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The Legal Realists on Political Economy

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Abstract

Alongside the well-known jurisprudential ideas associated with legal realism, some scholars have highlighted the realists' political-economic ideas. Best known among them has been Morton Horwitz, who has argued that the realists launched an "attack on the legitimacy of the market." Other scholars challenged this view and argued that there was no significant connection between legal realism and political economic ideas. I offer a corrective to both views. I first consider the work of five legal realists (Karl Llewellyn, Adolf Berle, William O. Douglas, Jerome Frank, and Thurman Arnold) and show that all held views that were well within the political-economic mainstream of their era, which did not challenge the legitimacy of market capitalism but wanted to see markets better regulated. I also show that for many of these realists, there were important connections between their jurisprudential and political-economic ideas. I then turn to some neglected writings of Felix Cohen to show that he too saw a direct link between his legal and economic ideas. However, unlike the other legal realists discussed here, he was a radical critic of market capitalism. I use his political-economic writings for a reconsideration of his better-known jurisprudential works.

Keywords: legal realism; political economy; Felix Cohen

Introduction

If American legal realism was ever an outsider view, it was entirely mainstream by 1937. By then, the legal realists could claim to have conquered two Ivy League law schools (Yale and Columbia) with prominent representation also at Harvard, the supposed bastion of the opposition to legal realism. The realists could boast sympathetic deans not just at Yale (Charles Clark, Wesley Sturges) and Columbia (Young B. Smith) but also at Harvard (James Landis) and one prominent Midwestern law school (Leon Green at Northwestern). In previous years, several legal realists had

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served as presidents of the Association of American Law Schools (Herman Oliphant, Clark, Arthur Corbin, Walter Wheeler Cook), and after Franklin D. Roosevelt was elected president, many realists were recruited by his administration for senior positions in the federal government (Landis, Oliphant, Thurman Arnold, William O. Douglas, Jerome Frank). Another legal realist, Felix Frankfurter, though not working for the administration, was an informal advisor for the president, making him possibly the most powerful law professor in the country. Before the decade's end, he was appointed to the US Supreme Court, only to be joined by Douglas a few months later. (The two soon became bitter rivals on the Court, but that is another story.)

Yet, to this day, the legal realists maintain a reputation as antiestablishment radicals. This reputation rests on their supposed repudiation of "the inherent worth of traditional values," for holding views inconsistent with democracy and the rule of law based on their supposed radical challenges to the then-dominant views about the determinacy of legal rules (White 1972, 1024–25; Fisher 2008, 39). According to this familiar image, the legal realists believed legal sources were so vague and so full of contradictory ideas that they could support virtually any legal conclusion. Consequently, the legal sources judges cited served as little more than after-the-fact rationalizations for decisions arrived at on other grounds, including the judges' personal background (gender, race, wealth, and so on), their political preferences, or even transient factors like their mood on the day.

Despite some challenges to this view (de Been 2008; Tamanaha 2011; Priel 2021a), this understanding of legal realism is still widely accepted.[1] For instance, Philip Bobbitt's (2014) recent overview of American legal thought of the last few decades spoke of the "labyrinths of indeterminacy" that the realists have unearthed, the "corrosive acid" of their ideas (2359), and the "wreckage" those ideas left behind them (2349). Bobbitt's view is by no means exceptional; one could fill pages with similar descriptions of the legal realists' disdain for legal doctrine and its enduing impact on legal thought. At the same time, several critical scholars have put greater emphasis on a different aspect of the realists' work: less jurisprudential questions of adjudication and legal reasoning and more questions of political economy. Joseph Singer (1988, 475, 482, 499) argued that, alongside the question of determinacy, a central feature of legal realism was "a pragmatic critique of power" and a challenge to the idea of self-regulating markets. A few years later, Morton Horwitz (1992) went further, urging greater emphasis on the way in which economic ideas translated into pre-realist legal doctrine, which in a clear and quite determinate fashion promoted the interests of certain groups over others. (This has led to some intra-critical legal studies squabbles, as recounted in Ernst 1993, 1031–34.) Following this alternative characterization, Horwitz (1992, 195) contended that the legal realists exposed the underlying assumptions of legal doctrine and, in doing so, "pursued their attack on the legitimacy of the market with a degree of insight, brilliance, and social passion that has never been equaled since."

This political-economic interpretation of legal realism has not gone unchallenged (Hovenkamp 2000, 855–56; compare Ernst 1993, 1070–74), but since the emergence of a law-and-political-economy perspective, it has received a new lease of life (Rahman 2016, ch. 3; Britton-Purdy et al. 2020, 1795–96, 1818–19). The aim of this article is to

[1] For more challenges to this view, see Dan Priel, "Realism, Positivism, and Determinacy," 2024 (unpublished); Dan Priel, "The Political Theories of the Legal Realists," 2024 (unpublished).

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contribute to this discussion by considering more closely the legal realists' works that focused on questions of political economy by offering a corrective to the view that argues for a strong association between legal realism and a critique of political economy. The corrective takes two quite different forms. First, I argue that many of the legal realists, especially those who wrote specifically on issues pertaining to the interaction between law and the economy, held views that were well within the political-economic mainstream of their day. What this meant during the New Deal years was not an attack on the legitimacy of the market system but, rather, a defense of a regulated market-based economy. As was common during the years following the economic collapse of 1929, these legal realists rejected laissez-faire ideology but saw themselves as reformers who came to fix, and, in this way save, American capitalism.

My second contribution involves one exception to this general characterization. In a series of forgotten writings, Felix Cohen expressed views that stand out in their radical criticism of political and economic liberalism. Based on these writings, I show the extent to which Cohen held fundamentally different views, rejecting capitalism, severely criticizing American courts as beholden of the interest of economic elites, and hoping to see a revolutionary change in the direction of socialism.

In addition to contributing to a more nuanced understanding of the legal realists' views on political economy, I aim to show, for both the mainstream legal realists and for Cohen, how their writings on economic issues were related to and complemented their jurisprudential ideas. By countering some scholars who have argued that there is no real connection between the two, I hope to contribute to a better understanding of the realists and their ideas.

The legal realists' views on political economy

When President Roosevelt faced a Supreme Court unfriendly to his legislative agenda, he floated his Court packing proposals. These proved very unpopular with the public and were eventually abandoned, but, before that happened, some legal realists turned to newspapers and magazines to show their support (Arnold 1937b; Green 1937; Llewellyn 1937; compare Arnold 1933).[2] This mobilization in defense of a sitting president's plan does not quite match the realists' radical reputation. But it matches other contexts when most of the legal realists were not just reliable supporters of Roosevelt but also boosters of his vision for American law and democracy.[3]

Consider Jerome Frank. In making the case for the radicalism of the realists, their detractors often present him as a prime example of an extreme and unprincipled nihilist. Even those otherwise sympathetic to realists' ideas often distance themselves from the views of someone they consider an unrepresentative outlier (Leiter 2007, 17;

[2] Karl Llewellyn had other proposals to limit the US Supreme Court's power. The *New York Times* reported around the time that Llewellyn also proposed that statutes could be declared unconstitutional only in a Supreme Court decision supported by at least seven justices (Mallon 1936). In a written article, Llewellyn (1936) suggested restricting this "veto" power to unanimous decisions.

[3] It is sometimes suggested that, chastened by the horrors of the Second World War II, the legal realists retreated from their earlier radicalism (see, for example, Purcell 1973, ch. 9). In doing so, they in effect conceded their critics' charge that the nihilism of their earlier writings could lead to fascism. With the possible exception of Adolf Berle, I do not think the evidence supports this claim as most of the realists' writings I consider in this article are from the 1930s.

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Dagan 2013, 25–26). In reality, Frank was among the most unflinching in his praise of the virtues of law and liberal democracy. Frank (1938a, 228) considered it the "unique value of political democracy" that it "alone [was] congenial to free experimentation." The following year, he expanded on this idea in a radio broadcast debate on the question of whether the speech of political groups advocating fascism or communism should be curtailed. Dismissing both fascism and communism as anti-American, Frank (1939, 14–15) offered full-throated support for the American brand of liberalism:

> [O]ur answer to those foreign "isms" should be in accord with what might be called the *liberal credo*: (1) Unreserved loyalty to the constitution. (2) A constant willingness to contend to the civil rights of all persons. (3) A recognition that a profit system so improved and conducted as to make it efficient, an independent property-owning middle class, and vital farm and labor movements are essential to our democracy and to the well-being of all Americans. (4) Thorough awareness that the best safeguard for America is a very a widely diffused American prosperity inside democracy. (5) Unhesitating adherence at all times to the position that the retention of our priceless heritage of American democracy requires opposition to anti-democratic foreign "isms" whether of the open or camouflaged Nazi, fascist, or communist varieties.

A few years later, Frank explained the important role law had to play in this vision. Taking to the pages of *Good Housekeeping*, he described law as "one of the best means worked out by human society for the adjustment of society's many difficulties" (Frank 1944, 43). Of course, Frank was speaking here only for himself, but—with one exception discussed below—I do not know of any legal realist holding fundamentally different views.

