The Scalpel and the Salve: Rekindling Romantic Realism

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Abstract

This essay argues that the legal realists were romantics in the tradition of Ralph Waldo Emerson. It traces this intellectual genealogy through perspective, vocabulary, and rhetorical strategy. In doing this work, it concludes that Hanoch Dagan’s proposal to reconstruct legal realism does not go far enough. He paints a picture of a therapeutic contemporary use of realist thought (the salve), but gives short shrift to the destructive energy at the core of the movement (the scalpel). Recasting the realists as romantics suggests that the lessons that we might take from them for contemporary legal theory are better framed as “rekindling” than “reconstruction.”

Introduction

Hanoch Dagan’s remarkable book reminds us that legal realism can yet be a productive and provocative force in the law and the legal academy. Without diminishing the nuance and power of his argument, I will use this essay as a forum to offer a more radical vision of the present promise of realism. In brief, I argue that the realists are standard bearers for American romanticism in the tradition of Ralph Waldo Emerson—and that inheritance has both a destabilizing and empowering potential that is attractive in today’s context. My argument proceeds in three parts. In Part I, I propose that Dagan’s book emphasizes a therapeutic vision of the value of realist thought (the salve). This vision is appealing, but it diminishes the destructive and revolutionary ferment at the core of realist thought. In Part II, I suggest that this ferment is best understood by describing the realists as American romantics in the tradition of Ralph Waldo Emerson. The connections here are evident in perspective, in rhetoric, and in substance. Part III briefly outlines the promise that this reframing holds for the present. Emphasizing the romantic roots of realism brings focus back to the value of destruction through critique (the scalpel) and suggests that rekindling a little destructive romanticism might be just what the doctor ordered.

I. Therapeutic Realism

Dagan introduces his project with a striking choice of words: his goal is to reconstruct legal realism. Implicit in the idea of reconstruction are two premises: first, that there was something constructed in the past, and second, that this something was destroyed or broken—left in need of reconstruction. For Dagan’s purposes, this terminology fits his project.

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He takes as a given that there was a movement in the early part of the twentieth century in American legal thought that was named (and/or has come to be remembered under the name) “legal realism.” Likewise, he takes as given that the relevance of this movement has mostly been left in the past. As he puts it bluntly, “[B]oth foes and friends of American legal realism . . . imply that, apart from the (surely important) goal of setting the historical record straight, the contemporary benefits of studying legal realism are rather marginal.”

In short, there was a movement, it has been marginalized, broken, forgotten—Dagan sets out to reconstruct it.

I heartily approve of Dagan’s desire to bring realism back into the conversation. So too do I approve of his unapologetic “sympathetic” reading which allows him to rise above the murk of the question of who were the “real” realists and what was it that defined the realist school. On page three, Dagan tells us that he has chosen to cast his lot with what I will call the “high realists” (Holmes, Cardozo, Llewellyn, and Cohen) while intentionally marginalizing the sometimes infuriating extremists like Jerome Frank and Thurman Arnold. As he says, he is not writing a comprehensive history of the movement, rather he is describing and defining the movement for present use in legal thought.

Dagan’s project is both coherent and urgent. It is urgent because of the taxonomy of pathologies in current legal thought that Dagan elegantly diagnoses throughout the book. Though he is too measured to explicitly name each one, Dagan clearly understands the current state of legal theory to be polluted by a set of polarized positions emerging from neo-formalism, hard consequentialism, and other -isms that have failed to cash in on the promise of realism. Rather than attack any specific position, Dagan instead aggregates these pathologies into a set of three large-scale schisms in legal thought: between law as power and law as reason, between law as science and law as craft, and between law as tradition and law as change. Having identified these schisms as seemingly unclosable


2 As far as I know, the term “high realist” is a neologism. I use it throughout the essay mostly as shorthand for the select group of thinkers that (as Dagan argues and I agree) represent the best and most appealing voices of the realist movement. Of course, the label “high” implies a pejorative reflection on those who do not make the cut. Without entirely disavowing this implication, I want to emphasize that for my purposes here, I am sticking to a small group of thinkers in order to make my analysis manageable. Much of what I say here might also apply to thinkers like Frank and Arnold—indeed I think that one takeaway might be that we should value the confrontational extremism of their views more than we currently do—but it is enough here to focus on a canonical core.

