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The sociological and psychological dimensions of American Legal Realism

I. The European and American trends of legal realism

The first appearance of the term 'legal realism' dates back to the end of the 19th century in Europe, and in the wake of the work of Hägerstörm, Lundstedt, Ross and Olivecrona, who belonged to what is commonly known as the 'Uppsala school of philosophy', 'Scandinavian legal realism' developed a new school of legal theory focusing on legal ontology, some elements of which can be found in American Legal Realism that emerged in the United States in the 1930s. However, while the Scandinavian legal realists were more concerned with classical questions of legal philosophy, American Legal Realism was mainly a school of thought that sought answers to problems of legal practice. The Scandinavian approach tends to be more academic, while the American more practical, determined not only by the different time period and milieu, but also by the different academic qualifications of the representatives of the movement. The vast majority of American legal realists were also active legal practitioners and, despite their careers in academia, paid little to no attention to the philosophical definition of what law is. They did not engage in depth with questions of why the law is binding and to abide by, whereas Scandinavian realism systematically sought to answer these very questions and rejected earlier positions offered as a critique of natural law, legal positivist positions as a foundation for the various legal systems. American Legal Realism did not focus on the dissemination of doctrines derived from epistemology or semantics, but rather on understanding and solving specific problems related to the practice of law.

Both schools of thought are sociological in the sense that they emphasise the sociological background of legal norms, the role of social facts in the interpretation of law and in determining the needs of law and social life. In line with legal pragmatism, law is understood as a mere prediction of how courts are likely to rule in particular cases. Both schools of realism can also be seen as sociological approaches to law in the sense that justice (fairness) is not defined in terms of *a priori* ideas, but in terms of the capacity of the legal system to balance competing social needs.

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American Legal Realism, compared to Scandinavian legal realism, takes a less radical view of the importance of legal norms. Although conceiving of judges as being heavily influenced by non-legal considerations in their judgements, American Legal Realism does not dismiss the normative aspect of rules in the application of law altogether, as do many of the leading advocates of Scandinavian legal realism.

It deserves to be stressed that in the 1930s American Legal Realism adopted several elements from the theories of legal pragmatism and behaviourism, which had not yet appeared in the Scandinavian movement.

II. The genesis of American Legal Realism

The emergence of legal realism as a trend in the United States is generally associated with a prominent and, compared to the average jurisprudential discourse, somewhat perplexing debate initiated by one of the most renowned American jurists of the time, Roscoe Pound. Karl Llewellyn, one of the most remarkable figures in what later became the 'school of thought', published a paper in 1930 entitled 'A Realistic Jurisprudence – The Next Step'.[1] Almost at the same time, Jerome Frank's chapter on legal realism, 'Law and the Modern Mind' , was published[2] , in which the author criticised, among other things, Roscoe Pound's theory. In response, Pound wrote 'The Call for a Realist Jurisprudence', which, by 'promoting' hitherto largely unknown authors, stimulated a debate on what realism in jurisprudence actually means. Llewellyn, seizing an exceptional opportunity, responded with a programmatic essay to a famous jurist of the time. In 'Some Realism About Realism – Responding to Dean Pound', the author, in addition to his interpretation of realism, named specific authors who he believed represented the idea of realism. He firmly denied that legal realism was a cluster or school of thought and argued that it was merely a manner of approaching the law.

In a later paper, he emphasized more clearly that "[w]hat realism rather was and is only a method, nothing more, and the only doctrine connected with it is that the method is good. 'See it fresh', 'See it as it works'."[3]

The private correspondence between Pound and Llewellyn[4] then took an interesting twist. Llewellyn, following a specific and puzzled response from Pound, sent a specific list of who he considered to be realists. Pound's response indicated that the views of several authors were difficult to distinguish from his own. In addition, several of those on the list have subsequently indicated that they do not consider themselves as legal realists (Corbin, Yntema and Green).

What does emerge from this unusual debate is the birth of a school of legal theory / sociology of law that did stabilize later. However much the authors who helped to create the school deny its existence, it later became the most indigenous school of legal theory in the United States.

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1 Llewellyn, Karl N.: *A Realistic Jurisprudence. The Next Step*. Columbia Law Review 1930. 431. p.

2 Frank, Jerome: *Law and the Modern Mind*. Brentano's. New York, 1930.

3 Llewellyn, Karl N.: *The Common Law Tradition. Deciding Appeals*. Little Brown. Boston, 1960. 510. p.

4 Hull, N. E. H.: *Roscoe Pound and Karl Llewellyn. Searching for an American jurisprudence*. University of Chicago Press. Chicago, 1997. 180–181., 220. pp.