When we turn to political-economic ideas, it is now quite common to see the legal realists as closely connected to institutional economics (Kamp 1995; Williamson 1996), with some commentators arguing that legal realism was, in effect, the legal sibling of institutional economics (Rutherford 2004). It is true that the call for more "realism" was heard at the time in other university departments and that, in economic departments, institutional economists were among the most vocal in rallying under this banner (Spiegel 1991, 629). However, institutional economics was, and remains, a loose idea with its share of internal disagreements, and it is not necessarily hostile to market economy. Therefore, to say that the realists accepted institutionalist ideas, by itself, does not tell us much.

Turning to the writings of the realists themselves, some have attempted to find in them radical economic positions to match their supposed jurisprudential radicalism. The one name that stands out in discussions of this matter is Robert Hale (1923, 1935), whose writings on economic coercion are by far the most frequently cited sources in this context. Based on these, several scholars have placed Hale at the center of the realist movement (Horwitz 1992; Fried 1998). I will not spend much time discussing Hale, precisely because his economic views have been discussed extensively by others. However, I will point out that there are some difficulties both with his characterization as a major figure among the legal realists and as a political-economic radical. For all of Hale's criticism of markets, he did not want to abolish the market system (Duxbury 1990, 440; Hovenkamp 2000, 855–57). As such, his views are broadly

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in line with my central claim in this section that most legal realists held views that were within the political economic mainstream of their day. Second, whatever Hale's views were, it is not clear how much they were shared by other legal realists. Debating whether Hale "really" was a legal realist may be a pointless intellectual exercise, but it is worth noting that there is relatively little evidence of much personal or intellectual interaction between him and the (other) legal realists, and also not much evidence that they shared his ideas or had much use for them (Schlegel 2000, 154; Leiter 2007, 18–19; Priel 2021a). Whether Hale was a central figure within legal realism or whether his views were a radical critique of market economy, his was just one voice.

At the other extreme, some commentators have argued that there was no real connection between the realists' jurisprudential works and economic ideas. In an article revealingly subtitled "Legal Realism and the Separation of Law and Economics," Herbert Hovenkamp (2000) concluded that most of the legal realists had relatively little to say about economics. In a different way, Neil Duxbury (1995, 155–58) reached a similar conclusion. Duxbury acknowledged that several prominent legal realists worked for the Roosevelt administration, but he questioned the connection between legal realism and the New Deal. The legal realists, he said, focused primarily on common law and commercial law and did not develop any serious ideas on administrative law and legislation in general or on the legislative reforms that were at the heart of the New Deal.

I believe that both the view that sees Hale's views as reflecting "legal realism" and the one that sees little connection between the legal realists and political economy are overdrawn. I want to contribute to this discussion by examining the writings of six legal realists, focusing mostly on their writings from the 1930s, the period when the American legal and political landscape was being reshaped by New Deal legislation.

In selecting a subsection of the legal realists, I open myself to the charge of cooking the evidence, picking the ones that fit a particular narrative. This might have been true if I presented "legal realism" as a uniform creed. But, as the realists often emphasized, there was no creed. My aim, therefore, is not to deny the existence of other legal realists who may have held other views; indeed, one aim of this article is precisely to show the diversity of opinion on questions of economic policy among the legal realists. Having said that, my choice is not random. To begin, I do not discuss many of the legal realists (for example, Hessel Yntema, Edwin Patterson, Max Radin, Walter Wheeler Cook, Joseph Bingham, or Arthur Corbin) who wrote little or nothing on questions of political economy.[4] Though not considered below, it is worth remembering that they existed and that they provide further support for my contention that the legal realists as a group could not be associated with any distinct, let alone radical, political-economic agenda.

[4] Max Radin (1931, 1939) published two books on the ethics of business. Both were largely historical surveys that contained only a few passing comments on the economic realities of the day. Neither book was critical of market economy, except in its most extreme and unrestrained forms. Walter Wheeler Cook wrote one essay that surveyed developments in antitrust law and concluded with the rather anodyne suggestion that, as some restrictions on freedom may result in greater overall freedom, so regulation is justified if its benefits exceed its costs (Cook 1931, 37). Herman Oliphant, who wrote on, and taught, commercial law and trade regulation, worked in the Treasury Department from 1933 until his death in 1939 but never wrote any extended discussion on political economy.

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Of the realists I discuss, four (Karl Llewellyn, William O. Douglas, Thurman Arnold, and Jerome Frank) appeared in Llewellyn's (1931a) list of legal realists, while the scholarship of another (Adolf Berle) is mentioned favorably several times in that essay and his name also appeared in some longer lists of legal realists who Llewellyn considered (Hull 1987, 967). More importantly, these five were also among the more influential legal realists, especially with respect to matters of economic regulation. Influence, admittedly, is a notoriously difficult quality to measure. Citations are a popular, if contested, currency of influence within academic circles. But whatever value they have, it is limited in its ability to measure influence in the world beyond. The legal realists I consider in this section were influential not (just) because they were prominent contributors to academic debates but (also) because they were in government positions that gave them the opportunity to change economic policy. As already mentioned, four of the five held high-level positions in the Roosevelt administration, all in roles dealing directly with the regulation of economic activity: Douglas and Frank both chaired the Securities and Exchange Commission (SEC), Frank after earlier stints in other departments, including serving as general counsel of the Agriculture Adjustment Administration (AAA). Arnold held several government positions (including both at the AAA under Frank and at the SEC under Douglas), before moving to the Antitrust Division of the Department of Justice, eventually heading it. All three later served as federal appellate judges (Arnold only briefly, Frank for over fifteen years, Douglas remains the longest-serving justice on the US Supreme Court). Berle was a member of Roosevelt's original brain trust, giving him unique access to the president during the early days of shaping New Deal policies. Karl Llewellyn did not leave academia, but starting in 1937, he spent much of the following fifteen years leading the project of overhauling American commercial law. The result of this effort, the Uniform Commercial Code (UCC), has been enacted (with some revisions) in all fifty states and remains the basis for commercial law in the United States to this day.

It is useful to start with Llewellyn, as one of his early writings provides a good summary of a foundational idea that, I think, other realists discussed in this section accepted. In one of Llewellyn's (1925, 668) earliest publications, he wrote: "Legal institutions provide a general atmosphere of security from personal aggression without which economic life could hardly be expected to unfold, an atmosphere wholly distinct from the particular technical regulation of any particular activity." This is a familiar institutionalist idea, which sees markets as supported, or even constituted, by law (Deakin et al. 2017; Pistor 2019, 21ff). Interestingly, Llewellyn did not limit his discussion to what Katharina Pistor (2019) recently called the "code of capital." As he put it, it is not just commercial law that was necessary for markets to function: "The law of murder, robbery, rape, does not relate to banking; yet only as it is effective does banking become possible" (Llewellyn 1925, 668).

In subsequent years, Llewellyn largely shifted his attention to other questions. Neither the famous jurisprudential works of the early 1930s, nor the more doctrinal studies on contract and commercial law written toward the end of that decade, pay a great deal of attention to questions of political economy. Here and there, however, Llewellyn made scattered remarks that showed his support for market economy. In 1934, as part of his tribute to the US Supreme Court for the "rather sweet job" it has been doing, Llewellyn praised it for recognizing and following the "ideology of the

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country" and "[o]ne of the things that have been outstanding in our country," namely that "our whole idealogy [*sic*] is built up in terms of business men, that what the business man does is great, if he is successful" (Llewellyn 1934b, 117). Those shocked by the fact that Llewellyn, during the so-called "*Lochner* era," was speaking so positively about the Supreme Court may be even more surprised to learn that, a few years later, Llewellyn refused to explain legal doctrine from that era "by the mere philosophy of laissez-faire" (Llewellyn 1942, 240).

Interestingly, what made markets attractive to Llewellyn was not that they promoted efficiency; it was that they upheld and sustained human cooperation and social traditions. In other words, it was not the self-interest of the baker or the brewer that gave us our bread and beer, nor was it the disciplining power of market competition. It was, on the contrary, norms of cooperation that lay at the basis of a successful market economy. This was true of individual contracts, which did not create a precise and carefully articulated formulation of parties' obligations toward each other but, rather, a flexible "framework" of "real working relations" (Llewellyn 1931b, 736–37). This was also true of market economy more generally, where "self-maintenance and traditional ways of bargaining outweigh ... governmental factors" in maintaining order (Llewellyn 1934a, 34).[5]

These ideas later formed the intellectual foundation for Llewellyn's work on the UCC (Batshaw Wiseman 1987; Twining 2012, ch. 12). In a document written in 1940 (reproduced in Twining 2012, 580–85), Llewellyn spelled out what he considered the central goals for the code. Much of commercial law, he said, was "non-political in character," and its main goal was to "afford[] material guidance" to those doing business. This was not just a matter of improving the clarity or simplicity of the law. Llewellyn considered it his goal to create a code that businesspeople could not just understand but also relate to: "A democracy needs law which is friendly to its people, law which is *known* to be friendly, even neighborly law" (581). This is a central idea in Llewellyn's (1941) thinking and central to his account of American (common) law more generally (see also Whitman 1987; Priel 2017, 631–34). From this perspective, the problem with Christopher Langdell's approach was that it treated law as a matter of abstract reason, not as "people's *right-way-of-life*," eventually resulting in "remote law," which is not "law to love, but law to dodge, or to use" (Llewellyn 1942, 263). This was not law emerging from the people but, rather, law imposed on the people. Contrary to the claim that the realists rejected traditional values, it was precisely traditional commercial values that Llewellyn saw as the basis of the market economy and social order that the law had to uphold. Llewellyn emphasized the need to design a commercial code that would incorporate and reflect the prevailing values of the commercial community, thereby giving law both predictability and legitimacy. There is thus close congruence between Llewellyn's views on the role of custom and tradition in regulating markets and as the source of law's norms and its legitimacy.

