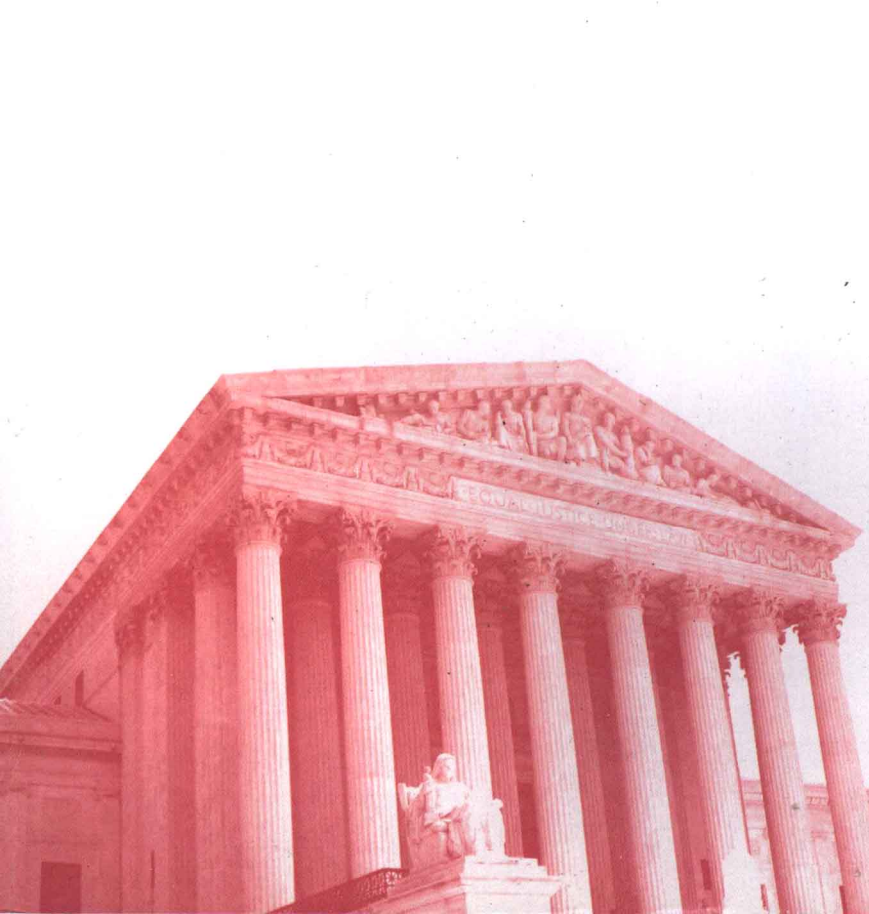
法学双语教学教材

Legal English

法律英语

曾令良 主编



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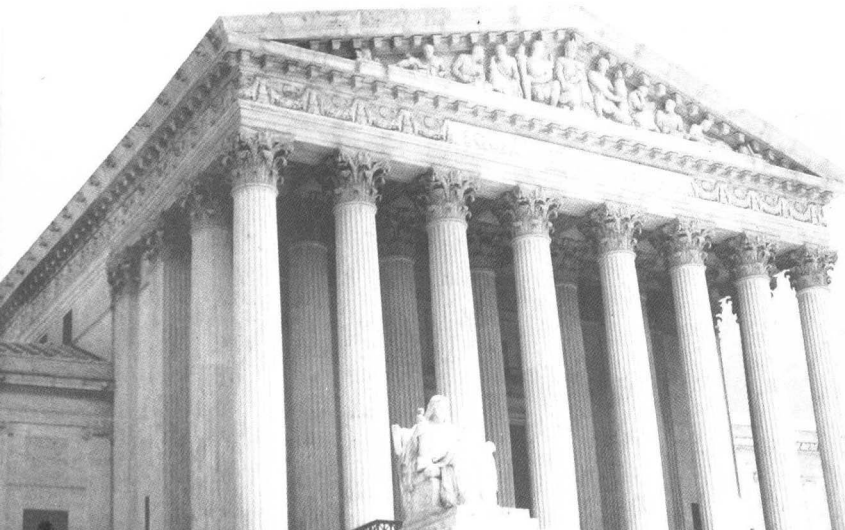

