Book Review

Modern American Legal Thought

Patterns of American Jurisprudence. By Neil Duxbury.* Oxford: Oxford University Press, 1995. Pp. viii, 520. \$49.95.

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The development of legal thought in America since the Civil War makes a natural subject for study. It makes a good story, too, for readers who are interested in law and who enjoy the interplay of ideas with events. Now, thanks to the English legal historian Neil Duxbury, we have the first book-length version of the story.¹ It is told very well indeed, but that should not prevent Dr. Duxbury from having plenty of successors—the subject is so rich that even his literate, thoughtful, and scholarly 500-plus page treatment is far from definitive.

I

Modern American jurisprudence gains some of its unity from the large historical developments that frame the period. After the Civil War, industry rapidly developed, urban populations increased, the frontier closed, a modern transportation and communications network developed, masses of immigrants arrived, and the United States struggled unsuccessfully with the aftermath of African slavery. As a result, American law had to come to terms with an

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1. G. Edward White covered some of this ground in a collection of essays, and Grant Gilmore and Morton J. Horwitz both said a great deal about American legal thought in books that treat the broader subject of American law. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977), MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* (1992); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* (1978). Dr. Duxbury's book, with its focus on a century of American legal theory, deserves to be called the first book-length treatment of American jurisprudence.

economy built around large corporations and powerful centralized financial markets, with the broad distribution of mass-produced consumer goods, with the social problems of urbanization and large-scale immigration, with industrial labor relations, and with tragic racial divisions.

Another part of the frame is supplied by a more parochial development: the establishment of the modern American system of legal education. Under Christopher Columbus Langdell's model, instituted at Harvard in 1870, most American lawyers enter the profession by way of postgraduate study in a university-based law school staffed by full-time career teachers who are expected to write as well as teach. Of course the existence of a guild of teacher-scholars paid to write about law does not guarantee that the development of a nation's legal thought will make an interesting story. Much professional legal scholarship simply catalogues legal doctrine for the use of lawyers, judges, students, and teachers, and lacks theoretical interest or political significance. But American law professors have as their object of commentary the legal system of the most law-permeated and court-centered society in history. By the time the modern law school arrived on the scene in 1870, American judges had already established both their power of constitutional judicial review and their habit of freewheeling common law judicial legislation, and so could hardly have failed to play a large role in the nation's legal transition to modernity.

The judges did not let the chance pass by, and the new guild of law professors were not shy about offering them advice and criticism. In the newly founded university law reviews, scholars found a regular outlet for a kind of writing that aimed to influence lawyers and judges without being so practical as to justify commercial publication. As a result, American legal literature was never segregated between purely professional writing on the one hand and theoretical academic scholarship on the other. What emerged instead was a mixed genre combining practical commentary and advocacy with theoretical arguments about the proper roles of courts and legislatures, the relation of public policy to individual rights, the requirements of the rule of law, and (reflexively) the nature of legal inquiry. The twists and turns taken by legal scholars writing about these questions provide the stuff of modern American legal thought.

II

In a course I teach on this subject, I organize the developments of the first century of the modern period (1870–1970) into four schools of thought: Classic, Progressive, Realist, and Process. Each of these approaches to law had its moment, and the main ideas of all are still alive today, if only in some cases as negative precedents to be avoided. The scene since 1970 is more chaotic, partly because we are in the middle of it, but also because theories

have proliferated as legal scholars have become more self-consciously theoretical. It might help if I sketch my own understanding of the sequence before I comment on Duxbury's treatment.

A. *The Classicists*

A good story requires a strong beginning, and this is provided by the Classical legal thought that arose, without much conscious theorizing, at the beginning of the modern period in the United States. The Classical legal thinkers supplied the fundamental negative precedent, a set of satisfyingly extreme dogmas against which their successors could define themselves by rebelling. The prototype of Classical thought, Langdellian legal science, was perhaps the purest kind of legalism on record. A more old fashioned group of jurists promoted the kind of laissez-faire constitutionalism epitomized by the Supreme Court's decision in *Lochner v. New York*.² The basic plot line of American legal modernity has been drawn from the responses to Langdell and to *Lochner*.

Langdell and his academic allies at Harvard and elsewhere promoted a vision of law that seemed tailored to the new university-based model of legal education.³ The Langdellians treated law as an intellectual discipline independent of theology, moral philosophy, economics, or political science, one that involved the application of scientific methods to common law materials. Langdellian legal science was not only academically ambitious, but also, despite its apparently unworldly character, had impressive practical advantages. After the collapse of the common law writ system, it delivered to American lawyers and judges a new classification and formulation of private law doctrine. As a pedagogy, it sorted law students out according to their facility in quickly making analogies and distinctions among fact situations, which tracked the analytical abilities needed in the corporate and financial work that had become the mainstay of big-city practice. Finally, Langdellism supplied to a conservative bar and bench a classically liberal (which by that time meant politically conservative) legal ideology, providing an up-to-date scientific basis for the common law system's emphasis on the protection of property and on freedom of contract.

Langdellian legal theory has sometimes been treated as an intellectual joke, but it was in fact a relatively coherent jurisprudence that emphasized three qualities many desire in a legal system. First, law should be *formal*, producing outcomes by the application of rules to facts without any intervening exercise of discretion. Second, law should be *systematic*, its rules descending

2. 198 U.S. 45 (1905).

3. The account of Langdellian legal science given here is a short summary of Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

deductively from a small number of coherently interrelated fundamental concepts and principles. Third, the resulting system should be *autonomous*, its principles derived from distinctively legal materials, not resting on politically or philosophically controversial claims or methods.

The first desideratum, the formal realizability of legal outcomes, is a goal common to many legal theories. But the Langdellians linked formality to systematicity and autonomy in a way that made theirs the most formal of formalisms. Langdell illustrated the character of his legal thought in his explanation of why a contract by mail could not possibly be formed when the acceptance was sent (the now-familiar mailbox rule), but only when it was received and read. An acceptance had to serve not only as an objective manifestation of the offeree's intent, but also as a promise; otherwise no consideration would support the contract. The offeree could indeed objectively manifest intent to accept by mailing the acceptance, but because a promise by its nature had to be communicated, there could be no consideration until the letter was received and read by the offeror.

Langdell insisted on the logical necessity of this conclusion, which in his view rendered "irrelevant" any argument that the mailbox rule was fairer or better served the interests of the parties.⁴ The mailbox rule would fail the requirement of systematicity, which required that legal rules must follow from a few fundamental principles rather than from any weighing of practical and moral considerations. Because arguments of justice and convenience were extralegal, they could not be invoked to justify an anomalous rule without violating the requirement of legal autonomy.

The claim that justice, efficiency, and indeed everything but the internal conceptual logic of the system were "irrelevant," dramatized the Langdellian legal scientist's principled neglect of the facts of human nature and culture; all the data of legal science were "contained in printed books,"⁵ the appellate reports in the law library. Believing that this austere positivistic approach could only be applied in its full purity to substantive private law, the Langdellians adamantly excluded procedure, legislation, and even public law from the purview of their scholarship and from the core law school curriculum.⁶

The public-law form of Classical thought, laissez-faire constitutionalism, was promoted by an important group of less resolutely pure and scientifically modern legal commentators who fell outside the orbit of Langdellian legal science. The 1868 treatise by law professor and judge Thomas Cooley,

4. See C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 20-21 (photo. reprint 1980) (2d ed. 1880).

5. Professor Langdell, Speech at the 'Quarter-millennial' Celebration of Harvard University (Nov. 5, 1886), in 3 LAW Q. REV. 123, 124 (1887).

