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THE LEGAL POSITIVISM OF JOHN AUSTIN AND THE REALIST MOVEMENT IN AMERICAN JURISPRUDENCE

Wilfrid E. Rumble†

“The house of jurisprudence,” Morris and Felix Cohen wrote, “has many mansions.”¹ Unfortunately, systematic comparison of these diverse structures is not a widespread scholarly practice. Comparative analysis is essential for understanding the true distinctiveness of the various traditions of jurisprudence and is indispensable for assessing new theoretical developments. This assumption underlies this study, which compares the ideas of John Austin with those of the legal realists.

Austin was the most influential figure in English jurisprudence for the last third of the nineteenth century and for much of this century. During his lifetime, he was a prophet without honor. He published his one completed work on jurisprudence, *The Province of Jurisprudence Determined*,² in 1832. It did not receive great attention, although a few journals reviewed it very favorably.³ Within a few years of his death, however, “it was clear that his work had established the study of jurisprudence in England. And it is now clear that Austin’s influence on the development in England of the subject has been greater than that of any other writer.”⁴

† Professor of Political Science, Vassar College. B.A. 1953, University of Minnesota; M.A. 1956, University of Minnesota; Ph.D. 1961, The Johns Hopkins University.

¹ READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 370 (M. Cohen & F. Cohen eds. 1951).

² See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (1954) [hereinafter cited as *PROVINCE*]. Austin’s lectures on jurisprudence were published posthumously. See J. AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* (5th ed. R. Campbell 1885) (1st ed. 1863) [hereinafter cited as *LECTURES*]. For bibliographies of Austin, see Hart, *Bibliographical Note, PROVINCE, supra*, at xix; Rumble, *Divine Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin*, 24 *AM. J. JURIS.* 139 n.1 (1979).

³ See, e.g., Book Review, 18 *WESTMINSTER REV.* 249 (1833); Book Review, 7 *L. MAGAZINE REV.* 313 (1832).

⁴ Hart, *Introduction*, in *PROVINCE, supra* note 2, at xvi. Carleton K. Allen claimed that Austin was the author of “the characteristic jurisprudence of England.” C. K. ALLEN, *LAW IN THE MAKING* 7 (7th ed. 1964). The publication of H.L.A. Hart’s *The Concept of Law* probably requires modification of this assessment. Nevertheless, Austin had a profound impact upon English jurisprudence.

The legal realists were not as influential in this country as Austin had been in England. In addition, they evoked a storm of protest that was quite unlike the reaction to Austin's teachings.⁵ Still, the realist movement was the most significant development in American jurisprudence in the period between the two world wars. Despite the controversy generated by the realists, they have had a substantial impact on legal thought in this country. Jerome Hall had good grounds for asserting that "most legal scholars in the United States, from the late twenties on, have been realists in important respects; and the polemics of the thirties should not obscure that fact."⁶ Although recent developments in American jurisprudence may require qualification of Hall's statement,⁷ many of the ideas produced by the realist movement are likely to retain considerable vitality.

This interpretation presumes that it is possible to generalize accurately about the notions of the legal realists. To take this position, however, is not to deny the difficulty of the task. "What the curious episode which we call American Legal Realism was about," Grant Gilmore observed, "has long been a puzzle not only to outsiders but to the participants" as well.⁸ Such bewilderment is probably inevitable. There is no universal standard for determining who is a legal realist.⁹ Theorists generally classified as realists frequently disagreed

⁵ See, e.g., works cited in W. RUMBLE, *AMERICAN LEGAL REALISM* 29 n.53 (1968).

⁶ J. HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 136-37 (1958).

⁷ See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), which, in many respects, is a defense of ideas that cut deeply against the grain of the realist movement.

⁸ G. GILMORE, *THE AGES OF AMERICAN LAW* 78 (1977).

⁹ See W. RUMBLE, *supra* note 5, at 1 n.1 for my classification of the realists, which relies heavily upon Karl Llewellyn's 1931 list of realists. See K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 74-76 (1962) [hereinafter cited as *JURISPRUDENCE*]. I have also added Thurman Arnold, Felix Cohen, and Fred Rodell to Llewellyn's group of realists. William Twining has criticized my selection of realists as "unnecessarily arbitrary." W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 409 n.24 (1973). This is an accurate description inasmuch as Twining implies that I gave no reasons for the selections. If, however, Twining meant to say that no reasonable basis *exists* for my selections, his criticism is unfounded. I rely heavily upon Llewellyn's list of realists for the following reasons: (1) Because Llewellyn maintained a pivotal role in the realist movement, he was in a good position to judge who the other participants in it were; (2) Llewellyn persuasively explained the basis for his selections. See K. LLEWELLYN, *JURISPRUDENCE*, *supra*, at 46-47 n.18; (3) Jerome Frank, who also played a major role in the realist movement, collaborated with Llewellyn in the preparation of the article and list. Llewellyn wrote, "Jerome Frank refused me permission to sign his name as joint author to this paper, on the ground that it was my fist which pushed the pen. But his generosity does not alter the fact that the paper could not have been written without his help. I therefore write the first sections, in partial recognition, as 'We,' meaning thereby Frank and myself." *Id.* at 42 n.*. These sections include the explanation of the basis for selecting the men described as realists. Reliance upon the judgment of two of the most important figures in the realist movement is not, I submit, an unreasonable *modus operandi*.

with each other.¹⁰ They also modified some of their ideas in the course of their lives.¹¹ Nevertheless, one can discern certain tendencies in the work of men generally acknowledged to be legal realists.¹²

Although the realists may appear to have had little in common with Austin, this perception is inaccurate. Even if it is unlikely that Austin directly influenced the realists, at least he shared a number of important ideas with them.¹³ It is not my purpose, however, to

Thurman Arnold and Felix Cohen may also legitimately be classified as realists. Edwin W. Patterson, a friend and colleague of many of the realists on Llewellyn's list, wrote that Arnold and Cohen could be included "with justification." E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 538 n.7 (1953). Llewellyn evidently believed that Arnold was a legal realist: "Arnold has joyously demonstrated (a) that he is still as tough a realist as he ever was, and (b) that realism is still 'a sustaining food.'" K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 509 n.1 (1960) [hereinafter cited as *DECIDING APPEALS*]. Frank also perceived Arnold to be a realist. See J. FRANK, *LAW AND THE MODERN MIND* xi (1963) [Unless otherwise noted, citations to *LAW AND MODERN MIND* are to the original 1930 edition.]. Felix Cohen's status as a realist may be more debatable than Arnold's, but it is still supportable. Cohen agreed with virtually all of the nine "points of departure" that the realists shared, see K. LLEWELLYN, *JURISPRUDENCE*, *supra*, at 55-57, although his writings on problems of ethical theory differentiated him from virtually all of the other realists. See F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* (1959) [hereinafter cited as *ETHICAL SYSTEMS*]; *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* (L.K. Cohen ed. 1960) [hereinafter cited as *THE LEGAL CONSCIENCE*]. In addition, Cohen has been described as "the best balanced and one of the most creative voices in the literature of what is loosely called American legal realism." Rostow, *Introduction*, in *THE LEGAL CONSCIENCE*, *supra*, at xvi.

Fred Rodell taught at the Yale Law School for most of his professional life; he was not a major figure in the development of the realist movement. His books include F. RODELL, *WOE UNTO YOU, LAWYERS!* (1957) and F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955). Some of the ideas developed in these works are so extreme that they are not representative of realist thought. For an interesting criticism of some of Rodell's views, see Frank, *Introduction*, in F. RODELL, *WOE UNTO YOU, LAWYERS!* (1957). It may, therefore, be desirable not to regard Rodell as a realist. His works are not a basis for my interpretation of the realist movement, although some of his ideas are possible developments from positions shared by the realists. To this extent, the classification of Rodell as a realist is useful for indicating the extremes to which some of the realists' ideas could be taken.

¹⁰ See, e.g., Frank, Book Review, 40 *YALE L.J.* 1120 (1931); Llewellyn, Book Review, 31 *COLUM. L. REV.* 82 (1931).

¹¹ See, e.g., J. FRANK, *supra* note 9, at viii-xx; K. LLEWELLYN, *THE BRAMBLE BUSH* 9 (1960); E. PURCELL, *DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 173 (1973).

¹² For an interpretation of the realist movement that argues against generalizing about it after 1928, see W. TWINING, *supra* note 9, at 82. Twining's interpretation should be compared with that of Grant Gilmore, *supra* note 8, at 78.

I believe some generalization is both possible and necessary. Otherwise, it would be impossible to speak accurately of the "realist" movement or to classify anyone as a "realist." It is one thing to contend that generalizations about tendencies require exceptions, or are in some instances impossible. It is another thing to argue that no kind of generalization, however careful and qualified, is possible.

¹³ The extent to which most of the realists were even familiar with Austin's work is an open question. Arthur L. Corbin "claimed that he had never read Austin," W. TWINING, *supra* note

establish that Austin influenced even indirectly the legal realists. Rather, it is to explain the most important similarities and differences between his philosophy of positive law and legal realism. As such, this Article is not a definitive analysis of Austin and the realists and it does not answer the following questions: (1) To the extent that Austin and the realists agreed, are their ideas well-founded? and (2) If they disagreed, whose position is most satisfactory? Even so, this study should lay the foundation for a comparative evaluation of the ideas of these major contributors to Anglo-American jurisprudence.

I

DIFFERENCES BETWEEN AUSTIN AND THE REALISTS

Although the most novel feature of this study may be its explanation of the similarities between Austin and the realists, this interpretation is in no way intended to deny the existence of numerous and important differences between them. First, their intellectual orientations were quite dissimilar. Austin lived prior to the impact of Darwinism and the emergence of the modern social sciences. He was an admirer of Hobbes and Locke, a disciple of Jeremy Bentham, and an ardent utilitarian.¹⁴ Austin was also a staunch Malthusian, a strong believer in the truths of the "inestimable science of political economy,"¹⁵ and, by the end of his life, an arch-conservative.¹⁶

The legal realists viewed the world through very different spectacles. As Walter Wheeler Cook observed, "[t]hey have all . . . been influenced to a greater or less extent by currents of thought which are running today in all fields of intellectual endeavor."¹⁷ Karl N. Llewellyn identified some of these currents when he characterized the

9, at 29, and the index to K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, contains no reference to Austin. The realist movement was essentially a response to American conditions, problems, and writers. The most important such writer probably was Justice Holmes, who aptly has been dubbed the "hero figure of the [realist] clan." Jones, *Legal Realism and Natural Law*, in *THE NATURE OF LAW* 262 (M. Golding ed. 1966). If Holmes had a profound effect upon the realists, the possibility exists that Austin had an indirect impact on their movement, because, unlike most of the realists, Holmes was very familiar with Austin's work. According to one commentator, "Holmes read Austin's works five times" between 1863 and 1871, and "[t]he Austinian strain in Holmes's thought was vigorous and persistent." M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870*, at 194 & n.d. (1957). For two of Holmes's discussions of Austin, see Holmes, *The Law Magazine and Review*, 6 AM. L. REV. 593 (1872), *reprinted in* 44 HARV. L. REV. 788 (1931), and Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), *reprinted in* 44 HARV. L. REV. 725 (1931).

¹⁴ See Rumble, *supra* note 2, at 144-47.

¹⁵ J. AUSTIN, *PROVINCE*, *supra* note 2, at 66.

¹⁶ See J. AUSTIN, *A PLEA FOR THE CONSTITUTION* (1859).

¹⁷ Cook, *Williston on Contracts*, 33 ILL. L. REV. 497 n.2 (1938).

realist movement as "of a piece with the development of objective method in psychology. It fits into the pragmatic and instrumental developments in logic. It seeks to capitalize the methodological worries that have been working through in these latter years to new approaches in sociology, economics, political science."¹⁸ Behaviorism, pragmatism, and instrumentalism, as well as the disciplines of sociology and political science, were unknown when Austin delivered his lectures on jurisprudence. In addition, the legal realists were generally less conservative politically than Austin.¹⁹

Despite the common law heritage of both Austin and the realists, their attitudes toward and knowledge of case law were quite different. Holmes once wrote that the "trouble with Austin was that he did not know enough English Law."²⁰ If Austin did know much about English law, it is not evident from his writings. Virtually all of the legal realists, however, demonstrated a thorough familiarity with cases. In fact, several of them were masters of particular areas of case law.²¹ In any event, the realists were more concerned with and knowledgeable of case law than Austin.

Furthermore, Austin and the realists had different fields of professional specialization. Austin, a legal positivist, was primarily a philosopher of law. None of the realists (with one or two possible exceptions²²) could accurately be classified in this way. Several realists

¹⁸ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 28 (footnotes omitted).

¹⁹ For discussion of the political outlook of the realists, see E. PURCELL, *supra* note 11; W. RUMBLE, *supra* note 5, at 76-77; W. VOLKOMER, THE PASSIONATE LIBERAL: THE POLITICAL AND SOCIAL IDEAS OF JEROME FRANK (1970); G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

²⁰ O. W. HOLMES, THE MIND AND FAITH OF JUSTICE HOLMES 87 (M. Lerner ed. 1943).

²¹ See, e.g., A. CORBIN, CONTRACTS (3d ed. 1947). Corbin has been described as possibly the first and the greatest of the "post-Langdellian scholars." G. GILMORE, *supra* note 8, at 79. To be sure, Corbin "took no part in the Realist controversy—his intellectual formation had been complete long before World War I." *Id.* Nevertheless, Llewellyn maintained that one of Corbin's articles, see Corbin, *The Law and the Judges*, 3 YALE REV. 234 (1914), was "the first rounded presentation of the realistic attitude, except for Holmes and Bingham." K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 46 n.18, 47.

