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LEGAL REALISM: ITS CAUSE AND CURE*

GRANT GILMORE†

From time to time there arises a school of legal thought which undertakes to make a clean sweep of the errors of the past and establish truth. In this country, for half a century, such a movement has been running its course under the name of Legal Realism. Today the controversy over realism seems to have died out; the time may have come when we can profitably inquire what it was about.

When we look back at any intellectual movement which violently engaged men's minds, it is easy to see that the premises were shaky and the promises overstated. But that is not enough. The mere fact that a particular way of thinking absorbed the best minds of a generation puts us on notice that something fundamental was going on—even though, from our vantage point in time, we may be able to see that what was going on was not what, at the time, seemed to be going on.

At first glance realism appears to have been a high-level jurisprudential or philosophical movement, based principally in the law schools, which offered a critical analysis, of a destructive or negative character, of certain then widely accepted theories of law. While the realist controversy was at its height, it seemed to be a matter of abstract academic debate, at a far remove from the work-a-day questions which concern the practicing lawyer and his clients. I believe, however, that the academic philosophers and the practicing lawyers were closer together than they realized or would have cared to admit: realism was the academic formulation of a crisis through which our legal system passed during the first half of this century. I shall draw your attention to some aspects of that crisis and how they were met: first, however, it will be helpful for us to consider the nature of the realist criticism.

Legal realism may be viewed as an elaborate commentary on an attitude toward law symbolized by the figure of that master of epigram, Justice Holmes.

*For a number of years Yale University has conducted each June a series of Alumni Seminars for the pleasure or profit of graduates of the University who return to New Haven to attend the commencement exercises or class reunions. In 1960 one of these Seminars was presented under the auspices of the Law School. This paper was one of several which were delivered on that occasion. It was, therefore, prepared for an audience made up principally of non-lawyers. This fact may serve to explain why some matters are dealt with in a manner which would be inappropriate in a discussion prepared for an exclusively professional audience.

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The life of the law, Holmes told us, has not been logic; it has been experience. And again: the common law is not a brooding omnipresence in the sky. And again: general propositions do not decide concrete cases. The habit of epigram survived in the later realist generations. Prejudice, said the late Felix Cohen, is the term we use to describe our opponent's facts; fact is the term we use to describe our own prejudices. The bias of realism was anti-conceptual, anti-doctrinal. It put enormous emphasis on facts—the facts of a case, the facts of an economic situation, the facts, it may be, of life. But even as to facts, the realists maintained an ingrained scepticism.

The trouble with the nineteenth century, said the realists, was that lawyers believed, and law professors taught, that law was a symmetrical structure of logical propositions, all neatly dovetailed. The truth or error, the rightness or wrongness, of a judicial decision could be determined by merely checking to see whether it fitted into the symmetrical structure; if it fitted, it was right; if it did not fit, it was wrong and could, or at least should, be disregarded. Moreover, law students could be trained by being made to read carefully selected collections of correct cases, from whose study, by induction, they could arrive at the correct general principles.

All this, said the realists, was nonsense. As a countervailing truth they proposed something like the following formulation. Law is not static but dynamic. It changes as society changes, both forever in an equilibrium precarious and unstable. The symmetrical structure of dovetailed logical rules has never existed—by necessary hypothesis could never exist. Generally stated rules of law do not so much explain as conceal the bases of judicial decision. A judge's holding in a case is an *ad hoc* response to a unique state of facts, rationalized, after the event, with a dissimulation more or less conscious, and fitted willy-nilly into the Procrustean bed of approved doctrine. The motivations of the judicial response are buried, obscure, unconscious and—even to the judge—unknowable. The value of a case, for purposes of study, lies in the actual decision—on this state of facts A won and B lost—rather than in the reasons given for the decision. The predictive value of past cases for future decisions is therefore slight or nil: the theory of precedent is simply a gimmick by which clever judges fool other people and stupid judges occasionally fool themselves. The study of doctrine—of rules of law—is sterile and absurd.

