all that has been going on. The country distrusts every 'corporation lawyer'." (1910/1983, 174).

Public sentiment against the monopolies and the law was not only manifested in growing reform legislation, but also in what Pound perceived as a more direct threat to the legal profession: an increasing movement toward the establishment of administrative agencies. These were legislatively-created bureaus and agencies, run by the executive branch of state or federal governments, which sought to regulate some of the greater abuses of the monopolies. As the executive branch was immediately responsible for the enforcement of the policies and regulations of these agencies and commissions, the effect

was to by-pass the courts' usual role in enforcement and adjudication of violations of law. Much to Pound's concern, this arrangement generally met with public favor.

Shortly before the *Lochner* decision was announced, Pound wrote "Do We Need a Philosophy of Law?" (1905) in which he extolled what he considered the glorious history of many centuries of Anglo-American common law. Pound argued that despite opposition and struggle, the common law system had succeeded in driving out from the United States practically every vestige of the colonialist French and Spanish civil law systems, even entrenching itself in the contents of all state and federal constitutions. Indeed, Pound went so far in his zealous advocacy of the common law as to suggest that the United States Constitution contained little that would have been new to Lord Coke, the prominent English common law judge of the early seventeenth century.

Pound did go on to express certain fears, however, or concerns about the present status of the common law. In a rather strange bit of historical analysis, Pound contrasted the current hostility towards the law with its popularity when Coke had attempted to curb the power of King James I by proclaiming the king's authority to be "under God and [common] law." Pound noted that,

> [t]oday, *for the first time*, the common law finds itself arrayed against the people; for the first time, instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire. It cannot be denied that there is a growing popular dissatisfaction with the legal system. (1905, 344).

That he could sincerely state that this was the first time in Anglo-American history that the common law was unpopular betrays much of Pound's excessive partisanship for the common law system and for the legal profession. But, there was perhaps another

reason for Pound's excessive zeal. That is, Pound seems to have attempted to reach an understanding of the nature of the contemporary clash of forces. To large segments of the population, a conflict between capital and labor, or corporations and the general public, was apparent. And, it was also the case -- or so it seemed -- that the legal profession, both bench and bar, was largely alligned with the former and against the latter. Pound, however, sought to restate the conflict as a clash between the public and the common law. In other words, Pound attempted to recharacterize the nature of the increasing public animosity toward the legal system. He portrayed the legal profession, not as a handmaiden to corporate wealth, but as independent professionals whose only allegiance was to the common law. In so doing, Pound sought to discover those factors within the common law tradition which might explain the fact that, *for the first time*, the common law had incurred the wrath of the general public.

In the 1905 article, Pound presented the hypothesis that the current deficiency causing the common law's unpopularity was its proclivity for attending to rights of individuals at the expense of those of society. This theme of a conflict between things 'individual' and things 'social' was to become one of the fundamental elements of his critique of the existing legal system, and also another way of restating the basic conflicts of his era in non-political and non-economic fashion. In this early statement of the problem, he wrote: "No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual...and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age." (1905, 344). To illustrate his point Pound referred directly to the

rash of cases in which state and federal courts, pursuant to their powers of 'judicial review', had struck down and nullified pro-labor legislative enactments. Alluding to 'freedom of contract' and similar doctrines he wrote:

> [T]he right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between our laboring population and oppression. This right of the individual and this exaggerated respect for his right are common-law doctrines. And this means that a struggle is in progress between society and the common law; for the judicial power over unconstitutional legislation is in the right line of common law ideas. It is a plain consequence of the doctrine of the supremacy of law, and has developed from a line of precedents that run back to Magna Carta. (1905, 345).

However, it seems that what lay behind Pound's defense of the common law was not simply pride in Anglo-Saxon traditions, but a concern for, and loyalty to the extraordinary privileges and powers which the common law system maintained in the hands of the legal profession. Therefore, Pound consistently advocated the ability of the common law to correct its own imbalance in favor of individualism. He believed that the flexibility of the common law would allow it to liberalize its own doctrines from within. In this regard, Pound observed that the common law's "cardinal doctrine is that law is reason and reason is the law," meaning that the law would inevitably adapt itself to the reasonable position. Pound hoped that this movement toward the 'rational' could be helped along through the enlightenment of a new generation of lawyers, coming from progressively-oriented law schools, who would lead the common law to "a more even balance between individualism and socialism."

Three points from the foregoing deserve special note as they mark the contours of Pound's basic position: first, Pound's devotion to the 'traditions' of the common law and to the legal profession, whose privileges it justified; second, his concerns for the present state

of the common law derived from his perception of the struggles of the times as involving conflict between common law traditions and the legislative enactments favored by the public at large; third, Pound's confidence that the bulk of the common law privileges could be maintained if, through the law schools, the legal profession could be re-educated to take a more flexible and 'rational' approach to the popular social reform legislation.

In the following year, in the midst of the furor over the *Lochner* decision, Pound delivered his, now famous, address before the national convention of the American Bar Association. When placed in the context of the pervasive acrimony of the times, his observations and conclusions seem rather moderate in tone: "we must not be deceived...into overlooking or underrating the real and serious dissatisfaction with the courts and lack of respect for law which exists in the United States today....Courts are distrusted, and executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion." (1906, 730).

This much was hardly deniable; nevertheless, Pound incurred the enmity of many conservatives within the profession by placing the blame for the situation largely on the courts and the judicial process. To support his position, Pound cited sixteen separate causes for the unpopularity of the legal system. Of these, several were to become staple themes throughout his long career: the transition to an 'age of legislation'; the mechanical operation of rules of law; the unduly individualist bias of the common law; the common law's proclivity for contentious procedure; the common law doctrine of the supremacy of

law; the lack of general ideas and of legal philosophy, which is "so characteristic of Anglo-American law; and the defects of case-made law." (1906, 731-749).

The first point was reflected in Pound's fear of the encroachment of administrative agencies on the courts' prerogatives. The second point was an expression of Pound's view that one of the inevitable drawbacks to uniform application of rules of law was a mechanical mode of decision which could "never entirely avoid eliminating factors which will be more or less material in some particular controversy." The remaining five points all were identified by Pound as long-standing attributes of the Anglo-American common law. Certainly, it was not Pound's intention to attempt to discredit or weaken the common law system in favor of continental civil law, or any other system. On the contrary, the essence of his entire career could be summarized as the search for means to preserve as much as possible of the common law prerogatives in the face of threats to it from the legislature and from the burgeoning number of quasi-judicial administrative agencies. These points, then, were those Pound felt most in need of attention in order for the common law to withstand the tide of popular resentment against the courts. Several had appeared in his article from the previous year, yet, because of their perceived importance, were reiterated and elaborated upon here.

In regard to the final point noted above, the defects of a case-law system, Pound was able to appreciate how its shortcomings appeared to the public:

> Suffice it to say that the want of certainty, confusion, and incompleteness inherent in all case-law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer...are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a

certainty that diligenee ean rake up a deeision *somewhere* in support of any conceivable proposition. (1906, 741. Emphasis in original).

Interestingly, however, Pound seemed amenable to some forms of eodifieation as a means of aiding the eourts out of their self-created morass of eonflieting, overlapping and obseure 'preeedents'. While he esehewed eodifieation of the eivil law type whieh deprives the judieiary of the power to ereate new law, he lauded the efforts at statutory systemization of law then eurrent in the United States as a means, first, of ridding the eommon law of the grosser anaehronisms and ineonsisteneies it inevitably develops within itself and, seeond, of providing "fresh starting-points" from whieh judges and lawyers eould begin to ereate entire new bodies of ease-law.

Pound elosed his 1906 address with an exhortation to the bar assoeiations to throw off their "yoke of eommereialism" and to revive faith and pride in their professionalism and in the seientifie aeeomplishments of Ameriean law sehools. In the eontext of the great rifts in society between the monopolies on the one hand and the factory workers and farmers on the other, Pound urged the bar to adopt an air of independent professionalism, deriving pride from the "spirit of the eommon law." Perhaps it was for this reason he was eonsidered by many eonservatives as a radieal eritie. But, as suggested above, the essenee of his work was to seek only those ehanges in the eommon law system as were neeessary to enable the judiciary and bar to maintain the great privileges and powers they exereised by means of it.

Pound urged eontinued faith in eommon law traditions and renewed efforts by the legal profession and the law sehools as the means of deliveranee from soeial erisis impending upon the legal system. He repeatedly stressed his belief that the key to a

permanent resolution of the conflict with the public lay in re-educating the next generation of lawyers in a new legal philosophy and improved judicial methods.

What, then, did Pound propose to offer in the way of new ideas and materials for the profession? Initially, two things: first, the introduction of concepts and techniques which had recently been developed by jurists of the civil law countries to meet similar problems; and, second, the benefit of the insights and ideas of the social sciences and of social philosophy which Pound perceived to be in advance of the jurists in their understanding of the conditions of the twentieth century. While certainly familiar with their leading conceptions, Pound's knowledge of the social sciences does not appear to have had any direct impact on his philosophy of law, save perhaps to lead him to embrace pragmatism. Rather, Pound's real distinction lay in his extraordinarily broad knowledge of the history of law and legal philosophy, not only of England and the United States, but of the European continent as well. The great advantage he held over his contemporaries was due to his grasp of the entire history of Anglo-American law, not only in itself, but in the context of the parallel history of the civil law. From this perspective, Pound could see in what respects the American system might benefit from the use of ideas, methods and practices of the continent.

By 1908, however, Pound had become a strong proponent of 'sociological jurisprudence', and by 1912 he had advanced a version of 'interest theory' as the basis for understanding law as a type of 'social engineering'. Indeed, it would seem that Pound understood his life's work to be the refashioning of these various sources into instruments

for the use of the American legal profession to enhance the delivery of justice within the legal system and thereby preserve the bar's status and authority.

In his early work, Pound identified the key problem of the common law as its inevitable tendency to construe legal controversies as questions of *individual* rights and liberties, rather than as social problems. To correct this troublesome bias, Pound urged the "socialization of the common law." Indeed, throughout his early work, Pound displayed a recognition of the fact that American jurisprudence lagged behind philosophy and the social sciences in that it had not reformulated its premises in accordance with the general shift from the individual to the social as the focus of theoretical inquiry and explanation. These new developments in the social sciences led to an attack on the natural law explanations which had deduced social standards from axioms developed through consideration of hypothetical, abstract individuals supposed to live prior to, or outside of actual societies -- that is, social contract theory. Pound recognized philosophic pragmatism as part of this general movement and praised its proposal to focus on actual human conduct rather than on abstract first principles. To this end, he observed that,

> [t]he sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument. (1908a, 609-610).

Along these same lines, Pound condemned the "liberty of contract" doctrine and other such rationales used by the courts against labor legislation as the unfortunate result of a "jurisprudence of abstractions." Criticizing their strained rationales for pro-business decisions, Pound borrowed the phrase 'mechanical jurisprudence' from Rudolph von

Jhering, the German theorist of sociological jurisprudence. Pound ridiculed what he called the 'philosophical' approach to jurisprudence which "divorced the jurist from the actual life of today," and that entertained an image of the ideal judge as one who was "translated to a heaven of juristic conceptions and seated before a machine which brought out of each conception its nine hundred and ninety-nine thousand nine hundred and ninety-nine logical results...." (1921a, 205). Pound observed that "[s]uch jurists have their counterparts in American judges of the end of the last century who insisted upon a legal theory of equality of rights and liberty of contract in the face of notorious social and economic facts. On the other hand, the conception of law as a means towards social ends, the doctrine that law exists to secure interests requires the jurist to keep in touch with life." (1921a, 205).

Borrowing heavily from Rudolf von Jhering, Pound theorized that the starting point for reasoning on legal problems should be shifted from 'abstract' doctrines on the rights and freedoms of individuals, to the 'concrete' interests of society at stake in the problem. That is, Pound saw Jhering's concept of the *social interest* as the means by which discussion of legal controversies could be brought down to the concrete, human level demanded by sociological jurisprudence.

For Pound, *interests* were to be defined as demands, or wants, or claims. Individual interests are demands made by individuals, and social interests are demands made by, or by virtue of involvement in, society. Much of Pound's work, it would seem, was devoted to presenting an interpretation of legal history as the interplay of interests competing for recognition and satisfaction under the guise of various legal doctrines.

> I am content to think of law as a social institution to satisfy social wants -- the claims and demands and expectations involved in the existence of civilized society

> -- by giving effect to as much as we may with the least sacrifice....For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence -- in short, a continually more efficacious social engineering. (1922/1955, 47).

The essence, then, of Pound's intellectual career can be understood as an attempt to reinforce the peculiar common law law-making role of the judge with theory, techniques and materials that would make the judiciary strong enough to continue to perform its tasks. His theory of interests was part of his attempt to provide the American legal profession with a new concept of the workings of the judicial process, taking into account, first of all, the activity and responsibility of the common law judge for formulating policy; and secondly, emphasizing that the judge must consider social facts if he is to make policy effectively and conscientiously.

Pound theorized that a balancing or weighing of conflicting interests was usually the underlying dynamic of judicial decision, even when the judge was unaware of it: "I submit that what courts do subconsciously, when they are at their best, is to generalize the claims of the parties as individual human claims, to subsume the claims so generalized under generalized claims involved in life in civilized society in the time and place, and endeavor to frame a precept or state a principle that will secure the most of those social interests that we may with the least sacrifice." (1923, 955).

Pound proposed that the judge frankly acknowledge his law-making capacity and that ideally he should address himself to the underlying interests in a four-step process of decision.