The uncertainty as to which author can be classified as a realist is neither only due to the aforementioned personal dispute between Pound and Llewellyn, nor only because the authors named by Llewellyn later objected to this classification. The difficulty of the definition is also due to the fact that the young authors of the 1920s and 1930s who opposed legal formalism drew heavily on the works of an older generation who also opposed formalism but who never considered themselves realists. This dilemma is aptly exemplified by the 1993 volume on legal realism, where, after some editorial explanation, "Great Old Ones" such as Roscoe Pound, Oliver Wendell Holmes, John Chipman Gray, Wesley Newcomb Hohfel, and Benjamin N. Cardozo were included as "predecessors" but also in chapters dealing with specific "realist" problems,[5] who another legal realism expert prefers to call the tour de force of the realists.[6]

III. The core concept of American Legal Realism

From the period preceding Llewellyn's work, the views of Oliver Wendell Holmes were undoubtedly the most influential on the understanding of the legal realists and Llewellyn, who was considered the 'founder'. In an 1897 lecture (The Path of the Law), the renowned

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[5] This volume also integrates the works of the following authors, who were associated by the editors with the movement of legal realism in the broad sense: Holmes, Oliver Wendell: *The Common Law (1881)*; Thayer, James B.: *The Origin and Scope of the American Doctrine of Constitutional Law (1893)*; Holmes, Oliver Wendell: *The Path of the Law (1897)*; Holmes, J.: *Lochner v. New York (1905)*; Pound, Roscoe: *Liberty of Contract (1909)*; Gray, John Chipman: *The Nature and Sources of the Law (1909)*; Pound, Roscoe: *Law in Books and Law in Action (1910)*; Hohfeld, Wesley Newcomb: *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913)*; Llewellyn, Karl N.: *A Realistic Jurisprudence. The Next Step (1930)*; Pound, Roscoe: *The Call for Realist Jurisprudence (1931)*; Llewellyn, Karl N.: *Some Realism About Realism. Responding to Dean Pound (1931)*; Corbin, Arthur L.: *Offer and Accpetance, and Some of the Resulting Legal Relations (1917)*; Isaacs, Nathan: *The Standardizing of Contracts (1917)*; Llewellyn, Karl N.: *What Price Contract? An Essay in Perspective (1931)*; Fuller, L. L. – Purdue, William R. Jr.: *The Reliance Interest in Contract Damages (1936–1937)*; Hale, Robert L.: *Coercion and Distribution in a Supposedly Non-Coercive State (1923)*; Cohen, Morris R.: *Property and Sovereignty (1927)*; Jaffe, Louis L.: *Law Making by Private Groups (1937)*; Frank, Jerome: *M. Witmark and Sons v. Fred Fisher Music Co. (1942)*; *Vegelahn v. Gunther (1896)*; Laski, Harold J.: *The Basis of Vicarious Lialibility (1917)*; *International News Service v. Associated Press (1918)*; Dewey, John: *The Historic Background of Corporate Legal Personality (1926)*; Berle, Adolf A. – Means, Gardiner C.: *The Modern Corporations and Private Property (1932)*; Landis, James M.: *The Administrative Process (1938)*; Cardozo, Benjamin N.: *The Nature of the Judicial Process (1921)*; *Pennsylvania Coal Company v. Mahom (1924)*; Dewey, John: *Logical Method and Law (1924)*; Radin, Max: *The Theory of Judicial Decision. Or How Judges Think (1925)*; Oliphant, Herman: *A Return to Stare Decisis (1928)*; Hutcheson, Joseph C. Jr.: *The Judgement Intiutive. The Function of the 'Hunch' in Judicial Decision (1929)*; Frank, Jerome: *Law and the Modern Mind (1930)*; Cohen, Felix S.: *Transcendental Nonsense and the Functional Approach (1935)*; Llwellyn, Karl. N.: *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statues Are to Be Construed (1950)*; Brandeis, Louis – Goldmark, Josephine: *Brief for Defendant in Error, Muller v. Oregon (1908)*; Cook, Walter W.: *Scientific Method and the Law (1927)*; Llwellyn, Karl. N. – Hoebel, E. Adamson: *The Cheyenne Way (1941)*; Moore, Underhill – Callahan, Charles C.: *Law and Learning Theory. A Study in Legal Control (1943)*; Oliphant, Herman (ed.): *Summary of Studies in Legal Education (1929)*; Arnold, Thurman W.: *Istitute Priests and Yale Observers. A Reply to Dean Goodrich (1936)*; Rodell, Fred: *Goodbye to Law Reviews (1936)*. In: Fisher, William W. – Horwitz, Morton J. – Reed, Thomas A. (eds.): American legal realism. Oxford University Press. New York, 1993.

[6] Tamanaha, Brian Z.: *Understanding legal realism*. Texas Law Review (87)2009/4. 731. p.