I have overstated the realists' position, as the realists overstated the position of their predecessors. It must be borne in mind that "realism" was never a well organized movement—indeed it was never organized at all. There were almost as many strands in realist thinking as there were realists. Some devoted themselves to the attack on the "conceptualism" of the past: at its worst this line degenerated into a childish nihilism. Others insisted principally on the need for the law—or for lawyers—to take over the methods of science; this meant for some the count-weigh-and-measure techniques of the natural sciences and for others the less rigorous techniques of the social sciences (among which law was frequently listed). Still others placed the new insights at the

service of political or ethical theory: since law had been freed from the dead hand of the past, it should in its new freedom be made to serve the values of a good society. If pursued far enough, this line of inquiry leads, on the one hand, to the conclusion that law is simply an instrumentality to be used by the state and, on the other hand, to the opposite conclusion that there exists a natural law (the law that "ought to be") which prevails over the positive law (the law that "is," as announced and enforced by the appropriate organs of state authority). Unraveled, these various strands in the skein of realist theory lead to surprisingly diverse conclusions; when gathered up, they remain discernibly related to each other and form a pattern.

It may have occurred to you that I have been using the term "law" loosely—referring now to the decisions of judges, now to the total body of positive law, decisional and statutory, now to the fundamental principles by which society is organized. I shall not apologize for my imprecisions nor do I propose that we clear them up by proceeding to a definition of terms. Intellectual discussion can be made too tidy; when our categories become over-defined we lose touch with reality. At all events, the realists used the term "law" as a symbol of multiple reference and we shall be faithful, at least to history, in leaving that usage undisturbed. The core meaning is law in action: the work of courts and legislatures. The other, broader meanings come in as overtones, to add richness, depth and confusion.

The realists claimed that the traditional explanations no longer described with even a remote approach to accuracy what our legal system was and how it worked. I am sure they were right. We may go a step further: during the half-century, more or less, of the realist controversy our legal system was undergoing profound modifications of a sort which were not (and could not have been) apparent to immediate observers. I shall attempt to describe some of these modifications and to suggest why they were inevitable. We shall limit our discussion to the area of so-called private law—not because comparable developments could not be traced in the field of public or constitutional law (I am sure that they could)—but because the limitation will serve to focus our discussion.

There are two preliminary observations to be made. The first is that, under the complicated scheme of government which we adopted, the great bulk of private law questions was left to the states. The Federal Government played almost no part in the establishment or development of the law of property or of contracts or of torts. In part the remission of these questions to the states resulted from what came to be the accepted meaning of the Constitutional provisions limiting the powers of the Federal Government and preserving the powers of the states. It is also true, however, that the Federal Government long remained inactive in areas where it had a clear Constitutional right to act—in areas, indeed, where the states were forbidden to act.

Secondly, the states left the job almost entirely to the courts. The legislatures played an astonishingly minor role. There was an occasional legislative

intervention designed to channel the course of judicial decision in a new direction. But such intervention was exceptional: throughout the nineteenth century the courts were left largely to their own devices. Our private law was, overwhelmingly, judge-made law. We must therefore inquire how the judges went to work.

We inherited from England a tradition of common law—that is, of decisional or judge-made law. Courts decide only the cases that come before them and their decisions generally bind only the parties litigant. Nevertheless, it is a part of our tradition that courts must decide particular cases in the light of historically developed general principles and that instead of merely giving judgment—say, that A must pay B damages for breach of contract—the court must explain in a reasoned opinion why A must pay. Another vital element in the tradition is that decision should be consistent: if it is decided today that a certain course of conduct by A amounts to a breach of his contract with B, so that A must pay damages, and if tomorrow it is shown to the court that C's course of conduct toward D was identical with (or very similar to) A's toward B, then C, like A, should be charged with breach and made to pay damages. This is the theory of precedent, of standing by the decisions: in lawyers' Latin, *stare decisis*. Although these propositions may seem too obvious to be worth stating, it is helpful to remember that legal systems which recognized none of them have been set up, and have worked, it may be, quite as well as our own.