> What the law-maker has to consider...is (1) the interests which the law may be called upon to recognize and secure, (2) the principles upon which...conflicting interests should be weighed or balanced in order to determine which are to be recognized and to what extent, (3) the means by which the law may secure the interests which it recognizes, and (4) the limitations upon effective legal action. (1913, 763).

That is, Pound believed that interests were discovered by the judge or jurist, not created by them. The existence of interests was taken by Pound as the objective starting point for the judicial process. The jurist simply 'catalogued' the interest he found; the judge simply 'recognized' which interest were competing in the case then before him. Ironically, in this respect, Pound's theory was not all that dissimilar from that of the classical theorists he criticized, those who understood the judicial role as *discovering* a pre-existing law or source of law.

In 1911 and 1912, Pound published a series of articles in the *Harvard Law Review*, entitled "The Scope and Purpose of Sociological Jurisprudence." In these articles, he praised Jhering for his contribution to the development of a *sociological* school of legal philosophy by being the first to conceive of legal developments and institutions as the products of *social* rather than individualistic forces. The articles also reviewed the history of sociological-philosophical theories generally from their inception under August Comte to the date of Pound's writing. Pound identified "mechanistic," "biological," "economic," and "psychological" stages of the development of sociological theories. What these *sociological* philosophies had in common was that, as distinguished from the classical philosophies which had centered on individualist conceptions, they attributed the leading role in explaining and justifying history and social institutions to various forms of social forces or social causes.

In 1921, addressing himself to professional sociologists, Pound observed:

> [I]t seems futile for the jurist to attempt to work out and classify social interests [on the basis of instincts] when sociologists are not yet ready to treat social forces in this manner, nor are psychologists so far agreed about fundamental instincts and tendencies as to afford an assured foundation. (1921b, 16).

This address identified a turn in Pound's thought that had begun some years before; a turn from social psychology, instincts and the behaviorial sciences generally, and toward a reconceptualized notion of social interests. The turn was prompted, in large part it would seem, by the influence of American pragmatism, and the work of William James in particular. By 1913, Pound had published his first statement of this view of the foundation of law as "interests" defined as 'demands' or 'claims'.

> [U]sing interest to mean a claim which a human being or a group of human beings may make, it is convenient to speak of individual interests, public interests, that is interests of the state as a juristic person, and social interests, that is interests of the community at large. (1913, 755).

Yet, Pound was not always clear whether social interests were to be construed literally; that is, as demands 'made by' society, as though society possessed a certain agency. Indeed, in later years he would qualify and reformulate this conception. A characteristically ambivalent formulation appeared in his 1921 article; there, he suggested that "the interests which the legal order secures may be claims or wants or demands of individual human beings immediately as such [individual interests]...or of the whole social group as such [social interests]." (1921b, 241). And, just as clearly, his formulation of a theory of social interests, at this time, was heavily indebted to the work of William James.

Pound attempted to distinguish himself from the nineteenth century schools of jurisprudence by denouncing their rigid, "mechanical" conceptualism. Rather, he

advocated a jurisprudence whose principal commitment would be to the justness of the concrete results achieved rather than to the logical rigor of the form of decision. In announcing a shift in priorities to the 'concrete', the 'human', the results of 'actual experiences', and away from the 'logical', the 'ideal', and the 'abstract individual', Pound echoed the themes of his contemporaries in the philosophical world -- the pragmatists. Indeed, in his 1908 article, "Mechanical Jurisprudence," Pound announced that "[t]he sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law." (1908a, 609).

Although Pound had attempted to give his theory of interests a strong philosophical grounding by borrowing heavily from James' work, there were, nevertheless serious conceptual weaknesses. For example, Pound's understanding of interests lacked any significant analysis or discussion of the concrete interrelations among interests. One sees in Pound the presumption that regardless of their objects, all claims are to be equally taken into account. The 'weight' assigned to an interest depends not on the nature of its object, but on the extent to which that objective would be affected by alternative dispositions of the case at hand. Only as it must be decided for the particularities of the case at hand is there consideration of the concrete interrelations of the posited interests. Pound did give some historical analysis of the origin and evolution of various social interests, in his theory of the stages of legal development. However, it seems clear that Pound consistently failed to take an identifiable position as to what social forces, groups, or interests are fundamental to legal and social development. In fact, Pound criticized the 'philosophical jurists' for attempting to assign intrinsic value to various interests in order to

determine which were the more important. Instead, Pound argued that any such absolute weighing of interests was impossible because of the continually fluctuating urgency of interests, and fluctuation of the 'received ideals' according to which they were weighed.

Further, Pound's tendency was towards conceptual isolation of interests from one another, as opposed to unifying them as parts of an overall structure of society. Each interest was assigned its individual compartment and called forth from that compartment only when recognized by the jurist as having applicability to the case at bar. Yet, for the most part, the contents of each compartment were treated as separate but equal, at least equal in the sense that each was equally legitimate as a possible ground of evaluation. As an extension of this, for Pound, there seemed to be a bias in favor of *existing* interests. That is, there was no provision for evaluating what interests should be promoted or favored. Any interest, so long as it existed, was credited with value in its favor, regardless of how unworthy its objectives may have been. As a consequence, although Pound was deeply critical of legal philosophies based on 'abstract concepts', or on the abstract rights of abstract men, he made the analogous mistake of founding jurisprudence on abstract, atomized claims or interests.

Pound's Interest Theory as Apology for Judicial Law-Making

Beyond the significant influence of William James' work, Roscoe Pound was also heavily influenced by the work of the German jurist Rudolf von Jhering. Pound was especially indebted to Jhering's view of law as a self-conscious *human* product; a view

that, in Pound's eyes, distinguished Jhering from the historical school of law and from what Pound characterized as "Nineteenth Century Jurisprudence."

Nevertheless, Pound was critical of Jhering's emphasis on legislation and on legislatively-created administrative agencies as the definitive forms of law-making and the administration of justice. This tendency in Jhering conflicted with Pound's desire to preserve and strengthen the law-making powers which the courts and legal profession of the United States had seized early in the nineteenth century. Accordingly, Pound assisted in redirecting the course of interest theory into a justification of a plenary, quasi-legislative power of the common law courts. Pound's purpose was, in effect, to adapt interest theory into a generalized theory of law-making in which the courts were placed as virtually co-equal partners with legislatures in their authoritative, law-making capacities.

American courts had *made* law, with some enthusiasm, throughout the 1800s, despite sporadic popular efforts to do away with the British inheritance of common law and to institute various forms of legislative codification. The historical school, however, worked to conceal the fact of judicial legislation, by recourse to the fiction that judges merely discover and apply a pre-existing, albeit unwritten, law. Pound, on the other hand, contended that such dissimulation was no longer possible in light of the public's reaction to the *Lochner* line of decisions. The political, partisan, *law-making* activity of the courts had become obvious to broad sectors of an increasingly hostile public. As Pound observed,

> we have a great deal of *freie rechtsfindung* in America, while disclaiming it in theory, and that too in a way that is unhappily destructive of certainty and uniformity. Not only do lawyers and law-writers perceive this situation, but it is coming to be understood, in an age of publicity, by the public at large. Necessary

> as it is to some extent in the period in which we find ourselves, the method by which it is carried out in this country is rightly felt to be unlegal. It injures respect for law. If the court does not respect the law, who will? There is no one cause of the current attitude toward law. But this judicial evasion and warping of the law, in the endeavor to secure in practice a freedom of judicial action not conceded in theory, is a prime cause. (1908b, 407).

Of course Pound did not wish to strip or limit the court's powers. On the contrary, he wished to foster and popularize the "spirit of the common law." Therefore, Pound felt that for this purpose, the best course was to forthrightly acknowledge to the public that the courts were making laws, and to go on to defend and justify that activity as though it were more or less normal and universally accepted. Thus, for example, even in his earliest writings, Pound insisted that throughout history, systems of law have contained alongside of the "imperative" (legislative) element, an equally essential "traditional" element which consists of a heritage of customary practices and accepted concepts passed down from one generation to another of the specially trained legal professionals; that is, the judges and lawyers. (1915, 353). This is but one example of many theoretical constructs in Pound's work which seek to establish judicial law-making as a norm. Pound recognized that if American jurists did not acknowledge and seek to justify the great powers judges were wielding, the public might come to feel that the courts had suddenly usurped the law-making powers which properly belonged to the people's elected representatives in the legislatures. (1915, 358).

The legal profession, by and large, eventually agreed with Pound's assessment of public sentiment and began acknowledging and rationalizing the extraordinary powers wielded by American judges. But, there was little agreement as to what theory could justify such powers. Indeed, this theoretical problem has remained a continuing source of

crisis (actual or potential), for the judiciary and legal profession. From Pound's time to the present day, American jurisprudence has focused its attention quite disproportionately on attempting to rationalize the role of the judge.[35] Pound attempted to accomplish the task of justification of judicial power through recourse to his interest theory of law.

According to Pound, the first task of the judge in deciding a case is to identify the interests competing therein and to decide which of them merit recognition. At this preliminary stage, Pound believed the judge should have at his disposal a complete listing (as reasonably possible) of all the various interests that have been recognized in prior decisions, statutes and other legal authorities, that have warranted legal protection.

While this manner of identifying interests -- that is, by culling from actual decisions of courts, statute books, legal authorities, and so forth -- seems highly *juristic* and non-sociological, Pound believed he was justified and perhaps compelled to resort to this method because of the lack of agreement among social scientists as to the nature of 'instincts' or any of the other 'social forces' that were being proposed as explanations of social institutions and arrangements. His argument was, as follows:

> There remains a method, less pretentious [than basing interests on instincts], that may yet yield more enduring results. Legal phenomena are social phenomena....Why should not the lawyer make a survey of legal systems in order to ascertain just what claims or wants or demands have pressed or are now pressing for recognition and satisfaction and how far they have been or are recognized or secured? This is precisely what has been done in the case of individual interests, although the process has been concealed by a pretentious fabric of logical deduction. The same method may be applied to social interests,

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[35]For example, H.L.A. Hart has observed that, "I confess I find myself strongly inclined ...to characterize American jurisprudence...by telling you in unqualified terms that it is marked by a concentration, almost to the point of obsession, on the judicial process." (Hart 1983, 123).

> and this should be done consciously...without any cover of metaphysics or logic. (1921b, 16).

Of course, if the interests, which were to serve as the primary determinants of evaluation, were derived exclusively from past or present law, there was an inherent prejudice in evaluation toward maintaining the status quo.[36]

Pound classified interests into three categories of demands: public, social and individual. The first of these, public interests, involved interests of the state as an entity; for example, laws for collecting taxes and against the bribing of public officials. Individual interests were those "demands or desires involved immediately in the individual life and asserted in title of that life." (Pound 1943, 2). As for social interests, the most significant category, Pound held that there were basically six, with several sub-headings under each. Pound's fullest discussion came in his 1921 article, "A Theory of Social Interests," in which he identified the fundamental social interests to be: in the general security, in the security of social institutions, in the general morals, in the conservation of social resources, in general progress, and in the individual life. (1921b, 243-245).

Having determined what interests are at play and competing in the case, and which are important for recognition, the judge must next decide how to *balance* the interests, one against the other. That is, the judge must decide what principle to apply in order to determine their relative weights, and which should give way in case of conflict. On this point, Pound criticized the efforts of his predecessors: "Social utilitarians would say, weigh the several interests in terms of the end of law. But have we any given to us

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[36]This was a point made early on by Edwin Patterson (1947, 566-567).

absolutely?" (1922/1954, 46). Rather, Pound had observed that philosophical and juristic ideas of the purposes of law had varied widely from place to place, and from one era to the next. Therefore, he rejected the attempt to 'pre-value' interests as an unwarranted reversion to the absolutism of natural law theories. Instead, Pound maintained that there must be a new valuation, or weighing, from case to case. In an article from 1913, Pound observed that "[p]hilosophical jurists have labored to reduce some method of getting at the intrinsic importance of various interests. They have sought for some absolute formula whereby we may be assured that the weightier interest intrinsically should prevail. I do not believe in such attempts for a moment." (1913, 765). Nevertheless, Pound did advance two principles that should be followed in the evaluation process:

> The first is that individual interests are to be secured by law only because and to the extent that they are social interests. There is a social interest in securing individual interests so far as securing them conduces to general security, the security of social institutions, and the individual moral and social life. Hence while individual interests are one thing and social interests are another, the law, as I have said, secures individual interests because of a social interest in so doing. No individual, therefore, may claim to be secured in an interest that conflicts with any social interest unless he can show some countervailing social interest in so securing him--some social interest to outweigh that with which his individual interest conflicts. The second principle is, secure at all times the greatest number of interests possible, with the least possible sacrifice of other interests. Interests change in their incidents, in their intensity, and even in their very nature. Hence such a principle recognizes that there can be no final work on any point of the law. The legal system must be kept flexible and law-making must accommodate itself perennially to shiftings in the quantity and quality of the interest it has to meet. (1913, 755-756).

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Finally, according to Pound, the three categories of interests were not mutually exclusive. That is, Pound's view was that any public and any individual interest could be restated in the form of a social interest. In some sense, he considered social interests to be simply generalized statements of individual interest. For example, an individual's personal

interest in his property could also be looked at from the standpoint of the social interest in the security of acquisitions. Moreover, Pound urged that, in most cases, individual interests should only be protected if restated as social interests. And, Pound warned that the intrinsic preference of the legal system for social interests over individual ones was such that in the weighing or balancing of interests in a given case, we must be careful to compare against each other only interests in the same category: "If we put one as an individual interest and the other as a social interest we may decide the question in advance by our very way of putting it." (1921b, 2).

