

## ARTICLES

### SOME REALISM ABOUT THE LLEWELLYN-POUND EXCHANGE OVER REALISM: THE NEWLY UNCOVERED PRIVATE CORRESPONDENCE, 1927-1931

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In this Article, Professor N.E.H. Hull evaluates the renowned debate between Karl Llewellyn and Roscoe Pound over the validity of the emerging Legal Realist movement. Examining the private correspondence between Llewellyn and Pound, including some newly uncovered letters, Professor Hull reveals that the focus of the debate over Realism was obscured by Llewellyn's failure to fully articulate his vision of the Realist movement. This failure, the author contends, is evident in Llewellyn's decision to provide only a partial list of scholars whom he identified with the Realist movement in his published response to Pound, *Some Realism about Realism, A Reply to Dean Pound*. Although this article named twenty scholars, Llewellyn had previously sent Pound a list of forty-four individuals whom he considered to be Realists or "realists-in-part-of-their-work." Llewellyn excluded his list of "realists-in-part-of-their-work" from his article, yet this category reflected Llewellyn's true perception of the Realists. Realism, Llewellyn believed, was not an ideology or a coherent legal philosophy. Rather, it was a technique which could be adopted by scholars regardless of their legal philosophy. By omitting this category from his list, the author argues, Llewellyn surrendered the opportunity to effectively dismiss the notion that the Realists were a structured school of jurisprudence. If Llewellyn had seized the moment to demonstrate that no identifiable school of Realism existed, Pound's critique would have been deflected away from the Realists and would have stood only as an unsubstantiated attack on the works of specific scholars.

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## I. INTRODUCTION

In 1930 and 1931, two of the most respected, productive, and colorful legal scholars of the twentieth century engaged in a "celebrated"<sup>1</sup> public debate over the validity and scope of a new mode of jurisprudential analysis. Before the controversy "had finally run its course in the late 1930s, [it] accounted for hundreds, if not thousands, of . . . pages in the law reviews."<sup>2</sup> Two articles by Karl Llewellyn,<sup>3</sup> the "wild eyed"<sup>4</sup> *enfant terrible* of post-World War I legal academics, and one by Roscoe Pound,<sup>5</sup> the Dean of Harvard Law School and spokesman for sociological jurisprudence, formally established—indeed named—the most important and original American jurisprudential movement of the first half of the twentieth century: Legal Realism.<sup>6</sup>

The Realists' impact on academic legal philosophy, judicial decision-making, and the development of modern American law can hardly be overstated. An endless parade of law review articles attack, defend, study, and analyze the Realist movement;<sup>7</sup> several noteworthy books are wholly devoted to the subject;<sup>8</sup> and many others deal with the Real-

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filled in biographical gaps in Table 3, *infra* p. 969. Finally, I would like to thank Professor Paul Freund for sharing with me his personal recollections of the controversy.

I am indebted to my expert editor and colleague, Professor Peter Charles Hoffer, for his patience and skill.

I would like to thank the Harvard Law School Library, the University of Chicago Law Library and the Yale University Library for permission to quote from and reproduce material from the Pound, Llewellyn, and Frank Papers, respectively. All rights to quote, cite, or reproduce those materials remain the property of those archives.

1. G. GILMORE, *THE AGES OF AMERICAN LAW* 137 (1977).

2. *Id.* Gilmore actually characterized those hundreds and thousands of pages as "tedious," but his comment was undoubtedly meant to be provocative. The articles generated by the controversy are unquestionably some of the most exciting jurisprudential literature written in America up to that time.

3. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *Next Step*]; Llewellyn, *Some Realism about Realism, A Reply to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter Llewellyn, *Some Realism*].

4. Roscoe Pound Papers [hereinafter Pound Papers], Box 24, File Folder 6, Harvard Law School Library, Llewellyn to Pound, undated, handwritten letter, probably written sometime between March 24 and April 5, 1931.

5. Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) [hereinafter Pound, *Realist Jurisprudence*].

6. W. RUMBLE, *AMERICAN LEGAL REALISM* 3 (1968); Hessel Yntema, a first-generation legal realist, recalled that the Realist movement "received its baptism in a notable polemic [between Llewellyn and Pound]." Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317 (1960).

7. A complete bibliography is impossible here; I refer the reader to excellent bibliographical footnotes in Laura Kalman's recent book. L. KALMAN, *LEGAL REALISM AT YALE*, 1927-1960 233-34 (1986); *see also* W. RUMBLE, *supra* note 6, at 2-3.

8. *See, e.g.*, L. KALMAN, *supra* note 7; W. RUMBLE, *supra* note 6; *see also* E. GARLAN, *LEGAL REALISM AND JUSTICE* (1941); J. PAUL, *THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS* (1958); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973) [hereinafter TWINING, *KARL LLEWELLYN*].

ist movement in part.<sup>9</sup> Several Realists even had the opportunity to apply their legal philosophy to the adjudication of cases when they became judges themselves, notably Jerome Frank, Charles Clark, and William O. Douglas.<sup>10</sup> All in all, "realism is generally regarded today as the most significant development in American legal theory in the years between the two world wars. Moreover, its impact is still visible."<sup>11</sup> There is also no doubt that with the advent of a new generation's jurisprudential movement—Critical Legal Studies (CLS)—interest in the Realists has never been stronger.<sup>12</sup> It is therefore most timely that the true story of the original controversy can finally be told. The private correspondence between the two principals that this author recently uncovered among the Pound Papers at the Harvard Law School Library<sup>13</sup> contradicts all the traditional accounts of that 1930-

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9. Any book attempting to discuss twentieth-century American jurisprudence must of necessity deal with the Realists. *See, e.g.*, E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 509-58 (1953); E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 111-33 (1974); H. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 23-24, 62, 129, 131-32, 299 (1983); E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 74-94 (1973); G. GILMORE, *supra* note 1, at 77-91; G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 63-113 (1980).

10. L. KALMAN, *supra* note 7, at 234 n.10; V. COUNTRYMAN, *THE JUDICIAL RECORD OF WILLIAM O. DOUGLAS* (1974); J. PAUL, *supra* note 8.

11. W. RUMBLE, *supra* note 6, at 3.

12. White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819 (1986). White notes "in a recent symposium on the Critical Legal Studies (CLS) movement, [there were] explicit statements that CLS has been influenced by the Realist movement of the 1930s." *Id.* Mark Tushnet agrees that "CLS is a direct descendant of American Legal Realism. . . ." Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986). Duncan Kennedy has gone so far as to call his own recent essay "an extension of the legal realist project. . . ." Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 n.1 (1986).

13. The correspondence between Llewellyn and Pound reposed in Pound's files and was bequeathed to Harvard Law School at Pound's death. The law school library organized and catalogued the Pound Papers in the late 1960s and early 1970s. Interview with Erika Chadbourne, Archivist of the Pound Papers (Feb. 18, 1987). No previous scholar of the Realist movement or of the principals in the controversy appears to have consulted the bulk of this correspondence. William Twining, author of the Llewellyn biography and organizer of the Llewellyn Papers at the University of Chicago Law School Library, saw only the letters in the latter collection. Llewellyn, however, seems to have kept little of his early correspondence with Pound. Many of Llewellyn's letters were handwritten and he appears to have kept no copy of either them or Pound's replies. Pound, on the other hand, carefully retained Llewellyn's letters as well as carbons of his own. There were only two letters exchanged relating to the controversy in the Karl Llewellyn Papers; they will be noted in the footnotes. There is, however, an interesting file of Llewellyn's letters to and from others with regard to the controversy in the Chicago collection, and they are very useful for filling in that end of the story. David Wigdor, who consulted the Pound collection for his 1974 study of Pound, found the Pound Papers at Harvard "vast and disappointing." D. WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 345 (1974). Perhaps because he conducted his research when the archivists had only started organizing the collection, he does not appear to have seen the two substantial files of Pound-Llewellyn correspondence. While he cites one Llewellyn-Pound letter, he does not seem to have seen the rest of the correspondence, particularly the important April 6, 1931 letter that contained Llewellyn's extended list of Realists. *Id.* at 263 n.14.

1931 public exchange.<sup>14</sup>

Most surprising among the newly uncovered correspondence was the discovery of Karl Llewellyn's original list of Realists.<sup>15</sup> While the list Llewellyn published in the footnote to his *Harvard Law Review* response to Pound—the list that has served as a basis for Realist scholar-

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There is a third principal involved in the controversy, Jerome Frank, who helped Llewellyn compose his reply to Pound for the *Harvard Law Review*. The Frank-Pound correspondence in the Pound Papers also appears never to have been consulted before now. None of the three major works on Frank used the Harvard collection (R. GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985); W. VOLKOMER, *THE PASSIONATE LIBERAL: THE POLITICAL AND LEGAL IDEAS OF JEROME FRANK* (1970); J. PAUL, *THE LEGAL REALISM OF JEROME N. FRANK*, *supra* note 8). Duplicates of most of the Frank-Pound material, however, do exist in the Frank Papers at Yale University, and Glennon, at least, used those materials. The private altercation between Frank and Pound, however, has not been treated before now. Most of my citations will be to Frank-Pound material in the Pound Papers but additional material available only in the Yale collection will be cited as well.

14. The traditional account of the controversy goes as follows: Karl Llewellyn, a protege of Wesley Hohfeld and Arthur Corbin at Yale and an emerging younger scholar, published a 1930 *Columbia Law Review* article promoting a new realistic jurisprudence. The article he published was somewhat critical of Roscoe Pound, a prominent, older scholar who had not been among Llewellyn's circle and with whom Llewellyn had no previous jurisprudential relationship. Llewellyn and his intellectual comrades thought that Pound had been, at one time, at the forefront of modern jurisprudence, but had retreated from progressive legal thought since becoming Dean of Harvard Law School. Only a few months after Llewellyn's article had been published, Jerome Frank published a book, *Law and the Modern Mind*, that articulated Frank's version of the new jurisprudence and also, even more vehemently than Llewellyn, attacked Dean Pound and his Harvard colleague, and conflict of laws specialist, Joseph Beale. J. FRANK, *LAW AND THE MODERN MIND* (1930). Pound, not unsympathetic to some of the younger jurisprudents, was incensed by the criticisms and the general lack of respect accorded his role in the development of modern American jurisprudence. When asked to submit an essay for the *Harvard Law Review*'s special issue to honor Justice Holmes on his ninetieth birthday, he hastily composed a vitriolic attack upon the Realists, sure that the special issue would provide him with an ideal forum to get his views on the new jurisprudence to the largest possible audience. The exchange turned into a full-scale, long-standing intellectual feud between Pound and Llewellyn when Llewellyn, with Frank's assistance, decided to publish a reply to Pound's attack. When Llewellyn approached the *Harvard Law Review* for space for his reply, the Columbia professor was rebuffed by its president, Paul Freund. Llewellyn, convinced the *Review* was trying to protect its Dean from attack and attempting to distance itself from the controversy (probably at Pound's own instigation), asked Pound to intercede with the *Review* for him. Pound, probably not wanting to exacerbate the feud, or perhaps afraid Llewellyn would make public charges about Pound's censorship, contacted the *Review* and convinced its editors to publish Llewellyn's response. In composing their reply, Llewellyn and Frank devised a list of twenty Realists whose work they would survey and sent it to Pound for comment. The twenty men Llewellyn identified were largely Llewellyn's colleagues and friends at Yale and Columbia. Probably because of the intellectual schism between the legal philosophies of the institutions, no one from Harvard (except Max Radin) was included on Llewellyn's list. This version of the Realist controversy is most fully detailed by William Twining. See TWINING, *KARL LLEWELLYN*, *supra* note 8, at 70-83. G. Edward White's article, *infra* note 20, at 1017-24, while not including all of the detail of the Twining version, is consistent with it. A similar account is provided by Grant Gilmore, but with a twist: the Gilmore variation holds the "absurd truth" was that Pound had read neither the Llewellyn article nor the Frank book—indeed, may never have read anything by either young man—before writing his attack on the Realists. Llewellyn and Frank had thus overreacted to the piece and incorrectly taken offense from it. G. GILMORE, *supra* note 1, at 136-37 n.25.

15. Pound Papers, 24-6, Llewellyn to Pound (Apr. 6, 1931).

ship for the last fifty-six years<sup>16</sup> —contained twenty names,<sup>17</sup> the actual list Llewellyn sent to Pound for verification or confirmation contained forty-four names.<sup>18</sup> This larger list is here reprinted and analyzed for the first time.

The discovery of Llewellyn's original list supports the thesis that Realism was neither an ideology nor a coherent legal philosophy, but rather a method or technology for looking at the law—a view, contrary to some later scholars' interpretation, that Llewellyn held throughout his life.<sup>19</sup>

Part II of this Article relates this newly reconstructed public and private controversy which "marked the full scale emergence of [the] new theory [Realism]"<sup>20</sup> and set off a jurisprudential debate and movement that "absorbed the best minds of a generation."<sup>21</sup> The third Part of this Article is devoted to an analysis of the original extended list of Realists and Llewellyn's view of Realism revealed by the contents and structure of this list. A brief conclusion suggests new directions for studying the Realists based on the newly uncovered private correspondence.

## II. THE REALIST CONTROVERSY

The story of the controversy began in 1927 with a private exchange between Llewellyn and Pound.<sup>22</sup> Karl Llewellyn was a thirty-four year old, newly appointed full professor at Columbia University School of Law and a recently appointed Commissioner on Uniform State Laws.<sup>23</sup> His most notable scholarly contributions when he began his correspondence with Dean Pound were an article in the *American Economic Review*,<sup>24</sup> a *Yale Law Journal* review of recently published works

16. Rumble admits that "there is no infallible method to determine who is a legal realist" and that his study "is based on the writings of men listed as such by Karl N. Llewellyn in a celebrated article on the movement." W. RUMBLE, *supra* note 6, at 2 n.1. Purcell also relies on Llewellyn's list. E. PURCELL, *supra* note 9, at 85, 284 n.12. See also E. PATTERSON, *supra* note 9, at 538. George Christie, in his casebook on jurisprudence, considers Llewellyn's list of twenty Realists and the citations to their writings which Llewellyn included in an appendix to be one of the chief virtues of the *Some Realism* article and "an invaluable bibliography on legal realism." G. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 751 (1973).

17. Llewellyn, *Some Realism*, *supra* note 3, at 1226-27 n.18.

18. See Table 2, *infra* p. 968.

19. See *infra* text accompanying note 276.

20. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1017 (1972).

21. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

22. Pound Papers, 24-6.

23. TWNING, KARL LLEWELLYN, *supra* note 8, at 104-05; see also W. TWNING, THE KARL LLEWELLYN PAPERS 3 (1968) [hereinafter TWNING, LLEWELLYN PAPERS].

24. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665-83 (1923).

on business and commercial law,<sup>25</sup> and a paper on *The Relation of Current Economic and Social Problems . . . to the Restatement of the Law* presented to the Academy of Political Science in 1923.<sup>26</sup> Publication of his casebook on sales and his lectures on the nature of law, published under the title *The Bramble Bush*, were still three years in the future. According to William Twining, Llewellyn's biographer, Llewellyn had "published relatively little before 1930."<sup>27</sup>

By contrast, in 1927 Roscoe Pound was a distinguished fifty-seven year old scholar, law professor and Dean—for the last eleven years—of the most prestigious law school in the country.<sup>28</sup> His widely read works on legal history and jurisprudence were already in print, including his articles on sociological jurisprudence,<sup>29</sup> and his books *Readings in the Common Law*,<sup>30</sup> *An Introduction to The Philosophy of Law*,<sup>31</sup> *Spirit of the Common Law*,<sup>32</sup> *Interpretations of Legal History*,<sup>33</sup> and *Law and Morals*.<sup>34</sup>

Given the difference in their ages and relative professional stature, it might appear that the two men had little in common, or at least were unlikely to have developed a friendship at this time. Not so: their correspondence suggests they were already acquainted.<sup>35</sup> There are several ways in which the two men may have met. First, the academic legal community was not as large in the 1920s as it is today, and professors at Columbia and Harvard were likely to meet at annual meetings of the Association of American Law Schools.<sup>36</sup> The two men might also have met at the June 1924 Cambridge conference to discuss the proposed Restatement of the Law by the newly established American Law Insti-

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25. Llewellyn, *The Modern Business Law Book*, 32 YALE L.J. 299 (1923).