We must not assume that, when this country began its staggering task of industrializing an almost unsettled continent, we had anything like a complete structure of law. Any system of law is complete in a purely formal sense: that is, if you take your case to a judge, he will decide it. There are no issues incapable of being authoritatively decided. On the other hand, no legal system provides answers in advance to questions that have not yet been asked. Our courts in the early nineteenth century were writing on a largely clean slate. There is little in our law of contracts, for example, that has any recognizable ancestry before 1800. The explanation for this is not that we had discarded English law and were deliberately making a fresh start: there was in fact no English law for us to discard and it is quite as true of England as it is of the United States that the law in this and in many other areas was a nineteenth century invention. Our rules of contract came into existence in the course of the industrial revolution, as the organization of business assumed what we would recognize as a discernibly modern form and as personal, rather than real, property became the chief repository of wealth.

The process of case-law evolution, after running smoothly for a hundred years, began to show signs of strain after 1870 or 1880. The need for reform was suggested from the law schools, from the courts, from the practicing bar; the first steps toward reform were indeed taken. An unusually perceptive critic like Holmes could sense what was going on more clearly than most. But a note of vaguely articulated unease fills much of the legal literature of the last quarter of the century.

I suggest that our case-law system was beginning to break down of its own weight. Toward the end of the nineteenth century the rate of acceleration in printed case reports became nightmarish. Digests of all the reported cases decided from the institution of courts in the American colonies until 1896—a period of over two hundred years—take up three shelves in the Law Library. Digests of cases decided since 1896 fill more than thirty shelves. This flood set in during the last quarter of the nineteenth century; not only were more courts in more states deciding more cases for more people, but a much greater proportion of the cases being decided was finding its way into print. You are familiar with the revolutionary effect of the discovery of printing on civilization. An almost equally revolutionary event in our legal history was the establishment of the National Reporter system during the 1870's: the West Publishing Company systematically undertook to publish all the opinions handed down by the federal courts, the highest state courts and, in increasing number, lower state courts. Whether the West Publishing Company, like the discoverer of the atomic bomb, should be looked on as a benefactor of mankind or as an enemy of the human race is a problem of moral philosophy with which a lawyer is ill equipped to deal.

When the number of printed cases becomes like the number of grains of sand on the beach, a precedent-based case-law system does not work and cannot be made to work. A hundred years ago a lawyer, in the course of his professional career, could—and many did—become familiar with the entire body of case law, both in this country and in England. In any given field, a competent lawyer could easily master all the available precedents. In this country it has been a long time since even the best lawyer could make that claim, even in the narrowest field.

But the effect of the multiplication of cases to infinity is not merely an accretion of intellectual anxiety among lawyers. This phenomenon strikes at the roots of a case-law system. The theory of precedent depends, for its ideal operation, on the existence of a comfortable number of precedents, but not too many. Such a theory could indeed establish itself only in a legal system already mature: only in relatively modern times does it become articulated in English law. There must be a substantial accumulation of the wisdom of the past before the courts can begin drawing on it for the construction of the bridge along which we move toward the future. But when the store of raw materials becomes too great, too varied, too confused, the bridge-building process turns into a random operation. When it becomes possible to cite to a court not merely two or three prior cases which bear a reasonable relationship to *this* case, but dozens of cases, many of them so nearly identical on their facts as to be indistinguishable, decided every which way—then what is the court to do?

