American Law Through English Eyes: A Century of Nightmares and Noble Dreams

Robert W. Gordon
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/1350

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
BOOK REVIEWS

American Law Through English Eyes: A Century of Nightmares and Noble Dreams


REVIEWED BY ROBERT W. GORDON**

INTRODUCTION

For a glorious brief moment a hundred years ago, American jurisprudence experienced the thrill of trans-Atlantic recognition. The leading British jurists looked to America, and especially to the Harvard Law School, as the new Athens of legal thought. From then on things have mostly gone downhill. British legal theorists have generally regarded their American counterparts with something between indifference and amused complacency. Our most distinctive legal-intellectual achievement, legal realism, is classified in British jurisprudence texts as an odd minor school of chaps who rather curiously supposed law was just what judges do, and do according to passing psychological whims, political fancies, or hunches.

Thus it is with considerable astonishment and gratitude that one pages through Neil Duxbury’s monumental Patterns of American Jurisprudence, an intellectual history of some of the more important tendencies in twentieth-century American legal thought. Duxbury (perhaps because he works in Manchester—the vigorous entrepreneurial periphery of England—rather than at the Oxbridge establishment) has taken trouble to learn about us, a lot of trouble. His has been a baptism by total immersion. I doubt that any American, not to mention any other foreign scholar, has ever read so widely and deeply in the literature of the American legal academy—texts, treatises, and law review articles by the ton, in the thousands. Along with the un-English trait of interest in and sympathy with our legal culture, Duxbury brings to his task the very English virtues of clear and engaging exposition.

The book is not, and does not pretend to be, a comprehensive history, though its scope is broad. It has chapters on legal formalism, legal realism, the “policy science” agenda of Myres McDougal and Harold Lasswell, the legal process

* Reader in Law, University of Manchester.
** Johnston Professor of Law, Yale University.
2. For references to some of these caricatures, see Neil Duxbury, Patterns of American Jurisprudence 67-68 (1995).
scholars of the 1950s, law and economics, and critical legal studies. Summarizing its thesis is difficult, because Duxbury claims not to have a thesis. In place of a thesis, Duxbury puts forward an antithesis: that the usual ways of telling the story of the development of twentieth-century American legal thought are badly flawed, because oversimplified.

I. DUXBURY'S CRITIQUE OF THE STANDARD STORY

The standard story Duxbury critiques and wants to qualify goes something like this. Somewhere around 1870 a mode of legal reasoning arose that we call formalism. It took over law in the academy, as Langdell's legal science; and also law in the courts, as Lochnerite dogmatism hostile to Progressive social legislation. Legal realism in turn arose as a response to formalism. The realists challenged the two principal claims of formalism: that law was autonomous from politics and that legal concepts and doctrines could be applied by judges to reach determinate results. Realism triumphed in 1937 when the U.S. Supreme Court abandoned the cause of striking down New Deal legislation on formalist grounds. The realists, however, went too far in critiquing the autonomy and determinacy of law. By identifying law with politics, they invited accusations of relativism, nihilism, disdain for the rule of law, and conflation of right with might—all maladies believed to have led to totalitarianism. Their effort to unite legal study with the social sciences collapsed, doomed both by its (sometimes ludicrous) intellectual failures and by the determined resistance of traditional professional lawyers.

After World War II, new versions of formalism were revived as a corrective to realist excesses. (In a variant reading of the story, the realists lost the courage of their own convictions and themselves led the retreat back to formalism.) The legal process school sought to re-establish the objectivity of adjudication—the sphere of competent judicial action—on reason as opposed to politics. Reasoned decisions were those that could be justified by neutral principles—"neutral" by virtue of resting upon broad political consensus. Similarly, the law and economics school sought to ward off the realist threat, while carrying forward the realist project of integrating law and social science, by locating an objective basis for law in efficiency or wealth maximization. Judge-made law, the lawyer-economists argued, was mostly already efficient (the positive theory); and whatever law wasn't ought to be made so (the normative theory). But these neoformalist attempts to put the realist genie back in the bottle have been challenged by critical legal studies, which strongly reasserts the realist claims that law is political and indeterminate. The specter of realist critique thus still looms over the legal landscape, challenging lawyers and jurists to ground the rule of law and the activity of adjudication—especially "countermajoritarian" constitutional activism—in something more objective and determinate than

3. See West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding state statute that set minimum wage for women).
political preferences.

Duxbury dislikes the standard story on some very general and then some more specific grounds. His general objection is that it illustrates the "'pendulum swing' vision of American jurisprudential history"\(^4\) according to which the entire legal system periodically lurches back and forth between paradigmatic belief-systems. "Formalism and realism have been made into more than mere shorthand. They have become theories, movements, schools of thought. As such, they are usually seen to cancel each other out."\(^5\) By contrast, Duxbury's narrative depicts "complex patterns of ideas."\(^6\) Instead of "movements" between or "revolts" against paradigms, he sees "slow and hesitant"\(^7\) tendencies; instead of wholesale replacement of one thought-system by another, he sees "a variety of ideas,"\(^8\) a coevolution and coexistence of competing systems.

Duxbury's general complaint is entirely reasonable—that legal scholars and historians tend to describe the legal system as completely captured by a single mode of thought in one period, and then swinging back to a polar opposite mode in the next. The originator of this narrative convention may have been Karl Llewellyn, with his account of "period styles" in legal reasoning: a Grand Style of early nineteenth-century opinion-writing, succeeded by a fin de siècle Formal Style, and finally by a recovery of the Grand Style in the 1920s and 1930s.\(^9\) Grant Gilmore followed with his hypothesis of a regular alternation in legal reasoning between "classic" and "romantic" modes.\(^10\) Morton Horwitz has used the metaphor of a Kuhnian "paradigm-shift" to describe a "transformation" of American legal thought from an "instrumental" mode of reasoning in the early nineteenth century, to a "formalist" or "Classical" mode in the late nineteenth and early twentieth centuries, which in turn was challenged and supplanted by a "realist" or "Progressive" movement in the twentieth.\(^11\)

Duxbury offers a mild but useful corrective in his reminder that such paradigms are exaggerations; that the real life of a legal system is more varied and complicated; that old ways of thinking overlap and coexist with newer ones; and that legal realism in particular was more a "mood" or set of tendencies than a sharply defined "movement" or "revolution" in legal thought. I agree. Late nineteenth-century lawyers, for example, never abandoned "instrumental" reasoning wholesale; both their scholarship and case law are full of policy argument. And their realist-influenced successors never abandoned formalism, if by formalism we mean reasoning downward from general legal categories and

\(^4\) Duxbury, supra note 2, at 2.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id. at 3.
\(^8\) Id. at 2.
conceptions (e.g., "An advertisement is not an offer. Therefore, a purported acceptance will not operate to create a contract."). Indeed, it is doubtful that any legal system can dispense with formalist reasoning in this sense.

Duxbury’s more specific—and, let’s face it, more interesting—complaint against the standard story is less explicit, but seems to be that the story overstates the significance of legal realism by giving it central determining force in the history of modern legal thought. Duxbury’s main points here are: First, it is wrong to see realism as the antithesis of formalism, because “realist jurisprudence failed to progress significantly beyond formalist legal thought” and in many respects remained “demonstrably formalist” itself.12 Second, it is wrong to see the postwar legal process school primarily as a response to realism because legal process thinkers were actually continuing a tradition of commitment to principled legal reasoning that preceded realism.13 Third, it is especially wrong to see law and economics as either a revolt against realism or as an attempt to carry out the realist program of integrating law and social science because the lawyer-economists derive their agenda from neoclassical economic theory and are not particularly interested in legal realism, legal reasoning, or any social sciences outside economics.14

While Duxbury’s complaint about the prominence realism enjoys in the standard story has some validity, it loses much of its interest if one simply substitutes for “legal realism” something like “the challenges to law’s determinacy and autonomy from politics posed, most sharply and typically, though not exclusively, by the legal realists in their critical as opposed to their reconstructive moments.” In other words, if one recharacterizes the main job of modern jurisprudence not necessarily as that of responding to “the realists” as such, but as a series of successive attempts to re-establish more or less objective foundations for legal reasoning—in an intellectual environment that has been irrevocably altered by skeptical attacks on such foundations—one will have found a tolerably effective way of organizing the history of the last hundred years of legal thought. In fact, unless I have seriously misunderstood him, the standard story, modified in the ways I have just suggested, is Duxbury’s story.