3 Even if he were defining the historical movement, he would have license to pick and choose his authors. Karl Llewellyn, writing at the defining moment of realism, was explicit that there was no unified “school of realists . . . . There is no group with an official or accepted, or even emerging creed . . . . They are related, says Frank, only in their negations, and in their skepticisms, and in their curiosity.” Rather than a school of individuals, Llewellyn identified realism as a “method of attack . . . wider than the number of its adherents.” Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1233-34 (1931). Thus, in its moment of definition, Llewellyn made explicit that the movement—the “ferment in the law”—was about method and ideas, not about personalities. This is as good a license as any to those of us who, like Dagan, want to talk about the movement in a holistic way, to set aside the writers and ideas that do not comport with what we see to be the core methods and ideas of the movement.
wounds in legal discourse, Dagan presents realism as a salve. On his account, realism promises to heal by mediation, accommodation, and wisdom. Refusing to choose sides in a polarized conversation, his realists see clearly that the law can only be understood when the opposing perspectives are held in a dynamic balance.4

Casting realism as therapeutic requires that it be soothing rather than inflammatory, and throughout the book Dagan is careful to tame his realists’ occasional wildness and defang their sometimes poisoned bite. Dagan rejects the cartoon version of realism so prevalent as shorthand in the academy; that law reduces to the idiosyncrasies and psychology of the law-giver.5 Addressing the schism between law as power and law as reason, Dagan tames Holmes’s famous call to divorce law from morals. Dagan argues that reading Holmes literally would be “embarrassingly shallow,” because it would make Holmes too radical to defend. Instead he suggests that Holmes be read as offering “methodological devices for opening up some liberating distance for the addresses of law’s coercive judgments.”6 In other words, Holmes should be read not as tearing the flesh of the law off of the bones of morality, but as diagramming the anatomy of the connection so that it can be clearly understood.7

The pattern is the same when Dagan turns to the schism between science and craft. He notes that “some realists” adopted the radical empiricist perspective which held that all that mattered to law was scientific and measurable knowledge about society. Acknowledging how polarizing this position was, Dagan turns to Cohen and Llewellyn for evidence that this radical position was not the core of realist thought. Once more the soothing tone: “Rejecting the program of brute empiricism, Llewellyn and Cohen promote an account that grants empiricism a more modest—and more reasonable—role in the legal universe. In this approach, the empirical phase in the legal analysis creates merely a ‘temporary divorce of Is and Ought.’”8 In Dagan’s hands (through the mediation of Llewellyn and Cohen) empiricism is transformed from a scalpel to a salve—it is made a tool of analysis, clarity, and healing rather than of destruction.

One more example of this pattern will suffice, though I submit that it is widespread and fundamental to Dagan’s project. Discussing the schism between tradition and

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4 For an encapsulation of this argument, see Dagan, supra note 1, at 4-9.
5 Jerome Frank’s famous (and perhaps apocryphal) version of this provocation is that the law depends more on what a judge had for breakfast than anything else. Judge Joseph Hutchinson referred to this radical subjectivity as the judicial “hunch.” See Joseph C. Hutchinson, Jr., The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision, 14 Cornell L.Q. 274 (1929). Dagan falls back on Cohen and Llewellyn to rebut this view and reassure his readers that realists do believe that law is not random or radically subjective: “Although legal realists do not deny that the personalities of individual judges may affect outcomes in particular cases, most believe that ‘[t]he eccentricities of judges balance one another,’ and the bulk of legal material falls into essentially predictable patterns.” Dagan, supra note 1, at 25 (quoting Benjamin Cardozo, The Nature of the Judicial Process 176 (1921)).
6 Dagan, supra note 1, at 31.
7 Dagan, as usual, returns to Llewellyn for this healing touch. Id.
8 Id. at 48.
change, Holmes once more becomes dangerous because of his attack on tradition in “The Path of the Law.” Seeing the danger of accepting Holmes at face value when he suggests that we might profit by forgetting tradition, Dagan transforms the “cynical acid” to a salve. Rather than a challenge to the tradition of law, Dagan sees Holmes as calling for a more nuanced view of tradition: “[T]he proper remedy is to supplement legal tradition with a program for directing law’s future evolution.” Through Dagan’s eyes, Holmes’s famous statement that “[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV” becomes not a challenge but rather a prescription. Tradition must be supplemented by current analysis—not overturned.

Dagan’s therapeutic tone is necessary to his project of reconstruction. His audience is made up of the same academics and legal voices that marginalized the realists in the first place. The deep worry motivating that marginalization is that if the realists are right, then coherence is fatally wounded—the law becomes radically subjective and founders on the shoals of politics. There is genius in Dagan’s move to transform the realists from the makers of the schisms to the healers. Realists become not the revolutionaries, but the wise men who promise to rebuild. Maybe Frank was Tom Paine, but Llewellyn and Cohen were more like Madison and Hamilton—statesmen that we can turn to in a time of crisis. I hope that this strategy is effective in reviving interest in the powerful thinking on display in the best of realist writing. And yet I worry that the cost of therapy and consolation may be a sacrifice of the power of the movement. Without disputing that aspects of realism can heal, I fear that something is lost when the scalpel is sheathed. Without disputing that realism can be reconstructive, I fear that something is missed when its destructive power is masked. Without disputing that realism can be a sober participant in current legal theory, I fear that something is lost when it fails to be exuberant, noisy, and impolite.