American judge argued that in applying the law to individual cases, there are often seemingly indeterminate considerations at play.[7]

This statement would become the guiding principle of the legal realism that would emerge in the first third of the 20th century, and the underlying idea that held together the diverse and contesting views. Most of the leading figures of legal realism taught and did their research at Columbia and Yale Law Schools, while many also practised law.[8] Later, some became prominent government officials and high-ranking judges,[9] gaining experience in lawmaking and the application of law, and developing arguments to justify their theories. The school's pronounced interest in the application of law (its approach, which often avoided fundamental questions of legal philosophy) can be traced back to the intertwining of American legal practice and academia.

The question of the indeterminacy of law can be interpreted first of all in the case of legal realism in contrast to the idea of legal formalism.[10] While the formalistic conception of the application of law attributes individual judicial decisions to legal reasons and assumes a clear-cut causal link between legal norms and individual decisions, legal realists believe that this link is unclear. In their view, individual judicial decisions are only partly based on legal grounds, or in some cases not at all.

According to the realist view, legal reasoning is based first and foremost on legislation and precedents, and the inconsistency of these sources, the difficulties arising from the narrow or wide scope for interpretation, cause the erratic nature that often makes decisions by the legal authorities unpredictable. On the other hand, a certain moderation is also characteristic of realists in relation to the indeterminacy of law. They do not claim that all legal cases are characterised by unpredictability. The "easy case – hard case" distinction can also be read in realist writings. They argue that the really serious problem of indeterminacy arises in cases which come before the appellate courts and to which determinate legal answers are difficult to give.[11] In these cases, judges make decisions based on considerations beyond the legal grounds and respond mostly to the stimulus of the factual issues of the cases. However, judges have a great deal of freedom in classifying and selecting the facts.[12] The idea of judges seeking to find legal grounds for their judgements based on considerations other than legal ones was by no means entirely novel. However, the advocates of American Legal Realism, based above all on their experience as legal practitioners, put it so convincingly,

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[7] Holmes, Oliver Wendell: *The path of the law.* Harvard Law Review 1897/8. 457–478. pp.

[8] Although one of its most ardent representatives, Jerome Frank, became perhaps the school's best-known advocate as a prominent lawyer, government employee and federal judge, far from the academic world.

[9] William O. Douglas, for example, finished his career as a federal Supreme Court justice, but Charles Clark, Thurman Arnold and Jerome Frank were also appointed as federal appellate judges.

[10] Ficsor Krisztina: *Jogi formalizmus*. In: Jakab András et al. (eds.): Internetes Jogtudományi Enciklopédia. HVG-ORAC. Budapest, 2021. http://ijoten.hu/szocikk/jogi-formalizmus. To refer to a specific passage, we recommend using paragraph numbers in the text, e.g. [8] or [12] to [18].

[11] Leiter, Brian: *American Legal Realism*. In Edmundson, W. – Golding, M. (eds.): The Blackwell Guide to Philosophy of Law and Legal Theory. Blackwell. Oxford, 2005.

[12] There are, of course, plenty of references to this conclusion in the earlier US literature. Smith, for example, argued in 1887 that the real reasons for the decision are concealed under the statement of facts in the preface to the decision. It is this power of stating the facts as he sees them which preserves the superficial consistency and certainty of the law, and conceals from the careless eye the total absence of definiteness and precision. Smit, Munroe: *State Statute and Common Law*. Political Science Quarterly 1887/2. 105–134. pp.

and with the help of many practical examples, that it was able to reach a wider readership of legal theorists than just those interested in legal theory.

Within legal realism, two internal strands can be distinguished. The first, which can be considered the sociological dimension, assumed that judicial decisions, despite their unpredictability, are nevertheless subject to a limited pattern, since judges may react in a similar way to legal facts because of the social/economic forces (i.e. not legal principles or legal reasons) that affect them.[13] The dissimilar personalities of judges are shaped and moulded by tradition and by the social and professional environment that surrounds them in the course of their work. This idea was shared by Llewellyn, Moore, Oliphant and Felix Cohen, while the other dimension of American Legal Realism, most notably represented by Jerome Frank, tended to give greater weight to psychological aspects, the judicial psyche. In this case, judges' decisions are not fundamentally determined by legal reasons, but by the personality of the judges. And the personality of the judge is almost indecipherable, which is identified as the most important reason for the 'unpredictability' of judicial judgements.