To illustrate, consider how well the three main elements of Duxbury’s critique of the standard story fit into the modified narrative I have suggested. Duxbury’s first point, that realism was not the antithesis to formalism and was in many ways formalist itself, loses force when we consider the modified story’s distinction between the legal realists’ critical and reconstructive efforts. The legal realists’ formalist projects—such as the attempt by some of them to reconstruct law as a technocratic social science or policy science—can be understood in the revised story as the realists’ own response to the skeptical challenge posed by their critical work. Karl Llewellyn’s Common Law Tradi-

12. DUXBURY, supra note 2, at 4.
13. Id. at 5.
14. Id. at 5-6.
tion, for instance, elaborates at length the thesis that, although Llewellyn and his fellow realists have demonstrated *ad nauseam* that "paper rules" (formal doctrine and reasoning) do not adequately describe or explain results in cases, those results are nonetheless not arbitrary: In commercial cases, at least, they harmonize with the "singing reason" of functional commercial purposes and the norms of commercial custom. In function and custom, Llewellyn found, or hoped to find, an alternative rational basis for adjudication as well as legislation.

Duxbury's second point, that legal process was not primarily a response to realism, fails to consider realism's irrevocable alteration of the legal intellectual climate. While the legal process thinkers were indeed carrying on a prerealist tradition in trying to refound legal reasoning on "principles," the legal process scholars of the 1950s had to locate their neutral principles in a world transformed by realist critiques—in a world, that is, in which few intelligent lawyers could any longer believe that the kind of top-down reasoning from general legal conceptions in which nineteenth-century judges had put their faith, could be expected to solve any concrete legal problem. One cannot imagine Lon Fuller, Henry Hart, Albert Sacks, Herbert Wechsler, Alexander Bickel, or John Hart Ely, to take Duxbury's list of legal process scholars, arguing to a court or classroom that if an employer's business is his property, then the "nature of a property right" requires that an injunction or damages be available to protect the employer against picketing laborers; or that parol evidence of contractual intentions must be excluded if the terms within the "four corners" of a written instrument are "plain and unambiguous" and therefore must objectively express the "will of the parties"; or that if a private plaintiff may not enjoin some economic activity as a nuisance, then the legislature may not regulate that activity through the police power. As Duxbury himself notes, the legal process scholars, most notably of course, Fuller, were in many respects legal realists themselves.

The quest for neutral principles had to make its way among minds sharpened by realism to distrust anything that sounded like formalist doctrinal reasoning, minds reflexively inclined to look for purposes, policies, and interests beneath the surface of formal doctrines. The process scholars themselves—most memorably John Hart Ely in his slashing, aphoristic, and quite deadly critiques of residual formal elements in rival process theories—had inherited a way of thinking uncongenial to their own project. Surely that helps to explain

---

15. *LLEWELLYN, supra* note 9, at 183-91.
16. *Id.* at 180-83. Llewellyn noted that the drafters of the Uniform Commercial Code, through open-ended drafting, successfully left "room for courts to move in and readjust over the decades." *Id.* at 183 n.186.
17. Duxbury traces the view that law rests on neutral principles back as far as *Lochner v. New York*, 198 U.S. 45 (1905). *DUXBURY, supra* note 2, at 275. But of course that view—that the law is an autonomous science deriving its determinacy and authority from principles—was an article of faith among American lawyers from the beginning of the republic.
18. *DUXBURY, supra* note 2, at 224.
why the search for neutral principles ultimately proved, as Duxbury eventually acknowledges, unconvincing.

Finally, Duxbury certainly seems right to argue that law and economics has no self-conscious relation to legal realism and that lawyer-economists are neither interested in judicial reasoning generally nor in legal realism specifically, nor yet in the history of prerealist and realist attempts to integrate law and economics. But the question that must be asked is: Why was the legal academy ultimately so receptive to economic analysis—especially in view of how cold, repellent, and alien many of its premises and working methods must appear to lawyers? I suggest that the answer has something to do with both the influence and broad challenge of realism.

Duxbury concedes that the realists’ flirtations with social science had created in the legal academy an openness to interdisciplinary work without which law and economics might not have flourished. But that openness never extended to empirical research in legal sociology, which has remained a marginal poor relation in most law schools. By the 1950s and 1960s, realist teaching and judging led law teachers into the habit of making consequentialist policy arguments as a conventional feature of doctrinal reasoning. Rapid-fire, hip-shooting policy analysis by then wasn’t just a way of thinking about law, but a way of doing law. Chicago-style economic analysis gave any law teacher curious enough to attend Henry Manne’s summer seminar or to read a few articles a much more powerful and elegant technique for making the kinds of arguments he or she would already have been making in a first-year classroom. The technique—at that early stage of its development anyway—demanded only slight technical knowledge and no empirical research whatsoever.

Moreover—and here’s how this chapter connects to Duxbury’s larger themes—lawyer-economists tried to make the realist threat (i.e., the engulfing of law by politics) manageable in exactly the same way the realists themselves had done: They traded in law’s autonomy for policy’s (supposed) determinacy. And they happily accepted that law, including adjudication, was indistinguishable from policy choice, believing that legal policymaking—so long as it focused on the goals of allocative efficiency or wealth-maximization and ignored distributional concerns—was or could be a neutral or value-free technique because it treated all values or preferences as facts or exogenous inputs and simply sought to maximize them. (Some of the economists even believed that the common law tends to approximate efficient results through a Darwinian mechanism of evolutionary selection.) Yet it is precisely those claims of lawyer-economists to value-neutrality—especially when combined with the Chicago School’s ferociously controversial policy agenda—that have met with the most skepticism. Though their influence has spread pervasively, few would credit them with having found the secret of an apolitical jurisprudence.

20. Duxbury, supra note 2, at 309.
21. Id. at 411-14.
II. DUXBURY ON SPECIFIC SCHOOLS OF LEGAL THOUGHT

To talk about *Patterns of American Jurisprudence* in terms of its broad general themes, however, is hardly to engage Duxbury on his own ground. The meat of this book is in the details of the chapters on specific strands of legal thought. Let me say something briefly about each of these.

A. FORMALISM

Duxbury begins by splitting "formalist" jurisprudence into two distinct components, an academic and a judicial. In the law schools, formalism was Langdell's legal science, "premised on the belief that law may and indeed ought to be conceived as a small body of formally-interrelated doctrinal principles . . . to be derived from upper-court . . . decisions."22 In the courts, formalism was a political creed, the ideology of laissez-faire political-economy in the service of the Spenscerian Social-Darwinist view that the fittest competitors will survive in a self-regulating free market.23 Duxbury then outlines the views of the major "proto-realists"—early critics of both brands of formalism—Holmes, Cardozo, John Chipman Gray, and Roscoe Pound—all of whom, he stresses, retained allegiances to formalist method while anticipating later realist critiques.24

This chapter is Duxbury's least original and leaves this reader rather dissatisfied. The description of academic formalism is too cursory and unelaborated to provide any clues to why later critics should have railed against it so—especially because in Duxbury's account, Langdell's own disciples rapidly converted his system from a science of substantive principles to a flexible and historically adaptable method of legal reasoning.25 It is sometimes a little misleading as well, for example in the comment that Langdell's legal science shows an "intense respect for *stare decisis*. For Langdell, to be able to discern the precedential status of any case is to have found the key to the science of law."26 This comment is preceded by a passage from Langdell making clear that legal science is based on principles, not precedents, that most prior cases are "worse than useless" for extracting principles, and that one studies cases not to find authority but to trace the historical evolution of the principles.27

Duxbury's description of judicial formalism is, I think, likewise misleading. The dominant ideology of "classical" public-law jurisprudence was not Social Darwinism but the free-labor-equal-rights ideology that only neutral and general laws, according neither special privileges nor special disabilities to any class or faction, could guarantee the framework under which individuals could make their own destiny, to the greatest possible extent, consistent with a like freedom

22. Id. at 3.
23. See id. at 25-32.
24. Id. at 10, 70-77.
25. Id. at 21-23.
26. Id. at 15.
27. Id. at 14.
in others.\textsuperscript{28} Formalist courts did indeed insist on a strict \textit{distinction} between private and public spheres, between private law (mostly common law), which constituted and facilitated a realm of voluntary transacting, and public law (mostly statutory and administrative), which "regulated" private transactions. But these courts tolerated a rapidly increasing volume of such public regulation—occupational licensing, factory inspection, promulgation and enforcement of new safety, health, and moral standards, regulation of public utilities, common carriers, banks, insurance companies, and stock promotion—so long as the judges thought it could plausibly be justified as in the general interest.\textsuperscript{29}