²² Felix Cohen and Walter Wheeler Cook are the most likely exceptions. Cohen's father was Morris R. Cohen, the highly respected American philosopher. Felix Cohen received M.A. and Ph.D. degrees in philosophy from Harvard in 1927 and 1929, respectively, and graduated from the Columbia Law School in 1931. His major works in legal philosophy are F. COHEN, ETHICAL SYSTEMS, *supra* note 9 and THE LEGAL CONSCIENCE, *supra* note 9. Unlike most of the other realists, Walter Wheeler Cook never practiced law. After his graduation from Columbia in 1894, he studied mathematical physics in Germany from 1895 to 1897. He appears to have been more widely read in the literature of the philosophy of science than any other realist. Many of his publications were designed to explain the implications of this philosophy for the study of law. See Cook, *A Scientific Approach to the Study of Law*, in ESSAYS IN POLITICAL SCIENCE: IN HONOR OF WESTIL WOODBURY WILLOUGHBY 201-07 (J. Mathews & J. Hart. eds. 1937);

were interested in the philosophy of law, and some of their ideas amount to sophisticated and valuable contributions to this field of study. Moreover, "philosophy of law" may be subject to an interpretation that would enable some realists to be classified as legal philosophers. Still, this characterization certainly would not apply to many of the exponents of "realistic jurisprudence." To this extent, Llewellyn correctly asserted that "[r]ealism was never a philosophy" although it was "persistently treated as such."²³

A. Conceptions of Law

The legal realists developed conceptions of law that differed in several respects from Austin's views. He believed that he had identified the nature or essence of law. Thus, he repeatedly distinguished between law properly, and improperly, "so called."²⁴ Law properly "so called" consists of general commands or imperatives, which Austin sharply contrasted with occasional or particular commands. The example *par excellence* of the latter is a judicial decision, such as the order that a particular thief receive a specific sentence. Austin maintained that this kind of decree "would not be a law or rule, but an occasional or particular command of the sovereign One or Number."²⁵ In other words, the particularity of judicial decisions or orders prevents them from properly being called law.

Austin stressed that the subject matter of jurisprudence is positive law, or law strictly so called, which he described as the express or tacit commands of the sovereign. This supreme and legally illimitable power is the ultimate source of every legal rule in an independent political society. Austin acknowledged that subordinate officials (such as judges) make law, but he emphasized that they do so at the pleasure of the sovereign.²⁶ The sovereign is identifiable, he argued, by two characteristics: habitual obedience from the bulk of the population, and habitual noncompliance with the commands of any other human superior.²⁷

Cook, *The Possibilities of Social Study as a Science*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* (1931); Cook, *Scientific Method and the Law*, 13 *A.B.A.J.* (1927). For discussions of Cook's philosophy of science and his efforts to apply scientific methods to the study of law, see W. TWINING, *supra* note 9, at 37-40, 378-81, and Verdun-Jones, *Cook, Oliphant, and Yntema: The Scientific Wing of American Legal Realism*, 5 *DALHOUSIE L.J.* 249, 261-66 (1979).

²³ K. LLEWELLYN, *DECIDING APPEALS*, *supra* note 9, at 509 & n.2.

²⁴ J. AUSTIN, *PROVINCE*, *supra* note 2, at 1-3.

²⁵ *Id.* at 21.

²⁶ *Id.* at 31-33.

²⁷ *Id.* at 193-94.

To turn from Austin's efforts to define law to similar efforts on the part of the legal realists is to enter a different universe. Some realists became so disenchanted with the war of words about the nature of law that they refused to enter, or at least continue, the battle.²⁸ Despite these disclaimers, however, there was a significant difference between Austin and the realists as to how they defined the law and what they expected to achieve from such definitions. The realists' approach was much more pragmatic, or instrumentalist, than Austin's. The pragmatic approach views definitions as tools or means to an end, the value of which is relative to the purpose of the definition. Felix Cohen lucidly expressed this perspective when he wrote that "[a] good deal of fruitless controversy has arisen out of attempts to show that [a] definition of law . . . is either true or false. A definition of law is *useful* or *useless*. It is not *true* or *false*, any more than a New Year's resolution or an insurance policy."²⁹

Most of the exponents of realistic jurisprudence were convinced of the uselessness of conceiving of law as merely rules or principles. Instead, they emphasized the significance of concrete, official decisionmaking. Although the realists rarely denied the possibility or importance of accurate generalizations about these decisions—indeed, a characteristic theme of the realist movement was the call for the development of such propositions³⁰—they maintained that the validity of these generalizations should be tested against actual decisions, or enforced rules. "The 'realists' will of course at once inquire," Walter Wheeler Cook observed, "whether . . . broad generalizations will 'account for' the 'law' as it is found in the decisions. From their point of view that is the acid test of the validity of any generalization."³¹ For example, consider the question of the existence of a contract:

When the realist asks this question, he is concerned with the actual behavior of courts. For the realist, the contractual relationship, like law in general, is a function of legal decisions. . . . Where there is

²⁸ See, e.g., T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 36 (1935) ("Obviously, 'law' can never be defined."); Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1145 (1938) ("Those of us who have learned humility have given over the attempt to define law."). Jerome Frank, having tried to define law in *Law and the Modern Mind*, subsequently expressed deep regret for this attempt:

I seriously blundered when I offered my own definition of the word Law. Since that word drips with ambiguity, there was already at least a dozen defensible definitions. To add one more was vanity A more futile, time-consuming contest is scarcely imaginable.

J. FRANK, *supra* note 9, at 46.

²⁹ F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 62 (emphasis in original).

³⁰ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 60.

³¹ Cook, *supra* note 17, at 505.

a promise that will be legally enforced there is a contract. So conceived, any answer to the question . . . must be in the nature of a prophecy based . . . upon past and present facts.³²

The realists also had little use for the concept of sovereignty. Several realists defined law in terms of judicial behavior and emphasized the crucial role of judges. Arthur L. Corbin argued that, of all the persons who express or declare rules or principles of human action,

the judges have far the greatest influence, for wherever there is an actual dispute they have the last word. What is the Constitution? We do not know until John Marshall has spoken. Do our statutes control us? Only in case the judges permit them, and only with the meaning the judges give them. As for all the rest, their expressions are only "academic."³³

Other realists advanced a broader conception of law, arguing that law is "not merely what the judge does . . . but what *any* state official does, officially."³⁴ What an official actually does may differ significantly from what he or she is supposed, presumed, or obligated to do. In fact, some officials may "do one thing, some another, and the courts now and again a third."³⁵ In short, a legal system may lack the unity presupposed by Austin's theory of sovereignty.

A factor that probably contributed to this difference between Austin and the realists is the dissimilar political and legal systems in which they lived and worked. Austin was subject to a unitary system in which the behavior of officials was more predictable than in the diverse jurisdictions of the American federal system. He also lived before the emergence of the panoply of executive and administrative agencies that characterize the modern state. It is difficult to imagine him writing, for example, that more "often than not, administrative action is, *to the layman affected*, the last expression of the law on the case. In such a situation . . . [it is] highly useful to regard it, for him, as being the law of the case."³⁶ In any event, the realists virtually ignored the idea of sovereignty that played such a central role in Austin's conception of positive law.

³² F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 65-66.

³³ Corbin, *supra* note 21, 3 *YALE REV.* at 236.

³⁴ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 31 (emphasis in original).

³⁵ *Id.* at 30.

³⁶ *Id.* (emphasis in original).

B. *Conceptions of Jurisprudence and the Study of Law*

1. *Austin's "General Jurisprudence"*

Austin and the realists espoused very different approaches to the study of law. Although both Austin and the realists were profoundly dissatisfied with established approaches and the bulk of legal scholarship, their dissatisfaction sprang from different roots. Consequently, they prescribed different remedies for the ills they diagnosed.

Austin began to deliver his lectures on jurisprudence at the University of London in 1828. During this period, "English lawyers thought of law as something to be learnt only by a process of imitation in barristers' chambers and attorneys' offices. There were no professional examinations and neither the universities nor the professional bodies taught law."³⁷ Austin believed that the results of these ideas and practices were pernicious. He lamented that "the knowledge of an English Lawyer, is nothing but a beggarly account of scraps and fragments. His memory may be stored with numerous particulars, but of the Law as a whole, and of the mutual relations of its parts, he has not a conception."³⁸ Such fragmentary knowledge was evident even in "the best of [the] English treatises."³⁹

Austin maintained that the development of the science of jurisprudence would eradicate these evils. He believed that jurisprudence should have an analytical function, the essence of which is conceptual clarification. He was primarily interested in general jurisprudence, which addresses the "principles, notions, and distinctions which are common to systems of law."⁴⁰ Although these ideas take different forms in particular legal systems, "they are to be found more or less nearly conceived; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists."⁴¹ Concepts like duty, right, liberty, injury, punishment, redress, law, sovereignty, and independent political society are necessary, Austin claimed, because "we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it."⁴²

³⁷ Hart, *Introduction*, *supra* note 4, at xvii.

³⁸ 1 J. AUSTIN, *LECTURES*, *supra* note 2, at 468.

³⁹ *Id.*

⁴⁰ J. AUSTIN, *PROVINCE*, *supra* note 2, at 367.

⁴¹ *Id.* at 366.

⁴² *Id.* at 367. Austin also included several other ideas within the purview of general jurisprudence. Although these principles are not necessary for a coherent understanding of a legal order, they "occur very generally in matured systems of law." *Id.* at 369. The distinction between *jus personarum* and *jus rerum* is an example. Austin maintained that because distinctions

Austin's lectures on jurisprudence were designed to clarify these universal concepts. He emphasized conceptual clarification for several reasons, one of which was his belief in the close connection between theory and practice. Because of this relationship, it "really is important . . . that men should think distinctly, and speak with a meaning."⁴³ In addition, Austin believed that conceptual clarification was essential for the development of law as a science.

At any rate, Austin stressed that general jurisprudence does not involve ethical evaluation of positive laws. Rather, the business of this science is the exposition of principles derived from existing legal systems. At the same time, he emphasized the importance of the science of legislation, the function of which is to "determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted."⁴⁴ Austin claimed that the sciences of jurisprudence and legislation are related by "numerous and indissoluble ties."⁴⁵ Accordingly, "[i]t is impossible to consider Jurisprudence quite apart from Legislation."⁴⁶

These ideas gave rise to Austin's proposed reforms for legal education. He advocated the establishment of an institution

like the Law Faculty in the best of the foreign universities . . . an institution in which the general principles of jurisprudence and legislation (the two including ethics generally), international law, the history of the English law (with outlines of the Roman, Canon, and Feudal, as its three principal sources), and the actual English law (as divided into fit compartments), might be taught by competent instructors⁴⁷

Austin contended that this training would be highly useful in the practice of law. Understanding the principles of general jurisprudence would simplify "the acquisition of practical knowledge in the chambers of a conveyancer, pleader, or draftsman."⁴⁸ Exposure to general jurisprudence would also benefit young men "destined for public life."⁴⁹ Their familiarity with the science would cause "the demand

of this sort "rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities, they . . . may be ranked properly with the general principles which are the subjects of general jurisprudence." *Id.* General jurisprudence thus presumes the existence of numerous similarities between different systems of law, the basis of which is "the common nature of man." *Id.* at 373.

⁴³ *Id.* at 55-56 (emphasis in original).

⁴⁴ *Id.* at 366.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 373.

⁴⁷ *Id.* at 389.

⁴⁸ *Id.* at 380.

⁴⁹ *Id.* at 389.

for legal reform [to] be more discriminating, and also more imperative; much bad and crude legislation would be avoided."⁵⁰

2. *The Realists, Langdell, and the Study of Law*

The realists were at least as dissatisfied as Austin with the study of law and legal scholarship. Otherwise, they would not have contrasted so sharply the backward condition of the law with the status of other "sciences."⁵¹ They attributed this unsatisfactory condition to various factors, one of which was a lack of conceptual clarity by legal scholars. In this respect, Austin's dissatisfaction with legal study paralleled that of the realists, but that is the extent of their agreement. The realists were, after all, reacting to a body of legal scholarship and schemes of legal education that had not existed in England or America during Austin's time. The most important development in this regard was not the gradual professionalization of law, the immense growth in the number of law schools, or the assumption by most major universities of a responsibility for legal education.⁵² Rather, the signal event was the widespread acceptance of the case method as interpreted by Christopher Columbus Langdell, for it was his ideas on this subject and their influence on legal scholarship that the realists attacked.

Langdell, Dean of the Harvard Law School from 1870 to 1895, contended that law is a science and, as such, consists of certain principles and rules. He stressed that the mark of a "true lawyer" is the ability to apply these generalizations "with constant facility and certainty to the ever-tangled skein of human affairs."⁵³ He maintained that the aim of every serious student of law should be to acquire

⁵⁰ *Id.*

⁵¹ See, e.g., Bingham, *Law Schools and the Future*, 6 J. LEGAL EDUC. 486, 498 n.3 (1953-54) (scientific study of law had "advanced very little beyond the status of medical schools of the sixteenth century"); Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 761, 771-72 (1932) ("Lawyers today are about where the physicians were before Vesalius began to dissect in order to discover what the human body was like."); Llewellyn, *The Theory of Legal "Science"*, 20 N.C. L. REV. 1, 13 (1941) ("[I]n this pre-pre-science of behavior relating to matters legal, we might as well recognize that we are today hardly as far along as were the physicists of the Seventeenth Century.").

