CHAPTER ONE

A Tale of Two Movements

Much that is natural, to the will must yield.
Men manufacture both machine and soul,
And use what they imperfectly control
To dare a future from the taken routes.

—Thom Gunn[1]

American pragmatism was not some naive form of scientism and it did not hinge on some blindly optimistic faith in the spread of democracy. It only appears as such to those who rule out there being postmetaphysical justifications for democracy and science.

—Hans Joas[2]

This book is a study of two twentieth-century schools of American legal theory and their relationship—Legal Realism and Critical Legal Studies (CLS). According to received opinion, these two schools of legal theory are kindred approaches. This study will challenge that notion. It will argue that there is little basis for the claim that these approaches are marked out by a close intellectual kinship. Hence, the following pages are not so much a genealogy of close family relations as an account of mistaken identities provoked by misleading similarities. It is a story about how the CLS movement adopted Legal Realism as an intellectual parent and attributed a family resemblance to it that it never possessed. It is also a tragic tale about how many valuable aspects of the Realist movement have become obscured by the genuine attempts of CLS scholars to revive and reinterpret Legal Realism for the present age.

Many readers will be acquainted with the protagonists in this story. For those who are new to this topic, however, this first chapter will start with a general introduction to the leading characters in the tale. This will lay all the necessary groundwork for the central theme to be defined more clearly. This central theme, in turn, will be divided into three subtopics around

which the book will be organized. Finally, this chapter will be rounded off with a number of remarks on the method employed and the approach taken.

A TWICE-TOLD TALE

The story of the short-lived Legal Realist movement—how it rose to prominence in the 1920s and 1930s, how it influenced American legal understanding, and how it formed the inspiration for the Critical Legal Studies movement from the 1970s onward—has been told many times. In its rough outline this story is largely uncontroversial. In the interbellum period the American legal field was stirred up by a loose group of legal scholars known as the Legal Realists. These liberal reformers with modernist sensibilities were impatient with the conservatism and formalism of American law. They were intent on putting law and legal scholarship on a new footing. Freely borrowing insights from the emerging social sciences, contemporary linguistic theory, psychoanalysis, cultural anthropology, and above all American Pragmatism, they tried to fashion a new approach to the study of law and gain a fresh understanding of the legal system. Hallmarks of this new Realistic ferment were a skeptical view of the power of legal rules to decide outcomes; a Pragmatic, social-engineering outlook on law as a tool for social development; a commitment to the empirical methodology of the social sciences as an alternative to traditional legal scholarship; and a conception of law as organically interwoven with society and bound up with the unique historical conditions of its developmental stage. These ideas were often expounded in a brash and racy style. With Legal Realism, in the words of one commentator, the jazz age had produced a "jazz jurisprudence."[3]

For all its ambition to change things, however, the Realist movement would prove to have only a short life span. After its emergence as a distinct movement, Legal Realism enjoyed a period of brisk activity. Yet the Realist movement was soon beset by a backlash in American academia against skeptical theory of the Realist variety. As international tensions heightened, the Realist critique came to be seen as a subversive influence, sapping the very foundations of free and democratic government with its alleged relativism and its skepticism about the fundamental principles of the American republic. With the totalitarian threat looming large in Germany, Italy, and Russia, casting doubt on the time-honored fundamentals of the American

political and legal system seemed like an act of gratuitous irresponsibility. In the anxious atmosphere of the late 1930s Legal Realism went into retreat. By the beginning of the 1940s Legal Realism had lost most of its momentum and had largely petered out. To be sure, some Realist scholars continued to write books and articles during and after the Second World War. Yet World War II marks a sea change in the American intellectual climate. These later writings are no longer in the same spirit.

Realism flared up and died out in a relatively short period of time. Realist ideas never settled into an authoritative statement. Hence, there is a sense of bemusement about Realism which persists to the present day. For many it is still not quite clear what to make of the Realist movement. In a recent history of American jurisprudence, English legal scholar Neil Duxbury describes Legal Realism as "one of the great paradoxes of modern jurisprudence. No other jurisprudential tendency of the twentieth century has exerted such a powerful influence on legal thinking while remaining so ambiguous, unsettled and undefined."[4] This remark reflects the dominant opinion on American Legal Realism today, namely, that it had a "powerful influence on legal thinking" in the United States, even though it is unclear what that "powerful influence" amounts to.