IV. Representative of the sociological approach: the theory of Karl Llewellyn

Karl Llewellyn is one of the most important exponents of American Legal Realism, who has left a legacy of significant works as a leading figure in the new movement that emerged in the circumstances mentioned above. After a short period of practising law, he began his academic career in the 1920s, becoming involved in academic teaching, research and, not least, the curricular debate which was then a hot topic.[14] His interest in the sociology of law and legal anthropology shaped his entire career, and can be seen in his writings, which are representative of the sociological approach within realism. His commitment to sociology can be explained by the aspirations of American modernism between the two world wars, which envisioned the conscious development of society based on an undersstanding of society. Llewellyn called for a realistic jurisprudence that would set definite goals, taking into account the knowledge offered by sociology, economics, psychology and anthropology, and would constantly monitor the laws enacted in the light of that knowledge.[15] Moreover, the 1930s were marked by the development of a hostile attitude towards formalism, which pushed jurisprudence increasingly towards empirical knowledge (The empirical method of knowledge acquisition was later supported in practical terms by the legislative demands of the New Deal era) In line with Scandinavian legal realism, the idea of separating values from facts also became more and more pronounced in the jurisprudence of the 1920s and 1930s, so that the latter might become the focus of interest in jurisprudence. Llewellyn, too, developed his ideas in the wake of this intellectual, in a sense "anti-intellectual"[16] movement, to become an activist of the emerging "legal realism".

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[13] Another division divides authors who can be classified as broadly realistic into "lawyers" and "scholars". H. Szilágyi István: *Karl N. Llewellyn*. In: Szabó Miklós (ed.): Fejezetek a jogbölcseleti gondolkodás történetéből. Bíbor. Miskolc, 1999. 246. p.

[14] In the last phase of his career, from 1951 until his death in 1962, he taught at the University of Chicago.

[15] Hull, N. E. H.: *Reconstructing The Origins of Realistic Jurisprudence. A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*. Duke Law Journal 1989/5. 1302. p.

[16] Duxbury, Neil: *Some Radicalism about Realism? Thurman Arnold and The Politics of Modern Jurisprudence.* Oxford Journal of Legal Studies 1990/1. 11., 30. pp.

One of his most important and highly resonant writings was a university notebook for students,[17] which, with its style and its harsh opposition to legal formalism, can be considered a programmatic writing of legal realism. In this book, he summarised the basic tenets of legal realism in an accessible and readable manner, including the scepticism of rules, according to which the norms laid down in statutes or precedents are in fact far from being the primary explanatory justification for judicial decision-making. Although Llewellyn did not undertake to develop a comprehensive concept of legal theory in this book, it has had a tremendous resonance, with many short sentences becoming world famous, so that legal theory and legal sociology writings are still cited to demonstrate the validity of American Legal Realism, and Llewellyn's conception of law within it. The author, in the 1951 edition of the book, attempted to refute the idea that the definition of law could be summed up in the oft-quoted phrase ("What these officials do about disputes is, to my mind, the law itself"), but this is no obstacle to the survival of his simplistic interpretation of American Legal Realism. In fact, Llewellyn was merely trying to make students aware that it is not enough to study the law and precedents, since they only help predict judicial decisions and help to encourage the judge to take some action in the course of his or her work as a lawyer.[18] (Llewellyn could not be blamed for total ignorance of the importance of statutes and precedents if only because he has in many cases in the field of commercial law performed legislative preparatory work for the government.) The indeterminacy, the lack of predictability, according to Llewellyn, arises from the fact that the canons of interpretation of legal sources can be legitimately contradictory. Both statutory and precedent interpretation can be contradictory, and judges, moreover, almost always have a leeway to interpret a statute or a decision in a previous case in a fact-specific way and to use the technique of distinction to justify a judgement that creates a new norm in accordance with their view. Llewellyn nevertheless believed that judicial decisions, despite their unpredictability, settle into predictable patterns. Using examples from his narrow field of research, commercial law, he sought to demonstrate that judges attempted to enforce in their decisions the uncodified moral norms of the commercial culture in which the dispute arose. By drawing attention to the role of non-legal factors in judicial decision making, Llewellyn made clear that jurists must rely on the social sciences to understand the development of law and the activities of judges.

From the point of view of the theory presented as representative of the sociological wing of legal realism, it is also worth mentioning Llewellyn's work in legal anthropology, all the more so because American Legal Realism is perceived by some as an anthropological approach to law.[19] A significant number of legal realists have started from the assumption that modern societies are fundamentally no different from the ways in which marginal societies function, and that empirical sociological and anthropological knowledge of low-technological groups can therefore provide the researcher with universal knowledge of the world of law. Llewellyn, together with Edgar Adamson Hoebel, developed the functionalist approach of the "law job/law staff" theory based on empirical research among Cheyenne

[17] Llewellyn, Karl N.: *The Bramble bush. On our law and its study*. Oceana Publications. New York, 1930. 12. p. ("What these officials do about disputes is, to my mind, the law itself.")

[18] For a detailed discussion see H. Szilágyi 1999, 249–250. pp.

[19] See Kamp, Allen R.: *Between-the-Wars Social Thought. Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*. Albany Law Review 1995/1.