Walter Wheeler Cook maintained that the traditional technique of the legal profession is "from the point of view of present day ideas of logic and of scientific method . . . as grotesquely inadequate for legal purposes as the childish mechanical notions of the nineteenth century have shown themselves to be in the field of physics." Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 308 (1927). Indeed, he believed that the use of truly scientific methods in the study of law "ha[d] never yet been tried." *Id.* at 303.

⁵² For a study of these and other developments in legal education, see Stevens, *Two Cheers for 1870: The American Law School*, in *LAW IN AMERICAN HISTORY* 405 (D. Fleming & B. Bailyn eds. 1971).

⁵³ C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* viii (1879).

this ability and that the best way to develop this skill is to learn how to analyze cases.

Langdell believed that mastering this art would not require the analysis of a tremendous number of cases, because legal doctrine grows by a slow evolutionary process traceable in relatively few cases. In fact, Langdell claimed that "[t]he vast majority are useless, and worse than useless, for any purpose of systematic study."⁵⁴ He emphasized that the number of fundamental legal rules and principles is "much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension."⁵⁵ Langdell maintained that all of the sources of the science of law are available in printed books; therefore, "the library is the proper workshop of professors and students alike; . . . 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."⁵⁶

The realists were unimpressed by Langdell's ideas. Although the degree and sources of their dissatisfaction varied, a common criticism was the inadequacy of the case method for predicting judicial decisions. William O. Douglas called Langdell's case method a "misnomer,"⁵⁷ because of its exclusive focus on judicial opinions. Such a focus

grossly oversimplifies and distorts the nature of law. After all, law is neither more nor less than a prediction of what a governmental agency or other agency of control will do under a given situation. A study of the legal literature exemplified by judicial opinions supplies part, but only part, of the material necessary to make such a prediction. The other psychological, political, economic, business, social factors necessary to complete that prediction are innumerable. The weakness of the old system was that all of these more general and imponderable factors were eliminated from consider-

⁵⁴ *Id.*

⁵⁵ *Id.* at viii-ix.

⁵⁶ Record of the Commemoration, November Fifth to Eighth, 1866, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 97-98 (1887), reprinted in A. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*, at 175 (1967).

⁵⁷ W.O. DOUGLAS, *Education for the Law*, in *DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS AS MEMBER AND CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION* 279 (J. Allen ed. 1969). Douglas is one of the men Llewellyn described as a legal realist. See K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 74.

ation. It was for that reason that the nonconformists in legal education began to raise disconcerting notes.⁵⁸

The realists also criticized other alleged defects of the case method as it had developed under Langdell's influence. One was the tendency to derive rules and principles from the study of a few rather than *all* reported cases, while another was the habit of formulating doctrine independent of the actual decisions of courts. These practices, the realists protested, were responsible for the substantial amount of legal scholarship that lacked solid factual support.⁵⁹

These attitudes strongly conditioned the often harsh reaction of some realists to the work of legal scholars like Samuel Williston and Joseph Henry Beale. Cook observed that "a steadily increasing num-

⁵⁸ W. DOUGLAS, *supra* note 57, at 280. Most of the nonconformists cited by Douglas were legal realists.

⁵⁹ One realist after another echoed these themes. "The literature of our law has been prolific of instances," Bingham declared, "where superficial and partial analysis into a few vague and utterly misleading generalities has removed an important topic of law almost beyond the range of correct apprehension by one who is not ready to undertake an independent and thorough investigation." Bingham, *What Is the Law?*, 11 MICH. L. REV. 1, 8 n.8 (1912). If Felix Cohen is to be believed, our "legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow." F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 48. Cohen adduced corporate entity, property rights, fair value, due process, title, contract, conspiracy, malice, proximate cause, and "all the rest of the magic 'solving words' of traditional jurisprudence" as examples of such concepts. *Id.* at 45. Herman Oliphant was particularly concerned about the unsatisfactory responses of judges and scholars to the phenomenon of change. He believed that "the last two hundred years ha[d] brought more changes in the circumstances of men living together than the previous two thousand years had done." Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 74 (1928). Students of law did not respond to this situation, however, by refining legal concepts or rules. Instead, they expanded categories of analysis and thus dulled "the tools for producing the discrimination necessary for intimacy of treatment." *Id.* at 74. This tendency, the "over-towering fact in Anglo-American legal history of recent centuries," *id.*, produced the "law's present classification of human activities, [which] compels us to sit in places where life's game is no longer played. In pondering many of our long prized abstractions, we study dead bodies from which the life we would know has departed." *Id.* at 76.

These perceptions were the basis of Oliphant's indictment of the "orgy of overgeneralization," *id.* at 74, that had generated the unfortunate transition from *stare decisis* to *stare dictis*. He particularly condemned the shift from "observation of judicial action to an excess of concern about judicial utterances." *Id.* at 76. Legal scholars were no longer concerned with the precise decisions of cases, but with broad principles arrived at independently of actual holdings. "If there be only one case in point," for example, "and that be in conflict with some implication of our favorite universals, it is wrong—wrong on principle." *Id.* at 75. Oliphant therefore concluded that although "[t]he spirit of the common law may still reside in the day to day work of our judges . . . it has all but departed the body of their opinions and the writing of scholars." *Id.* This spirit was also conspicuously absent from the commercialized legal encyclopedias and statements of the *corpus juris*. Oliphant characterized these works as "hastily made by stringing together judicial generalities, usually innocuous and frequently inconsistent and by peppering them with cast citations either to the number of recent minimum or with the abundance of an indiscriminated deluge." *Id.*

ber of so-called—perhaps miscalled—‘realists’ have been subjecting to critical analysis the presuppositions and modes of thought underlying the work of the men of Williston’s generation.”⁶⁰ One of these presuppositions was the unity of the legal universe. Cook believed that this notion is impossible to reconcile with the totality of judicial decisions. The assumption that the law of contracts consists of a unified body of doctrine, for example, can only be maintained by empirically unacceptable methods. One must either completely ignore some judicial decisions or fail to distinguish consistently between actual holdings and dicta. In Cook’s view, Williston’s treatise on the law of contracts illustrated both of these vices;⁶¹ the “‘legal universe,’ . . . as some of the newer writers see it, is far more complex than that visualized by the more orthodox writers of whom Professor Williston is an example.”⁶²

Similar beliefs underlie the critical response of the realists to the American Law Institute’s first attempt to restate the law. In an effort to clarify the content of the law, the Institute proposed to restate the fundamental principles behind the “swamp of decisions.”⁶³ Although the realists conceded the uncertainty of existing law, they reacted very negatively to the Institute’s prescription. The gravamen of their complaint was that the Restatement’s methodology was defective. Cook, for example, criticized the theoretical basis of the Restatement sections on jurisdiction. The root of the problem, he argued, was not beginning with “the concrete phenomena of judicial decisions as they occur and formulating theories primarily on the basis of accurate observation of these phenomena.”⁶⁴

This critique represents the underlying basis of the realists’ efforts to develop narrow rules or categories. A characteristic feature of the realist movement was “[t]he belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past.”⁶⁵ The realists maintained that the method of refinement, “the orthodox technique of making distinctions, and reformulating,”⁶⁶ should be

undertaken systematically; exploited consciously, instead of being reserved until facts which refuse to be twisted by “interpretation” force action. The departure from orthodox procedure lies chiefly in

⁶⁰ Cook, *supra* note 17, at 497.

⁶¹ *Id.* at 499, 505, 514.

⁶² *Id.* at 514.

⁶³ 1 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 52 (1923).

⁶⁴ Cook, *Tort Liability and the Conflict of Laws*, 35 COLUM. L. REV. 202, 222 (1935).

⁶⁵ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 56.

⁶⁶ *Id.* at 59.

distrust of, instead of search for, the widest sweep of generalization words permit. Not that such sweeping generalizations are not desired—if they can be made so as to state what judges do [or ought to do].⁶⁷

This position presumes the existence of the case method, to which most of the realists were sympathetic. Their objective was not to discard the case method, but to rescue it from the abuses fostered by the influence of Langdell's ideas.⁶⁸

3. *The Behavioral Focus of The Realists*

These criticisms heavily influenced the reforms that the realists advocated for the study of law. Although they disagreed on the direction reform should take, the positions they adopted differed significantly from Austin's recommendations. This is not to imply that the

⁶⁷ *Id.* at 59-60 (emphasis in original) (footnotes omitted).

⁶⁸ Some of the realists, however, advocated more unorthodox reforms, such as empirical research on the actual operation and effects of the legal system. A perception of the imperative need to acquire such information largely inspired the foundation of the Institute of Law at the Johns Hopkins University in 1928. The aim of the school was "the development of the scientific study of law. All else [was] incidental." Cook, *supra* note 51, at 309. Achievement of this objective required research of quite a different nature from that which Langdell advocated. Walter Wheeler Cook emphasized that

the only way to find out what anything does is to observe it in action and not to read supposedly authoritative books about it, or to attempt by reasoning to deduce it from fundamental principles assumed to be fixed and given. The consequences of this assumption is that only a small part of the work of the staff of the Institute will be with books in libraries; by far the larger part will be concerned with the difficult, time-consuming, and expensive task of gathering and interpreting the facts concerning the operation of our legal system.

Cook, *Scientific Study and the Administration of Justice*, 34 MD. ST. B.A. REP. 148 (1929).

For a provocative interpretation of the relationship between Langdell and the realists which differs from that developed in this article, see G. GILMORE, *supra* note 8. Gilmore believes that

the adepts of the new jurisprudence—Legal Realists or whatever they should be called—no more proposed to abandon the basic tenets of Langdellian jurisprudence than the Protestant reformers of the fifteenth and sixteenth centuries proposed to abandon the basic tenets of Christian theology. These were the ideas that "law is a science" and that there is such a thing as "the one true rule of law."

Id. at 87. Gilmore therefore maintains that "[r]ealist jurisprudence proposed a change of course, not a change of goal." *Id.* at 100. Although this interpretation is defensible, it is, in certain respects, quite misleading. First, some realists doubted that a science of law was possible in the foreseeable future. See Frank, *supra* note 51, at 773; Llewellyn, *supra* note 51, at 10, 13, 14, 16, 22. Second, the conception of a science of law held by the more optimistic realists was radically different from Langdell's. Although they used the same words—"science of law"—to describe their goal, they sought, in effect, a different goal. Finally, the extent to which the realists believed that the "one true rule of law" can be discovered by the right approach varied. Some of them did indeed take positions which imply the existence of such a rule. For striking expressions of this point of view, see Corbin, *supra* note 21, at 250, and K. LLEWELLYN, *DECIDING APPEALS*, *supra* note 9, at 122. Other realists expressed opinions which imply that there is no such thing as the one "true" rule of law. See note 119 *infra*.

realists viewed conceptual clarification as unimportant. There is, after all, an analytical component to "realistic jurisprudence." Holmes declared that "it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth."⁶⁹ Precisely for this reason, he claimed that it would be advantageous to "master Austin."⁷⁰ Although the realists seldom mentioned Austin, they shared Holmes's opinion of the value of conceptual clarification. Still, the realists advocated a substantially different focus for the study of law from Austin's.

The most prominent feature of the realist movement was the call for study of the actual or probable behavior of judges and other officials. In fact, this focus is the hub of the varied spokes of "realistic jurisprudence." To be sure, the pursuit of this interest sometimes led the realists in different directions. They disagreed, to an extent, about the nature, implications, and rationale of a behavioral focus. These considerations, however, should not obscure the unity of purpose that pervaded the realist movement. Its participants shared a firm conviction of the imperative need to discover what officials have done, are doing, and are likely to do. This belief prompted Hessel Yntema to differentiate sharply legal positivism from legal realism: the "typical interest of a genuine legal positivist is in logic and form, while the interest of the legal realists in these aspects of law is in a degree incidental to their interest in the function, operation, and consequences or, in other words, the substance, of law."⁷¹ Thus, the thrust of the realist movement deviates from the predominant emphasis of Austin's analytical jurisprudence. Recognition of this rather obvious difference, however, necessarily invites the question of its explanation.

Various factors conditioned the behavioral focus of the realists, one of which was their perception of conceptual clarification as only the first step in the development of a science of law. Felix Cohen interpreted "realistic jurisprudence" to consist of a theory of the nature of law, legal rules, legal concepts, and legal questions, the essence of which is the definition of law as a function of judicial decisions.⁷² Although he appraised the utility of this definition very highly, he insisted that it is "only a preliminary stage in the life of

⁶⁹ O. W. HOLMES, *supra* note 20, at 86.

⁷⁰ *Id.* at 87.

⁷¹ Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154, 1164 (1941).

⁷² F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 69.

legal science.”⁷³ Joseph W. Bingham expressed a similar point of view, criticizing Austin for

an attenuated artificial idea of the scope of jurisprudence, [which] . . . has led to a distortion of the importance of analytical processes and their verbal paraphernalia into an alleged basic pure science of law. The two most famous proponents of this type of schools or cults of jurisprudence are John Austin . . . and Hans Kelsen. . . . Both are subject to the criticism that they mistake careful mechanical analysis and selection and definition of terms for the essence of legal science instead of only incidental machinery of thought, useful to a far lesser degree as the logic of mathematics is useful to the inquiries and understanding of natural scientists.⁷⁴

Cook was less critical of at least a certain kind of analytical jurisprudence.⁷⁵ At the same time, he recognized its limitations. Although conceptual clarification “is an indispensable tool, it is not an all-sufficient one for the lawyer.”⁷⁶ In particular, “analytical work merely paves the way for other branches of jurisprudence, and . . . without the aid of the latter satisfactory solutions of legal problems cannot be reached.”⁷⁷

The realists shared Cook’s evaluation of the limitations of an analytical jurisprudence. This attitude partly accounted for the realists’ emphasis upon a behavioral focus in the study of law. They were also acutely aware of the possible gap between the law-on-the-books and the law-in-action. Although Roscoe Pound had emphasized the significance of this particular distinction prior to the emergence of the realist movement,⁷⁸ the realists were even more eager to stress the divorce between “paper” and “real” rules or rights. They also emphasized that knowledge of the existence or extent of this gap can only be developed through a focus on behavior:

⁷³ *Id.*

⁷⁴ Bingham, *Law Schools and the Future*, 6 J. LEGAL EDUC. 486, 496-97 n.3 (1953-54).