I do not see these views as a repudiation of Llewellyn's earlier idea that a functioning market economy needs the security that law provides, nor is there here anything like the opposition to almost any form of market regulation found in some

[5] In all this, Llewellyn was echoing ideas found in John Commons (1924, 299–300) and Walton Hamilton (1932), two works that Llewellyn frequently cited for their influence on his own thinking.

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of the law-and-economics writings of the subsequent decades.[6] But it is also quite evident that Llewellyn, perhaps more than other legal realists, accepted some version of the idea that markets are capable of, perhaps even dependent on, some degree of self-regulation derived from dominant commercial customs.

Llewellyn looked at commercial law through the lens of particular transactions. Berle, Douglas, Arnold, and Frank were in government positions that encouraged them to look at the regulation of entire industries. As such, unlike Llewellyn, all four of them figure prominently in some histories of the New Deal (see, for example, Irons 1982; Schwarz 1993; Brinkley 1995). However, these books tend to pay relatively scant attention to the jurisprudential debates on rules, adjudication, and legal reasoning that dominate the legal scholarship on legal realism, leading to a certain disconnect between the two discourses. Against this background, and especially against the denial by some legal historians of the relationship between legal realism and the theory or practice of political economy, my aim in this section is to show that, at least for some legal realists, there was a clear connection between the two.

In somewhat different ways, Berle, Douglas, Arnold, and Frank all accepted that a market economy was the key to the economic success of the United States. At the same time, they also saw a need for active policing of the operation of markets to secure the potential benefits of a market economy. In numerous publications written during their time in government and often aimed at the general public, they explained why such reforms were needed to prevent the collapse of market capitalism. Like Llewellyn, they did not limit their discussion to economic performance or efficiency. They saw a direct connection between economic regulation and broader questions of political and legal theory, thus demonstrating a relationship between their jurisprudential and political-economic views (compare Curtis 2015).

Adolf Berle got his start at Columbia by asking for a meeting with Dean Harlan Fiske Stone and telling him that his law school's corporate law course was "rotten." It focused on small corporations that had dominated the American economy in past decades, altogether ignoring the dramatic changes taking place in the securities markets and their effect on modern corporations. He proposed a more realistic course, one that studied the corporation through the lens of its financing (Berle 1974, 115–16). Understandably, Berle expected to get promptly thrown out of the building; instead, he got himself a job. What he told in class to his students, and what his scholarship told the world, was that old ideas that drew a direct connection between private property and the power to determine what was to be done with it did not correspond to the realities of modern corporations, where ownership of shares of a corporation often did not translate to the power to control it. This was a key claim of Berle's best-known book, *The Modern Corporation and Private Property* (Berle and Means 1932). It was this separation that made possible the concentration of property in the hands of a few, resulting in half of corporate wealth in the United States being held by the two hundred largest corporations. This "corporate oligarchy" had the potential to lead to "corporate plundering" (355).

[6] The law school of the University of Chicago was Llewellyn's last academic home. In the last decade of his life, Llewellyn witnessed there the early stirrings of what would become the Chicago law-and-economics juggernaut. He did not like what he saw (Kitch 1983, 184, 187).

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Berle drew rather surprising conclusions from this view. More than the others discussed in this section, he was open to the blurring of boundaries between private and public, not as philosophical abstractions but, rather, as implying support for more collectivist policies. As he saw it, since some industries have effectively "ceased to be private," greater government control of them had become inevitable (Berle 1935a). In a memo from 1932, he even predicted that, if trends were to continue, the American economy would look quite similar to the Russian one within the space of two decades. After all, "[t]here is no great difference between having all industry run by a committee of Commissars and by a small group of Directors" (Berle 1971, 46). For these views, Berle has been considered to be one of those who were exploring at the time pathways toward a "postcapitalist" future (Brick 2015, ch. 2).

Berle was not entirely clear about what this meant in practice (Schwarz 1987, 66). He seems to have been enamored of the benefits of centralized planning and terrified by the "general breakdown" that he foresaw as the likely outcome of the lack thereof (Berle 1933). (He was so worried about it that in 1931 he confided in a friend that he hoarded food [Schwarz 1987, 67].) Berle was also troubled by the allocative inefficiencies of a system that produced an abundance of goods yet had millions living in poverty. He saw centralized planning as a solution to these problems and often expressed indifference as to who was in charge, as long as there was someone: "Whether it was rugged individualism, Fascism, Communism, Socialism, or what-not, made not the slightest bit of difference. Actually, the job was to satisfy the perfectly legitimate needs of a huge mass of people, all of whom were entitled to their right to live" (Berle 1933, 5; see also Berle 1935b, 46). This attitude led him to express more enthusiasm than one would expect for "the idea of the 'corporate state', ... fathered by Messrs. Mussolini and Hitler, in which the corporation, instead of being regarded as private, is frankly absorbed into the state machinery, working a real revolution in government technique" (Berle 1934, 125; on some New Dealers' infatuation with such ideas, see also Schwarz 1987, 120; Whitman 1991). In later writings, he still suggested that what people call "free markets" was itself a "statist instrument," which delivered results only under state control (Berle 1963, 10).

Berle's favorable views of planning led him to positions that were quite different from some of the realists discussed below. Like other liberals of this era, he recognized the need to put corporations under greater government control but, unlike many of them, he was rather ambivalent about anti-monopoly action (Sternsher 1964, 51; Schwarz 1987, 74; Brinkley 1995, 125). He was unimpressed with the rhetoric of the "so-called sixty families" controlling the American economy (the New Deal's era equivalent of the "one percent") (Berle 1938, 330). Throughout his life, he was ambivalent about the benefits of aggressive antitrust policies and also adamant in his opposition to courts using the broad language of the antitrust statutes to change the economic structure of the country. If some corporations were deemed to be too big, he thought it was Congress that should take action (Berle 1949, 1960a, 1960b, 6–7).

Overall, however, "bigness" did not seem to Berle (1962a) to be a problem of great magnitude. On the contrary, Berle thought that, up to a point, bigness improved efficiency. What mattered more was the concentration of power. Here, he put his famous idea about the modern corporation's separation of ownership and control to surprising use: it implied it was possible to enjoy the benefits accrued by large economic units while avoiding the danger of excessive concentration of power.

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The largest American corporations, he wrote after the Second World War, are "not owned or operated by or for the benefit of any handful of billionaires. They are actually operated by thousands of executives in [*sic*] behalf of stockholders who, if they do not always exercise direct control, directly reap the rewards of good management" (Berle 1952, 12). The Soviet image of the American capitalist as a tuxedoed, cigar-smoking businessman was wrong; in reality, everyone who invests in the stock market "more than four-fifths of the families in the United States are 'capitalists.'" Berle could thus contrast the "'socialization of wealth through state ownership' contemplated by the Marxian revolution" with the real wealth distribution as provided by "the individual, or democratic, ownership of the national wealth and national production proceeding spontaneously from the growing wealth of the United States" (Berle 1952, 33; see also Berle 1962a). In these postwar writings, Berle (1962b, 436) was satisfied that, though far from perfect, the American way, which relied on private enterprise "under guidance and control," achieved far better results than either classical laissez faire or communism.

All this jibed with Berle's commitment to liberalism. Like many others during the New Deal years, he looked for some "middle ground" between nineteenth-century individualism and twentieth-century collectivism (in either its socialist or fascist guise) (Berle 1950a, 56–57; 1962b, 436–37; Schwarz 1987, 83). It was during these years that Berle (1935b, 45) spoke of the need to find solutions to the United States' economic woes that accorded with core American values such as freedom and democracy. Years later, Berle (1950a, 56–58) said that some of the policies adopted by American governments were "socialist," while others looked downright "laissez faire." He was fine with both as long as they did not compromise on his core liberal values of "freedom and development of individuals" (Berle 1950b, 43), along with "individual dignity and worth, combined with the greatest attainable opportunity for self-reliance" (Berle 1950a, 58).

Though sometimes considered a legal realist, it must be acknowledged, that (as far as I know) Berle never associated himself with legal realism and did not say much about the jurisprudential questions that interested most legal realists. Not so William O. Douglas, who in a short but stellar academic career established strong connections with many of the leading legal realists, including some that remained lifelong friends. Like Berle, he felt that the corporate law that had been taught was outdated and ignored modern realities. And, like Berle, he suggested that focusing on corporate finance could provide a more realistic alternative to learning the workings of the modern corporation and its impact on society (Douglas 1936a, 5). But he was more attuned to realist slogans like the emphasis on a "functional approach," which he applied to the study of corporate and bankruptcy law (Douglas 1929, 1932).