26. Llewellyn, Address before the Academy of Political Science in New York, *The Relation of Current Economic and Social Problems . . . to the Restatement of the Law* (May 9 and 10, 1923).

27. TWINING, KARL LLEWELLYN, *supra* note 8, at 105. See K. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

28. P. SAYRE, *THE LIFE OF ROSCOE POUND* 1-4 (1948); D. WIGDOR, *supra* note 13.

29. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911) and 25 HARV. L. REV. 140, 489 (1912) (pts. 1-3).

30. (1913).

31. (1922).

32. (1921).

33. (1923).

34. (1924).

35. The first extant letter from Pound to Llewellyn refers to the fact that the Dean had received an unsigned, typewritten letter that he thought might be from Llewellyn because he thought he recognized a handwritten notation as Llewellyn's handwriting. Pound Papers, 24-6, Pound to Llewellyn (July 2, 1927). The unsigned letter was in fact from Llewellyn and is the first of the correspondence. Pound Papers, 24-6, Llewellyn to Pound (June 27, 1927). The implication of Pound's comment, of course, is that he was familiar with Llewellyn's handwriting, though there are no earlier letters by Llewellyn to Pound in the Pound Papers.

36. R. STEVENS, *LAW SCHOOL* (1983).

tute.<sup>37</sup> It is also possible that they had become familiar with one another when they both had appealed for clemency for Sacco and Vanzetti earlier in 1927.<sup>38</sup>

However Pound and Llewellyn may have come to know one another, Llewellyn felt comfortable enough with their acquaintance to write to Pound that he was working on an article in which he planned to take exception to Pound's 1916 article *The Limits of Effective Legal Action*.<sup>39</sup> Pound's article, which originated as an address before the Pennsylvania Bar Association, though presented in Pound's customary philosophical and historical style, was really a profoundly conservative political attack on Progressive legislative initiatives. The Progressive rebel who only ten years before had blamed popular dissatisfaction with the law on the "mechanical operation of legal rules,"<sup>40</sup> and decried the "price we must pay for certainty and uniformity,"<sup>41</sup> now argued that "dissatisfaction with law, criticism of legal and judicial institutions, and suspicion as to the purposes of the lawyer" arose "in the wake of ambitious social programs calling for more and more interference with every relation of life."<sup>42</sup> No longer critical of the formalist style of judging he had previously condemned, the newly appointed Harvard Law School Dean appeared nostalgic for "our hard-won justice according to law."<sup>43</sup> Invoking his own version of legal history, he argued that, with the new regulatory agencies and commissions, "we are reverting in some degree to the crude methods of rough-and-ready adjustment of controversies imposed on primitive law by the desire for peace at any price."<sup>44</sup>

Primitive law, in Pound's schema of legal history, was the first stage of legal development. The second stage was what he called "strict law," roughly coinciding with the era of the common law forms of ac-

37. American Law Institute (ALI) Financial Records, volume 3, ALI archives, indicate Llewellyn was reimbursed for attending the June meeting. He may have been invited because of his remarks at the Academy of Political Science meeting discussed *supra* at text accompanying note 26. Pound also attended the meeting; he was a founding member of the ALI and chaired a committee in charge of Classification and Terminology of Law. For a detailed discussion of Pound's and Llewellyn's associations with the ALI, see my forthcoming book *THE NEW JURISCONSULTS: THE AMERICAN LAW INSTITUTE AND THE TRANSFORMATION OF AMERICAN LAW IN THE TWENTIETH CENTURY*.

38. See P. SAYRE, *supra* note 28, at 218 (on Pound's involvement); TWINING, KARL LLEWELLYN, *supra* note 8, at 341-49 and TWINING, LLEWELLYN PAPERS, *supra* note 23, at 105-10 (discussing Llewellyn's advocacy in the case).

39. Pound Papers, 24-6, Llewellyn to Pound (June 27, 1927) (unsigned letter); Pound, *The Limits of Effective Legal Action*, 3 A.B.A. J. 55 (1917) [hereinafter Pound, *Limits*].

40. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 397 (1906) [hereinafter Pound, *Causes*].

41. *Id.* at 400.

42. Pound, *Limits*, *supra* note 39, at 56.

43. *Id.* at 57.

44. *Id.*

tions. The jurists of this period, Pound argued, consciously sought "the ends . . . of certainty and uniformity in the decision of controversies . . . through rule and form."<sup>45</sup> In Pound's third stage, the introduction of equity jurisdiction infused the law with moral principles,<sup>46</sup> but "men soon perceived that it gave too wide a scope to magisterial discretion."<sup>47</sup> The fourth stage—corresponding to what we now term late nineteenth-century "formalism," "conceptualism," or the "classical" period of American jurisprudence—Pound approvingly called "the maturity of law."<sup>48</sup> The "overwide magisterial discretion" of the third stage, Pound argued, was thus "corrected by a gradual fixing of rules and consequent stiffening of the legal system."<sup>49</sup> The final stage Pound outlined was the same modern period he had criticized at the beginning of the essay as a return to primitive law. After this personal account of legal periodization, Pound concluded that the present (1916) era suffered from excesses similar to those of the third stage of "equity or natural law" and "just as equity restrained the unconscientious exercise of legal rights and legal powers, the legislation of today is limiting the power of an owner to dispose of his property."<sup>50</sup>

The legislative evils to which Pound addressed his censure were the Progressive regulatory commissions and agencies. Long before his well-known opposition to the New Deal's quasi-judicial administrative agencies,<sup>51</sup> Pound publicly decried "administrative tribunals" which "proceeding summarily upon principles yet to be defined are acquiring jurisdiction at the expense of the courts."<sup>52</sup>

With characteristic historical hyperbole he concluded:

The rising Court of Chancery, the King's Council, the Star Chamber, the Court of Requests, and all the administrative organs of justice in Tudor and Stuart England, have their analogies in twentieth century America. The sixteenth century sergeant at law who complained that the chancellor set aside the law of the King's Court because he was not acquainted with the common law, neither with the goodness thereof, would sympathize with complaints that may be heard at the meeting of any state bar association today.<sup>53</sup>

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45. *Id.* at 59.

46. *Id.* at 59-61.

47. *Id.* at 61.

48. *Id.* at 62.

49. *Id.* at 61.

50. *Id.* at 63.

51. D. WIGDOR, *supra* note 13, at 255, 271-74.

52. Pound, *Limits*, *supra* note 39, at 64.

53. *Id.*

In the ten years between 1906 and 1916, Pound's jurisprudential philosophy appears to have revolved nearly one hundred and eighty degrees.<sup>54</sup>

Llewellyn's proto-realist critique of Pound's interpretation of jurisprudence emerged clearly in this early correspondence. Pound's historical sketch, Llewellyn thought, was totally ahistorical. Pound, according to Llewellyn, had imposed a design of conscious, causal processes on what was undoubtedly an unconscious practical evolution followed by post-hoc rationalization. Pound was guilty of what Llewellyn later called in the 1930 article "postmortemizing."<sup>55</sup> Pound's macro-categorization of legal development—in sharp contrast to the emerging Realists' interest in studying and collecting individual case data—overlooked the everyday, ad hoc experience of the jurists responsible for that development. "It is hard," Llewellyn told Pound, "to read *Njal's Saga* and believe the rules and forms there involved were built with any conscious aim at either certainty or uniformity of outcome."<sup>56</sup>

Llewellyn continued with two additional points. The first was an observation that Malinowski's recently published *Crime and Custom in Savage Society*<sup>57</sup> contradicted Pound's assertion that law in the primitive stage did not distinguish between religion, morals and rules.<sup>58</sup> The second was a quibble with Pound's claim that because modern society no longer recognized private actions at law against individuals (presumably men) who harbor disaffected wives who have deserted their husbands, there were no longer any legal (only moral or communal) sanctions against such conduct.<sup>59</sup> Llewellyn queried Pound: "Do you not regard divorce for desertion as a sanction of the wife's failure to live with her husband, even though the attempts at specific reparation have gone into the discard?"<sup>60</sup> Llewellyn's letter concluded: "I offer my queries as evidence that the writings provoke to thought."<sup>61</sup>

Both Pound's substantive analysis and his methodology ran completely contrary to Llewellyn's; nevertheless, Llewellyn elected caution in taking on a professional colleague and legal scholar of Pound's stature. Always careful that he not misquote or mistake someone's mean-

54. It should be noted that although Pound's attitude toward "mechanical" judging had reversed itself, his 1906 essay already showed some of his antipathy toward legislatively created, quasi-judicial agencies and commissions. Pound, *Causes*, *supra* note 40, at 396.

55. Llewellyn borrowed the phrase from his friend T. R. Powell. Llewellyn, *Next Step*, *supra* note 3, at 437.

56. Pound Papers, 24-6, Llewellyn to Pound 1 (June 27, 1927).

57. B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926).

58. Pound Papers, Llewellyn to Pound, *supra* note 56; Pound made that assertion in Pound, *Limits*, *supra* note 39, at 58.

59. Pound, *Limits*, *supra* note 39, at 67.

60. Pound Papers, Llewellyn to Pound, *supra* note 56, at 2.

61. *Id.*

ing, he told Pound that "it occurred to me that it is better to find out what a man means than to speculate in print upon his meaning."<sup>62</sup> Llewellyn dutifully acknowledged his "indebtedness to [Pound's] writings,"<sup>63</sup> but respectfully suggested that Pound had erred in saying that the jurists of the "stage of strict law" had consciously used "rule and form" to achieve certainty and uniformity. Rather, Llewellyn argued, "the process runs other end to: rule and form had come to be and were not subject lightly to men's change; certainty and uniformity resulted, and survived until their survival came to seem somewhat vigorously inexpedient."<sup>64</sup>

It is almost certain that the article Llewellyn told Pound he was writing was the same article he later published as *A Realistic Jurisprudence—The Next Step*.<sup>65</sup> There are several good reasons to believe this. First, a survey of Llewellyn's published work and unpublished manuscripts during this period reveals no other project related to the jurisprudential subject matter covered in his letter to Pound.<sup>66</sup> Second, the 1930 article began as a paper Llewellyn presented to a meeting of the American Association of Political Science in December 1929, under the title *Modern Concepts of Law*.<sup>67</sup> The original title indicates better than the later published title that the subject of the piece reflected a critical overview of modern jurisprudence similar to that which Llewellyn discussed in his letter. Furthermore, extant in the Llewellyn Papers are drafts of this paper dating from as early as 1925; clearly he had been working on the piece when he wrote to Pound in 1927.<sup>68</sup> Finally, there are several specific points of correspondence between the subject matter of Llewellyn's June 27 letter to Pound and material covered in the 1930 law review article, until now considered the opening shot in the heated exchange between the two men. Llewellyn's criticism of Pound's *Limits of Effective Legal Action* appears in *A Realistic Jurisprudence—The Next Step*.<sup>69</sup> Indeed, the published criticism uses Pound's article as only a starting point to show how hide-bound Pound's vision of sociological jurisprudence had become, if in fact Pound ever understood the "sociological" analysis he claimed to espouse.<sup>70</sup> Llewellyn pointedly omitted

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62. *Id.* at 1.

63. *Id.* at 2.

64. *Id.* at 1.

65. Llewellyn, *Next Step*, *supra* note 3.

66. W. TWINING & R. ELLINWOOD, JR., **THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION** (comp. 1970).

67. Llewellyn noted this fact in a footnote to the published article. Llewellyn, *Next Step*, *supra* note 3, at 431 (footnote at asterisk).

68. Karl Llewellyn Papers [hereinafter KLP], B.I.6., University of Chicago Law Library; W. TWINING & R. ELLINWOOD, JR., *supra* note 66, at 4.

69. Llewellyn, *Next Step*, *supra* note 3, at 435.

70. *Id.*

Pound from his list of modern jurisprudents whose work might be representative of the new "point of view" even though Pound's predecessor among the sociological jurisprudents, Eugen Ehrlich, was included.<sup>71</sup> A second point that appeared in Llewellyn's *Columbia Law Review* article and in that first letter to Pound was his use of *Njal's Saga* as an illustration of how realistic analysis rendered Pound's legal periodization of strict law a vastly inadequate overgeneralization.<sup>72</sup> Finally, Llewellyn's published and unpublished ruminations both cite Malinowski's *Crime and Custom in Savage Society*.<sup>73</sup>

Pound promptly responded at length to Llewellyn's cryptic letter.<sup>74</sup> The Dean does not appear to have taken offense at Llewellyn's criticism, but tried gamely to deal with Llewellyn's queries. At the outset he apologized: "It is a bit difficult to explain the matter about which you inquire and I wish I might do so by word of mouth."<sup>75</sup> The five, double-spaced, typewritten pages that follow rehearse Pound's original article. Pound adhered to his grand historical categorization and provided examples from Roman, Greek, and late medieval English and Continental law to support his contention that the jurists in the early stages of legal development consciously sought certainty and uniformity. "In all of them you see a legal development through the activity of professional lawyers applying rigid logical reasoning to procedural forms and formal legal transactions or authoritative legal texts, with the idea of rule and form as a means toward certainty constantly before them."<sup>76</sup>

Throughout his reply, Pound never quite caught Llewellyn's underlying criticism. For example, Pound ignored Llewellyn's substantive point about *Njal's Saga* and simply disputed the latter's aside that the legal culture of the Icelandic tale appeared to belong to the "strict law" stage rather than the "primitive law" stage of legal development.<sup>77</sup> Again, Pound ignored what Llewellyn had to say about Malinowski

71. Llewellyn did, in fact, create a list of modern jurisprudents who he felt exemplified or anticipated the new, modern, "realistic" vision of jurisprudence which he argued was the "next step" in this first article. Llewellyn, *Next Step*, *supra* note 3, at 454-55. Later analyses of Llewellyn's list seem to overlook this list as well. Actually, this first list significantly overlaps the one he later created and sent to Pound in preparation for *Some Realism about Realism*. A fuller discussion of the first list in this context appears in Part III of this Article.

72. Llewellyn, *Next Step*, *supra* note 3, at 437; Pound Papers, Llewellyn to Pound, *supra* note 56.

73. Llewellyn, *Next Step*, *supra* note 3, at 436; see *supra* text accompanying note 57.

74. Pound Papers, 24-6, Pound to Llewellyn (July 2, 1927). Llewellyn's prose, as quotations in my text might indicate, was not terribly clear. Also, as Pound noted in his reply, the letter arrived unsigned and he had to deduce who its author was.

75. *Id.* at 1.

76. *Id.* at 2.

77. Pound Papers, Llewellyn to Pound, *supra* note 56, at 1; Pound Papers, Pound to Llewellyn, *supra* note 74, at 3.

and equivocated whether primitive law may or may not have differentiated between legal rules and religion.<sup>78</sup> "In other words," Pound excused himself, "all generalization involves a certain amount of elimination, and we can do no more than frame hypotheses which will help us to grasp the significant points."<sup>79</sup> Of course, that was just the obverse of Llewellyn's point: generalizations did eliminate the particular. Overdrawn hypotheses artificially created "significant points." Pound had not begun to grasp what Llewellyn had tried to say. Finally, Pound argued that divorce for desertion could hardly be considered a sanction against a truant wife if her motive for desertion was to effect a divorce.<sup>80</sup>

Pound's display of learning<sup>81</sup> and his patience in reply to Llewellyn's queries about an eleven year old article were more than polite; they were an effort to win the respect and admiration of the younger man. The currying tone of the letter indicates how much Pound wanted Llewellyn's approbation:

I am taking a train and very likely shall not be able to see this hastily dictated letter before it goes to you. If it proves unsatisfactory in any respect, won't you please write to me again and I will try to take pains and make things more clear. With best regards. Yours very truly,<sup>82</sup>

—it is almost as if their relative professional positions were reversed.

