Legal Realism Now?[1]

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I. Introduction

Legal realists have accomplished quite a bit since Holmes. Some have succeeded in swallowing whole fields of law with economic jargon. Others have eaten away at law's mystical innards by exposing its racism, sexism, and classism. And still others have evacuated from the legal intestines the digestible bits so savory to the mouth of the 19th century jurist: the *categories*. What is left of law in this picture? One answer, for many realists, is not much. Law is a policy tool, don't you know? It is designed to *do* things. And it is the task of scholars to show how law does things, not to identify "transcendental nonsense."[2] Surely Felix Cohen has a point.

But, as Thomas Grey reminds us, even the most tough-minded realist had a love for categorization and systematization.[3] True, it was with an eye toward how useful the exercise, but not always. Much of Adam Mossoff's essay, *Trademark as a Property Right*,[4] could easily be regarded as engaging in the nonsense legal realism left behind. This is how Ramsi Woodcock characterizes it in his response, *Legal Realism: Unfinished Business*.[5] Formalistic, conceptual analysis is, on this view, an analytical black hole. But this is an exaggeration, a mischaracterization. It is true, as Brian Frye notes, that Mossoff's essay makes a "valuable contribution,"[6] even if it is not the kind of contribution of which many are fond. More than that, though, Woodcock's response reveals a curious analytic amnesia about the nature of conceptualization and realism. And it is one that traps realists into a lexical vortex not unlike the one they so eagerly deride.

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[1] Title adapted from Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988).

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

[3] Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 822–824 (1989) ("Since the heyday of the Realists, legal thinkers have tended to assume that legal taxonomy and conceptual doctrine-building necessarily rest on Langdellian premises. Behind this assumption often lies the instinctive nominalism, or cult of the concrete, that denies all practical importance to generalization and abstraction. Yet no pragmatist[, including Holmes,] would endorse such an antipathy to generalization."); *see* Singer, *supra* note 1, at 470-72 (noting that even realists acknowledged the usefulness of generalizations in certain circumstances).

[4] Adam Mossoff, *Trademark as a Property Right*, 107 KY. L.J. 1 (2018).

[5] Ramsi A. Woodcock, *Legal Realism: Unfinished Business*, KY. L.J. ONLINE (2019).

[6] Brian L. Frye, *Metaphors on Trademark: A Response to Adam Mossoff, "Trademark as a Property Right"*, KY. L.J. ONLINE (2019).

II. Realism and Formalism

The realists replaced talk of legal metaphysics with power,[7] and later economics, race, sex, and so on.[8] I must admit that I regard this development as positive. Replacing formalistic legal internalism—the view that legal categories have inherent conceptual features, and that legal analysis proceeds by deductive logic—with a more nuanced understanding of law as an interactive, social process was an important criticism. It enabled us to better understand law's effects and how we might change them. And yet in attempting to escape the autonomous, legal hermeneutics characteristic of formalism, some analytical techniques developed their own kind of internalism.

Consider the economic analysis of law, where formalistic internalism of a different kind carries on without a hint of irony. The more one reduces legal issues to the economic lexicon, the more it resembles the formalist metaphysics it ridicules. Does fair use solve market failures? Does intellectual property law increase efficiency? Do patents have spillover effects? Should a legal entitlement be protected by a liability rule or a property rule? Does the legal rule create a positive or negative externality? Or, best of all, does the law increase social welfare? The task of the scholar answering these questions is to categorize things in the right way, in a way that allows an economic analysis. But in these cases the economic analysis *is* legal analysis. And what did the formalists want to do except legal analysis? If we follow the arguments to their most basic form—and even to their regular appearances in scholarship—we wind up in the world of abstractions legal realism promised to leave behind.[9]

That's not to say there aren't real differences. One of formalism's rather astounding claims was to offer a method for "deducing" "right" answers from judicial decisions or statutes. Economic analysis of law, on the other hand, one-ups formalism by providing not merely answers but also questions. Economic analysts of law want policy to determine law, and economics to determine policy. When the analyst categorizes legal rules or doctrine, she does so to understand how to achieve particular policy results—those that maximize (or promote) efficiency.[10] One ought to be able to determine whether a rule is correct by evaluating whether it achieves the desired economic result. Right answers here are of the economic, not the formalist, kind.[11] So, too, are the questions.