One thing the court will do—to judge by our own experience—is radically to change its way of using cases. I am indebted to an English colleague, now transplanted to our alien soil, for the observation that English lawyers have

an approach to cases which is at the opposite pole from the approach which has been bred in the bone of every American lawyer for generations. The English have the great good fortune of being less numerous and less litigious than we are, and of having a single, instead of a multiple, system of courts. The English are still apparently living with a case-law system, even though it is reasonable to suppose that they too are gradually approaching the jumping-off point. In England, I am told, the case "on all fours"—the case whose facts are indistinguishable from the facts of the case at bar—far from offering itself in a drift of carbons as it does with us, hardly exists at all. Therefore in England the precise facts of prior cases are not looked to with particularity; what is important in the precedents—the cases which, being in the same general area, are in point—is the process of reasoning by which they were decided, the general principles which they illustrate.

Having been trained as an American lawyer, I find this approach to the use of precedent shocking. I know that a case stands on and for its own precise, particular facts. I tell my students with wearisome iteration: Never mention a case without stating its facts; Never quote general language from an opinion, divorced from the factual context in which the language was delivered; take care of the facts and the law will take care of itself. This is the end result of fifty years of experience with an overburdened case-law system. Our use of precedent has become self-defeatingly narrow. We chop logic, we split hairs, we distinguish the indistinguishable. And as we do so, the course of judicial decision, following our impossible refinements, becomes capricious and unpredictable. If you sharpen the point of a pencil too fine, the point—or the pencil—will disappear. So with our use of precedent.

Long before these pressures had approached breaking-point, isolated voices had begun to argue in favor of a general codification. This argument, in Anglo-American legal history, was authoritatively formulated at a time when the case-law system was working well—when indeed it had a century of vigorous life before it. In eighteenth century England Jeremy Bentham sought, with powerful naiveté, to demonstrate the inherent superiority of codified law over case law. In this country the argument for codification was forcefully stated by a protean figure of the early nineteenth century: Joseph Story, justice of the Supreme Court of the United States for over thirty years, professor of law at Harvard during much of the same period, author of textbooks on practically everything. Toward mid-century, David Dudley Field of New York came within a hair's-breadth of persuading that state to codify its law; his brother Stephen, who emigrated to California with the Forty-Niners, carrying the Field Codes in his slim baggage, succeeded in having them adopted as the basic law of the Golden State. After 1850 professional interest in a general codification became continuous and, we might say, respectable.

We may usefully pause to consider what we mean by the ambiguous term: codification. "Code" is often used as a loose synonym for "Statute": when the legislature passes a statute which regulates an area previously left to the

decisional law, lawyers are apt to say that the area has been "codified." I think that we can make a better use of the two terms: A "statute," let us say, is a legislative enactment which goes as far as it goes and no further: that is to say, when a case arises which is not within the precise statutory language, which reveals a gap in the statutory scheme or a situation not foreseen by the draftsmen (even though the situation is within the general area covered by the statute), then the court should put the statute out of mind and reason its way to decision according to the basic principles of the common law. A "code," let us say, is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source. We may take another, subsidiary distinction between "statute" and "code." When a "statute," having been in force for a time, has been interpreted in a series of judicial opinions, those opinions themselves become part of the statutory complex: the meaning of the statute must now be sought not merely in the statutory text but in the statute *plus* the cases that have been decided under it. A "code," on the other hand, remains at all times its own best evidence of what it means: cases decided under it may be interesting, persuasive, cogent, but each new case must be referred for decision to the undefiled code text.

Having proposed these definitions and distinctions to you, I must caution you against accepting them. For one thing, our two terms—statute and code—are not customarily used by lawyers, or even by law professors, in these carefully differentiated senses. In the second place, while it is helpful for purposes of discussion to separate our two categories sharply, set them up as black opposed to white, in real life they merge into each other with infinite gradations.

We did not of course get—we do not have now—a fullblown codification on the French or German models. It is a facet of our national genius that we reject clear-cut solutions. We make do, we tinker, we shore up the falling structure with an ingenuity that verges on madness. So here: we proceeded to codify—or at least reduce to statutory form—various bits and pieces of our law, going about it, however, in such a haphazard way that not even God could have told what we were about.