Llewellyn was somewhat taken aback by Pound's reply. He thanked Pound for taking the time to answer him "so fully," but was left unsatisfied by Pound's discourse. He told him: "Your letter makes your position entirely clear, I think."<sup>83</sup> Llewellyn reiterated his doubts

as to the wisdom of attributing much consciousness of certainty and uniformity, as an end, to the professional lawyers whose work seems to be chiefly operative in introducing and building up the stage of strict law as you define it . . . I am led to wonder whether the consciousness of certainty and uniformity as values to be sought, are not rather of the nature of justifications of an institutional system already under attack in some quarters. . . .<sup>84</sup>

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78. Pound Papers, Pound to Llewellyn, *supra* note 74, at 4.

79. *Id.*

80. *Id.*

81. Pound had a well-known tendency to be pompous in quoting authorities and displaying his breadth of learning. D. WIGDOR, *supra* note 13, at 285.

82. Pound Papers, Pound to Llewellyn, *supra* note 74, at 4-5.

83. Pound Papers, 24-6, Llewellyn to Pound (July 7, 1927).

84. *Id.*

There was no meeting of the minds between the two men, though Llewellyn tried to downplay their disagreement: "All of which would seem to indicate that our difference is chiefly one of emphasis."<sup>85</sup> The correspondence temporarily broke off; it was probably clear to both men that their dialogue had reached an impasse.

The published debate began with Llewellyn's 1930 *Columbia Law Review* article *A Realistic Jurisprudence—The Next Step*.<sup>86</sup> As an exposition of what the new jurisprudential movement was about, Llewellyn failed to present any coherent analysis of Realist thought. The article was a hodgepodge of legal definition, criticism of Pound, "some quasi-Hohfeldian ideas about remedies and rules, and end[ed] with a plea for an interdisciplinary approach to legal research, with human behaviour as an important focus."<sup>87</sup> The only consistent strains in the article were Llewellyn's emphasis on "real rules"—the record of actual court practice that has no prescriptive value other than to predict "that courts *ought to* continue in their practices"<sup>88</sup>—and his disdain for "paper rules"—"what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—that the books there say 'the law' is."<sup>89</sup> These, of course, were the crux of the difference between Llewellyn and Pound in the earlier correspondence.

Llewellyn had warned Pound that his article would criticize some of Pound's work. But the 1927 correspondence did not indicate how far that critique would go. It is even possible that the brief but unfruitful dialogue in 1927 exacerbated Llewellyn's disaffection with Pound's jurisprudence and this was translated into a major attack on Pound in his 1930 essay. Scholars have minimized or overlooked the condescending and contemptuous nature of Llewellyn's attack on Pound in this first article.<sup>90</sup> The entire first section of Llewellyn's article is devoted to Pound. Llewellyn began by adopting Pound's summary of nineteenth-century schools of jurisprudence but quickly turned to a critical analysis of Pound's reliance upon "precepts" of law.<sup>91</sup> These, in turn, Llew-

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85. *Id.*

86. Llewellyn, *Next Step*, *supra* note 3.

87. W. TWNING & R. ELLINWOOD, JR., *supra* note 66, at 70. Even a cursory reading of the article cannot help but leave a reader reeling from the juxtaposition of "developing" but unconnected insights. Even Llewellyn's biographer and disciple, Twining, recognized the problems with the essay. TWNING, KARL LLEWELLYN, *supra* note 8, at 70.

88. Llewellyn, *Next Step*, *supra* note 3, at 448 (emphasis in original).

89. *Id.* (emphasis in original).

90. Twining characterized Llewellyn's comments on Pound as "perceptive" and "quite critical." TWNING, KARL LLEWELLYN, *supra* note 8, at 70-71. White thought that Llewellyn's criticisms of Pound were "milder" than those of Frank in the latter's *Law and the Modern Mind*, published only months after Llewellyn's article. White argues that Frank's "attack on Pound was more personalized and intense." White, *supra* note 20, at 1020-21 (discussing J. FRANK, *supra* note 14).

91. Llewellyn, *Next Step*, *supra* note 3, at 434.

ellyn argued, are "roughly synonymous with rules and principles, the principles being wider in scope and proportionately vaguer in connotation, with a tendency toward idealization of some portion of the *status quo* at any given time."<sup>92</sup> Llewellyn's evaluation of Pound was ambivalent:

Only a man gifted with insight would have added to the verbal formulae and verbalized (though vague) conceptual pictures thus far catalogued, such an element of *practices*, of habits and techniques of action, of *behavior*. But only a man partially caught in the traditional precept-thinking of an age that is passing would have focussed that behavior on, have given it a major reference to, have belittled its importance by dealing with it as a phase of, those merely verbal formulae: precepts.<sup>93</sup>

As in the correspondence, Llewellyn's problem with Pound was the latter's insistence on generalization of ideals and dismissal of behavioral reality. Indeed, it was in the footnote to the above criticism that Llewellyn referred to Pound's article on *The Limits of Effective Legal Action*.<sup>94</sup> Had Llewellyn's appraisal of Pound ended there, Pound might not have felt the need to respond; but Llewellyn's escalating invective in a footnote to his discussion devalued Pound's entire scholarly corpus:

Critical reading of Pound's work, it may be noted in passing, and especially the phrasing of any concrete criticism, are embarrassed by the constant indeterminacy of the level of his discourse. At times the work purports clearly to travel on the level of considered and buttressed scholarly discussion; at times on the level of *bedtime stories for the tired bar*; at times on an intermediate level, that of the thoughtful but unproved essay. Most often, it is impossible to tell the intended level of any chapter or passage, and the writing seems to pass without notice from one to another. Now it is obvious that three successive, mutually inconsistent generalizations, though no one of them sustainable as the deliberate propositions of a scholar, may all be illuminating and indeed all true at once—on the level of the after dinner speech, or even of the thought-provoking essay. All of which gags the critic at the same time that it perhaps stimulates his critical faculties.<sup>95</sup>

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92. *Id.*

93. *Id.* (emphasis in original).

94. *Id.* at 435 n.3.

95. *Id.* (emphasis added).

Llewellyn was understandably taken by surprise when, after the essay appeared, he received a note of congratulation from Pound on the piece.<sup>96</sup> Pound wrote Llewellyn: "I have just seen your remarkable paper in the *Columbia Law Review*. . . . Everyone who has the science of law at heart must rejoice that you are thinking into its problems."<sup>97</sup> Pound was either a consummate gentleman or was determined not to take offense from the damning footnote. Indeed, he good-humoredly remarked in reference to Llewellyn's criticism: "May you be spared the necessity of making bar association addresses and popular talks which falls to the lot of a voice crying in the wilderness as mine had to be so long. Very likely it got injured in the process."<sup>98</sup> He concluded by expressing admiration for Llewellyn and his generation's jurisprudence: "Veni post me, me fortior."<sup>99</sup>

Llewellyn was incredulous at Pound's reaction and may have wondered whether Pound had understood his article's criticism. In a short handwritten letter thanking Pound for his "gracious note," Llewellyn remarked, "I note that you withhold comment on its soundness."<sup>100</sup> Then, perhaps not realizing the Pandora's box he might be opening, Llewellyn ingenuously told Pound that he hoped "that sometime you may find leisure to take me over the jumps. Though it would be even better if . . . you could pry loose leisure to show us what skilled irrigation can do to a wilderness."<sup>101</sup> It should not have been a surprise to Llewellyn, therefore, when Pound did exactly as Llewellyn suggested in the March 1931 issue of the *Harvard Law Review*.<sup>102</sup> But Llewellyn was surprised and "distressed" by the publication of Pound's article.<sup>103</sup> Though Llewellyn had suggested Pound "take [him] over the jumps," he seems to have had no idea that Pound was actually working on an article about the Realists. Only a month before Pound's essay was pub-

96. Llewellyn noted his astonishment in a footnote added to a reprint of the article in his collection of essays. K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 14 n.9b (1962).

97. KLP, III.65(b), Pound to Llewellyn (Apr. 29, 1930). (The letter was misfiled in A.65.b., a file related to J. FRANK, LAW AND THE MODERN MIND, *supra* note 14. The University of Chicago Law School librarian is refiling it as I edit this Article).

98. *Id.*

99. *Id.*

100. Pound Papers, 24-6, Llewellyn to Pound (May 1, 1930).

101. *Id.*

102. Twining, who probably did not see Llewellyn's reply to Pound because there was no copy of the letter in the former's papers, speculated in his account of the controversy that as a result of Pound's congratulatory note, Llewellyn may have been "under the impression that Pound looked on him with special favour" and that he was therefore "sharply disillusioned in the following year, when 'realism' became the focal point of a bitter and protracted controversy." TWINING, KARL LLEWELLYN, *supra* note 8, at 71-72. Whether the controversy was in fact "bitter" and how it may or may not have affected the personal relationship of Pound and Llewellyn is discussed *infra* text accompanying notes 147-53.

103. TWINING, KARL LLEWELLYN, *supra* note 8, at 73 (Twining quoting Llewellyn).

lished, the two had corresponded at some length about collaborating on an article on contracts.<sup>104</sup> Pound never mentioned to Llewellyn in any of his letters that he had written and was about to publish an article critical of the new jurisprudence Llewellyn had championed.<sup>105</sup>

Pound's forum was a special issue of *Harvard Law Review* dedicated to Justice Oliver Wendell Holmes, Jr. on the occasion of his ninetieth birthday.<sup>106</sup> In fact, Pound's study, *The Call for a Realist Jurisprudence*, was the only solicited essay that did not focus on Holmes's career or jurisprudence. Pound later explained to Paul Freund (then president of *Harvard Law Review*) that Pound had not understood that the *Review* had expected a Holmes-related piece.<sup>107</sup> The Dean was at that time temporarily absent from the law school—serving on the Wicker-sham Commission in Washington, D.C.—and so a misunderstanding could easily have occurred. His Washington assignment, removed as he was from his office, library, and secretary, also suggests that he may have sent the article on the Realists because it was something he had already substantially written and could hastily complete in time for the *Review*'s deadline.<sup>108</sup>

Pound was clearly stimulated by Llewellyn's article and encouraged by Llewellyn's letter to write his essay—the very fact that Pound referred to a "Realist" jurisprudence confirms Llewellyn's influence.<sup>109</sup> Most of Pound's specific criticisms of Realist jurisprudence were probably not inspired by Llewellyn's published work, however. For one thing, Llewellyn had published fairly little before 1930.<sup>110</sup> For another, the little that Llewellyn had published (and would publish, for

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104. Pound Papers, 24-6. Five letters and a telegram were exchanged between February 2 and February 16, 1931 as the two men tried to arrange a meeting to discuss their possible collaboration. Their work on the contracts article will be explored in greater detail in my forthcoming book, *ROSCOE POUND AND KARL LLEWELLYN: TWENTIETH CENTURY JURISPRUDENCE IN TRANSITION, 1927-1962*.

105. Pound Papers, 24-6.

106. Pound, *Realist Jurisprudence*, *supra* note 5.

107. Interview with Professor Freund (Feb. 20, 1987). Pound, according to Freund, reproached the student for not informing him that all the contributors were expected to write and, except for himself, had written essays about Holmes. The Dean appeared to Freund to have been somewhat embarrassed by his faux pas.

108. Grant Gilmore suggested this in his version of the controversy and it seems consistent with my reconstruction of events. Gilmore's other assertion, that Pound had neither Llewellyn nor Jerome Frank in mind and had probably never read anything by Llewellyn or Frank before he wrote his critical essay, is totally refuted by evidence from Pound's correspondence. G. GILMORE, *supra* note 1, at 137. I have already discussed this evidence as it relates to Llewellyn; there is also correspondence, discussed *infra* text accompanying notes 154-83, that shows that Pound also had read Frank's recently published book *Law and the Modern Mind* (J. FRANK, *supra* note 14). Twinning agreed that Pound had read Frank. TWINNING, KARL LLEWELLYN, *supra* note 8, at 72.

109. Llewellyn was the first to term the new jurisprudence "realistic" in his *Next Step* article and Frank referred specifically to "legal realism" in *Law and the Modern Mind*. Llewellyn, *Next Step*, *supra* note 3, at 431; J. FRANK, *supra* note 14, at 42-52.

110. See *supra* text accompanying note 27.

that matter) was not the heavily statistical and psychological type of scholarship Pound singled out for criticism in the second part of his study.<sup>111</sup>

A closer reading of Pound's essay shows that he was caught between admiration for these younger scholars and skepticism about the soundness of their approach. Though a great deal has been written—starting with Llewellyn's second article—about Pound's criticisms of the Realists, Pound's sympathy for and understanding of this new jurisprudential movement are rarely emphasized. Indeed, the introduction and first part of *The Call for a Realist Jurisprudence* evidence an introspective empathy for the new approach.<sup>112</sup> Pound admitted, for example, that:

our unconscious measure may be that of a philosophy and psychology and legal science of the past, whereas they [the Realists] are struggling to put things in terms of the philosophy and psychology of today, and thus to set up a legal science for the twentieth century.

Hence I approach the subject of the call for a realist jurisprudence, insistent on the part of our younger teachers of law, with some humility.<sup>113</sup>

Pound may have thought he was doing the new breed of jurisprudents a favor by announcing to his own generation the arrival of the new movement: “[h]ere is an important movement in the science of law,” Pound proclaimed, “and it behooves us to understand it and be thinking about it.”<sup>114</sup> And indeed, Pound's stature in academic and juristic legal circles meant that an article by him, particularly in the august Holmes celebratory issue of the *Harvard Law Review*, guaranteed serious consideration of the new movement.<sup>115</sup>

The three parts of Pound's article analyzed the Realist methodology in different ways. The first part looked at the Realist program generally and is by far the soundest critique. Pound began by trying to define Realism:

As I read them, the new juristic realists hardly use realism in a technical philosophical sense. They use it rather in the sense

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111. Even Llewellyn himself saw his work as moderate, rather than extreme, examples of realist scholarship. See Table 2, *infra* p. 968 (Llewellyn's categories of Realists).

112. Accounts of the controversy either totally ignore or give short shrift to the first part of Pound's article. Gilmore, for example, does not even mention it. G. GILMORE, *supra* note 1, at 136-37 n.25.

113. Pound, *Realist Jurisprudence*, *supra* note 5, at 697.

114. *Id.*

115. Llewellyn, himself, admitted in *Some Realism* that “When Dean Pound speaks on jurisprudence, men listen.” Llewellyn, *Some Realism*, *supra* note 3, at 1225.

which it bears in art. By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be, or as one feels they ought to be. They mean by realism faithful adherence to the actualities of the legal order as the basis of a science of law.<sup>116</sup>

By stating that the “new realists” did not use realism in its “technical philosophical sense,” Pound was carefully distinguishing between the “neo-realists,” as he called them, and medieval scholastic legal-realist philosophers. As Pound was undoubtedly aware, the twentieth-century Realists had little in common with their medieval namesakes. Indeed, in the medieval philosophical debate the twentieth-century Realists would more closely resemble the earlier realists’ opponents, the nominalists who believed that “the only real substances in nature were the individual things apprehended by us through observation” and that “the generalizations and classifications which we use to describe the outside world are merely *nomina*.<sup>117</sup> The nominalists, like the later Realists, rejected universal, formal principles in favor of the individual case. Pound therefore realized that the “new realists” had characterized their jurisprudence as “realist” not in a philosophical sense but as the term had more recently been applied to the arts.

Pound’s analogizing the legal Realists to their artistic cousins demonstrates how far he had come in comprehending the former’s jurisprudence. Indeed, it is ironic that it was Pound rather than Llewellyn, an amateur poet, who pointed out this connection. Legal thinkers were somewhat behind their counterparts in art and literature in discovering realism.<sup>118</sup> Nevertheless, the correlative realist movements shared a viewpoint and critical approach that were remarkably similar and probably sprang from similar social-cultural conditions. Not surprisingly, they pose similar problems for scholars. Eric Sundquist’s comments on the literary realists eerily echo Pound’s remarks fifty years earlier about the realist jurisprudents: “The problem lies in part in the central difficulty of describing the program of a group of writers who virtually had no program but rather responded eclectically, and with increasing imaginative urgency, to the startling acceleration into being of a complex industrial society following the Civil War.”<sup>119</sup>

Pound seemed to have finally grasped what Llewellyn had tried to convey in earlier correspondence. Or, perhaps, Pound had understood

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116. Pound, *Realist Jurisprudence*, *supra* note 5, at 697.