I don't mean to suggest that legal realism is the conceptual equivalent to law and economics; it certainly is not. I also don't mean that other features of legal realism fail to surpass legal formalism; they certainly do. But it's a mistake to think

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[7] See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 17-67 (Oxford Univ. Press 2013), for a general review of legal realist themes.
[8] CRITICAL LEGAL STUDIES (James Boyle, ed., N.Y. Univ. Press 1992).
[9] *See, e.g.,* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (Harv. Univ. Press 2006).
[10] The two standard versions of efficiency are Kaldor-Hicks and Pareto Efficiency.
[11] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (Harv. Univ. Press 2009). We should, though, remind ourselves that Posner and the formalists both share the dubious honor of proclaiming their preferred method a "science."

that conceptual analysis *as such* is a waste of time because we should concern ourselves only with policy. Not only does conceptual analysis sometimes yield important insights, it's also critical to a functioning legal system. Formalism's toolkit—analogical reasoning, adherence to precedent, conceptual analysis, etc.—is not just obscurantist cover for personal judgments, policy, or otherwise. Its machinery also provides a means for avoiding discussions of policy when it is impractical or imprudent.

Sometimes, maybe even often for trial judges, there is no obvious policy analysis to be had. Much of the trial judge's work involves discovery and technical procedure. Legal rules do not always and in every case present the judge with clear policy choices. To ask them to consider the policy consequences of every decision they make, to ask them to predict and control future cases and strategy, is a burden too great for even the most accomplished jurist. And, even where consideration of policy is possible, it may not be desirable. If current events tell us anything about law, it's that formalism may be law's redeeming virtue as well as its mystical vice. Law can't and shouldn't be all politics, power, race or economics, just as it shouldn't be all internal, conceptual wheel-spinning. Isn't this what realism taught? This is why a rather well-known exponent of judicial pragmatism—one who has swooned over economic analysis of law[12]—suggests that judges might resort to the tools of formalism to build a legal decision.[13]

And yet we have grave unease about the self-proclaimed judicial scientist, or, for that matter, the more contemporary judicial umpire. Our worries stem from insights realism has wrought. And they are real worries. But if the formalism, so dominant in judicial chambers, cannot give us "right" answers, does it reduce the judge to a black-robed huckster? Are those well-meaning men and women doing anything other than playing a kind of conceptual shell game? There is a nuanced answer.[14] In hewing to subtlety, though, we are susceptible to the failures so meticulously identified by the realists: a desire for right answers, and, more importantly, a method for deriving them.

Perhaps this is why economic analysis of law, more than some of the other realist approaches to law, has appeal. It is not merely a criticism of law's conceptual house of cards; it offers a "scientific" method for deriving "right" answers that are determined by "facts" in the "real world." Of course, the economist's real world is a fictional oversimplification. And the facts she uncovers are more institutional than

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[12] *See* David A. Simon, *Problems in Theory: Intellectual Property* (forthcoming 2019-2020) (manuscript on file with author).

[13] *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (Harv. Univ. Press 2005); RICHARD A. POSNER, THE PROBLEMATICS, *supra* note 11. Posner's version of judicial pragmatism, and many other versions, grew out of the philosophical school of pragmatism. *See* Simon, *supra* note 12.

[14] Realism never claimed to reduce judges to charlatans. It sought to illuminate the factors *other than formal legal analysis* that influenced judicial decision-making. *See* Singer *supra* note 1, at 470-75. Yet this produced a puzzle: how does one engage in legal analysis without "reverting to . . . formalism . . . or reducing all claims to the raw demands of interest groups?" *Id.* at 468. The question is "so hard that judges and scholars often reassert central elements of formalist reasoning they had hoped to discard." *Id.*

brute.[15] At least, though, economics professes concern for (some) consequences of legal rules. Formalism, it is true, tends to become, well, overly formalistic. In these circumstances it is easy enough to see the appeal of approaches like those favored by economists. Does this mean that law and economics—or, for that matter, consequentialism—is valuable and legal formalism is not? Hardly. Does the realism of the 20th century render "quixotic" the formalism of Mossoff's essay? Yes, but not entirely.

Although the method of legal formalism *as an objective arbiter of law* is passé, the *method itself* is not. If we try to determine what makes something property and what makes something not-property, have we done something valuable? Have we done something important by characterizing laws into liability and property rules?[16] Should we, while we're at it, waive off Socrates for annoying the gentry with pestering questions about nature of justice?[17] The answer depends upon *why* we are categorizing. Economic categories help us evaluate, within a certain conceptual system, which rules we might want to adopt and why. I doubt many people think the formalism does the same.