Despite his spectacular success as a professor, academic life was not enough for the ever-ambitious Douglas. When the SEC was formed in 1934, Douglas left Yale Law School to join it, becoming a commissioner in 1936, then serving as its chairman from 1937 until his appointment to the US Supreme Court two years later. Shortly after joining the SEC, Douglas established a reputation as a hard-charging regulator. He made no secret of his view that the dramatic changes in financial markets justified a more aggressive role for government in the regulation of the economy. At the same time, even before joining the SEC and throughout this period, he also insisted on leaving "responsibility on industry for its own planning" (Douglas 1934, 532; see also Schwarz 1993, 163–66). Despite some heated rhetoric during this period, Douglas maintained that his approach was in no way a challenge to market economy but an attempt to protect it from forces

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seeking its destruction (see, for example, Douglas 1936b, 87, 93; 1937, 37).[7] The SEC, in Douglas's (1938c, 1) words, was "one of the outposts of capitalism" tasked with patrolling financial markets to catch the fraudsters and manipulators.

Douglas respected market economy for allowing honest human toil to improve humanity's lot. He acknowledged that business failure was an inevitable part of capitalism, a byproduct of the development of new technologies. That it ruined some businesses by making some old technologies obsolete was still justified because it improved most people's living conditions. Therefore, his target was not capitalism but those who created "fancy corporate structures" so arcane that investors had to turn to "magicians and higher mathematicians" to know the value of securities (Douglas 1938b, 1). Douglas (1936b, 87) described those engaged in such activities as "the termites of high finance" because, like their biological counterparts, the termites of the financial world destroyed the structures they occupied from within, except that "[i]nstead of feeding on wood they feed and thrive on other people's money."

"Other people's money" was, of course, Louis Brandeis's phrase, and it was not the only one Douglas adopted. More than any of the legal realists I discuss in this section, Douglas subscribed to the Brandeisian idea of "the curse of bigness," the view that big corporations, simply due to their size, were a source of economic trouble. They were inefficient, they had too much power, and they undermined human values, causing people to lose "opportunities to develop [their] personality and [their] capacities" (Douglas 1940, 14–16). Douglas thus added to his critique of "mysterious" financial practices an attack on large corporations for the social upheaval they instigated and the threat they posed to democracy (Rogers 2008, 906–7, 924–26). Against those who thought that the regulation of financial markets undermined freedom and "interfere[d] with the American way," Douglas (1936b, 93) countered that it was modern economic developments that were a perversion of capitalism and of American life. Though his style was very different from Llewellyn's, his writings also convey a certain nostalgia for older forms of market economy. In line with that, Douglas called for "old-fashioned conservatism" in finance for the sake of "preserv[ing] capitalism under a democratic form of government" (Douglas 1938b, 1; 1938c, 5).[8]

If Douglas compared the SEC to a patrolman, for his successor at its helm, Jerome Frank (1938c, 1), it was a physician who practices "preventative financial health

[7] Some of William Douglas's (1940) speeches during this period were republished following his appointment to the US Supreme Court. But the book editor made some changes to them and occasionally spliced together what were originally different speeches into a single essay. Whenever possible, I cited the original texts, available on the Securities and Exchange Commission (SEC) website, https://sec.gov.

[8] Upon assuming the role of chairman of the SEC, Douglas gave a press conference in which he described himself as a "conservative sort of a fellow from the old school" (*New York Times* 1937). Such self-descriptions must be treated with caution, and there is little doubt that Douglas was trying to assuage those who were worried about his appointment because of his past statements discussed in the text. But it is noteworthy that, in his history of the SEC, Joel Seligman (1982, 157) dubbed Douglas's chairmanship "profoundly conservative" as it was primarily concerned with improving market competition and productivity. A less obvious source for Douglas's views on capitalism is one of his many travel books that he published during his tenure on the Supreme Court. In his book dedicated to his travels in the Soviet Union, Douglas (1956, ch. 3) had a chapter to the Soviet economy. While respectful, it was not sympathetic to planned economy. The book also contrasted the "healthy, responsible" capitalism of the United States with the "highly expolitive [*sic*]" Asian variant (236).

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service" to make sure past ills do not recur. In another address, Frank (1938c, 14) expanded on the role of the SEC and summarized his views on political economy:

> The SEC has been intensely interested in improving the operation of our economy under the profit system so that that system can survive, in order that America can flourish as a democracy within the framework of the profit system. Radical critics of our profit system insist that it unavoidably involves practices which run counter to the welfare of the people. The answer to those critics is not merely to deny the criticisms which they make, but to prove by action, not by mere angry denial, that practices gravely inimical to the welfare of most Americans, are eradicable and can be extirpated without departing from the profit system.

In a sense, then, Frank was no different from Douglas. He too saw the Great Depression and its aftermath as an opportunity for both economic and democratic renewal. In fact, his first line of defense for the US economic system was that "the majority of the American people are still devoted to the profit system" and that, therefore, "it would be impossible, even if anyone considered it desirable" to challenge it (Frank 1934, 12414). But Frank did not rest his case merely on political expediency. Frank had no desire to see the market capitalism replaced for "the truth is that the profit system has not heretofore been given a fair trial" (12412).

Frank's (1938a) *Save America First* (a title that even one contemporary reviewer called "lamentable" [Thompson 1938]) was his attempt at such a trial. Unlike Frank's (1930) first book, *Law and the Modern Mind*, which was a widely discussed best seller, controversial but also much praised, the reaction to Frank's second book was muted, and many of the reviews were tepid at best. Today, the book is virtually forgotten, but it cannot be ignored here because it contains Frank's most sustained discussion of questions of economic policy. The book is an example of intellectual patriotism, drawing a sharp contrast between "disintegrated Europe" with "integrated America." Against the twin European evils of fascism and communism, Frank presented the United States as a beacon of democracy and progress. Pushing this line further, one of the book's most contentious ideas was that the United States should seek economic self-sufficiency. Frank (1938a, 10) described this as a challenge to the European idea of free trade, which Americans accepted as part of their "blind acceptance of certain scarcely scrutinized attitudes—many of them imported by [American] economists, conservative and radical alike, from Europe." Frank's call for separation from the troubled continent was thus an intellectual one as much as it was economic.[9]

The remainder of Frank's book is an extended defense of the New Deal. Frank largely avoided the word "capitalism" (and, when he did, he put it in quotes) to distance himself from the laissez-faire ideology he opposed. But to the consternation of socialist critics (Mitchell 1938), Frank was adamant on retaining the "profit

[9] Ironically, the autarkic policies that Jerome Frank advocated, were gaining popularity in Europe at the time, most of all in fascist and communist regimes (Frieden 2006, ch. 9). It is also ironic that the political-economic model that Frank favored is nowadays most fully realized in Europe. Putting these points to one side, it is fair to say that the case Frank made for economic self-sufficiency was weak (Hazlitt 1938). This is one issue on which the Second World War led Frank to change his mind. In his next book, Frank (1942, 332) repudiated his earlier view.

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system," which he saw as deeply connected to human freedom. Frank had an almost visceral dislike for the idea that humanity was subject to immutable "laws," be they the laws of supply and demand of classical economics or Marxist doctrines of historical inevitability. Frank considered both as inimical to the very idea of human freedom (a theme expanded on in one his later books, *Fate and Freedom* [Frank 1945a]).

The active welfare state Frank favored was the antidote, a practical proof of the error of those approaches that denied human freedom and the possibility of its improvement: "We can have property, profits, democracy and true individual initiative coupled with a good life for all our people," grounded on the "revised Adam Smith philosophy" that takes "selfishness, if adequately enlightened" as its "motive power" (Frank 1938a, 392, 349). Frank did not keep his discussion at the level of abstract ideas. He identified the cause of the Great Depression as the concentration of money in the hands of too few people, leading to insufficient demand. He thus advocated for what we now call "stimulus spending," including public works (235–50, 366–81),[10] as well as a stronger social safety net. He asked rhetorically: "Does [the state] owe no duty to see to it that the potential wealth of this country becomes an actuality, and that all citizens adequately share in that increase of wealth?" (392). At the same time, he opposed the nationalization ("governmentalization" in his terminology) of struggling industries following the Great Depression (330), worrying that if such practices were adopted "we would probably have some form of Socialism, or perhaps even Communism" (334).

All the policies that Frank (1938a) favored required extensive use of the law—hence, Frank's remarks quoted earlier about the positive role of law in improving society. But the New Deal legislation did not just make good economic sense; it was also part of a grander plan to revitalize American democracy (400–1). The Great Depression provided a "magnificent opportunity, through wise statesmanship, to make in America a unique civilization—an economic-political democracy every citizen of which will have a full life" (416). The New Deal promoted the interests of the majority against the interests of a small minority that controlled industry (407). For most people, the New Deal meant more, not less, freedom (402–3, 408).

It is this view of human freedom that ties Frank's ideas on political economy to his more familiar jurisprudential ones. Frank (1932) criticized those who adopted a "Euclidean" approach to law, one that started with self-evident, foundational truths and derived from them answers to more concrete problems. Beyond the more familiar epistemological criticism of this approach—namely, that the foundational principles it proclaims are not self-evidently true, Frank also challenged its underlying politics. He favored an "experimental" approach to jurisprudence because it saw humans as free to make their own laws as they see fit for the sake of achieving their desired goals (Frank 1932, 586; 1934). Frank (1938a, 413–14) conceded that, given his own views about the impossibility of predicting human action, he could not guarantee that his policy prescriptions were the right ones, but at least the active state he favored was determined to try rather than to succumb to "fatalism," which he considered the real

[10] Frank read and was impressed by John Maynard Keynes's (1936) *General Theory of Employment Interest and Money* (Schwarz 1993, 179), as were some of the other legal-realist New Dealers such as Oliphant (Blum 1959, 387) and Adolf Berle (Schwarz 1987, 120).