The organization through which were taken the first steps toward codification of our private law—if indeed that is what they were—was the National Conference of Commissioners on Uniform State Laws. This cumbersome name suggests an aspect of our problem on which we have not yet commented. Matters of private law were left initially to the states. That meant, to start with, a handful of homogeneous jurisdictions strung out along the Atlantic Coast. By the end of the century, it meant forty-odd jurisdictions, spread across a continent, living under the most diverse conditions of culture, climate and economic organization. Each state was, or had, a law unto itself: the most

obvious symptom of our developing legal crisis was the irreconcilable diversity of the rules of law applicable to commercial transactions which were themselves no respecters of state lines. To this evil, the device of a system of nationally uniform state laws, cast in statutory form, suggested itself as a hopeful solution.

The National Conference of Commissioners first addressed itself to matters of basic commercial law. Its early labors were rewarded with astonishing success. Uniform Statutes on the law of negotiable instruments and of sales, to mention only two, were quickly adopted by most, or by all, states. In less than thirty years a major segment of our private law was restated in statutory form—was, perhaps, codified.

These early "Uniform Acts" were certainly not treated as codes (in the sense in which we are using the term); indeed, they were hardly treated as statutes. The general understanding of the profession seems to have been that the new statutes were designed merely to restate the common law. The lawyers and judges, who were entirely familiar with the common law, went on thinking, talking, arguing and deciding cases, as if the statutes had never been passed. In time, the common law background faded from consciousness and the statutes had to be seriously examined—but that took a generation or more.

After 1900, the task of codifying the common law became the never-ending preoccupation of the state legislatures. Statutes, uniform and nonuniform, increased by geometrical proportion. But many basic areas of the law for a long time resisted, and in some instances continue to resist, the process. Yet even where the legislatures forebore to intervene, the progressive breakdown of a relatively pure case-law system manifested itself in odd and interesting fashions. It is of the essence of such a system that it defies precise analysis: it is fluid, like mercury to the grasp. It can be described in a series of rough approximations; it resists being pinned down by any form of authoritative statement. Yet between 1920 and 1940, the attempt was made to pour the common law into a rigid mold. This extraordinary operation was performed by the American Law Institute, whose membership comprised the most distinguished practicing lawyers, judges and law professors in the country. During twenty years, the Institute produced statements, called for some reason Restatements, on almost every branch of the common law: we have a Restatement of Contracts, a Restatement of Torts, a Restatement of Property, and so on. The best of the Restatements were of the highest professional quality and have had, deservedly, a wide influence.

The Restaters may not have asked themselves why they were doing what they were doing; it is sufficient unto the day to find some task not demonstrably anti-social and to work at it. They were, however, producing something new under the sun: a common law in statutory form, distinguishable from statute or code only in that it lacked the legislative sanction. Now courts if they were so inclined—and many were—could "follow the Restatement" exactly as they would follow a statute. The Restatement episode fits into our argument

as an attempt, of the highest order of interest, to preserve the viability of a case-law system which, in its pure form, had outlived its time.

I suggested earlier that an instinctive judicial response to the problem of too many cases had been the development of an extraordinarily narrow theory of precedent. We may now note a second phase of judicial response, which becomes discernible only when the legal situation at large, so to say, has been significantly modified. I have in mind a tendency among judges to refuse to make great decisions.

In the great days of the common law the great judges, whose names all lawyers revere, were bold and daring innovators, who made law with a sort of joyous frenzy: Mansfield, Marshall, Kent and many others. Today the pace has slackened: our judges look before they leap. Cardozo was one of the greatest of modern judges: his preferred technique was, in a series of cases taken as opportunity presented them, to inch almost imperceptibly toward a goal which was, I have no doubt, clear in his mind from the beginning. Occasionally in Cardozo there is a throwback to the great days: the most recent case I can think of in which an American court revolutionized a major legal doctrine in the field of private law is a case of Cardozo's: the date was 1916. But by preference our judges assume a more humble role.