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内 容 摘 要

本教材是为了适应21世纪全球化趋势下法律人才培养的需要而编写的。其主要目的是，使法律专业的学生在具备一定的基础英语的前提下，基本掌握法律专业英语的基本词汇、基本句法和基本结构，同时掌握用英文表述的各主要法律部门的专业知识和各种法律文书的特点，从而为学生们在中外法学殿堂进一步深造或毕业后从事与法律有关的对外交流与合作奠定法律专业英语的基础。

本教材分为两大部分，第一部分由11个教学单元组成，内容涉及各主要法学部门，包括法理学、宪法学、行政法学、刑法学、民法学、商法学、环境法学、国际公法学、国际私法学、国际经济法学、诉讼法学。第二部分由7个教学单元组成，涉及各种主要的法律文书，包括合同书、法院判决、仲裁书、法律意见、法学论文、国际条约、国际决议等。每个教学单元又分为四个部分，即正文、专门词汇、练习题、补充读物。

本教材所选资料主要来源于国内外的网站及已经出版的英文著作，选材新颖、题材广泛，为学生提供了解、比较各国法律的第一手资料。在编写过程中注重法学基础知识，并强调英语技能的操作。在内容设计上既照顾到英语学习的规律，又考虑到法律学科的体系，从而使学生收到“一石二鸟”的学习效果。

编写法律英语教材是一项探索性的工作，加之时间仓促，难免存在许多不适当甚至错误之处，敬请广大的学生和读者提出意见和建议，以便提高质量。

编 者

2006年元月

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Lesson One
Jurisprudence

Text
American Legal Realism

"Legal realism" is the label that was given to a group of American legal theorists in the 1920s, 1930s and 1940s, who challenged the ideas about legal reasoning and adjudication dominant in judicial and legal academic writing at the time. Its influence on (American) legal thinking can be summarised by the fact that the phrase, "we are all realists now" has become a kind of legal academic cliché.

Among those writers who described themselves (or who are described by others) as "realists", there was little by way of agreed views, values, subject-matter or methodology. It has become commonplace to note that the differences among those writers were sufficiently significant that it approaches distortion even to refer to "the legal realists" as though it were a coherent movement (one commentator writing recently preferred to refer to legal realism as a "feel" or "mood"). With those disclaimers noted, I will try to give a general outline of American legal realism.

Many of the themes (and much of the tone) of the legal realists can be found in the work of Oliver Wendell Holmes, who (by most ways of delimiting the realist movement) came earlier. In *The Common Law*, published in 1881, he wrote:

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

In these few sentences one can find (or at least read in) most of the themes for which the American legal realist movement would be remembered.

The "realism" in "legal realism" is the use of that term in its colloquial meaning: "being realistic" as being worldly, somewhat sceptical, looking beyond ideals and appearances for what is "really going on." First, the main focus of this "realism" was on judicial decision-making: that a proper understanding of judicial decision-making would show that it was fact-centered; that judges' decisions were often based (consciously or unconsciously) on personal or political biases or constructed from hunches; and that public policy and social sciences should play a larger role in judicial decisions. Secondly, feeding into this central focus on adjudication was a critique of legal reasoning: that beneath a veneer of scientific and deductive reasoning, legal rules and concepts were in fact often indeterminate and rarely as neutral as they were presented as being. It was the indeterminacy of legal concepts and legal reasoning that led to the need to explain judicial decisions in other terms — hunches and biases — and the opportunity to encourage a different focus for advocacy and judicial reasoning: social sciences and "public policy." Thirdly, the criticisms of legal reasoning and judicial decision-making flowed towards a parallel criticism of legal education, which was said to reflect the same false formalism and neutrality as were present in legal reasoning and judicial decision-making. (These three themes are clearly interconnected, so there is a certain arbitrariness in deciding where one starts the discussion, and even in deciding where one places various sub-issues: e. g. the emphasis on the social sciences could be as easily discussed under any of the three themes.)