The Realism of Legal Realism

For the definition of Legal Realism, the term *realism* should not be taken as a reference to some systematic theory. Nevertheless, the term does provide some general clues as to what the Realist movement was about. For the Realists, *realism* primarily seems to have signified an approach that cut through the institutional pieties of law and focused on the way law operated in the real world. This declared devotion to *realism* was not unique to the Realist movement. It was a mind-set they shared with many of their contemporaries. Realism was part of a broader current in late nineteenth- and early twentieth-century academic culture, which intellectual historian Morton White has characterized as a "revolt against formalism." This revolt entailed a "reaction from the formal, the deductive, the mathematical, the mechanical, in favor of the historical, cultural aspects of human behavior."[5] Scholars involved in this revolt, White maintained, were united in their rejection of formal and abstract models of social behavior and shared a preference for more richly textured explanations of social phenomena, explanations that took into account the unique cultural and historical conditions that shaped them. Closer attention to the processes of *real* social life, they

believed, should replace such disembodied concepts as the economic man in economics or the immutable principles of justice in law. Legal Realism was an integral part of this trend in academic thought.

Beyond the world of academia, Legal Realism also had an affinity with the popular muckraking and debunking spirit of the early twentieth-century United States. As the eminent historian Richard Hofstadter observed in his classic study of the period, the muckraking journalists and realistic writers of the Progressive Era, exposing political corruption and social injustice in their articles and novels, pioneered "a fresh mode of criticism" in which the dominant feature was "realism."[6] Realism for these journalists and writers meant the unembellished description of the harsh, hidden realities of American life, which often contrasted sharply with the edifying myths of American society. This "fresh mode of criticism" carried over to other realms of thought including law, Hofstadter noted, and "as scholars reached out for their own 'realistic' categories, the formalistic thought of an earlier and more conservative generation fell under close and often damaging scrutiny."[7] Hence, much in the style of the muckraking journalists and the realistic novelists, Hofstadter believed, the Realists were intent on tearing down the solemn facade of the law to expose what went on behind it.[8]

Langdellian Orthodoxy

The facade that the Realists were aiming to demolish had been erected only half a century before under the auspices of Christopher Columbus Langdell, dean of the Harvard Law School from 1870 to 1895. The view of law he inspired in the late nineteenth century was still widely accepted among legal scholars in the interwar period. It is important to sketch the broad outlines of this Langdellian, or Classical, view of law because so much Realist work was written in opposition to it. In a way, Langdell set the agenda for many of the Realist concerns. The innovation Langdell is most famous for is his case method, still the standard method of teaching in American law schools today. For present purposes, however, what is important is not so much the case method as the rationale Langdell provided for introducing it. In the introduction to his first casebook on the law of contracts, Langdell claimed that law, "considered as a science, consists of certain principles or doctrines." These principles and doctrines had been expressed in long series of Common Law cases dating back centuries. The best way to get at them was to retrace the cases in which they were embodied. This involved only a limited number of the reported cases. In the ma-

jority of cases the judge simply got it wrong, and these, Langdell claimed, were "useless, and worse than useless, for any purpose of systematic study." A casebook could thus be limited to a moderate number of select cases. Also the number of fundamental doctrines on which the Common Law was based was much smaller than one might suspect from the great diversity of reported cases. The same doctrine or principle was "constantly making its appearance" in "many different guises," Langdell contended, and this had led to "much misapprehension" about the number of doctrines and principles embodied in the Common Law.[9]

The rough outlines of Langdell's view of law and legal scholarship can be gleaned from these introductory remarks to his first casebook. Law understood as a science involved an exercise in taxonomy. The legal scholar's job was to bring order to the chaotic mass of reported cases. The truly significant cases had to be separated from the inconsequential ones and subsumed under the rubric of one or another fundamental Common Law doctrine. Implicit in this understanding of legal scholarship was the assumption that there was a set of timeless, immutable, and fundamental principles of law, which found only imperfect expression in the welter of Common Law cases. Legal inquiry was a search for these true and fundamental principles in the messy particulars of Common Law adjudication. This is why Langdell believed he could attach the label of science to legal scholarship—legal scholars unearthed the fundamental legal principles underlying the multifarious judicial decisions handed down from the past, much like the scientist uncovered the general laws shaping diverse natural phenomena. Thus, Langdell advocated in a famous speech that "the library is the proper workshop of professors and students alike; . . . it is to us all what the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."[10]