117. E. BODENHEIMER, *supra* note 9, at 27.

118. See, e.g., C. SNOW, *THE REALISTS: EIGHT PORTRAITS* (1978) and *AMERICAN REALISM: NEW ESSAYS* (E. Sundquist ed. 1982).

119. *AMERICAN REALISM: NEW ESSAYS*, *supra* note 118, at viii.

all along and only appeared obtuse as he attempted to convince his young colleague of the value of his own approach. Whatever the provenance of Pound's new insight, Llewellyn's influence on Pound is apparent in the first part of the article. Once Pound defined the Realist approach, he criticized it—as it has been criticized ever since (indeed, as CLS proponents currently do)—for lacking any ultimate purpose. For, Pound suggested, “[a]fter the actualities of the legal order have been observed and recorded, it remains to do something with them. What does realism propose to do with them which we had not been doing in the past?”<sup>120</sup> Observation, Pound realized, was worthwhile, but the inchoate realist jurisprudence, like literary realism, had no program. Pound also pointed out that what these Realists were doing was neither new nor unique. Previous jurisprudential schools—rationalists, historical jurists, analytical jurists and positivists—according to Pound, had tried to look at the legal system realistically. But “our *new realist*,” he wrote, “rejects all these conceptions of juristic reality.”<sup>121</sup> Pound expressed skepticism that the new jurists could “find the one unchallengeable basis free from illusion which alone the new realist takes over from the illusion-ridden jurists of the past.”<sup>122</sup> Showing personal empathy with the same twentieth-century relativism that inspired the Realists themselves, Pound suggested, “[i]f recent philosophy teaches aright, there is no absolute reality” and “no absolute significance.”<sup>123</sup> Pound concluded, as Llewellyn had mentioned in one of his letters, that “the difference today is one of emphasis.”<sup>124</sup>

The emphasis of the realists on criticism, Pound conceded, deserved merit since:

[it] is useful in that it shows us what we have to do in making [the legal process] more effective, or in making their workings more in accord with the ends of law, or in finding better instruments to take their place. The new realists have been doing good work at this point. But such critical activity, important as it is, is not the whole of jurisprudence, nor can we build a science of law which shall faithfully describe the actualities of the legal order and organize our knowledge of these actualities, merely on the basis of such criticism.<sup>125</sup>

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120. Pound, *Realist Jurisprudence*, *supra* note 5, at 697.

121. *Id.* at 698 (emphasis added).

122. *Id.* at 699.

123. *Id.* On the advent of relativist science, social science and outlook, see P. JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES* 1-48 (1983). On the relativism of the time and its influence on the Realists, see, for example, its influence on Jerome Frank in W. VOLKOMER, *supra* note 13, at 207-08.

124. Pound, *Realist Jurisprudence*, *supra* note 5, at 699.

125. *Id.*

"There is as much actuality," Pound defended himself and his generation, "in the old picture as in the new. Each selects a set of aspects for emphasis. Neither portrays the whole as it is."<sup>126</sup> Pound concluded that the problem with the "new" realists' insistence on the objective scientific gathering of facts was that "facts occur in a multifarious mass of single instances. To be made intelligible and useful, significant facts have to be selected, and what is significant will be determined by some picture or ideal of the science and of the subject of which it treats." "The new realists," Pound argued, "have their own preconceptions of what is significant, and hence of what juristically must be."<sup>127</sup> Pound found the realists' "psychological theories of the behavior of particular judges in particular cases"<sup>128</sup> objectionable and concluded, "[m]ost of them merely substitute a psychological must for an ethical or political or historical must."<sup>129</sup>

Much of Pound's analysis and criticism of the Realists in the first part of his essay was both perceptive and reasonable. Indeed, close reading of this first section reveals that Pound may have better stated the Realist position than Llewellyn himself. He showed paternal interest in and approval of most of these younger academics' efforts. Pound attacked no individual, nor even any specific approach, until the very conclusion of this first part, when he singled out psychological methodology. He did not say who he had in mind on this point. Perhaps he had read Judge Hutcheson's provocative 1929 essay *The Judgment Intuitive:—The Function of the "Hunch" in Judicial Decision*,<sup>130</sup> but he most certainly had read and probably was responding to Jerome Frank's recently published *Law and the Modern Mind*.<sup>131</sup> At least one scholar has speculated that Pound had probably not read Frank's book before writing his article on the Realists.<sup>132</sup> Pound's correspondence with both Llewellyn and Frank indicates otherwise. Frank had personally arranged to have his publisher send a copy of his book to Pound as soon as it was published. In a letter to Pound in which he almost challenged the eminent Dean to read the volume, Frank told Pound that "[i]f you should happen to be interested enough to read it, I would be, of course, immensely interested in your reactions."<sup>133</sup> Pound, ignoring Frank's sarcastic tone, responded by thanking Frank for the book and promising him that he would "read it at the first opportunity" with, he

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126. *Id.*

127. *Id.* at 700.

128. *Id.*

129. *Id.*

130. 14 CORNELL L.Q. 274 (1929).

131. J. FRANK, *supra* note 14. Pound's criticism of Frank was even more pointed in the second half of the article, discussed *infra* text accompanying notes 138-42.

132. G. GILMORE, *supra* note 1, at 137 n.25.

133. Pound Papers, 14-13, Frank to Pound (Oct. 7, 1930).

assured the New York practitioner, "much interest and profit."<sup>134</sup> Pound apologized, however, that his work on the Wickersham Commission would prevent his getting to it "for the next few weeks."<sup>135</sup> There is no reason to doubt that Pound kept his promise and that Frank's book inspired some of the criticism that appeared in Pound's *Harvard Law Review* article. Pound implied as much to Llewellyn when he wrote to the Columbia professor shortly after the essay appeared.<sup>136</sup>

Such comments and general criticisms as Pound made in the first part of his article (even Pound's specific disagreement with applying psychology to legal analysis) could have been considered a fair reading of Realist scholarship. Neither Llewellyn nor Frank would object to them. But Pound went much further in the second part of his essay. He ostensibly identified five "items . . . found so generally in the writings of the new school, that one may be justified in pronouncing them, or most of them, the ideas of current juristic realism."<sup>137</sup> The commonalities Pound thought he recognized in the jurisprudence of the "new school" included: (1) a "faith in masses of figures as having significance in and of themselves;"<sup>138</sup> (2) "belief in the exclusive significance or reality of some one method or line of approach," including an insistence on precise terminology or an attempt to fashion "a science of law analogous to mathematical physics"<sup>139</sup> all the while emphasizing "the uncertainties, the lack of uniformity, and the influence of personal and subjective factors in particular cases;" (3) an "assertion that the sole valid approach is by way of psychology" or at least "some one psychological starting point is the *unum necessarium*";<sup>140</sup> (4) an "insistence on the unique single case rather than on the approximation to a uniform course of judicial behavior," leading some "[r]adical neo-realists[ts] . . . to deny that there are rules or principles or conceptions or doctrines at all;"<sup>141</sup> and finally, (5) "many of the new juristic realists conceive of law as a body of devices for the purposes of business instead of as a body of means toward general social ends."<sup>142</sup> It is not hard to see how Llewellyn and Frank might have thought some of Pound's criticisms were directed at them. Certainly Frank had laid heavy emphasis on the psychology of judging in his book, and Llewellyn laid equal emphasis in his work on the reality of market and business practices. Nevertheless, the

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134. Pound Papers, 14-13, Pound to Frank (Oct. 20, 1930).

135. *Id.*

136. Pound Papers, 24-6, Pound to Llewellyn (Mar. 21, 1931).

137. Pound, *Realistic Jurisprudence*, *supra* note 5, at 701.

138. *Id.*

139. *Id.* at 702.

140. *Id.* at 705.

141. *Id.* at 707.

142. *Id.* at 708.

entire tenor of Pound's critique was hyperbolic, a fact that became entirely clear after reading the third and final part of Pound's article.

In the last part of the essay, Pound suggested "a program of *relativist-realism* jurisprudence" that could satisfy his criticisms while furthering the general aims of these younger academics.<sup>143</sup> Pound's positive suggestions sounded like less extreme versions of the positions he had criticized. Nevertheless, Llewellyn, Frank and the other Realists who objected to Pound's criticisms fretted that Pound had grossly exaggerated their views in the second part of his essay, without citing a single specific example to support his translation, and then—insult added to injury—merely reformulated and adapted them in the third part. It was less the inaccurate attribution that irked them, than Pound's arrogant appropriation of their contributions to jurisprudence.

Even so, most of the more mature Realist scholars would have probably preferred to let the issue drop.<sup>144</sup> Not Karl Llewellyn—this was the kind of intellectual debate on which he thrived. He held no grudges and assumed others acted similarly. He simply adored the parry and thrust of an intellectual duel for its own sake.<sup>145</sup> Thus, Llewellyn did not hesitate to write to Pound to tell him that he had contacted Paul Freund "offering him for the June issue a rejoinder to your paper in the Holmes number."<sup>146</sup> There was no hint of disaffection with Pound himself—only over what the Dean had written.<sup>147</sup> Indeed, Llewellyn told Pound, "I found your article quite exciting and only wish that you had put us into the pillory one by one."<sup>148</sup> The reasons he gave Pound for writing a reply were that "the realists as a group show up somewhat better than one would gather from your paper. Better in two ways. First, in that the errors and exaggerations that you very properly castigate will prove on a careful examination of the literature

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143. *Id.* at 710 (emphasis added).

144. Indeed, several people Llewellyn wrote to in preparation of his response to Pound told him that they didn't think it worthwhile to start a public debate. *See, e.g.*, KLP, B.65(b)., Arnold and Douglas to Llewellyn (Apr. 18, 1931 and Apr. 13, 1931 respectively). *See also infra* note 232.

145. Interview with Professor Clyde Summers (Jan. 8, 1987), who recalled that aspect of Llewellyn's personality from his days as a Llewellyn student at Columbia University School of Law.

146. Pound Papers, 24-6, Llewellyn to Pound (Mar. 17, 1931).

147. Llewellyn was not merely trying to ingratiate himself with Pound by affecting continued friendliness and respect, notwithstanding his rejection of Pound's criticisms. After *Some Realism* appeared, Llewellyn received a congratulatory note from his friend Louis Weiss, in which Weiss uncharitably commented "it did my heart good to see Roscoe take it on the jaw . . . he is such a louse that my main criticism of your response is that it sharply understated and was far too conservative in tone." KLP, A.65.b., Weiss to Llewellyn (July 21, 1931). Llewellyn responded sharply: "I regard that method of getting ahead which consists in a young man pulling down an older man who has, in his day, done good work, as rather unfortunate." KLP, A.65.b., Llewellyn to Weiss (July 23, 1931).

148. Pound Papers, Llewellyn to Pound, *supra* note 146, at 2.

to be rather peculiar to individuals than common to the group."<sup>149</sup> Llewellyn seemed to imply that he agreed that some of his Realist brethren might have been guilty of the excesses Pound had decried. "And second, because the positive contributions of the group seem to me to reach further than comes to clear expression in your article."<sup>150</sup> The article Llewellyn appeared to contemplate seemed friendly and unobjectionable.

Pound responded to Llewellyn's letter in the same friendly spirit. He told Llewellyn, "[i]t did not occur to me that I was pillaring [sic] anybody."<sup>151</sup> Pound chose to avoid any argument with Llewellyn. He even tried to soften his criticism by reminding Llewellyn that he had been "careful to say that no school can be judged by exaggerations or eccentricities of particular adherents, and especially so in its early stages."<sup>152</sup> Roscoe Pound wanted no feud with the Realists, particularly Karl Llewellyn. The busy Dean hoped that he and this bright young law professor could share rather than argue about their respective views on legal philosophy. He confided to Llewellyn that he hoped that "[n]ext September when I am back at Cambridge with nothing to do but my school work I wish I could talk this whole matter of the future of jurisprudence in the United States over with you. There are very few doing serious work of the first order in that subject." And, he continued in a conciliatory vein, "I cannot but think that those who are should be getting together in the hope of finding a program upon which they can agree. It seems to me too much of the energy of those who are working in the science of law has been wasted in controversy, and that some really great things could be achieved through understanding and cooperation." He concluded his letter by offering an unequivocal apology: "I am sorry if my attempt to understand and set forth a possible program for a group of thinkers with whom I have a great deal of sympathy should have appeared to be controversial." He added, as if to admit he might have been carried away, "I suppose that is what comes from having to do things in a hurry."<sup>153</sup> If ever one scholar had offered an olive branch to another, this was the moment.

Only one thing Llewellyn had said caused Pound even the slightest alarm—that "Jerome Frank has promised to go halves with me on the labor."<sup>154</sup> The controversy became three-cornered with Llewellyn's im-

149. *Id.*

150. *Id.*

151. Pound Papers, 24-6, Pound to Llewellyn (Mar. 21, 1931) (the original of this letter resides in KLP, B.65(b)).

152. *Id.*

153. *Id.* at 2-3.

154. Pound Papers, 24-6, Llewellyn to Pound (Mar. 17, 1931). According to Llewellyn, Frank wrote him on the basis of having seen a manuscript copy of Llewellyn's review of Frank's book that Frank thought "showed a curious empathy." As a result of that initial contact Frank

pleading of Frank. Something had turned Pound against Frank since their polite correspondence only six months before. That something was undoubtedly the fact that Pound had finally read Frank's book, for Pound wrote Llewellyn:

I must confess I am troubled about Jerome Frank. When a man puts in quotation marks and attributes to a writer things which he not only never put in print any where, but goes contrary to what he has set in print repeatedly, it seems to me to go beyond the limits of permissible carelessness and to be incompatible, not merely with scholarship but with the ordinary fair play of controversy.

Pound was not merely critical of Frank, he was indignant: "I cannot afford to discuss anything with one who uses such tactics, and should like to suggest to you whether you can afford to identify yourself with him."<sup>155</sup> Pound liked Llewellyn and thought he could influence him to give up his association with Frank.

Instead, Llewellyn defended Frank. "[C]an you take time out of a busy life to give me a bill of particulars? I am surprised that you have caught him attributing to anyone remarks that have not been made. My impressions have been that he was both too honest and too careful to do that, even in the heat of controversy."<sup>156</sup> Even as he defended his friend, Llewellyn reassured Pound that "[o]ne thing is certain, and that is that this prospective article will not . . . [misquote anyone] and also will be free of heat."<sup>157</sup> Whatever antipathy Pound had toward Frank, Llewellyn did not want to chance any rift between himself and the older man. In a hasty postscript to that letter, Llewellyn told Pound that "I have just had Mr. Frank on the phone and he is very eager to learn of the places in which he may have made misquotations, since there is a chance of holding off the second printing long enough to make correction and apology."<sup>158</sup> What Llewellyn actually had done in that telephone conversation was to unleash "hurricane Jerome" on an unsuspecting Pound.

Jerome Frank must have been incensed by what Llewellyn told him Pound had written. No sooner had he gotten off the telephone with Llewellyn than he checked every reference to Pound in his book and

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wound up collaborating with him on the response to Pound. K. LLEWELLYN, *supra* note 96, at 104 n.aaa.