What is missing from Dagan’s therapeutic analysis is the destructive exuberance that fueled so much of realism. To extend the therapy metaphor: Dagan hides the scalpel while showing us the stitches. Less abstractly, what Dagan gives too-short shrift to is the extent to which the very diagnosis of the pathologies that he identifies is a realist intervention. The very schisms around which Dagan structures his argument were identified by the realists through a process of destruction. To make them the healers of the schisms without crediting them with the destructive discovery sacrifices too much of what is essential to their thought.

I propose that this destructive and revolutionary spirit in service of clarity is actually at the heart of realist thought. As such, I would modify Dagan’s framing. We need something stronger than a reconstruction of realism, we need a rekindling.

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9 Id. at 61 (emphasis added).
II. Transcendentalists, Romantics, and Transcendental Nonsense

Let me start with a controversial statement: the legal realists were romantics. Or more precisely (if no less controversial): the legal realists were the heirs of the transcendentalist American romanticism of Ralph Waldo Emerson.10 There are good reasons for this claim to seem implausible. After all, the title of Felix Cohen’s manifesto was “Transcendental Nonsense and the Functional Approach.” The use of “transcendental” by Cohen was hardly friendly—rather the words suggested the pernicious abstractions and obscurities of formalism.11 By sheer semantic force, Cohen resists the label “transcendentalist.” So too, with the label: romantic. For the most part, romantic is used as a pejorative word in legal discourse—realist and otherwise. Like Cohen’s scorn for transcendental, romantic sounds unpractical, fluffy, unmoored in reality.12 In general, lawyers would rather be scientists than poets. To put it more concretely, romanticism in legal discourse has come to represent something like the opposite of pragmatism. It is far more likely that the realists would be described as destroying the romantic vision of the law embodied by Langdellian formalism than that they themselves would be described as romantics.13

To the extent that romantic and transcendental mean unmoored, unrealistic, dreamy, and idealistic, I have no interest in arguing that the realists were either romantics or transcendentalists. But I think that these caricatures get Emersonian romanticism precisely wrong. For all the obscure flourishes and classical allusions in Emerson’s essays, the core of his thought was a rejection of abstractions in service of a return to the value of experience. The driving inspiration of American romanticism was to destroy an old oppressive order that dehumanized religion and philosophy (for Emerson, the main concern was theological but it bled into all areas of thought) and return the power and agency to

10 Of course, Emerson was not the only transcendentalist, and arguably was neither the most radical nor influential. Nevertheless, I am narrowing my field of vision to Emerson for two reasons. First, in this short essay there is simply not room to accommodate the diversity of thought and perspective within the movement. Even if Emerson is not a perfect proxy, he is at least a single voice. More substantively, Emerson’s influence on Holmes makes his work the most direct vector for transcendentalism into the conversations that I am following.

11 For Cohen, “transcendental nonsense” was shorthand for the “supernatural” thinking typified by Von Jhering’s “heaven of legal concepts.” It meant delusion and confusion. Transcendental seemed to signify unreal, or untethered to reality. See Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 811 (1935).

12 Dagan himself adopts this pejorative use of the word “romantic” in several places in his book. For example on page six, realism represents a middle path between cynicism (Austinian positivism) and romanticism (formalist idealism). Dagan, supra note 1, at 6.

13 I will have more to say about my own definition of romantic and romanticism below. Let me here note that this caricature of legal discourse does not necessarily extend outward into the academy. Serious (if controversial) thinkers like Stanley Cavell and Richard Rorty have explicitly embraced romanticism and claimed the label for themselves. Both Cavell and Rorty see in romanticism much of what I praise in the realists: a dynamic relationship between skepticism and self-making agency which abjures fatalism and embraces human experience. See, e.g., Stanley Cavell, In Quest of the Ordinary: Lines of Skepticism and Romanticism (1988); Richard Rorty, The Banality of Pragmatism and the Poetry of Justice, 63 S. Cal. L. Rev. 1811 (1990).
the individual human actor. Understood on his own terms, Emerson was advocating not for a retreat into the world of ideas and the ideal, but rather for diving headfirst into the world of the real. Given this description, one might claim that Emerson was a realist as much as the realists were Emersonians.