⁷⁵ Cook otherwise would not have appraised so highly Wesley N. Hohfeld’s contributions to the science of law. Cook, however, sharply distinguished Hohfeld’s work from that of most jurists in the analytical tradition. Cook interpreted these jurists as taking the position that analysis of legal conceptions is an end in itself. Unlike them and, by implication, unlike Austin, Hohfeld was primarily interested in legal conceptions as applied in judicial reasoning. In fact, one of his “greatest messages” to the legal profession was his demonstration that “an adequate analytical jurisprudence is an absolutely indispensable tool in the equipment of the properly trained lawyer or judge—indispensable, that is, for the highest efficiency in the discharge of the daily duties of his profession.” Cook, *Introduction*, in W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 3-4 (Cook ed. 1919).

⁷⁶ *Id.* at 4.

⁷⁷ *Id.*

⁷⁸ See Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

The question is how, and how much, and in what direction, do the accepted rule and the practice of decision diverge? More: how, and how much, *in each case*? You cannot generalize on this, *without investigation*. Your guesses may be worth something, in the large. *They are worth nothing at all, in the particular . . .* [T]he significance of the particular rule will appear only *after* the investigation of the vital, focal, phenomenon: the behavior. And if an empirical *science* of law is to have any realistic basis, any responsibility to the facts, [there is] no escape from moving to this position.⁷⁹

4. Austin's Likely Reaction to The Realists' Behavioral Focus

Although Austin never addressed the behavioral point of view,⁸⁰ he was dismayed by what he perceived to be the "growing bulk and intricacy of the English law (a bulk and intricacy which must go on increasing)."⁸¹ His prescription for this evil was codification,⁸² a remedy which presupposes a greater belief in the utility of a general jurisprudence than the realists maintained. Austin insisted, for example, that codification requires talents and knowledge that "cannot be acquired by a merely empirical study of our own particular system, and by the mere habit of applying its rules to particular cases in the course of practice."⁸³ Rather, the skills required for codification demand "scientific study,"⁸⁴ the heart of which is general jurisprudence. This discipline

tends to fix in the mind a map of the law, so that all its acquisitions made empirically in the course of practice, take their appropriate places in a well-conceived system; instead of forming a chaotic aggregate of several unconnected and merely arbitrary rules. It tends to produce the faculty of perceiving at a glance the dependencies of the parts of his system, which . . . is the peculiar and striking characteristic of the great and consummate lawyer.⁸⁵

⁷⁹ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 17-18.

⁸⁰ It is difficult to ascertain accurately how Austin would have responded to the realists' behavioral focus. The realists raised questions that had not been of primary interest to Austin. Moreover, the behavioral emphasis of the realists was conditioned by a set of circumstances and problems unknown to Austin. Still further, there is a certain amount of tension between different elements of Austin's jurisprudence. On the one hand, his work falls within the tradition of British empirical philosophy. All of the utilitarians viewed themselves as empiricists. As such, Austin could not consistently attack the development of empirically verifiable knowledge about the operation or effects of the legal system; nor could he attack the attempt to describe, explain, or predict the behavior of judges and other officials or their interaction with laymen. Still, Austin might regard these efforts as the wrong solutions to the problem.

⁸¹ 2 J. AUSTIN, LECTURES, *supra* note 2, at 1092.

⁸² See notes 184-96 and accompanying text *infra*.

⁸³ 2 J. AUSTIN, LECTURES, *supra* note 2, at 1095.

⁸⁴ *Id.*

⁸⁵ *Id.*

This passage reflects attitudes and beliefs that contrast sharply with the realists' point of view. Their movement was characterized by an emphasis on the American legal system. This emphasis mirrors the realists' dissatisfaction with the attempt to develop a "useless quintessence of all systems, instead of an accurate anatomy of one."⁸⁶ Furthermore, the realists doubted that the *corpus juris* has the kind of underlying doctrinal unity presumed by Austin's science of general jurisprudence.⁸⁷

II

SIMILARITIES BETWEEN AUSTIN AND THE REALISTS

Although their intellectual orientations differed somewhat, Austin and the realists did not see the world through entirely different spectacles. In fact, their perspectives paralleled each other in several respects. This observation facilitates assessment of the originality of some of the realists' ideas. Certain themes of the realist movement echo refrains that Austin strongly emphasized; others are modern American refinements of his notions.

A. *The Empiricism of Austin and The Realists*

The most fundamental similarity between Austin and the realists may be the assumption that all knowledge is ultimately derived from observation and experience. If this is "empiricism," then both Austin and the realists were empiricists. This is an important point of consensus because it significantly affected other areas of agreement.

Austin's empirical outlook is evident from various dimensions of his philosophy of law. Although he believed that successful codification requires more than "merely empirical study of our own particular system,"⁸⁸ this does not imply that he opposed empiricism. Rather, it indicates his belief that the development of a good code would require knowledge of both English law and the principles of general jurisprudence. Austin felt that the latter should be derived by

⁸⁶ O.W. HOLMES, *supra* note 20, at 87.

⁸⁷ Despite important differences between Austin and Langdell, they were, in a sense, spiritually closer to each other than either was to the realists. Both men presumed that principles exist which provide a complete map of the law. They assumed that law has an underlying unity of doctrine that can be mastered by the right kind of approach. As such, their position sharply contrasts with the views of the legal realists.

⁸⁸ 2 J. AUSTIN, *LECTURES*, *supra* note 2, at 1095.

studying "the legal institutions which exist, or have existed, among mankind, considered as actual facts."⁸⁹

Austin's empirical orientation is also apparent from his view of the close relationship between theory and practice. He insisted that theory is "essential to practice guided by experience and observation."⁹⁰ He strenuously denied that what is true in theory can be false in practice. The foundation of this denial was his belief that theory is a compendium of particular truths. Unless a theory is "true of particulars, and, therefore, true in practice, it has no *truth* at all."⁹¹

The legal realists also ascribed considerable import to the "facts." Recall, for example, the realists' indictment of Langdellian jurisprudence and their behavioral focus in the study of law.⁹² Their attitude toward the facts also underlies the term "legal realism." Roscoe Pound accurately defined legal realism as "fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be, or as one feels they ought to be."⁹³ Of course, the desire to record accurately things as they are does not sufficiently capture the distinctiveness of the realist movement. Nevertheless, a deep conviction of the need to develop generalizations supported by the facts was one of the bonds that united the realists.⁹⁴

⁸⁹ Book Review, 118 *EDINBURGH REV.* 222, 224 (1863). Austin's view reflects a characteristically Benthamite attitude. According to Leslie Stephen, "the strong point of Benthamism . . . [was its] reverence for the facts. Knowledge was to be sought not by logical jugglery but by scrupulous observation and systematic appeals to experience." L. STEPHEN, *LIFE OF SIR JAMES FITZJAMES STEPHEN* 123 (2d ed. 1895). In this sense of the term, Austin was a "Benthamite."

⁹⁰ J. AUSTIN, *PROVINCE*, *supra* note 2, at 49.

⁹¹ *Id.* at 50. For a good discussion of Austin's empiricism, see Morison, *Some Myth about Positivism*, 68 *YALE L.J.* 212 (1958).

⁹² See notes 57-59 & 69-79 and accompanying text *supra*.

⁹³ Pound, *The Call for a Realist Jurisprudence*, 44 *HARV. L. REV.* 697, 697 (1931).

⁹⁴ "My faith in jurisprudence," Llewellyn wrote, "has always rested on the need for seeing the facts straight, as the beginning for the man of law-government." Llewellyn, *What Law Cannot Do for Inter-Racial Peace*, 3 *VILL. L. REV.* 30, 33 (1957). Llewellyn maintained that the attempt to satisfy this need was the heart of the method of the "newer Jurisprudence." K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 135. This interpretation may not be entirely accurate, but the realists manifested a strong desire to learn "what goes on." *Id.* If some of them believed that this goal could best be achieved by the development of an empirical science of law, others regarded this objective as "too pretentious." Frank, *Are Judges Human?*, 80 *U. PA. L. REV.* 223, 258 (1931). According to Frank,

many of those persons who follow Holmes are looking forward to years of patient observation and description. They want that description in the homeliest terms. There is very little of it in existence today [1931]. That is why some of Holmes' followers squirm when this proposed program of observation and description is referred to as "an empirical science of law." That label, they feel, is too "high-hat."

Frank, *supra* note 51, at 773. Still, this very statement presumes a strong commitment to accurate observation and description of the facts.

Austin and the realists thus shared an empirical "cast of mind." This does not mean that their approaches to the study of law are entirely acceptable from an empirical point of view. It can be argued that neither Austin nor the realists developed particularly useful conceptual frameworks for the study of law or the behavior of officials. The emergence of a "behavioral jurisprudence" in the last two or three decades tends to reflect this criticism of the realists.⁹⁵ Moreover, some of the theories advanced by Austin and the realists may lack a solid foundation in the facts. Austin attributed a necessity and universality to certain of his ideas that is difficult, if not impossible, for empirical generalizations. His conceptions of law and sovereignty have also been characterized as inconsistent with at least some of the facts.⁹⁶ Critics of the legal realists have lodged similar charges against many of their ideas.⁹⁷ Nevertheless, both Austin and the realists firmly believed that satisfactory theories should be based upon the facts.

B. *The Distinction between Law and Morality*

Perhaps the most distinctive feature of legal positivism is a sharp distinction between law and morality. A similar distinction is evident in the writings of the realists as well. If the claim that an unjust law is no law at all is the core of natural law, then both legal positivism and legal realism fundamentally contravene that tradition of jurisprudence.

Very few jurists protested against the alleged confusion of law and morality as vigorously as Austin. Instances of such confusion would, he asserted, "fill a volume"⁹⁸ and are "one most prolific source of jargon, darkness, and perplexity."⁹⁹ Dissatisfaction with this tendency underlies Austin's efforts to clarify the province, or scope, of jurisprudence, and to distinguish law properly, and improv-

⁹⁵ For discussion of the relationship between legal realism and judicial behavioralism, see W. RUMBLE, *supra* note 5, at 175-79; Ingersoll, *Karl Llewellyn, American Legal Realism, and Contemporary Legal Behavioralism*, 76 ETHICS 253 (1966); Verdun-Jones, *supra* note 22.

⁹⁶ See J. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (1901); H.L.A. HART, *THE CONCEPT OF LAW* (1961); H. MAINE, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS* (1914).

⁹⁷ See, e.g., H.L.A. HART, *supra* note 96; works cited in W. RUMBLE, *supra* note 5, at 1 n.1, 29 n.53. For criticisms representative of various perspectives, see B. CARDOZO, *THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 7-46 (M. Hall ed. 1947); H.L.A. HART, *supra* note 96; R. POUND, *CONTEMPORARY JURISTIC THEORY* (1940); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942); Moskowitz, *The American Legal Realists and an Empirical Science of Law*, 11 VILL. L. REV. 480 (1966).

⁹⁸ J. AUSTIN, *PROVINCE*, *supra* note 2, at 184.

⁹⁹ *Id.* at 371.

erly, so called. He began from the premise that law is a product of will, something that is *made* rather than *discovered*. Positive law (law "strictly so called"),¹⁰⁰ the subject matter of jurisprudence, consists of the commands of the sovereign. Positive morality consists of the moral rules that exist in a given society. Some of these rules are law "properly so called," while others do not warrant such classification.¹⁰¹ Divine law consists of the commands of God, which may be either expressed or tacit. The principle of utility is the index for these tacit commands and the measure or test of the ethical goodness or badness of human laws.¹⁰² Austin strenuously insisted, however, that these laws exist regardless of their ethical value. "The existence of law is one thing; its merit or demerit is another. . . . A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."¹⁰³

Austin objected to the confusion of law and morals on both theoretical and practical grounds. First, he believed that such confusion impedes understanding of established law and its enforcement. The foundation of this belief was his assertion that the "most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals."¹⁰⁴ Positive laws creating the legal right to own slaves are an example. To contend that this right does not exist because it ought not to exist is to ignore the actual law "in every age, and in almost every nation."¹⁰⁵

Austin also objected to the confusion of law and morality on political grounds. The theory that an unjust law is no law at all not only impedes understanding of the realities of law enforcement; it also fosters indiscriminate resistance to positive laws. Though Austin believed that disobedience is ethically justifiable on utilitarian grounds,

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.* at 123.

¹⁰² *Id.* at 7, 46-47, 54.

¹⁰³ *Id.* at 184. This last proposition is the essence of Austin's distinction between law and morality. Confusion of law and morality results in the failure to recognize that an established law that is bad from an ethical point of view is still a law. The exemplar of this confusion, according to Austin, was Sir William Blackstone, the influential eighteenth century legal commentator. See generally W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (19th ed. 1870). All of the utilitarians criticized Blackstone, but none assailed him more vehemently than Austin. In particular, he strongly disagreed with Blackstone's view that "human laws which conflict with the Divine law are not binding, that is to say, are not laws." J. AUSTIN, PROVINCE, *supra* note 2, at 185.