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enemy of human freedom. Frank thus saw his own liberalism as a counter to the ideas of Marxists, legal formalists, and classical economists who in their different ways were all "Euclidean," treating humans as the playthings of immutable laws that they did not devise and could not change. For this reason, the occasional characterization of Frank as a "nihilist" is not simply a caricature, an exaggeration of Frank's ideas for emphasis or effect; it is the very opposite of his wholehearted endorsement of liberal values and of the idea of using the power at the government's disposal to improve the life of those living under it.

If there is a legal realist to whom the "nihilist" label may seem more fitting, it is Thurman Arnold. In his best-known works, he expressed the view that all principles—legal, philosophical, economic—were, at best, useless. He was cynical about all grand statements and enjoyed poking fun at them. One example, by no means the most significant but illustrative of Arnold's style and substance, is his treatment of the Post Office motto ("[n]either snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds"). All this meant, Arnold (1934, 29; 1935, 95) said, was that mail is delivered in winter. With equal glee, Arnold scorned the economic and jurisprudential shibboleths of his day. He was especially impatient with legal theorists who sought to show that, with some effort and ingenuity, all moral and political principles cohered with each other. In a letter from 1937, he wrote that any "workable philosophy ... is necessarily a maze of contradictions so hung together that the contradictions are either not apparent or else are reconciled by a mystical ritual" (Arnold 1977, 267).

Despite all this, I do not think Arnold was a nihilist either. He wanted to get things done and believed that too much thinking could get in the way. He complained about "burning idealists" who "attack unprincipled practices, even when they are producing humanitarian results" (Arnold 1935, 7). For example, Arnold thought the first generation of antitrust reformers failed to achieve any real results because they were "[o]bsessed with a moral attitude toward society, they thought in Utopias. ... Philosophy was for them more important than opportunism and so they achieved in the end philosophy rather than opportunity" (Arnold 1937a, 220). When opportunity came his way, Arnold did not let it slip by. After his appointment to head the Antitrust Division of the Department of Justice, he committed to it with abandon. He secured a five-time expansion of its budget and a vastly expanded staff, reinforcements that allowed him to pursue a far larger number of cases than any of his predecessors (Miscamble 1982; Brinkley 1995, ch. 6).

Ironically, it was during these years of intensely practical work that Arnold discovered a sovereign idea that came to dominate his thought: free competition. In *The Folklore of Capitalism*, after spending many pages on critique, Arnold (1937a, 332) was elusive, even evasive, on his positive agenda, admitting that he was "play[ing] safe and refus[ing] to be specific." By the time he published his next book, there was no cageyness: "In a society where individual freedom is the prevailing ideal, the *main* method of distributing goods and services must be by free exchange in a free market" (Arnold 1940, 10). To be sure, Arnold still emphasized practicalities over theories, still insisted on the importance of explaining antitrust legislation in a manner that made sense to laypeople. But in addition to the rhetoric familiar from his earlier works, Arnold now stated that maintaining free markets is "the first concern of every political democracy" (11).

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Of course, for Arnold, these ideas had very practical implications. In his mind, the real scourge was not the curse of bigness but, rather, "the disease of cartelization" (Arnold 1942b, 30). Characteristically, Arnold dismissed the question of size as meaningless in the abstract while, at the same time, expressing much less concern than Douglas over corporation size itself. He even acknowledged that consumers, whose protection he saw as the main goal of antitrust law, liked the cheap products made by big corporations (Arnold 1940, 122–23, 129; 1942a, 14–16). For him, the real problem was restraint of trade, that led to higher prices. In an article published in the *New York Times Magazine*, Arnold (1938) contrasted the "almost unlimited competition" of "farmers, retailers, and small business men," where prices adjusted according to changing supply and demand, with the world of "concentrated industrial power," where cartels could keep prices high even when demand dropped.[11]

Despite touting the "free markets" mantra, Arnold was no libertarian. Unsupervised markets invited what we now call "rent seeking behavior," resulting in what he described as the "hardening of the arteries of commerce" (Arnold 1942b, 30). Neither economic forces alone nor private legal action could match these disruptive forces on their own (Arnold 1940, ch. 8). Keeping markets free was a never-ending battle, which only aggressive government action had any chance of successfully waging: "This job will not take care of itself" (Arnold 1939, 525).[12] To further complicate matters, employing the same analysis, Arnold held some highly anti-trade-union views. As he saw it, unions were another example of anticompetitive groups restraining trade, and he argued that their actions hurt not just the interests of consumers but those of labor as well (Arnold 1940, ch. 11).

As with the other legal realists discussed so far, Arnold's economic ideas were related to his democratic ideals. Competition was valuable not just for its ability to distribute goods efficiently; Arnold occasionally echoed the eighteenth-century idea of *doux commerce*, the civilizing power of commerce. He claimed that the Renaissance began with a rebirth of commerce and that "[f]ree commercial enterprise breeds free dissemination of ideas" (Arnold 1940, 283). One could not have political freedom, he suggested, without

[11] This is an issue on which Thurman Arnold, Douglas, and Frank held different views. Of the three, Frank was closest to Berle's view. Frank was impressed by the then popular idea of "ruinous competition" (on the idea, see Hovenkamp 2009, 326–30). He saw great savings from economies of scale and worried that these benefits would be lost in markets consisting of only small firms (Frank 1938a, 296). In his words, "the diminution of competition, rather than its increase, seems unquestionably to be required if we are to obtain essential flexibility in their prices and increase in their volume of production" (316). Douglas used his first antitrust decision on the US Supreme Court to consider and reject this view. *US v. Socony-Vacuum Oil Co.*, 310 US 150 (1940). The difference between Arnold and Frank is captured in an exchange following Arnold's (1945) review of Frank's (1945a) book *Fate and Freedom*. In his review, Arnold stated that "vast integrated corporations [are] obsolete" and, in effect, accused Frank of being soft on antitrust. Frank (1945b, 25) replied that Arnold "almost" convinced himself that antitrust is the solution to virtually all of society's ills, a view he did not share.

[12] A later essay by Arnold may indicate a change in view (or, possibly, since by then Arnold was in private practice, a change of client). Arnold called there for a free-trade area between the United States and Europe. Noting a shift toward socialism in some countries, he saw it as the result of insufficient competition: because "the expanding free-trade area necessary for competitive capitalism in an age of mass production" does not yet exist, government has to step in (1950, 10). This suggests that by then Arnold had come to think that the establishment of an expanded free-trade area would diminish the need for government action.

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free exchange as the main form by which goods are allocated (10–11, 283; see also Arnold 1942a, 15). With the war raging in Europe, he could maintain that upholding a system of free market exchange was part and parcel of the fight against fascism: "Unless we can preserve our industrial democracy [that is, market competition], our political democracy will disappear" (Arnold 1940, 127). Two years later, cartels became Arnold's (1942b, 29–30) chief reason for the country's lagging productive efficiency when compared to Germany's. With the two countries now at war, fighting cartels was no longer just a matter of economic necessity but was also a patriotic duty (80–81).

By then, Arnold treated competition as a justification not only for market economy but also of democracy. This was not just the familiar marketplace of ideas. The connection Arnold drew between political and economic freedom provided him with a response to those who worried about contradictions in the New Deal legislation. As mentioned, in his earlier writings, Arnold (1935, ch. 5) criticized efforts to show how all values and all principles cohere when what mattered was that they produced results. In later writings, he used the idea of competition to give internal tensions within legislation a positive spin. Rather than a problem, the contradictions found in the law were indicative of the dispersal of power emblematic of a functioning democracy, evidence that the laws were the product of compromises among competing interest groups. The only way to avoid them was to have one group in charge of designing all the laws (Arnold 1940, 107–9). Next to the more familiar checks and balances, these compromises were "*economic* checks and balances" (109; emphasis in original), showing that no group got everything it wanted.

The (only?) radical legal realist

It should be clear that none of the legal realists discussed so far offered any serious critique of market economy. Along with many others during that era, they rejected laissez-faire capitalism, and they endorsed one of the commanding ideas within the Roosevelt administration—namely, that an active state was the key to fixing its shortcomings (Brinkley 1995, 10–11; Frieden 2006, 195–96, 229). They were all liberals, with Frank and Douglas and probably Berle somewhat to the left of Llewellyn and Arnold. As shown above, they did not always agree about what their liberalism meant in practice,[13] but even Frank and Berle, who were less enthusiastic than Arnold about market competition, did so more out of concern for efficiency and not because they considered markets inherently unequal. Given the positions they held, they can be seen as being among the architects of the postwar American regulatory state that saw market economy as a corollary, not the enemy, of democracy and freedom.

Cohen's political essays

Apart from serving as a reminder not to treat the legal realists as more radical (jurisprudentially or politically) than they were, the preceding discussion serves as a

[13] In addition to differences already mentioned, Arnold's anti-union stance was not shared by Frank (1938a, 368–69), who called for the stronger unions. Douglas (1934, 1938a) argued for strengthening the powers of administrative agencies, whereas Arnold (1940, 103–6) favored court litigation because the "elasticity" of the common law allowed adjusting the law to the special circumstances of each case without hindering freedom by delegating too much power to the government.