The skepticism about formalism is a direct result of legal realism's critique. Formalism-as-judicial-science is dead, and so legal formalism offers no *independent* reason to adopt its conclusions. But, then again, neither does economics. Didn't legal realism's razor cut judicial science at the knees, whatever its instantiation? Economics, then, must provide independent reason why we should accept its analysis before we run full boar into the thicket of efficiency, markets, and elastic demand. A system's emphasis on consequences is a good reason to favor it over a system that disregards consequences. We should remember, though, that non-consequentialist reasoning doesn't disregard consequences. And neither does formalism. Legal realists, above all else, have taken pains to point this out.

Then again, consequences are important. And if we claim—as do consequentialists—that *consequences are all that matters*, then it's quite important to understand what count as consequences and how and why they are measured. A particular passage from Woodcock's response is relevant:

> But what Americans care about is whether protecting brand loyalty is good or bad for consumers. Protecting brand loyalty might be good for consumers because it allows firms to reap rewards from investing in the production of better products. Or protecting brand loyalty might be bad for consumers because it magnifies the power of seductive advertising or the familiarity

[15] JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 27 (1995) (explaining that "brute facts" are those facts that exist independently of human institutions, and "institutional facts" are those that exist in virtue of human institutions, and also distinguishing the statement of brute facts, which requires the human institution of language, from the stated brute facts, which exist independently of language).

[16] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[17] PLATO, THE REPUBLIC (Page, Capps, & Rouse eds., 1937).

> generated by having been first to market to create irrational brand attachments, leading to higher prices and harm to more-innovative but less-well-known competitors. *Legal realism demands that the debate over trademarks be carried out in these terms*, in terms of effects.[18]

Notice the conceptual backsliding. The realist should not assume, as does Woodcock, that the language of economics determines the measuring of effects. The more pragmatic among us wonder not whether modifications to trademark law will increase consumer surplus or promote social welfare (as measured by economists) but rather *what effects does trademark law have on society?* Does it silence critics? Does it threaten to invade every aspect of our lives, to render every experience we have to one determined by trademark holders (in particular, large corporations)? Most importantly, we want to know if the effects are the kind we want to encourage? Mossoff's essay, it is true, does not consider such questions, but neither does Woodcock's.

III. Reality and Effects

An emphasis on effects shouldn't require us in every circumstance to point out the effects of some conceptual scheme or another. Or if it does, we should also place similar demands on the kinds of effects we are interested in, and why. It is natural for Woodcock to assume that a focus on consequences requires a focus on reality. Consequences presuppose events with effects in the world of sense. For Woodcock, Mossoff's conceptual analysis falls outside the scope of reality because it doesn't concern events in the world of sense—which Woodcock defines as the quantifiable effects of laws upon economic measures. No wonder he has difficulty finding in Mossoff's essay redeeming qualities. Formalism, in Woodcock's view, is not reality based. And because formalism is fantasy, it should be discarded. It's a curious conclusion to reach for someone who acknowledges the continuing dominance of formalism in legal practice and education.

Yes, of course, but *formalism's pervasiveness is precisely the problem*, according to Woodcock. Lawyers and judges engage in analysis that amounts to verbal smoke and mirrors. Formalism's reality is unreality. One cannot divine property rights by consulting sacred texts; one must examine the things as they function in the real world. I am sympathetic to this line of thought, but one should be careful not to run with it too far. Use in judicial opinions is use in the real world. The judge understanding the internal development of a concept is an effect in the real world. This is not an argument that judges or policy makers—or god help us, law professors—should ignore effects outside the courtroom. Only that effects inside (the head) matter, too.

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[18] Woodcock, *supra* note 5, at 8.

Sometimes these internal effects are significant. Where, for example, formalism provides a compelling account of law's doctrines or rules. Explanatory power is not only reason-giving, but reason-making. Realists should take note because many of realisms offshoots can't fully explain law.[19] Realism, at least less sophisticated versions, necessarily leaves out important conceptual features by its criticism of them as window-dressing. Worse still, it regards central features of law as distractions or, as in the case of morality, hopelessly empty. In economic analysis of tort law, for example, the idea of corrective justice is nowhere to be found. Yet this concept animates the principal features of the doctrine.[20] Mossoff's analysis is in a similar vein: it tries to account for *why*, internally, the laws are the way they are. Maybe it doesn't succeed. But this is something economic analysis, and much of realist scholarship, cannot do.