Langdell's approach clearly bore the credentials of nineteenth-century laissez-faire liberalism. His science of law provided a realm of fundamental legal principle that existed separately from the political process. In the courts this autonomous realm of legal principle was vigorously defended against legislative incursions, as it was believed to provide a private sphere in which individual American citizens could shape their own lives free from any government intrusion. Judges thought of themselves as applying eternal and true principles of justice. Ill-considered legislation that did not fit with these true and unchanging principles had to be strictly construed or declared unconstitutional. The true in law did not admit compromise by

the unwise and fickle preferences of democratic majorities. In practice this meant enforcement of a formal, legal equality between citizens that was blind to existing social and economic inequalities, as well as judicial resistance to legislative attempts to counteract these inequalities. Regulation of the economy by the legislature was believed to impinge on the basic rights of free citizens to work out their own arrangements.

The Langdellian view of law was highly influential. Langdell's case method was rapidly adopted as a teaching method by most American law schools, and the conception of law inherent in it gained wide acceptance among legal scholars. It was still the dominant view in the 1920s when the Realist movement started to take shape. In fact, the Langdellian science of law seemed to reach a new high point in the big Restatement projects orchestrated by the American Law Institute—especially created for the purpose—in the early 1920s. These Restatement projects were aimed at reducing the increasing complexity of American law. With the growing divergence of decided cases in the burgeoning American republic and the explosive growth in the number of case reports, the body of case law had become too heterogeneous and unwieldy for American lawyers to work with.[11] The Restatement projects were attempts to provide authoritative and accessible restatements of the law in the respective legal fields to afford lawyers with an easy reference to existing law. The leading authorities in the different legal fields were brought together in the American Law Institute to furnish these codelike summaries of case law, which were based on old-time Langdellian legal science. As the legal historian Edward White observed, the Restatements were meant to be "a perfected version of Langdellian geometric and taxonomic logic."[12] In other words, the Restatements tended to reaffirm the immutable Common Law principles and doctrines that had been the focus of the Langdellian science of law for half a century. The Restatements were conservative efforts, aimed at recapturing the old unity and coherence that American law no longer had.

The Realist Critique

Realism was a reaction against everything the Classical, Langdellian view of law stood for. The Realists disliked the formalism of the Langdellian approach: its Platonic search for pure and static principle behind the disorderliness of everyday adjudication; its library-oriented conception of legal science; its bias against legislation; its inherent conservatism; and its affinity with laissez-faire economics. The Realists provided a profound critique of

these aspects of the Classical view and offered radical alternatives to its basic tenets. Where the Classical view centered on the importance of legal rules in the judicial decision-making process, the Realists were skeptical about the efficacy of these legal rules in the real world of adjudication. Where the Classical view reassured legal scholars that they could practice their science within the confines of the library walls, the Realists wanted to turn law into an empirical social science and chase legal scholars out of the library to study legal practice firsthand. Where the Classical view assumed the givenness of a set of fundamental and unchanging principles of law, the Realists saw the legal system as a function of the ever-changing social and cultural context. Where the Classical view had led to a principled obstruction of social reform and economic regulation in the courts, the Realists proposed a more instrumental view of law that would foster, and not hinder, social change.

Of the elements listed above, the renowned rule skepticism is probably most commonly identified as a defining characteristic of Legal Realism. The Realists were highly skeptical of the Langdellian systematization of case law in a limited set of fundamental principles and doctrines, such as the American Law Institute was undertaking with its Restatement projects. These rules did not accurately reflect what went on in the courts, the Realists maintained, nor were they as important in the judicial decision-making process as was commonly believed. This rule skepticism was informed by a sophisticated understanding of language which took meaning to be socially constructed rather than given. The law, in other words, did not reflect some preexisting, rational, or natural social order. Rather, it imposed an order on the messy social world with flawed and imperfect concepts and categories fabricated and developed by the legal community and the wider society.