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useful contrast to the very different views of a sixth legal realist. Felix Cohen was also a lawyer who worked for the Roosevelt administration. But, unlike Arnold, Berle, Douglas, and Frank, who were all part of a powerful and well-connected network of senior administration officials, Cohen held a junior position at the Department of the Interior. Though his work there has had a lasting impact in the form of the *Handbook of Federal Indian Law* (Cohen 1940) (which in revised form is still in use today), he wielded little power. This gave him a certain anonymity that allowed him to engage in activities that were outside of the political mainstream. However, as Landon Storrs (2013, 222–24) has noted, Cohen still managed to get into trouble for his views, which probably adversely affected his promotion within the department. Frustrated, he resigned from his government post in 1947, six years before his death from cancer at the age of forty-six.

I want to discuss here three articles by Cohen that I will collectively call "the political essays" (Cohen 1932a, 1935a, 1935b). In these writings, Cohen presented a very different view of the market economy, rejected liberalism and capitalism in no uncertain terms, and hoped to see a revolutionary change to socialism. Surprisingly, this left-wing critique of New Deal liberalism (and, by implication, of other legal realists) remains virtually unknown. It is surprising since Cohen himself is not unknown. His essay "Transcendental Nonsense and the Functional Approach" is widely regarded as one of the perennial classics of American legal thought (Cohen 1935c). It is reprinted or excerpted in many jurisprudential anthologies and is also included in the unofficial hall of fame of twentieth-century American jurisprudence (Kennedy and Fisher 2007). While Cohen's other jurisprudential writings are not nearly as famous, they are read by those who seek a more rounded understanding of Cohen's views.

By contrast, the political essays are so little known that they go unmentioned even where one would expect them to be discussed. They are not considered in the writings of critical scholars, especially in works seeking to draw a political link between legal realism and critical legal studies. Likewise, William Fisher and colleagues' (1993) anthology of legal realism includes a lengthy excerpt of Cohen's "Transcendental Nonsense." But though the volume focuses (excessively, some have argued) on questions of political economy, it does not mention Cohen's political essays. The political essays are also absent from several articles (Golding 1981; Feldman 1986; Cornwell 1995; Paul 2006) and a three hundred-page doctoral dissertation (Koppelman 1969) dedicated to a critical examination of Cohen's ideas. Perhaps most surprisingly, the political essays are given only a passing glance in Dalia Tsuk Mitchell's (2007) sympathetic biography of Cohen. Tsuk Mitchell makes a few references to them (57, 119, 128–29) but does not discuss in detail the thrust of these articles, making it difficult to realize just how different the views he expressed in them were from those of other legal realists or even from the views that Cohen expressed in his other writings published in other venues. Admittedly, Tsuk Mitchell's biography focused on Cohen's work with Native Americans and the way in which he helped conceive of them as distinct legal orders within the United States. But, on this too, what Cohen said in the political essays could help frame his later work.[14]

[14] For Dalia Tsuk Mitchell (2007), the key idea for understanding Cohen's main writings, including "Transcendental Nonsense," is pluralism. Pluralism has different meanings, but, at least as far as normative pluralism is concerned, Cohen's early writings convey an anti-pluralist message. The answer to ethical dogmatism, he said, was not "the dogma of tolerance" but, rather, turning to "the scientific test

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In fairness to these authors, none of the political essays appeared in academic journals, where Cohen's better-known writings were published. Of the three, only one, "The Socialization of Morality" (Cohen 1935b), was reprinted in a posthumous collection of some of Cohen's writings (Cohen 1960).[15] Indeed, it is hard to escape the impression that Cohen was not too keen about advertising them. Though "Transcendental Nonsense" and "Socialism and the Myth of Legality" were published only a few months apart (June and November 1935, respectively), neither mentions the other. Cohen's discussion of property in "Transcendental Nonsense" bears an obvious connection to his earlier discussion of property in the first of the political essays, "Politics and Economics" (Cohen 1932a), yet he did not cite it in his later article. Given Cohen's understandable concerns about the impact his political views and activism may have on his career, it looks as though he created two intellectual personas—a utilitarian legal philosopher and a radical socialist writer—and kept them relatively separate. Though his different writings are consistent overall, their tone is very different. Cohen's jurisprudential work irritated some legal academics, but it was not perceived as politically problematic; the political essays were an altogether different matter.[16]

It is unfortunate that, even so many decades later, the political essays remain unknown. For one, they shed light on the views of a well-known legal realist. Later in this essay, I will argue that they help correct certain misconceptions about Cohen's better-known jurisprudential works from this era. But even on their own they deserve recognition. They address themes touching on moral philosophy, political philosophy, law, jurisprudence, and political economy. They are not without their faults: in "The Socialization of Morality," Cohen (1935b) contrasts the individualism of modern ethics with the concern for social order and harmony found in the Soviet Union. Shortly after a famine in which millions perished, and just before Stalin's great purges began, Cohen wrote of the wonders of "the purposeful industrialization of Russia under Soviet rule," where "[m]aterial change, far from being a disruptive force, may itself become the stable axis of a morality oriented to the dynamic forces of industrial civilization" (93).[17] But whether one agrees with everything (or anything) Cohen wrote in these essays, they are written with verve and force, and they are entirely free

of empirical confirmation" (Cohen 1931b, 120). At the time, Cohen (1933) characterized legal realism as modern-day Benthamism. This included his belief that ethical questions were questions of fact that would be resolved definitively by science (Cohen 1932b, 1934). Since Cohen (1931a, 1931b) also argued that criticism of the law should be based on its correspondence with morality, it follows that his overall approach to law at the time, reflected also in his political essays, was anti-pluralistic. I agree with Golding (1981) and Cornwell (1995) that Cohen's later writings suggest a change in philosophical outlook.

[15] The reprinted article is the least overtly political. In it, Cohen rejected individualistic morality as selfish and narrow and affirmed a social conception of morality instead. The essay's political aspect was Cohen's (1935b, 91–94, 98) claim that a more socialized "human soul" is congruent with the "socialization of institutions" and his praise for Soviet Russia for its strides in this direction. (How Cohen reconciled this reference to "soul" with the logical positivist views he expressed in "Transcendental Nonsense" published the same year, I am not quite sure.)

[16] In 1942–43, Cohen coauthored three essays on combating totalitarian propaganda. Extolling the virtues of "our democracy," these pieces are gentle in tone and explicitly denounce communism (Kramer and Cohen 1943, 546). Private letters from this time indicate that this was a combination of political calculation and genuine preference for social democracy over communism (Storrs 2013, 207–8, 223).

[17] Years later, in a critical review of Karl Popper (1950), Cohen (1951, 1447) could still talk of "European political thinkers from Plato to Stalin," without hinting at Stalin's more lasting legacy.

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of the jargon that mars the writings of many left-wing critics of liberalism. Although in some ways they show their age, some of the ideas expressed in them sound surprisingly contemporary.[18]

Cohen's socialism was undogmatic. He tartly remarked on the Marxist idea of the eventual withering of the state that "the socialist commonwealth is not the inevitable outcome of an evolutionary technological process, and a socialist is not a person who gets on to a divine bandwagon before the messianic password has become known to the general public" (Cohen 1932a, 71). Instead, Cohen insisted that a "socialist commonwealth . . . will become actualized only if the socialist can show a world more attractive blueprints and more persuasive prospectuses than can his rivals" (71). Because Cohen did not believe Marxists' "religious assurance that the state will wither away when the revolution comes," he urged like-minded radicals to take their ideas to every institution and challenge the status quo with respect to every domain of life (71, 75, 80–82). As with his own choice of employment, he showed willingness to work within the system: "Until the existing weapons of class oppression can be utterly destroyed, they must be pointed in a new direction" (Cohen 1935a, 30).

All the legal realists discussed above saw laissez-faire ideology as their target. Cohen (1932a, 70), by contrast, considered it a "dead and academic theory" and thought those arguing against it were wasting their time (see also Cohen 1938, 164). This was not a self-satisfied remark celebrating an intellectual battle won; rather, it was the opening gambit for Cohen's attack on what he considered his real target, the liberal, regulated capitalism that the other legal realists championed. In a review of Arnold's (1937a) *Folklore of Capitalism*, Cohen (1938, 164) made this clear when he contrasted his own "left wing" legal realism, which he described as "a technique of social criticism," with the "right wing" version of legal realism, "realism as a defense of the status quo." Cohen praised other legal realists for pointing out the gap between what judges said and what they did. But, he said, these liberal legal realists could not explain why it happened. Cohen (1935a, 14, n. 9) explained this failure in terms of other legal realists' commitment to methodological individualism, which blinded them to the influence of

[18] They shed light on aspects of legal realism in other ways as well. Following Brian Leiter (2007), Matthew Etchemendy (2021, 402–3) associated the legal realists with other "realist" thinkers such as Niccolo Machiavelli and Friedrich Nietzsche. Whatever truth this claim may hold for other legal realists (I am inclined to think that, apart from Oliver Wendell Holmes, Arnold is the only realist it fits), it is not true of Cohen. Cohen (1935b, 83–84) named Machiavelli as one of the intellectual architects of the move he deplored from social morality toward individualism. Though Cohen does not name Nietzsche, he almost certainly was targeting him as well. Cohen describes the virtue of socialism in "[r]edefining the moral virtues and vices," even replacing its heroes and saints: in Soviet Russia, the "figure of Christ, who deals with all things in an intimate and personal way, has been replaced by the figure of Lenin, the exponent of statistical morality" (94). Most strikingly, Cohen, like Nietzsche, favorably contrasted the morality of the Old Testament to that of the New Testament, which, again like Nietzsche, he considered a morality of a slave class. But his reasons were markedly different. Early Christian morality was directed at people with no political power, so it urged them to ignore "broad social questions": "Distinguished from the earlier Jewish morality, with its detailed analysis of social and economic relationships, primitive Christianity made a virtue of the necessity under which its audience labored to take no thought for the morrow, and to render unto Caesar that which was Caesar's" (90). Cohen's turning Nietzsche's message on its head is evident in his remark: "Genius is achieved not by Robinson Crusoe fired with the individualistic passion for self-sufficiency, but by men who can rely upon their fellows to perform tasks for which they are not fitted and are thus freed and helped to fashion rare gifts" (92).