6. See FRANK L. ELLSWORTH, LAW ON THE MIDWAY 67 (1977); Grey, *supra* note 3, at 34.

Constitutional Limitations,⁷ helped give the laissez-faire constitutionalist movement doctrinal formulation, and commentators like John Norton Pomeroy, John Dillon, and Christopher Tiedeman sustained that movement as it worked to overcome the traditional American judicial deference to regulation by state legislatures.⁸ Often using an old-fashioned natural-rights language that Langdellians rejected as unscientific and legally impure, the Lochnerians elevated the core of the private law of property and contract to higher-law status.⁹ After percolating for some years in the state courts and in treatises and dissenting opinions,¹⁰ laissez-faire constitutionalism was nationalized around the turn of the century by the United States Supreme Court in *Lochner v. New York* and other decisions.¹¹

B. *The Progressives*

The next chapter was written by the promoters of Progressive Jurisprudence,¹² which flourished between the late 1890s and early 1920s and maintained its influence through the New Deal. The movement took its philosophical inspiration from American pragmatism, its politics from the Progressive movement, and much of its vocabulary from the emerging social sciences. It began with Oliver Wendell Holmes's pragmatist critique of the Langdellian vision of law as an autonomous logical system in which considerations of fairness and utility were irrelevant. "The life of the law has not been logic: it has been experience,"¹³ he famously responded, and later

7. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (photo reprint 1972) (1868) Cooley picked up and generalized the emerging tendency of mid-nineteenth-century state court judges to adapt older doctrines protecting vested property rights into a new activism on behalf of classical liberal principles of freedom of contract and formal equality.

8. See generally CLYDE E. JACOBS, LAW WRITERS AND THE COURTS (1954) (examining writings of Cooley, Tiedeman, and Dillon); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW (John Norton Pomeroy ed., 2d ed. 1874) (1857) (containing additional notes and commentary by Pomeroy).

9. See, e.g., CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 80-81 (photo reprint 1974) (1890) (noting "extraordinary demands of the great army of discontents" for social legislation and "applaud[ing] the disposition of courts to seize hold of" natural law doctrines to protect classical liberal principles against such socialistic legislation).

10. See JACOBS, *supra* note 8, at 1-85 (surveying cases and treatises).

11. See, e.g., *Smyth v. Ames*, 169 U.S. 466 (1898) (affirming authority of judiciary to determine reasonableness of railroad rates).

12. It was awkwardly dubbed "Sociological Jurisprudence" by Roscoe Pound in his famous speech, *The Need of a Sociological Jurisprudence*, 31 A.B.A. REP. 911 (1907). The title has generally stuck, but today it has the seriously misleading implication that the adherents of this school were devoted to what would now be called "sociology of law." Pound meant "social" rather than "having to do with sociology," and when Cardozo said that "the method of sociology" was the master method of judicial decision, he was speaking of decision according to the judge's conception of social welfare. See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921).

13. Oliver Wendell Holmes, *Book Notice*, 14 AM. L. REV. 233, 234 (1880), reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 103 (Sheldon M. Novick ed., 1995) [hereinafter COLLECTED WORKS] (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879) and WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT (1879)).

urged that "[t]he true science of the law . . . consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition."¹⁴ Roscoe Pound and Benjamin Cardozo were the most important of the many jurists who followed Holmes in seeing law as an instrument for the conscious pursuit of social welfare, an instrument whose master term was policy rather than principle, whose master institution was the legislature rather than the courts, and whose servants should devote themselves to social engineering rather than doctrinal geometry.

The pragmatists had argued that the primary process of human thought was instrumental problem solving rather than detached speculation, and Progressive jurisprudence recharacterized law and legal thought in the same spirit. First, law itself was no longer idealized as an abstract and autonomous system of norms, but was seen as a means to an end, a socially embedded and purposive set of activities aimed at satisfying human wants collectively expressed as public policies. In Cardozo's words, "[t]he final cause of law is the welfare of society."¹⁵ Second, the Progressives retained but reinterpreted in pragmatist fashion the structure of abstract legal concepts and principles that had been the primary focus of Classical legal thought. No longer conceived as essences and axioms, these were now seen as pointers and guidelines meant to help decisionmakers resolve social problems in light of public policies. If the mailbox rule served the contracting parties, the principle of consideration was flexible enough and the concept of a promise fuzzy enough to allow convenience to prevail.¹⁶ "General propositions do not decide concrete cases," as Holmes said—though he added that a sound general principle can "carry us far toward the end."¹⁷

The Progressives saw technological and industrial innovations as social advances, but advances that required intelligent collective action to ameliorate their harmful side effects. The legal version of Progressivism adopted the social theory and the politics of the movement.¹⁸ Change had become too rapid to be dealt with any longer by the glacial and unconscious process of case-by-case common law adaptation. Scientific legislative reform, guided by experts pursuing shared public values, had to replace analogical judicial reasoning from precedents at the center of the legal process. Judicial resistance to democratic reforms was retrograde, whether it took the aggressive form of

14. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899), reprinted in 3 COLLECTED WORKS, *supra* note 13, at 406, 412–13.

15. CARDOZO, *supra* note 12, at 66.

16. See OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881), reprinted in 3 COLLECTED WORKS, *supra* note 13, at 109, 271 ("If convenience preponderates in favor of either view, that is sufficient reason for its adoption. So far as merely logical grounds go, the most ingenious argument in favor of [the received-and-read rule] is Professor Langdell's.").

17. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

18. Holmes was not a Progressive in his private political opinions, but as a jurist he believed that the dominant forces in the community should have their way, and, to his mind (after about 1895), this meant Progressivism.

laissez-faire constitutionalism or stemmed from Langdellian inattention to legislation and obsessive focus on the details of private law doctrine. The "mechanical jurisprudence" of the Classical thinkers misrepresented the nature of law in the service of reactionary politics.¹⁹ Courts should defer to legislatures in constitutional cases, should ascertain and promote legislative purpose in interpreting statutes, and should draw on the policies reflected in statute law to sublegislate the fields left by legislatures to common law development.²⁰ If freely elected and guarded against corruption by special interests, legislators could be counted on to reflect the consensus values of an essentially unified popular sovereign.²¹

In pursuing the reform agenda, the legal Progressives believed that lawyers had to learn the facts about society.²² Designing legal doctrines and institutions to meet public needs required lawyers to become "social engineers," systematically investigating social problems, familiarizing themselves with the available methods of reform, and testing whether these had the intended effects. Progressive lawyers wrote "Brandeis briefs" compiling evidence on the adoption and effectiveness of social legislation in other industrial countries to show courts that these were indeed reasonable (hence constitutional) exercises of the police power,²³ and argued for the relaxation of laissez-faire constitutional restrictions on social reformist legislation on the ground that this would allow the states to serve as "laboratories" of reform.²⁴

Langdellian legal science and laissez-faire constitutionalism both survived the Progressive era, however, and the 1920s found old Classical jurists uneasily sharing control over American legal thought with middle-aged Progressives. The legal establishment founded the American Law Institute in 1923 with the Progressive Benjamin Cardozo as its first president, and launched its Restatement of Contracts with the Langdellian Samuel Williston as reporter and the Progressive Arthur Corbin as his assistant. A Supreme Court headed by the laissez-faire Chief Justice William Howard Taft continued

19. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-06 (1908).

20. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (arguing that courts ought to play limited role at intersection of common law and legislation); see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (emphasizing interstitial nature of legislation by judges).

21. The assumption of consensus was reflected in the little attention paid by the Progressives to questions of minorities and their rights against majoritarian prejudice and neglect; for the Progressives, rights against the majority meant rights of property and freedom of contract.

22. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), reprinted in 3 COLLECTED WORKS, *supra* note 13, at 391, 399 ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.").

23. In *Muller v. Oregon*, 208 U.S. 412 (1908), the Supreme Court relied for the first time on this type of fact-filled brief submitted by then-Mr. Louis D. Brandeis in defense of protective labor legislation for women. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 450 n.1 (12th ed. 1991).

24. See *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (deploring use of Fourteenth Amendment "to prevent the making of social experiments in the insulated chambers afforded by the several states").

to invoke liberty of contract to strike down reformist state legislation, over the opposition of the constitutional Progressives Holmes, Louis D. Brandeis, and Harlan F. Stone.²⁵

C. *The Realists*

Into this scene, a younger generation of legal theorists brought a second wave of modernist jurisprudence, Legal Realism. The Realists carried on the Progressive jurists' critique of Langdellian legal science and shared both their desire to bring the methods of social science to the study of law and their generally favorable attitude toward government regulation of the economy. But despite these similarities, Realism was very different in emphasis and spirit from Progressive jurisprudence. The Realists shifted the focus of legal study back from legislation to the judicial process, particularly the common law process in private law cases, but with an iconoclastic and revisionist account of what judges did and how they did it.

The Langdellians and Progressives had worked together on the project of systematically formulating the common law in terms of broad substantive concepts and principles, something that all tacitly agreed was required by the collapse of the traditional procedure-based writ system. Reformers like Holmes, Corbin, and John Henry Wigmore as well as Classicists like Langdell, Williston, and James Barr Ames had helped to classify private law into tort and contract, organized around concepts like duty and negligence, and offer, acceptance, and consideration.²⁶ Although the Progressives saw the principles and legal categories as guidelines and pigeonholes rather than the axioms and essences of Classical legal thought, they agreed with the Classicists on the utility of the systematizing project.

The younger generation, faced by the conceptual edifice their elders had built, turned against the project of legal architecture itself. They thought that the principles and concepts used to state the law in the treatises and the Restatements served neither to guide action nor to predict outcomes. The Realists argued that the operative rules of the system, concealed behind the official rhetoric of abstraction, were based on narrow type situations and real-world activities.²⁷ For example, a Realist contracts scholar pointed out that

25. See, e.g., *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (invalidating New York law regulating prices of admission to theaters and other places of amusement); *Adkins v. Children's Hosp.*, 261 U.S. 525, 559 (1923) (invalidating law establishing board to fix minimum wages for women and children in District of Columbia); *Truax*, 257 U.S. at 328 (invalidating Arizona statute protecting employees' right to picket).

26. On the conceptually systematic work of the Progressive pragmatists, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 824-25 (1989).

27. See, e.g., Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931) (defending Realism against criticisms leveled by Dean Pound); Herman Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCH. REV. 215 (1927) (urging scholars to classify human situations for legal treatment in order to reinvigorate doctrine of stare decisis); Max Radin, *The Theory of Judicial Decision: Or, How Judges*

in the special context of life insurance policies, courts sometimes treated contracts by mail as formed even before the acceptance was mailed;²⁸ another Realist attacked the effort to formulate a general test for what degree of preparation constituted a criminal attempt, urging that the cases showed this differed as the substantive crime and the practical context shifted.²⁹

For the Progressive notion of judges as subordinate legislators, ideally consulting principle in the light of policy to fill in the gaps left between rules laid down by statute and precedent, the Realists substituted the idea of judges as arbitrators, whose social function was to keep the peace by resolving potentially disruptive disputes.³⁰ Not only did the Realists find the general and distinctively legal concepts and principles found in treatises and Restatements hollow and indeterminate, rhetorical rather than operative in their significance, but they also made the same criticism of the equally general "policies" and "interests" relied on in Progressive legal theory. They believed that the important influences on judicial decisions were the procedures under which they were reached³¹ and judges' often unconscious sense of how disputes fit into the web of habitual and customary practice.

Like their predecessors, the Realists hoped for progress through social science, but they had in mind progress in the *study* of law rather than in the law itself. Judges were not to be the consumers, but rather the objects, of behaviorally oriented social science investigations designed to correlate "stimuli" (the facts of cases) with "nonverbal judicial behavior" (the outcomes of those cases) and to uncover the unconscious roots of the "hunches" leading judges to their decisions.³² These studies might lead indirectly to improvements in the quality of legal decisions, but only by inducing judges to disregard formal and systematized abstractions and to go with the unconscious flow of practice-based intuition.³³

So while there was much iconoclasm about received legal pieties and a consequent air of radicalism in many Realist writings, the practical thrust of

Think, 11 A.B.A. J. 357 (1925) (arguing that legal experience furnishes mind with many type situations or categories to which new situations are naturally assimilated).

28. See Walter W. Cook, *Williston on Contracts*, 33 ILL. L. REV. 497 (1939) (reviewing SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (rev. ed. 1938)).

29. See Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930).

30. See JEROME FRANK, *LAW AND THE MODERN MIND* 157 (1930) (describing judge's most important role as that of arbitrator); K.N. LLEWELLYN, *THE BRAMBLE BUSH* 2-5 (1930) (explaining why law is not about rules simpliciter, but about disputes).

31. See Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 642-47 (1932). Charles Clark, the Realist Dean of the Yale Law School during the 1930s, was the primary author of the Federal Rules of Civil Procedure.

32. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 274-81, 287-88 (1929) (offering personal experience of respected federal district court judge as direct testimony in favor of Realism); Oliphant, *supra* note 27, at 228-29 (calling for scientific study of judges' "nonvocal behavior," i.e., "what the judges actually do when stimulated by the facts of the case before them").

33. See Radin, *supra* note 27, at 359-60, 362.

Realism was narrow (in its focus on the judiciary) and in many respects conservative (in its deference to habit and custom) when compared to Progressive legal theory. In the domestic politics of their day, the Realists did provide ideological ammunition to the New Deal with their diminished portrait of the judiciary as a dispute resolution bureaucracy whose rhetoric had little to do with its actual decisions. By thus undermining the prestige of the courts, they gave important support to President Franklin Delano Roosevelt's Court-packing assault against the rear guard of laissez-faire constitutionalism.