Somewhere along the way, this aspect of Emerson’s thought and of American romanticism became obscured, at least with respect to the law. By the time the biographical and theoretical literature on Oliver Wendell Holmes, Jr. exploded, it had become commonplace to note just how far his thinking had diverged from Emerson’s. The standard narrative, probably most popularly embodied in Louis Menand’s *The Metaphysical Club*, is that Holmes admired Emerson ferociously as a youth but that through the horrors of his experience in the Civil War, his idealism and romanticism were worn away, leaving only a hard-edged pragmatism. In other words, Holmes (and with him the foundational intellectual structure of legal realism) has generally been understood to reject Emersonian romanticism. Ironically, it is this very summary of Holmes’s relation to Emerson that may

14 Emerson was famously banned from Harvard after delivering his “Divinity School Address” in 1838. In the speech, he touched off a firestorm of controversy by questioning the divinity of miracles and attacking the rigid formalism of American ministers. Phillip F. Gura, *American Transcendentalism: A History* 101-16 (2008). He was striking out against a religious establishment that had removed the experience of religion from daily life and taken the experience of divinity away from individuals. In its place, he wanted to humanize and personalize religious experience. He wanted to empower the individual to stir up the stagnant pool of the establishment. For a sense of this argument without encapsulating it: “Whenever the pulpit is usurped by a formalist, then the worshipper is defrauded and disconsolate . . . . A snow-storm was falling around us. The snow-storm was real, the preacher merely spectral, and the eye felt the sad contrast in looking at him.” Ralph Waldo Emerson, *The Divinity School Address*, in 1 *The Complete Works of Ralph Waldo Emerson* 117, 137 (Edward Waldo Emerson ed., 1903) [hereinafter Complete Works].

15 It becomes obvious here that I see romanticism as tracking closely to pragmatism. Here again, I am following in the footsteps of Cavell and Rorty who both outline a tradition that stretches from Wordsworth, through Emerson and Thoreau, and forward to James and Dewey. See Cavell, supra note 13, at 11; Rorty, supra note 13, at 1816 (identifying the “romantic side of Dewey”).

16 Though Holmes was a prominent man throughout his life, and the object of both praise and scorn, he did not become the subject of a full biography until the 1980s. This was because full access to his papers was restricted until then. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 591-92 (1993).


18 There is, of course, nuance to any generalization as broad as this. There have been two strands in the scholarship linking Holmes to Emerson. The first, most famously embodied by Richard Posner, identifies Holmes as a kindred spirit with another famous admirer of Emerson, Friedrich Nietzsche. See Richard A. Posner, *The Problems of Jurisprudence* 241 (1990). Where Posner sees this as a kind of praise, others including David Luban have leveled the same comparison as a critique. See David Luban, Justice Holmes and the Metaphysics of Judicial Restraint, 44 Duke L.J. 449, 453 (1994) (concluding Holmes’s philosophy was “strange, attractive, yet ultimately unacceptable” precisely because it was so close to Nietzsche’s). The other strain has drawn the connection between Holmes and Emerson more directly. Anne Dailey has argued that while Holmes largely rejected transcendentalist thought, he did draw on the same roots of European romanticism that inspired Emerson and his cohort. Anne Dailey, Holmes and the Romantic Mind, 48 Duke L.J. 429 (1998). But only Sanford Levinson has gone so far as to sketch out a version of the connection that I am defending here. Contributing to a collection celebrating the centennial of “The Path of the Law,” Levinson wrote a brief piece arguing that Holmes owed more to his old mentor than is commonly acknowledged. Levinson’s focus is largely on Holmes as sharing a “serene skepticism” with
be to blame for the confusion about the words transcendental and romantic that I note above. On the one hand there is the thing that Holmes rejects: Langdellian formalism in its idealist and idealized Platonic search for truth. On the other hand is the idea that Holmes was rejecting his early utopian idealism, embodied by Emerson. Using the transitive principle, formalism became romantic, abstraction became transcendental.

But when you douse this conflation in Holmes’s cynical acid, what emerges is a clear (if not complete) intellectual genealogy linking Emerson, to Holmes, to the realists; and especially to the high realists. This genealogy provides the justification for calling the realists romantics. I propose that the connections run deep, but here I trace them illustratively through two examples. Both examples rely on a definition of romanticism in the American context that I am, admittedly, extrapolating for myself primarily from Emerson’s writings. What I mean by romanticism is a commitment to a way of viewing the world that privileges human agency in the present, physical world and casts aside formalist barriers that would limit and paralyze that agency. Thus, in Emersonian terms, romanticism means enjoying “an original relationship with the universe.” This relationship is with the universe as it is tangibly (the wind, the trees, the feeling of water on one’s cheek, the satisfaction of physical labor) and temporally (unfettered by the musty tomes of the past and unencumbered by the paralysis of anxiety about the future). Placing the human in this original relationship empowers her to own the power that she has over human affairs in the present. She is able to make change and her every action is itself original and impactful. Thus, the fundamental images of romanticism are dynamic. The world is known by moving through it, the present constantly plows the future into the past.