What is missing from Duxbury’s chapter is an account of formalism at the working level, of ordinary doctrinal reasoning in the courts, and of doctrinal rationalization in academic articles and treatises about contracts, torts, property, competition, conflicts, corporations and the like, as well as about public-law subjects such as regulation of monopoly, public utilities, industrial conditions and accidents, and labor organization. It was these ways of doing doctrine, especially private law doctrine, that inspired most of the proto-realist and realist critiques of formalism both as a method of thinking about and teaching law, and as a source of what the realists believed to be arbitrarily reactionary principles in adjudication. Only once, while speaking of Roscoe Pound’s critique of the cases constitutionalizing “liberty of contract” as reflecting “artificial criteria of general application” insensitive to the real facts of social life,\textsuperscript{30} does Duxbury suggest how academic and judicial formalisms might have, in Duxbury’s phrase, “intermeshed.”\textsuperscript{31}

\textbf{B. REALISM}

Loyal to his antithesis—that the vice of legal-intellectual history has been to

\begin{itemize}
\item \textsuperscript{28} Duxbury periodically recognizes this. \textit{See, e.g.}, \textit{Id.} at 45 (arguing that Spencerian laissez-faire economic theory does not “explicitly feature in the [Lochner] decision”); \textit{Id.} at 275 (arguing that \textit{Lochner} embodied constitutional requirement of neutrality). Yet he continues to label as examples of Spencerian “evolutionary economics” opinions such as \textit{Allgeyer v. Louisiana}, 165 U.S. 578 (1890), which he quotes:

\begin{quote}
The “liberty” mentioned in [the Fourteenth Amendment] means, not only the right of the
citizen to be free from the mere physical restraint of his person . . . but . . . to be free in the
employment of all his faculties . . . to live and work where he will; to earn his livelihood
by any lawful calling . . . and for that purpose to enter into all contracts which may be proper
\end{quote}

\textit{Id.} at 590, \textit{quoted in Duxbury, supra} note 2, at 29 (ellipses added). I can’t see any Social Darwinism in this passage: It seems to express a view of liberty as autonomous, individual self-development rather than extolling the system-level benefits of competition.


\item \textsuperscript{30} \textit{Duxbury, supra} note 2, at 58 (quoting Roscoe Pound, \textit{Liberty of Contract}, 18 \textit{Yale L.J.} 454 (1909)).

\item \textsuperscript{31} \textit{Id.} at 57-58.
\end{itemize}
homogenize very diverse ways of thinking into uniform "schools" or "move-
ments"—Duxbury does not attempt a general characterization of legal realism, 
save as a "commitment to candour, to telling it—whatever 'it' happened to 
be—as it is."32 He prefers to call it a "mood" or "tendency," without rigid 
intellectual boundaries, and, in support of the antithesis, offers up sketches and 
vignettes of some of the principal realists (Thurman Arnold, Robert Hale, 
Jerome Frank, and Herman Oliphant, among others) and of the institutional 
(Columbia, Yale, Johns Hopkins), intellectual (institutional economics, behav-
ioral psychology, progressive interest-group political science, philosophical 
pragmatism), and political (progressive and New Deal politics) settings that 
nurtured them. The chapter is a vast cafeteria with samplings of real delights 
and delicacies.33

The chapter’s leitmotif, however, is rather dour and deflating; it tells of 
realism’s failure to do much to reorient legal thought, legal education, or 
political practice. The reader is never quite sure whether Duxbury is more 
concerned about reproving the realists for the incoherence or latent neoformal-
ism of their intellectual ambitions (e.g., the reconstruction of law as a predictive 
science), or for their loss of nerve and failure to follow through on their 
program. Duxbury scores some telling points against the realists’ capacity for 
follow-through, especially in his Legal Realism and Legal Education Section,34 
which demonstrates the cautiousness and limitations of the realist program as a 
method of reforming legal education. Though the realists stressed that law was 
what lawyers and officials really do, and to that end supplemented cases with 
"materials" on the context of case decisions, Duxbury points out that in their 
casebooks and teaching they rarely broke through the limits of appellate doc-
trine and the case method. The realist-dominated schools did not accept Frank’s 
invitation to convert to "lawyer-schools” centered around clinical instruction.35 
Nor did they do much teaching or research on legislation and administrative 
law, leaving the pioneering work on these subjects to be done at the supposed 
heartland of old-style formalism, Harvard.36

One of the reasons I suspect that Duxbury is so hard on the realists is that, 
like Laura Kalman and John Henry Schlegel before him, he takes the principal 
aim of the realists’ enterprise—though he is careful to recognize it as only one 
among many—to be the conversion of legal study into social science.37 To 
the extent this was what realism was about, it did indeed suffer from both

32. Id. at 71.
33. To cite one of my favorites, among many others, Duxbury offers the insight that while political 
scientists of the 1920s and 1930s were analyzing the Supreme Court as a political institution, the legal 
realists were inclined to treat it anthropologically, to stress its "totemic" or "symbolic" functions. Id. at 
117.
34. Id. at 135-49.
35. Id. at 138.
36. Id. at 156.
37. See generally LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); JOHN H. SCHLEGEL, 
incoherence and limited reach. As Duxbury says, echoing contemporary critics like Lon Fuller, the empirical realists rarely thought much about why they wanted to know more facts about the context of law, beyond a vague notion that with such knowledge they could make law more “predictable” and more “effective” as a means of “social control.”38 Surrounded by lawyers who routinely made assumptions and arguments about the social effects of legal rules and decisions, but didn’t care to learn anything about what those effects actually were, the realists urged their colleagues to defer normative judgments until more facts could be found out. But as Schlegel has demonstrated,39 all these empiricists managed to accomplish was to threaten the professional identity of law teachers without showing what benefits social science could deliver for the internal enterprise of the law school—training lawyers in the rhetorics and (selective) techniques of practice and reforming law. For these sufficient and also some very bad reasons (law teachers’ professional rigidity, inertia, laziness, and ungrounded snootiness about other disciplines), law-in-action empirical studies never made much headway in the law schools.40

But was restating law as social science largely what realism was about? Though Duxbury is right to make us wary of overgeneralizing about the realist generation, I think most realists shared a common aim, which was not the development of a general theory of law, but the reorientation of legal rhetoric, the common discourses of rationalization and justification. By looking in the wrong places and seeing realism as a general jurisprudence or social science of law, rather than as a multitude of efforts to turn around humdrum legal reasoning, Duxbury understates the realist contribution to legal thought and education. The test of the success of the realist aim is, once again, at the level of the “formalist” rhetoric they critiqued, mid-level doctrinal reasoning in particular subfields of law. At this level, realist practice is not that hard to describe: Its mottoes might be “Think things not words,” and “General propositions do not decide concrete cases.” The realist urge was to critique the concepts of classical formalism as overabstract and empty; the realist method was to disaggregate and contextualize, to restate principles as “functional” policies and purposes, rights as practically available remedies, and rules as patterns of results likely to be obtained in particular settings. The typical realist article examines an area of law that orthodox formalist analysis interprets as governed by some overarching concept or principle—say that of “consideration” or “mutual agreement” in contract law or “proximate cause” in tort law. The article then shows that in cases decided under the general rubric, the principle is applied quite differently and the differences track distinctions in fact patterns (usually patterns having to

38. DUXBURY, supra note 2, at 90-91.
40. Duxbury, however, understates the inroads that the social sciences did make, ignoring the rather impressive body of evidence that Laura Kalman has assembled of the uses of social science in the realist-inspired teaching materials of the immediate postwar period. See generally KALMAN, supra note 37.
do with subject matter or parties—insurance, employment, or construction in contracts; shippers, passengers, or bystanders in railway torts). The realist critic then restates what he perceives to be the operative rather than the formal legal rules in the cases and offers a functional—purposive, consequentialist—rationale for the rule. In private law fields like contracts and torts, the realists often concluded that the actual decisions made functional sense, even if the formal rationales were "transcendental nonsense"; in the more politically controversial fields of regulatory law, the critics were more likely to conclude that the latent policy subtext was irrational or the product of an inarticulate, conservative political or economic judgment. There's nothing much heroic or dramatic about this enterprise of rhetorical critique and reorientation, but incrementally over time, drip-drip-drip like stalagmite formation (or water torture if you prefer), it profoundly altered everyday argument and reasoning in American legal culture.

Duxbury periodically perceives this aspect of realism, but (I expect) because of his focus on large and general ideas, doesn't think it especially interesting or significant. He does discuss admiringly and at length one of the most penetrating and original realists, the Columbia lawyer-economist Robert L. Hale, who generalized his critical work in subfields, such as public utilities law, into a powerful critique of the public-private distinction in classical-formalist law and political economy. Hale's insight was to demolish the distinction between private law that established a sphere of consensual voluntary relations and public law that coercively regulated that sphere. All private bargains, he pointed out, were the products of legal coercion, because all depended on relative power and resources (capacities to withhold access to resources that others need, to organize collectively, and so forth) created and maintained by legal sanctions. If legal coercion is omnipresent in the economy, we cannot object to new regulation on the ground that it coerces, but must ask whether it coerces the right parties to the right ends: by coercing some, it may increase the practical freedom of others, just as does the system in force—the existing "free market."