Along with this attitude of timidity in innovation goes, naturally enough, an attitude of increasing deference toward the legislative command. In the nineteenth century, the principal canon of statutory construction was: any statute in derogation of the common law—as, of course, what statute is not?—must be strictly construed. That is to say, the courts, despite and not infrequently in the teeth of the statute, reserved for themselves the greatest possible freedom of manoeuvre. Since then, we have made much progress. Courts have learned to construe statutes broadly, not narrowly, and indeed show signs of going even further: in the light of what might be called the principle of statutory radiation, they apply the legislative mandate even beyond the area to which the statute, according to its terms, is limited. In short, the courts have been learning to treat statutes as if they were codes.

Statutes themselves have changed radically in character. The typical statute as recently as a generation ago was drafted in a style of loose and vague generality. The draftsmen seem to have been little concerned with a precise use of terms: ambiguities, inconsistencies and downright contradictions abound. Furthermore the draftsmen were accustomed to paint with a broad brush: the older statutes state a general proposition without filling in the subsidiary details. Statutes so drafted were largely dependent on judicial construction to reduce the statutory generalities to particular meanings. We have now become accustomed to a quite different style of drafting, which is precise, highly technical and detailed to an extraordinary degree. This new style seems to have come in with the federal regulatory statutes of the New Deal period, but has since that time become standard for all legislative enactments state and federal, in the area of private as well as of public law.

We do not yet have enough experience with our modern, tightly drafted statutes to know how well they will work in the long run. One of the strengths of the older statutes was their imprecision and formlessness: as conditions changed, the courts, with almost as much facility as if they were dealing with a judge-made rule, could mold the old statute to the new conditions. Modern statutes are much less susceptible to judicial manipulation. An unexpected change in the business cycle might leave the courts powerless until the complicated mechanisms of the state and federal legislatures could be set in remedial motion. One thing does become clearer with each decade—going off the common law standard is like going off the gold standard—you can never go back. Of the making of statutes there is, and will be, no end.

There is one last piece to be produced for our jig-saw before (hopefully) we set about assembling the pieces. I have insisted on the preponderant role played by the states as architects of our private law. The federal giant, in this area, is just beginning to stir: with his long-delayed entrance, we are, it may be, at last catching sight of the principal character.

Our present subject is not the massive intervention of the Federal Government in all areas of social and economic life—although I am sure that the events which I will briefly rehearse are not unrelated to that major political event of our century. In the reflecting pool of our private law, we sometimes catch a mirror image of the great events that take the public eye.

Well over a hundred years ago in a case called *Swift v. Tyson*, Justice Story, the apostle of codification, delivered an opinion for the Supreme Court of the United States which announced the doctrine that in matters of general commercial law the federal courts were not bound to apply the common law of any state. We may look on the rule of *Swift v. Tyson* as an early—perhaps the earliest—attempt to find a workable solution to the bothersome problems posed by the increasing diversity of the laws of an increasing number of states. The solution was not eminently successful: while the federal courts were not bound to follow the state courts, neither were the state courts bound to follow the federal courts, which led to the unhappy situation that winning or losing your case might depend on which set of courts you happened to get into.

In 1939, in one of its most celebrated reversals, the Supreme Court, speaking through Justice Brandeis, announced the discovery that *Swift v. Tyson* had been unconstitutional all along: the federal courts must follow state decisional as well as state statutory law in all cases where state law (and not federal law) applies. The name of the overruling case was *Erie Railroad Company v. Tompkins*: working out its implications has ever since provided a livelihood for many lawyers and headaches for all federal judges. But I do not propose to bore you with the ramifications of *Erie* theory.