This dynamism is one of the things that Dagan values in the realists. But it is also what makes his project of reconstruction so tricky. This is because movement requires destruction. The first step for a romantic is to make room for movement; the first step is to destroy that which would keep her bound, still, constrained, paralyzed. Only once the

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19 I have neither space nor inclination to tease out the complex relationship between continental romanticism and the American reflections that emerged from its influence. The very rough outline of the story is that Emerson and many of his fellow-travellers were deeply influenced by German romantic writers whom they mostly read through the translations of the famous English romantic poet and thinker Samuel Taylor Coleridge. European romanticism thus served as a spark (mediated through transatlantic travel and translation) that ignited American Transcendentalism. See generally Gura, supra note 14.

20 Ralph Waldo Emerson, Nature, in 1 Complete Works, supra note 14, at 1, 3. Defining the term in Emerson’s words is consistent with, if reductive of, a Cavell-inflected strain of American theory and philosophy. Without belaboring the point, Cavell understood “Romanticism [to be] an encounter with what loomed as a monumental and finally unsatisfactory attempt to deal with the problem of skepticism (in its Cartesian or Humean form) once and for all: Kant’s epistemology.” Russell B. Goodman, American Philosophy and the Romantic Tradition 11 (1990). In other words, Cavell understood the romantic impulse as the impulse to cast away skepticism, not through ideals or idealism, but rather through making skepticism itself a human and productive act.
constraints are broken and human agency is unchained is movement possible. Look care-
fully and you will see that this is the model upon which nearly all high realist writing is
built: destroy the paralyzing fictions so that we can get down to the work of figuring out
the truth.

A. Boiling, Burning, Kindling and Fermenting: The Destructive Impulse

Walt Whitman famously said of Emerson that he was “simmering, simmering,
simmering; Emerson brought me to a boil.”21 Holmes would use similar language about
Emerson throughout his life. In 1876, in a letter accompanying a copy of one of his first
legal essays, he told Emerson that he, “more than anyone else started the philosophical
ferment in [his] mind.”22 More than half a century later, near the end of his life, Holmes
affirmed that Emerson was “the early firebrand of my youth that burns to me as brightly
as ever.”23

Boiling, fermenting, burning—these are words of dynamic transformation and de-
struction. Holmes used them to describe Emerson’s influence on his thinking, but they
also became part of his own vocabulary about the law. Indeed, what I am describing as
the destructive impulse emerged in the same terms in the works of other high realists as
well. Llewellyn begins his famous response to Roscoe Pound: “Ferment is abroad in the
law. The sphere of interest widens; men become interested again in the life that swirls
around things legal. . . . The ferment is proper to the time.”24 Llewellyn’s use of the word
ferment is a window into a broader view on his romanticism. The entire first section of
his manifesto is a statement that things that were still are now in motion. Life “swirls
around things legal,” the law that seemed placid and lifeless is now “spilling, flooding, into
the canal of stagnant words.” The result is again, “ferment and trouble.”25 The force of
Llewellyn’s thrust is to illustrate how dynamic change has unsettled and destroyed the cul-
tivated scholastic stillness of the legal culture.

Even if other realists do not use these precise words, their kindling quality does ap-
ppear throughout the realist corpus. When he notes that it has long been recognized that
“something is radically wrong with our traditional thought-ways,” Felix Cohen is giving an-
other name to Llewellyn’s ferment.26 He goes on to elaborate its effect on legal thought.
Those who are kindled by the recognition that something is wrong and must change are
inspired to burn away the illusions: “[F]unctionalism represents an assault upon all dogmas

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21 See F.O. Matthiessen, American Renaissance: Art and Expression in the Age of Emerson and Whitman
523 (1941).
22 Levinson, supra note 18, at 233.
23 Id.
24 Llewellyn, supra note 3, at 1222.
25 Id.
26 Cohen, supra note 11, at 821.
and devices that cannot be translated into terms of actual experience. 27 In other words, when the realist fire is kindled, it starts the process of achieving clarity by destroying.