Indians.[20] According to this theory, conflicts exist in all societies, and in some cases it is necessary to have a distinct group of people (law staff) to manage human conflicts (law job), who, no matter how simple or complex the society, are engaged in fundamentally similar activities. Law, however, according to Llewllyn, does not ensure the order of society, but an additional means of dealing with conflicts that cannot be resolved without legal means, as he had already pointed out in his anthropological studies. "Law comes into play only at the individual margin."[21]

Llewellyn, similar to the liberal school, attaches great importance to judicial wisdom, and in many places pays tribute to the law-developing activities of judges. In one place he states that judges do their work like tribal folk artists, having shown extraordinary group wisdom in the process of developing a legal institution in their narrow field of commercial law.[22]

An assessment of Llewellyn's work was made relatively early on. As early as 1934, Fuller, in an article on the evaluation of American Legal Realism, gave him special attention, arguing that to understand realism it was almost sufficient to analyse Llywellyn's writings. As he put it, "[t]here are, it seems to me, good reasons why Llewellyn is entitled to be regarded as the man most representative of the movement as a whole. In the first place, despite the contrary impression sometimes created by his impulsive literary style, he is not a radical. His realism is distinctly of the middle-of-the-road variety. […]Furthermore, he has written extensively and his writings constitute a more or less comprehensive exposition of the realist view. Finally, more than any other realist he has been willing to expose the premises which are implied in his approach. He is a 'philosopher' in the sense that he has the intellectual temerity to reveal the hidden springs of his convictions – at least most of the time."[23]

V. The best-known representative of the psychological approach: Jerome Frank

Jerome Frank is one of the representatives of the school who expressed his views as a legal practitioner, rather than in an academic setting. In his books, he has developed a wide variety of themes in order to prove a fundamental point.

Jerome Frank has described himself as a factual sceptic,[24] contrasting his understanding with that of the legal realist authors who he considers to be sceptical of the rules.[25] By rule scepticism, he meant the idea that judges are not guided by written rules in making their decisions, and therefore citizens and lawyers cannot know what the court will decide in a given case even if they know the rules. This view, which in legal theory is best associated with the names of Ehrlich, Pound or Llewellyn, has been the subject of much opinion and

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[20] Llewellyn, Karl N. – Hoebel, E. Adamson: *The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence*. University of Oklahoma Press. Norman, 1941.

[21] Llewellyn 1930, 113. p.

[22] Llewellyn, Karl N.: *Jurisprudence. Realism in Theory and Practice*. The University of Chicago Press. Chicago, 1962. 399. p.

[23] Fuller, L. L: *American legal realism.* University of Pennsylvania Law Review 1934/5. 430. p.

[24] Frank, Jerome: *Law and the modern mind*. Doublday. Garden City, 1963. X–XI. pp. (Originally published by Brentano's. New York, 1930.).

[25] The fact that Frank is still considered by many to be a rule sceptic is also due to Hart, who in his influential work refers to him as the paradigmatic figure of the rule sceptics.

it would be difficult to count its adherents today. The notion of "living law" (*lebendes Recht*)[26] or the notion of "paper rule", the famous saying "Law in books, law in action"[27] all refer to this idea. What these ideas have in common, according to Frank, is that they presuppose, in addition to 'paper' rules that cannot guarantee the predictability of law, a set of real rules that actually guide judges in their decision-making, that can be known and from which the decision can be predicted with greater certainty. This "living law", according to the rule sceptics, could be the real object of research in jurisprudence.

Jerome Frank thought that rule-sceptic legal practitioners raise a real problem when they suggest that rules make future judicial decisions unpredictable. The mistake is made when the importance of this problem is overstated. And they do so because they draw their examples from US appellate and/or higher court practice. They draw their conclusions after studying judicial decisions that follow an appeal, usually on the basis of a discretionary decision that focuses specifically on points of law. And, says Frank, they are ignoring the very essence of the administration of justice. Judicial decisions are not primarily uncertain because of questions of law. It is made more uncertain by the factual issues that usually arise in first instance trials.

In trials based on the principle of verbality, the judge or jury must consider the weight of the evidence and assess the testimony of witnesses. This is where the greatest uncertainty lies. Witnesses, similar to judges, are human beings and are therefore far from infallible. They may make mistakes in their observations or distort their testimony to suit their own interests. They may have prejudices. One witness may appear to the judge or jury to be more sympathetic than the other, and therefore more credible and convincing in what he or she says. The defendant's personality, clothing, manner of speaking, hair style may make the judge or jury feel unnerved and influence their decision making. The judge may be anxious because of some serious trauma on the day of the trial. This may make him or her more unfocused and some facts may escape his or her attention. The list of subjective factors could go on and on. Frank believes that these factors of uncertainty are above all the reason why judicial decisions are unpredictable.[28] In addition, the separation of questions of fact and law is artificial and the judgements on these two questions are closely linked in the minds of judges or juries. Once the court of first instance has reached a verdict, the case may go to the higher court on appeal. Here, however, if the first instance verdict was wrong because of an incorrect assessment of the facts, the judges must already start from a hypothetical version of events that is different from the real one. This inevitably leads to a wrong judgement even if the court is correct on the point of law. On this basis, Frank concludes that the work of what he calls 'rule sceptics' is led astray by an overestimation of the importance of the higher courts, the 'myth of the higher courts'.[29] Frank describes the American judiciary as a veiled system of Islamic qadi justice. The US judge, apparently under the rule of objective law, decides disputes by subsumption, by assigning a pre-existing legal norm to a set of facts. In this way, he carefully considers the facts and then assigns the appropriate rule of law or precedent. According to Frank, this idea is naive and based on a misunderstanding of the human decision-making mechanism. If judges were to