155. Pound Papers, 24-6, Pound to Llewellyn (Mar. 21, 1931).

156. Pound Papers, 24-6, Llewellyn to Pound (Mar. 23, 1931).

157. *Id.*

158. *Id.* at 2.

sent a two-page telegram to Pound about the allegations.<sup>159</sup> Frank admitted that he had found misplaced quotation marks on page 208 that "indicated incorrectly that my interpretation of your views is something which you yourself have said."<sup>160</sup> But he attributed the error to bad proofreading rather than deliberate misrepresentation and "humbly apologize[d]" to his former professor<sup>161</sup> telling him that "I greatly deplore and will have [the error] corrected."<sup>162</sup> Suspecting that Pound's criticism might have been on behalf of his Harvard friend and colleague Joseph Beale (also skewered by Frank in the book), Frank concluded his missive: "[I]f your comments to Llewellyn refer to misquotation of anyone else other than you I shall be glad to have you call any such mistake to my attention."<sup>163</sup>

The next day Frank followed up his telegram with a letter.<sup>164</sup> Having "more carefully examined [his] book and compared it with [Pound's] writings" he had decided that there was no misquotation and enclosed a list of every Pound quote or reference Frank had used for Pound to review. He urged Pound to send him any corrections as quickly as possible since Frank was holding up the second printing of the book "[t]o the publisher's great annoyance."<sup>165</sup> In a postscript, he listed all of his references to Beale's work since "[i]t has just occurred to me that perhaps you had in mind some possible misquotations of Professor Beale."<sup>166</sup>

Frank was boiling with indignation over Pound's charges and tried to enlist allies for his defense. When not writing letters and telegrams to Pound, Frank was writing letters to Felix Frankfurter, Thomas Reed Powell and Julian Mack informing them of Pound's baseless charges and vociferously defending himself.<sup>167</sup> Frankfurter replied to Frank: "I'm sorry, but I don't feel in a position to be an intermediary between you and Pound."<sup>168</sup> Powell's reply was more supportive: "No one who

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159. According to Frank's telegram, Llewellyn had "just phoned" to tell him what Pound had written. Pound Papers, 14-13, Frank to Pound (telegram dated Mar. 23, 1931 (5:22 p.m.)).

160. *Id.*

161. Walter Volkmer discovered that Pound had been one of Frank's professors at the University of Chicago School of Law. W. VOLKMER, *supra* note 13, at 2 n.3.

162. Pound Papers, Frank to Pound, *supra* note 159.

163. *Id.* at 2.

164. Pound Papers, 14-13, Frank to Pound (Mar. 24, 1931).

165. *Id.* at 3.

166. *Id.*

167. Jerome Frank Papers [hereinafter Frank Papers], Box 4, File Folder 109, Yale University Library, Manuscripts and Archives. Some of these letters Frank sent but others are marked "unsent." Frank Papers, 4-109, Frank to Frankfurter (Mar. 25, 1931) (two letters of same date, one marked "unsent" and the other presumably sent).

168. Frank Papers, 4-109, Frankfurter to Frank (Mar. 26, 1931).

knows Pound well will infer from the fact that he said you misquoted him that you misquoted him.”<sup>169</sup>

When Pound failed to respond to Frank's urgent messages, Frank sent another telegram, followed by another letter, and subsequently a third telegram when it occurred to him that Pound might not have received any of his earlier missives because the Harvard Dean was in Washington, not Cambridge.<sup>170</sup> Frank was under a great deal of pressure from his publisher and seemed desperate to quell Pound's objections before submitting his revisions for the second printing. Pound finally sent Frank a brief reply on March 27, apologizing to Frank for not responding to his letters and telegrams. He explained to Frank that he was separated from his books and had hoped that he “might find an opportunity of going to a library where I could look at the books” but that “there has been no chance.”<sup>171</sup> In an extremely conciliatory tone, Pound accepted Frank's apology for the latter's faulty proofreading and generously suggested that Frank's misinterpretation was probably due to the limitations of Pound's own writing. Pound told Frank, “very likely in thirty odd years of writing I have written much that I would wish the Statute of Limitations would bar.”<sup>172</sup> Pound was indirectly attempting to apologize to Frank for his rash comments.

Frank was not mollified by Pound's honeyed words and took no chances in wiring his reply to Pound; he sent copies to both Cambridge and Washington.<sup>173</sup> Frank also wrote another letter that same day in which he concluded both apologetically and defensively: “I am sorry that the incident occurred. As I stated in a previous letter, I have never deliberately misquoted anybody and I am glad to find, upon carefully checking my book, that I have not been guilty of even inadvertent misquotation of yourself.”<sup>174</sup> Pound, now probably tired of Frank's insistent queries about misquotes, coolly replied that he had no time to spend checking citations and attempted to put an end to the entire affair by telling Frank: “I should not think of suggesting to you what you should do in your own book. Certainly that is a matter entirely for your own judgment.”<sup>175</sup>

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169. Frank Papers, 4-109, Powell to Frank (Apr. 4, 1931).

170. Pound Papers, 14-13, Frank to Pound (telegrams dated Mar. 27, 1931 (4:29 p.m.) and Mar. 28, 1931 (10:50 a.m.)); Frank to Pound (Mar. 27, 1931).

171. Pound's March 27 letter to Frank is missing from the Pound Papers but is extant in Yale's Frank Papers—it was a handwritten note Pound sent from Washington. Frank Papers, 4-109, Pound to Frank (Mar. 27, 1931). Pound subsequently wrote to Frank from Cambridge on April 2 explicitly repeating some of what he said in his earlier note. Pound Papers, 14-13, Pound to Frank (Apr. 2, 1931).

172. Frank Papers, 4-109, Pound to Frank (Mar. 27, 1931) (handwritten note).

173. Pound Papers, 14-13, Frank to Pound (telegrams dated Mar. 30, 1931 (1:36 and 2:14 p.m., respectively)).

174. Pound Papers, 14-13, Frank to Pound (Mar. 30, 1930).

175. Pound Papers, 14-13, Pound to Frank (Apr. 2, 1931).

Frank refused to let the matter drop, however, and continued to press Pound to tell him about specific misquotes. Writing in a tone every bit as formal and restrained as Pound's, he defended his conduct and pointed out how fair he had been throughout in giving Pound every opportunity to substantiate his charges and offering to make corrections or clarifications: "I think you will agree that I have done all that was possible in the circumstances."<sup>176</sup> Pound did not bother to reply to Frank's pestering, but Frank persisted. Indeed, as he wrote Pound later that month, now that he had actually seen the original letter Pound had sent to Llewellyn, "[t]he vigorous character of your statements in that letter warrants me, I believe, in asking that, at your very early convenience, you advise me just what you had in mind when you wrote as you did. . . ."<sup>177</sup> This time Pound wrote Frank almost begging the New York practitioner to let him be: "Won't you please consider that I am doing a full time teaching job (six hours a week), and doing the administrative work of Dean of the Harvard Law School, and am trying to do my part on the work of this Commission, coming here every Tuesday night and returning Saturday night. Under such circumstances much as I should like to respond to your insistent requests I think it should occur to you that I simply haven't got the time."<sup>178</sup>

Frank was not pacified and like Llewellyn, who was contemporaneously meeting Pound's blank wall on the Realist response, was completely frustrated by Pound's evasions and excuses. A couple of days after receiving Pound's April 25 reply, Frank wrote Julian Mack again to ask his advice and help: "I do not know what to do about the matter further. Would it be at all possible for you to write to Pound? After all, you were my sponsor and his vicious slap at me does somewhat reflect on your judgment. Could you not, as a Harvard Law School trustee, properly ask him to explain to you what he had in mind?"<sup>179</sup> The Frank papers do not contain Mack's reply, but it is unlikely Mack followed Frank's suggestion.

After pondering the situation for a couple of weeks, Frank chided Pound that "I recognize, of course, that you are busily engaged in important work. But a few weeks ago you interrupted your work to write to Llewellyn in most emphatic terms about my alleged improprieties in misquoting you in my book and concerning my character. I think I was,

176. Pound Papers, 14-13, Frank to Pound (Apr. 3, 1931).

177. Pound Papers, 14-13, Frank to Pound (Apr. 24, 1931). Frank had consulted Julian Mack about his reply to Pound and whether he should demand that Pound write a retraction to Llewellyn for what he had originally said. Frank sent two versions of the letter to Mack for comment and the two men decided that Frank should not immediately demand a retraction. Frank Papers, 4-109, Frank to Mack (Apr. 20, 1931); Mack to Frank (Apr. 21, 1931).

178. Frank Papers, 4-109, Pound to Frank (Apr. 25, 1931).

179. Frank Papers, 4-109, Frank to Mack (Apr. 27, 1931).

therefore, not unreasonable in asking you to pause for a brief interval to write me, *at least in general terms*, what you had in mind when you made those statements.”<sup>180</sup> Frank would brook no excuses: “[t]he lapse of time since you wrote Llewellyn is sufficiently short so that you are surely able to remember, in a general way, to what you were referring. However, I want this effort to cost you as little time as possible. I am therefore sending you two copies of my book—one to your Cambridge and one to your Washington address.” In addition, “I am enclosing a memorandum for your convenience, citing each of the passages in my book where you were quoted, and in connection with each such citation, citing (and sometimes quoting) the passages in your writings from which the quotations from your writings were taken.”<sup>181</sup> The memorandum he sent Pound was fourteen mostly single-spaced pages. Frank, a consummate practitioner, had marshaled his resources to produce a completely professional brief, but “Judge” Pound summarily dismissed Frank’s cause.<sup>182</sup> The harassed Dean ignored Frank even though the young lawyer offered to pay Pound to hire “some student or other person whom you trust, to do for you the more or less clerical work of comparison” and argued that therefore the “plan will involve no labor on your part and no expense to you.”<sup>183</sup>

It is no wonder after all this that Frank refused to let Llewellyn list him as coauthor of the response to Pound.<sup>184</sup> He probably wanted no more potential accusations of misquotation or misinterpretation from that quarter.<sup>185</sup> If there was any feud among the principals of the con-

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180. Pound Papers, 14-13, Frank to Pound (May 14, 1931) (emphasis in original).

181. *Id.*

182. I have taken up Frank’s challenge to Pound. A review of Frank’s memorandum, the text of his book and Pound’s works cited or quoted by him indicates Frank was innocent of Pound’s charges. I would have to agree with Llewellyn’s assessment that Frank “[s]howed [he] could quote Pound against Pound on any point imaginable” and “[t]his riled Pound, especially because [Frank’s book] was widely sold in popular circulation.” Clyde W. Summers, carbon typescript of class notes on Llewellyn’s course in jurisprudence, contained in KLP, at 21 [hereinafter Summers, Llewellyn Notes].

183. Pound Papers, 14-13, Frank to Pound (May 14, 1931).

184. Llewellyn, *Some Realism*, *supra* note 3, at 1222.

185. A postscript to the Pound-Frank episode: nearly a year after the flurry of letters and telegrams between the two men, Frank wrote to Pound once more, this time in a very conciliatory vein. Frank complimented Pound on the latter’s contributions to the reports of the Wickersham Commission and uncharacteristically confided that his “admiration for your genius goes back many years, to the time when, about 1908, I was studying political science. That on some points I have ventured to disagree with you does not mean that I do not still humbly endorse the views of the numerous lawyers who recognize your invaluable contributions to legal thinking.” He went on to say, “Many times heretofore I have been tempted to write to you in this vein. But I have been deterred by the fact that you have left unanswered my letter to you of May 14, 1931.” Pound Papers, 14-13, Frank to Pound (Apr. 6, 1932). If Frank thought he could effect a reconciliation with Pound he was probably disappointed. The Pound Papers contain no copy of a reply to this letter.

troversy, it was between Pound and Frank, not between Pound and Llewellyn.<sup>186</sup>

Llewellyn and Frank, in the meantime, had continued their collaboration on the response to Pound. Llewellyn's request for space in the June issue of the *Harvard Law Review* had met with a cool response from Freund.<sup>187</sup> The *Law Review* editor, according to his own account of the incident, sent a more or less form letter to Llewellyn informing him that the *Review* would welcome a submission but could not guarantee acceptance in advance.<sup>188</sup> Llewellyn was outraged and, probably aware of the altercation-in-progress between Frank and Pound, suspected the Harvard Dean of exerting pressure on the journal to keep a Llewellyn-Frank critique from being published.

Frank probably also told Llewellyn of some difficulties the former had had with Paul Freund a few months before, which, taken with Llewellyn's rebuff, led both men to believe that Pound had exerted pressure on the *Law Review* to censor them. Two months before Pound's article appeared, Freund had written an enthusiastic letter to Frank about the latter's newly published book and solicited an article from Frank for the *Law Review*. Freund appeared undaunted by the controversy Frank's book had generated and indeed seemed to welcome an article in the same vein.<sup>189</sup> According to Frank, he wrote to Freund a few days later accepting the editor's invitation, and Freund had responded "stating that [Frank] could send an article of considerable length." Three weeks later, Frank sent Freund the promised article. On March 4, Freund returned the article to Frank. Freund's letter to Frank, according to Frank's account, complimented him on the piece but gave four reasons for rejecting it: "Much of the article would be accepted without dispute by anyone. . . . There was too much *ad hominem* character in the argument. . . . A large part of the paper would evoke much more dissent in certain quarters, ranging from more violent opposition to differences in emphasis. . . . The article was written with an eye to the controversy which my book had produced, 'yet this contemporaneous aspect did not seem altogether fortunate from our point

186. Schlegel, for instance, following Twining, refers to "Llewellyn's feud with Pound over the existence and content of Realist Jurisprudence." Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195, 250 (1980).

187. This account of Llewellyn's dealings with the *Review* was related to the author by Professor Freund in an interview on February 20, 1987.

188. Professor Freund commented that if Pound's *Realist Jurisprudence* article had attacked any specific individuals, the *Review* might have been more amenable to guaranteeing space for a reply. *Id.*

189. Frank Papers, 4-108, Freund to Frank (Jan. 22, 1931).

of view.' "<sup>190</sup> Frank wrote Felix Frankfurter that Freund's "letter read to me as if his desire was that Harvard should have none of its ideals assailed in the pages of its journal."<sup>191</sup>

Frank clearly connected the rejection of his article by Freund to Pound's just-published article and attributed Llewellyn's difficulty in getting the response to Pound placed to the same quarter. He wrote Frankfurter: "I am confirmed in this suspicion by what has occurred in the last few days."<sup>192</sup> Frank told Frankfurter about Llewellyn's proposed rejoinder to Pound and Freund's cool reception to Llewellyn's request for space. According to Frank, "Freund replied to Llewellyn that he did not think such an article was in keeping with the spirit of the *Review* and that Pound's article was entirely satisfactory because it more or less described the situation without warranting any controversy."<sup>193</sup>

It is not clear whether Frank actually saw Freund's letter or was paraphrasing what Llewellyn told him the letter contained. The original letter from Freund to Llewellyn was quite different in both tone and substance (and was much closer to Freund's own recollection) from what Frank told Frankfurter Freund had written Llewellyn. What Freund actually said was that:

I find it very difficult to reply to your letter offering to prepare an article for our June issue by way of rejoinder to the essay by Dean Pound. The fact that the *Review* has never had the privilege of publishing a paper from your hand leads to an impulse to ask for your manuscript on any terms, however "lopsided" the agreement might be. There is, however, a very important consideration which restrains the impulse. Because of the fact that our March number largely neglected the demands of the ordinary practitioner, who is our constant reader, we decided to balance interests for the rest of the year by running as many bread-and-butter articles as we could. It happens that we had already committed ourselves to one which is not of this sort, and this makes us even more chary of allotting further space to jurisprudence and kindred topics. If one can not live by bread alone, it is equally true that one can not subsist—especially if one is a *Law Review*—chiefly on wine.

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190. The above account of the sequence of events was related in a letter (marked "un-sent") from Frank to Felix Frankfurter. Frank Papers, 4-109, Frank to Frankfurter 1-2 (Mar. 25, 1931).

191. *Id.* at 3.

192. *Id.*

193. *Id.* at 4.

The problem is rendered more difficult because you probably felt that in opening our pages to Dean Pound's paper we ought not in good conscience to close them to one which was provoked by it. The force of this position loses some of its strength for me, at all events, because it seemed to me that Dean Pound's article, however it may have erred in particulars, did not itself invite controversy. Indeed I felt that it suited our purposes admirably, since its publication would not promise an extended series of attacks and counter-attacks, with the Review as the *situs* of the battle.<sup>194</sup>

Freund may have miscalculated and he may have been a bit naive, but there seems little evidence of any untoward influence upon him by Pound to censor Llewellyn's response. According to Freund, Pound had had little to do with the *Law Review* even when he was on campus, and after he left for Washington he did not communicate at all with the *Review*'s editors either to bar or encourage publication of Llewellyn's prospective article. Though Llewellyn had asked Pound to write to Freund and later thanked him for interceding, the *Law Review* president never heard from him and says that it was Professor Edmund M. Morgan who convinced him to accommodate Llewellyn.<sup>195</sup>

Though Freund's letter was not meant as a rebuff, Llewellyn was incensed by Freund's reply. He wrote a scathing letter to his friend Morgan who, as it happened, was Acting Dean at the Harvard Law School while Pound was on leave working with the Wickersham Commission. Llewellyn told Morgan that he would bring Pound's underhanded censorship to the attention of the Association of American Law Schools at its next meeting.<sup>196</sup> After reading Llewellyn's angry missive, Morgan called Freund to his office to discuss the problem. The acting Dean showed Llewellyn's letter to Freund, told the young man not to

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194. KLP, A.65.b., Freund to Llewellyn (Mar. 23, 1931).