¹⁰⁴ J. AUSTIN, PROVINCE, *supra* note 2, at 815.

¹⁰⁵ *Id.* at 187.

he emphasized that "to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny."¹⁰⁶

Although Austin dissociated law from morals, he acknowledged possible relations between them. He affirmed "without hesitation" that "all human laws ought to conform to the Divine laws."¹⁰⁷ He emphasized that the substance of legal, moral, and ethical rules often overlaps.¹⁰⁸ He even acknowledged that moral rules may be more effective regulators of human conduct than positive law.¹⁰⁹ Nevertheless, he insisted that a positive law that conflicts with moral or ethical rules is still a law.

This theme was also quite popular among the most influential forerunners of the realists in American jurisprudence. In "The Path of the Law," for example, Holmes explicitly professed the need to distinguish between law and morality.¹¹⁰ Several passages in Holmes's address have a pronounced Austinian flavor. "The first thing for a business-like understanding of the matter [the study of law]," Holmes claimed, "is to understand its limits, and therefore . . . at once to . . . dispel a confusion between morality and law."¹¹¹ He emphasized the "danger, both to speculation and to practice, of confounding morality with law."¹¹² Despite his highly critical attitude toward this confusion, Holmes acknowledged that morality often influences law. Indeed, he claimed that "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 . . . tends to make good citizens and good men."¹¹³ Moreover, he was careful to point out that his emphasis on the distinction between law and morals had

¹⁰⁶ *Id.* at 186.

¹⁰⁷ *Id.* at 184.

¹⁰⁸ *Id.* at 159.

¹⁰⁹ *Id.* at 160-61.

¹¹⁰ O.W. HOLMES, *supra* note 20, at 71.

¹¹¹ *Id.* at 73.

¹¹² *Id.* at 78. Although Holmes's critique was not identical to Austin's, their rationales were strikingly similar, as is evident from Holmes's assertion that

when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.

Id. at 74.

¹¹³ *Id.* at 73.

“reference to a single end, that of learning and understanding the law.”¹¹⁴

The realists' favorable references to Holmes were legion.¹¹⁵ Their praise would have been ill-informed or disingenuous if it did not reflect agreement with his attempts to distinguish law from morals.¹¹⁶ Their own writings also reflect a strong desire to distinguish clearly between the law as it is and as it ought to be. “Law is law, whether it be good or bad,”¹¹⁷ Felix Cohen wrote, and no legal realist would have disagreed with him. Cohen specifically defended his definition of law on the ground that it “reveals the concept of law as something purely positive or natural, involving no connotations of approval or disapproval. We are thus able to avoid the confusions following inevitably upon commendatory definitions of law.”¹¹⁸

To the extent that the legal realists took this position, their point of view was indistinguishable from Austin's. Of course, their reasons for criticizing the confusion of law and morals were not identical to his. Unlike Austin, several realists expressed views that imply that ethical judgments are subjective.¹¹⁹ Nevertheless, they fully agreed

¹¹⁴ *Id.* Holmes did not specifically acknowledge Austin's contribution even though Austin had advanced an identical argument 65 years earlier. John Chipman Gray was less reluctant to give credit where it was due. Gray believed that the “great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State or other organized body is not an ideal, but something which actually exists.” He insisted that the established law in this sense is “not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is,” and maintained that to “fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished.” J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 94 (2d ed. 1921).

¹¹⁵ See, e.g., F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 54, 61; J. FRANK, *supra* note 9, at 253-60; K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 29, 46 n.18, 181, 507, 516, 517; Cook, *Oliver Wendell Holmes: Scientist*, 21 A.B.A.J. 211 (1935); Frank, *Mr. Justice Holmes and Non-Euclidian Legal Thinking*, 17 CORNELL L.Q. 568 (1932); Yntema, *Mr. Justice Holmes' View of Legal Science*, 40 YALE L.J. 696, 703 (1931). For criticism of the realists' interpretations of Holmes, see Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 674 (1936) and Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 792 (1938).

¹¹⁶ In fact, several of the realists specifically endorsed Holmes's efforts in this direction. See, e.g., Cook, *supra* note 115, at 212; Frank, *supra* note 115, at 570; Yntema, *supra* note 115, at 698-99.

¹¹⁷ F. COHEN, *ETHICAL SYSTEMS*, *supra* note 22, at 15.

¹¹⁸ *Id.* at 14. Cohen also cited Blackstone's conception of law as an example of such confusion. *Id.*

¹¹⁹ See Bingham, *supra* note 59, at 2-3; Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 612 (1923); Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 943 (1931). For discussion of this strand in the realist movement, see E. PURCELL, *supra* note 11, at 91-94, 159-78.

This argument for distinguishing between law and morals more closely parallels the position of a twentieth century positivist such as Hans Kelsen than that of Austin. For Kelsen's ethical noncognitivism, see H. KELSEN, *GENERAL THEORY OF LAW AND STATE* xvi (A. Wedberg trans. 1961). Austin, a convinced utilitarian, believed that the goodness or badness of positive laws is objectively determinable.

with him that the confusion of law and morals had perniciously affected the study of law. Llewellyn maintained, for example, that the "temporary divorce of Is and Ought for purposes of study" is one of the "peculiar" and "characteristic marks of the movement."¹²⁰ The legal realists thus agreed that

during the inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be. More particularly, this involves during the study of what courts are doing the effort to disregard the question what they ought to do.¹²¹

The realists' assessment of the role of the "is" and the "ought" in the application or interpretation of law diverged to some extent from Austin's characterization of law and morals. The realists' analysis of the judicial process implies that the "field of free play for Ought in appellate courts is vastly wider than traditional Ought-bound thinking ha[s] ever made clear."¹²² Austin was not a traditional ought-bound thinker who ignored the realities of judicial decisionmaking. Nevertheless, he did not estimate so generously the room for the free play of the "ought" in appellate courts.

The apparent discord between Austin and the realists on this issue does not, however, negate their fundamental agreement about the relationship between law and morals. The appellate courts' consideration of the "ought" does not necessarily signify a link between law and morality. The "ought" behind a judicial decision may be a personal preference or a judgment about policy, rather than a moral or ethical principle.¹²³ A utilitarian like Austin would reject the distinction between judgments of policy and ethical appraisals because the latter are, in his view, reducible to the former. Nonetheless,

¹²⁰ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 55, 57 (emphasis in original). Llewellyn observed that the divorce between the "is" and the "ought" in the study of law is "temporary," *id.* at 55, arguing that to men "who begin with a suspicion that change is needed, a permanent divorce would be impossible." *Id.* at 56. This attitude appears to be incompatible with Austin's thesis. After all, Austin insisted that the business of the science of jurisprudence is the exposition rather than the evaluation of positive law. J. AUSTIN, PROVINCE, *supra* note 2, at 366. Nonetheless, in an important sense, Austin also believed that the divorce between the "is" and "ought" in the study of law is temporary. In fact, he was no less interested than the realists in the reform of law. One of the many signs of his deep concern with this problem was his belief in the vital importance of the science of legislation, the focus of which is "positive law as it ought to be." *Id.* at 6 (emphasis in original).

¹²¹ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 55-56 (emphasis in original).

¹²² *Id.* at 70.

¹²³ H.L.A. HART, *supra* note 96, at 200-01.

Austin would insist that judgments of policy may be mistaken. He would argue also that judicial decisions that establish bad policy are law until they are overruled or undermined by "interpretation." Therefore, despite their differences about the free play of "ought" in the decisions of appellate courts, Austin and the legal realists took fundamentally similar positions with respect to the relationship between law and morality.

C. *Law and Sanctions*

The conceptions of law held by Austin and the realists also presuppose or imply a connection between law and sanctions. Austin claimed that law properly so called consists of commands, which, in his view, are "the *key* to the sciences of jurisprudence and morals."¹²⁴ The difference between commands and other significations of desire is not a matter of linguistic form or style. Certain expressions of desire that take the form of requests in reality may constitute commands, while other wishes that appear to be imperatives in fact may not be commands. The crucial factor for distinguishing commands from other expressions of desire is "the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded."¹²⁵ This pain or evil is the essence of a sanction, the liability to which is the basis of Austin's conception of legal obligation.

Austin's argument implies that the possibility of incurring a sanction is a necessary condition for the existence of law. Holmes evinced a similar assumption in his conception of law. He began from the premise that the objective of the study of law is the "prediction of the incidence of the public force through the instrumentality of the courts."¹²⁶ A legal right is "only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."¹²⁷ Similarly, a legal duty is "nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."¹²⁸ These ideas explain Holmes's insistence on the utility of the "bad man's" perspective for the purpose of understanding law:

¹²⁴ J. AUSTIN, *PROVINCE*, *supra* note 2, at 13 (emphasis in original).

¹²⁵ *Id.* at 14.

¹²⁶ O.W. HOLMES, *supra* note 20, at 72.

¹²⁷ *Id.* at 397.

¹²⁸ *Id.* at 72.

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 . . . in the vaguer sanctions of conscience.¹²⁹

The bad man wants to know, in other words, *if* and *how* sanctions will be applied to actions he is considering. The same point of view underlies Holmes's conception of law as "prophecies of what the courts will do in fact, and nothing more pretentious."¹³⁰

A similar concern with sanctions is evident in the various conceptions of law advanced by the realists. Their interest in the actual behavior of officials arose in part from the belief that official behavior ultimately determines whether individuals will be compelled or permitted to engage in certain conduct. This notion explains, for example, why "[r]ules' in the realm of action *mean* what rules *do*; 'rules' in the realm of action *are* what they do. The *possible* application and applicability are not without importance, but the *actual* application and applicability are of controlling importance."¹³¹ A similar consideration underlies the insistence of some realists that the test for the existence of a right is the availability of a remedy. If my right to something is violated, but no one will be compelled to stop violating it, or to compensate me for its violation, then my right is only a string of words. "Denial of all remedy, direct and indirect," Corbin writes, "is the total negation of legal 'right'; and a denial of the most effective remedies cuts down in exact proportion the character and value of the 'rights' that may still be given some minor forms of recognition."¹³² A similar line of thought explains why some realists emphasized the importance of procedures. Max Radin observed that there "is a sense, and a proper sense, in which procedure is the essence of the law. . . . And certainly to know what a person's rights are, is a futile and sterile piece of knowledge unless one knows how to get them."¹³³

Of course, the realists' claims about the relationship between law and sanctions did not totally conform to Austin's ideas. He maintained that even the remote possibility of incurring a sanction is sufficient to create a legal obligation.¹³⁴ In contrast, several realists

¹²⁹ *Id.* at 74.

¹³⁰ *Id.* at 75. "I don't care a damn if twenty professors tell me that a decision is not law," Holmes wrote, "if I know that the Courts will enforce it." 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 115 (M. Wolfe ed. 1953).

¹³¹ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 34-35 (emphasis in original).

¹³² 2 A. CORBIN, CONTRACTS § 294, at 73 (1950).

¹³³ Radin, *The Achievements of the American Bar Association*, 26 A.B.A.J. 19, 23 (1940).

¹³⁴ J. AUSTIN, PROVINCE, *supra* note 2, at 16.

took positions that imply that the existence of legal duties or rights depends upon the probability of incurring sanctions.¹³⁵ Various factors accounted for this difference, one of which was the realists' perception that legislatively prescribed sanctions are frequently ignored or distorted by judges and law-enforcement officials:

The object of a realistic legal criticism will be not the divine vision which follows the words "Be it enacted:" but the probable reaction between the words of the legislature and the professional prejudices and distorting apparatus of the bench, between the ideas that emerge from this often bloody encounter and the social pressures that play upon enforcing officials. Words are frail packages for legislative hopes. The voyage to the realm of law-observance is long and dangerous. Seldom do meanings arrive at their destination intact. Whether or not we approve of storms and pirates, let us be aware of them when we appraise the cargo.¹³⁶

Another factor influenced the realists' departure from Austin's ideas about law and sanctions. It was the belief that the probability of incurring sanctions, rather than the mere possibility thereof, strongly influences the layman's choice of conduct. According to Frank, for example, the "law in the sky, above human experience, is valueless to the wayfaring man To mere humans, law means what the courts have decided and will decide, and not vague, 'pure' generalizations."¹³⁷ Llewellyn, echoing this argument, declared that "[i]f, as I claim, what . . . judges *do* is vastly more important than what . . . judges say, that can be only because importance to *other* people, to the laymen, the poor devils *to whom* they do it, appears to me the primary measure of importance."¹³⁸ Llewellyn also emphasized the importance of administrative activity. Although the decisions of judges are central to any analysis of the relationship between law and sanctions, "there is a vast body of other officials whose actions are of no less importance."¹³⁹ To the laymen affected by them, these actions are more important than judicial behavior. For

[t]he actions of these other officials touch the interested laymen more often than do those of the judge; increasingly so, and apparently increasing at a rising rate of increase as the administrative

¹³⁵ See, e.g., F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 65-66; K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 10-11, 22; Bingham, *Science and the Law*, 25 GREEN BAG 162, 164-65 (1913); Cook, *Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 475 (1934).

¹³⁶ F. COHEN, *ETHICAL SYSTEMS*, *supra* note 9, at 240.

¹³⁷ J. FRANK, *supra* note 9, at 55.

¹³⁸ K. LLEWELLYN, *supra* note 11, at 89-90 (emphasis in original).

¹³⁹ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 29-30.

machine gains in function and in force. More often than not, administrative action is, *to the laymen affected*, the last expression of the law on the case.¹⁴⁰

This point of view quite obviously reflects the evolution of the modern state since Austin's time. The vast expansion of the "administrative machine" is a fact of life in most societies. This development has increased the possibility of divergence between the law "on-the-books" and the law "in action." To this extent, the realists' point of view can be interpreted as a typically modern refinement of Austin's position. At any rate, the differences between them should not obscure their fundamental agreement about the interrelation between law and sanctions.