[26] Ehrlich, Eugen: *Grundlegung der Soziologie des Rechts*. Duncker and Humblot. Munich, 1913.
[27] Pound, Roscoe: *Law in books and Law in Action*. American Law Review 1910/1.
[28] Frank 1963, XIV. p.
[29] Frank 1963, XV. p.

decide in this way, they would not be acting in a "human way". And "a judge, merely by putting on his robes, will not acquire [...] an artificial mindset".[30] He invokes the science of psychology to prove his point. According to psychologists, judgement rarely starts with a premise followed by a conclusion. Rather, it starts with a conclusion, for which one tries to find the right premises. Judgments are thus worked out backwards from an experimental conclusion by judges, who, according to Frank, are undoubtedly human beings.[31] This tentative conclusion is the result of the judge's instinct, his intuition, and judges only change their decision on the basis of this intuition if they are unable to find a legal rule or precedent that is appropriate to the conclusion. The question arises, however: what is the source of the judge's instinct, his sense of justice, which determines his decisions in the way described? Well, according to Frank, this is undoubtedly influenced by existing legislation and precedents. These norms shape and influence the sense of justice of people, including judges. Some lawyers, he says, very rarely add that the role of the law can be distorted by the economic, political or moral prejudices of the judge. These influences are, of course, only acknowledged by those who subscribe to a sociological conception of law. Frank argues that the latter are also wrong to see the effects of judges' race, upbringing, class, economic background and the resulting biases as exhaustive of the factors that influence judges' decisions. The formula is much more complicated than that. It is true that a judge's political prejudices might influence his or her decision in a case. But there are thousands of factors that can dampen, distort or outweigh the impact of this prejudice, and whose role is not recognised by jurisprudence. A judge's prejudice is often altered by his or her affection for or aversion to a particular person or group of people. In the course of the trial, he comes into contact with lawyers, witnesses and parties, who provoke different reactions. A "nasal sound, a cough or a gesture may bring back a pleasant or painful memory because of past experiences. As he listens to the witness who behaves in this way, his memories will affect what he hears and will affect how he will evaluate the weight and credibility of the testimony."[32] The role of these seemingly insignificant factors is something Frank emphasises, especially in the light of the fact that, in determining the weight of the evidence, the judge's (or jury's) main task is to assess the witness's demeanour.

According to Frank, the majority view in common law countries is that judges do not and cannot make law. His task can be limited to maintaining the old one. And if he finds that a previous judicial decision is unreasonable, he can prevent the common law from being distorted by the new decision. There are occasional minority opinions to the contrary,[33] but the majority of legal scholars and practitioners stubbornly adhere to the idea that judges do not make law, they only apply it.[34] What could be the reason for this? – asks Jerome Frank. Why do judges themselves deny that they have legislative power, when it is clearer than ever that they do have such power. And they necessarily do, since regulating all of life's circumstances is a hopeless task, and the gaps must be filled by the legislator.[35] Frank again turns to psychology for the answer. Law is uncertain, and people

[30] Frank 1963, 109. p.
[31] Frank 1963, 112. p.
[32] Frank 1963, 115. p.
[33] Frank quotes, among other things, Pollock's famous phrase: "No intelligent lawyer can now say that judicial decisions do not contribute to and change the law."
[34] Frank 1963, 37. p.
[35] Frank 1963, 6. p.