195. Pound told Llewellyn that he would write to Freund's successor, Lester Schoene, on his behalf. Pound Papers, 24-6, Pound to Llewellyn (Mar. 21, 1931) (original in KLP, B.65(b)). Twining, who saw the original of Pound's letter in the Llewellyn papers and a draft memo from Llewellyn to fellow Realists that said—incorrectly it turns out—that the *Harvard Law Review* had refused space for his reply but that the *Columbia Law Review* would publish the piece (later corrected to say that *Harvard* had promised space in its June issue), perpetuated Llewellyn's misunderstanding of the incident. His version, upon which later scholars relied, incorrectly stated that Llewellyn was flatly denied space for the reply to Pound until "pressure was brought to bear on the Editor by members of the Harvard faculty, including Pound himself." TWINING, KARL LLEWELLYN, *supra* note 8, at 73.

196. I could find no copy of the March 24 letter to Morgan in the Llewellyn Papers. I have had to rely on Freund's recollection of it in my interview with him and references to it in later correspondence from Morgan and Freund to Llewellyn. Llewellyn appears to have written a similar letter, threatening to publicize what he thought was the *Review*'s scholarly censorship, to Freund directly, but since the signed original remains in the Llewellyn Papers, it was probably never sent. KLP, A.65.b., Llewellyn to Freund (Mar. 25, 1931).

take the tone of the letter too seriously—Llewellyn, he explained, had a mercurial temperament—and “pointed out to [Freund] a number of considerations which he had evidently not thought about.”<sup>197</sup> Those considerations included “the fact that in many places [Harvard Law School] is regarded as entirely too much satisfied with itself, and as having a supercilious, if not a hostile, attitude towards experiments in legal education and new methods of attack upon legal problems which originate elsewhere.”<sup>198</sup> Morgan then gently suggested that if he were in Freund’s place he would write Llewellyn to tell him the *Review* would be glad to publish the article in the June issue. Freund “went away promising to give the matter further attention.”<sup>199</sup> In fact, Freund took Morgan’s advice.<sup>200</sup>

Freund’s second letter to Llewellyn doesn’t mention the former’s meeting with Morgan, but rather confided that Llewellyn’s “letter of March 24 and some troubled reflection consequent upon it have convinced me that there are some ramifications of the problem to which I gave less attention than they deserve.”<sup>201</sup> Despite this unease about ramifications, Freund told Llewellyn that he still felt “there is not so sharp a cleavage between what you consider a legitimate difference of opinion about the Dean’s article and what you term a fighting difference about the marks of a scientific journal.”<sup>202</sup> Freund also defended himself and the *Review* against Llewellyn’s charge that the journal had caved in under pressure from Pound:

Simply because it seems so natural to me to take for granted the autonomy of the Review, I looked on your reference to *lèse majeste* as a merely humorous interpolation, as I suspect it was. It [is] unnecessary for me to say to you that the Review has not been an organ of state for the Law School; the material which we have published by student editors and by instructors from other schools in the field of Conflict of Laws will come to mind as an example. But I am painfully aware that the risk of misinterpretation runs high if a reply to the Dean’s paper is published elsewhere. . . . So far from giving too much attention to the source of the article in our March

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197. KLP, A.65.b., Morgan to Llewellyn (Mar. 27, 1931).

198. KLP, A.65.b., Morgan to Llewellyn (Mar. 28, 1931).

199. *Id.*

200. Ironically, Freund says that he thought *Some Realism* was one of the best things Llewellyn had written and if it had been submitted, as Freund had written to Llewellyn originally, he was sure that the *Review* would have accepted it. The entire episode was the result of Llewellyn’s misunderstanding of Freund’s letter. Freund, looking back on the incident, says that he should have written a different letter to Llewellyn.

201. KLP, A.65.b., Freund to Llewellyn (Mar. 26, 1931).

202. *Id.*

number, I believe that I gave altogether too little attention to it. The danger that because of the article's source we will be thought to deem the subject *res judicata* is an impressive and an oppressive one to contemplate. This consideration makes the factor of space-distribution, which particularly concerned me, seem comparatively trivial.

Freund appealed to Llewellyn's sense of fairness: "not merely in justice to yourself but in fairness to the Review, you [should] give us the opportunity of publishing your paper." The student editor concluded by telling the Realist contracts professor: "I know you will not put your reply off on my technicalities of offer and acceptance."<sup>203</sup>

### III. WHO WERE THE REALISTS?

Llewellyn realized that the only way to refute Pound's charges was to systematically review the corpus of Realist literature; but to survey the Realists' work, Llewellyn would first have to decide who, in fact, were the Realists. His musings on that question in his 1930 *Next Step* article were eclectic.<sup>204</sup> On that first occasion, his purpose was to demonstrate, in a genealogical manner, the evolution of the new mode of analysis, rather than to define a coherent jurisprudential group. Out-spoken critics of the older jurisprudence, like Underhill Moore, Samuel Klaus, Charles Clark, Hessel Yntema and William O. Douglas, were lumped together with older progressive thinkers like Louis Brandeis<sup>205</sup> and even sociological jurists like Eugen Ehrlich<sup>206</sup> who might have inspired the skeptics of the 1920s, but resist categorization as members of the Realist "movement."<sup>207</sup> Llewellyn admitted that "[t]he work of the different men moves in somewhat different fields, and is uneven in value." He was trying to be as inclusive as possible—"to show that neither a single country nor a single school is involved"—to suggest "that the point of view [of the behavior or realistic approach] has moved beyond the stage of chatter and has proved itself in operation."<sup>208</sup> The list Llewellyn tried to compile in 1931 had to be more clearly defined, because he was no longer trying to establish a pedigree for a new approach, but to defend practitioners of the approach from aspersions cast on their work.

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203. *Id.*

204. Llewellyn, *Next Step*, *supra* note 3, at 454.

205. See L. BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 81-82 (1984) (discussing Brandeis' progressive views).

206. Eugen Ehrlich's sociology of law inspired Pound, among others, with its view of the relativity of legal rules. E. PATTERSON, *supra* note 9, at 509.

207. See Table 1, *infra* p. 967 (Llewellyn's complete list from the *Next Step* article).

208. Llewellyn, *Next Step*, *supra* note 3, at 455.

Llewellyn's plan for the article, he told Pound on March 17, "was to work through the material of Moore, Frank, Oliphant and Klaus; Cook, Green, Yntema, Clark and Radin and Llewellyn; and to some extent of Corbin, Sturges and Douglas." He had decided on these men because this "most vocal group, is characteristic, and gathers most of the men who would come in question." Nevertheless, he was uncertain enough of his decision, or defensive enough, to inquire of Pound: "Do you have any others in mind?"<sup>209</sup> Pound replied that "[c]ertainly I did not have in mind a number of those who you name—for instance, Clark. On the other hand, I did have in mind Bingham and Lorenzen, who had been particularly insistent upon the unreality of supposed rules, principles and doctrines."<sup>210</sup> Curiously, Pound did not group Llewellyn with the Stanford and Yale professors he had singled out even though Llewellyn had been equally insistent on the unreality of rules in his 1930 article. Nor did Pound mention Frank, probably to avoid adding to that imbroglio.<sup>211</sup>

Even more curious is the fact that although Pound repeatedly referred to the "new realists" as younger academics, part of a new generation of scholars, the only two men he would admit to having in mind when he wrote his critical essay—Bingham and Lorenzen—were actually his contemporaries.<sup>212</sup> Pound, perhaps realizing that the controversy he had always tried to avoid was catching up with him, tried to obfuscate. It had always been Pound's modus operandi to criticize only in general terms,<sup>213</sup> never letting himself be pinned down to specific charges against individuals who might take issue with him. His Holmes piece had followed the same pattern, but now he was being pursued.<sup>214</sup> To refuse to name any names would leave him open to the charge of fabricating his critique. To be more forthcoming could result in an academic feud with the best and brightest of a new and vigorous gener-

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209. Pound Papers, 24-6, Llewellyn to Pound (Mar. 17, 1931).

210. Pound Papers, 24-6, Pound to Llewellyn (Mar. 21, 1931) (original in KLP, B.659(b)).

211. As Summers summarized Llewellyn's version of the affair in 1945-46, "The Emperor [Pound] was peeved and wrote about Realism and criticized them [Llewellyn and Frank]." Summers, Llewellyn Notes, *supra* note 182, at 21.

212. Pound was born in 1870. P. SAYRE, *supra* note 28, at 14. Ernest Lorenzen was born in 1876 and Joseph Walter Bingham was born in 1878. TWNING, KARL LLEWELLYN, *supra* note 8, at 76. The three men were thus sixty-one, fifty-five, and fifty-three, respectively. Although they might have been considered in their "prime," they could hardly have been called "young."

213. See his controversial speeches on *The Causes of Popular Dissatisfaction with the Administration of Justice* and *The Limits of Effective Legal Action* in which his seemingly bold remarks were carefully couched in general terms, never mentioning a judge or state legislature by name. See *supra* notes 40 and 39 respectively.

214. Llewellyn thought Pound had "[i]ncluded all modern writers of diverse [views]. Pound brought all the various ideas [together] and called it 'realism' and by grouping them together proceeded to take them apart." Summers, Llewellyn Notes, *supra* note 182, at 21.

ation of scholars.<sup>215</sup> At sixty-one, he could not risk offending young men who he had every reason to believe would outlive him.<sup>216</sup>

At first, Llewellyn expressed little surprise at Pound's selection of representative Realists, except for the categorization of Ernest Lorenzen "as one of us wild-eyes."<sup>217</sup> Also, in the published list in *Some Realism*, he would ultimately include Clark despite Pound's disclaimer.<sup>218</sup>

Llewellyn consulted Frank about the list and Pound's response. Frank replied with a set of additional names.<sup>219</sup> Llewellyn then wrote to Frank with some names he thought Frank had overlooked: Wesley Sturges, Edwin Patterson, Charles Clark, William O. Douglas and Leon Tulin. Llewellyn told Frank he was reluctant to include Joseph Francis because "Francis is hardly more than an echo of Cook," but conceded to Frank that Francis could "fairly be included."<sup>220</sup> Frank, in addition to suggesting additional names, had dissected Pound's article in his customarily meticulous fashion.<sup>221</sup> Llewellyn responded with his own plan for analyzing Pound's charges and recommended to Frank a plan for their collaboration. This included a suggestion about how they might allocate the labor of analyzing the writings of the men they had chosen.<sup>222</sup> Llewellyn's original suggestion for dividing the work would have had Frank scrutinize the writings of Bingham, Green, Hutcheson, Arnold, Hamilton, Oliphant and Frank while Llewellyn

215. Pound clearly wanted to avoid a feud with these younger men. His apologetic letter of March 21 emphasizes his distaste for "controversy" and his admiration for the group as a whole. Pound Papers, 24-6, Pound to Llewellyn (Mar. 21, 1931).

216. Actually, Pound would outlive many of this younger generation including Frank and Llewellyn. Frank died in 1957; Llewellyn died in 1962; Pound died in 1964.

217. Pound Papers, 24-6, Llewellyn to Pound (Mar. 23, 1931).

218. Llewellyn, *Some Realism*, *supra* note 3, at 1226 n.18.

219. I could not find a copy of Frank's letter to Llewellyn with his suggested list of Realists, though he certainly wrote such a letter sometime between March 16 and March 20. On March 16 Llewellyn had first mentioned Pound's article in a letter to Frank in which he thanked Frank for the latter's favorable review of *The Bramble Bush* (K. LLEWELLYN, *supra* note 27). Llewellyn sent Frank a second letter on March 20 in which he acknowledged receiving Frank's suggested list. Frank Papers, 5-118, Llewellyn to Frank (Mar. 20, 1931).

220. Frank Papers, 5-118, Llewellyn to Frank 1 (Mar. 20, 1931).

221. Unfortunately, Frank's letter dissecting Pound's article is not in the Llewellyn file of the Frank Papers. All we know of it is derived from Llewellyn's response. Llewellyn's comment on Frank's nine points of analysis was, "You seem to have them all." *Id.*

222. Frank, after receiving Llewellyn's letter, attempted to organize or categorize the men by the methodologies Pound had identified in his article. On the back of the last page of Llewellyn's letter to Frank appears a diagram of sorts in what appears to be Frank's handwriting. The categories Frank used in this schematization of the Realists were: those men who used "figures" ("pro: Oliph[ant]? Moore? Anti: Ll[e]wellyn] Green Clark Yntema?"); those who employed "one line of approach" ("pro: Moore Oliphant Bingham(?) anti: Cook Green Ll[e]wellyn] Frank"); those who insisted on "exact terminology" (pro: [blank] anti: Corbin Cook Clark Ll[e]wellyn] Green Frank Bingham Oliphant Radin"); and a fourth category of those men advocating a science of law equivalent to "Math Physics" [pro and anti columns were blank]. Frank Papers, Llewellyn to Frank, *supra* note 220.

would take on Corbin, Clark, Tulin, Douglas, Patterson, Moore, Klaus and Llewellyn. Left open for negotiation was who would deal with Cook, Francis, Radin and Yntema.<sup>223</sup> Frank expressed his preference for taking on Bingham, Green, Radin, Yntema and Hutcheson and agreed that he and Llewellyn take themselves "if it's what you mean."<sup>224</sup> The final apportionment, according to Llewellyn in the published *Some Realism* article, was somewhat less equitable than he originally suggested: Frank studied only four of the men's writings while Llewellyn analyzed the other sixteen.<sup>225</sup>

Even after the two agreed on these men, they probably felt insecure about identifying them in print without acquiescence from the men themselves. On March 27 they composed a carefully worded "general appeal" to the "non-traditionalist" colleagues they had identified, asking them to help with the answer to Pound.<sup>226</sup> They asked everyone on the list to write them, as quickly as possible, stating whether they could "recall any place in your published work in which there appears a statement which more or less coincides with any of the points Pound makes? If not do you hold such positions?"<sup>227</sup> They also asked for citations to published work in which their correspondents might have "taken a stand on either side or in the middle in regard to one of these matters. . . ."<sup>228</sup> "Of course," they assured their associates, "acknowledgment will be made for any help received."<sup>229</sup> The memorandum delicately concluded with the critical query: "We should also appreciate expression of your opinion as to whether you regard yourself as in general among the 'juristic realists' and as to whether you think that there is any community of point of view among the men whom we propose to discuss and to whom . . . we are sending this letter?"<sup>230</sup>

Responses to the Llewellyn-Frank memo trickled in. Despite the fact that he was one of the older members of the group,<sup>231</sup> Arthur Corbin's reply was typical.<sup>232</sup> Corbin told Llewellyn, his protege, that

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223. *Id.* at 2.

224. Frank Papers, 5-118, Frank to Llewellyn (Mar. 23, 1921) [sic].

225. Llewellyn, *Some Realism*, *supra* note 3, at 1228 n.18.

226. KLP, B.65(b) (Mar. 27, 1931) (memo). "Non-traditionalist" was the term they used in the memo; "realist" was not a term used by these men to describe themselves and Llewellyn probably didn't want to cloud the issue with an internal dispute about semantics.

227. *Id.*

228. *Id.*

229. *Id.* They may have been surprised at how many of those who answered their memo asked that their assistance remain unacknowledged. See, e.g., KLP, B.65(b), Moore to Llewellyn (Apr. 11, 1931).