☞ Realism and Legal Analysis

The form of legal analysis dominant at the time the realists were writing was criticised as "formalistic," by which it was meant that the argument was presented as if the conclusion followed simply and inexorably from undeniable premises. Once the proper label was found for an object or action ("contract," "property," "trespass," etc.), the legal conclusion soon followed.

The realists argued that the premises lawyers used were open to question, and that labels and categories hid moral and policy assumptions that should be discussed openly. An example of realist analysis can be seen on the losing side of one of the most famous American tort law cases, *Palsgraf v. Long Island Railroad.* In that case, a railroad employee was negligent in his attempt to assist a passenger; as a result of the negligence, the passenger dropped a package, which happened to contain explosives. An explosion occurred, which led to the injury of the plaintiff, who was standing some distance away. The question in the case was whether someone should be liable for all injuries "proximately caused" by that person's negligence. The majority, in an opinion written by Judge (later Justice) Benjamin Cardozo, decided that the plaintiff could not recover, on the basis that the railroad employee had no duty to the plaintiff, and his negligence was an injury only to the passenger he was trying to help. The dissent, written by Judge William Andrews, included a realist attack on the solidity of the concept of "proximate cause":

> "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."

In other words, the legal concepts alone do not get us to a decision, and we are fooling ourselves and the public if we claim that they do. The final conclusion regarding whether "proximate cause" exists or not will be based on unstated premises regarding public policy (or perhaps based on unstated biases or prejudices).

☞ Realism and the Courts

Judicial decision-making at the time was often portrayed (by judges in their opinions as well as by commentators) as being a nearly mechanical, nearly syllogistic move from basic premises to undeniable conclusion. The legal realist response was to argue that judges often have discretion, that judicial decisions were often in practice determined by factors other than the legal rules, and to move the focus of attention from conceptual analysis to policy argument and fact-finding. One can get a sense of legal realism just from the titles of some of its articles: for example, "Are Judges Human?" "What Courts Do in Fact," "Transcendental Nonsense and the Functional Approach" and "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision."

The classical perspective of judicial decision-making was that judges decided cases by merely discovering the appropriate legal rule, a process that required the mere application of simple logical deduction from basic principles. Legal realists offered a variety of counter-images of what they thought really went on in decision-making, a number of which are summed up in this half-caricature of realism: "judges in fact follow their instincts in deciding cases, making sham references to rules of law; generally they are themselves unaware of what they are doing, and persist foolishly in believing that they are being obedient to precedent."

There were (at least) two strands to the realist discussion of judicial decision-making: that decisions were strongly underdetermined by legal rules, concepts and precedent (that is, that judges in many or most cases could have, with equal warrant, come out more than one way); and that judges were (and, by some accounts, should be) highly responsive to the facts, and the way the facts were presented, in reaching their decisions. (One commentator has gone so far as to describe the assertion, "in deciding cases, judges respond primarily to the stimulus of the facts of the case," as the "core claim" of American legal realism.)

However, the claim that general principles in fact do not determine the results of particular cases and the claim that they can not are quite distinct. The first is a statement about causation in the world: why judges decide cases the way they do. The second is a statement about logical possibility, the nature of language or the nature of rules: the point being that one cannot derive in a deductive fashion the result in (some, most, all) legal cases from general principles.

The two claims are independent; one can affirm the first without affirming the second. Both themes were present in the writings of the legal realists. Both themes have become embedded in the way modern lawyers and legal academics think about law, and in the way law is taught. If it was once subversive to think that extra-legal factors influence judicial decisions, it now seems naive to doubt it. And it is commonplace to assume, at least for relatively important and difficult cases, that strong legal arguments can be found for both sides.

There are obvious ties with the first theme discussed: the indeterminacy and lack of neutrality of legal concepts, and the inability to derive unique results in particular cases from general legal rules. If that was the state of law in the abstract, then it comes as no surprise that judicial decisions cannot be based solely on these rules and concepts (and judges who claim otherwise were either fooling themselves — or lying).