attribute this uncertainty to lawyers, who are judged inconsistently. On the one hand they are looked upon with respect, on the other they are seen as duplicitous, word-smithing pretenders who unnecessarily complicate the law, which could be clear and precise without them. Frank derives society's need for predictable, secure law (apparently influenced by Freud) from the relationship of children to their fathers. For a long time, the child looks to his father as an unquestioned judge whose decisions are consistent and predictable, and who brings order to the chaos of conflicting views of right behaviour.[36] Later, the growing child expects the same predictability from the adult world and demands the same certainty from the legal system. It is this need that lawyers try to satisfy when they talk about the stability of the legal system and deny judicial legislation. According to Frank, this is not necessarily a conscious deception, since the majority of lawyers and judges are themselves unaware that legal instability is not an exceptional phenomenon or an unfortunate accident. The law is necessarily indeterminate and variable, and people will never be able to create a comprehensive set of rules that can settle potential future disputes in advance. But this is by no means a tragedy. In fact, it is precisely the capacity of the legal system to change continuously that has social value. "When human relations are trnasforming daily, legal relations cannot be expressed in enduring form [...] Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, t constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions."[37] Jerome Frank is therefore talking about the self-deception of judges, which he sees as a serious danger. By maintaining the impression that only the legislature has the power to change the law, they contribute to a distrust of themselves. The public's experience in current cases is that the court is unambiguously making law. Judges can then be legitimately accused of corruption and dishonesty by citizens when they themselves deny the obvious fact of legislating. It must therefore be acknowledged, and even made clear to lawyers, that the legal system is necessarily uncertain and that judges do indeed make law, so that this dangerous pretence can be replaced by the discovery of the truth. The myth of the rule of law, based on a crystal-clear separation of powers, which condemns judges to applying the law alone, must be abandoned.

VI. The importance and impact of legal realism

Many have attempted to regard the legal realism movement, including American Legal Realism, as a school of legal theory, and have tried to define a unified concept of legal theory from the ideas of the authors belonging to this movement. However, several realist authors objected to this, saying that legal realism as a school of thought never existed.[38] For example, Jerome Frank, perhaps the best known figure of the school, made this statement despite the fact that he himself consistently referred to legal realism and legal realists in his 1930 work. Later, however, he realised that there was much more that separated the realists in the same camp than united them. He argued that if there is something that unites all those who are referred to as American legal realists, it is more a critical attitude towards

[36] Frank 1963, 21. p.
[37] Frank 1963, 7. p.
[38] See Frank 1963.

an earlier view of law than a unified legal theory. For this reason, he thought it more appropriate to use the term "constructive scepticism". Llewellyn, another major exponent of the movement, also objected to the realistic movement being considered a tendency.[39] This view is shared by many and the American legal realists are seen as a group of lawyers who opposed formalism.[40] The work of the American legal realists can be seen as a continuation or even a development of the sociology of law that was developing at the beginning of the 20th century. This is not simply because there is no textbook on the sociology of law that does not pay special attention to the doctrines of the legal realists, but because they attach a special role to sociological (and social science in general) approaches to the study of law, and to empirical methods of investigation.

If an attempt is made to find a common denominator among[41] authors with a wide range of interests and differing views on many points, the following points can be highlighted: Dismissal of legal formalism, scepticism of legal norms. The denial that judges decide cases solely on the basis of legal norms and legal reasoning. (Legal norms and reasoning are often merely an *ex post* rationalisation of judgements made on the basis of non-legal considerations.) A social science approach to the study of law, with particular reference to sociology and psychology. Emphasis on the role of non-legal factors in determining the nature of judicial decisions. Demanding a reform of legal education in order to improve the quality of jurisprudence. An instrumental view of law as a tool at the service of social objectives.

However, it should be stressed that the above common denominator of similarities of view also makes it difficult to distinguish them from the authors known as legal pragmatists, who before the advent of realism (especially Holmes or Pound) held very similar positions.[42]

American Legal Realism has become deeply embedded in the consciousness of legal theorists and, despite the protests of the realists, has become a prominent legal theory/ sociology of law, despite the constant criticism it has received since its birth. Fuller's comments in 1934 illustrate the initial opposition to the movement.

> "[...] the movement reveals its flaws quite blatantly. The mistakes of youth [...] There were manifestos, action programmes. There have been debates on the appropriate "approach", mostly conducted with a respectful detachment from the problems to be approached [...] what is missing is a comprehensive work that both describes and applies the methods... There is nothing to compare with, say, Geny's four-volume "Science et Technique", which closed the movement for the reform of legal method in Europe."[43]

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[39] "[...] There is no school of realists", was the oft-quoted statement in "Some Realism about Realism". Llewellyn 1993, 72. p.

[40] See, for example, White, Morton G.: *Pragmatism and the American mind. Essays and reviews in philosophy and intellectual history*. Oxford University Press. New York, 1973.; White, Morton G.: S*ocial Thought in America. The revolt against formalism*. The Viking Press. New York, 1949.; Lloyd of Hampstead, Dennis Lloyd – Freeman, Michael D. A.: *Lloyd's introduction to jurisprudence.* Stevens. London, 1985. 679. p.; H. Szilágyi 1999, 245. p.

[41] Llewellyn 1993, 72. p.

[42] Tamanaha even concludes in his study that the position of legal realism was almost entirely present in the pragmatist writers who preceded the emergence of the school. Tamanaha 2009.

[43] Fuller 1934, 430. p.