230. KLP, B.65(b) (Mar. 27, 1931) (memo).

231. Corbin was a leader of the first generation of Realists. L. KALMAN, *supra* note 7, at 25.

232. Corbin's criticisms of Pound, his skepticism about whether Pound had meant to include him in his critique, whether there was a "school" of realist thought, and his desire for

"[i]t did not occur to me, as I hastily skimmed through Pound's article, that he referred to me at all or that his article affected me in any way. I certainly feel no call to answer it."<sup>233</sup> Corbin also thought he did not "have [much] in common with the other men" on Llewellyn's list and that "they have so many and important differences as to make it highly misleading to classify them under a name."<sup>234</sup> Corbin was antipathetic to any jurisprudential classification, and his advice to Llewellyn seems to suggest that for Llewellyn to try to talk about Realists as a group would simply lead the young man into the same misguided thought processes as the Dean: "Pound has always loved to classify men into 'Neo-Hegelians' and other 'schools.' The men I know do not classify in any such way (if it is a way)."<sup>235</sup> Corbin was more condescending toward than critical of Pound's article. He told Llewellyn that "Pound's article gave me the impression that it was directed at the indefinite group of younger men, partly, at least, at Harvard, who now delight in sneering at Pound. He cannot help being aware of their attitude; and the 'old bull' is making use of his horns."<sup>236</sup> Corbin was also aware of Pound's penchant for avoiding personal confrontation: "Of course, he can't gore anybody by name; so he creates a straw man and disembowels the straw."<sup>237</sup> Despite his outspoken criticisms, Corbin's remarks were made strictly in confidence. He cautioned Llewellyn that though he had no objection to Llewellyn using his published work to refute Pound's charges, "I don't wish to be taken as answering him in any respect."<sup>238</sup> Corbin, like Llewellyn's other correspondents, was unable or unwilling to suggest names of other scholars for Llewellyn's list.

Unable to enroll volunteers for his school of Realism, Llewellyn was forced to turn to Pound again. If Pound would admit that he had certain individuals in mind when he wrote his article, Llewellyn could confront the issue of whether such individuals were actually part of a coherent movement. On April 6, he confided to Pound that "I hate to trouble you again on this matter of the realists, but I can't help it."<sup>239</sup> Llewellyn admitted he was having difficulty in writing the response he had planned because he could not definitively state who the Realists

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confidence, summarized and anticipated later responses from younger Realists Samuel Klaus (April 20, 1931), Underhill Moore (April 11, 1931), Leon Green (April 1, 1930), Thurman Arnold (April 18, 1931), William O. Douglas (April 13, 1931) and Francis Bohlen (September 28, 1931). Llewellyn must have written to Bohlen somewhat later than the others; he appears on the list Llewellyn sent Pound on April 6, 1931, discussed *infra* text accompanying notes 239-59, but does not appear on the headnote of the memo. KLP, B.65(b).

233. KLP, B.65(b), Corbin to Llewellyn (Apr. 1, 1931).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. Pound Papers, 24-6, Llewellyn to Pound (Apr. 6, 1931).

were. "It is absurd," he told Pound, "for us [Llewellyn and Frank] to set up our own criterion of who are realists and then demonstrate that your criterion does not fit our group. If the group you have in mind is not the same as the group we have in mind, that is another question, and one easier to handle."<sup>240</sup> Writing the response to Pound was a far more difficult task than Llewellyn had originally thought. By his calculated reticence, Pound was winning the logistical battles in the war of nerves. Llewellyn could not merely survey the work of a few people he might think were representative of the movement. If Llewellyn had to omit individuals he considered obvious Realists because they denied membership in the group, Pound could defend himself by arguing that Llewellyn had overlooked the very individuals whose scholarship Pound had criticized.

Llewellyn developed a plan to circumvent these problems, which he outlined to Pound:

What we would like to do, therefore, is first, to discuss your criteria with reference to the men you had in mind (and also with reference to those whom we should class as the more notorious rebels)—although we would distinguish according to whether or not you had picked the particular men discussed. And after that we should like to present our own picture of the realistic movement at large. We have to call on you for help because we find extraordinary difficulty in locating passages which would class anybody as being in the group you had in mind; and we figure, therefore, that it must be considerably smaller than we had first thought.<sup>241</sup>

In order to determine whom Pound had in mind, Llewellyn enclosed a new list of names which he asked Pound to annotate "with a *yes* or *no* beside the names according as you either had the man definitely in mind, or were thinking of him as excluded from your discussion."<sup>242</sup> Llewellyn concluded by asking permission to cite Pound's reply in the published discussion. Llewellyn's first purpose was to outflank Pound's refusal to name names. By giving Pound a chance to tick off individuals, Llewellyn hoped either to trap Pound into specificity and then refute his individual arguments, or to simplify his own task in surveying the realist literature by omitting the individuals Pound had not intended to criticize. The list Llewellyn enclosed with his letter to Pound was meant to be as inclusive as possible on its face, giving Pound the broadest discretion. Llewellyn noted on the top of the list: "We do not guarantee

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240. *Id.*

241. *Id.*

242. *Id.*

to discuss all of these; but we shall try to cover at least all you name."<sup>243</sup> The new list dropped Brandeis and the European jurists who Llewellyn had considered forerunners of the Realist movement, but did include Frankfurter, Handler and Landis from the *Next Step* article, though these men had disappeared from both his earlier letter to Pound and the memorandum Llewellyn wrote with Frank. In addition to the three people he had retained from the *Next Step* article, Llewellyn added the two men Pound had mentioned—Bingham and Lorenzen; the five individuals Frank had suggested—Arnold, Hutcheson, Hamilton, Patterson and Tulin—and sixteen others.<sup>244</sup>

Whether the length of the new list was meant as a courtesy to Pound or an attempt to nail him down, it unveiled a qualitatively different approach to defining Realism from those Llewellyn had previously assayed. The intellectual novelty of the list lay in its structure. For the first time, Llewellyn divided his list into categories. These categories were not merely titles grouping names from the old list; here the categories generated names. They conceptualized Realism intellectually, as well as genealogically.

The first category included Llewellyn's and Frank's "notion of realists who may have taken extreme positions on one point or another."<sup>245</sup> Everyone in this category, except John Hanna,<sup>246</sup> had appeared in the Llewellyn-Frank memo. Most of them had also appeared on the list Llewellyn originally had sent Pound in March, and two of them—Moore and Klaus—had even been included in Llewellyn's 1930 *Next Step* article. The second category contained the "realists who are thorough-going, but probably less extreme in their position."<sup>247</sup> Again, many of these men had figured in previous lists, though several were new: Berle, T. R. Powell, Smith, Kidd, Hutchins, Francis and Bonbright. Of these, only Francis and T. R. Powell would be retained in the published article. These first two categories, though they may have given greater coherence to the names in them, offer no new insights into Llewellyn's concept of Realism.

The third category is by far the most interesting and suggestive. Not a single name in the third category would appear in Llewellyn's *Some Realism* article. Nevertheless, this category reveals the scope of Llewellyn's vision of Realism. Realism was neither an ideology nor a coherent legal philosophy; it was, rather, a method or "technology" for

243. *Id.* See Table 2, *infra* p. 968.

244. See Table 1, *infra* p. 967. A more complete discussion of these additional sixteen individuals appears *infra* text accompanying notes 247-59.

245. See Table 1, *infra* p. 967.

246. Llewellyn obviously had doubts about including Hanna since he parenthetically noted after Hanna's name "perhaps." See Table 2, *infra* p. 968.

247. *Id.*

looking at the law. The third category contained "examples" of individuals who Llewellyn considered "realists-in-part-of-their-work." The idea of "in-part-of-their-work" meant that Realism was a technique anyone could use, irrespective of his or her legal philosophy or political orientation. No scholar would have to adopt that methodology as the only, or even primary, mode of analysis. Here, in the embodiment of this list of "realists-in-part" was Llewellyn's most effective dismissal of the idea that the Realists were a school of jurisprudence. If Llewellyn could have shown there was no identifiable school of Realism—as Corbin and many of his other correspondents wanted Llewellyn to do—Pound's article would have lost all force as a jurisprudential critique. Pound's criticisms would have stood only as unsubstantiated attacks on particular scholars' work.

Because this third category was such a departure from Llewellyn's previous conceptualizations, it is worth a closer look at the men in it. Llewellyn had already cited Frankfurter's and Landis' *The Business of the Supreme Court* in his *Next Step* article to show that those Harvard law professors had published work he considered "realistic."<sup>248</sup> Both men had, in addition, displayed their "anti-formalist" inclinations in their teaching of administrative law and legislation, respectively.<sup>249</sup> Except for Frankfurter and Landis, none of the men listed in this category had ever appeared on any of the earlier Realist inventories. Llewellyn had other criteria in mind. Edmund M. Morgan emphasized actual courtroom practice and a problem approach to teaching evidence in his classes at Yale and later at Harvard and was, "as the realists and Harvardians recognized, perhaps the only professor to lean toward realism in both theory and education."<sup>250</sup> Edgar Noble Durfee was another proponent of reforming the law school curriculum to reflect the real practice of law.<sup>251</sup>

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248. Llewellyn, *Next Step*, *supra* note 3, at 454-55 n.22 (citing F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) and F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930)). Llewellyn may also have been thinking of Frankfurter's work on the Cleveland Crime Survey. See Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 496 (1979).

249. L. KALMAN, *supra* note 7, at 49-52.

250. *Id.* at 54. Kalman states, however, that Morgan "was never a realist." The contradiction between the latter statement and the assessment of Morgan's work quoted in my text points up the problems created by the post-*Some Realism*, restrictive definition of a Realist. Had Llewellyn not abandoned the third category with its expansive conceptualist framework, such contradictory categorizations (like that of Morgan) would not result. For a discussion of what happened to the third category, see *infra* text accompanying notes 270-76.

251. Durfee would later publish an article, *Broadening Legal Education*, 31 MICH. L. REV. 206 (1932).

Llewellyn's inclusion of George Bogert must come as a surprise to students of Realism.<sup>252</sup> Llewellyn, a colleague of Bogert in the National Conference of Commissioners on Uniform State Laws, however, probably admired Bogert's pioneering work on sales law and thought he recognized a realistic approach in Bogert's work on that subject.<sup>253</sup> Sam Bass Warner, a law professor at Harvard, was a pioneer in collecting criminal statistics and using them to paint a realistic picture of criminal law.<sup>254</sup> Warner's Harvard colleague, Sheldon Glueck—a trained sociologist as well as lawyer—had published a breakthrough, interdisciplinary study of crime and, when Llewellyn compiled his list, was collaborating with his wife, Eleanor Glueck, on their soon-to-be published studies of crime and delinquency.<sup>255</sup>

Llewellyn's Columbia colleague, Richard R. B. Powell, was at this time working on an innovative—if ultimately unsuccessful—new comparative-style casebook on trusts and estates.<sup>256</sup> Edson R. Sunderland, University of Michigan professor of law, was active in law reform, particularly procedural reform.<sup>257</sup> His casebooks on code and common law pleading and trial and appellate court practice may have impressed Llewellyn as realistic. Dean Justin Miller of Duke University Law School taught at Columbia during the summer of 1929, and Llewellyn's talks with him about jurisprudence and social science that term may

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252. Neither Kalman nor Rumble even mentioned Bogert in their studies of Realism; Twining quoted Max Rheinstein, who cited Bogert as an example of those American Law Institute founders whose nineteenth-century concepts of jurisprudence, though necessary, perhaps, to restate the law, "did not stand up, however, to the dynamics of the 20th century." This assessment of Bogert should obviously be reexamined. Not only did Llewellyn include Bogert on his list of realists-in-part, but even Twining pointed out that Bogert, along with Llewellyn, used drafts of the Uniform Commercial Code to teach sales at the University of Chicago School of Law. TWINING, KARL LLEWELLYN, *supra* note 8, at 15, 280.

My own work on the ALI suggests that the jurisprudence of many of the early ALI leaders (like Bogert) has been misunderstood and miscategorized. Their jurisprudence was much closer to Realism than has traditionally been argued. They were not "classical" or "formalist" jurists, but rather what I call "Progressive pragmatists." This will be treated at length in two forthcoming articles on the ALI: *The Restatement of the Law that Never Was: The American Bar Association Committee on Classification and Restatement of the Law and the Failure of Classical Jurisprudence, 1889-1923* and *Institute Bards or Priests? The American Law Institute and its Realist Critics*. This will also be addressed in my forthcoming book, *supra* note 37.

253. E.g., *COMMENTARIES ON CONDITIONAL SALES* (1924). See also 17 WHO'S WHO IN AMERICA 336 (1932-33) (Bogert's career).

254. S. WARNER, *SURVEY OF CRIMINAL STATISTICS IN THE UNITED STATES* 19, in NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON CRIMINAL STATISTICS* (1931). Warner was already working on his study of crime in Boston when Llewellyn was compiling his list. S. WARNER, *CRIME AND CRIMINAL STATISTICS IN BOSTON* (1934).

255. See 1956 TEACHER'S DIRECTORY, ASSOCIATION OF AMERICAN LAW SCHOOLS (1955) (biographical information on Glueck) [hereinafter TEACHER'S DIRECTORY].

256. See L. KALMAN, *supra* note 7, at 82, 87, 257 nn.55 & 56.

257. See 17 WHO'S WHO IN AMERICA, *supra* note 253, at 2225 (biographical information on Sunderland). Sunderland, like Bogert, has never before been associated with realism. Kalman, Rumble and Twining never mention him.

have convinced Llewellyn to consider Miller a realist-in-part.<sup>258</sup> Charles T. McCormick, Dean at the University of North Carolina, may also have become acquainted with Llewellyn during a summer teaching stint at Yale. He may have told Llewellyn about the Realist-style research he was doing on the *Parol Evidence Rule as a Procedural Device for Control of the Jury* or his involvement with Charles Clark's study of the federal courts.<sup>259</sup>

If Llewellyn thought his comprehensive new list would catch Pound off balance and pin him down, he was disappointed. Pound told his young critic, in typical fashion and without the slightest hint of irony: "To use Maitland's phrase, one who classifies tears a seamless web."<sup>260</sup> Pound was not impressed by Llewellyn's compilation of Realists. He argued that "[m]any of those you name have done the bulk of their work and all of them some of their work from other standpoints."<sup>261</sup> As usual, he refrained from specificity and dealt with Llewellyn's new categorization evasively. Of the first category of extreme realists, Pound told Llewellyn, "I recognize some. As to others, I haven't seen enough of their writing on jurisprudence to form an assured opinion."<sup>262</sup> While not too helpful, Pound had at the very least not denied Llewellyn's categorization of the first nine men. As to the second category of "thorough-going" realists, Pound admitted "there is no doubt of some." Yet Pound did not elaborate. "As to others," he told Llewellyn, "I am a bit surprised at your understanding of them."<sup>263</sup> In a congenial vein he explained that "[p]erhaps in their case, as in the case of any of us who have been writing for any length of time, there has been a gradual change of front which may have escaped my attention."<sup>264</sup>

Llewellyn must have found such comments maddening; Pound was teasing him with his apparent cooperation but lack of specificity. The older man saved his most pithy and devastating remarks for Llew-

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258. Miller was chairman of the Association of American Law Schools (AALS) committee on surveying criminal law and procedure and served on the advisory committee on crime for the Social Science Research Council. *Id.* at 1624. Again, Miller has never been mentioned in the standard works on Realism.

259. 41 YALE L.J. 365 (1932). The Realists, on the whole, preferred bench rather than jury trials and therefore applauded any device that could be used to constrain the role of juries in civil litigation. McCormick left Duke to teach at Northwestern the year after Llewellyn's *Some Realism* article was published. 17 WHO'S WHO IN AMERICA, *supra* note 253, at 1554, and TEACHER'S DIRECTORY, *supra* note 255, at 181-82. Neither of these biographical sources mentions McCormick's summer teaching position at Yale. On the Yale teaching job and McCormick's role in the federal court study, see Schlegel, *supra* note 248, at 502 n.203.

260. Pound Papers, 24-6, Pound to Llewellyn (Apr. 9, 1931).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

ellyn's last, innovative category of "realists-in-part." In that group, Pound chided, "you might put almost all of us there. All of us today," after all, "surely have something of what is in the juristic air we breathe."<sup>265</sup> This was a very powerful rejoinder. First of all, Pound was saying that there was no boundary to the third category. Llewellyn's group could be extended so far as to have no intellectual coherence. Second, if Pound himself could be included in the third category, it lost all analytical utility as a reply to Pound. Third, though Pound had not explicitly said so, anyone (including Llewellyn) could infer that if Pound could be included in the third category, then Realism was not so sharp a break with the earlier "Progressive pragmatic" jurisprudence;<sup>266</sup> Pound's original criticism, in his Holmes essay, that there was nothing very new in what these "realists" were doing, would have been correct.