But only in that respect did the Realists live up to their reputation as the jurists of the New Deal. They abandoned the Progressives' focus on legislation, on legislative policies as guides for judges, and on social science as a source of facts to be used by reformist lawmakers, just when these considerations had become most salient to lawyers and judges. As a consequence, the working legal theory of most of the lawyers who marched from under Felix Frankfurter's wing to draft the statutes and staff the agencies of the New Deal was not Realist but Progressive.³⁴

D. *The Process Jurists*

Frankfurter was an important progenitor of the school that dominated American legal thought from World War II until the late 1960s. Three elements defined the Process approach: focus on the rule of law as a value essential to the preservation of liberal democracy; support for the New Deal and the modern administrative and welfare state; and doctrinal emphasis on jurisdiction and procedure as against substantive law.

Up to the mid-1930s, the ideal of the rule of law was closely associated with laissez-faire constitutionalism and with the conservative defense against the advance of the administrative state. As a result, Progressives and Realists had made no effort to reinterpret for their own purposes what they perceived as a partisan and reactionary concept. But a number of events reinstated the concept of the rule of law in the affections of liberal reformers and thus set the stage for the emergence of Process jurisprudence.

First, F.D.R.'s Court-packing proposal troubled many liberals who otherwise supported the New Deal; to them, an independent court system still mattered, even in the face of the Supreme Court's retrograde defense of laissez-faire and states' rights constitutionalism.³⁵ Then, when death and retirement finally produced a New Deal Supreme Court, a new liberal rule-of-law agenda began to emerge, as the Court signaled its willingness to expand the ideal of equal justice under law to society's outcasts and underdogs, its

34. See WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 136-47 (1982).

35. See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 74-77 (1938).

"discrete and insular minorities."³⁶ Finally, the Nazi and Stalinist use of secret police and a subservient political judiciary to institute state-sponsored terror increasingly dramatized the centrality of due process and legality to liberal democracy, and put Progressive and Realist jurists whose theories neglected or seemed to undermine these values on the defensive.³⁷

The Classical and laissez-faire version of the rule of law had emphasized deduction of substantive private rights of property and contract from broad yet determinate general legal principles. The New Deal liberals, heirs to the Progressive and Realist critique of formalism, did not accept that the judicial process was confined to the deduction of clear legal rules from a few basic principles and the application of those rules to facts in order to produce results. Like the Progressives, they saw law as a mix of principles and policies, rules and standards, and they believed that adjudication required trained judgment, not simply logical acumen.³⁸ But for them, this did not mean that adjudication was interstitial legislation (the Progressive view), or intuitive dispute resolution in the light of unconsciously absorbed custom (the Realist view). What marked adjudication off from more political forms of decision was a process of articulate, reasoned elaboration of the varied and flexible norms of the system by judges who were inculcated with craft standards and dedicated to resisting the temptations of political partisanship. Though not purely logical in nature, this process of decision based on articulate justification was sufficiently constraining to allow effective criticism of judges on rational (nonpolitical) grounds, and it was the filtering of the output of the political system through this process of impartial reasoning that put government under the rule of law.³⁹

The Progressive influence was evident in the Process jurists' rejection of both Classical formalist judicial method and laissez-faire private rights as the foundation of the rule of law. Their New Deal side was also apparent in the special attention they devoted to the characteristic institutions of New Deal lawmaking—the regulatory statute and the independent administrative agency. In the Process view, legislatures acted legitimately when they implemented public policies that had strong public support, even when in doing so they

36. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that "more searching judicial inquiry" may be required into legislation directed at such minorities).

37. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 159–78 (1973) (describing effect of totalitarianism on Realism).

38. Compare Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 950–57 (1923) (on value of intuition and importance of policy in judging), with HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS* 138–43 (1994) (mimeo 1958) (on complex interaction of principles, rules, policies, and standards in judging).

39. See HART & SACKS, *supra* note 38, at 145–52 (arguing for reasoned elaboration of reasons for courts' decisions); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72 (1978) (arguing that rationality of law is procedural in nature); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that legal principles enunciated by courts should be politically neutral).

modified traditional private rights of property and contract. Courts were no longer to construe reform legislation narrowly insofar as it was "in derogation of the common law," but broadly in light of the public-spirited purposes attributable to the reasonable legislator.⁴⁰ Process jurists found a new jurisprudential niche for independent administrative agencies, which were properly given broad regulatory discretion over areas of economic life whose governance required specialized expertise and continuous supervision. Agencies should be subjected to the rule of law on questions of procedure, but on substantive matters, judges should defer to agency expertise.⁴¹

Finally, the Process jurists did for American jurisdiction and procedure what the Classical legal thinkers had done for substantive private law—they reduced it to a doctrinal system. Process school writers worked hard to bring conceptual order to such subjects as administrative law, which meant administrative procedure and judicial review of administrative action,⁴² and federal jurisdiction, which meant the relationship between the federal courts and the other institutions of government.⁴³ In the Process jurists' eyes, these subjects were not merely the technical and practical housekeeping side of the legal system; instead, they demanded serious and systematic theoretical attention and the elaboration and application of a structure of principles governing the relationship between the legislative, executive, and judicial branches as well as between state and federal governments.

The most flourishing years of Process jurisprudence coincided with the heyday of the Warren Court. On the Supreme Court's new project of reinterpreting the Constitution with a tilt toward the underdogs, the Process jurists were divided. Most of them followed Felix Frankfurter in rejecting liberal activism as simply the mirror image of the conservative activism of the old Court, equally partisan and no more consistent with the conception of a nonpolitical judiciary dedicated to upholding the rule of law.⁴⁴ A minority of Process thinkers took up the suggestion first planted by another old Progressive, Justice Harlan Stone, shortly after the ascension of the New Deal Court;⁴⁵ these writers argued that the rule of law in a democracy required active judicial correction of the tendency of a majoritarian political system to

40. See HART & SACKS, *supra* note 38, at 1374–80 (arguing that courts should consider legislative purpose in interpreting statutes).

41. See *id.* at 165–67 (describing judicial deference to administrative agency decisions).

42. See generally KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958) (systematizing administrative law); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965) (systematizing administrative process).

43. See generally HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953) (systematizing law of federal courts).

44. See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Wechsler, *supra* note 39; see also Henry M. Hart, Jr., *Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

45. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

undervalue the interests of minorities, dissenters, and the downtrodden.⁴⁶ This division presaged a more far-reaching breakup; by the late 1960s, the remarkable sway that Process jurisprudence had held over postwar American legal thought was about to come to an end.

E. *The Battle of the Schools*

The intersection of a growing administrative state with the American tradition of adversarial legalism made for enormous growth during the 1960s in the size of the legal profession, and concomitantly in the number of law professors. The influx to law schools of many students (and eventually teachers) with graduate training in other academic subjects stimulated a fashion for interdisciplinary legal scholarship. At the same time, the Warren Court's activism, in conjunction with the liberal agenda of the civil rights and antipoverty movements, led many young lawyers and law professors to believe that reformist courts and movement lawyers could bring about large-scale egalitarian social change. The more ambitious of these hopes were disappointed, creating on the Left a mood of impatient frustration with traditional liberal reformism, and giving birth to a radical legal movement. In the same years, laissez-faire ideas were reinvigorated on the Right, in reaction against two generations of the growth and centralization of state power.