What was to fill the conceptual gap left when one's faith in the neutrality and determinacy of legal concepts was lost? For many of the realists, the answer was social science, the understanding of how people actually behave, and the way in which legal rules reflect or affect behaviour. This turn to the social sciences can be seen in a number of places, including "The Brandeis Brief," a brief on legal issues that based its legal conclusions on extensive sociological research.

The "Brandeis Brief" was named after Louis Brandeis, a legal reformer who later sat as a Justice on the United States Supreme Court. The term refers in

particular to a brief Brandeis co-wrote defending the constitutionality of a state statute limiting the maximum working hours for women:

> "Containing two pages of legal argument and ninety-five pages of sociological and economic data about the conditions of working women's lives in factories, the Brandeis brief, by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality."

This faith in the social sciences can also be seen indirectly through the work many realists did in the American "New Deal," creating administrative agencies and regulations meant to solve various social problems through the law. The weak point of realist thinking in this area was the tendency towards technocracy, the belief that social scientific expertise by itself would be sufficient to lead to right results, missing the point that there is always a need for a moral or political structure within which to present (or to do) the empirical work; there could not be "neutral experts" on how society should be organised.

☞ Realism and Legal Education

The approach of the generation of academics prior to the realists was also a target. Christopher Columbus Langdell, Dean of the Harvard Law School and originator of the "case method" of teaching law, famously advocated that law was a science, whose principles and doctrines could be "discovered" in cases, much as biologists discover the principles of their science in their laboratories. One commentator summarised Langdell's approach as follows:

> "To Langdell 'science' conjured up the ideas of order, system, simplicity, taxonomy and original sources. The science of law involved the search for a system of general, logically consistent principles, built up from the study of particular instances. Like the scientist, the lawyer should study original sources; like the botanist, he must select, classify and arrange his specimens."

Given the realist analyses and criticisms given above, it is not surprising that they tended to be scornful of Langdell's "science of law," and all aspects of legal education that seemed to follow from it. To the extent that one can speak of "a realist view" on education, it would primarily be one of following through on the implications of other realist views: that legal concepts should be taught in a way which demystified them; and that legal issues should be shown to be often under-determined by legal rules alone, with policy arguments appropriate and necessary for the resolution of many legal disputes.

☞ An Overview

The basic misunderstanding of American legal realism by some later writers turned on a confusion regarding the purpose and point of the realists' work. For example, when the realists stated that we should see law from the perspective of a prediction of what judges will do ("the bad man's" perspective), later writers misunderstand the argument when they saw that as a conceptual claim.

As a conceptual claim, it would have obvious weaknesses (for example, how can a judge on the highest court see the law as a prediction of what the judges will do? The highest court is the final word on what the law will mean and there is no other court whose decisions the judges could try to predict). The predictive theory is better understood as an attempt to shake up the overly abstract and formalistic approach many judges and legal scholars used for discussing law. To put the matter another way, the realists wanted people in the legal profession to spend more time thinking about how law appears "on the ground" or (to change the metaphor) "at the sharp end": to citizens for whom the law means only a prediction of what the trial judge will do in their case (or a prediction of how the police will treat them on the street corner).

In various ways, American legal realism can be seen as the forerunner of the perspectives on law to be discussed in law and economics, critical legal studies, critical race theory and feminist legal theory. The connection is often in-

direct: by undermining the confidence in the "science" of law and the ability to deduce unique correct answers from legal principles (as well as questioning the "neutrality" of those legal principles), the realists created a need for a new justification of legal rules and judicial actions, and they offered a set of arguments that could be used to support claims of pervasive bias (against the poor, against women, or against minorities) in the legal system.

(Adapted from Brian Bix, *Jurisprudence: Theory and Context*, Westview Press, 1996.)