If this insistence on experience sounds like William James, so too does it sound like Emerson. 28 Throughout his work, Emerson repeats the idea that received ideas are only useful in as much as they help us understand and act in the present. In “The American Scholar,” books stand parallel to Cohen’s “dogmas and devices.” Emerson says, “they can only serve us, when they aim not to drill, but to create; when they gather from every ray of various genius to their hospitable halls, and, by the concentrated fires, set the hearts of their youth on flame.” 29 Take away the rhetorical flourish and what remains is a familiar core idea: everything that does not clarify, illuminate, or work in the world that we encounter should be cast away.

But asking whether Llewellyn and Cohen are Emersonians is itself only a tool to arrive at the deeper observation that they are both kindled and interested in kindling. In other words, faced with what they see as a monstrous inheritance, they find themselves inspired to destroy and make anew—and in destroying, they want to explain, transmit, and kindle that inspiration in others. In the face of a system which the realists perceived to be denying human agency, denying the radical dynamism of the present, the realists were inspired to lash out to assert and defend the place of the human in the law.

It is this romantic aspect of the realist project which suggests to me a reframing of Dagan’s project as “rekindling” rather than “reconstructing” realism. The spirit of rebellion embodied in Cohen’s almost bloodthirsty gaze at the false idols of formalism is intertwined with the power of both the critique and the philosophy. Moreover, it is a spirit that I propose is part of what might be productively reclaimed in the present.

B. Historical Exorcism

Once kindled, what are the tools of destruction that the realists used to clear away the dogmas and stagnations in the law? Among the many, I want to focus here on one: history. The way that the realists used history to loosen the grip of legal traditions and dogmas owes a debt to Holmes, who in turn owes a direct debt to Emerson. The strategy,

27 Id. at 822.

28 It is beyond the scope of this paper to draw the thick connections between Emerson and William James. To the extent that pragmatism itself was an outgrowth of American romanticism, it only lends support to my observation that the realists (whom Felix Cohen understood to be applying pragmatism to the law) should also sound like romantics themselves. For just one example among many works connecting Emerson to James, see James M. Albrecht, Reconstructing Individualism: A Pragmatic Tradition from Emerson to Ellison (2012).

29 Ralph Waldo Emerson, The American Scholar, in 1 Complete Works, supra note 14, at 79, 93. Emerson goes on in this vein over and over again. The core idea of his “Divinity School Address” is that the dogmas of the church have become stale and stagnant—inhuman—to the exclusion of inspiration, action, and experience. The key figure is that of miracle, which was once a dynamic expression of living, breathing, religious experience, but which has now been deadened into an ossified artifact. Emerson says this artifact must be destroyed: “[I]t is Monster. It is not one with the blowing clover and falling rain.” Emerson, supra note 14, at 129.
which I am giving the name “historical exorcism,” looks like this: the law is x, it is x because that is how it has been passed down to us, the actual story of x being passed down to us shows that x is an artifact not necessarily justified in today’s society: therefore, we are free to examine x without the baggage of tradition or history on its own, present, terms. Historical exorcism is romantic because it seeks to liberate present analysis from the paralyzing shackles of tradition. By using the methodology of history to diminish the hold that the past has on our present action, exorcism both emphasizes the dynamic nature of the law and places lawyers and legal actors in positions of power to act in the ever-moving present of the legal system.

Historical exorcism was a frequent tactic for Emerson. In the very first lines of his first published book, he signals his desire to shake free of the past: “Our age is retrospective. It builds sepulchers of the fathers. It writes biographies, histories, and criticism. The foregoing generations beheld God and nature face to face; we, through their eyes. Why should not we also enjoy an original relation to the universe.”

Here is Emerson’s statement of intent—we are bound by history and to be free in the present we must unbind ourselves. As for guidance on how to read history, Emerson says in his essay “History,” “[T]he student is to read history actively and not passively . . . . I have no expectation that any man will read history aright, who thinks that what was done in a remote age, by men whose names have resounded far, has any deeper sense than what he is doing today.”

In that same essay, Emerson applies his perspective to the law: “Every law which the state enacts indicates a fact in human nature; that is all. We must in our own nature see the necessary reason for every fact.”

There is clear hostility to history implicit here, but it is a mistake to understand it as hostility to accepting history as a settlement. In suggesting that one must read history actively, Emerson is signaling that history is revelatory and inspiring rather than paralyzing.

So far, we have only the outline of a method, but little substantive guidance. In his later essay, “Politics,” Emerson begins to suggest how one might go about reading history actively in the context of the law. Here, Emerson defines the law as a set of artifacts created in the churning mill of passing time. The wise man, the “active” reader of history, understands that each artifact does not place a new stone on the pyramid of legal truth, but rather that the justification for laws becomes more attenuated as their enactment recedes further into the past.