The interplay of these currents gave rise in turn to three tendencies observable in legal thought at the beginning of the 1970s. First, influenced politically by the civil rights movement and intellectually by the revival of rights-based moral and political philosophy,⁴⁷ liberal legal theorists shifted the case for judicial activism from the cautious process-based theories of the post-New Deal tradition to a more aggressive and substantive approach. The Law and Moral Philosophy movement portrayed judges as practical philosophers whose job was to define and enforce rights as trumps over the policy compromises reached by the ordinary political system of legislation.⁴⁸

Second, just as some liberals impatient with the pace of reform became radicals and gave birth to the New Left, like-minded legal activists became disillusioned with the results of liberal reformist lawyering and founded the Critical Legal Studies movement. The New Left lawyers drew emotional

46. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRICT* (1980).

47. Most notably, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

48. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 188-91, 198-99 (1977) (arguing that rights are those individual interests based on principle of equal concern and respect that government may not infringe for general utility). The Law and Moral Philosophy school also emerged in more or less conservative-libertarian forms. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981) (applying conservative Law and Moral Philosophy arguments to contracts); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (developing philosophical argument for libertarianism); Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (applying conservative Law and Moral Philosophy arguments to torts).

impetus from the radical movement politics of the Vietnam War period, and intellectual sustenance from twentieth-century developments in European Marxist thought, such as Gramsci and the Frankfurt School, that made the critique of liberal capitalist ideology central to the cause of radical social change. Critical Legal Studies accordingly took up the analysis and critique of the ideology of "liberal legalism" in all its versions: process-based, rights-based, and efficiency-based.⁴⁹

Third, many conservative and centrist intellectuals came to believe that the economy was overregulated, and that regulation was often designed more in the interest of organized interest groups, including the professional classes from whom the lawyers and regulators were drawn, than for the benefit of the consuming public in whose name these regulations were imposed. Intellectually, the Law and Economics movement was driven by the work of Ronald Coase and others, who argued that a free market depended for its optimal functioning upon the ability of the legal system to define entitlements so as to minimize information and transaction costs.⁵⁰ The more centrist lawyer-economists emphasized changes in regulatory practice that would allow better mimicking of efficient markets, while the more conservative ones focused on arguing for the efficiency of the pre-welfare state common law.⁵¹

The proliferation of jurisprudential schools did not stop with these three tendencies. The second American women's movement had a great impact upon law and eventually upon legal thought. Some legal feminists sought to advance the cause of women by arguing in the liberal idiom for rights to equal treatment and nondiscrimination, while others argued that women should bring a distinctive and gendered voice to law, emphasizing care and relationships over autonomy and rights.⁵² Still others joined the Critical assault on liberal legalism, arguing that it was an ideology sustaining not just capitalism and class privilege but also patriarchy.⁵³

The critique of liberal legalism as an ideology has also been extended in recent years by Critical Race Theory to add white supremacy as yet another form of unjust domination protected against radical change by lawyers' theoretical apologetics for the status quo.⁵⁴ Some feminists and Critical Race theorists have promoted narrative—fictional and autobiographical—as an

49. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); *THE POLITICS OF LAW* (David Kairys ed., rev. ed. 1990).

50. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

51. Compare GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (arguing for changes in regulatory practice), with Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (arguing for efficiency of pre-welfare state common law).

52. See DEBORAH L. RHODE, *GENDER AND JUSTICE* 12–14 (1989) (discussing early liberal feminism); *id.* at 59 (distinguishing liberal rights-oriented feminism from radical feminism); *id.* at 308–13 (discussing relational feminism inspired by Carol Gilligan's theory of psychological gender differences).

53. See, e.g., *id.* at 59–61 (discussing radical feminist critique of liberal, rights-oriented feminism).

54. See *CRITICAL RACE THEORY* (Kimberlé Crenshaw et al. eds., 1995).

important form of legal and scholarly discourse.⁵⁵ In this way, their movements have joined with Law and Literature, which, in various modes and from various political perspectives, has argued that literary texts, criticism, and interpretation can enrich the scholarly understanding of law no less than can insights drawn from economics and moral philosophy.⁵⁶ Law and Society urges similar interdisciplinary enhancement of law study from social sciences other than economics.⁵⁷ Public Choice theory extends the methods of economic analysis from the actors regulated by the legal system to the actors who operate that system, analyzing public life on the assumption that legislators and government officials are seeking to maximize private advantage.⁵⁸ Civic Republican theorists argue that preferences and motivations are culturally variable, subject to modification by the way influential social institutions model appropriate behavior, and that law should promote public spirit and cooperation rather than the self-interested autonomy emphasized by classical liberalism.⁵⁹

In this legal world, where each new (and old) theory puts itself forward as the last word on law, it is not surprising that a number of legal intellectuals, mostly of a politically conservative bent, have argued that lawyers should stop theorizing and go back to being lawyers, drawing up rules for the guidance of human affairs, and then trying to see that the rules get applied as written.⁶⁰ This neoformalist tendency says, in effect, "none of the above" to the smorgasbord of legal theories offered by academics in recent years.

In contrast, some other recent legal theorists would consciously revive the older pragmatist tendency in American legal thought and would welcome the competing theories in the spirit, "all of the above." Legal pragmatists argue that while the life of the law has indeed not been theory but practice, nevertheless, well informed practice takes account of the insights offered by the various theories. Lawyers can get practical help from theories if modest and critically minded theorists point out where each would-be grand theory fails to make good its claim to supply *the* truth in jurisprudence, while recasting these theories as perspectives on law, each of which may have something useful to say in context when we understand its limitations.⁶¹

55. For a review of this literature, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

56. See, e.g., JAMES B. WHITE, *JUSTICE AS TRANSLATION* (1990).

57. See LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY* 95-110 (1977).

58. See DANIEL P. FARBER & PHILIP A. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

59. See, e.g., Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

60. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). All of these writers show to varying degrees the direct or indirect influence of the ideas about law found in FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

61. See *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver eds. 1991) (surveying views on legal pragmatism of scholars from various disciplines).

III

Neil Duxbury's narrative skeleton differs from mine on a few points, and of course he adds a lot of flesh to it in his very thorough treatment. Before I turn to his structure and the details of his narrative, let me take up his general strategy. His approach is to sketch the main ideas of the period in fairly general terms, and then to trace their biographical roots, institutional affiliations, and intellectual lineage in some depth, while placing jurisprudential ideas in a broader cultural and intellectual context. He calls his genre "jurisprudence as intellectual history,"⁶² and his book displays the intellectual historian's characteristic virtues and emphases: resistance to schematism; focus on the contingent interactions of ideas with institutions, events, and personalities; alertness to the complications in the way patterns recur and overlap; and suspicion of theorists' claims to originality (he says that "[j]urisprudential ideas are rarely born; equally rarely do they die").⁶³

Duxbury does not claim to have found a single dominant theme or pattern to modern American jurisprudence. He stresses the complexity of his subject and argues that we misunderstand the modern history of legal thought in the United States if we see it in conventionally reductive terms as a simple "pendulum swing"⁶⁴ or "boxing contest"⁶⁵ between formalism and realism. The conventional view portrays the rise of Langdellian formalism as provoking an antiformalist revolt by Holmes and others, culminating in the Legal Realism of the 1930s, which instigated a return to formalism in Process jurisprudence and Law and Economics, which was followed in turn by a realist revival in contemporary Critical jurisprudence, and so on. Rejecting this model of oscillation between formalism and realism, Duxbury tells the story in terms of a number of overlapping patterns and themes, among them the faith in law as reason through principles, the varied efforts to understand law through economics, the attempt to describe the system from the outside using social science, and the recurrent critique of law's tendencies to obscure social division and conflict and to overstate the degree of consensus.