Except for the bit on Hale, however, Duxbury's treatment of the realists remains on the whole disparaging of their ideas and influence. In addition to understating the realist contribution to legal scholarship, Duxbury generally


42. See, e.g., DUXBURY, supra note 2, at 144-45 (discussing KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930)).

43. Id. at 107-11.

deflates any claims that the realists had much effect on public policy. Although
many realists went into the New Deal, he argues, there is little connection save
at the most general level between realist ideas and New Deal programs.45
Thurman Arnold as scholarly realist, for example, "ridiculed the essentially
symbolic, toothless nature of American antitrust regulation."46 As head of the
Antitrust Division, however, he not only prosecuted aggressively under the
antitrust laws, but promoted them as a "symbol of our traditional ideals"47 for
free competition. "Thurman Arnold the legal realist," Duxbury concludes, was
a rather different beast than Thurman Arnold the New Dealer.48

Duxbury's claims about the marginal influence of realists on policy seem
exaggerated. One could, for example, make a case for Arnold's public career as
realism in action. Arnold's critique of the symbolism of the antitrust laws was
that they fostered the myth of a competitive economy of individual enterprisers
in an actual economy dominated by giant organizations. As Duxbury is certainly
aware, Arnold did not deprecate the symbolic functions of law; indeed, he saw
them as promulgating frequently useful myths. But Arnold also thought they
distracted attention and resources from the practical tasks of governance that he
(rather naively) believed sensible administrators, informed by the facts, would
usually agree were appropriate. As antitrust administrator, he sought to accom-
plish both instrumental and symbolic tasks: the instrumental, to direct prosecu-
tions at "bottlenecks," localized concentrations that impeded competition; the
symbolic, to reorient the ideology of antitrust away from the obsolete and
mystifying opposition to bigness per se, to the promotion of competition in the
service of "democracy" (the public accountability of big corporations and labor
unions) and "consumer welfare."

More generally, I think Duxbury understates the effects of realist theory on
practice because he does not look closely enough into particular fields. In policy
fields like labor law, public utilities rate regulation, securities law, and the
regulation of bankruptcy reorganizations, among other places, one can find
plenty of traces of a generation of realist methods of analysis and realist
prescriptions for reform.49 Duxbury also overlooks the pervasive influence of

45. DUXBURY, supra note 2, at 153-54.
46. Id. at 154.
47. Id.
48. Id. at 154-55.
49. For traces of realist influence on policy fields, see generally TEMPORARY NAT'1. ECONOMIC
COMM., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER (FINAL REPORT AND RECOMMENDA-
TIONS), S. Doc. No. 35, 77th Cong., 1st Sess. (1941) (antimonopoly policy); SECURITIES AND EXCHANGE
COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND
FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1940) (corporate reorganization); JOEL
SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE
COMMISSION AND MODERN CORPORATE FINANCE (1982) (securities regulation); Daniel R. Ernst, Com-
LAW & HIST. REV. 59 (1993) (labor law reform); George L. Priest, The Invention of Enterprise
realist scholars such as Fleming James and Friedrich Kessler, and realist judges such as Roger Traynor, John J. Francis, and J. Skelly Wright, on common-law policy reforms, especially the expansion of manufacturers', sellers', and landowners' liability in contract, tort, and property law.

In summary, while crammed with valuable learning and insight, and shrewd perceptions of the realists' limitations and failures, this chapter does not quite get at the core of the realists' projects and ends up understating their achievements.

C. POSTWAR "POLICY SCIENCE"

One offshoot of realism was the brand of law known as "policy science" promoted by Myres McDougal and Harold Lasswell at Yale Law School in the 1940s and 1950s. Duxbury rather inexplicably devotes an entire chapter to this episode. Critics of realism in the 1930s had warned that its skepticism would lead to nihilism and thence to embrace of totalitarian dictatorships. Sensitive to this charge, McDougal and Lasswell developed a program of legal education, mainly put to work in international law but aspiring (in vain, as it turned out) to take over the rest of the curriculum as well, that was committed to training lawyers as policymakers by teaching them problem-solving skills that included clarifying and making explicit the values and goals of policy—American values, to be exact. As Duxbury summarizes their aims:

The purpose of introducing policy science into the study of law is to demonstrate to lawyers that the legal values of a liberal democracy may be scientifically approved—approved, that is, by pro-democratic, scientific methodology. American lawyers, in other words, are urged to look beyond the law for normative guidance not so that they might discover any old values, but so that they might affirm explicitly the values to which they are already committed, the individualistic values of American democracy.51

Legal education, in this view, is a technical training designed to remove the blinders and prejudices that stand in the way of apprehension of a pre-established truth. This was, as Duxbury comments, a program peculiarly well suited to the Cold War era.52

If the problem with realist pragmatism was its incuriosity about values and ends, the problem with McDougal-Lasswell policy science, says Duxbury, was its complacency.53 Yale policy science—outside the field of international law, on which it had considerable influence—remained isolated and marginal. Duxbury says it was perceived as "too idiosyncratic, elitist, jargon-laden and utopian: it projected a hazy vision of law in a future society without any real

50. DUXBURY, supra note 2, at 161-203.
51. Id. at 175.
52. Id. at 176-77, 197-98.
53. Id. at 202.
indication of how lawyers were supposed to turn that vision into reality.\textsuperscript{54}

Although Duxbury’s critique is mostly on target, Lasswell and McDougal’s idea of law as policy science in the service of a canonical set of values and goals is less of an outlier or innovation in American legal education than he suggests. The idea that law schools should train lawyers not just for narrow professional skills, but also for policymaking responsibilities, was no invention of the New Deal or Cold War periods. The idea itself is as old as the Republic, whose original independence had been justified, whose constitution had been secured, and whose legislative and executive policymaking posts had since been dominated by lawyers. Since George Wythe and Thomas Jefferson’s eighteenth-century design for a law school in Virginia, almost every American plan for legal education has stressed the need for training in (what nineteenth-century lawyers called) the science of legislation, the knowledge and skills of statecraft.\textsuperscript{55} Langdell’s reforms at Harvard sharply broke with that tradition by restricting the curriculum almost entirely to private law. But the tradition of law as a training ground for public service persisted anyway—Yale and Columbia, for example, continued to promote such training as part of their mission—and the New Deal recruitment of lawyers (by 1939 the Federal government employed some 5,368 lawyers) gave it fresh relevance.\textsuperscript{56} The elite schools in particular, restaffed after the war with ex-New Dealers, had every reason to suppose that a significant fraction of their graduates would join the policymaking establishments, most likely after or on leave from careers in private practice. Law faculties didn’t argue about whether law students should be prepared for policymaking careers, only about the best preparation. The most conservative view (which still pervaded Harvard when I was a student there in the late 1960s) was that the ordinary skills of the first-year classroom—practice in crackerjack case-law analysis—would suffice to produce the generalist lawyer-craftsman who, if “smart” enough as certified by law school grades, could go on to master any policy area, manage any institution, or for that matter, return to the law school and teach any subject.

Lasswell and McDougal’s other basic idea, that good law training was not value-free but meant to equip lawyers to serve the (supposedly) unproblematic agreed-upon values of American liberal individualism, was also hardly peculiar to their enterprise. As Duxbury makes clear in his following chapter, the generation of 1950s legal process scholars mostly accepted as given that their society’s legal system rested on a basic and unproblematic consensus on values and institutional arrangements. The Yale policy scientists were unusual only in that they tried to describe the consensus in relatively explicit terms.

\textsuperscript{54} Id.

\textsuperscript{55} Jefferson’s notes on teaching law at Virginia, for example, proposed a curriculum of the “common and statute law, that of the chancery, the laws feudal, civil, mercatorial, maritime and of nature and nations; and also the principles of government and political economy.” \textit{1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY} 230-31 (Richard Hofstadter & Wilson Smith eds., 1961).

\textsuperscript{56} See \textit{ESTHER L. BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE} 28-29 (1948).
D. LEGAL PROCESS

In this chapter, Duxbury sets out the antecedents and main tenets of the most influential jurisprudential school of the postwar period, the "legal process" school founded by Lon Fuller, Henry Hart, and Herbert Wechsler, and advanced mainly through the work of Albert Sacks, Alexander Bickel, Harry Wellington, and John Hart Ely. Duxbury identifies as the distinguishing features of this school the views that: (1) law is purposive; (2) different legal institutions—legislatures, courts, administrative agencies—have different competences, capacities, and modes of rational action and justification; and (3) adjudication is distinctive in that (ideally, at least) it is a reasoned activity that is justified by reference to principles, in contrast to legislation, which rests on policies.