Words and Special Terms

legal realism	现实主义法学
legal reasoning	法律推理
adjudication	(法庭的) 判决，裁定
syllogism	三段论法，推论法，演绎
skeptical	怀疑论的
deductive reasoning	演绎推理
premises	前提
contract	合同，契约
property	财产，所有权
trespass	非法侵害，侵入
tort law	侵权法
plaintiff	原告
majority	法院判决的多数意见
Justice	(美国联邦最高法院) 大法官
recover	胜诉，(根据法律程序) 取得 (赔偿等)
dissent	法院判决的少数意见，异议
proximate cause	近因
transcendental	先验的， 超越的， 超出人类经验的
rule of law	法治
obedient to precedent	服从先例
case method	案例教学法
law and economics	经济分析法学
critical legal studies (CLS)	批判法学

critical race theory	种族批判法学
feminist legal theory	女权主义法学

Exercises

Ⅰ. Reply the following questions by reading the text:

1. What is the "core claim" of American legal realism?
2. Is law a science? What is your opinion?
3. How do different legal thoughts influence legal education?
4. What is the relationship between American legal realism and other perspectives on law?

Ⅱ. Translate the following into Chinese:

These new movements (Law and Economics, Critical Legal Studies, Feminist Legal Theory, Law and Literature, and Critical Race Theory) in American jurisprudence brought to the legal academy a new feeling of excitement as well as unease. As a result of these movements, people debated and argued about basic concepts in jurisprudence and law, and there has been much disagreement and academic dissent over the continuing validity of traditional notions surrounding law and adjudication. What seemed secure in the 1960s and much of the 1970s became hotly contested in the 1980s. New players in the legal academy advanced new ideas about the nature of law and adjudication. For some, modern-day jurisprudence had become like "a stew that is being constantly fed with spices and flavorings and endlessly stirred."

By the end of the 1980s, the jurisprudential "stew" had simmered to a boiling point. The legal academy was embroiled in fundamentally different discourses and perspectives on law and adjudication. Devotees of the law and economics movement argued that law and adjudication would be best understood as a discourse about economics. Critical legal studies devotees claimed that law and adjudication were best understood as an ideological discourse shaped by power relations. Feminist legal theorists believed that law should be analyzed as gender discourse.

Meanwhile, critical race theorists advanced a discourse of race to challenge the "race-neutral" stance of mainstream legal discourse. Those in the law and literature movement argued that law and adjudication would be more fruitfully approached from a literary perspective. Jurisprudential discourse mushroomed into a number of different professional discourses that advanced different normative and theoretical methodologies for understanding the nature of law and adjudication.

Ⅲ. Translate the following into English:

1. 随着市场经济体制的改革和依法治国方略的推进，我国的立法工作取得了巨大成就，一个具有中国特色的社会主义法律体系框架基本建立。当代中国社会主义法律体系包括下列主要法律部门：宪法、行政法、民法、经济法、劳动法与社会保障法、环境法、刑法、诉讼法、军事法（李龙主编：《法理学》，人民法院出版社、中国社会科学出版社 2003 年版，第 372 页）。
2. 法律解释是一项技术性很强的活动，所以它不仅需要具有良好职业教育背景的专业法官，同时也需要这些法官在司法过程中逐渐形成的司法技艺来实现法律解释追求的目标——在合法与合理之间形成某种平衡。这样，在法律解释的过程中无论是自由探寻的方法还是平义的方法还是考古学的方法，都需要在实践中习得（李龙主编：《法理学》，人民法院出版社、中国社会科学出版社 2003 年版，第 447 页）。

Supplementary Reading

1. Why Study Legal Theory?

The discussion of the nature of legal theory... will leave many students saying "So what? How will all this help me when I am a lawyer?" You may even pray in aid Cotterrell's comment that "no-one could suggest that legal theory has at any time been necessary to help the lawyer earn a living in everyday practice." But the key word here is necessary, for there can be equally little doubt that cases do arise where practitioners with a knowledge of legal theory are better equipped than those who lack it. Indeed, it may even be argued that without a knowledge of legal theory there is a sense in which you cannot