When compared to previous commentators on modern American legal thought, Duxbury is closest in spirit to historians like Laura Kalman and John Henry Schlegel, who seek to embed ideas in a detailed local and institutional context.⁶⁶ He is less inclined than G. Edward White or Morton Horwitz to relate jurisprudential trends to large movements in politics,⁶⁷ and stands at

62. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 1 (1995).

63. *Id.* at 2.

64. *Id.*

65. *Id.* at 471.

66. See LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459 (1979).

67. See HORWITZ, *supra* note 1; WHITE, *supra* note 1, at 99-163, 194-226.

furthest remove from Grant Gilmore's sweeping and impressionistic—almost Hegelian—treatment of the development of American jurisprudence as a kind of spiritual drama.⁶⁸

Duxbury is at his best when, for example, he traces the origins of the Law and Economics movement back to the 1930s and the struggles in the economics department of the University of Chicago—between Progressives (led by Paul Douglas) and free marketeers (led by Frank Knight)—that led to the appointment of Henry Simons as the first economist on the Chicago law faculty, and then via the antitrust teachings of Aaron Director on to the present-day Chicago scene.⁶⁹ In the same spirit, Duxbury gives detailed accounts of how the dispute between Roscoe Pound and Karl Llewellyn⁷⁰ and the choices of Young Smith and Robert Hutchins as deans at Columbia and Yale, respectively,⁷¹ contributed to the origins of Legal Realism. He is equally good at background summaries of intellectual influences, such as his account of the interaction of classical economics and Spencerian Social Darwinism in the background of laissez-faire constitutionalism,⁷² and of the pluralist interest group tradition in political science as part of the context of Process jurisprudence.⁷³

Because Duxbury covers institutional affiliations and intellectual influences in such depth, something has to give. In fact, from my perhaps idiosyncratic perspective, there are no fewer than three things that give. When I set out to introduce law students to the main jurisprudential theories of the past century, I think of myself as addressing, with respect to each theory, these four questions: (1) What was the theory and where did it come from?; (2) What political interests did it serve?; (3) What solutions did it suggest to practical legal problems?; and (4) What was its intrinsic appeal as a set of ideas?

It is mainly the first of these questions that Duxbury poses for himself. No doubt this is the most basic question, and it is certainly reasonable that the first book on this subject should treat it carefully and in depth. Another author might have given equal emphasis to the other questions, leaving some of the detailed tracing of affiliations and influences to more specialized studies. That would have been a different book from the valuable one that Duxbury has written with such labor and skill, and we can be glad that he has stuck to playing his strongest suit. But if only for the sake of incitement to those

68. See GILMORE, *supra* note 1. Gilmore, White, and Horwitz in their quite divergent ways all treat modern American legal thought in terms of a dialectic of formalist and realist tendencies, and thus exemplify the standard view that Duxbury contests. See *id.*, HORWITZ, *supra* note 1, WHITE, *supra* note 1.

69. See DUXBURY, *supra* note 62, at 330–64.

70. See *id.* at 72–77.

71. See *id.* at 83–89.

72. See *id.* at 26–29.

73. See *id.* at 242–50.

scholars who will follow in his footsteps, let me sketch the dimensions of the subject that his approach necessarily slights.

The most distinctive feature of American law has been its deep involvement with American government and politics, and as a result, legal theory in America has always had inescapable political implications. These receive somewhat sporadic treatment in Duxbury's book. He does sometimes attend to politics, especially when the connections with legal theory are unavoidable, as between laissez-faire constitutionalism and late nineteenth-century conservatism, or between Critical Legal Studies and the New Left politics of the late 1960s and early 1970s. In a few other cases, he makes valuable and less obvious observations, as when he discusses the surprising lack of connection between the scholarship of the Legal Realists, so many of whom were New Dealers, and the political program of the New Deal.

But he does not stress the close relationship between the earliest critics of formalism and the Progressive movement; nor does he examine how Process jurisprudence related to the curious combination of prosperous optimism and Cold War anxiety that marked the American politics of the 1950s; nor does he spell out the intimate relations between Ronald Dworkin's rights-based jurisprudence and the liberal activism of the Warren Court, or between Chicago-style Law and Economics and the deregulatory politics of the Reagan-Bush era. In general, he does not seem to keep his eye firmly enough on how the centrality of the judiciary in American politics affects the substance of legal thought. An important dimension of any legal theory in America is whether it augments or diminishes the prestige of judges vis-à-vis legislators; and it is at least a plausible hypothesis that American legal theorists play judges up or down according to whether the theorists agree more with the politics of the judges or the legislators who are their contemporaries. Though this must strike true believers in the autonomy of legal ideas as dreadfully reductionist, I would, nevertheless, like to see score kept along these crude lines in any history of modern American jurisprudence.

A second pragmatic dimension of legal theory is its relation to ordinary legal doctrine and law practice. Most of the important theories addressed in Duxbury's history have had characteristic expressions at the level of doctrine and practical law reform. Because American legal theorists tend also to be commentators on and teachers of practical legal subjects, their theories have typically been worked out in tandem with their responses to concrete legal problems. The resulting practical bias of American jurisprudence has produced a fascinating dialectical relation between theory and practice: The most general ideas both respond to and reciprocally influence the way their proponents deal with more mundane lawyers' issues. Along these lines, one could profitably discuss the relation of Langdellian legal science to the great substantive treatises like Williston's *Treatise on the Law of Contracts*; of Progressive legal thought to the Brandeis brief; of Legal Realism to the Federal Rules of Civil

Procedure and article 2 of the Uniform Commercial Code; of Process jurisprudence to systematizing treatises like Hart & Wechsler's *The Federal Courts and the Federal System*; of Law and Economics to the contractual analysis of corporation law; and so on.

Duxbury does not do much of this kind of thing, but when he does descend to take account of practice and doctrine, his forays prove illuminating. For example, he points out the contrasting approaches to statutory interpretation of the Progressive James Landis and the Realist Max Radin—Landis arguing that judges should be guided by legislative history and the policy behind statutes, Radin arguing that policy and purpose can no more tie judges' hands than can linguistic meaning, so that judges must be free to reach whatever result suits them within the broad limits of plausibility set by the possible meanings of legislative language. Duxbury rightly uses this contrast to illustrate the paradox that the superficially more radical Realist jurisprudence was in practice relatively conservative. As he says, "realism never truly evolved into a jurisprudence of legislation and administrative regulation,"⁷⁴ and its "conservatism . . . rested ultimately in the fact that it remained a private law jurisprudence in a public law world."⁷⁵ Reading only the Realists' familiar general pronouncements on rule skepticism and judicial discretion does not bring this point home; one must look into the actual legal problems that the Realists addressed.