Whether as a result of intent or ignorance, Pound treated Llewellyn's entire list, particularly the third category, as if it were only Llewellyn's own stab at classifying Realists as a philosophical group, rather than the way Llewellyn had meant it, namely, as examples of practitioners to varying degrees of a methodology. Only by thus ignoring Llewellyn's definition of Realism had Pound maintained the validity of his own critique. In the end, Pound had elusively told Llewellyn, "Why not take me within the four corners of what I have written and go on that as I had to do when I wrote. After all *quod scripsi scripsi*."<sup>267</sup>

As powerful as Pound's response was, Llewellyn could have maintained the upper hand if he had only adhered to his original concept. Pound may not have realized or may have simply ignored the full implication of Llewellyn's third category—that Realism was only a methodology, not a school of legal philosophy. That definition undercut Pound's rejoinder entirely. Llewellyn might have simply replied that of course Pound could be considered a "realist-in-part"—Pound had, after all, prominently called for and participated in empirical studies of the legal process. Such a response would have effectively coopted Pound into the Realist camp.<sup>268</sup> If Pound were clearly wrong that

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265. *Id.*

266. "Progressive pragmatism" is my term for the jurisprudential school that succeeded the "classical," "conceptualist," or "formalist" jurisprudence of the nineteenth century. An extended discussion of that development and its relationship to Realism appears in the two articles cited *supra* note 252.

267. Pound Papers, Pound to Llewellyn, *supra* note 215.

268. Joseph Bingham told Llewellyn as much in his reply to the Llewellyn-Frank circular memo. KLP, A.65.b., Bingham to Llewellyn (Aug. 10, 1931). After *Some Realism* was published, Bingham reiterated that observation: "Why, O Why, did you not follow my suggestion and give the coup de grace to Pound's opposition by expressly including him among the realists—put 'him on the list' by name with the rest of the outlaws. That's where, secretly [sic], he wishes to be and it would have added an effective touch of humor to the argument." *Id.*

everyone could be included, admitting Pound and sociological jurisprudence to the third category would subsume them under Realism, with the result that the latter approach would become the focal point of modern jurisprudence without having to be defined as a school. As such, its practitioners would become the new voice of legal thought and analysis without the institutional coherence that could leave them, as a group, open to institutional attacks like Pound's.

Llewellyn's final shot in the exchange with Pound, his article *Some Realism About Realism: A Reply to Dean Pound*,<sup>269</sup> is often studied in courses on legal history and remains a subject of intense scholarly interest. What Llewellyn said and did not say is still controversial.<sup>270</sup> The recently uncovered correspondence throws new light upon Llewellyn's options and his choice among them. In the face of Pound's clever reply to the April 6 list, Llewellyn omitted all of the individuals from the first two categories who had never been formally associated with the Realist inner circle, even though he had obviously thought their work epitomized the Realist methodology. Such omissions reinforced the idea that the Realists were a rather small, well-defined intellectual clique. Even worse, Llewellyn had been intimidated into dropping the third category of "realists-in-part" entirely and thereby obscured his own definition of Realism. Indeed, in what amounted to a surrender to Pound's schemes of classification, Llewellyn retrenched on his characterization of Felix Frankfurter as a "realist-in-part." He conceded that "Felix Frankfurter we do not include; he has been currently considered a 'sociological jurist,' not a 'realist.' It profits little to show that one thought a realist does not fit an alleged description of 'realists.'"<sup>271</sup> What was left was a weak denial that the Realists were a school and a point by point defense of the Realists against "Dean Pound's indictment" that effectively dignified it as valid.

His reticence, a faint echo of Pound's, denied Llewellyn the option of defending Realism as a working tool of progressive, but non-ideological, law thinkers. The irony was that Llewellyn, himself, would prove to be just such a law thinker. Llewellyn's first drafts of the Uniform Commercial Code were a fusion of critical insights and construc-

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269. Llewellyn, *Some Realism*, *supra* note 3.

270. For example, did the article prove that Llewellyn was a moral relativist? Some Realists, notably Felix Cohen, believed in the moral underpinnings of Realism. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1933). Other Realists, for example Jerome Frank, were far more skeptical. Llewellyn, himself, called for a "temporary divorce of Is and Ought for purposes of study." Llewellyn, *Some Realism*, *supra* note 3, at 1236.

271. Llewellyn, *Some Realism*, *supra* note 3, at 1227 n.18. This published characterization led Laura Kalman erroneously to conclude that Llewellyn and Frank never considered Frankfurter a Realist. L. KALMAN, *supra* note 7, at 56.

tive impulses.<sup>272</sup> In denying Pound inclusion amongst the third category—by electing not to publish it—Llewellyn lopped off his strongest evidence for the constructive, programmatic potential of Realism. What was left were the bare bones of the first two categories fleshed out by epigrammatic asides. A few individuals from the third list made their way into Llewellyn's footnotes, where they were dismissed for lack of standing.<sup>273</sup> Although the end of the article did plead for the positive, constructive intent of Realism,<sup>274</sup> Llewellyn's list lacked the names that would have best sustained that claim.

If, in terms of logic and argumentation, Pound's views prevailed, since he had succeeded in cutting the heart from Llewellyn's case, history has given the palm to Llewellyn. Llewellyn's second article will remain standard fare on the composition of the Realists. With our knowledge of Llewellyn's original list and Pound's replies, we can see that Llewellyn's effort was incomplete, at best. How far Llewellyn's original definition of Realism was obscured by his failure to follow through with the conceptual framework of the April 6 list can be gauged by the fact that when Llewellyn unequivocally reiterated that definition, in what turned out to be his last words on Realism, in his 1960 book, *The Common Law Tradition*,<sup>275</sup> scholars regarded it as "inconsistent with the . . . interpretations of the realist movement forwarded by Llewellyn in his articles of the 1930's."<sup>276</sup>

#### IV. NEW DIRECTIONS

The first new direction to which this study of Llewellyn and Pound points is, appropriately enough, a methodological one. Private correspondence, when available to the legal historian or jurisprudential scholar, is an essential part of the record. Analysis of Karl Llewellyn's thinking, Roscoe Pound's responses, and the resulting public contro-

272. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

273. E.g., Felix Frankfurter. See *supra* note 271 and accompanying text.

274. Llewellyn, *Some Realism*, *supra* note 3, at 1242.

275. Llewellyn stated his definition very clearly:

Realism was never a philosophy, nor did any group of realists as such ever attempt to present any rounded view, or *whole* approach. . . . What realism was, and is, is a method, nothing more, and the only tenet involved is that the method is a good one. "See it fresh," "See it as it works"—that was to be the foundation of any solid work, to *any* end. . . . Of all of these things, only "see it fresh," "see it clean" and "come back to make sure" are of the essence. They go to method. *That method is eternal*. That is point 1. The method may have come into first discussion among lawyers in relation to rules and judicial decision, but it is no more limited to that area than it is to matters legal. It applies to anything. That is point 2. But *the method* includes nothing at all about whither to go. That is point 3. *Realism is not a philosophy, but a technology*.

K. LLEWELLYN, *THE COMMON LAW TRADITION* 509-10 (1960).

276. W. RUMBLE, *supra* note 6, at 35.

versy is not only incomplete but wrong without the private correspondence. Manuscripts, letters, memoranda, diaries and other private materials are indispensable to understanding public exchanges.

A second, more substantive direction is that Karl Llewellyn's early efforts to define Realism were consistent with his mature definition in his *Common Law Tradition* and with his practice of realism throughout his life. When he made lists, asked for help from other Realists, and tried to see Realism from others' eyes, he was anticipating the approach he would employ as Chief Reporter on the Uniform Commercial Code. Realism was first a way of looking at phenomena, letting that phenomena dictate their own arrangements and rules, rather than imposing general rules on the subject from outside. Llewellyn laid the groundwork for Legal Realism by studying legal realism.

Perhaps most important, Karl Llewellyn saw Legal Realism as a program. His third category, recombined here with his published call for realism, anticipates the non-academic quality of the movement. Realists, Karl Llewellyn knew, wanted to hold a realistic mirror to the law and then reformulate the law to match its realistic reflection. The men in his third category of realists-in-part were those who had put that program into practice in their areas of specialization, even if many of them had not given much thought to the jurisprudence of their work. Others would put their toes into the water—writing codes and casebooks, working for the regulating agencies and advising Presidents. Legal Realism was an activist orientation.

This Article also suggests new directions for Pound students. Heretofore portrayed as villain or antique, Pound now emerges a more sympathetic figure. While the Realists reacted to Pound's criticism, they overlooked the fact that the Dean understood the origins and methodology of legal Realism perhaps even better than they did themselves. Pound, the legal historian and sociological jurisprudent, correctly distinguished the Realists from their earlier philosophical namesakes and placed twentieth-century legal Realism in the context of recent literary realism. But Pound was also a man perplexed and trapped by the next stage, that is, by the logical implications of some of his own writings. He, too, was a sometime empiricist, but never grasped, or conceded, the Realists' insistence on reformulating the law to reflect empirical reality. The gulf that divided him from them remained, not because he was antagonistic to their enterprise, but because he did not wish to be coopted into it. He knew, or sensed, that the new century belonged to Realism. His concession that even he could be regarded as a Realist if Llewellyn's third category were published was prescient, and he struggled mightily to avert that fate.

Table 1: Evolution of Llewellyn's List of Realists

"Next Step" (1930)	KNL to RP <sup>b</sup> 3/17/31	KNL/JF Memo <sup>a</sup> 3/27/31	KNL to RP 4/6/31	"Some Realism" 6/31
Moore	Moore	Moore	Moore	Moore
	Frank	Frank	Frank	Frank
	Oliphant	Oliphant	Oliphant	Oliphant
Klaus	Klaus	Klaus	Klaus	Klaus
	Cook	Cook	Cook	Cook
Green	Green	Green	Green	Green
Yntema	Yntema	Yntema	Yntema	Yntema
Clark	Clark	Clark	Clark	Clark
	Radin	Radin	Radin	Radin
	Llewellyn	Llewellyn	Llewellyn	Llewellyn
	Corbin	Corbin	Corbin	Corbin
	Sturges	Sturges	Sturges	Sturges
Douglas	Douglas	Douglas	Douglas	Douglas
	Arnold		Arnold	
	Bingham		Bingham	Bingham
	Hutcheson		Hutcheson	Hutcheson
	Hamilton		Hamilton	
	Patterson		Patterson	Patterson
	Tulin		Tulin	Tulin
			Francis	Francis
			T.R. Powell	T.R. Powell
			Lorenzen	Lorenzen
Frankfurter			Frankfurter	
Handler			Handler	
Landis			Landis	
Brandeis				
Ehrlich				
Lambert				
Hedeman				
Nussbaum				
Moley				
Ishizaki				
			Hanna	
			Morgan	
			Kidd	
			Smith	
			McMurray	
			McCormick	
			Miller	
			Sunderland	
			R.R. Powell	
			Berle	
			Glueck	
			Warner	
			Bogert	
			Durfee	
			Bonbright	
			Hutchins	
			Hale	
			Turner [Steffins]	
			Bohlen	

<sup>a</sup> Source: University of Chicago Law Library, Karl Llewellyn Papers, A.65.b.<sup>b</sup> Source: Harvard Law School Library, Roscoe Pound Papers, 24-6.

*Table 2: The List Llewellyn Sent Pound, April 6, 1931<sup>c</sup>*

*"Our notion of realists who may have taken extreme positions on one point or another":*

- [Walter W.] Cook
- [Joseph W.] Bingham
- [Jerome] Frank
- [Underhill] Moore
- [Herman] Oliphant
- [Samuel] Klaus
- [Wesley] Sturges
- [Joseph C.] Hutcheson
- [John] Hanna (perhaps)

*"Our notion of realists who are thorough-going, but probably less extreme in their positions":*

- [Arthur L.] Corbin
- [Max] Radin
- Walton Hamilton
- [Adolf A.] Berle
- [Ernest] Lorenzen
- C[harles] E. Clark
- [Karl N.] Llewellyn
- Leon Green
- [Edwin W.] Patterson
- [Hessel E.] Yntema
- T[homas] R[eed] Powell
- Y[oung] B. Smith
- [Alexander Marsden] Kidd
- [Milton] Handler
- [Leon A.] Tulin
- [Robert Maynard] Hutchins
- [Thurman] Arnold
- [William O.] Douglas
- [Joseph] Francis
- [James C.] Bonbright

*"Our notion of realists-in-part-of-their-work (examples)":*

- [Felix] Frankfurter
- [James M.] Landis
- [Edmund M.] Morgan
- [Edgar Noble] Durfee
- [George G.] Bogert
- [Sam Bass] Warner
- Sheldon Glueck
- R[ichard] R. Powell
- [Edson Read] Sunderland
- Justin Miller
- [Charles T.] McCormick
- [Robert Lee] Hale
- [Roscoe B.] Turner [Steffins]
- [Orin Kip] McMurray
- [Francis] Bohlen

<sup>c</sup> Source: Harvard Law School Library, Roscoe Pound Papers, 24-6.

Table 3: *Llewellyn's Additional Realists, April 6, 1931*

<u>Name</u>	<u>Birthdate</u>	<u>Education</u>	<u>Occupation 1930-31</u>
[John] Hanna	1891 (d.1964)	Harvard, LLB	Prof. of Law, Columbia
Walton Hamilton	1881 (d.1958)	Univ. of Michigan, Ph.D.	Prof. of Law, Yale Law School
[Adolf A.] Berle	1895 (d.1971)	Harvard, LLB	Prof. of Law, Columbia
Y[oung] B. Smith	1889 (d.1960)	Columbia, LLB	Dean, Columbia Law School
[Alexander Marsden] Kidd	1879 (d.1955)	Harvard, LLB	Prof. of Law, California (Berkeley)
[Milton] Handler	1903	Columbia, LLB	Prof. of Law, Columbia
[Robert Maynard] Hutchins	1899 (d.1977)	Yale, LLB	President, University of Chicago
[Thurman] Arnold	1891 (d.1969)	Harvard, LLB	Prof. of Law, Yale
[James C.] Bonbright	1891 (d.1969)	Columbia, Ph.D.	Prof. of Economics, Columbia Univ.
[Felix] Frankfurter	1882 (d.1965)	Harvard, LLB	Prof. of Law, Harvard
[James M.] Landis	1899 (d.1964)	Harvard, LLB	Prof. of Law, Harvard
[Edmund M.] Morgan	1878 (d.1966)	Harvard, LLB	Prof. of Law, Harvard
[Edgar Noble] Durfee	1882 (d.1958)	Chicago, JD	Prof. of Law, Michigan
[George G.] Bogert	1884 (d.1977)	Cornell, LLB	Prof. of Law, Chicago
[Sam Bass] Warner	1889 (d.1979)	Harvard, LLB	Asst. Prof. of Law, Harvard
Sheldon Glueck	1896 (d.1980)	National Univ., LLB; Harvard, Ph.D.	Prof. of Law, Harvard
R[ichard] R. Powell	1890 (d.1982)	Columbia, LLB	Prof. of Law, Columbia
[Edson Read] Sunderland	1874 (d.1959)	Univ. of Berlin, LLB, A.M.	Prof. of Law, Univ. of Michigan
Justin Miller	1888 (d.1973)	Univ. of Montana, LLB	Dean, Duke University Law School
[Charles T.] McCormick	1889 (d.1963)	Harvard, LLB	Dean, U. of N.C. Law School
[Robert Lee] Hale	1884 (d.1969)	Columbia, Ph.D., Harvard LLB	Prof. of Law, Columbia
[Roscoe] Turner [Steffins]	1893 (d.1976)	Yale LLB	Prof. of Law, Yale
[Orin Kip] McMurray	1869 (d.1945)	Hastings College of Law (Calif.)	Visiting Prof. of Law, Columbia
[Francis] Bohlen	1868 (d.1942)	Univ. of Pennsylvania LLB	Prof. of Law, Penn