D. *The Reform and Evaluation of Law*

Austin and the realists not only held conceptions of law that are similar in a number of respects, they shared a strong interest in legal reform and developed somewhat similar approaches to the evaluation of law. As a disciple of Jeremy Bentham, one of the English legal system's harshest critics, Austin maintained that "no other body of Law, obtaining in a civilized community, has so little of consistency and symmetry as our own."¹⁴¹ He assailed the "enormous bulk,"¹⁴² the "unrivalled intricacy,"¹⁴³ the "matchless confusion and obscurity,"¹⁴⁴ and the "multitude of wanton distinctions"¹⁴⁵ of English law, the "empire of chaos and darkness."¹⁴⁶ Although these strictures were directed at the uncertainty of English law, Austin criticized many of its rules as inexpedient as well.¹⁴⁷

The legal realists similarly were disenchanted with established law. They thought of law as a means to social ends, the efficacy of which "needs constantly to be examined."¹⁴⁸ The realists developed a "conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports

¹⁴⁰ *Id.* at 30 (emphasis in original).

¹⁴¹ 1 J. AUSTIN, LECTURES, *supra* note 2, at 467.

¹⁴² *Id.*

¹⁴³ *Id.* at 58.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ J. AUSTIN, PROVINCE, *supra* note 2, at 64-65.

¹⁴⁸ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 55.

to serve."¹⁴⁹ This conception may be one of the most influential contributions of the realist movement.¹⁵⁰

Austin's and the realists' cognate interests in legal reform were accompanied by common result-orientation approaches to the evaluation of law. Austin, an ardent utilitarian, claimed that rules should be evaluated on the basis of their effect on the general happiness. He stressed that "legislation ought to be governed by actual experience of the wants and exigencies of mankind,"¹⁵¹ and agreed with Bentham that a "body of law cannot be spun out from a few general principles assumed *a priori*, but must be founded on experience of the subjects and objects with which law is conversant."¹⁵² Law, in other words, "should be determined by general utility, not drawn out from a few arbitrary assumptions . . . called the law of nature."¹⁵³

If the theory of natural law to which Austin alluded entails the deduction of a body of law from *a priori* principles, then the legal realists joined Austin in disputing that theory. Although Llewellyn stressed that they had not developed a normative program, he observed that a "likeness of method in approaching Ought-questions is apparent."¹⁵⁴ The heart of this approach and a distinctive character-

¹⁴⁹ *Id.*

¹⁵⁰ Hessel Yntema, for example, opined that the "significant achievement of American legal realism has been to imprint in legal thinking the concept of relativity in the adaptation of positive law to social change." Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317, 329 (1960). See also T. ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE 68 (1968). There Thurman Arnold spelled out some of the changes for which he felt the realists deserve much of the credit:

[S]ince the days of Frank Roosevelt, there has been a startling revolution in our attitudes toward law, legal procedures, and the sanctity of the Constitution of the United States. The old idea that the common law was a seamless web built case by case throughout the ages, all of which had been reconciled into legal principles by irrefutable logic, has all but disappeared. Legal procedure is no longer an abstract science: its delightful complications, its technical traps, and its abstract logic are no longer available to the skilled craftsmen of that dark science. The Constitution of the United States that in the early days stood as an unyielding obstacle to practical legislation attempting to relieve human needs and correct social injustices has gone. . . . It is no longer available as a weapon against social reform of any kind.

For studies of the implications of realism for constitutionalism, see E. PURCELL, *supra* note 11; Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640 (1972); Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288 (1971).

¹⁵¹ 2 J. AUSTIN, LECTURES, *supra* note 2, at 679.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 72. For studies of the ethical theories of the legal realists, see E. GARLAN, LEGAL REALISM AND JUSTICE (1941); E. PURCELL, *supra* note 11; Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961); McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834 (1941).

istic of the realist movement, he maintained, was an "insistence on evaluation of any part of law in terms of its effects."¹⁵⁵ The exponents of realistic jurisprudence also demonstrated "fairly general agreement that effects of rules, so far as known, should be taken account of in making or remaking the rules."¹⁵⁶

This similarity between Austin and the realists did not, however, lead to identical approaches to ought-questions. One difference between them was the realists' call for empirical studies of the effects of law. These inquiries were viewed as essential in order to replace "armchair speculations" with "informed evaluations."¹⁵⁷ The development of such appraisals "without study of the persons whom law affects is impossible."¹⁵⁸ This difference between Austin and the realists, however, is one of emphasis rather than principle. In fact, the realists' call for empirical investigation of the effects of law is, in one sense, a logical outgrowth of utilitarianism.

Austin not only argued that positive law must be evaluated on the basis of its social effects, but also proposed a test under which these effects should be judged: the long-range consequences of rules, or rule changes, on the general happiness. Austin believed, thus, that the principle of utility is the proper standard to employ in appraising the effects of law or legal change. In fact, he devoted a substantial portion of his only published book¹⁵⁹ to the definition and defense of this principle.¹⁶⁰

As a rule, the realists did not share Austin's interest in questions of ethical theory. The realists were not philosophers of law—the issue of which ethical standard should be used to evaluate the effects of law was not a pressing question for most of them. Those who expressed views on the subject took positions that run the gamut. Some realists appear to have accepted noncognitivist ethical theories.¹⁶¹ Others, like Cook, developed ideas very similar to those of John Dewey, the great philosopher of pragmatism.¹⁶² A few realists, including Llewellyn and Frank, even expressed a sympathetic attitude toward natural

¹⁵⁵ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 57.

¹⁵⁶ *Id.* at 72.

¹⁵⁷ *Id.* at 56.

¹⁵⁸ *Id.* at 67.

¹⁵⁹ J. AUSTIN, *PROVINCE*, *supra* note 2.

¹⁶⁰ *Id.* at 33-118. Austin's utilitarianism had a stronger impact upon his legal theories than has generally been recognized. *See* Rumble, *supra* note 2, at 139-80.

¹⁶¹ *See* note 119 *supra*.

¹⁶² *See* Cook, *Walter Wheeler Cook*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 59, 60 (1941). For a discussion of the impact of Dewey upon Cook, *see* Verdun-Jones, *supra* note 22, at 250-56.

law.¹⁶³ On balance, however, the realists advocated a result-oriented evaluation of law that sharply contrasts with an appeal to natural law or rights. To this extent, their point of view parallels Austin's utilitarian approach, though the two do not coincide perfectly.

III

JUDICIAL LEGISLATION AND CODIFICATION

Austin and the realists developed both similar and contrasting ideas about judicial legislation. The most notable contrast may be their divergent accounts of how judges reach decisions. Austin's description of this process assumes that it is highly rational, an assumption which a number of realists explicitly criticized.¹⁶⁴ Nevertheless, many of Austin's ideas about judge-made law adumbrated views subsequently expressed by the legal realists. In this respect, Austin may have been, aside from Holmes, the most important forerunner of the realist movement in nineteenth century Anglo-American jurisprudence.

A. *Austin*

The resolution of specific disputes through the application of law is, according to Austin, the hallmark of judicial decisionmaking.¹⁶⁵ Elucidation of his conception of how judges make law requires, thus, an explanation of how they apply it. Although Austin recognized that judges can reach decisions without applying old or new rules, he apparently regarded such decisions as exceptional and, in any case,

¹⁶³ J. FRANK, *supra* note 9, at xx (1963); K. LLEWELLYN, *DECIDING APPEALS*, *supra* note 9, at 122; K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 111-15. The significance of the passages cited can be exaggerated. According to Purcell, "Frank ultimately drew closer to the natural law school than any of the other realists . . . [H]e had come a long way from the philosophical implications of *Law and the Modern Mind*." E. PURCELL, *supra* note 11, at 173. This interpretation exaggerates how close Frank drew to the natural law school. The most convincing evidence of this exaggeration is Frank's chapter on natural law in J. FRANK, *COURTS ON TRIAL* 346-73 (1949), in which he stated that it is "high time that we put an end to the device of referring to Nature as the justification for any particular social or economic program or method of government. That device has always led to the worst kind of casuistry. It is oblique, indirect, lacking in forthrightness." *Id.* at 353. See also *id.* at 348, 350, 351. For an excellent discussion of Llewellyn's attitude toward natural law, see W. TWINING, *supra* note 9, at 216-27.

¹⁶⁴ See W. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 8, 33 (1980); J. FRANK, *supra* note 9, at 33, 36, 100-11, 148-49; Corbin, *supra* note 21, at 250; Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *YALE L.J.* 468, 480 (1928). This emphasis reflects both the realists' observations of judicial behavior and the influence of psychological and other theories that emerged after Austin's death. See K. LLEWELLYN, *DECIDING APPEALS*, *supra* note 9, at 12, 58; W. RUMBLE, *supra* note 5, at 69-72.

¹⁶⁵ 2 J. AUSTIN, *LECTURES*, *supra* note 2, at 621.

wholly indefensible.¹⁶⁶ The dominant method by which courts reach decisions is through the application of law—classifying the facts and subsuming them under rules. Most cases do, and all cases should, involve the application of law in this sense.

Austin classified the law that judges apply into two categories: established rules, which are derived from statutes or precedents, and newly-created rules. Judges legislate to the extent that the law they apply consists of newly-created rules. Thus, the vast majority of cases fall into two basic categories. In the first, judges only apply rather than create rules; in others, judges make the rules, then proceed to apply them.

Despite not uncommon interpretations of his ideas, Austin was no stranger to the phenomenon of “judiciary law.”¹⁶⁷ In fact, he ridiculed the “childish fiction employed by our judges, that judiciary or common law is not made by them, but a miraculous something, made by nobody, existing from eternity, and merely *declared* from time to time by the judges.”¹⁶⁸ Austin was unable to understand “how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated.”¹⁶⁹ He also insisted that many of the new rules introduced by English judges were derived from “their own conceptions of public policy or expediency.”¹⁷⁰ Furthermore, Austin contended that judges frequently introduce new rules “under colour of interpreting statute law, or of getting by induction at prior judge-made law.”¹⁷¹ Thus, a new rule, “disguised under the garb of an old one, is applied as law to new cases.”¹⁷²

¹⁶⁶ *Id.* at 581-82.

¹⁶⁷ *Id.* at 620.

¹⁶⁸ *Id.* at 634. Although Austin did not specifically mention Blackstone in this context, he must have disagreed with the learned commentator. Blackstone had earlier expressed the view that the “judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*” and that an English judge “is only to *declare and pronounce*, not to *make or new-model*, the law.” 3 W. BLACKSTONE, *supra* note 103, at 258, 305 (emphasis in original).

¹⁶⁹ J. AUSTIN, PROVINCE, *supra* note 2, at 191.

¹⁷⁰ 2 J. AUSTIN, LECTURES, *supra* note 2, at 539.

¹⁷¹ *Id.* at 637.

¹⁷² *Id.* at 531. The process of spurious interpretation *ex ratione legis* is an example. The judge who employs this method of construing a statute does not reason from the literal meaning of statutory language. Instead, he either restricts or extends it in accordance with his own conception of what is necessary to achieve the purpose of the law. Such restrictions or extensions are only “pretended applications of the statute.” *Id.* at 635. In reality, they are part of a “process of legislative amendment, or . . . correction” rather than genuine interpretation. *Id.* at 629.

Austin defended judicial legislation on several grounds, one of which is the ambiguity of certain legal terms.¹⁷³ Established rules that contain these terms are "hotbeds of competing analogies. The indefiniteness is incorrigible. A discretion is left to the judge. Questions arising on them . . . are hardly questions of interpretation or induction, for though the rule were explored and known as far as possible, doubt would remain."¹⁷⁴ Austin also contended that judicial legislation is a necessary response to the negligence or incompetence of the sovereign legislature in "almost every community."¹⁷⁵ He claimed that

unless the work of legislation had been performed mainly by subordinate judges, it would not have been performed at all, or would have been performed most ineffectually: with regard to a multitude of most important subjects, the society would have lived without law; and with regard to a multitude of others, the law would have remained in pristine barbarity.¹⁷⁶

Austin believed that judicial legislation is not only necessary, but of "obvious utility"¹⁷⁷ as well. Judge-made law is particularly beneficial, he argued, as a means of adapting law to social and other changes. As an example of the system's response to the failure of judges to develop new rules, Austin cited the creation of courts of equity. The need for these courts arose from the unwillingness of judges of the common law courts to "do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages."¹⁷⁸ Indeed, Austin went so far as to deny that "there is any danger whatever in allowing them [the judges] that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator."¹⁷⁹ He therefore lashed out at the "too great . . . respect [of judges] for established rules."¹⁸⁰

¹⁷³ Words such as "libel," "lunacy," "prodigality," "reasonable time," and "reasonable notice" are examples.

¹⁷⁴ 2 J. AUSTIN, LECTURES, *supra* note 2, at 1001 n.20.

¹⁷⁵ *Id.* at 612.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 647.

¹⁷⁹ J. AUSTIN, PROVINCE, *supra* note 2, at 191.