It was Fuller, whom Duxbury credits with the animating insights of legal process, who developed the theme that "[t]he creation and application of law is a purposeful enterprise. Legal rules and institutions characteristically serve a multiplicity of purposes. If we are properly to understand law, we must interpret it by reference to those purposes." Following Felix Frankfurter's lead, the legal process scholars extended purposive analysis to legislation, arguing that statutes should not be treated as arbitrary acts of sovereign will or naked political force, but as rational actions to be interpreted by courts and administrative agencies in light of the public-regarding purposes that may be attributed to them. They even extended purposive analysis to the work of ordinary lawyers, whose business is to maintain and improve the procedures that ensure decisions "are calculated as well as may be affirmatively to advance the larger purposes of the society." What are those purposes? Broadly, those of maximizing "the total satisfactions of valid human wants." Our society organizes this pursuit of human wants through differentiated institutions "with their own areas of competence and criteria of soundness." Most purposes are pursued and effectively realized through "[p]rivate ordering" structured by a "self-applying" legal framework of equal rights and liberties; "[p]ublic regulation of private activity ought, accordingly, to be permitted only where the processes of private ordering are found wanting"—in "trouble cases." Legislatures, courts, agencies, and arbitrators all make law, each within their proper sphere of competence and sound method. The method of judges, being unelected, must be to decide cases according to reason, i.e., to justify decisions by reference to "principles" rather than "policies."

In theory, this was a descriptive system as well as a normative one. The

57. DUXBURY, supra note 2, at 205-99.
58. Id. at 228.
59. Id. at 260-61.
60. Id. at 256 (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 6 (tentative ed., Harvard Univ. 1958)).
61. Id. at 254 (quoting HART & SACKS, supra note 60, at 114).
62. Id. at 263.
63. Id. at 257.
64. Id. at 258-61.
process scholars believed that, on the whole, American institutions of private and public legal ordering really worked the way they were supposed to (though they shunned any sociological investigation that might have tested their belief). That belief was what made it possible for them to define legal ability as a technical craft without opening themselves to the charges of value-neutrality or relativism that had haunted realism: Since good purposes are immanent in the law, by pursuing craft excellence in ways appropriate to their roles in the system, lawyers will simultaneously serve good purposes.

Nonetheless, process scholars poured an enormous amount of energy into critique of one institution, the courts. A reader of the *Harvard Law Review* “Forewords” of the 1950s could easily come away believing that all was well with America save the quality of judicial reasoning, especially in the Supreme Court under Chief Justice Earl Warren. This tradition reached its high point in Herbert Wechsler’s famous reproof of the decisions in *Brown v. Board of Education* and other equal protection cases. Wechsler argued that the Court had failed to find a principled means of choosing between two conflicting principles, that of the freedom to associate and the freedom not to associate.

Wechsler’s critique, of course, could be turned back upon the legal process school itself: If basic principles underlying the law often came into conflict, was there ever a principled choice between principles? Duxbury shows how some earlier jurists had approached this issue. Pound seemed to think that, although principles differed, each would find its appropriate place in a different sphere of law. Cardozo believed that ultimately, in choosing between principles, judges had to rely on “instinct.” The most interesting thinker about this issue, John Dickinson, though concerned to found legal reasoning on a bedrock of principles in order to refute legal realist claims of the indeterminacy of legal doctrine, sounded much like a realist himself when arguing that “[t]he broad general principles of the law have a significant habit of traveling in pairs of opposites”; and that in hard cases where principles conflict, judges must “strike a balance” between them, “drawing a line” based on necessarily arbitrary “considerations of policy.” The legal process scholars, Duxbury concludes, never found a convincing way to address this issue.

65. Id. at 254.
69. Id. at 219.
70. Id. at 221 (quoting John Dickinson, *The Law Behind the Law: II*, 29 Colum. L. Rev. 285, 298 (1929)).
71. Id. at 221-22. Though Duxbury doesn’t note it, the settlement of conflicts between principles by drawing arbitrary lines was one of Holmes’s standard accounts of the judicial function. Holmes differed from Dickinson in his willingness to admit—even celebrate—the arbitrariness of such line-drawing rules. Dickinson argued that judges when “devising a new rule” do so by framing “one which can be made by some process of reasoning, facile or tortuous, to appear as a necessary logical deduction from some already established rule.” Id. at 222 (quoting Dickinson, *supra* note 70, at 315). This also sounds
More than anything else in his book, Duxbury’s treatment of the legal process school is a model of clarity and sympathy. He gives us long and lucid summaries of Fuller’s main writings,72 Hart and Sacks’s Legal Process materials,73 Wechsler’s lectures on principles,74 Bickel’s jurisprudence of “prudence,”75 and the later work in the process tradition of Ely and Dworkin.76 He is not uncritical: Indeed, he finds “for the most part, well founded” the critique of legal process that it rested on a complacently idealized view of American society—the view that operating within a fundamental consensus on basic values, which lawyers were not supposed to examine or debate, American institutions would indeed function so as to maximize the satisfaction of “valid human wants.”77 He shows how similar the process school was to the pluralist political science of the same period, which argued that the clashing and horse-trading of interest groups with overlapping memberships and common respect for procedural norms of the political process, would generally work out for the general welfare.78 He shows how the process scholars’ presumption in favor of the outcomes of “private ordering,” justified on the ground that “every normal member of the society has the same personal capacity to exercise private powers, and thereby to command the backing of society for his own personal arrangements,”79 shrugged aside the most penetrating insight of realism—Robert Hale’s point that the legal system endows people with very differential capacities to coerce one another in the marketplace.80

At the same time, Duxbury gives honor and credit to the legal process scholars where it is due. He defends them against the (frequently made) charge of political conservatism: Most process scholars (except Bickel in his later years) actually supported most of the Warren Court’s “rights revolution” and gave much energy to finding a principle that would justify judicial activism in Brown while continuing to deplore it in Lochner v. New York.81 He also points out that Hart and Sacks’s Legal Process materials were a genuine pedagogical innovation, in that they included statutes, administrative agency rules, and

---

72. Id. at 223-32.

73. Id. at 251-66.

74. Id. at 267-78.

75. Id. at 278-88.

76. Id. at 293-97.

77. Id. at 263-64.

78. Id. at 245-47.

79. Id. at 257 (quoting HART & SACKS, supra note 60, at 309).

80. Id. at 257.

81. 198 U.S. 45 (1905). The summa of such attempts was Ely’s Democracy and Distrust, supra note 19. The legal process scholars, including Ely, did break with the Warren Court over the abortion case, Roe v. Wade, 410 U.S. 113 (1973), not because they favored legislation prohibiting abortions, but because they could find no plausible support in even a very broad reading of the Constitution for the Court’s invalidating such legislation. See, e.g., John H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973).
arbitrators’ decisions, as well as appellate cases, and were organized around “problems.” On the whole, legal process could hardly have found a friendlier historian.

E. ECONOMICS IN LAW

Duxbury’s first priority in this chapter is to rebut the thesis that “law and economics simultaneously represents realism fulfilled and realism thwarted”; on the one hand a continuation of the realist enterprise to redescribe law as an instrumental policy science, and on the other hand a reversion to neo-Langdellian formalism. He is especially irked at the suggestion that law and economics and critical legal studies (CLS) are intellectually linked by their relationship to realism, either because they are “battling for the mantle of legal realism” or because CLS embraces, while law and economics denies, core realist premises. Lawyer-economists, Duxbury argues, just don’t much care about legal realism one way or the other.

As I said earlier, Duxbury’s point pretty well vanishes if one considers “realism” a shorthand not for a specific bunch of legal intellectuals, but for some general attitudes or positions towards law. These general attitudes include the following claims: First, autonomous legal reasoning is indeterminate; no case in the system may be resolved solely by reference to internal legal materials—concepts, standards, rules, or precedents. Second, to understand what really decides cases, one must look to contextual factors (fact-patterns, interest-group pressures, self-interest of deciders) and especially to (usually inarticulate) policies, purposes, or social functions that may be served by the decision. Third, the object of legal studies is to clarify and make explicit the “real” factors informing and the actual social consequences resulting from decisions in order to reform the rules, principles, and decisional practices so that the legal system will serve its valid purposes more effectively.