Rule skepticism often went hand in hand with another famous Realist notion, namely, "predictivism." Since the law in the books was of only limited help in predicting what judges would decide, the Realists started wondering whether the new social sciences would not do better. Following the lead of Oliver Wendell Holmes and his "bad man theory" of law, the Realists suggested that maybe Holmes's view that "prophecies of what the courts will do in fact and nothing more pretentious" should be adopted as the focus of legal study. This led to the notion of predictivism, that is, the idea that not ratiocination but accurate scientific knowledge about judicial behavior patterns should be the information with which lawyers assisted their clients. Many Realists believed that the scientific study of the law would disclose common factors that conditioned judicial decisions and

would suggest more accurate predictive rules. More than any other Realist idea, predictivism came to symbolize the new approach and was taken to sum up its contribution to legal theory. It also became a focal point for critique. Indeed, it was the argument that H. L. A. Hart criticized in his famous discussion of Realism, a critique which many have thought was so devastating that it sealed the fate of Realism.[13] Hart's influential critique has recently received harsh criticism itself, however. Brian Leiter has argued that the type of rule skepticism that Hart managed to invalidate so convincingly was not in fact endorsed by any Legal Realists and that the rule skepticism they did endorse is not affected by his arguments.[14]

A second Realist idea was the suggestion to use social science as a method to chart the policy alternatives available for the case involved. Law was not an end in itself, the Realist claimed time and again. It was an instrument to promote the welfare of society. To foster the welfare of society, empirical knowledge about social and economic conditions was called for, and that knowledge could be gained from the social sciences. The Legal Realists here followed the lead of Roscoe Pound and his sociological jurisprudence. Long before the Realists formulated their critique of legal formalism, Pound had warned lawyers not to become "legal monks" in their sanctimonious reverence for the law as a self-sufficient system of rules.[15] As an alternative, Pound had recommended his "sociological jurisprudence," which entailed "the movement for Pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument."[16] The Realists took many of these ideas on board. Yet, even though they were indebted to Pound, they also believed he had not succeeded in executing his program. The "brilliant buddings" in Pound's work, as Realist Karl Llewellyn contended, had "in the main not come to fruition." Pound's sociological jurisprudence had remained "bare of most that is significant in sociology," he remarked, and his idea of law-in-action had been "left as a suggestion."[17] Legal Realism was going to change this. Realism was going to bring Pound's "brilliant buddings," which had never flowered, to fruition at last. Or so Llewellyn hoped.

The Legacy of Legal Realism

The Realist movement is often seen as a kind of adolescent phase in American law. Through the turbulent Realist experience, the narrative

goes, American law finally came of age. The Classical late nineteenth-century notion of law that preceded Legal Realism had been premised on the idea that law was autonomous, determinate, neutral, and based on a small set of timeless and unchanging principles of justice. The rebellious and iconoclastic Realist movement was needed to dislodge these nineteenth-century illusions and to pave the way for a more mature view of law that openly acknowledged the unavoidable policy choices made in the judicial process. Pubescent foolhardiness accompanied this ascent to full maturity, and Legal Realism was characterized by an exaggerated skepticism about the determinacy of legal rules, a concomitant and undue belief in the omnipresence of judicial discretion, and a naive faith in the promise of social science to offer solutions to these problems. Rid of these adolescent excesses, however, Realist insights about the limits of legal formalism and about the need to include considerations of social policy in the analysis of law became common currency in postwar legal scholarship. While the more immoderate views of the Realists have been outgrown, the story goes, the valuable lessons of Realism have been learned and adopted into mainstream legal scholarship—an assessment succinctly expressed in the adage "Realism is dead. We are all Realists, now."

This complacent view of postwar legal scholars has been challenged in recent decades by the left wing of American jurisprudence—Critical Legal Studies. CLS grew out of the radical New Left of the 1960s. Its central claim is that the liberal legal system is not a neutral body of rules but a devious form of politics. Law is seen as a structure of dominance, as a system degenerated beyond reconstruction. As Critical Legal scholar Alan Hutchinson puts it, liberalism "has become a dangerous political anachronism" and the adherents of CLS "do not wish to embroider still further the patchwork quilt of liberal politics, but strive to cast it aside and reveal the vested interests that thrive under its snug cover."[18] CLS is not a movement for piecemeal reform but for radical, comprehensive critique of the legal system. CLS adherents believe that Legal Realism preceded them in some of their core insights—notably that law is not certain but indeterminate, not neutral but political, not natural and necessary but arbitrary and contingent. Critical Legal scholars assert that their mainstream brethren have mainly tried to deflect these elements in the Realist legacy. Hence, they argue that the lessons of American Legal Realism have not been learned at all. On the contrary, they believe that postwar American legal scholarship is best understood as a set of evasive maneuvers aimed at circumventing the unsettling problems posed by the Legal Realists. These evasive maneuvers, however, have led academic lawyers nowhere. The Realist insight that law

is indeterminate, political, and contingent, CLS adherents claim, cannot be skirted around so easily. In contrast, Critical Legal scholars claim not to elude but to face squarely the implications of Realist thought. They see themselves as picking up where the Realist project was cut off.[19]