Hart's criticism was aimed above all at the rule-scepticism of American legal realists. He did not claim that this idea was incoherent, but merely that it was a gross exaggeration. Hart's 'open web' approach may be a moderate form of rule scepticism, which allows the legal practitioner to reach different conclusions because of the different ways in which the concepts in the norms may be interpreted. This, however, Hart argues, does not give rise to the exaggerated scepticism of the realists.[44]

Dworkin, in his major work, did not devote much space to the legal realists, but he found the theory of the American legal realists[45] highly "plausible" and Leiter not too moderately called the theory a "joke".[46]

Despite strong criticism, the influence of American Legal Realism in legal theory and sociology of law is undeniable. Its problem-oriented, practical approach to theoretical questions of law, its style of making serious issues comprehensible to readers who are not steeped in philosophy, and its thought processes, with their real-life examples, leading to an understanding of the workings of the application of law, have influenced even later authors who were otherwise sharply critical of the movement's excesses. And it is undeniable that American Legal Realism can be seen as the forerunner of a modern movement in legal theory (Critical Legal studies).[47]

Beyond the academic sphere, the impact of the realists on legislation and law enforcement is even more striking. Many of the realists have been involved in guiding the legislative process on behalf of the government, and in the case of the Uniform Commercial Code, for example, realists have not only been involved in drafting the law, but have also influenced its application.[48] Although they were not the first to draw attention to the difference between the law on paper and the law in practice, it was the realists who made the phenomenon truly tangible.

The influence of realists on legal education cannot be ignored either. While the educational reform brought about by Langdell moved American legal education towards the study of case law (above all Supreme Court decisions), the realists were not content with merely teaching law and precedent through case law. Because of their commitment to the social sciences, they demanded that legal education include the teaching of the knowledge that can be decisive in judicial decisions beyond strict legal reasoning. The textbooks used today illustrate the success of realism in this area. The realists believed that to teach the law properly, it was necessary to understand the economic, political and social dimensions of the problems facing the courts, since these would be reflected in the judges' decisions. Today, when a textbook on a field of law is published under the title 'Cases and materials', it also emphasises the 'non-legal aspects' of the legal institutions, which clearly shows the influence of the realist movement.

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[44] Hart, H. L. A.: *The concept of law*. Clarendon. Oxford, 1994. 124–154. pp.

[45] Dworkin, Ronald: *Law's empire*. The Belknap Press. Cambridge, 1986. 37. p.

[46] Leiter, Brian: *Rethinking Legal Realism. Toward a Naturalized Jurisprudence*. Texas Law Review (76)1997/2. 278. p.

[47] For evidence of this see Altman, Andrew: *Legal Realism, Critical Legal Studies, and Dworkin*. Philosophy and Public Affairs 1986/3.; Engle, Eric: *A Primer on Left Legal Theory. Realism, Marxism, CLS & PoMo*. Idaho Critical Legal Studies Journal 2010/2. 64–78. pp.; Tushnet, Mark: *Critical Legal Studies and the Rule of Law*. In: Meierhenrich, Jens – Loughlin, Martin: The Cambridge Companion to the Rule of Law. Cambridge University Press. Cambridge, 2021.

[48] See Danzig, Richard: *A comment in the Jurisprudence of the Uniform Commercial Code*. Stanford Law review (27)1975/3.

BADÓ ATTILA

AZ AMERIKAI JOGI REALIZMUS SZOCIOLÓGIAI ÉS PSZICHOLÓGIAI VETÜLETE

(Összefoglalás)

Az amerikai jogi realizmus nem az ismeretelméletből, vagy szemantikából eredő tanok terjesztésére koncentráló jogelméleti irányzat, hanem mindenekelőtt a joggyakorlathoz kapcsolódó konkrét problémák megértésére és megoldására irányuló kísérlet. Az iskola szociológiai alapállású abban az értelemben, hogy hangsúlyozza a jogi normák szociológiai hátterét, a társadalmi tények szerepét a jogértelmezésnél, illetve a jog és a társadalmi élet szükségleteinek meghatározásánál. A jogot – a jogi pragmatizmussal egybecsengően – annak előrejelzéseként fogja fel, hogy a bíróságok adott esetekben valószínűleg hogyan fognak dönteni. A skandináv jogi realizmushoz hasonlóan abban a tekintetben is jogszociológiai megközelítésűnek tekinthető az amerikai realista iskola, hogy az igazságosságot nem a priori elképzelések alapján határozza meg, hanem a jogrendszernek az egymással versengő társadalmi igények kiegyensúlyozására való képessége alapján. A jogi realizmus, a szociológiai megközelítése mellett erősen kötődik a pszichológiához is, és az iskolán belül a szociológiai és pszichológiai megközelítés az iskola két markáns alakjánál világosan elválik. A tanulmány ennek bemutatására vállalkozik.