¹⁸⁰ 2 J. AUSTIN, LECTURES, *supra* note 2, at 646. This evaluation of judicial legislation prompted one of Austin's infrequent criticisms of Jeremy Bentham. Bentham was one of the severest critics of judge-made law in the history of Western jurisprudence. He condemned it as a "mock," "sham," "bastard," and "dog" law, 5 THE WORKS OF JEREMY BENTHAM 235-36

To the extent that he advocated these ideas, Austin was indisputably a forerunner of the legal realists. Still, his analysis of judicial legislation extended beyond these ideas to claims quite unlike those of the realists. Although Austin extensively praised the benefits of judicial legislation, he also adamantly objected to its numerous disadvantages. These include: the relative inaccessibility and unknowability of judge-made law; the difficulty of accurately determining the *ratio decidendi* of a case; the lack of any certain test for determining the weight of a precedent; the *ex post facto* character of the rules that judges make; the narrowness of judge-made rules;¹⁸¹ and the bad effect of judicial legislation on the symmetry of the *corpus juris*.¹⁸²

Austin attached the most importance to the uncertainty that judicial legislation supposedly fosters. Positive law, in his view, should provide a guide for conduct. Austin maintained that judge-made law is difficult to find, to know, to predict, and therefore, to follow. It is, in other words, a very uncertain guide. When judges legislate, the new rules that they introduce are by definition *ex post facto*. In this context, the uncertainty of judicial legislation is a source of injustice.

This indictment of judiciary law underlies Austin's enthusiasm for codification. Despite his criticisms of Bentham,¹⁸³ Austin shared his predecessor's belief in the utility of codifying the *corpus juris*.¹⁸⁴ The major reason Austin adduced for the expediency of codification was the inefficacy of judicial legislation. He insisted that a mere enumeration of its "great defects"¹⁸⁵ and "monstrous evils"¹⁸⁶ is "amply sufficient to demonstrate . . . that codification is expedient."¹⁸⁷ Indeed, Austin claimed that "no judicious or candid man

(J. Bowring ed. 1962) [hereinafter cited as WORKS], which is "disgraceful to men," 3 *id.* at 206, and a "wretched substitute to real and genuine law," 9 *id.* at 8. Despite his veneration for Bentham, Austin could not accept his condemnation of judicial legislation. Bentham should have blamed judges not for making law, but "for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases." J. AUSTIN, PROVINCE, *supra* note 2, at 191.

¹⁸¹ Because of the narrowness of judge-made rules, the "exigencies of society are provided for bit by bit, in the slowest and most inefficient manner." 2 J. AUSTIN, LECTURES, *supra* note 2, at 658.

¹⁸² If the *corpus juris* comprises both statutory and judiciary law, then the entire legal system . . . is necessarily a monstrous chaos: partly consisting of *judiciary* law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decision, and partly of legislative law struck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes. *Id.* at 660 (emphasis in original).

¹⁸³ See note 180 *supra*.

¹⁸⁴ 3 J. BENTHAM, WORKS, *supra* note 180, at 205, 209-10.

¹⁸⁵ 2 J. AUSTIN, LECTURES, *supra* note 2, at 666.

¹⁸⁶ *Id.* at 660.

¹⁸⁷ *Id.* at 662.

will doubt . . . that a well-made statute is incomparably superior to a rule of judiciary law,"¹⁸⁸ largely because the former is much more knowable than the latter. Of course, Austin acknowledged that even the best code is unlikely to so condense and simplify the law that the bulk of the community will know much of it.¹⁸⁹ Nonetheless, he argued that the law could be "so condensed and simplified that *lawyers* may know it: And that, at a moderate expense, the rest of the community may learn from lawyers beforehand the legal effect of transactions in which they are about to engage."¹⁹⁰

Austin's critical attitude toward judicial legislation is also evident from his very concept of codification. He conceived of a modern code as a "complete body of statute law, intended to supersede all other law whatever."¹⁹¹ Codified rules would be "the only positive law obtaining in the community."¹⁹² To be sure, he recognized that "no code can be perfect"¹⁹³ and acknowledged that the growth of judiciary law "cannot . . . be prevented altogether."¹⁹⁴ Nevertheless, he insisted that it should be confined to a "moderate bulk"¹⁹⁵ and "narrow lines."¹⁹⁶ In short, in the best of all possible worlds the amount of judicial legislation would be inconsiderable.

B. *The Realists*

Several of Austin's ideas about judicial legislation adumbrated positions subsequently taken by the legal realists. One example is their belief in the existence and utility of a significant amount of judge-made law.¹⁹⁷ Another is their critique of the pretenses for obscuring the introduction of new rules.¹⁹⁸ At the same time, Austin expressed some views on this subject with which the realists would have strongly disagreed.

The most important example of this last dimension of Austin's thought may be his defense of codification. His arguments presuppose that judicial legislation could, and should, be reduced to the bare

¹⁸⁸ *Id.* at 661.

¹⁸⁹ *Id.* at 653.

¹⁹⁰ *Id.* (emphasis in original).

¹⁹¹ *Id.* at 636.

¹⁹² *Id.* at 649.

¹⁹³ *Id.* at 675.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1028.

¹⁹⁷ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 55, 70, 72.

¹⁹⁸ See J. FRANK, *supra* note 9, at 114-15, 148-49; K. LLEWELLYN, *DECIDING APPEALS*, *supra* note 9, at 5-6, 38, 40, 121, 124, 125-26, 133-34; and Frank, *supra* note 94, at 267.

minimum. Nothing similar to this attitude is evident in the literature of the legal realists. Most of them did not explain fully their opinions on the possibility and desirability of codes. Therefore, it is impossible to elucidate their reaction to Austin's analysis of codification with complete certainty. Nevertheless, it is highly likely that they would have disagreed with the ideas Austin developed on codification. In particular, the realists would argue that not even the best code could, or should, eliminate judge-made law to the extent that Austin had desired.

This response may be inferred from the views that Frank and Llewellyn expressed about codification. Frank maintained that unchanging application of codes is "impossible."¹⁹⁹ European experience with allegedly gapless codes had, in his view, confirmed this judgment. Frank proffered several reasons for the failure of these efforts to construct unvarying bodies of law, one of which was the scope and rapidity of socio-economic change.²⁰⁰ He also observed that even the wisest legislators command a limited vision of the future:

[T]he history of Continental law . . . [demonstrates that] a code cannot be stable, it must be adaptive. Even in a relatively stable society, no one can foresee all future combinations of events. . . . Situations are bound to occur which the legislature never contemplated when enacting the statutes. Then the incompleteness of the code calls for judicial law-making.²⁰¹

Frank also believed that a comprehensive, gapless code of laws would become a straightjacket, impeding necessary and useful changes. Since this result would be socially intolerable, judges would be forced to change and adapt the terms of the code surreptitiously. This practice, inevitably, would increase rather than decrease legal uncertainty. Judges would develop forced "interpretations" of the code and obscure what they would actually be doing—making law. This process may create the appearance of certainty, but in fact it "increases legal contingency and doubt."²⁰²

¹⁹⁹ J. FRANK, *supra* note 9, at 190.

²⁰⁰ *Id.* at 188-89.

²⁰¹ *Id.* at 189.

²⁰² *Id.* at 191. Frank also criticized the notion of a complete body of statutory law as perpetuating the "basic legal myth," *id.* at 12, the essence of which is the illusion that "law either is or can be made approximately stationary and certain." *Id.* Frank claimed that the desire for a complete code of laws is indicative of the power of "the old dream of legal finality and exactitude," *id.* at 203, concluding that codification reflects a "childish belief in legal finality . . . [that] is and will ever be based upon illusion." *Id.* at 193.

It was no coincidence, Frank asserted, that many proponents of an all-sufficient code also espoused the command theory of law. Frank cited Austin as a typical example of this class of

Despite these criticisms, Frank disclaimed an intent to reject every conceivable kind of code. He emphasized that his critical remarks should not be interpreted as a "blanket indictment of wise codification which aims at simplicity and flexibility rather than completeness and finality."²⁰³ The sort of code Frank advocated differed significantly, however, from the type that Austin favored.²⁰⁴

Llewellyn saw greater benefits from codification. Otherwise, he would not have expended such a vast amount of time and energy drafting the Uniform Commercial Code.²⁰⁵ A conspicuous feature of the Code is the significant role that courts must play in the development of its provisions. This idea reflects Llewellyn's belief that "semi-permanent Acts must *envisage and encourage* development by the court"²⁰⁶— "[b]orderline, doubtful, or un contemplated cases are inevitable."²⁰⁷ The Code therefore requires a liberal interpretation of its provisions:

"This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices."²⁰⁸

Of course, the Uniform Commercial Code was not intended to give courts *carte blanche* in interpreting its provisions. The proper construction of the Act "requires that its interpretation and application be limited to its reason. . . . The Act should be construed in

thinkers. *Id.* According to Frank, Austin's conception of law was as childish and oversimplified as his faith in codification, *id.*, and represented "almost a replica of the child's want that his father shall be an omniscient, omnipotent law-maker and giver of commands." *Id.* at 194.

Llewellyn objected to Frank's explanation of the basic legal myth. *See* note 215 and accompanying text, *infra*.

²⁰³ *Id.* at 192 n. *.

²⁰⁴ This is evident from Frank's endorsement of the Swiss Civil Code. He portrayed it as seeking "simplicity and flexibility, not detailed, complete regulation. It is 'more like an outline of legal principles than a body of provisions purporting to regulate all legal relations.'" *Id.* at 192. Indeed, Frank even stated that "a code deliberately devised with reference to the desirability of growth and stated in terms of general guidance and flexible principles may some day prove to be the way out of some of the difficulties of legal administration in America." *Id.* at 311.

²⁰⁵ For an excellent discussion of Llewellyn and the Uniform Commercial Code, see W. TWINING, *supra* note 9, at 270-340. Although the Uniform Commercial Code was the product of a collaborative effort, "there is no doubt that Llewellyn was easily the most important single figure." *Id.* at 271. *See generally* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 1 (2d ed. 1980).

²⁰⁶ W. TWINING, *supra* note 9, at 304 (emphasis in original).

²⁰⁷ *Id.* at 322.

²⁰⁸ *Id.* at 322-23.

accordance with its underlying purposes and policies.’”²⁰⁹ The Code was drafted in the hope that lawyers and judges “would adopt ‘the Grand Style’ in their approach to it.”²¹⁰ The Grand Style means that “every current decision is to be tested against life-wisdom, and . . . the phrasing of the authorities which build our guiding structure of rules is to be tested and is to be vigorously recast in the new light of what each new case may suggest either about life-wisdom, or about a cleaner and more usable structure of doctrine.”²¹¹

Llewellyn contrasted the Grand Style with the Formal Style. The latter involves precisely the kind of approach that Austin advocated for applying the terms of a code. Under the Formal Style, “the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law.”²¹² Judges who had perceived their function in this manner “sought to do their deciding without reference to much except the rules, sought to eliminate the impact of sense, as an intrusion.”²¹³

Thus, both Frank and Llewellyn rejected the kind of code that Austin favored. Llewellyn, however, ascribed greater value to codification than did Frank. This difference reflects, among other things, their conflicting appraisals of the possibility and desirability of legal certainty. Llewellyn, for example, expressed the opinion that law, “in the sense of decision, is in fact much more predictable, and hence more certain than [Frank’s] treatment would indicate.”²¹⁴ Llewellyn also maintained that “even adventurous spirits want some footing to adventure from. That need is practical.”²¹⁵

Unlike Llewellyn, Frank claimed that law “always has been, is now, and will ever continue to be, largely vague and variable.”²¹⁶ The fundamental reason for this uncertainty is fact-skepticism, a notion which implies that the reactions of judges or jurors to the facts of most cases are inherently unpredictable.²¹⁷ Frank classified the proponents of realistic jurisprudence into two groups, rule-skeptics and fact-skeptics. The rule-skeptics, of whom Llewellyn was perhaps “the outstanding representative,”²¹⁸ focused on appellate courts and

²⁰⁹ *Id.* at 323.

²¹⁰ *Id.* at 312.

²¹¹ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 217.

²¹² K. LLEWELLYN, DECIDING APPEALS, *supra* note 9, at 38.

²¹³ *Id.* at 5 (emphasis in original).

²¹⁴ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 107.

²¹⁵ *Id.* at 108.

²¹⁶ J. FRANK, *supra* note 9, at 6.

²¹⁷ J. FRANK, COURTS ON TRIAL, *supra* note 163, at 74.

²¹⁸ *Id.* at 73.

strived for greater legal certainty. From their point of view, it is "socially desirable that lawyers should be able to predict to their clients the decisions in most law-suits not yet commenced."²¹⁹ Uncertainty exists because the "paper" rules used for predicting judicial decisions are unreliable, a correctable defect. Replacing such "paper" rules with "real" rules that describe the actual uniformities in judicial behavior would markedly improve the predictability of judicial decisions.

In contrast to the rule-skeptics, the fact-skeptics focused on trial courts. According to Frank, the fact-skeptics maintained that even the accurate formulation of "real" rules would not markedly increase legal certainty. They believed that "it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) law-suits not yet begun or not yet tried."²²⁰ The fact-skeptics therefore argued that "the pursuit of greatly increased legal certainty is, for the most part, futile—and that its pursuit, indeed may well work injustice."²²¹ Thus, the fact-skeptics did not strive to increase legal certainty. Rather, their objective was "increased judicial justice."²²²

These ideas engendered Frank's and Llewellyn's difference of opinion on the subject of codification. Fact-skepticism implies the inevitability of a tremendous amount of legal uncertainty at the trial court level. A fact-skeptic could therefore entertain only the most limited expectations about the benefits of codification. For this reason, the distance between Frank and Llewellyn may have been as great as that between Llewellyn and Austin.