Both law and economics (L&E) and CLS subscribe to this set of attitudes, though sharply differing in other respects. And as approaches to studying and teaching law, they have a common origin in their founders’ dissatisfaction (bordering on disgust) with what they perceived to have been the intellectual inadequacies of the way they themselves had learned law in the legal process era. What drove many of us crazy (to speak autobiographically for the moment) about the old curriculum was the way it had taken many of the legal-realist attitudes on-board ship as things to be taken into account in analyzing or arguing cases—contextual influences, social policies and purposes, real-world consequences—but then kept them penned up in tiny cages in the hold. Our teachers often referred to policies or contextual factors that influenced (or should influence) decisions, but always casually and ad hoc, one case at a time,

82. DUXBURY, supra note 2, at 253.
83. Id. at 302.
84. Id. at 308.
balancing them with lightening speed to suggest one result or another; they rarely tried to generalize the fact-patterns or policies across cases or doctrinal fields; and they almost never tried to develop at length any theories of the policies, purposes, or sociologies of the fact-patterns.85

In reaction, both L&E and CLS (and law and society research as well) devoted much of their formative early work to nondoctrinal synthesis.86 L&E—the Chicago school of L&E anyway—and CLS also reacted politically against the legal process consensus and its complacent pluralism. Instead of assuming that the legal system generally functioned in a fair and effective way, both were sharply critical of much of the substance and process of modern law. The radical and neo-Marxist critics of the left, for example, often agreed with the public choice critics of the right that legal institutions and decisions were captured by powerful groups and corrupted to serve their interests.87 Instead of treating “basic” values as undebatable givens, both L&E and CLS were moved to try to clarify and make explicit the social visions and assumptions about self and society underlying legal decisionmaking. By so doing, they forced centrist liberals to discuss and defend their values rather than assume them as the commonsense everyone could take for granted.

Of course, in other ways the movements’ aims were very different. L&E, like the social-engineering side of realism, was keen to reconstruct law as a scientific enterprise of positive description and normative policymaking; to dissolve the problem of conflicting values by treating them simply as “preferences”—facts to be measured and aggregated in a utilitarian calculus. Unlike CLS, L&E never wanted to be overtly political; it wanted to be scientific. It was perceived as expressing a strong political ideology because its policy proposals departed so radically from the status quo. CLS, on the other hand, sought to sharpen awareness of conflicts of value and political interests in the legal system; to emphasize their incommensurability rather than blend them into the same calculus; and to subject the “policy” arguments of postrealist legal discourse

85. Of course there were exceptions. Lon Fuller, a central figure in the legal process school, by focusing on remedies rather than rights, had in a famous article retheorized the entire field of contract law as based on reliance rather than promise. See Lon L. Fuller & William Perdue, Jr., The Reliance Interest in Contract Damages: 2, 46 YALE L.J. 373 (1937).


87. This commonality went only so far as the critique of legislation and administration. Chicago L&E reasserted with full vigor the public-private distinction of classical formalism, arguing that the private sphere of markets and the “common law” tended to produce presumptively “efficient” joint-maximizing outcomes. CLS resurrected the realist Hale’s critique that choices made in markets are made under regimes of public ordering (whether common or statutory law) that produce very unequal distributions of resources to coerce others.
(including L&E itself) to the same kind of critique that the realists had brought to bear on the doctrinal arguments of classical formalism. Even in this enterprise, however, the CLS scholars were aided by L&E’s solidification of the miscellaneous policy rationales of doctrinal legal reasoning into a form coherent enough to criticize.

In short, I think the thesis that Duxbury wants to debunk—a thesis that compares and contrasts L&E and CLS by showing their relation to legal realism—has more substance than he allows. To be sure, lawyer-economists themselves rarely mention either realism or CLS: They are allied to a powerful, ascendant, notoriously insular discipline that rarely refers to anything outside its own boundaries. But the comparison is still illuminating to the outside observer.

After this preliminary skirmish, Duxbury gets down to details. He starts with a brief history of early twentieth-century precursors to modern L&E, which is unfortunately too scattered and miscellaneous to be very useful, and leaves out much of the intellectual background, especially the marginalist revolution and the progressive-liberals’ generalization of Ricardian rent-theory to all transactions, that one needs to make sense of the legal economics of the 1920s and 1930s. The chapter improves dramatically in cogency and interest when the narrative shifts to Chicago. So far as I know, Duxbury is the only historian who has ever attempted a sustained account of the rise of law and economics at Chicago. Working mostly from published materials, he has put together a fascinating story of personal and intellectual influences at Chicago Law School before it became famous. The key transitional figure in the account is the economist Aaron Director, a mythic hero who induced experiences very close to religious conversion in a succession of Chicago law teachers, including Edward Levi, Robert Bork, and Richard Posner.

In these sections, Duxbury’s general reluctance to descend from abstract jurisprudential theory to mid-level substantive fields happily deserts him—perhaps because lawyer-economists have no general views of law or legal reasoning to discuss. He devotes sixteen pages to Chicago and Harvard antitrust theory, and another fifty-two to Chicago economic and legal-economic theorists (Knight, Simons, Friedman, Becker, Coase, Alchian and Demsetz, and Posner), with particular attention to the Coase theorem and Posner’s principle of wealth-maximization and to some of their major critics. Unlike his remarkably illuminating material on Chicago from 1930 to 1960, Duxbury’s sections on modern (post-Director) L&E don’t offer much fresh insight to any reader.

88. DUXBURY, supra note 2, at 316-30.
89. For this background, see Herbert Hovenkamp, The First Great Law and Economics Movement, 42 STAN. L. REV. 993 (1990) (describing the four factors leading to interest in law and economics: use of evolutionary models in development of law and economics theory, influence of German Historical School, increased popularity of utilitarian welfare economics, and growth of social sciences). See generally BARBARA FRIED, ROBERT HALE AND PROGRESSIVE LAW AND ECONOMICS (forthcoming 1996).
90. DUXBURY, supra note 2, at 341-48.
91. Id. at 348-64.
92. Id. at 364-416.
who is generally familiar with the literature of L&E, but they do give (so far as I
am able to judge) an exceedingly clear and useful overview of the subject. My
only real complaint about this section is that it ends too soon to say much about
the second-generation, post-1980 phase of L&E, which differs in many ways
from the first phase dominated by Chicago and Posner, or about Posner’s own
quite spectacular evolution from formalist scientism to a skeptical pragmatism
with strong resemblances to legal realism in his views of what judges do.93

F. CRITICAL LEGAL STUDIES

Duxbury’s final chapter is a prolonged and, in its effects if not always its
intentions, a savage overview—“strafing” might be a better word—of the
critical legal studies movement of the 1970s and 1980s.94 He asks himself why
he should bother to describe this movement at all, when “[e]xposing the myriad
vices of ‘the crits’—the fuzzy reasoning, the abstruse jargon, the moral impover-
ishment, the double standards, the political naiveté, the unworldly ideals, the
legal incompetence, and so on—has become a popular pastime among clever-
dicks, reactionaries and attention-seekers,”95 and it seems pointless just to pile
on, especially because CLS is by now merely a historical curiosity. He decides
the job is worth doing, partly because CLS did something important: It re-
 minded American lawyers of the awkward realist challenges that the process
scholars and lawyer-economists had tried to ignore or explain away—that
“adjudication is still a political affair; economic freedom still conceals coer-
cition.”96 Ultimately, however, Duxbury’s judgment on CLS is severe; although
he tries hard to distance himself from the cruder demonizing critiques,97 he ends
up adopting most of them as his own.

Duxbury presents four theses on CLS. First, like all left-wing political
projects in the United States, CLS never had a chance of real political impact;98
like all left-intellectual projects, it was a self-indulgent form of academic
politics whose influence was confined to the university;99 like all left-legal
projects, its aims and methods were inherently contradictory, given that “propo-
nents of any form of radical jurisprudence will be compelled to rely on the very
legal apparatus which they oppose.”100 Second, CLS’s principal claim, that law
is “indeterminate,” is absurdly exaggerated; pruned back to proper size, the
claim is obvious and banal, “since few if any modern lawyers would suggest
that legal systems are wholly neutral, systematic and coherent.”101 Third, CLS

94. DUXBURY, supra note 2, at 421-501.
95. Id. at 423. This quotation nicely captures Duxbury’s general ambivalence towards CLS—you’re
never sure whether he endorses all these critiques or attributes them to hysterical overreactions.
96. Id. at 427.
97. See, e.g., id. at 499.
98. Id. at 428-30.
99. Id. at 430-35.
100. Id. at 502.
101. Id. at 490.
criticizes the existing order without suggesting anything other than vague or utopian speculations to put in its place. Fourth, CLS fell "on its own sword" when it relied on the "rights" it had criticized to protect its own from losing their jobs; as well as when feminist and critical-race movements emerged in turn to critique CLS for its critique of rights, its neglect of their own distinct experiences and agendas, and its institutionalization as another bastion of white male privilege.