The law is only a memorandum. We are superstitious, and esteem the statute somewhat: so much life as it has in the character of living men, is its force. The statute stands there to say, yesterday, we agreed so and so, but how feel ye this article today? Our statute is a currency, which we stamp with our own portrait: it soon becomes unrecognizable, and in process of

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30 Emerson, supra note 20, at 3.
31 Ralph Waldo Emerson, History, in Essays by Ralph Waldo Emerson, First Series 6 (1903).
32 Id. at 8.
time will return to the mint. . . . As fast as the public mind is opened to more intelligence, the
code is seen to be brute and stammering. It speaks not articulately, and must be made to.33

Here is the blueprint that Holmes and the realists would follow.34 Because the law is in
flux with time, its self-justification diminishes over time. History thus becomes a tool for
recognizing that the law has become “brute and stammering” and clearing the way to
make it “speak articulately.”

Perhaps it is obvious at this point how close Holmes’s own view of the use of his-
tory in “The Path of the Law” is to his old hero’s. Holmes reframes the strategy of
historical exorcism. He begins with how law deals with history in (his) present day: “[I]f
we want to know why a rule of law has taken its particular shape, and more or less if we
want to know why it exists at all, we go to tradition . . . and somewhere in the past, in the
German forests, in the needs of Norman kings, in the assumptions of a dominant class, in
the absence of generalized ideas, we find out the practical motive for what now best is
justified by the mere fact of its acceptance and that men are accustomed to it.”35 While
this is the current practice, Holmes insists that it is insufficient—it is “revolting”—to
leave it at this. Simply finding the source in history and tracing it forward is not a justifica-
tion. Rather, history is a necessary first step in the study of law because it is “the first step
toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth
of those rules.”36 In this move, Holmes inverts the role of history in legal study. Rather
than justify or assuage, Holmes insists that it sparks rebellion and destruction. History is
the tool not only for revealing the dragon of legal tradition, but for killing it. “When you
get the dragon out of his cave on to the plain and in the daylight, you can count his teeth
and claws, and see just what is his strength. But to get him out is only the first step. The
next step is either to kill him, or to tame him and make him a useful animal.”37

Like Emerson, Holmes is advocating an active and destabilizing use of historical
inquiry. When we reveal the contingency of tradition, it ceases to have power. Unbound
by the false constraints of tradition, lawyers and judges become free to push the law to-
ward a more human and useful form. As proposed by Holmes and Emerson, historical
exorcism became one of the most common rhetorical tools used by proto, early, and high
realists. Holmes’s contemporary James Bradley Thayer used historical exorcism on the
idea of judicial review to show how recent an innovation it was and thus to make room

33 Ralph Waldo Emerson, Politics, in Essays by Ralph Waldo Emerson, Second Series 154 (1903).
34 Emerson himself makes a proto-realist gesture toward following the blueprint later in the essay.
Anticipating realist critiques of property from Morris Cohen to Robert Hale, Emerson briefly retells the
history of how property law became what it was in the mid-nineteenth century. Using this story, Emerson
concludes that the development of property rules was contingent and that the rules as they existed needed
to be justified in the context of the present. See id. at 154-57.
35 Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).
36 Id.
37 Id.
for reform;\textsuperscript{38} John Chipman Gray used the same strategy on the doctrine of \textit{stare decisis}, demonstrating that reliance on precedent was an innovation of the twentieth century and thus making space to question its dominance.\textsuperscript{39} Historical exorcism was also a key part of Roscoe Pound's attack on formalism. For example, in “Liberty of Contract,” Pound argued that freedom of contract was an artifact of the legal and social exigencies of the revolutionary generation. It was a classic exorcism: he used history as a tool to unsettle the megalith of “freedom of contract” and clear the way for new thought.\textsuperscript{40}

From the proto and early realists, the high realists adopted historical exorcism in a diverse set of ways. John Dewey followed Holmes’s template closely in his article defining and challenging corporate personhood. He uses history both to clarify how we got our present idea of corporate personality and to clear a path to question it.\textsuperscript{41} Morris Cohen used exorcism to explain and challenge the foundation of the then-prevalent “traditional theory of rights.” Like Pound, he made the very Emersonian observation that the theory of rights that we have was alive and useful (remember the fading currency) in the eighteenth century, but was no longer coherent in the present.\textsuperscript{42} But even where the high realists did not explicitly turn to history, the Holmesian strategy of exorcism can be detected.