Even so, all of the realists would criticize Austin's expectations for codes as too optimistic. His support of codification assumes that a comprehensive set of legal rules can be drafted that will control or dictate judicial decisions. This assumption was unacceptable to the realists, who criticised it on various grounds. Corbin set the tone for others by emphasizing that "however 'well-settled' the rules may be, their application to life is always uncertain. A rule lives only in its application; apart from that, it is a dead, inert thing. A new and different application of the rule is the creation of a new rule."²²³ Corbin left no doubt of his conviction that new and different applications of established rules are inevitable. He therefore disputed the

²¹⁹ *Id.*

²²⁰ *Id.* at 75.

²²¹ *Id.*

²²² *Id.*

²²³ Corbin, *supra* note 21, at 239.

assumption that syllogistic reasoning on the basis of these rules can prevent the development of new rules. To be sure, in

a superficial aspect, the application of rules to cases may seem to be a deductive process; a pre-existing general rule is the major premise from which the judge arrives at a particular conclusion applicable to John Doe. In fact, however, the law in its growth and application is an inductive process. The supposed pre-existing rule is a mere assumption of the court. . . . [Y]ou can get out of a major premise all you put into it. . . . In all cases the judge must construct his own major premise, and this he does not find any easy matter.²²⁴

This belief contributed to the realists' distrust of "the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing courts decisions."²²⁵ This distrust is the essence of the rule-skepticism that pervaded the realist movement. Many factors conditioned this skepticism besides the conviction that cases cannot be decided solely by syllogistic reasoning.²²⁶ First, the realists believed that a large number of competing precedents exists in most cases, each of which might justify conflicting decisions. Second, they maintained that precedents and statutes are subject to a wide range of interpretations. Third, the realists recognized the ambiguity inherent in legal language. Fourth, they shared a perception of rapid and extensive change in the society regulated by law. A fifth consideration was the impact of psychological theories, most notably the concept of rationalization. Finally, the realists stressed the importance of the attitude of judges in determining how they exercise their "sovereign prerogative of choice."²²⁷

Although Austin recognized these considerations, he did not attribute as much weight to them as did the legal realists. For example, consider their respective analyses of how the *ratio decidendi* of a case may be determined. Austin acknowledged the difficulty of this process²²⁸ but claimed that it is surmountable. He argued that the rule of a case can be established by the following formula:

Looking at the *general reasons* alleged by the Court for its decision, and *abstracting those reasons from the modifications which were suggested by*

²²⁴ *Id.* Corbin referred to a number of legal questions, the answers to which are uncertain, in order to illustrate his point that cases "cannot be decided merely by constructing a syllogism." *Id.* at 240.

²²⁵ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 56 (emphasis in original).

²²⁶ For a detailed discussion of these factors, see W. RUMBLE, *supra* note 5, at 48-106.

²²⁷ O.W. HOLMES, COLLECTED LEGAL PAPERS 239 (1952).

²²⁸ 2 J. AUSTIN, LECTURES, *supra* note 2, at 650.

the peculiarities of the cases, we arrive at a *ground or principle* of decision which will apply universally to cases of a class, and which like a statute law, may serve as a rule of conduct.²²⁹

In contrast to Austin, the realists tended to emphasize the existence of competing grounds or principles of decision. Felix Cohen argued, for example, that the "search for a logical formula that will determine precisely what rule each decision implies is a wild goose chase starting from a logical confusion,"²³⁰ the essence of which is "ignorance of the logical fact that no particular proposition can imply a general proposition."²³¹ He therefore concluded that none of the rules supposedly established by prior cases "has any logical priority: courts and lawyers choose among competing propositions on extra-logical grounds."²³²

Nevertheless, the contrast between Austin and the realists should not be exaggerated. The degree of and reasons for rule-skepticism varied substantially from one realist to another.²³³ Austin could be characterized as a moderate rule-skeptic. As such, he did not differ as much from some realists as from others. Aside from this, some of the factors that account for rule-skepticism are subject to modification and control. Rule-skepticism is, after all, a theory of the less-than-controlling impact of established rules on judicial decisions. As such, it is compatible with the belief that rules exist or can be developed that would and should guide judicial decisions. Llewellyn observed that the realists believed that "*there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose*,"²³⁴ but he also recognized their efforts to discover "*the factors thus far unpredictable, in good part with a view to their control*."²³⁵ Nevertheless, the realists would have criticized Austin's estimate of the extent to which legal rules can dictate—as distinguished from guide—decisions in most cases. The realists would likely have agreed with Corbin that it "may assist towards certainty to reduce various branches of the law into the

²²⁹ *Id.* at 622.

²³⁰ F. COHEN, *THE LEGAL CONSCIENCE*, *supra* note 9, at 88 (footnote omitted).

²³¹ F. COHEN, *ETHICAL SYSTEMS*, *supra* note 9, at 34 n.47.

²³² *Id.* at 34 n.47. For a similar view, see Oliphant, *supra* note 59, at 73, 159.

²³³ For statements which minimize the impact of established rules on judicial decisions, see J. FRANK, *supra* note 9, at 8, 118, 138, 155, 252, 267-68; L. GREEN, *JUDGE AND JURY* 19, 214, 215, 258 (1930); K. LLEWELLYN, *supra* note 11, at 14; Oliphant, *supra* note 59, at 159; Yntema, *supra* note 164, at 478-83. For statements which ascribe a heavy impact to at least some established rules, see K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 9; K. LLEWELLYN, *DECIDING APPEALS*, *supra* note 9, at 179; Bingham, *supra* note 59, at 21; Frank, "*Short of Sickness and Death*": *A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U. L. REV. 545, 588 (1951).

²³⁴ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 9, at 60 (footnote omitted).

²³⁵ *Id.* at 61 (emphasis in original) (footnote omitted).

form of a statutory code, but uncertainty remains. Society does not stay put; and if the code lags behind, it is no longer the governing law."²³⁶

The realists would also have recommended a more flexible code than Austin because they believed that a substantial amount of judicial legislation is both inevitable and desirable. Underlying this attitude is a more sympathetic evaluation of common law methods of adjudication than Austin demonstrated. For example, very few realists were as critical as Herman Oliphant of the shortcomings of legal scholarship, particularly the transition from *stare decisis* to *stare dictis*.²³⁷ His very indictment of the latter presupposes, however, a strong endorsement of the former. Oliphant extolled the spirit of *stare decisis* on several grounds. He maintained that this method demonstrates a thoughtfulness about consequences, cautiousness in considering only "immediate problems,"²³⁸ and carefulness in illuminating these difficulties "from the glow of the prudence and insight which its own experimentation patiently forges."²³⁹ *Stare decisis* affords us both the "counsel of experience" and the "latitude of trial and error."²⁴⁰ Thus,

[w]ith eyes cleared of the old and broad abstractions which curtain our vision, we come to recognize more and more the eminent good sense in what courts are wont to do about disputes before them. . . . [T]he decision of a particular case by a thoughtful scholar is to be preferred to that of a poorly trained judge, but the decision of such a judge in a particular case is infinitely to be preferred to a decision of it preordained by some broad "principle" laid down by the scholar when this and a host of other concrete cases had never even occurred to him.²⁴¹

These attitudes explain why Oliphant described *stare decisis* as the "greatest contribution of our common law and of our people to the art of human government."²⁴² As such, his point of view illustrates what Llewellyn could have meant when he wrote, "Still wholly within the tradition of our law, [the realists] strove to improve on that tradition."²⁴³ In contrast, Austin was, in a sense, outside of the

²³⁶ Corbin, *supra* note 21, at 245.

²³⁷ See Oliphant, *supra* note 59.

²³⁸ *Id.* at 162.

²³⁹ *Id.*

²⁴⁰ *Id.* at 75.

²⁴¹ *Id.* at 159.

²⁴² *Id.* at 162.

²⁴³ K. LLEWELLYN, JURISPRUDENCE, *supra* note 9, at 57.

common law tradition. At least his commitment to the ideal of codification reflects dissatisfaction with the practices that Oliphant praised. Austin's attitude toward codification also embodies a belief in an *elegantia juris* that the realists did not share.

C. *The Significance of the Differences between Austin and The Realists*

Thus, the realists would have disagreed with Austin about the extent to which a good code could and should eliminate judicial legislation. Because Austin believed that not even the best code could entirely eliminate judicial lawmaking, this difference is only one of degree, not of fundamental principle. Furthermore, the difference is not as significant as it might at first appear. Despite his belief that a good code is both possible and desirable, Austin was pessimistic that it would ever be enacted. He maintained, in effect, that until we arrive at the promised land, a substantial amount of judge-made law is inevitable and expedient.

Austin claimed that the utility of judge-made law varies with the kind of legal system in which it occurs. Judiciary law has little or no place in the ideal *corpus juris*, the foundation of which is a comprehensive code. In the absence of such a code, however, the law judges make is superior to statutory law. Its benefits have thus outweighed its substantial costs in "almost every community."²⁴⁴

Austin concluded that "there is more of stability and coherency in judiciary law, than might, at the first blush, be imagined."²⁴⁵ In fact, he asserted that judicial respect for precedents is "too great."²⁴⁶ He also took the position that judge-made rules are in practice less uncertain than statutory law. He emphasized not only that "unless a statute be well made, it commonly is more uncertain than a rule of judiciary law,"²⁴⁷ but also that judicially created rules are in fact

²⁴⁴ 2 J. AUSTIN, LECTURES, *supra* note 2, at 612. Austin would not have reached this conclusion unless he believed, unlike Bentham, that judges do not arbitrarily reach decisions. In fact, Austin described five important restraints on judicial behavior. The law judges make is limited by public opinion, sovereign legislatures, and, in the case of lower courts, by courts of appeals. *Id.* at 644-45. Judges are also restrained by their perceptions of the reaction of the bar to their decisions. Judicially created rules are, in reality, the joint product of judges and of the "private lawyers who by their cunning in the law have gotten the ear of the judicial legislators." *Id.* at 645. This control is so important, Austin believed, that it prevents deviations from existing law that are inconsistent with "the interests of the community, or, at least . . . the interests of the craft." *Id.* He optimistically believed that the two sets of interests "do, in the main, chime." *Id.* Finally, judges manifest a high regard "for the interests and expectations which have grown up under established rules: or under consequences and analogies deducible from them." *Id.* at 646.

²⁴⁵ *Id.* at 647.

²⁴⁶ *Id.* at 646.

²⁴⁷ *Id.* at 661.

technically superior to existing statutory rules. Indeed, Austin even stated that "the law of every country which was made by judges has been far better made than . . . statutes enacted by the legislative."²⁴⁸ Austin believed that the technical superiority of judge-made rules is the major reason for the sovereign's acquiescence in judicial legislation.²⁴⁹ This situation is likely to continue until legislatures are much better qualified than they have been in the past, a possibility he doubted would ever be realized.

Although Austin believed that the benefits of judicial legislation have outweighed its costs, he refused to believe that this calculation is written into the nature of things. The drafting and implementation of a comprehensive and ideal code of laws is unlikely, but not impossible. The realists' disagreement with this notion reflects, in part, a differing understanding of the limitations of legal rules as a means to control or dictate judicial decisions. Austin and the realists also appraised somewhat differently the costs and benefits of judicial legislation. Although Austin obviously was more conscious than many of the realists of what he believed to be the disadvantages of judge-made law, the practical significance of these differences is not immense. Austin and the realists disagreed largely about the place of judicial legislation in a highly problematical future. They would have agreed that, in the meantime, judges will and should continue to make law.

CONCLUSION

This study's examination of the relationship between the ideas of Austin and the legal realists provides the basis for a number of important conclusions. First, there are realistic elements in Austinian positivism as well as positivistic dimensions to legal realism. Austin and the realists shared an empirical orientation that conditioned other similarities in their ideas. Although they ascribed different degrees of importance to conceptual clarity and precision, they agreed that it is important. They also developed conceptions of law that are similar in several respects. Furthermore, their approaches to the evaluation of law demonstrate a common result-orientation. Finally, Austin and the realists emphasized the wide scope of judicial legislation in the legal systems of their respective countries.

At the same time, Austin's intellectual and professional orientations differed significantly from those of the realists. These differences may have influenced the numerous tendencies within the realist move-

²⁴⁸ J. AUSTIN, *PROVINCE*, *supra* note 2, at 191.

²⁴⁹ 2 J. AUSTIN, *LECTURES*, *supra* note 2, at 612.

ment that have no parallel in Austin's jurisprudence. First, the realists took a more pragmatic approach to the definition of law than did Austin. Second, the realists developed conceptions of law that emphasized the decisions of officials and the likelihood of sanctions. Moreover, the exponents of realistic jurisprudence stressed the actual behavior of officials. Although the realists' approaches to the study of law branched out in many directions, their common behavioral focus contrasts sharply with the thrust of Austin's analytical jurisprudence. In addition, few traces of his enthusiasm for a detailed and complete code of laws are evident in the realist movement. Unlike Austin, the realists stressed the inevitability of a large amount of judicial legislation, largely because of a belief in the inherent limitations of legal rules, which is not found in Austin's analysis.

The legal realists thus developed various ideas that Austin did not in any way foreshadow. The significance of these differences varies. In some respects, the realists attempted to answer questions that Austin had not raised. In other respects, the realists and Austin gave different answers to the same question. Regardless, awareness of the differences between them is necessary for assessing what is distinctive about legal realism.²⁵⁰

²⁵⁰ This Article's comparison of Austin and the realists is not, by itself, sufficient to analyze the distinctiveness of the realist movement. Some of the realists' ideas that have no analogue in Austin's writings were to a greater or lesser extent adumbrated by other jurists, such as Justice Holmes, John Chipman Gray, and Roscoe Pound. Analysis of the relationship between their ideas and those of the realists is essential for determining the distinctiveness of the realist movement. Even so, the realists owe a much less heralded debt to John Austin, one which this study has sought to explain.