Pound's theory of judicial decision as consisting in a free balancing of interests seemed to serve well two of his highest priorities: It explained the failures of the absolutistic theories to be adequate to the task of coping with the conflicting forces that the contemporary courts were ever more compelled to handle; and, it contained an acknowledgment to the public of what many already knew -- that the courts were actively and consciously making laws.

However, Pound's theory simultaneously created a dilemma which has continuously plagued modern American jurisprudence. That is, if the ultimate ground of decision is not strictly legal rules or rights, but the interests which the judge supposes to lie behind those rules, how can one know whether one's legal rights will be respected? Moreover, how can one anticipate what interests a judge will deem to lie behind any given statute, precedent or right, ; how strongly he will evaluate them; or, to what extent he will deem them to be involved and in need of protection under the circumstances of the given

case? Indeed, the whole notion of a 'rule of law' seems threatened by Pound's theory of interests.

Further, Pound's list of interests was highly speculative; in fact, he periodically revised it. And, it was clear that the catalog of interests was only his opinion as to what were the most important interests represented and protected in the thousands upon thousands of volumes of decisions, statutes and commentaries from which he abstracted them. One of Pound's harshest critics on this point was Karl Llewellyn, who observed:

> To be sure, we do not know what interests are. Hence, behind substantive rights...we now have interests [which] we need not check against anything at all, and about whose presence, extent, nature and importance, whether the interests be taken absolutely or taken relatively to one another, no two of us seem able to agree. (1930, 435).

Llewellyn concluded sarcastically, "[t]he scientific advance should...be obvious. Complete subjectivity has been achieved." (1930, 435).

While Llewellyn's criticisms were sharp and to the point, he was hardly alone in his negative assessment of Pound's reliance on a theory of interests as the ground for judicial decision. Many of the charges are familiar ones, yet still have resonance for those who distrust judicial activism: what justification does a judge have in assuming the authority to reformulate legal rules according to a purely subjective interpretation of the interests claimed to lie behind the rules? What control does the public have over the enormous freedom of the judges to 'reinterpret' the law? And so on. Walter Kennedy, a conservative Catholic jurist was quick to assail Pound's work, noting that "[i]t does not suffice to shuffle the mass of wants and claims into a confused pile and then give effect to as many as we can in so far as harmony will permit." (Kennedy 1925, 71). Nor could

Pound find theoretical refuge among friends; William James' theory of interests as demands seemed to provide no basis for ranking one abstract demand above another -- all demands were equally valuable. Pound's attempt to depart from the traditional view of the judge's function as the impartial discovery and application of existing law created the basis for what H.L.A. Hart would characterize as the "nightmare" of American jurisprudence: that the traditional image of the politically neutral and objective judge, as distinguished from the highly politicized legislator, was little more than "an illusion, and that the expectations which it incites are doomed to disappointment...always...[or] very frequently." (Hart 1983, 126). For Hart, this judicial arrogation of legislative powers suggested "a cynical interpretation of de Tocqueville's observation that political questions in the United States sooner or later become judicial questions." (1983, 126).

Nonetheless, Pound was himself well aware of the inadequacies of this early attempts at interest balancing. Therefore, we find in Pound's work supplemental conceptions with which he proposed as theoretical limitations to the extreme expansion of judicial powers suggested by his conception of interests. Turning from James' neo-Kantian approach to the evaluation of desires, Pound ultimately advanced a neo-Hegelian notion that the judge is guided and restrained by certain "jural postulates" of his society or civilization, and by "received ideals" of the legal profession. The jural postulates of the time and place, a conception Pound borrowed directly from Josef Kohler, served to play a stabilizing role for Pound's theory of judicial decision by helping to explain how the judge is guided by legal standards in his empirical search for new rules of law, even though he may not base the decision directly on established rules of law. Following Kohler, Pound

attempted to show that adjudication was not merely a matter of arbitrary or idiosyncratic personal construction. In a passage from Kohler that Pound often referred to, the former makes this point more clear.

> Thus far we have overlooked most unfortunately the sociological significance of law-making. While we had come to the conviction that it was not the individual who made history but the totality of the peoples, in law-making we recognized as efficient only the person of the law-maker. We overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with works that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years oflinguistic development, and not through the personality of the individual....Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become. (Kohler 1921, 187-189).

Jural postulates, then, were certain general underlying presuppositions which were unstated, unformulated and perhaps quite unconsciously entertained by a society's legal system. Although they were unformulated until brought to light by the perceptive jurist, they were firmly embedded, in fact presupposed, in the theory and practice of a given society's system of law. According to Pound, the purpose in formulating the jural postulates was "to formulate what was presupposed by the law as to possession, as to property, as to legal transactions and resulting relations, and as to wrongs." (1942, 113). As distinguished from the absolute principles set forth by various natural law theories, Pound characterized jural postulates as being temporally and culturally contingent, varying from one society to another and also from one era to another within a given society. Yet, because the changes in jural postulates would develop gradually, they served to provide a

desirable blend of stability and continuity. As a consequence, they provided the method by which a judge could value conflicting interests and decide which to recognize.

Another means by which Pound sought to assuage fears of radical judicial subjectivity was through his identification of the "received ideals" of a given legal order. (Pound 1923, 953). According to Pound, received ideals were *idealized pictures* that judges have in mind regarding the general nature and purposes of the legal system or of principles and standards of law. In part, the received ideals are coincident with legal philosophy, so that, for example, adherents of the "nineteenth century school" of jurisprudence entertained received ideals of the purpose of law as consisting in the maximization of liberties of individual human beings considered in the abstract. They entertained ideals of the nature of the judicial function as a purely passive 'discovering' of pre-existing precepts. But, according to Pound, received ideals undergo development just as any other part of the legal system, and he hoped to supplant the now outdated nineteenth century notions with the new ideals represented by sociological jurisprudence, wherein the judge is no longer engaged in passive discovery, but becomes a 'social engineer' who actively develops new rules to help govern modern society.

For Pound, the received ideals were part of the law itself, not merely adjuncts to it, and should be consciously used in the process of decision. He noted that, "[w]hen such ideals have acquired a certain fixity in the judicial and professional tradition they are part of 'the law' quite as much as legal precepts. Indeed, they give the latter their living content and in all difficult cases are the ultimate basis of...decision." (1923, 654). Moreover, like jural postulates, the received ideals change from era to era, and from place to place,

depending on the peculiar social experiences of the time. But, according to Pound, received ideals are occasionally altered *within* a given era; hence, they are not to be understood as static conceptions like those of the 'nineteenth century school' or natural law theory. Rather, they arise from within legal experience itself, and are not external to it. Nevertheless, they provide a necessary measure of stability in that they remain , for the most part, constant within a given era. Thus, by means of the concept of 'received ideals', Pound hoped to explain how stability and reliability could be maintained simultaneously with the flexibility for experimentation and growth that his activist interest theory seemed to give to the judge.

By introducing jural postulates and received ideals, Pound extended his reliance on this view in an attempt to bolster his account of judicial decision. That is, having articulated an activist model of adjudication -- one of social engineering through judicial decision -- Pound recognized the need to reinvigorate the traditional image of the judge as impartial discoverer and interpreter of pre-established laws. In explaining that the judge is in part constrained by such postulates and professional traditions or ideals, constant within a given era of a society, Pound hoped to reach an acceptable compromise between two functions of the judge which he thought equally indispensable: One of upholding and applying the existing system of legality; the other actively to foster developments in the law. The need for the latter had been clearly evidenced by the *Lochner* line of decisions. The mistake of the courts in those cases, and of their academic allies, was in their one-sided insistence on the stabilizing function of the courts and of legal doctrine, thereby ignoring the equally fundamental need for development of the law.

Pursuing this line of thought to its logical conclusions, Pound eventually attempted to universalize his conception of the conflicting needs of change and stability in law, and presented it as the fundamental element of all legal philosophy. He suggested that the varying balances struck by societies between the dual needs of stability and growth undergirded and explained the distinct aspects of the five stages of legal history. Consequently, Pound viewed legal history as a dialectic, propelled forward by alternating socio-legal concerns for stability and consolidation on the one hand, and growth, change and reform on the other. The jurists of late nineteenth century America, for example, had clearly emphasized stability at the expense of growth and reform. According to Pound, this emphasis had been appropriate to the era of economic consolidation following the Civil War. But, historical developments of the early twentieth century demanded change and growth in the laws; a development stifled by various attempts of the courts and jurists to persist in methods of analysis appropriate to an earlier period in time.

Further, he suggested that it is the "social interest in the general security" which is responsible for the alternations between the great eras of legal history. The waxing of society's interest in security, he argued, brought on periods; while the waning of that interest corresponded to periods of growth and reform. For example, according to Pound, the crisis of his own era was due to the conflicting pressures brought to bear on the legal system to remain stable and consistent, on the one hand; and to accommodate new interests and demands through reforms on the other. The nineteenth century schools represented the former pressures, while 'sociological jurisprudence' represented the latter.

Pound gave clear articulation to this view in his lectures at Cambridge University in the early 1920s:

> Law must be stable, and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable....Accordingly the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law, affording no scope for individual wilfulness, with the idea of change and growth and making of new law. (1922/1967, 1).

As we have seen, Pound early on argued that legal rules, principles and concepts should not be "imported from an external source of reality beyond," as he alleged the "nineteenth century schools" had done (that is, Langdell and his progeny). Legal rules were not to be mechanically derived by deduction from pre-established religions or idealistic conceptions. Rather, Pound contended that legal rules and concepts arise in the course of legal experience: they arise *in* experience and, once formulated, are tested *by* experience. Reworking some basic themes in American pragmatism, Pound contended that the received ideals, as well as the jural postulates, though not so fixed as religious dogma or idealist precepts, nevertheless did not "impair the certainty and predictability which are demanded for the general security." On the contrary, "rightly used, the recognition of these elements makes for a real as distinguished from an illusory, certainty." (Pound 1936, 81).

For Pound, what was distinctive about both the notion of received ideals, and that of jural postulates, was that, while they provided for stability or certainty, such certainty

was always relative; that is, it was ultimately subject to the changes of a given historical era. It was stability *within* a gradual process of social and legal change. Both concepts served as Pound's means of providing for what he saw as the inevitable need for a compromise between the two. Through them, he believed he had solved, as well as practically possible, the quest for certainty in the realm of law, without recourse to the illusory goal of the natural law and historical schools of jurisprudence: discovery of immutable legal principles.

It would seem, then, that Pound turned to the concepts of received ideals and jural postulates in order to demonstrate that the freedom of the judge -- a freedom implied in Pound's earlier emphasis on a theory of interests -- was only apparent, while in actuality quite delimited. That is, the judge theoretically exercises some or all of his functions as 'interest-balancer' (recognizing interests, weighing interests, delimiting interests, enforcing interests), against a background of relatively stable standards and principles (jural postulates and received ideals), established by a given civilization's legal system and, more importantly, its legal profession. In this way, the general security is maintained despite the inevitable changes brought about through judicial decision. This is the compromise between the need for stability and the need for change. According to Pound,

> [i]deal pictures of the social order and of the end of law are means of directing and organizing the growth of the law so as to maintain the general security...[and] are guides to lead growth into definite channels and insure a reasonable continuity and permanence in the development of rules and doctrines. (1923, 657).

Yet, Pound clearly recognized that such received ideals could only serve their function of stabilization if there was widespread agreement upon their content among the legal

profession. Thus, he urged his colleagues to "learn how to supply substantially the same ideal picture to all our magistrates." (1923, 662).

What is implicit in Pound's theory, however, is not only an unquestioning acceptance of an important role for the legal profession in the maintenance of social stability and order, but a valorization of the judiciary as the focal point of legal certainty and professional development. Clearly, the great powers or freedoms accorded to the judiciary have been a centuries-old characteristic of the common law system. But Pound endeavored to enhance an already powerful position.

Much more explicit in Pound's work was his struggle to achieve a theoretical reconciliation of the conflict between judicial power and the democratic freedoms he ostensibly championed in his critique of *Lochner*-era decisions. Pound's concern was not with expanding the sphere of democratic accountability, however; rather, he was nearly obsessive in his single-minded concern to preserve and enhance the status and authority of the legal profession. Against the backdrop of the Supreme Court's persistent nullification of popularly supported progressive legislation, as in *Lochner*, Pound suggested an analysis of the underlying problem as a conflict arising from the differing ideals of law held by the people and by the legal profession. (Pound 1912, 227).

Pound suggested, on the other hand, that the *people* – standing on the classical American ideals of democracy – held that the law of the land was what *they* willed it to be, so long as that 'will' was duly expressed in a democratic and constitutional manner through their state and federal legislatures. On the other hand, judges and lawyers, trained in the history of the common law, viewed the premises and fundamental doctrines of

constitutional democracy as little more than restatements of pre-existing, eternal and universal principles of justice and right, which had long been recognized and protected by various institutions and doctrines of the common law. Among these common law principles were the classical conceptions associated with the rise of capitalism: freedom of property, freedom of contract, and a number of political liberties and rights.

From the legal profession's perspective, according to Pound, such principles were so embedded in the legal traditions of common law jurisdictions that even the United States Constitution was to be considered as, in essence, a recapitulation of those principles and corresponding rights. Legislative enactments inconsistent with such fundamental principles must, then, be set aside.[37] The courts, therefore, assumed it to be their duty to *discover* such inconsistencies and nullify the offending statutes. According to Pound, both *sides* – lay public and the legal profession – believed, in good faith, that they were acting according to the law, and that the other was unjustifiably interfering with the exercise of its lawful powers. (1912, 227).