As one who has been associated with CLS since its beginning around 1977, and who has spent a ridiculous amount of time trying to explain its ideas, I can't evaluate Duxbury's arguments very dispassionately. The reader is entitled to take what I say about this chapter at a discount. But I would still like to use this review to offer up a counterview or antidote to Duxbury's theses, in the (probably vain) hope of preventing his history of this movement, backed by the authority of his evident tremendous learning, from hardening into orthodoxy.

1. The Futility of the American Left

In a staggeringly condescending section (that could easily have been written in the 1950s, the high point of "end-of-ideology" consensus history in the United States), Duxbury dismisses the entire history of American radicalism as pathetic and ineffectual. Such small successes as it had in promoting working-class causes only strengthened workers' attachments to individualism and capitalism. Isolated politically, unable to find allies in the wider society, occupied by Herbert Marcuse's critique of capitalist consumerism rather than with real social evils, the "New Left" intellectual radicals of the 1960s confined themselves to finding and protesting evils within the university. CLS is, with some qualifications, an extension of New Left politics, and has suffered from the failures and follies to which American radicalism is doomed.

It is easy to trivialize the American "left" if like Duxbury you equate it with European socialism and make achievement of a proletarian revolution the criterion of its success. To do this you have to ignore all the indigenous forms of radicalism—artisinal and workingmen's republicanism, abolitionism, agrarian populism, industrial unionism, and the black civil rights, women's, and farm labor movements, to name just a few—and their cumulative impact on the forms of economic and social life. If having taken account of these you still conclude as Duxbury does that all these movements only "bolstered rather than undermined the dominant political and economic values of American society," you would surely have to allow that they had considerably changed the meaning of what it means to apply those values in practice. A society like the
America of 1800, in which most enlightened persons supposed that the equal rights to life, liberty, and the pursuit of happiness were fully compatible with slavery for blacks, extinction of legal personality for married women, prosecution as criminal conspiracies for labor unions, and restriction of suffrage to propertied white males, might be said to have subscribed to the same "dominant values" of liberal-democratic capitalism as the society of today. But they are rather different societies: The forms of subordination and exclusion that then seemed necessary to the realization of free and equal citizenship now seem totally to contradict it.

Duxbury's deflating account of 1960s leftism seems particularly ironic at a moment when Newt Gingrich and other conservatives are blaming everything they dislike about contemporary society on the "counterculture." The overgrown regulatory state; the corruption of the poor by welfare; the distortion of equal opportunity by special preferences; the decline of the family, reversal of sex roles, legitimation of gay and lesbian lifestyles, and spread of pornography and violence in mass culture; the secularization of public life, the decay of patriotism, and the vogue of multiculturalism; environmentalist extremism that threatens property rights and wealth creation—all of these, the conservatives say, we owe to the 1960s' radicalism. Does the truth "lie somewhere in between" Gingrich's paranoid fantasy of a radical takeover and Duxbury's dismissal of any radical influence? Not really; it lies elsewhere entirely, in a plausible history.

Duxbury's story of the radicals' retreat into university politics in the wake of the collapse of outside social movements fits the 1980s much better than the 1960s, which—is it really necessary to recall?—was a period of extraordinary social activism on the left, including most definitely a left consisting of students and lawyers. Duxbury refers fleetingly to the "civil rights struggles and the anti-war demonstrations" and the war on poverty, but only as events on the "outside" to which student radicals responded by trashing their universities. Who does he think were in those struggles and demonstrations, working in the Office of Economic Opportunity Legal Services and California Rural Legal Assistance, participating in "consciousness-raising" feminist workshops, helping farmworkers organize boycotts, organizing the welfare rights movement demonstrations, bringing test cases on behalf of women, aliens, the illegitimate, the inmates of prisons and mental asylums? The origins of CLS owe nothing, so far as I'm aware, to Herbert Marcuse, but a great deal to these social change movements and to their palpable achievements, as well as to the ferocious resistance they provoked.

The crucial lesson learned from all this ferment was that apparently frozen practices and beliefs—including legal practices and beliefs—can suddenly become plastic and alterable, neither because of changes commanded from the

108. Id. at 430-35.
109. Id. at 436.
centers of power nor vanguard conspiracies organized from below, but from
thousands of local actions in churches, workplaces, fields, families, relation-
ships, and schools, coalescing into broadly transformative sea-changes. The
extraordinary changes in racial relations and perceptions, in the roles and
relations of men and women, and in beliefs about the appropriate relation of
humans to their natural environment are only the most dramatic legacies of
these movements. CLS was in some part an attempt by young law teachers and
practitioners to weave this experience of plasticity—as well as the savage
backlash it provoked—into a reworked understanding of a legal process whose
orthodox interpreters kept insisting was not possible to change in any major way.

Duxbury strongly recalls that orthodoxy in his claim that a basically unalter-
able American value consensus (liberal exceptionalism) fixes the outer bound-
daries of possible social change, and that trying to achieve radical change
through the doctrinal and procedural resources of a basically unalterable legal
process founded on that consensus is therefore a contradiction in terms. 110 If
you try to work through the system, you will be swallowed up by the system. It
was precisely this tragic-complacent centrist inevitabilism—along with the
right-wing inevitabilism that collective efforts to alter outcomes of market
forces through law will invariably be futile or self-defeating, and the left-wing
inevitabilism that actions taken within the framework or “logic” of bourgeois-
capitalist (or “racist” or “patriarchal”) legalism will invariably only reinforce
the legitimacy of that framework—that CLS was determined to challenge. Its
basic argument was: “And yet it moves!”

2. The Absurdity and Obviousness of the “Indeterminacy” of Law

According to Duxbury, the CLS claim of the indeterminacy of law is absurd
because most cases are easy cases whose resolution under prevailing legal
doctrines is pretty much a foregone conclusion; it is also obvious because
everyone except the most nutty formalist will concede that some cases are hard
cases that will require discretionary—“political” if you like—choices among
competing principles, policies, or lines of precedent. (I think this is how
Duxbury would argue this point, though it’s hard to be sure because he doesn’t
argue it for himself.) Like the legal realists before them, CLS writers used
examples from dozens of doctrinal and policy fields to try to show how the
divisions of principle or policy in the hard cases were deep fault lines that ran
through the easy ones as well, so that any easy case could be made a hard one
by calling on the conventional resources of legal argument within the field. CLS
scholars also tried to generalize the divisions into broad categories of opposi-
tional forms of argument or social visions—rules versus standards, Hobbesian
individualism versus Durkheimian social interdependence, voluntary versus
socially determined choices. They tried to demonstrate how as legal decisionmak-
ing moves from one topic, context, or historical period to the next, it draws first

110. Id. at 501-02.
upon one polar form of argument and then upon its opposite, on each occasion
privileging one set of arguments and suppressing the alternative set. Finally,
they sought to inventory the devices that are commonly used to “mediate” the
contradictions and keep the alternatives out of sight or contained in tiny side
compartments. But, the argument continued, the suppressed pole always lurks
just beneath the surface, perpetually suggestive of alternative forms of social
life, ready to be awakened in contingent changes of circumstance or political
mood that may, gradually or suddenly, make the alternatives plausible and
practical.

The political stakes of ordinary law, if these arguments were correct, were not
trivial and incremental, but potentially enormous. This was not a claim that
all that was needed to bring about major social change was to have clever law
professors theorize the suppressed alternatives and to have clever lawyers make
the arguments based on them. It was rather that the alternatives were potentially
or immanently present in the commonplace doctrines, policies, and institutional
forms of legal-social life; that in actual fact the alternatives had historically
been or currently were being partially realized in various corners or pockets of
law and society; and, finally, that the thesis that the legal system was inherently
and unalterably conservative was one of “false necessity.”

Now these claims may be all wet as an adequate general description of the
legal system, but the writers who made them sought to show how they played
out in many highly specific fields of doctrine and policy—compulsory terms in
contract law, the construction of “intent” in the general criminal law, PINS
(“persons in need of supervision”) proceedings in juvenile court, quality con-

trol in welfare administration, tax deductions for charitable contributions and
vacation homes, the public-private distinction in labor law, tortious interference
with freedom of contract, plant closings, and cost-benefit analysis of entitle-
ments, to mention just some of these. It seems to me that anyone who wants to
show the fallacy of CLS’s claims of indeterminacy-based-on-suppressed-
alternatives is going to have to take on—as almost none of CLS’s critics have
ever bothered to do—the claims at the level at which they were made. Duxbury,
just as in his treatment of formalism and legal realism—though not in his
treatment of L&E—just never gets down to this level.