Is this reality? It sure feels like it. The problem realists have with this reality is that it tends to obscure the dynamics of power, privilege, and so on. But so does economic analysis of law. What realism teaches is not that the *economic method* will give us the answers that we want, but that the *language* of economics performs the same sleight of hand as legal formalism. Ideology infects the terminology and structure of economics—and, consequently, its application to law—to such a large degree that its most basic and foundational concepts (e.g., efficiency, markets) are taken as proper starting points for analysis. The realist dares not make any such assumptions: pressing on these tender spots in the skin of economic analysis reveals the rot that lies underneath. When the skin breaks and the realist peers inside, she sees that theoretical debates about terminology and its application have about as much impact on the infection as debating whether trademarks are property in the formalist picture. The indeterminacy of economic analysis must be confronted along with the indeterminacy of formalism.

This problem is not limited to economic analysis of law. Even the more general consequentialist picture, one to which I am somewhat partial, has its own schemata, which, like so many others, can't help but become all-encompassing. When one attempts to assemble a consequentialist version of ethics or law, she quickly begins to make accommodations to non-consequentialist reasoning.[21] To shield consequentialism from the attacks of deontology, however, consequentialism has an automatic "vacuum cleaner" that can suck-up any non-consequentialist attacks: *any non-consequentialist theory* can be "consequentialized."[22] If this is true, then we are left with a theory so encompassing and far-reaching it offers no meaningful concrete guidance; indeed, since the vacuum cleaner can suck up almost any deontological theory (or value), consequentialism itself falls victim to the kind

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[19] Here, I am thinking mainly of economic analysis of law.

[20] *See* JULES COLEMAN, THE PRACTICE OF PRINCIPLE (1999). *See also* JULES COLEMAN, RISKS AND WRONGS (1992).

[21] Simon, *supra* note 12.

[22] David McNaughton & Piers Rawling, *Agent-Relativity and the Doing-Happening Distinction*, 63 PHIL. STUD.: AN INT'L J. FOR PHIL. IN THE ANALYTIC TRADITION 167–185 (1991). *But see* Campbell Brown, *Consequentialize This*, 121 ETHICS 749 (2011). See, for example, Stephanie Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. Rev. 1487 (2017), for attempts at this in IP scholarship. See Simon, *supra* note 12, for an explanation of why this approach doesn't succeed.

of charge realists are accustomed to making: it doesn't capture the reality it deems so important.

IV. Conclusion

Despite its shortcomings, formal conceptual analysis, just as economic analysis or critical legal studies, does have value. It tells us about the nature of our conceptual structures, why we rely on them, and whether these assumptions should be revisited. In short, it is part of the legal realist project, even if its prescriptions may not be. More than that, though, formalism has an interesting and important reality-based feature: it *does* provide *judges* with an *internal* reason—a reason judges count as significant—to accept its conclusions, or at least consider them seriously. These reasons are not *just* window-dressing; they can act as real constraints.[23]

Woodcock is too quick to wave off conceptual analysis as irrelevant in the new age of empirically-driven law. At the same time that Woodcock recognizes that legal disputes are driven by the formal legal analysis, he notes that legal realism has destroyed this method of decision-making. Maybe law is outgrowing its formalist britches, but its practitioners still need to wear pants. We might laugh when one tries to determine the fundamental attributes of property in the same way philosophers now laugh at the quest to identify the essence of a table. But in the real world, the former impacts people's lives while the latter makes no difference whatsoever.[24] Better to be measured about the whole thing than to throw out old clothes before the new ones have arrived. If Mossoff offends legal realists, then, it may be because they have caught a glimpse in the mirror.

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[23] This is true even in the Court that has the most opportunity and freedom to make policy in the guise of law. *See, e.g.*, Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. OF POL. 1062 (2009). As noted before, even realists didn't really claim that judges were *unconstrained* – but rather they were constrained by factors other than law. In particular, they argued that formalism provided cover for the influence of these extra-legal factors.

[24] I don't mean to suggest that philosophy makes no meaningful contribution to people's lives, or has not influenced how people think or how, for that matter, science proceeds. But at least in this example, there is no import in a *legal* setting how this might make a difference.