To suggest a way of reconciling this apparent conflict of legal ideals, Pound drew an analogy from British political history: the struggle between Lord Coke and King James I. Coke had been able to curb the powers of the monarch by proclaiming that the king's rule was not absolute, but subject to "God and the common law." Although James objected that law was nothing more than *reason*, and he could perceive and deploy reason as well as anyone, ultimately he was forced to concede that only the judiciary had the

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[37]This understanding was encapsulated in the familiar interpretive reference that statutes in derogation of the common law were void.

practiced wisdom to understand the intricacies of the "artificial reason" on which the common law was based. In practice, this meant that the king must defer to the judicial determinations of the courts. This, as Pound points out, marked the establishment of the doctrine, integral to the common law, known as "supremacy of the law."

What is important about Pound's retelling of this familiar piece of English legal history is not so much his reminder of the origins of judicial supremacy, but his analytical conflation of the two *sovereigns*. Specifically, Pound argued that, in disputing the court's common law powers, the contemporary public had adopted the same untenable position taken by King James. Certainly, Pound's historical analogy is objectionable on a number of levels. What interests me here, however, is not the questionable character of such a comparison in and of itself. Rather, I am more concerned to suggest that the very fact of putting the question as such, and the lessons Pound then draws from his analogy, reveal a good deal about his understanding of the role of legal expertise under conditions I have described as those of legal modernism – conditions of uncertainty and complexity in the law – and the corresponding threat such conditions posed for the continuing authority of the legal profession.

Here, I would argue, Pound is explicit in his concern to justify and protect the privileged position of the judiciary, and with that, to make a claim for the expertise and status of the legal profession as a whole. Having succeeded to the king's position of sovereignty, Pound argued, the American public must bow, as did the king, to the special expertise of the judges in interpreting the traditionally received principles of reason, justice and liberty, which were supposed to inhere in the common law. Insofar as *law*, drawn by

the judges from common law sources, conflicts with democratic law enacted by the will of the people, it is the latter, Pound contended, that must give way. He observed that "[m]ere will, as such, has never been able to maintain itself as law. The complaint of our sovereign peoples that their will is disregarded must be put beside the querulous outburst of James I, 'Have I not reason as well as my judges?'" (1912, 231). Recognizing a conflict between popular will and legal authority, Pound's attempt at resolution seems rather one-sided in favor of the privileged claims of expertise. His conclusions regarding reconciliation of any such tensions lay not in favor of expanding the sphere of democratic contestation over the meaning and application of law. Rather, for Pound, "the way out lies in strong courts with full powers of doing justice, guided by the law-giver, but not hampered by an infinity of rules, the full effect whereof in action no one can hope to foresee." (1912, 231).

CHAPTER 5

FREEDOM, CONSTRAINT, AND THE CREATIVE ROLE OF THE JUDGE: CARDOZO AND COMMON LAW ADJUDICATION

It often has been argued that the rule of law is essential to the preservation of individual freedom and the maintenance of a viable and legitimate democratic political order. Proponents of the rule of law ideal identify its principal virtue as the guarantee of neutrality, uniformity, and predictability in the formulation and application of the law. (See, e.g., Raz 1983, 210-229). In common law countries, the rule of law is often associated with the concept of *stare decisis*, or the rule of precedent. Further, because the Anglo-American legal system is, in its origins, a common law system, the role of the judge -- in particular, the appellate judge -- assumes a place of central importance.[38] The concept of the rule of law serves as an ordering principle for the legal system. In deciding a case, judges must apply and rationally elaborate upon the appropriate pre-existing rules, established precedent, and settled legal principles. Most adherents to the rule of law ideal concede that this is not a mechanical process; yet, adjudication is nonetheless alleged to be constrained under a process that is governed by the basic elements of neutrality, objectivity and rationality. Consequently, legal determinations are understood to be relatively determinate and free from the arbitrary exercise of power -- judges apply the law, they do not create it. The judiciary mediates the exercise of political power, but does not initiate its deployment; power is thereby constrained and ultimately dissolved in law.

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[38]See Posner (1990, viii), where he identifies the appellate judge as "the central figure in Anglo-American jurisprudence."

However, since the emergence of the Realist movement in American legal thought, if not before, the rebuttal to this 'classical' vision has remained fairly consistent: judicial decision-making is *not* rationally determinate; there is no distinct mode of legal reasoning that is separable from political ideology; the theoretical distinction between the legal and the political should be, and is, collapsed. Contemporary critical legal theorists who urge a renewal of the Realist project, argue that the inherent indeterminacy of language in general, and legal rules in particular, justifies doubts about the determinacy of any legal system and the exercise of power legitimated through reference to such a system. The basic argument is that, to the extent that a legal system rests on a foundation of determinate rules and their application, it thus becomes necessary for that legal system to rebut this form of rule-skepticism to claim legitimacy.

The claim that law is not an autonomous sphere of activity, separate from the realm of politics, problematizes the traditional understanding of the judge as a neutral arbiter of legal disputes, objectively identifying and applying the law to a given factual situation. Rather, the rule of law, from such a skeptical perspective, seems little more than an ideological cover for the arbitrary and unconstrained exercise of political power. Indeed, contemporary champions of the rule of law ideal, such as Ronald Dworkin, contend that legitimate government under law is impossible if the law is substantially indeterminate. (Dworkin 1977, 84). Bringing the original Realist position into sharper political focus, contemporary critical legal theorists maintain that legal indeterminacy or uncertainty is evidence for their claim that the rule of law is little more than an elaborate ruse; the pretense of legality masks the extent to which systematic bias and prejudice affect

judicial decision-making. Citizens are thereby misled about the actual reasons for their oppression and are therefore unable to focus their resistance and resentment upon the real cause of their suffering.

In *Law and Modern Society* (1976, 192), Roberto Mangabeira Unger identified the central role legal analysis plays in any critical assessment of the liberal theory of the rule of law: "An understanding of liberal society illuminates, and is illuminated by, an awareness of that society's legal order and legal ideals. For the rule of law has been truly said to be the soul of the modern state. The study of the legal system takes us straight to the central problems faced by the society itself." Yet, according to Unger, the very nature of contemporary liberal society "predisposes men to struggle for the rule of law ideal at the same time that it keeps them from fully achieving this ideal." (1976, 67-68). That is, on the one hand, fear of unconstrained governmental power and of our fellow citizens --- the desire for individual freedom and political order --- suggests the necessity to struggle for the rule of law. While, on the other hand, the inherent subjectivity of adjudication suggests the impossibility of achieving the ideal. In Unger's analysis, the simultaneous longing for both freedom and order, is characteristic of the modernist predicament. (See Unger 1980). The recognition, indeed the obsession with, judicial subjectivity emerged as well, as I have argued above, in the modernist era. This was, of course, part of a larger shift in emphasis, from the late nineteenth century on, to the aesthetic, ethical and political ramifications of cognitive modernism (i.e., radical, or unconstrained, subjectivity).

The Realist Backdrop to Cardozo's Thought

The intellectual historian, H. Stuart Hughes, identified an 'intellectual revolution' which began in the 1890s, and set the terms of social thought for the twentieth century. At the center of the revolution was the problem of *consciousness*. According to Hughes, "it was the period in which the subjective attitude of the observer of society first thrust itself forward in peremptory fashion." (Hughes 1961, 15). Subjectivity "presented an essentially cognitive problem: the disparity between external reality and the internal appreciation of that reality." (Hughes 1961, 16).

In the legal field, the question of subjectivity emerged most prominently in the form of the debate between formalists and their critics over the nature of judicial decision-making. American Legal Realists devoted much time and effort to an exposition and understanding of legal doctrine as the product of an epistemologically-situated subject.[39] In short, the realist argument was that a given legal determination was authorized by political power and was not the necessary product of an abstract, rational determination; another judge, with another political position, may well have provided another legal outcome. The realists urged a complete subordination of objective sources of law, privileging the political ideology and personal idiosyncracies of the individual judge, deciding the particular case then before him. The slogan, "law is what judges do in fact," became a legal shorthand for their 'new' recognition of judicial subjectivity. They rejected the importance attached by previous legal theorists to rules and principles as actual

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[39]I take this to be at the heart of the old claim, *all law is politics*; that is, doctrine does not flow in some rational process from a neutral and objective judicial determination, but is largely dependent on how the judge *sees* the world.

determinants of decision. For example, in a frequently cited article, Joseph Bingham observed that "[a]ll the ambitious attempts to define [law]...agree that it consists of a system of rules and principles enforced by political authority. I believe that this idea is fundamentally erroneous and that it is a bar to a scientific understanding of our law and its particular problems." (Bingham 1912, 3). And, in one of the founding documents of the Realist movement, Karl Llewellyn contended that "the use of precepts, or rules...as the *center* of reference in thinking about law, is a block to clear thinking about matters legal....[R]ules of substantive law are of far less importance than most legal theorizers have assumed." (Llewellyn 1930, 431, 442). Or, in Jerome Frank's view, the traditional emphasis of American law and legal thought on rules and principles was due to a "childish need" for an "unrealizable certainty." (Frank 1930/1970, 21).

Thus, at the heart of the realist position was a thoroughgoing juristic subjectivism. Expanding on Pound's work, yet in many ways critical of it as well, the realists derogated the importance of the objective sources of the law, while simultaneously elevating the importance of the subjective role of the judge. Where Pound had urged a recognition of the fact of judicial creativity, so too Frank contended that judges should openly acknowledge their freedom and thereby take responsibility for the creative role they inevitably play in the development of the law:

> The pretense, the self-delusion, that when [judges] are creating they are borrowing, when they are making something new they are merely applying the commands given them by some 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-authority. (1930/1970, 121).

Curiously, the Realists presented as a novel discovery the fact that judges are rarely bound by common law precedents, and are in fact largely free to manipulate precedents to *justify* the outcome they desire. This great 'discovery' had of course been made even more forcefully by Jeremy Bentham more than 150 years earlier. Indeed, the realists seemed unaware of the view that the attempt to crystallize and organize common law 'rules' was a development owing more to the Langdellian efforts to confront chaos and uncertainty in the law. Instead, the realists maintained that judicial subjectivity was inevitable and, therefore, that the only meaningful focus of study was judicial behavior, method and technique.

The question that emerges from a rehearsal of this familiar engagement is to ask of the effect of openly invoking the problem of certainty in the law; that is, does realism ultimately endanger its own claim to *truth* by repeatedly calling attention to the 'fictive' status of judicial reason. I would suggest instead, that the result of this process of demystification was not enlightenment, but simply to defuse the critical tension inherent to the problems of judicial power. In short, the realist argument served to reinstantiate the power of the American judiciary. Their 'radicalism' tended to conceal the fact that they were, because of their institutional location and academic concerns, ultimately little more than apologists for the Anglo-American tradition of judicial supremacy. Just as Pound's 'radicalism' was better understood as advocacy of a more far-sighted adjustment by the legal profession to the incursions of the legislature than those most of his colleagues were prepared to make at the turn of the century, so the later realist critiques were a renewed attempt to justify and maintain professional hegemony in the face of an increasingly

insistent barrage of popular legislation. As Bruce Ackerman has observed, the realists were "profoundly conservative, not iconoclastic. Rather than transforming traditional legal discourse, the realist critique allowed the profession to survive the New Deal without restructuring its basic conceptual equipment." (Ackerman 1984, 5).

In criticizing the formalism and rigidity of the 'nineteenth century' schools of jurisprudence, Roscoe Pound had already stressed that there was more to law than rules and principles. Besides the substantive doctrinal content of legal rules, the *law*, according to Pound, also consisted of methodology and purpose. Relying on Pound's initial insights, but moving beyond them, the realists suggested little relevance for legal doctrine, in a substantive sense, and urged that it be pushed into the background in any critical analysis of the law and legal system. And, although most realists accepted Pound's argument that law exists for social purposes, that is, as a means to accomplish those ends, they rejected Pound's suggestion that it was the responsibility of jurists to determine what the goals and purposes of the law should be. Following Llewellyn's (and Holmes') lead, the realists maintained the need for a separation of *is* and *ought*, contending that normative evaluation was outside the scope of a truly *realist* jurisprudence. Instead, the dominant realist position was that the principal concern of legal analysis should be the *scientific* study of techniques and methods used by judges in their production of legal doctrine.

This criticism of, and apparent move away from, Pound's attention to the purposive elements of the law – and the role of the legal profession in its development – was important, but not as significant as it might at first seem. That is, I would suggest that the realist position simply subsumed Pound's valorization of the common law and

concomitant centering of the judge into a quest for an *empirical* understanding of this process. The realists sought to focus attention on the question of judicial method. Methodology, until then, had largely been neglected. Yet, with the influence of Holmes' work, it had slowly but steadily come to the foreground. By the 1920s, it had become an object of principal concern for realist scholars. (See, e.g., Summers 1982, 136).

According to Bruce Ackerman, "[w]hat was desperately required was a method by which one might *continue* talking in largely traditional ways about particular disputes without raising the large abstractions that had gotten the common law into such political troubles. It was precisely this that Realism could offer the profession." (Ackerman 1984, 17). This emphasis on method reflected the Realist's awareness that the Anglo-American judge was free to dominate the doctrinal elements of law through professional techniques of adjudication. Although such domination had been argued for at least since Coke's claims on behalf of the 'artificial reason' of the law, the realist-inspired emphasis on method should be understood as an integral part of the development of the discourse of legal modernism; a discourse that was constituted by, and in turn constituted the changing nature of professional authority and legal expertise that began with Holmes, was developed by Pound, and would come to fruition in the 1920s and 1930s.

