THE REVOLUTION OF LEGAL REALISM AGAINST FORMALISM (HOLMES) AND THE COUNTER-REVOLUTION OF KANTOROWICZ

Edward J. Capestany

In his Riverside Lectures delivered in 1956 Professor Harry W. Jones identified the reasons for what he calls the "Natural Law-legal realism antagonism". To begin with, much of the Natural Law criticism of the realists was merely a returning of blow for blow. Early realist writings, particularly, contain a good deal of hit-and-run cynicism directed not only at the method but at the aspirations of Natural Law thinking. Second, and more important, the realists were answering different questions, attempting a long-needed analysis of the decisional *process*, without always making it clear that this was what they were about. There was underbrush to be cleared away –particularly the old slot-machine theory of judicial decision– and realist commitment to this limited mission was such as to create a widespread impression that the realists, as a group, were not at all interested in the problem of justice. This concentration on the decisional process as it is in fact, and consequent underplaying of the legal ought-to-be, was bound to draw fire from the members of a philosophical tradition that had focused its attention for seven hundred years on justice and righteousness in law. Third, and I think this is the fundamental source of antagonism, one

basic realist attack was on what Holmes called "the fallacy of logical form" in law, the adequacy of the syllogism as an explanation of the process of judicial decision. "The historic association of Scholastic thought, including Scholastic Natural law, with the method of formal logic is such that sharp dissent from the Natural law quarter was inevitable" (from *The Nature of Law*, Readings in Legal Philosophy, edited by M.P. Golding, Columbia University, Random House, New York, page 264).

Professor Jones observes that legal realism "is not a systematic philosophy of law to which all the so-called realists subscribe, but rather a way of looking at legal rules and legal processes". Then Jones points out that "the common feature that justifies bringing them all under one tent is a shared skeptical temper towards legal generalizations... and that "Mr. Holmes is, of course, the hero figure of the clan" (262). Thus, let us examine Holmes' conception of law.

The legal revolution started in an address delivered by Mr. Justice Holmes, then of the Supreme Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897. (*Harvard Law Review*, vol. X, 457). Holmes elaborated upon two pitfalls of the law: one of confounding law and morality and the other the fallacy that the only force at work in the development of the law is logic. In relation to the first pitfall, Holmes warned us "when I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law".Then he formulates his famous "Bad man" theory: "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". Thus, the bad man he does not care two straws for morality but he only wants to know (and that's why he hires a lawyer) what the courts are likely to do in fact, because "the prophecies of what the course will do in fact, and nothing more pretentious, are what I mean by the law". For this reason he

told bluntly those young students: "when we study law we are not studying a mystery but a well-known profession". The job of the lawyer is that of prediction, "prediction of the incidence of the public force through the instruments of the court". Holmes was very conscious of the possible reactions of his audience, not only of that hall, but of the world in general, thus he warns: "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism". From then on, he was known as "the great cynic", and he referred in his speech to this attitude of separating law and morality as to wash something "with cynical acid". In order to disentangle the confusion between law and morality he refers to an example and to the law of contract. "Three hundred years ago a parson preached a sermon and told a story out of Fox's Book of Martyrs of a man who had assisted at the torture of one of the saints, and afterward died, suffering compensatory inward torment. It happened that Fox was wrong. The man was alive and chanced to hear the sermon, and thereupon he sued the parson. Chief Justice Wray instructed the jury that the defendant was not liable, because the story was told innocently without malice. He took malice in the moral sense, as importing a malevolent motive. *But nowadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage*". Thus Holmes clarifies: "we still should call the defendant's conduct malicious; but in my opinion at least, the word means nothing about motives. In the law of contract the use of moral phraseology has led to equal confusion... morals deal with the actual internal state of the individuals mind, what he actually intends... we talk about a contract as a meeting of the minds... yet nothing is more certain than the parties may be bound by a contract to things which neither of them intended... because "contracts are formal" and "the making of a contract depends not on the agreement of two minds in one intention, but on the

agreement of two sets of external signs –not on the parties' having *meant* the same thing but on their having *said* the same thing".

Next Holmes elaborates on the second pitfall of the law: "that the only force at work in the development of the law is logic". (In his book *The Common Law* he had already advanced this position that put him at the forefront of legal realism). Holmes refers to the danger of trying to work out law like mathematics. This is a "natural" mode of thinking "longing for certainty". However, he tells us "behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding". Holmes is talking of "a matter not capable for exact quantitative measurement". He gives us a concrete example to illustrate the case: "why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition". (Holmes in trying to get at "the root and nerve of the whole proceeding" makes an analysis of the underlying causes of liability in accidents. He feels that judges are responsible for not exposing "the very ground and foundation of judgments". Thus it seems that Holmes is very much aware of the existence of some principles that are the nerve of the whole proceeding). It is in this respect that I would like to mention some comments of M.R. Cohen:

"The present wave of nominalism in juristic science is a reaction by younger men against the *abuse* of abstract principles by an older generation that neglected the adequate factual analysis necessary to make principles properly applicable. It is natural, therefore, for the rebels to claim as their own one who for more than the time of one generation has valiantly stood for the need of more factual knowledge in the law. But no group can claim Justice Holmes as its own unless it shares his respect for the complexity of the legal situation and exercises the same caution against hastily jumping from one extreme error to the

opposite. Holmes' position is, I judge, in perfect agreement with that of a logical pragmatist like Pierce: Legal principles have no meaning apart from the judicial decisions in concrete cases that can be deduced from them, and principles alone (i.e., without knowledge or assumption as to the facts) cannot logically decide cases. *But Holmes has always insisted* that the man of science in the law must no only possess an eye for detail but also "insight which tells him what details are significant". And *significance involves general principles* that determine which facts are irrelevant and which may be neglected as irrelevant. The law consists of prophecies as to how the public force (as directed by courts) will act. But the judge whom Holmes respects is the one who, like Shaw, not only has technical knowledge, but also understands "the ground of public policy to which all laws must ultimately be referred". (*Law and the Social Order*, New York, Harcourt, Brace and Co., 1933, pp. 212 and 13).