The Critical Legal Studies Movement: Realism Meets Radicalism

The CLS movement seems to have taken an interest in the Legal Realists right from the start in the mid-1970s. Mark Tushnet, one of the founding members of the CLS movement, has attested to this early fascination with the Realists in an autobiographical account of the genesis of the movement. According to Tushnet, in 1976 he, Duncan Kennedy, and David Trubek decided to create a "location" for a number of legal scholars on the left who were scattered over the United States but who were writing academic legal work which displayed some common themes. Critical Legal Studies was created to provide these various legal scholars with a platform to explore their shared ideas. One of the mutual themes in the work of these left-wing scholars, Tushnet maintains, was "the identification, in numerous substantive areas of law, of paired oppositions and standard arguments deploying sets of claims from one side of those oppositions against sets drawn from the other side." Drawing from the work of the Realists, this insight led to the development of the "indeterminacy argument," according to Tushnet, which held that "within the standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances." In other words, the legal system was made up of opposing principles that allowed for the development of contradictory legal arguments on almost any legal issue—a CLS version of rule skepticism, which, Tushnet claims, later developed "into philosophically more sophisticated deconstructionist techniques."[20]

The Realist legacy also presented a problem for CLS scholars, however. The indeterminacy argument, Tushnet maintains, "had led some of the realists to offer a relatively informal descriptive and normative sociology of law." The object of the descriptive sociology, Tushnet believes, was to show that "the existence of a community of lawyers, sharing what Llewellyn called a 'situation sense,' eliminated the possibility that the contradictory results, available as a matter of theory, would actually be realized in practice." While the normative aspect of the Realist sociology sought to establish that "the values of that community, or some other community into which it could be transformed, justified the choices among possible results at which the

legal system arrived." The Legal Realists, in other words, claimed that legal rules by themselves did not decide outcomes but that constraints such as the ethos of the legal institution and the shared intuitions about what kind of solutions certain sets of practical problems required made sure that this legal indeterminacy did not translate into indeterminate judicial decisions. The postwar Law and Society movement, Tushnet believes, had tried "to provide a more systematic basis for the realists' informal sociology of law." Yet to Critical Legal scholars this was an approach that seemed to turn into apologetic support of the status quo. CLS was more skeptical about "the normative acceptability of the results found acceptable by the community of lawyers." Hence, a second theme in the CLS movement "was a critique of the sociology of law that was implicit in the way legal realism had been assimilated in the legal academy."[21]

In contrast to the traditional sociology of law, CLS stressed the autonomy of law as an ideological structure, rather than its foundation in the social context. CLS adherents saw the sociology of law as a mode of explanation that was too deterministic in its emphasis on the social setting as the primary factor shaping law. "The cultural-radical strand in cls," Tushnet notes, "contributed an . . . impetus to the forces emphasizing freedom of choice rather than determinism."[22] CLS wanted to show that the law was not the natural and necessary product of social circumstances but a contingent system that could very well be replaced with another. In "Classical social theory"—the tradition of Marx and Weber—fundamental legal terms and categories like "ownership of private property" played a large role. However, such legal terms preceded, rather than were explained by, these social theories. Hence, these fundamental categories of law were implicated in the social theory that tried to explain them. Because the indeterminacy argument had shown these legal categories to have shaky foundations, the social theory built on them also became suspect. Thus, Tushnet observes, "the indeterminacy thesis threatened the social theory that legal realists had relied on to resolve the normative and descriptive difficulties exposed by their analysis of law. Put in a different way, the indeterminacy thesis, developed in the specific context of legal doctrine, created an atmosphere in which the deterministic leanings of classical social theory were suspect."[23] Consequently, the CLS movement focused on the law as an autonomous, ideological artifact rather than as a product of social forces. And because in their perspective there was choice as to how law should be conceived, the existing system was not necessary but based on ideological preference. Law, in the way it arbitrarily classified and ordered society, was political through and through.