The last question that naturally occurs about a legal theory is how it is experienced by those legal intellectuals who find it appealing. To answer this question, one must step out of the historian's external and explanatory mindset, and approach the theory not as an object of study but as a body of ideas offered for acceptance. This means formulating it in its most attractive light, at least for a present reader who is willing to make some effort to enter imaginatively into the theory's original historical context. The appropriate disciplinary model here is not intellectual history but the history of philosophy, and the aim is not to show how the ideas fit with the events and forces of their time but rather to induce appreciation of the ideas themselves. In this mode, the author or teacher tries to speak for the Classicist, or the Realist, and invites questions from the reader or student along the lines of "How would you deal with this problem?" or "How can you defend against this objection?"

Duxbury is not inclined to this mode. Though he does not rigorously hold to the persona of objective historical narrator, when he speaks with his own voice he does so only to give his present opinion of some aspect of the legal theory he is considering. These personal interventions are lively and congenial, and help the reader understand who Duxbury is and what he thinks. Still, I found myself wishing as I read along that I would hear another voice as

74. *Id.* at 156.

75. *Id.* at 157–58.

well—the present advocate for past thinkers who can no longer adjust their words to respond to the concerns of a present audience, the translator for our time of Langdell, or Roscoe Pound, or Jerome Frank, or Lon Fuller.

But it is unfair to blame an author for writing one book rather than another, much less another two or three. This is especially so when, as in Duxbury's case, the author has already written a very good book of more than five hundred pages. My ruminations on what he has left undone should be taken more as a sketch of possible directions for future scholarship than as a criticism of Duxbury.

IV

Finally, it is worth turning to some of the details of Duxbury's narrative and the interpretations it embodies. His first chapter covers Classical and Progressive thought; his second deals with the Realists; his third takes up Lasswell and McDougal's Policy Science jurisprudence; his fourth deals with Process jurisprudence, which for him includes rights-based jurisprudence derived from moral philosophy; his fifth and longest chapter is an extended discussion of the place of economics in twentieth-century jurisprudence; and his last chapter is concerned with Critical Legal Studies, with brief mention of feminist jurisprudence and Critical Race Theory. He stops short of any discussion of the very influential conservative formalist jurisprudence of recent years;⁷⁶ this is a pity, as it could have nicely rounded off the narrative (from the formalism of Cooley and Langdell to the formalism of Friedrich A. Hayek and Antonin Scalia). But Duxbury has already been bold enough to venture his bet that a number of very recent developments will turn out to be significant, and the line between history and current events is never easy to draw.

In style, Duxbury's account of the thinkers he discusses is readable and jargon-free, and what he has to say is supported by admirably thorough research. The interpretations he offers—both explicitly, by way of judgment, and implicitly, by way of the organization and emphasis of his narrative—are invariably intelligent, and on the whole orthodox. There are, however, a few points where he departs from the conventional wisdom.

The most interesting innovations involve Classical and Realist thought. Standard accounts of late nineteenth-century legal thought written from a jurisprudential perspective tend to put Langdell, Harvard, and legal science at the center of things, while histories of constitutional thought stress the developments leading to *Lochner*. Duxbury has had the good judgment to give equal weight to Langdellian formalism and laissez-faire constitutionalism at the beginning of his story while keeping them distinct. Though I would say a little more than he does about the importance of the commentators (Cooley above

76. See *supra* note 60 and accompanying text.

all) in developing constitutional liberty of contract and would emphasize the premodern natural rights element in this body of thought, his treatment is an advance over what is usually said.

Also noteworthy is Duxbury's somewhat unorthodox treatment of the Realists. I suspect that he might originally have been tempted away from the more sedate precincts of English jurisprudence to the study of American legal thought by the glamorous aura of daring that surrounds these thinkers. But if so, his careful study of their work has led him to a deflationary view of their reputation as legal revolutionaries. The Realist bent for behaviorism, combined with their trust in folkways, shaped their legal thought into an updated version of the old historical school, one more romantic celebration of the grand old common law tradition of unconsciously muddling through. They were neither the dangerous nihilists portrayed by their conservative and Catholic critics in the 1930s and 1940s, nor the progenitors of Critical Legal Studies and its left-radical attack on liberal legalism. In this respect, as in his treatment of Classical thought, Duxbury's departure from conventional wisdom is to his credit.

Some innovations, however, are less successful. Most of my disagreements with Duxbury derive in one way or another from his relatively perfunctory treatment of the Progressive legal pragmatists, who in my view were the source of the mainstream of modern American legal thought.

The most curious feature of Duxbury's book is its emphasis on Policy Science, the school of legal thought promoted at the Yale Law School after World War II by the political scientist Harold Lasswell and the legal scholar Myres McDougal. Whatever the intellectual merits of Policy Science, it never had any significant influence on American lawyers, judges, or legal scholars. Process jurisprudence had the field to itself in the immediate postwar years and was so dominant as a legal theory that it seemed at the time not to be a theory at all, but only simple common sense about law. Good historian that he is, Duxbury understands and explicitly notes Policy Science's lack of impact.⁷⁷ So why does he devote one out of his six chapters to this minor phenomenon?

One possibility is that Duxbury realized that his narrative otherwise understates the role of policy jurisprudence, which surely has been one of the most important strands in modern American legal thought. Lasswell and McDougal did treat law as policymaking, indeed almost to the exclusion of everything else, so an account of their theorizing does serve the purpose of remedying this potential defect. But jurisprudence as policy science could have been better discussed in connection with the thought of the Progressives, particularly the central figures of Holmes, Pound, and Cardozo. In Progressive jurisprudence, by contrast with Policy Science, the policy dimension was integrated with a modest view of the role that lawyers, and particularly judges,

77. See DUXBURY, *supra* note 62, at 202.

should play in democratic lawmaking. The Progressive legislature had primary responsibility for making policy, and hence making law; the main job of Progressive lawyers and judges was to apply the rules laid down in legislation with attention to their animating purposes, while filling the gaps left by those rules under the guidance of the policies manifest in the legislative record. Progressive lawyers also had an important role to play in making the rules themselves; they were to absorb and translate for policymakers what social scientists had learned about the factual underpinnings of social problems, and about the available means of solving those problems.

Duxbury does not describe the Progressive legal thinkers in these terms in his initial brief account of their thought, where he focuses on what he calls their "proto-realist" critique of formalism.⁷⁸ Seen in this light, Holmes, Pound, and Cardozo do not emerge as central shapers of American legal thought, but as transitional figures between the Classicists on the one hand and the Realists on the other. Duxbury emphasizes the "ambiguity, equivocation and contradiction" involved in what he sees as these jurists' tentative first steps along an antiformalist road whose terminus is Realism.⁷⁹ But this neglects the animating, constructive part of Progressive legal thought: its vision of law as social engineering. This leaves his overall presentation of modern American legal thought lacking the main event, law as the implementation of public policy. Perhaps the overemphasis of Lasswell and McDougal was meant to make up for what could have been better presented in the context of Holmes, Pound, and Cardozo.