For an elaborate appraisal of the shifting image of Holmes in the American scholarly community I strongly recommend G. Edward White's essay: "The Rise and Fall of Justice Holmes", *The University of Chicago Law Review*, vol. 39, n° 1 (1971).

By taking the position of the lawyer as a professional predictor of the court's decisions, Holmes imposed a tunnel vision on the law that demanded expansion later on by legal realists like Llewellyn. Kantorowicz used the image of baseball. It would be silly to think that the rules of this game are simply generalized predictions of what umpires will decide! And one can always wonder about the nature of the law for the judge: is law for him predictions of what he will decide?

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If Holmes started the reaction against logical formalism, it was Hermann Kantorowicz who brought it to a screeching halt with the best organized essay ever written on legal realism. The essay

is entitled "Some Rationalism about Realism", *Yale Law Journal*, vol. 43, (1934), pp. 1240-52. Copyright, 1934 by the Yale Law Journal Co.

Kantorowicz reduces legal realism to two fundamental postulates: that law (as the judge's decision) is not a body of rules but of facts, and that legal science is an empirical science. He traces the first postulate to the "free law" doctrine (the judges fill the gaps of laws with rules). The second derives from the sociological school of law.

The nature of law of the realists betrays six fundamental prejudices: that the law consists of nothing but formal principles (formalistic prejudice); the attack on words (verbalistic prejudice); refusal to investigate the meaning of the legislator (historical prejudice); overlooking the fact that language is related to classes (nominalistic prejudice); exclusive consideration of living institutions, not laws (sociological prejudice); exclusive concentration on prediction of court's decisions (professional prejudice).

Kantorowicz considers the startling consequences of the postulate that says that there is no law outside of the decisions; undecided cases are outside of the realm of law; brand new statutes couldn't be interpreted (since there is no science of law to interpret them, since law is just decisions); contradictory decisions could not be predicted; what about rules that never came before the court ("the president must be 35 years of age"); the law that reads "murder is punishable by death" is not a law until it happens; why do we have learned men to decide cases?

Kantorowicz next investigates the nature of legal science (empirical) and observes that this theory is based on six confusions: 1) confusion of natural and cultural science, the cop stops you because you went through a red light (observable fact) and then he tells you that you "ought have stopped (not observable); 2) confusion of "explanation" and "justification". The judge comes to court intoxicated (explanation) but his decisions cannot be justified by law: 3) confusion of law and

morality: Notice how the legal realists incriminate themselves by this accusation to the defenders of classical morality: because, who could "confuse" things unless he accepts that there are two things to be confused? But since the realists only accept "facts" then really, they are the ones who blend two realities in fact when they observe a distinction; 4) confusion of reality and meaning. Realists insist on the "tangible" of the empirical facts. A new born baby has become the richest man when his rich daddy dies. But nothing of this change is "observable" in the child. 5) Placing the cart before the horse: poetry is what poets write; shoes are what shoemakers make. Law is what courts will decide!; 6) Confusion of cases and "case law". But cases themselves are not binding but the reasons for their decisions, and if repeated, they have the binding force of precedent.

Kantorowicz considers now the startling consequences produced by the conception of law as an empirical science. Dissenting opinions would always be contrary to legal science (which is only of observable decisions). Charging a jury would imply the judge telling what he is about to do. The proper study of law schools would be to study the psychology of the judges so as to be able to predict their decisions!

The main emphasis of Kantorowicz' article is that the realists were more concerned with what the courts were doing that with what could be deduced from the norms of the laws. He stressed that the "law is not what the courts administer, but the courts are the institutions which administer the law" (page 250).

Kantorowicz was greatly attracted to the ideas of Savigny, the founder of the historical school and was one of the first German professors of law to espouse sociology as a complement to jurisprudence. Savigny himself with his historical school was reacting against the rationalism of the Iusnaturalist school of the seventeenth century. In more modern times the founders of the sociology of law were reacting against the abstract formalism of the norms. Thus Eugene Ehrlich in his *Fundamental Principles of*

Sociology of Law stressed that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in juridical decision, but in society itself". Harvard University Press, 1936.

Along with Kantorowicz, one of the most eminent pioneers of modern sociological jurisprudence was Roscoe Pound. They both were concerned with the main objective of sociological jurisprudence as that of framing hypotheses on which to base the operation of general laws governing laws in society. For that purpose sociological jurisprudence has to avail itself of the proper methodology of the social sciences (like statistical, analysis, surveys, etc.). It seems that must of what sociological jurisprudence does is to bring to law what the social sciences discover. In doing this they are faced with a difficult problem which is that of the integration of what is considered a factual science (sociology) with another concerned with values (jurisprudence).

Pound's famous program of 1911-12 in which he formulated the practical objectives for his movement, was criticized on the grounds that it was like an orchestra for ever tuning up the instruments without actually playing or like athletes constantly flexing their muscles but never getting into the arena, while other critics complained about the tendency to "activism" displayed by the school.