In his influential essay, "Modernist Painting," Clement Greenberg contends that "[t]he essence of Modernism lies...in the use of the characteristic methods of a discipline to criticize the discipline itself, not in order to subvert it, *but to entrench it more firmly in its area of competence*." (Greenberg 1966, 101. My emphasis). This is, I believe, both the impulse behind, and the effect of the realist emphasis on judicial method. Although

Greenberg's analysis is devoted to modernism in painting, it is nevertheless useful as a way of getting at a type of critical thought exemplified in legal realism. Greenberg observes that,

> [m]odernism used art to call attention to art. The limitations that constitute the medium of painting – the flat surface, the shape of the support, the properties of pigment – were treated by the Old Masters as negative factors that could be acknowledged only implicitly or indirectly. Modernist painting has come to regard these same limitations as positive factors that are to be acknowledged openly. (1966, 102-103).

The realist disparagement of the importance of legal doctrine is, in many ways, similar to Greenberg's characterization of modernist art. Initiated by Holmes, adopted and promoted by Pound, it consisted of a vigorous attack on the role of conceptual categories. Such categories merely served a mystifying function and inhibited a direct examination of the law-making process. Corresponding to this was an elevation of the role of experience. The abstract was denigrated at the expense of the concrete; the universal derided in favor of the particular; the general displaced by an emphasis on the narrow or specific. Ultimately, products of thought were discredited, while those things that could be *observed* were privileged. Finally, the claim for connections among things and events was deemphasized in favor of an understanding of discontinuity and the uniqueness of each event.

This empiricist attitude permitted the realists to justify a disdain for the conceptualistic jurisprudence of Langdell and other formalists. However, there was also an inevitable tendency toward the valorization of subjectivity, an emphasis on the *ad hoc* nature of adjudication, and, ultimately, a justification of judicial freedom. Bruce

Ackerman seems correct, then, to have stressed the essentially conservative nature of realism, while fully acknowledging its liberal attitude towards the reform legislation of the New Deal. While accepting such legislation in a particularist way, realist methodology thwarted any movement toward the development or expansion of doctrinal content or principles of the New Deal. Instead, it pushed to the center of attention the principle of juristic empiricism; the result was to privilege the continued domination of the legal profession – judge and lawyer. The realist flight to particularism, to narrowness, to minute inspection and observation, served, then, to deflect attention from the ideological conflicts which were a part of the historical crises to which the New Deal ostensibly was directed.

In another context, Georg Lukacs defended literary realism (specifically, socialist realism), against abstract expressionism by observing that

> [g]reat realism...does not portray an immediately obvious aspect of reality but one which is permanent and objectively more significant, namely man in the whole range of his relations to the real world, above all those which outlast mere fashion. Over and above that, it captures tendencies of development that only exist incipiently and so have not yet had the opportunity to unfold their entire human and social potential. (1977, 48).

To dwell on the surface of things, as much of *legal* realism was content to do, privileging the immediacy of (visual) experience, inevitably renders the object of analysis, according to Lukacs, "opaque, fragmentary, chaotic, and *uncomprehended*." (Lukacs 1977, 39). Certainly, legal realism – at least its most prominent exponents – recognized the *reality* of judicial creativity and the resulting uncertainty of the law. Yet, it might be the case that they failed to truly probe the depths of judicial *freedom*; the impact of judicial subjectivity

on the process of decision. A plausible rendering of realist work may be that their purpose was not to celebrate the possibilities of legal uncertainty, but to demonstrate how the old claims to certainty were grounded in myth – the myth of formalist reasoning and the false efficacy of conceptualistic legal categories. Yet, this process of demystification was only the first step in the process of forging a new, more empirically sound, legal certainty.

Turning again to Lukacs' work on literary realism, perhaps we can get some hint of what legal realists were gesturing towards: "to penetrate the laws governing objective reality and to uncover the deeper, hidden, mediated, not immediately perceptible network of relationships that go to make up society." (1977, 38). Lukacs goes on to observe, however, that

> [s]ince these relationships do not lie on the surface, since the underlying laws only make themselves felt in very complex ways and are realized only unevenly, as trends, the labour of the realist is extraordinarily arduous, since it has both an artistic and an intellectual dimension. Firstly, he has to discover these relationships intellectually and give them artistic shape. Secondly, although in practice the two processes are indivisible, he must artistically conceal the relationships he has just discovered through the process of abstraction....This twofold labour creates immediacy, one that is artistically mediated. (1977, 39).

If we use Lukacs' insights into the critical potential of literary realism as something of a heuristic construct by which to evaluate legal realism, then I believe the latter work tends to come up short in the comparison. This is so I think because of the realist emphasis on an empirical posture. In this sense, I would suggest that a more compelling exponent of the realist position is, somewhat ironically, Benjamin Cardozo[40]; *ironic* because Cardozo is not generally considered to be a part of the realist movement.

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[40]Although, as we will see below, Cardozo ultimately relies on a rather nebulous 'social science' to rescue some of the potential problem areas of 'sociological adjudication'.

Moreover, he was subjected to a rather snide and condescending critique at the hands of one of realism's central figures – Jerome Frank. And, Cardozo, devoted the bulk of one of his final, and most important, extra-judicial works to a critique of "neo-realism," as he called it. (Cardozo 1932/1947). Yet, in that same piece – an address to the New York State Bar Association – Cardozo ultimately identifies his own work with the realist movement. Nevertheless, Richard Posner justified his decision to "pass over" those thinkers traditionally identified with American legal realism in his treatment of American jurisprudence for the following reason: "At least about the large questions of jurisprudence...the legal realists had little to say that Holmes and Cardozo had not said earlier." (Posner 1990, 20). Obviously, this does not settle the matter. Perhaps, however, it does lend some support to my decision to characterize *realism* as a form of legal thought, or way of talking about the law, that emerged sometime before the published work of those who were, perhaps, more self-conscious of this jurisprudential development. And, perhaps, it lends some support for my decision to end the discussion of this line of legal thought with an examination of Benjamin Cardozo, who, I believe, best understood the problem of judicial subjectivity and, in response, provided the most interesting attempt to come to terms with its implications – a problem that I see as occupying the heart of what I have tried to characterize as *legal modernism*; a problem that still drives much work in American jurisprudence.

Cardozo and the Common Law Judge

In his theoretical writings, Cardozo, like Pound, attempted to maintain the authority of the common law against the perceived threat of legislative encroachment. More specifically, Cardozo sought to enhance the role of the judiciary in the governing of a society in a state of flux. Cardozo's work suggests both a conception of the common law's role in society and an argument as to how the judiciary – the appellate bench in particular – should fulfill that role. As such, it provides an implicit framework for the role of the lawyer in society as well.

Underlying much of Cardozo's extra-judicial work was the understanding that the United States was a pluralistic, continuously developing society. Such an observation is not particularly profound; yet, it is important to the development of Cardozo's jurisprudence. According to Cardozo, fundamental social norms are never fully shared among citizens within the larger political community. Nor are they static over time. Instead, they reside within the continuous flux of social and political development. This conception of society entailed an integral function for the common law. That is, for Cardozo, the common law ought to articulate and enforce that limited set of norms that citizens in a pluralistic and evolving society do hold in common at any given time. More importantly, according to Cardozo, the principal task of the common law judge – the appellate judge in particular – is to *restate* just what those shared beliefs are, thereby enabling citizens to recognize and reaffirm what it is that they hold in common.

The attempt to confront two fundamental problems in the law drove much of Cardozo's theoretical work. The first was the problem posed for a common law,

precedent-based system by the proliferation of conflicting precedent. A problem, as I have suggested above, concerned much of the academic and practicing bar from the 1870s onward. The second problem was that caused by the continual transformation of the social order in which all law operates. For example, Cardozo opened his 1923 lectures at the Yale Law School with the following observation:

> The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth. (1923/1947, 186).

The first problem complicated the task of both judge and lawyer and threatened to reveal inconsistency or worse, contradiction, in the process of common law adjudication, thereby calling into question the legitimacy of the entire system of justice. For Cardozo, however, the nature of the problem suggested its response; that is, the need for some mechanism by which jurists could catalogue and classify legal doctrine and thus *scientifically* manage access to relevant legal precedent. Cardozo's first attempt at a resolution to this problem was his call for a "Ministry of Justice" (1921) and, ultimately, would find him giving full support to the *Restatement* project launched by the newly formed American Law Institute.

The second problem, in part subsuming the first, called for efforts beyond the taxonomic tasks assumed for the Restatements. That is, beyond the categorization of already existing precedent – the job of legal science – there was also a need for legal philosophy; a need arising from forces external to the law itself. In his "Address to the New York State Bar Association," Cardozo observed that the felt need of contemporary jurists to find refuge in philosophy "has its origin in causes more profound and

fundamental [than the] avalanche of precedents." (Cardozo 1932/1947, 8). Rather, it emerged as "a response to the agitations and the promptings of a changing civilization demanding outlet and expression in changing forms of law and a jurisprudence and philosophy adequate to justify the changes." (1932/1947, 8). Law and society required a philosophical jurisprudence which was capable of understanding and explaining the "growth of the law;" one responsive to the needs of reconciling the apparently conflicting demands between "rest and motion," and "stability and progress." (Cardozo 1928/1947, 252).

Cardozo's ideas concerning the need for a "principle of growth" is best understood within his larger framework of how the law functions. According to Cardozo, the problem of the law's growth cannot be fully grasped without first having some understanding of the law's social origins. (1923/1947, 247). That is, Cardozo viewed the common law as the codification of norms of behavior that were traditionally observed by people within their respective societies. For example, in *The Nature of the Judicial Process*, Cardozo suggests that "[l]ife casts the moulds of conduct, which will some day be fixed as law. Law preserves the moulds, which have taken the form and shape from life." (1921/1947, 132). These norms, in turn, reflect behavioral patterns that have proven useful to social groups over time. (1921/1947, 150).

According to Cardozo, at any moment in history, many of these norms will be widely endorsed by, and enforced among, members of a given social group. For example, in *Paradoxes of Legal Science*, he notes that "[t]here are certain forms of conduct which at any given place and epoch are commonly accepted under the combined influence of

reason, practice and tradition, as moral or immoral." (1928/1947, 274). Consequently, these norms create widely shared expectations of how one ought to behave. Departures from expected behavior will be condemned and, perhaps, formally sanctioned. Yet, Cardozo denied that societies share, or that they should adopt, any one set of norms. Rather, he believed that the norms that govern individual's lives are historically and geographically contingent: "The forms of conduct...are not the same at all times or in all places." (1928/1947, 274). Moreover, it was not simply that norms of moral obligation were specific to certain times and places, but that this cultural web of expectations and obligations – inculcated in individuals through formal education and less formal expressions of public opinion – constituted the very identity of a given social group. (1928/1947, 282-283). For Cardozo, then, individuals may lead seemingly atomistic existences; nonetheless, they always live within the existing structures of society and not in isolation from them. (1928/1947, 305-306).

Cardozo insisted, then, that "[l]aw accepts as the pattern of its justice the morality of the community." (1928/1947, 274). A community, for Cardozo, was any social group that shared norms defining the obligations owed by individual members to one another in their social interactions. Such norms, in modern, industrializing societies, were not fixed, but varied in several important respects: between different communities at the same time, and within the same communities across time. Further, Cardozo recognized that modern American communities were, somewhat paradoxically, heterogeneous. Relying on the work of the sociologist Albion Small, Cardozo suggested that American communities form "a union of disunions, a conciliation of conflicts, a harmony of discords."

(1928/1947, 306). That is, Cardozo sought to stress the inherent plurality of communities; yet, it was a pluralism that existed always within a larger unity. Further still, he hoped to identify the continual process of evolution *within* communities. Both perspectives informed Cardozo's understanding of the importance of the common law in social and political life and determined, in large measure, his views on the role and function of the common law judge.

Cardozo's work is informed, then, by a particular image of social life; the basic idea of which is that members of a given society recognize certain norms that in turn define the obligations citizens owe to one another. These norms establish expectations about how people ought to behave in various circumstances. Traditionally, according to Cardozo, these expectations were reinforced by means of education, indoctrination, or the sanction of community opinion. However, with the complexity of modern society, we have developed laws and legal institutions to arbitrate and settle definitively the content of these obligations. Even so, these laws will naturally tend to enforce those obligations that have gained a certain standing and recognition within a community. As Cardozo observes in *Paradoxes of Legal Science*, "[t]he judge, so far as freedom of choice is given to him, tends to a result that attaches legal obligations to the folkways, the norms or standards of behavior exemplified in the life about him." (1928/1947, 260).

Importantly, however, when norms of obligation are incorporated into the common law, they gain a special status. That is, once these norms are written into a judicial decision, the naturally coercive power of public opinion is reinforced by the greater coercive power of the state. Thus, for Cardozo, "[d]uties that had been conceived

of as moral only, without other human sanction than the opinion of society, are found to be such that they may effectively and wisely be subjected to another form of sanction, the power of society." (1928/1947, 277). The common law, Cardozo observed, is that part of customary behavior that has been "stamped in the judicial mint as law, and thereafter circulate[s] freely as part of the coinage of the realm." (1923/1947, 199).

As a matter of description, then, Cardozo seemed to believe that the law generally reflects historically recognized norms of obligation. More importantly, Cardozo not only thought that the common law does reflect and enforce community standards of obligation; he believed that it ought to: "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate." (1928/1947, 274). Given this perspective, for Cardozo, the proper role of the common law judge is to *articulate* those obligations observed and respected by the community. That is, he assumes the ability of the judge to *recognize* and interpret the 'social text' in which a given community's moral beliefs have been inscribed. While this might initially suggest a monolithic view of social life, Cardozo insisted that any given community is inevitably pluralistic and constantly evolving over time. Thus, the task for the common law judge is to determine the point at which he goes beyond simply enforcing obligations widely recognized and followed in the community, and starts to impose an artificial orthodoxy. The task is to determine which among the full range of moral duties recognized by different groups *deserve* legal recognition. To assist them in the accomplishment of this task, Cardozo recommended that judges "follow, or strive to follow, the principle and practice of the men and women

of the community whom the social mind would rank as intelligent and virtuous." (1928/1947, 274).