111. I sometimes think British lawyers have trouble taking this claim seriously because they come
from a legal culture where courts don’t seem to have much leeway in decision: judges come from a
very homogeneous profession uniformly trained in conventional readings of precedent; they have no
power of judicial review of legislation; and they certainly don’t have the historical experience American
judges had between 1870 and 1937 of using the doctrines of private common law as the baselines
marking the constitutional limits on permissible legislative change. Even so, if one looks at the record
of British judges in a field such as labor torts, where the courts repeatedly defended what they plainly
believed to be a natural and proper baseline common-law regime against the Labour Party’s statutory
revisions of that regime, one can find examples of situations where the political stakes even of judicial
decisions are both large and visible. See, e.g., Osbourne v. Amalgamated Soc’y of Ry. Servants, [1909]
1 Ch. 163, aff’d, [1910] A.C. 87 (H.L.); J. Lyons & Sons v. Wilkins, [1896] 1 Ch. 811. CLS’s claim is,
of course, that the stakes are often largest where least visible, in the taken-for-granted common sense of
the legal system.
3. CLS’s Failure to Suggest Concrete Constructive Alternatives

Duxbury’s third argument is that CLS trashes the current system without suggesting alternatives. This is the most familiar critique of CLS, but Duxbury has less excuse than most other critics who make this claim because, unlike them, he has actually read a lot of the work that responds to the critique. I really think the critique is just completely wrongheaded. To begin with, the critique assumes something about the status quo that CLS denies, and then asks CLS to perform a feat that many “Crits” think impossible. Recall CLS’s account of “indeterminacy” in legal doctrine and policy and in legal-social practices: it claims that ordinary law-talk misdescribes what it calls the “current system” of law and its role in social life; that there is no system in the sense of a more or less coherent, closed, self-reproducing body of practices; that in every corner of the legal world that you look at carefully, you’ll find multiple and conflicting principles competing for recognition and dominance; and that any sense of closure legal actors feel about the system derives from their success in suppressing its immanent alternatives.

Exactly the same analysis explains how CLS writers often do put forward constructive alternatives to the status quo: the alternatives are developed out of the suppressed poles of principle, policy, and social vision. Duncan Kennedy argues, for example, that contract law contains many doctrines that vindicate “paternalist” and “redistributive” policies as well as “efficiency” policies. He suggests an expansion of those policies into various regimes of compulsory terms, and uses alternative applications of economic theory to explain why these changes need not injure prospective beneficiaries. William Simon contrasts two models of welfare benefits administration: a “standards”-based model run through broad discretion of professional social workers, and a “rule”-based model of micromanagement run through unskilled front-line bureaucrats with no discretion. He shows how, in recent years, rule-based systems have replaced standard-based, and argues that a modified version of the recently-suppressed alternative, “downward professionalization” of the workforce, would be superior in both humanity and efficiency. In other work, Simon develops a model of cooperative organization of production and of housing, using examples from both current and historical cooperative experi-

113. Id. at 608-14.
ments, as alternatives to dominant modes of corporate organization and housing associations. He also expounds a revisionary notion of ethical discretion in law practice, based partly on the historical example of Louis Brandeis’s practice, as an alternative to the current adversary ideology.

Simon is admittedly unusual in the consistency and depth of his commitment to fleshing out alternatives to contemporary practices; but there is plenty of other CLS work that does the same. Duxbury takes notice of none of this work, save Duncan Kennedy’s famous (and, for the way it was seized on as typical of CLS fantasy-thinking, unfortunate) “utopian proposal” for equalizing the status of law schools and the salaries of professors and janitors. He does acknowledge that among the crits, Roberto Unger has done the most to outline a program of social reconstruction, but then says that “[e]laboration of his thesis is inappropriate and indeed impossible here.” If you don’t cite most of a movement’s constructive work and don’t say much about what you do cite, it’s not hard to conclude that there isn’t any!

4. The Eclipse of CLS

Duxbury’s final argument is that CLS thinkers were impaled on their own “critique of rights.” They were denounced as hypocritical for arguing that their own rights against unfair dismissal should be protected against hostile faculties. More important, new schools of thought arose on the legal left, challenging CLS’s premise that social change always has to begin locally, with the situation in which one finds oneself and with the practices one is engaged in daily. But it is a gross distortion to argue that was its exclusive focus. The CLS figure most often accused of unworliday utopian fantasizing, Unger, spent years in his native Brazil writing for daily journals on political topics, doing grass-roots organizing, serving as minister of state government in Guanabara, and running for political office. How many law professors have done more concrete work trying to put their ideas into practice?


119. DUXBURY, supra note 2, at 493.

120. Id. at 480.

121. I don’t completely dissent from one aspect of Duxbury’s critique, that CLS, like other left-oriented movements in the 1970s and 1980s, was unduly focused on university politics and the reform of legal education. I agree partly with this critique even though this focus derived naturally from CLS’s pragmatic premise that social change always has to begin locally, with the situation in which one finds oneself and with the practices one is engaged in daily. But it is a gross distortion to argue that was its exclusive focus. The CLS figure most often accused of unworliday utopian fantasizing, Unger, spent years in his native Brazil writing for daily journals on political topics, doing grass-roots organizing, serving as minister of state government in Guanabara, and running for political office. How many law professors have done more concrete work trying to put their ideas into practice?

122. DUXBURY, supra note 2, at 501.
notably feminist-critical and critical race schools. The race scholars, in particular, argued that the CLS rights-critique was parochial and misguided with respect to the experience of groups whose struggles had historically relied on rights.

Duxbury realizes that both these critiques somewhat missed the point: "The [CLS] argument is not that rights do not matter, but that they are indeterminate." To say, "if you don't believe in rights, you shouldn't have any," is like saying, "If you believe Property is not a natural category but a collective label for a bundle-of-sticks that the legal system selectively picks out for protection in a variety of contexts, you shouldn't be allowed to own anything." Rights have tremendous force as political claims in historical causes both of emancipation (the Rights of Man, the Rights of Property [for all]) and reaction (the Rights of Property [for some]), and an undeniable operational reality in the form of rules and practices. In the United States, for example, your "right" not to be detained by the police without consulting a lawyer operates as a rule that is largely respected by the police and enforced by courts. But rights do not and cannot do the work that liberal legal thinkers hoped they would do as trump claims protecting persons from overreaching by others and the state because rights often conflict, and the conflict cannot be resolved by appeal to rights. This is exactly the point that Duxbury recognizes is at the heart of legal realism, and that he makes against the legal process school's attempt to refound law on "neutral principles."

Moreover, Duxbury seems right to argue that the limited space available for the "left" in American law schools is space that in recent years has been increasingly ceded to race and gender scholarship and multicultural identity politics. Here, as with the chapter on L&E, the reader regrets that Duxbury breaks off the narrative without a fuller description of contemporary trends. He has very little to say about feminism or critical race theory, and almost nothing about later evolutions of CLS into various forms of pragmatic, poststructuralist, and postmodern theory.

CONCLUSION

*Patterns of American Jurisprudence* is a very mixed bag. Its overt thesis (or antithesis) is that it is misleading to tell, as most historians do, the story of twentieth-century American legal thought as a story of "pendulum-swings": successive attempts (most notably and aggressively by the legal realists) to challenge the core notion of liberal legalism—that law, especially adjudication, is for the most part a fairly objective and determinate enterprise distinct from politics—followed by attempts to evade or refute the challenge by re-

---

123. *Id.* at 490.
124. For a sympathetic and thorough treatment of these movements of the 1980s, as well as a much more reliable account than Duxbury's of both early and late CLS, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (1995).
establishing law on determinate nonpolitical foundations, followed by renewals of the challenge and new responses. Yet a somewhat modified version of this story turns out, in spite of what Duxbury protests, to be his own story, albeit one that he tells with a hitherto unmatched volume of learning and richness of detail. In quality, the content is uneven: He has an informative but somewhat misleading chapter on classical formalism; a very rich and interesting but unduly dismissive chapter on legal realism; a brief and useful but seemingly superfluous chapter on Yale policy science; an exceptionally lucid and sympathetic treatment of the legal process school; a highly competent and revealing survey of the Chicago brands of law and economics up until 1980; and finally an unfriendly and ultimately unsatisfactory account of critical legal studies.

Even though I obviously have some quarrels, a few of them serious, with the way Duxbury has handled the extraordinarily demanding and difficult task he has set for himself—acquainting himself with a century’s work in a foreign legal culture and mastering its peculiar preoccupations and debates—I want to make clear that even for Americans who think they know their own legal culture well, this book is an education. It is also immensely fun to read—a treasure house of observation, gossip, insight, and citation. Both for better and for worse, any future discussions of our legal thought, its history, and its structure will have to refer to this quirky, magisterial book and come to terms with its arguments.