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social forces on the development of the law. It was this error that Cohen sought to correct in his political essays.

Of the three, the most substantial, and the one whose attack on legal liberalism was most relentless, is "Socialism and the Myth of Legality" (Cohen 1935a). In it, Cohen said: "The vices of the 'liberal' conception of law as 'rules of the game' are avoided by those who view the law as the chief instrument of class oppression and insist that a revolutionary party must attack the capitalist legal order with every means at its disposal" (7). The critique of the liberal order had two main elements. First, there was the charge that a regime that pretended to be democratic and to treat everyone equally accommodated many inegalitarian, anti-democratic policies. Cohen gave as an example the influence of money on politics and the monopoly given to capitalist forces on the channels of "education and propaganda" (24–25). The root cause of much of this was the tendency to think of politics as a "unique" institution (Cohen 1932a, 77). Cohen was especially frustrated by the fact that many socialists failed to recognize this, committing the grave error of treating the world of politics and economics as conceptually distinct: "You cannot fight on the economic front and stay neutral on the legal or political front. Politics and economics aren't two different things, and the failures of the labor movement in this country largely arise from the assumption that they are. Capitalism is as much a legal system as it is an economic system, and the attack on capitalism must be framed in legal or political terms as well as economics terms" (75; see also Cohen 1935a, 12).

Cohen (1932a, 71, 75, 76) considered the familiar but "false" dichotomy between politics (government or the public domain) and economics (business or the private sphere) as a distinction that ignored reality: "[G]overnment is a sort of business and that business is a form of government." Therefore, for Cohen, the essence of socialism was "the attempt to apply to all government, to the government in Wall Street as well as the government in Washington, the ideals of liberty and democracy and the subordination of personal ambition to the welfare of society" (80).[19] This perspective allowed Cohen to present in a new way many familiar legal concepts. The very idea of private property, with the authority to decide on what others could do on it, was a form of government. As Cohen put it, the essence of property is the right to exclude along with the immunity from being excluded. And as these rights were backed by the state, it follows that property is nothing but "delegated governmental power," in turn implying that there is no difference between "government that is called government and government that is called property" (80).[20]

[19] Some of what Cohen said in this context sounds remarkably similar to recent writings on the subject. Compare Cohen's (1932a, 75) remark that "[c]apitalism is as much a legal system as it is an economic system, and the attack on capitalism must be framed in legal or political terms as well as in economic terms," with Pistor's (2019, 12; emphasis in original) that "capital is a *legal* quality that helps create and protect wealth."

[20] While Felix Cohen was echoing here Morris Cohen's (1927; 1933) ideas about the public nature of contract and private property, there can be no mistaking their different views. Unlike his father's self-confessed liberalism (M. Cohen 1946), for Felix Cohen (1935a, 9), "the law is itself an instrument for depriving workers of the property they create," a fact "obscured by the legal mythology of economic individualism and liberty of contract." As mentioned above, Berle (1933, 1950b, 46) also noted functional similarities between public and private providers of services, but his reason for doing so was to point out the need for choosing between the two based on their efficiency. And he still maintained that "the corporation is not an instrument or a form of government" (Berle 1950a, 36).

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Another example was corporations: "[A] board of corporate directors is as much an organ of government as a state legislature or a board of aldermen. . . . [T]horough-going democracy and liberty are incompatible with autocratic control of the nation's economic life by individuals who are selected by birth and fortune rather than by the will of those producers and consumers whom they rule" (Cohen 1932a, 76). In "The Myth of Legality," Cohen (1935a) elaborated on this point: "A corporation is no less a governmental agency than a bureau or commission. Not only is it created by the state, but all its legal powers are derived from a charter issued by the state, and might be qualified by the terms of that charter. In the exercise of its corporate powers, it calls upon the armed forces of the state to enforce its edicts (unless it maintains its own private police force)." As a result, many anti-democratic acts were deemed unproblematic because they were done by a private corporation:

> What difference does it make to me whether a prohibition against radio speeches advocating birth control or public ownership is issued in the name of the Federal Radio Commission or in the name of the Radio Corporation of America? Obviously the difference in label doesn't correspond to any functional difference in the prohibition. The same coercive power looms in the background of each command. Why then should we think of one as economic and the other as political? (Cohen 1932a, 79)

These views are notably similar to views expressed recently by Elizabeth Anderson (2017). She writes that, with few exceptions, "[e]mployers' authority over workers . . . is sweeping, arbitrary, and unaccountable. . . . The state has established the constitution of the government of the workplace: it is a form of private government" (54). The details are, of course, different because Anderson is writing against a different intellectual background, but the basic theoretical points are similar.[21] In terms of practical prescriptions, Cohen went further in calling for a rethinking of the work on the basis of democratic principles, an idea that Anderson is rather circumspect about (69).

Cohen's second, related, critique of liberalism was that the law was rigged in favor of the interests of the ruling class. In his telling, virtually every area of law, including property, contract, tort, even the rules of civil procedure and evidence, were suffused with capitalist ideology that operated to exploit the working class (Cohen 1935a, 12). Consequently, the liberal ideal of legality—that of setting out "rules of the game," fair and equal for all—was a myth. In reality, it was a game where "one of the teams employs the umpire and reserves the right to change the rules, to disqualify the other team's players, or to move away the goals posts when the other team threatens to score" (3–4).[22] After reviewing several examples, Cohen concluded that there could be

[21] Elizabeth Anderson (2017, 65) states: "In other words, in the great contest between individualism and collectivism regarding the mode of production, collectivism won, decisively." Cohen (1932a, 70–71) explains: "The crucial issue today is not between laissez faire individualism on the one hand and collectivism on the other. History is deciding that question. The question for us is what sort of collectivism we want."

[22] These words are particularly resonant after then-Judge John Roberts's remarks during his confirmation hearing that "[j]udges are like umpires" whose limited role is to "make sure that everybody plays by the rules." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the Supreme Court before the Senate Judiciary Committee*, 109th Cong., 1st Sess., September 12, 2005, https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf.

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no doubt that American court decisions represented "the most reactionary section of the capitalist class" (5). Other legal realists, if they mention any such idea at all, dismissed it (Priel 2021a).

Cohen acknowledged that "a capitalist government as efficient as that of the United States does grant to the masses a large measure of security against private retail violence, with a minimum security against use of actual legal violence. To that extent capitalist law commands widespread popular respect as a source of peace and order" (Cohen 1935a, 9). But Cohen did not see this as a cause for celebration because this fact made it possible for the law to maintain the appearance of classlessness, masking the way in which law was a tool of class oppression and violence on a far larger scale: "There is no appearance of violence when a steamroller crushes a beetle, or when a hungry man is sent to jail for a stealing a loaf of bread. ... Actual violence is unnecessary if the threat of violence is accepted at face value" (8, 13). One of his examples, particularly relevant to this article, was antitrust law, which Cohen argued was not used against any big corporations but was often invoked to curb actions taken by organized labor (16).

Because Cohen rejected the historical inevitability of socialist triumph, he argued that socialism had to be fought for, and one arena for this battle was that of ideas. In his 1932 essay, Cohen seemed to suggest that, with a good argument, the courts might sometimes be persuaded. Yes, courts are "predisposed to favor capital," but they still had to be shown how. If it were not so, he noted, capitalists would not need to have their own lobbies and think tanks (Cohen 1932a, 75). With good argument, then, some battles might be won. In his more strident "Myth of Legality" essay published three years later, Cohen suggested a different reason for invoking the ideal of legality and doctrinal legal arguments:

> Recognizing that every step towards power will be met with a constitutional challenge, a revolutionary party must be prepared to make its own constitutional law. In form, such law must derive from the language of the written constitution; in substance, such law must be based upon the revolutionary will and power of the masses. The theoretical claim of constitutionality is relevant only in so far as it is itself a potent factor in organizing this will and this power and disorganizing the opposing class forces. It is to the people that this claim of legality and constitutionality must be directed, and not to the judicial organs of the capitalist order (except in so far as these organs offer useful theaters of social drama). (Cohen 1935a, 29)

This passage highlights what may look like a tension between Cohen's conviction that legal doctrine was skewed in favor of the ruling class and his genuine respect for the "liberal" value of legality. Cohen's response was that many elements of the liberal order included popular ideas accepted by many members of the working class. But it was more than that. Even if unsuccessful in court, the language of the Bill of Rights was useful because it provided "excellent battle-cries for American socialism" and an opportunity to show the "non-socialist public" how "capitalist courts" were "leading a bitter revolt against the principles of free speech and public assembly" found in it (26). Standard legal documents could thus be used effectively to highlight the gap between professed ideals and grim reality (28). This idea helps us connect between Cohen's unknown political essays and his better-known jurisprudential works, especially "Transcendental Nonsense and the Functional Approach."