Erie seemed to announce that state law should prevail, unless displaced by a federal statute, and that there should be no competing federal common law. The point I should like to make is that the Supreme Court, even during the years while it has been diligently tending *Erie*, has, almost unconsciously as

it were, been allowing a vast new growth of nonstatutory federal decisional law to spring up and run wild. Since *Erie* it has been discovered, for example, that the law applicable to any transaction to which the Federal Government, in any of its capacities, is a party is federal law: if there is no applicable federal statute, the court is free to improvise and need not follow the law of any state. Even more interesting is a principle which is beginning to emerge in the application of federal statutes. Since the establishment of the Republic it has been assumed, almost without discussion, that a federal statute is a limited thing, just as the Federal Government is one of limited powers. When a gap appears in a federal statute, it should be filled in, according to traditional theory, by resort to the great corpus of the common law—that is, by resort to state law (since, except in the limited area staked out by *Swift v. Tyson*, there was assumed to be no general federal common law). The new principle gives to federal statutes an area of much wider application: gaps, it now appears, should be filled in by extrapolation from the statute itself. Thus, we might say, each federal statute carries with it a sort of floating penumbra of potential common law all its own.

We have come a good way from our starting point. We have noted several types of response to what I have called the break-down of the common law system: the narrowing of the theory of precedent, the abdication of judicial power to innovate, the replacement of decisional law by statute, the attempt to achieve nationally uniform state laws, the current indications of a federalization of even our private law, the tendency to promote statutes to a code status. The movement called legal realism was, I suggest, still another type of response to the same fundamental crisis.

Legal realism was essentially a demonstration that the system of law which had evolved in this country had become intolerably overburdened and unworkably complex. Realism in this century has been an American exclusive: it has had no counterpart in England or in the European countries whose legal systems are closely related to our own. It was a response to an American crisis—a crisis which was precipitated by our phenomenally rapid national growth in population, in wealth, in diversity of economic organization and cultural circumstance. We need not go the length of saying that the movement we know as realism is unprecedented. If, for example, we knew more about Roman law than we do, we might be able to trace a comparable reaction during the period when that city-state, reluctantly and almost overnight, became a world empire.

It is familiar learning that for hundreds of years mediaeval scholars, instead of using their own eyes, relied uncritically on the often demonstrably inaccurate observations of the Greeks: one aspect of the great rebirth of Western thought which we call the Renaissance was that people began to see what was actually in front of them. In somewhat the same way, the realists took a fresh look at the world and discovered that much had changed since Blackstone's time. The realist revolution had its greatest success in its onslaught

on nineteenth century conceptualism—which was overready to assume that a well-articulated set of rules would by itself enable our legal system to withstand the shocks of a new era. The realists probed, with striking success, into the nature of the decisional process. They created a professional climate of opinion which immensely facilitated the making of necessary adjustments within the traditional framework of our law. They did much to make of law a more useful and flexible instrument for the resolution of social conflicts.

Yet even while the realists were working out their analysis of what was wrong, the law, by a sort of instinctive reaction, was proceeding to purify itself. The several tendencies which we have noted worked, and work, toward simplification—toward a more precisely stated, more manageable system. What had to be done was done—not by a revolution, not at the cost of a break with tradition, not as the result of a “scientific” diagnosis and treatment. Without anyone quite knowing how, the broken-down machine was put back in running order—as if by an inspired job of tinkering.

The crisis, of which the realist movement was a symptom, and the manner in which that crisis was for a time met, are typical of the nature and the process of law. Law cannot be, since society never is, stable. A system which works well for a generation or a century must sooner or later come in for repairs. No doubt the more successful a system has been in its own time, the more delayed and difficult will be the process of renewal. If we may judge by the violence of the realist reaction, the principal trouble with our law was that it had worked too well for too long.

Law, like a radioactive substance, renews itself through a process of continual decay. The disease which threatens to destroy the *corpus juris* sets in motion the antibodies which enable it to survive. In the nature of things, crisis, after a period of repose, can be succeeded only by crisis. Change is the only constant. Yet in taking stock of the extraordinary changes which have marked¹ our legal history over the past fifty years, we must not overlook how much in our tradition has been preserved. The more things change, the French proverb reminds us, the more they are the same: our gains, it may be, are illusory, but so are our losses.