The remarkable and confrontational first half of Felix Cohen’s “Transcendental Nonsense” rarely invokes history, but the attack on “thingification” takes the same form. For Cohen property, contract, and corporate identity are all empty concepts that we have received. They are faded coins that are no longer intelligible. They have to be shattered and remade. Though his tool for shattering is a brutal logic that only marginally draws on historical analysis, the exorcism feels familiar. Karl Llewellyn comes closer to using history explicitly in “What Price Contract.” Though he does not retrace the same ground that Pound and Morris Cohen had cleared, the entire first part of his argument amounts to a historical reframing of our idea of contract law. Through this process he makes space for his distributional analysis of contract law as it currently exists.\textsuperscript{43}

\textsuperscript{38} See James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

\textsuperscript{39} Gray, like Thayer, predated Holmes in “The Path of the Law,” and some of his rhetoric was strikingly similar: “That judicial precedents have executed a great influence in all systems of law is more than probable; the feeling that a law is morally right has often arisen from the fact that it has long been followed as a rule.” John Chipman Gray, Judicial Precedents—A Short Study in Comparative Jurisprudence, 9 Harv. L. Rev. 27 (1895).

\textsuperscript{40} See Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454, 457 (1908).

\textsuperscript{41} See John Dewey, The Historical Background of Corporate Legal Personality, 35 Yale L.J. 655 (1926).

\textsuperscript{42} See Morris Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 21-23 (1927). Cohen adopts the same strategy five years later with respect to contract law. “For while the study of the past in itself is not sufficient to determine desirable policies for today, it is necessary to view reigning ideas in their perspective and past careers if we are to separate them from their obsolete elements.” Morris Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 554 (1933).

These examples skim the canon of legal realism, but only scratch the surface. If you read the realists carefully, you will see historical exorcism everywhere. Where a tradition exists, it is investigated and if it is found wanting, it is destroyed. As Felix Cohen noted, the first step for any functionalist is to destroy the stale dogmas that came before. In so saying, he was restating Emerson and Holmes. Emerson’s faded coin became Holmes’s dragon became Cohen’s dogma. The romantic realists used whatever tools at their disposal to count the dragon’s teeth and either kill it or tame it.

III. The Consequences of Rekindling

Construing the realists as romantics in an Emersonian tradition is, I admit, my own kind of historical exorcism. As I mentioned, I am in sympathy with Dagan about the value of bringing realism back into the conversation among legal thinkers. But I am not satisfied with the tamed and therapeutic vision of realism that Dagan offers. Seeing the realists as romantics reflects how little romanticism is abroad today in legal thought. Though I do not have the space here to offer a manifesto, let me end with a provocation. What might the realists have to tell us about the value of kindling ferment in today’s legal discourse? Surely there are targets for outrage and revolt. Having identified those targets, might we not be reminded of the power of historical exorcism as a tool of attack?

To suggest one example, what might Felix Cohen say about the current state of Commerce Clause jurisprudence? The Supreme Court’s recent healthcare decision demonstrated just how strange things have gotten. Hinging Congress’s constitutional power to provide health care to Americans on a very abstract debate over what does or does not count as commerce is precisely the kind of bizarre conceptual thinking that Cohen abhorred. Closer examination with historical scalpel in hand reveals how contingent this state of affairs is. The degree to which the Supreme Court limited congressional power between 1880 and 1920 was itself an innovation driven by a complicated combination of political and cultural factors. When the deadlock was finally broken in the 1930s and 40s, it was the Commerce Clause which emerged as the hook for the explosion of federal power to hang on. The Civil Rights Act, the entire Federal criminal law, all environmental regulation—nearly every national regulatory effort is justified as a regulation of commerce. But everyone knows that the rationales for these laws go well beyond commerce.

Isn’t this precisely the kind of nonsense that Felix Cohen attacked so devastatingly? Without even rekindling realism, how might understanding the reliance on the Commerce Clause as an indefensible legal abstraction motivate a change in our present conversation? Might not a rekindled realism seek to dismantle the illusion at its roots? Might not a romantic realist also show how the heuristic of “commerce” has entrenched a

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45 I cannot help but mention that Cohen’s article remains one of the most cited (if not the most read) American law review articles of all time. It is #39 on Shapiro and Pearse’s list. See Fred R. Shapiro & Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483, 1490 (2012).
kind of economic justification for government action that has obscured other motivations for action that might work better for more people?

Of course, this is neither the time nor place to offer anything more than this provocation. Let me only suggest that this is the kind of provocation that one might hope to get from a “rekindled” destructive realism. Of course, Dagan’s wise realists have profound things to say about how we should ultimately negotiate the balance of the scope of federal power, and how we should strive to hold competing and opposite legal claims in balance. But the true realists insist on that kind of therapeutic thinking only once the field has been cleared. In this, they were romantics and revolutionaries. Here’s to the hope that their spirit may be rekindled.