Stanley Brubaker (1979) has characterized this position as a form of Platonic perfectionism. Brubaker portrays Cardozo as believing that the purpose of law in a liberal and democratic society is to define, articulate, and enforce the standards of intelligence and virtue prevalent among the noblest portion of the citizenry. By enforcing the code of conduct endorsed by such a group, society itself "rank[s] as intelligent and virtuous;" and law acts a s a mechanism for imposing the norms of the society's most developed persons on society as a whole. (Brubaker 1979, 250). For Brubaker, "[t]he social mind in Cardozo's jurisprudence...has as its final cause the cultivation of intelligent and virtuous people." (1979, 250).

Such an interpretation certainly gains some support from Cardozo's many addresses to lawyers and law students, wherein he maintains that, at its best, the practice of law both requires nobility of character and ennobles its practitioners. (See, e.g., Cardozo 1939/1947). However, I think these impulses may be better understood within the context of the Progressive-era politics which Cardozo subscribed to, with its emphasis on government by experts and of a type of moral perfectionism that seemed to undergird many efforts at social and political reform. Moreover, Cardozo rarely seems to suggest that it is the duty of the common law judge to contribute to the *common* perfection of the citizenry. Rather, for Cardozo, in a pluralistic and democratic community, the state cannot hope to impose a comprehensive view of human perfection on a citizenry whose moral views often diverge. In this sense, I think that Brubaker fails to appreciate the

ambiguity in Cardozo's thought. Moreover, Brubaker ignores the modernist elements driving Cardozo's attempt to work through the relationship between state and individual within the context of a legal order. That is, Brubaker discounts the real importance of pluralism, and its implications, to Cardozo's thought. The notion of pluralism within a larger union reflected Cardozo's attempt to identify and control certain antinomies fundamental to modern life which are reflected in the title, *Paradoxes of Legal Science*. There, Cardozo attempts to provide the theoretical foundation from which the common law judge could recognize and, thereby, constrain the tension between individual and society, stability and growth, freedom and restraint.

For Cardozo, "[t]he state exists to subordinate to law, and thereby to order and coherence, the rivalries and struggles of its component groups and individuals. It is thus, in the words of [Albion] Small 'a union of disunions, a conciliation of conflicts, a harmony of discords'." (1928/1947, 306). The law's function, then, is to maintain a peaceful coexistence: common law judges are to strive to enforce a standard of decent conduct that reflects a minimum ethical code to which all members of a pluralistic community can subscribe. That is, law, for Cardozo, must identify "a minimum ethics, that is to say the whole combined requirements of morals, whose observance, at a given stage of social development, is absolutely indispensable." (1928/1947, 277). If the citizens in a pluralistic community cannot agree about many questions of religion or morality, they can and do agree that, as they go about their individual lives, they ought to treat each other according to certain standards of respect and care. According to Cardozo, the common law functions well when it captures those standards in its rules and finds points of agreement

that can bind the diverse membership of the community. In his estimate, the principal function of judges was "not to transform civilization, but to regulate and order it." (1928/1947, 286).

Language and the Judicial Function

Cardozo's conception of the common law's function may be further elaborated by considering why he thought the proper use of language was vital to the realization of its function. In this way we can gain a better understanding of his basic notion that judges *articulate* those norms that form the core of their respective communities.

Law is expressed through language, but it is not something separate from language. It does not exist prior to or outside of language; instead, it structures the very reality it then seeks to describe. That is, legal language not only describes a given legal relationship; it creates it as well. Thus, legal language is both descriptive and instrumental. Indeed, it is this instrumental character of legal language that poses the difficulties with which Cardozo seeks to engage. Legal language is articulated in response to concrete situations. And, it is because the outcome of legal discourse carries such great consequences for the everyday lives of members of a given community that the element of continuity in that discourse takes on such great importance.

Throughout his writings, Cardozo displayed an appreciation of the importance of language for the work of courts; he readily acknowledged the obvious point: judges trade in words. For Cardozo, "[t]he sentence of today will make the right and wrong of tomorrow." (1921/1947, 113). And, while he was well aware of the potential for legal

language to inhibit action and obscure thought, he was equally aware of the fact that it could be harnessed for constructive purposes. Because judicial rulings define and enforce the obligations that citizens within a pluralistic community owe to one another, the manner in which they are delivered affects the viability of the principles they put forth. For example, in his essay, "Law and Literature," Cardozo observes that "[t]he argument strongly put is not the same as the argument put feebly. The strength that is born of form and the feebleness that is born of lack of form are in truth qualities of the substance. They make it what it is." (1930/1947, 340). It would seem to follow from this that judicial opinions are, in Cardozo's understanding, crucial elements in the proper exercise of the judicial function. That is, they are not mere recitations of authority; rather, judicial opinions, for Cardozo, represent the means for an explication of the exact dimensions of moral obligations and of giving content to the formal and generalized rules of the common law.

As noted above, for Cardozo, the function of the common law is to develop rules that capture the evolving core of moral sentiments shared by members of the judge's community. As a consequence of this fact, Cardozo suggests that we must understand also that the exact contours of this web of obligations are never easily defined. The principal difficulty here derives from the fact that the judge is confronted with a "social mind" that is both complex and constantly evolving; it is a *text* that is never fully articulate. As Cardozo was to observe: "The moral code of each generation supplies a norm or standard of behavior which struggles to make itself articulate in law." (1928/1947, 261). John Goldberg, in an important study of Cardozo's thought, observes that "[i]t is precisely

because the content of the social mind is complex and evolving that, in rendering his decisions, the judge simultaneously shapes that social mind he ostensibly is trying to read. That is, the judge makes clear what is only *semi*articulate, by translating moral sentiments into legal rules." (Goldberg 1990, 1344).41 The judge also animates these rules and makes them more compelling, according to Cardozo, by deliberately employing language aimed at persuading the legal profession, and society at large, that a particular rule or outcome adheres most closely to beliefs *already held*. In short, the judge both discovers and creates the social mind. (1923/1947, 228).

Cardozo captured this interplay between discovery and creation in several ways. For example, he spoke of judges having to "interpret the social consciousness" (1932/1947, 13); he referred also to "reiteration" and "restatement," both of which capture his belief that the principal role of the common law judge is to restate that which has already been expressed, albeit cryptically, by the community. (See, e.g., 1921/1947, 162). Cardozo's own extra-judicial writings are exemplary of the *reiterative* method. When one reads Cardozo's most famous work, *The Nature of the Judicial Process*, one is immediately struck by the extent to which his philosophical writing is little more than a mosaic of quotations from other thinkers. Recognition of this fact has often lead to the dismissal of Cardozo as an unoriginal or derivative thinker. Edwin Patterson was more generous in his appraisal, suggesting that "[Cardozo's] inveterate habit of quotation expressed his genuine humility and his belief that he was a product of the culture of his

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[41]Much of the argument in the remaining pages is heavily indebted to Goldberg's treatment of Cardozo's work

epoch." (Patterson 1939, 74). I would suggest, however, that there was something more at work here. For Cardozo, it was a fully self-conscious method of legal analysis – a method he recommended to all common law judges. At the heart of this reiterative mode of thinking is the same basic insight that informs much of Cardozo's legal thinking. That is, in the midst of social flux and intellectual complexity, the fundamental task of the judge is to define and amplify – to reiterate – the basic points of agreement among citizens in the community.

It is generally understood that the common law is the product of an incremental process; but, a major part of the process, for Cardozo, is reiterative. Cases that apply a particular rule of law continually restate that rule in slightly different contexts. This movement helps to reinforce a set of opinions about the obligations individuals owe to one another. In this sense, Cardozo maintained that "fundamental [legal] conceptions once attained form the starting point from which are derived new consequences, which at first tentative and groping, gain by reiteration a new permanence and certainty." (1921/1947, 124). If, through reiteration, the contours of legal principles become better defined, the members of a society will have clearer rules to guide their conduct. Ideally, then, judge-made law will help to give members of a pluralistic community their moral bearings and articulate what they share, even as the content of what they share changes over time. This is a task that can be accomplished to define and articulate moral obligations. According to Cardozo, judges serve their communities by helping the citizenry elaborate, order, and examine prevalent moral intuitions, even though those intuitions are contested and exist in

a constant flux. It is in this manner, says Cardozo, that the judge helps to "order and regulate" the community, providing for both "stability and growth."

Common Law Adjudication and the 'Method of Sociology'

Although Cardozo never developed a precise methodological prescription from which judges could satisfy the conflicting demands of stability and growth, he did provide an analysis of common law adjudication that purported to show why it was realistic for judges to believe that they could consciously adapt the law to changes in social mores, without undermining the rule of law. This argument culminated in his exposition of the style of adjudication he characterized as the "method of sociology." With this method, judges were to examine legal issues and decide certain cases by direct reference to the mutually recognized obligations that formed the core of their communities. It is important to add, however, that Cardozo intended the scope of its application to be limited only to cases that crossed a certain threshold of difficulty -- one that came after the methods of "philosophy," "evolution" and "tradition" had been turned to and found inadequate to the task. It is some indication of Cardozo's uneasiness with this method that, even in the cases that suggested reliance on the method of sociology, he urged caution. Such limitations were important to Cardozo's prescriptions for adjudication because they helped to ensure that judges would not use the method of sociology in a way, or with a frequency, that threatened the demands of *stare decisis*, a principle that he still found important to the legitimacy of the judicial function. Nonetheless, Cardozo readily

admitted that judges should *legislate*, but that they should do so only interstitially; that is, only in the gaps left by the other sources of law. Cardozo explained this as follows:

> I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I meant that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance. (1921/1947, 133).

According to Cardozo, the method of sociology calls for the judge to apply standards which have been distilled from the more general ideas and beliefs then current in society. This suggests a certain similarity to the method of tradition; yet, for Cardozo, the method of sociology was qualitatively different from the other three methods. As Edwin Patterson has observed, with the methods of philosophy, evolution, and tradition – unlike sociology – "established authoritative materials provide the legal doctrine." (Patterson 1939, 162). That is, the other three methods embodied what might be termed 'ordinary' modes of common law reasoning. It was the unique quality of the method of sociology, at least as Cardozo saw it, that it raised concerns about the ability of particular laws to function for socially desired ends. That is, the method of sociology explicitly recognized that judges must sometimes ask not only what the law on a given question *is*, but also what the law *ought* to be. The method of sociology, for Cardozo, was concerned with what values a particular adjudication would promote.

According to Cardozo, the common law traditionally achieves any particular goals only indirectly; that is, it seeks to promote a particular vision of social welfare through the formulation of general that, when consistently applied, will help to attain those goals. The 'radicalism' of the method of sociology, at least for Cardozo, was that it dispensed with

the indirection that was at the heart of the common law, precedent-based, system. Instead, the method of sociology asked judges to temporarily 'forget' the bonds of accumulated precedent and *directly* address the social usefulness of a legal rule. In doing so, it explicitly adopted a perspective *external to* the common law by looking at the justification of a particular doctrine in light of the fact that "[t]he final cause of law is the welfare of society." (1921/1947, 133).

Cardozo's reference to "social welfare" here is not to an abstract ideal, but to the shared values of a particular society. Therefore, when a judge uses the method of sociology, he is to examine prevailing assessments concerning the relative worth of different beliefs, practices, rules, and institutions. He provided an example of the application of the method in his second series of Storrs Lectures, referring to a New York case in which the Court of Appeals changed the common law of the state to make an action for "criminal conversation" (a civil suit brought against a party engaged in adultery with one's spouse) available to women, where it had been available only to men. Cardozo explained that "social, political, and legal reforms had changed the relations between the sexes, and put woman and man upon a plane of equality. [Contrary precedent] founded upon the assumption of a bygone inequality were unrelated to present-day realities, and ought not to be permitted to prescribe a rule of life." (1923/1947, 231-232). The method of sociology asks, then, whether the leal doctrine in question squares with prevailing norms on which there is some degree of consensus.

Nonetheless, Cardozo was anxious to insist that he was not advocating a radical departure from accepted judicial practice; that is, a judge was still expected to analyze

difficult cases by first developing analogies from past precedent. It was only when there was a question of law or fact that was open to more than one plausible solution under existing precedent, and that could not be resolved by reference to history or present practice; or, where existing precedent was clearly out of step with prevailing norms, that the judge was encouraged to reconcile 'directly' proposed dispositions of the case by what he perceived to be contemporary community values. Indeed, Cardozo was anxious to note that his methodological prescriptions effectively advocated a form of judicial restraint. That is, in articulating the method of sociology, Cardozo sought to make public what was heretofore in the shadows. In so doing, he tried to persuade judges that they serve their role best in attempting to perform it *directly* only on rare occasions. The method of sociology, in Cardozo's view, was an indispensable analytic tool, but it was not the judge's only tool. Yet, by offering the option of the method of sociology, even under a fairly narrow set of circumstances, he wanted judges to recognize that his prescription for dealing with the "tyranny of concepts" (formalism), did not undermine the common law itself.