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Rereading a classic

Given how widely read "Transcendental Nonsense" has been, it is all but inevitable that different people understood it very differently. Yet there is one dominant reading shared by authors of otherwise very different intellectual and political orientations. The article is standardly read as dismissing all legal argument, perhaps even all political argument, as incoherent. Elizabeth Mensch (1998, 35) argued that "Transcendental Nonsense" showed that the legal realists did not have clear political goals but merely sought "to clear the air of beguiling but misleading conceptual categories," a critique that was consistent with both a fully centrally planned economy and the "radical deconcentration of industry." Relying exclusively on "Transcendental Nonsense," Gary Peller (1985, 1238) similarly attributed to Cohen the "deconstructive" view that all legal and political discourse was "not simply ideologically based" but "incoherent." Mensch and Peller were not critical of Cohen; on the contrary, they considered his arguments successful and important. But similar views proved influential also among critics of the legal realists, who blamed them for destroying the idea of law as a meaningful rational enterprise (see, for example, Langbein 1995, 551).

There is enough in Cohen's better-known jurisprudential work from this era (for example, Cohen 1931a, 1932b, 1934) to question these readings of Cohen's jurisprudential writings; the political essays make them untenable. It is plausible that Cohen did not wish to reveal his political views in "Transcendental Nonsense" but not that he believed and argued that the political views he promoted at the same time were just as incoherent as all others. In fact, one of Cohen's political essays, includes what looks like a thinly veiled criticism of some of the legal realists for their moral skepticism, which are applicable, I think, to some of his critical legal studies interpreters. As Cohen (1935b, 84) put it, based on vulgar understandings of "anthropology, psychology, and psychoanalysis [some writers] offered cumulative reassurance to those who felt it necessary to regard moral standards as products of superstition, conspiracy, indigestion, or sexual aberration, and even Einstein's theory of relativity came to be popularly regarded as mathematical evidence for the proposition that every moral belief is as good as any other moral belief."

Jeremy Waldron (2000) criticized Cohen on a different but related basis (see also Smith 2015). Waldron argued that Cohen's work, and especially "Transcendental Nonsense," downplayed law's systematicity, treating each legal question on its own and ignoring the way in which legal concepts were interconnected, and that this interconnectedness and mutual support is crucial for understanding law. Again, this view is hard to reconcile with Cohen's work. Systematizing was central to Cohen's thought (Feldman 1986, 495–97), and, just as with ethical skepticism, Cohen repeatedly criticized other legal realists for downplaying its significance (see, for example, Cohen 1931c, 1938). In one place, Cohen (1938, 164) took some of the legal realists to task for thinking that "'rules' and 'principles' are only noises, without practical significance." Such a view, he worried, inevitably ended up justifying "whatever happens to exist." It is this failure "to think systematically" about social reality that ends up sustaining the status quo (164).

Cohen's approach to systematizing law and ethics was definitely unique among the legal realists. Waldron correctly identified Cohen as being influenced by the writings

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of the logical positivists, who sought to explain reality on the basis of sense perception and the methods of science. The logical positivists argued that whatever could not be explained in these terms (for instance, all references to supernatural beings) was nonsense. This created a problem when it came to most moral discourse. Seemingly descriptive sentences such as "murder is wrong" did not seem to correspond to anything that could be described in perceptual terms. To avoid the conclusion that all such talk is meaningless, many logical positivists "translated" moral discourse into non-descriptive reactions to events in the world. To say "murder is wrong" is not to describe anything but to utter one's negative emotional reaction to, or to express one's disapproval of, intentional killing.

Faced with the same dilemma, Cohen (1932b, 1934) opted for the opposite answer, arguing instead that moral questions were questions of fact, to be answered using the same methods of natural science used for answering all other factual questions. Since Cohen believed that legal criticism was ethical criticism, it follows that he believed questions about what law ought to be had to be answered using the same methods. This is the reason Cohen considered much of legal discourse to be "nonsense." Lawyers often ignored this point, instead analyzing legal questions in terms of the "internal" logic of the law or by employing the various techniques of legal reasoning. This, Cohen argued, inevitably resulted in circular explanations that skirted the ethical issues at stake.[23] To use one of Cohen's examples, the concept of property could not yield an answer to the question of the proper scope of legal protection to trademarks. It was the other way around: what property is, was a conclusion to be drawn from answering the ethical question of the appropriate scope of trademark protection. This was not a challenge to ethical argument but, rather, a call to engage in it more openly.

This non-skeptical view is quite clear from Cohen's jurisprudential writings from this era, but the political essays help clarify some his claims. For example, Cohen criticized the idea of property as a relationship between people and things. This was not due to Cohen's rejection of systematicity (contra Smith 2015, 2064) or a wholesale dismissal of the value of legal doctrine. On the contrary, he considered the "somewhat mysterious relationship between a person and a physical object" problematic, because it could not be reconciled with legal doctrine regarding many forms of intangible property (Cohen 1932a, 78). Cohen then added a political angle to this critique: the popular understanding of property in terms of physical possessions made exploitation of the working class easier. It was due to this idea that "[a]ny proposal to abolish the legal system of property ... appears to most Americans to be a perverse attack upon the meager fruits of their own industry and frugality" rather than, as he saw it, as a way of liberating them (Cohen 1935a, 9).

In light of this, the main argument of "Transcendental Nonsense" appears quite similar to arguments that Cohen had made in earlier writings (see, for example,

[23] Waldron's challenge, read less strictly, seems more valid. Cohen, like Bentham, was confident in the possibility of finding determinate answers to ethical questions. Against this, lawyers' approaches of finding answers to legal questions (relying on canons of interpretation, following precedent, and so on) appear, as they did to Bentham, as self-serving obfuscations. But if the answers to ethical questions are contested, there may be institutional (or systemic) reasons for courts to avoid direct engagement with ethical questions (Priel 2021b).

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Cohen 1931a, 1931b)—that is, that the techniques of legal reasoning (*stare decisis*, canons of statutory interpretation, and so on) obscure the ethical element in legal disputes. As Cohen put it, "internal" legal thinking tends to turn ethical questions into aesthetic ones, encouraging lawyers to find "symmetrical," "logically consistent" solutions, instead of looking for the solution that best helps society (Cohen 1931a, 219; 1935c, 845). The political essays added a layer of political critique: this obfuscation allowed judges to adopt solutions that consistently favored certain classes.

One of the reasons for the runaway success of "Transcendental Nonsense" has to do with its rhetoric, which is more forceful than Cohen's earlier articles. But, mainly, I think, it is because in that essay Cohen kept in check his controversial ethical and metaethical views. On the one hand, Cohen did not express in it his view that moral questions are factual questions that one day would be resolved by the methods of natural science, a view unlikely to endear him in the eyes of critical scholars, who have been skeptical of the application of scientific methods to human affairs (de Been 2008, ch. 5). On the other hand, Cohen hid his political views, making his arguments palatable to those who did not share his politics.

If this is true, "Transcendental Nonsense" may owe part of its reputation for being too successful in hiding its author's politics. So much so that James Boyle (1985, 697) could state that Cohen had no interest in the way transcendental legal nonsense "support[ed] the legitimacy of the liberal state," and Jeremy Waldron (2000, 45) could similarly accuse Cohen of "complacency about enlightened moral thought," which "was not exploded until the followers of Critical Legal Studies began to question the tautologies of 'policy' and nostrums of the liberal consensus." With the aid of his political essays, we can see that this was precisely one of Cohen's targets.

Conclusion

A reviewer of Frank's (1942) *If Men Were Angels* noted that "[i]t is a curious irony that men like Frank and Thurman Arnold who are definitely concerned to perpetuate the system of individual initiative should be thought of as wild-eyed radicals" (Levy 1942, 369; see also Glennon 1985, 76–78; Shamir 1995, 162). Evidently, already then the realists had acquired a reputation that did not quite match their actual views. Just as evidently, such remarks went unnoticed because the realists' reputation as wild-eyed radicals has persisted. Decades later, Horwitz (1988) could still write that the realist movement "challenged the premises of reigning legal orthodoxy in ways so fundamental that its insights have not yet been fully absorbed into contemporary legal thought." Brian Tamanaha (2011) questioned claims such as this with respect to the realists' jurisprudential ideas, and though I have some reservations about his arguments (Priel 2018), his work provides a useful corrective to a lot of mythologizing about the legal realists. In this article, I have focused on the realists' ideas on political economy, arguing that, here too, prominent legal realists were not as iconoclastic as both their popular image and some of the historical scholarship suggest. Most legal realists, I have argued, expressed views that were within the political mainstream of their age. This does not mean that there was nothing of interest in what they said or that their ideas had no impact; it does mean that their voices contributed to slow evolutionary change, not to revolutionary transformations (compare Gordon 1994).

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Felix Cohen was an exception, an intellectual outlier, philosophically and politically, and, perhaps for this reason, also institutionally. But his case provides further confirmation for my claim. His critique of mainstream political economy (often directed at other legal realists) has been so well buried that it remains unknown more than seven decades after his death.

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