Duxbury's treatment of the Progressives is particularly odd in light of his own cogent critique of the myth that Realism was the radical central act in the drama of modern American jurisprudence. It is as if he wrote his half chapter on the Progressives, treating them as relatively minor figures in the transition to full-fledged Realism, and only later came to demote the Realists from the dominant place which that treatment presupposed. Given his ultimately deflationary portrait of the Realists, it would have been more natural to focus on the feature in Progressive thought that most distinguishes it from Realism—its self-conscious and forceful promotion of the central American tradition of pragmatic policy-oriented jurisprudence.

Duxbury comes back to deal with one aspect of the constructive side of Progressive legal thought after his chapter on Realism, in his chapter on the Process jurists. Here he again sees himself as revising conventional wisdom, in this case the standard interpretation of Process jurisprudence as a neoformalist reaction to Realism. In contrast to this approach, Duxbury portrays the Process school as continuing an older American jurisprudential tradition that puts faith in reason (identified with an emphasis on legal

78. *See id.* at 32.

79. *See id.* at 33.

principles) at the heart of law. To illustrate the pre-Realist roots of this tradition, he inserts a flashback to the Progressive account of legal principles.⁸⁰ He rightly points out that Pound, Cardozo, John Chipman Gray, and John Dickinson (he could have added Holmes, Wigmore, Corbin, John Dewey, and Morris Cohen) had made quite a point of reaffirming the importance of general principles in legal reasoning.⁸¹ For the Progressive pragmatists, the point of formulating legal principles was to classify legal problems in a perspicuous way and to guide decisionmakers' attention to relevant policy considerations in cases not governed by established rules. Duxbury's earlier discussion of the Progressives as "proto-Realists" does not deal with this aspect of their thinking.

The pragmatist conception of principles as useful guidelines to legal judgment does indeed link the Process jurists back to the Progressives, and does distinguish both groups from the intervening Realists, who saw principles as providing only a rhetorical smokescreen to cloud the actual (mainly unconscious) sources of legal decision. It is appropriate to make this connection, as both the Progressive and the Process approaches, in their different ways, represent the pragmatist tradition in modern American legal thought. But "principle" was not the central concept for either the Progressives or the Process thinkers. For the Progressives, that role was played by policy and by their associated utilitarian conception of law as an instrument for pursuing social welfare. The Progressives viewed legal principles as substantive guidelines for judges, designed to marshal for their attention the policy considerations most relevant to the decisions that they had to make in negotiating the gaps between competing rules, and in applying open-ended standards. For the Process jurists, the two central themes were their attempt to work out a defensible nonformalist account of the rule of law and, of course, their emphasis on *process*—institutional design, jurisdiction, and procedure—as the primary focus of legal theory and scholarship. Both themes distinguished the Process jurists from the Progressives, who (like the Realists) had no particular interest in the ideal of the rule of law, and who also (like Lasswell and McDougal) saw law mainly in terms of the implementation of substantive policy rather than in terms of process. The emphasis on procedure was the legacy that the Process jurists took from the Realists, who had seen adjudication as dispute resolution and had correspondingly elevated procedure out of its traditionally subordinate role as the mere handmaiden of substantive law, policy, and rights.⁸² The Process jurists did not focus so much on the content of the principles as on their form—if these principles were to guarantee

80. *See id.* at 212–23.

81. *See* Grey, *supra* note 26, at 824–25.

82. *See supra* notes 30–31 and accompanying text.

government according to law, they had to be general in their terms and neutral between the interests of competing factions in the political marketplace.

Duxbury's sense that principles rather than process are the heart of Process jurisprudence leads him to yet another interpretation that, in my opinion, obscures an important distinction. He includes among the Process jurists the philosophically minded legal thinkers who have sought to integrate law with generally Kantian liberal moral and political philosophy, and have portrayed the central point of adjudication as the judicial definition and protection of human rights. This misses the crucial transition that thinkers like Ronald Dworkin represent from process back to substance as the main focus of jurisprudential thought, and the important political step that they represent from moderate suspicion to all-out approval of the liberal activist human rights project of the Warren Court.

Again, this can be traced back to Duxbury's truncated treatment of Progressive jurisprudence. A more rounded portrait would have better integrated the Progressives' treatment of principle with the rest of the constructive side of their legal theory—in particular, with their substantive conception of policy as part of law, and of lawyers as social engineers. To repeat, policy, not principle, was the controlling concept of Progressive jurisprudence; similarly, process, not principle, formed the core of Process jurisprudence; and rights, not principle, lie at the heart of Law and Moral Philosophy. But Duxbury focuses on principle and was led by the flexibility of this protean concept to link Process and Progressive jurisprudence as legal theories based essentially on faith in reason and principle. Having defined the Process school by its focus on principle, he then naturally, but misleadingly, also describes Dworkin and his followers as Process jurists, because they too believe in reason and think that principle is important.

Actually, the centrality of legal principle and of reason in law has been a theme common to Classicists, Progressives, Process jurists, and Moral Philosophers, but these schools have all understood the nature and significance of reason and principle quite differently. For the Classicists, principles were internally derived axioms that made the law systematic, and dictated rules and outcomes in a closed, geometrically rational system; for the Progressives, they were guidelines that conveniently directed legal decisionmakers to relevant policy considerations, thus promoting instrumental rationality; for the Process jurists, they were neutral justifications whose formulation checked substantive passions through procedural reason, preventing judges from being influenced in their decisions by interest group politics; and for the Moral Philosophers, they were general normative truths that defined substantive human rights, and as such, trumped merely instrumental policy considerations in judicial reasoning. All of these schools of thought are indeed varieties of legal rationalism, but the differences among them are at least as important as this rather abstract commonality.

Duxbury forcefully criticizes the view that Langdellian legal science and Realism have been the main protagonists in the history of modern American legal thought, with other thinkers more or less imperfectly replaying the struggle between these schools over formalist and antiformalist tendencies in jurisprudence. He explicitly disavows this one-dimensional view and argues for analyzing the thought of the period in terms of a number of additional themes. But I believe that his portrayal would have been more effective along these lines if he had clarified the overarching alternative themes that have cut across the debates between the formalists and their opponents.

It is a separate issue from formalism versus antiformalism, for instance, whether substance or process should be the main focus of legal study; on this dimension, the Classicists, Progressives, and Moral Philosophers are joined against the Realists and the Process jurists. Another aspect of the debate is the "rule of law" issue: whether independent judges have a distinctive and important role to play in the polity. Classicists, Process jurists, and Moral Philosophers have tended to believe so, and Progressives and Realists have in general disagreed. Other important themes in American legal thought have included the extent to which jurists regard law as autonomous from other disciplines and modes of thought, and the relative emphasis given to description and prescription in the study of law. I believe that a little more deliberate schematism along these lines could have sharpened Duxbury's interpretation and clarified his narrative by helping him more effectively to escape from the simplistic formalism versus antiformalism framework that he rightly rejects.

Even if I am correct in these criticisms, they do not undermine the impressive character of Duxbury's achievement. He has defined a fascinating topic, has been the first to give it full-length treatment, and has done so with searching and conscientious research and consistently intelligent interpretation. With *Patterns of American Jurisprudence*, the study of modern American legal thought is finally well launched.