What, then, are judges actually doing, according to Cardozo, when they use the method of sociology? They are, he says, interpreting the "social mind;" which means that, in any evolving, pluralistic community, they will be involved in the attempt to determine which among various competing beliefs in that community form its ethical core. Thus, for Cardozo, adjudication under the method of sociology is more than simply a matter of conducting a 'poll' to determine "the whim or humor of the hour." (1928/1947, 281). Rather, the judge is called upon to identify the 'deeper' judgment of the community, even

when it is embodied in a minority view. Given this, Cardozo's method of sociology sometimes seems more an aspiration than actual method – one incapable of actually constraining judicial behavior, but serving more as a translator's guide. Moreover, one might ask whether this methodology served to replace a "tyranny of concepts" with the tyranny of sociological adjudication; where the common law judge imposed his own reading of the 'social text' onto the law, not under cover of formal rules, but through the authority of sociological 'method'.

Cardozo anticipated, but ultimately dismissed, anxieties provoked by the specter of common law judges using the courts as a forum for the expression of their personal biases: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." (1921/1947, 164). In part, Cardozo was willing to exempt such possibilities out of his belief that most cases simply did not require the application of the method of sociology, but instead involved a relatively unproblematic application of prior case law. Further, anticipating the arguments of contemporary neo-pragmatists such as Stanley Fish, Cardozo suggested that even when judges were to employ the method of sociology, they still functioned as part of an ongoing profession with rules, traditions, and habits that were part of a deeply felt culture which served to ensure a certain regularity in professional behavior.

Yet, even if a thoroughly 'professionalized' judge, familiar with and responsive to the duties and responsibilities of his office, will not engage in arbitrary decision-making, the question remained as to whether such judges will still not be susceptible to 'deeper'

subconscious motivations. Cardozo did not dismiss this problem quite so quickly, but addressed it at the end of *The Nature of the Judicial Process*. There, he acknowledge that, although the method of sociology requires judges to interpret the mores of their time,

> there are likely to be as many estimates of the 'Zeitgeist' as there are judges on [a court]....The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. (1921/1947, 181).

Although education might help minimize the element of subconscious bias, Cardozo conceded that it could never eliminate it. Consequently, he insisted that, to identify those portions of the social mind to be incorporated into law, judges must exercise self-conscious discretion. It would seem, however, that in his appreciation of the abilities of the judiciary, Cardozo was nonetheless willing to subject citizens to the potentially anti-democratic authority of judges. Thus, although Cardozo sought to provide a corrective for the tendency within common law adjudication to valorize precedent at the sake of everything else, he did so only through identifying a new theoretical 'problem space': judicial subjectivity. Yet, the answer to the problem of subjectivity, for Cardozo, lay in the need to distinguish between the subjective *origins* of a judicial account of the social mind and its subsequent *justification*.

In *The Nature of the Judicial Process*, Cardozo had suggested the theoretical implausibility of the classical tradition in jurisprudence because of the inevitability of human subjectivity: "In this mental background every problem finds its setting, we may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." (1921/1947, 110). Although Cardozo emphasized the subjectivity

of judicial decision-making, and the resultant potential for indeterminacy in legal doctrine, he concluded by finding certainty and stability in sources external to the law. In doing so, he reassured his listeners that nihilism need not prevail from his *realist* observations. Rather, anticipating anxiety over his claims of the inherent subjectivity of the judicial process, he responded by noting that "[w]e may wonder sometimes how from the play of all these forces of individualism, there can come anything coherent, anything but chaos and the void. Those are the moments in which we exaggerate the elements of difference. In the end there emerges something which has a composite shape and truth and order." (1921/1947, 123). Cardozo's confidence that uncertainty and complexity were manageable, that some sort of objective binding was possible, was grounded in a belief in the potential for social science – as the necessary adjunct to the method of sociology – to provide the certainty and stability that "scientific jurisprudence" had once promised, but now clearly lacked. As with Holmes and Pound, Cardozo seemed to place his faith for the future of law, outside of law. This, somewhat paradoxically, in order to maintain the authority of law.

CHAPTER 6

CONCLUSION: REALISM AND/AS THE RECONSTITUTION OF PROFESSIONAL AUTHORITY

In this work, I have attempted to explore the responses of three American legal theorists to a perceived crisis in American law and for the legal profession. I have characterized the situation as a 'crisis' by recourse to the term *legal modernism*, in order to capture the dominant tropes through which it was discussed: uncertainty and complexity in the law. The 'responses' (jurisprudential writings) were not always self-consciously directed at meeting this crisis -- although often they were -- but I believe that concern for the continued legitimacy and authority of the law and its principal carriers, the legal profession, in a situation of uncertainty and complexity, was always present. And, although the period I examine stretches from 1870 to the early 1930s, I believe that much of what was involved here continues to have relevance for our understanding of the relationship between the legal profession and the law.

Phillipe Nonet and Philip Selznick observed that "[c]ritics of law have always pointed to its inadequacy as a way of ministering to change and achieving substantive justice. Those anxieties remain, but today a new note is struck by repeated references to a crisis of legitimacy." (1978, 4). This *crisis* may be understood as posing a threat to our ability to sustain a belief in the foundational principle of our legal system – the rule of law. Indeed, for some, the very persistence of the ideal of the rule of law in contemporary legal thought may present something of a puzzling phenomenon. From this perspective, one might assume that the 'myth' of the rule of law had been sufficiently debunked, if not by

legal realism, then by post-realist socio-legal scholars working both within and outside the legal academy. Nonetheless, as Allan Hutchinson and Patrick Monahan have recently noted: "The rule of law is a rare and protean principle of our political tradition. It has withstood the ravages of...time and remains a contemporary clarion-call to political justice. Apparently transcending partisan concerns, it is embraced and venerated by virtually all shades of political opinion. The rule of law's central core comprises the enduring values of regularity and restraint, embodied in the slogan of *a government of laws, not men*" (1987, xiii).

A target of the contemporary radical critique of law is the very ideal of the rule of law. The assault on this foundational concept of liberal legalism has been led, most recently, by a group of legal academics associated with the Conference on Critical Legal Studies (CLS). In large part, the CLS argument may be understood as a more sophisticated restatement of the familiar refrain: *all law is politics*. Their position is grounded in the critical recognition of an allegedly fatal blow to the rule of law ideal – the "indeterminacy thesis" – which can be understood in contrast to the notion of rational determinacy, a claim that the authoritative legal materials and their reasoned elaboration by judges yield pre-existing, discoverable, right answers to legal questions.

While betraying a continued allegiance to the 'judge-centeredness' of traditional common law legal theory, contemporary critical legal theorists nonetheless maintain that judicial decision-making is not rationally determinate, and that there is no distinct mode of legal reasoning that is separable from political ideology. For example, critical theorists such as Duncan Kennedy (1976) and Joseph Singer (1984), argue that the inherent

indeterminacy of language in general, and legal rules in partieular, justify doubts about the determinacy of any legal system and the exereise of power legitimated through referenee to such a system. To the extent that liberalism rests on a foundation of determinate rules and their applieation, it thus becomes necessary for liberalism to rebut this form of rule-skeptieism in order to (re)elaim legitimacy. As Singer suggests: "Determinacy is neeessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it" (1984, 12). The elaim that law is not an autonomous sphere of aetivity, separate from the realm of politics, problematizes the traditional understanding of the judge as a neutral arbiter of legal disputes, objeetively identifying and applying the law to a given factual situation. Rather, the rule of law, from this perspective, seems little more than an ideological cover for the arbitrary and unconstrained exercise of political power. Moreover, CLS's elaims ultimately would seem to undermine the legitimacy of the practieing bar, whose authority and power rest on its monopoly over professionally 'determinable' legal doctrine and proeedural rules.

Aceording to John Brigham and Christine Harrington, this *realist* approaeh suggests an "interesting paradox;" that is, "although it (realism) is treated as a given by legal academics and social scientists, it is also continually advaneed as a vanguard project" (1989, 41). Moreover, Brigham and Harrington suggest that "[r]ealism manifests an essentially anti-law rhetoric while serving as the rationale for law-reform movements and as the basis of a modern legal orthodoxy" (1989, 41). Building on the work of Brigham and Harrington, Austin Sarat and William Felstiner, in a study of divorce lawyers and their clients (1995), have found that many members of this sub-speeialty within the profession

often characterize the legal system, in their interactions with clients, as a highly indeterminate and radically subjective decision-making process. Legal rules are said to play little part in a given decision. Rather, the idiosyncracies of the judge are predominant. The only constraining factor in an otherwise arbitrary (from the client's perspective) process is the lawyer's knowledge and understanding of the "hidden transcripts" of the law – how the system *really* works. Knowledge of the judge, how he or she has ruled in the past, which clerk will help with late filings, etc., constitutes the *knowing subject* – the experienced lawyer who can give a more or less competent prediction of future behavior. Individual experience supplants "special access to an objective body of knowledge" (i.e., the formal legal rules) as the basis of professional authority. The legitimacy of this *realist* expertise, however, exists in a constantly uneasy tension, always threatening its own undoing. What is *real* here is not an unmediated object, accessible in the external legal world; it is, rather, a professionally and discursively mediated account of the legal process and its distortions. What is real is the lawyer's perspective, the legitimacy of which is determined by a principle of professional *recognition*.

Although limited in scope, Sarat and Felstiner's work might seem to provide some empirical support for claims CLS wants to make against the legal system as a whole. Certainly, as others have observed, however, much of the CLS argument is not original to them (see, e.g., Stumpf 1996). For example, James Herget has noted that "[t]he critical legal scholars are th latest in a long line of jurisprudential thinkers to direct our attention to the judicial process in order to point out that 'hard' law is really soft, that legislated

rules and precedents do not determine the outcome of cases in court, and that a false perception nevertheless persists that judges are somehow bound by the rules of law laid down elsewhere" (Herget 1995, 59). This is not something those associated with CLS would attempt to deny, however; in fact, most readily acknowledge their intellectual debts to the legal realists of the 1930s and 1940s, the sociological jurisprudence of Roscoe Pound and Benjamin Cardozo; and, beyond that, to the seminal work of Oliver Wendell Holmes, Jr. (see, e.g., Singer 1984, 48).

I have looked 'backward' as well, examining those texts which provided a large part of the theoretical backdrop for debates within contemporary jurisprudence. I began with a brief discussion of the emergence of Langdellian formalism. Several important interpretations of the period have argued that formalism was instrumental to the consolidation and maintenance of political and economic power by privileged capitalist interests in a period of rapid industrialization. I have suggested, however, that the emergence of formalism was due, in large part, to a perceived threat to the epistemological structure of legal doctrine, thereby threatening the continued legitimacy of the legal profession as well.

Although he provided little in the way of an extended theoretical discussion of these matters, it is nonetheless clear that Langdell sought to advance the notion that the law (in both its practice and study), is an autonomous discipline. By this, he meant to erect boundaries around the law, creating a space within which legal expertise could reside. The developing sense of chaos caused by a precedent-based system spinning out of control could be tamed, Langdell believed, within these boundaries, through the scientific

arrangement of the *texts* of the law – appellate opinions. The relevant principles of law could then be inferred from this, now manageable, *library*. The new legal mandarins – professors of law – were to be the caretakers of this body of knowledge, providing the judiciary with the appropriate material from which to deduce the 'correct' legal outcome in any given case. Their decisions were governed by reason alone; the rule of law was preserved.

Locating the study and arrangement of these texts within the newly emergent universities, clothing its students with the prestige of scientific expertise, held obvious attractions for a legal profession desperate to enhance its prestige and legitimacy. The 'scientific' character of the inquiry elevated the study and practice of law to a level of specialized, technical expertise, available to the few only after years of study. To remove the investigation of law to the domain of 'neutral' expertise, separate from the world of politics and policy, was an important means by which the legal profession could assert dominion over the law. In a legal space characterized by the judicial application of determinate rules to analogous factual situations, lawyers could claim a monopoly to represent citizens in *legal* matters. This 'classical legal consciousness' was soon enough shorn of Langdell's version of scientific *method*, but the formalist undergirding of professional authority remained – some semblance of which remains to the present day.

This was not my principal target, however. Almost from its inception, Langdellian formalism (and its successors) came under attack, both for its methodological shallowness and conservative political implications. It is this attack, most often associated with the movement known as legal realism, that I was interested in. However, because of what I

was looking for, my approach was somewhat different than that generally found in the literature. The most obvious difference is that I chose to focus on the important theoretical work that preceded legal realism: Holmes, Pound, and Cardozo. My assumption was that most of what is important to the realist position was already evident in this work. More importantly, though, instead of focusing on the critical engagement between realism and formalism, picking a winner, and calling it a day, I have had something else in mind: In the wake of the critique of legal formalism – a type of legal reasoning that implies a justification of professional claims to the authority of legal expertise – what stands in its place? What constitutes a *realist* version of legal expertise; what are its implications for the legal profession, and for the relationship between non-lawyer citizens and their laws? This seems to me to be a very large task, and what I have done here is, I believe, only a beginning – but it is no less necessary because of that.

To set about accomplishing this task, I have engaged in a fairly close reading of the principal theoretical texts of Holmes, Pound and Cardozo. Like Langdell and his successors, they also were responding to the problem of uncertainty – doctrinal indeterminacy – and complexity in the law, with its attendant consequences for the status and legitimacy of expert authority. All three emphasized the inherent indeterminacy of the law and sought to debunk the formalist approach of constraining it through the proper organization and understanding of legal doctrine. If, however, adjudication is not a matter of reason, but one of *politics* instead, are there any truly meaningful constraints on judicial behavior? And, can lawyers still lay claim to a specialized and technical expertise?

