(Flickr, mbell1975, 2007)

(New York Times, 2019)

Legal Realism in the 21st Century

carl warf

"Given that many today in the field of law presuppose the existence of core tenets of the theory, such as empirical evidence and deference to legislative intent, it should be understood that the legacy of legal realism is alive and well in the 21st century."

As a society, many of us at some point in our formative years are taught that Congress creates laws, the President executes laws, and judges interpret laws. Such a clear-cut explanation of roles may well be appropriate for the purpose which it serves: introductory-level knowledge of our government. Yet, this overly simplistic framework also obfuscates the necessary power- and role-sharing among branches in this great American experiment called democracy. Perhaps in a vacuum a judge might rely solely on their schooling and legal expertise; however, the point of this piece is not to opine on hypotheticals, but rather to discuss the place of a theory of law known as "legal realism" in the present. This theory proposes that judges make rulings not only based on the facts of the case and existing precedent, but also are influenced by relevant social interests and public policy. Historically, legal realists have argued that empirical perspectives and empirical data – rather than a singular reliance on "rules of law" - were a necessary factor for the legal system to consider the relevant social conditions. Broadly speaking, it would be misleading to claim that there is zero relationship between those on the bench and the environment they operate in; legal realism advances that the influence of this external environment can have a liberating effect on the legal process and stimulate social and legal change.

"Broadly speaking, it would be misleading to claim that there is zero relationship between those on the bench and the environment they operate in; legal realism advances that the influence of this external environment can have a liberating effect on the legal process and stimulate social and legal change."

It can be argued that the seeds of legal realism were planted by Oliver Wendall Holmes in 1897, prior to his ascension to the Supreme Court. However, the theory did not grow into a movement until the first few decades of the 20th century, when the seeds that had been planted in the minds of intellectuals and burgeoning lawyers alike flowered and resulted in legal realism being taught at many law schools across the country, and later applied in public sector entities where law school graduates went to work. Due largely to a reaction against legal formalism, which was the predominant theory for much of the 19th century and posited that judges logically infer correct legal outcomes from clear and defined rules, legal realism emphasized practical outcomes and challenged the formalist notion that judges always did what they said. Brian Leiter excellently summarized this distinction when he wrote "what the Legal Realists taught us is that too often the doctrine that courts invoke is not really the normative standard upon which they really rely, and it was central to Legal Realism to reform the law to make the actual doctrine cited by courts and treatise writers correspond to the actual normative standards upon which judges rely."

Scholars have described the theory of legal realism as the most "important jurisprudential movement of the twentieth century." Proponents of the theory (as well as the theory itself) were vital to the passage and continued existence of President Roosevelt's New Deal programs, such as large-scale infrastructure projects designed to increase employment and an expansion of federal regulatory authority. Prominent intellectuals who identified in some vein as legal realists (such as Felix Cohen and William Douglas, among others) found themselves with an opportunity to "operationalize" the theory in a practical sense, on a vast scale in support of an administration that viewed it favorably. In a mutually beneficial relationship, these intellectuals attained "...prestigious government positions, while the Administration was able to take advantage of a substantial influx of legal talent." Given that legal realists yearned to make the law work for society, the marriage of New Deal programs and legal realism was a transformative partnership.

Given this, why do many of the same scholars who extol the importance and significance of legal realism in the 20th century also acknowledge its short-lived zenith? Partly as it was overtaken by the legal process movement, which emphasized reasoned elaboration and a focus on long-established legal norms, such as legislative intent. Advocates of the legal process movement posited that many of the legal questions of the day could be resolved through the prescribed mechanisms without the primary focus on the empirical impacts of rulings that legal realism called for. A sort of middle ground between legal formalism and legal realism, the legal process movement would become the dominant theory of law for many of the following decades; this is due in part to the fact that many legal questions before a judge have a certain expectation of outcome that is generally agreed upon by other judges and as such factors of influence in the external environment may not play a significant role in a determination.

If legal realism as a dominant theory of law is a bygone relic, its legacy still exists in the present. It was legal realism that provided the theoretical grounding of the modern administrative state, which today impacts our lives in more ways than can be counted. It was legal realism which provided a wider lens for examining and understanding rulings in both public and private law. And it was legal realists who were successful in their central goal: posing a challenge to the objective and formulaic notions of legal formalism. Given that many today in the field of law presuppose the existence of core tenets of the theory, such as empirical evidence and deference to legislative intent, it should be understood that the legacy of legal realism is alive and well in the 21st century.

References

Cohen, F. S. (1935). Transcendental nonsense and the functional approach. Columbia Law Review, 35(6), 809-849. doi:10.2307/1116300

Curtis, M. J. (2015). Realism revisited: Reaffirming the centrality of the New Deal in realist jurisprudence. Yale Journal of Law & the Humanities, 27(1), 157-200.

D'Amato, A. (2010). The limits of legal realism. Yale Law Journal, 87, 468-513.

Fuller, L. L. (1934). American legal realism. University of Pennsylvania Law Review, 82(5), 429-462.

Legal Formalism. (n.d.). Retrieved from https://www.law.cornell.edu/wex/legal_formalism

Legal Realism. (n.d.). Retrieved from https://www.law.cornell.edu/wex/legal_realism

Leiter, B. (2005). Chapter 3: American Legal Realism. In The Blackwell Guide to the Philosophy of Law and Legal Theory. Malden, MA: Blackwell Publishing.

Leiter, B. (2015). Legal realism and legal doctrine. University of Pennsylvania Law Review, 163, 1975-1984.

West's Encyclopedia of American Law. (n.d.). Retrieved from https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/legal-realism

PRE-LAW SOCIETY

EST. 2019

Edited by Rose Chang