As I have shown above, none of the three wished, in their critiques of legal formalism, to leave the situation of legal uncertainty intact. They simply believed that formalism provided an inadequate resolution to this problem; in part because its adherents misunderstood the real nature and proper function of the law itself. Holmes, Pound and Cardozo accepted uncertainty and complexity in the law as a fact; they sought, however, to *manage* it – through "external standards," "prediction," "social interests," "jural postulates," or the interpretation and rearticulation of a "social mind;" and through the incorporation of the social sciences into the law. The false science of Langdell must be replaced by a 'true' science of the social world. Law must be approached as an instrumental means to non-legal ends; as such, law should be understood as nothing more than the product of particular interests. What this suggested to me was the formation of an alternative orthodoxy – a 'realist legal consciousness' – from which claims to professional expertise could be nourished. Like formalism, realist forms of reasoning and justifications of professional authority have certain political implications. This is perhaps most evident in Holmes, Pound and Cardozo's arguments for the continuing relevance and authority of the legal profession, vis-a-vis other forms of expert knowledge, in a rapidly modernizing society. Each was clearly intent upon maintaining the status and privileges of the American legal profession. One claim to the authority of the legal profession (formalism) was rolled back only to be reconstructed in another, equally pervasive form.

Further, the critique of formalism is grounded in epistemological claims that have, I believe, important ethical and political implications separate from, but related to,

attempts to recharacterize the legitimate authority of the legal profession as a whole. Realism becomes a way of 'seeing' the world and 'talking' about it. However, in the wake of the critique of formalism, what will now support the claim to a monopoly over the representation of citizens in *legal* matters?

In Chapter Two, I made reference to the contemporary legal philosopher, David Luban and his understanding of the idea of legal modernism through the concept of the "Copernican Revolution." With its emphasis on the importance of situated perspective, Copernicanism, Luban reminded us, taught us to mistrust our everyday understanding of the world we live in. The implication of this for legal modernism is that "[t]he truth about legal structures must be radically different from the way they manifest themselves in practice." (Luban 1994, 3). For Luban, Holmes serves as the quintessential legal modernist. This aspect of his work is evident from the earliest published material in the 1870s, to his last major jurisprudential effort, "The Path of the Law," published in 1897; the attempt to look beneath the surface of the law in the belief that appearances too often deceive. This tendency, though less obvious in the work of Pound and Cardozo, is still there, a product of Holmes' influence on their thought.

I returned to Holmes in order to examine the emergence of the idea of legal indeterminacy in his extra-judicial writings. In doing so, I sought to emphasize an aspect of Holmes' theoretical work that, to date, has not received the attention I believe it deserves – the articulation of a type of perspectivism that is related to the identification of indeterminacy in the law. Holmes went to great lengths to look at the law from a lawyer's point of view; in particular a common law lawyer. Further, along with the emergence of

the idea of legal indeterminacy, in fact as a corollary to it, we can find in Holmes' work the origins of a distinctive form of legal discourse; a new language of power if you will, and with it, the outline of a different form of legal knowledge. What is generally identified as Holmes' "prediction theory" of law, I would suggest, may be better understood as an attempt to reconstitute the grounds of legal knowledge, or expertise, and professional authority. In contemporary critical legal theory, indeterminacy generally is deployed as a *debunking* trope; Holmes helps us to see its constitutive elements as well. His perspectivism – here, the attempt to conceptualize law from the practicing lawyer's point of view – discursively carves out a space within which professional (legal) experience could provide the basis for a reconstituted form of expert authority.

Holmes' jurisprudence contains within it an implicit reconceptualization of legal practice. This new juridical discourse of expertise and professional authority subsumes a discursive 'space' of law – judge, lawyer, client and common law legal doctrine – are reconstructed in Holmes' modernist jurisprudence. In my opinion, the work of Roscoe Pound and Benjamin Cardozo fleshes out, in important ways, Holmes' seminal contributions to American jurisprudence. The project of this dissertation, then, was to examine this (re)construction of the space of law in late nineteenth and early twentieth century American legal thought. Further, I sought to explore the implications of this reconstruction, implications which, I believe, still resonate in contemporary jurisprudential discussions.

One of the concerns which animated this project had to do with what I perceived as the elision of the normative possibilities of *law* – and, therefore, the possibility of a

democratically meaningful understanding of justice – in the reconstructed juridical space of realism; what I have characterized as legal modernism. The focus of legal modernism, I argued, was not on the normative content of law, but the observable behavior of legal officials, whose decisions are explained by the political, economic, or psychological interests that really motivate them. Law becomes mere epiphenomena. Legal experts must stake their claim to professional authority on the ability to recognize the interests at play; to see things 'hidden' from the rest of us. The concern was with the tendency to attribute our understanding of law to what the legal profession *says* is law and, thus, with an apparent foreclosure of any meaningful possibility to construct our own normative world through law. It is to suggest a certain professional hegemony over the ethical possibilities within the space of law. My argument, then, was that the realist/modernist account of law, however compelling as a critique of formalist legal reasoning, served as well to reclaim the authority of professional expertise in the wake of its own (apparent) assault. That is, realism advanced in the wake of its claim at having demystified the obfuscations of formalism, while simultaneously eliding its own role in constituting a new legal space that is no more *real* and, ultimately, no more hospitable to popular access than that which went before.

My reading, here, is admittedly anachronistic. As suggested above, I approach the work of Holmes, Pound and Cardozo, not as an historian of American legal ideas; but as one informed by contemporary issues and concerns. In turn, I believe that an engagement with these texts provides a theoretical space outside of the present, from which to reflect back on the present. We continue to live under the impact of a realist tradition in law that

begins with the jurisprudence of Holmes, Pound and Cardozo. But, we seem far less aware of how realism works to preserve legal/professional authority. This means that we tend to reject the self-presentation of law as an objective system of abstract rules, neutrally applied by independent judges whose access to the law is through a direct course of legal reasoning in which they have been specially trained. It means that we are suspicious of, and seek to pierce, the false appearance that law creates. It means that law is nothing more than what the *judge* says it is. And, it means that we no longer believe that law can make any claims of its own; rather, it is valued only as a means to some other end. As I suggested at the beginning of the dissertation, this is generally viewed as a progressive development. Defenders of a formalist faith are naive, or worse; to 'believe' in law is simply to miss the point . Without defending formalism itself, I do want to register a strong suspicion of its realist critique. I do so because it has been my sense that in constantly performing its critique of formalism, certain "consequences" of realism have too often avoided critique – a realist justification of legal expertise being my specific concern.

This concern has been given some empirical illumination by the recent work of Austin Sarat and William Felstiner on the relationships between divorce lawyers and their clients. In their investigation, which seeks to operationalize some of the basic theoretical insights of Brigham and Harrington's critical work on realism, Sarat and Felstiner heard lawyers consistently debunk their clients' belief in the relevance of legal rules to the adjudication of claims within the legal system. What *was* relevant was a knowledge of people and places far more inaccessible to the average layman than the rules themselves. What Sarat and Felstiner were describing was realist legal consciousness at work. They

were witness to non-lawyer citizens experiencing a loss of control vis-a-vis the law and, thereby, ever more dependent on the legal expert. The truly meaningful world of the law was not the one they saw with their own eyes, it was something hidden to them. At the end of his chapter on the "Sociology of Law," Max Weber observes that,

> Whatever form law and legal practice may come to assume...it will be inevitable that, as a result of technical and economic developments, the legal ignorance of the layman will increase. The use of jurors and similar lay judges will not suffice to stop the continuous growth of the technical element in the law and hence of its character as a specialists' domain. (Weber 1978, 895).

My argument has been that, in the wake of the crisis of legal modernism, the emergence of a realist discourse of law and its critique of the inadequacies of formalism's response to that crisis, realist jurisprudence has not slowed the developments Weber speaks of; it has, in some ways, exacerbated them.

In suggesting this, I perhaps expose a certain naivete that the late Grant Gilmore cautioned against. Gilmore opened his Storrs Lectures at Yale Law School by reminding his audience that,

> [f]rom the beginning of social time there have been institutions like courts which have generated...something like law. In all societies beyond the most primitive a professional class of lawyers and judges has emerged and maintained itself. In most societies at most periods the legal profession has been heartily disliked by all non-lawyers: a recurrent dream of social reformers has been that the law should be (and can be) simplified and purified in such a way that the class of lawyers can be done away with. The dream has never withstood the cold light of waking reality. Thus there has always been law and there have always been lawyers (1977, 1).

While I wish to challenge Gilmore's conflation of *law* with lawyers, believing that there is something in law worth maintaining beyond its professional representations, my point, however, is not to situate the argument within the tradition of Bentham and

Rantoul, seeking some plan of codification that would render lawyers irrelevant to the workings of a new legal order. Rather, I wish simply to examine the emergence of a new justification for expert authority, one grounded in the identification and problematization of judicial subjectivity. But, in so doing, I wish to suggest as well a critical reading of this new defense of the legitimacy of professional power. During a period of tremendous social and economic change, the traditional defense of the legal profession's authority – formalism – began to seem more and more out of place and in danger of losing credibility; it appeared to the emergent critics as little more than the rhetorical mask of illegitimate power and injustice. Claims to professional authority once grounded in the determinacy of legal rules were challenged by a positivist expertise based on the observations and predictions of judicial behavior. This modernist sociological jurisprudence, or realism, seemed to many better able to support claims to professional authority under these new historical conditions – a moment of crisis for the American legal profession. Ostensibly critical of the classical orthodoxy, this emergent movement in legal thought promised the availability of a progressive politics through the unmasking of purely formal justifications of legal decisions, thus exposing their *real* bases in the interests of relevant legal actors.

By saying this, I have not meant to suggest that realism supplanted formalism as the dominant image of law from which the legal profession could draw its theoretical sustenance. Rather, both now lead a complex coexistence. Indeed, in some ways, this provides the realist vision with much of its continuing potency. It is an example of what Stanley Fish has referred to as the law's ability to contain and deploy what would appear to be mutually contradictory discourses as one; "a discourse continually telling two stories,

one of which is denying that the other is being told" (Fish 1991, 203). Yet, when one reads the contemporary critical literature, this is nowhere in evidence. Peter Gabel and Paul Harris (1982-83), working from a realist/CLS perspective, provide a good example of this sort of analysis. Rejecting the liberal-legalist valorization of the rule of law, Gabel and Harris observe "that the legal system is an important public arena through which the state attempts – through manipulation of symbols, images, and ideas – to legitimize a social order that most people find alienating and inhumane" (1982-83, 370). Nonetheless, Gabel and Harris insist that "the very public and political character of the legal arena gives lawyers, acting together with clients and fellow legal workers, an important opportunity to reshape the way that people understand the existing legal order and their place within it" (1982-83, 370).

They identify both what is at stake and what are the possibilities for critical legal thought and practice. Yet, they seem largely ignorant of their own complicity in the reproduction of domination through the very legal system they critique. For Gabel and Harris, *politics* is ubiquitous and it overwhelms law. Law's 'weakness' here can be understood in the recognition that currently existing law is nothing more than an elaborate rhetorical cover, masking the distribution of power among various interest groups and individuals. Law is, then, nothing more than the product of these social and political interests. Even so, the (radical) lawyer still has an important role to play, according to Gabel and Harris, in the advancement of a progressive politics within the traditional institutional apparatus of law. This role is, in part, to help clients understand law by piercing law's pretensions to formality and political neutrality.

I concede that there is much to agree with in Gabel and Harris' analysis, I would argue as well that the image of law that informs this critique ultimately works to undermine their stated desire for a 'democratic' reshaping of the legal order. Crudely put: why do we need lawyers, radical or otherwise, to engage in critical political (or legal) analysis? Clearly there is nothing unique that the radical lawyer, *as lawyer*, has to offer to those interested in progressive *political* activity. The question remains open regarding the citizen's ability to achieve political ends within the space of law.

In another context, Sarat and Felstiner suggest that,

> [i]n a legal order whose legitimacy is said to rest on the claims of formalism, procedural justice, and, to a lesser extent, on those of equity, the law talk of the divorce lawyer's office is replete with 'rule skepticism'....If the presentation of a formalist front...is necessary to legitimate the legal order, then the presentation of the legal process at the street level may work to unwind the bases of legitimation that other levels work to create. While critical scholars are devoted to proving the proposition that legal rules are indeterminate and to enlisting practicing professionals in the project of demystifying and exposing the claims of legal formalism, divorce lawyers seem routinely to be engaged in this same project as they counsel clients (1995, 107).

In light of this recognition, Sarat and Felstiner (see, e.g., 1995, 87) express some amazement that contemporary critical legal scholars such as Gabel and Harris continue to advance realism as a "vanguard project" (Brigham and Harrington 1989, 41), even though its basic tenets seem to be accepted and routinely articulated by at least one segment of the practicing bar. This is attributable, I would suggest, to the fact that realism has not been adequately analyzed as a discourse of expertise which serves to ground professional authority. This dissertation has attempted to show that the paradox, first suggested by Brigham and Harrington, and later observed by Sarat and Felstiner – of lawyers identifying

the indeterminacy of rules within the legal system in order to advance their own claims to authority based on the contingencies of 'local knowledge' – has a theoretical dimension to it; one that has a history, and is better understood once located within that theoretical tradition I have examined above.

In laying out a partial history of this development, focusing on certain key texts from that history, I do not wish my argument to be understood as calling for the return to a pre-realist, or formalist, grounding for professional authority. Rather, in suggesting that realism should be understood not so much as a critique of formalism, but as another attempt to ground professional authority, I wish to call into question the very conflation of law with the legal profession. I have sought to do this in order that we might law claim to the ethical project of law – justice – a project that, otherwise, seems secondary to the endless processes of professional closure.

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