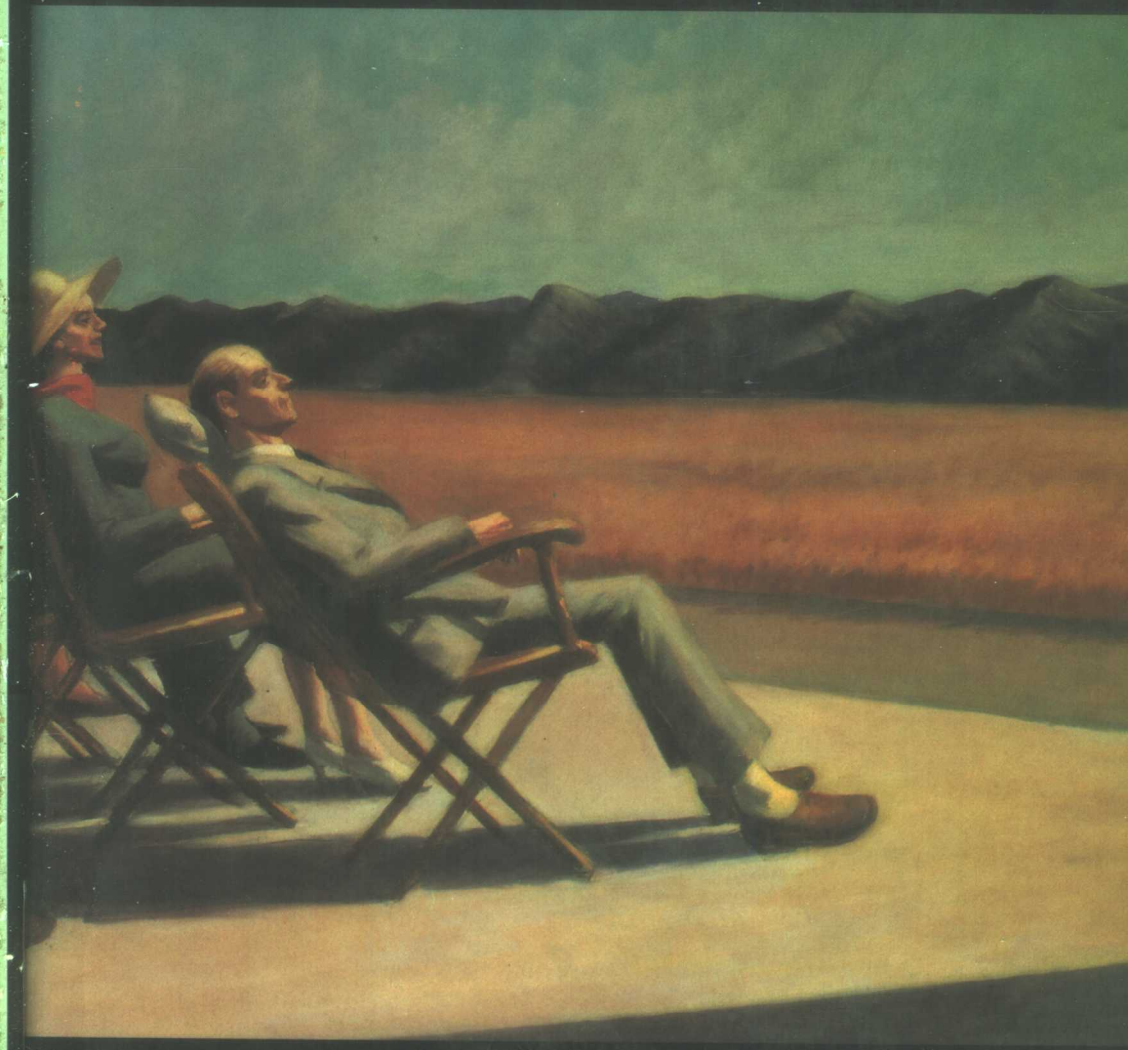
PATTERNS OF AMERICAN JURISPRUDENCE



NEIL DUXBURY

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Manchester, England
September 1994

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Introduction
Jurisprudence as Intellectual History

What is jurisprudence? More or less anyone who has studied or taught the subject will have asked, or have been asked, this question, and they will know that it cannot satisfactorily be met with a stock answer. Many different types of intellectual endeavour go under the name of jurisprudence. A characterization of the subject which encompasses all these different types of endeavour will be so broad and so bland as to be worthless. The word jurisprudence is shorthand for a multitude of ideas; and there can be no universal consensus concerning what makes an idea 'jurisprudential'.

The term, 'American jurisprudence' is hardly less ambiguous. Not only does it denote different things for different people, but those who have attempted to explain and develop the subject have tended to rely on certain key concepts and themes in order to represent a variety of ideas about law. Terms like 'formalism' and 'realism' are rarely used in an homogeneous fashion: every expositor of American jurisprudence seems to have his or her own personal slant on what these and other terms signify. Lack of agreement over such terms—whether, for example, it is correct to characterize pre-realist jurisprudence as formalist, scientist, conceptualist, or whatever—and over what they might be taken to mean is something to which those engaged in American jurisprudence seem resigned. Like anyone faced with the task of explaining jurisprudence, those who concern themselves with American jurisprudence in particular recognize the necessity of thinking and writing in shorthand. A word like formalism will inevitably come to represent a variety of ideas about law, and disagreements are bound to arise over ways in which the word is understood.

There is plenty of shorthand to be found in this book; and there are many points at which particular interpretations and applications of this shorthand might be contested. For some readers, for example, the exposition of formalism presented in Chapter 1 is likely to provoke nothing if not disagreement. But the point of this book is not to suggest that there is a definite set of ideas about law which any particular jurisprudential concept or theme ought properly to denote. The premiss of the book, rather, is that the ways in which jurisprudential concepts and themes are interpreted and applied influence the manner in which ideas about law come to be understood historically. The primary objective of this book, in other words, is not to explore generally the problems that might arise from

employing a handful of concepts and themes to explain a comparably large variety of ideas about law, but to try to demonstrate that our use of concepts and themes affects the way in which we represent the history of legal ideas.

The manner in which the interpretation and application of jurisprudential concepts and themes influences the history of legal ideas seems, in the United States, to be particularly significant and problematic. There runs, throughout this book, a distrust of what might be termed the 'pendulum swing' vision of American jurisprudential history. This vision, I believe, dominates American jurisprudential discourse; and its dominance seems to be attributable to the manner in which many of those engaged in American jurisprudence have conceptualized their subject matter. The problem, in essence, is that writers in American jurisprudence have tended to develop certain basic themes—in particular, the themes of legal formalism and legal realism—in an over-emphatic, sometimes over-dramatic, fashion. Formalism and realism have been made into more than mere shorthand. They have become theories, movements, schools of thought. As such, they are usually seen to cancel one another out. Thus it is that there exists a fairly conventional history of American jurisprudence since the 1870s: first there was formalism, epitomized by the Langdellian revolution; then came the realist revolt against formalism; after which came the renaissance of formalism, exemplified by both process jurisprudence and law and economics, which was superseded by the return to realism in the form of critical legal studies. The pendulum of history swings back and forth, accordingly, between formalism and realism. Sometimes the concepts are varied—formalism becomes scientism, realism becomes pragmatism, or whatever—but the basic pendulum-swing vision of American jurisprudential history remains more or less constant.

This book challenges that vision. The central thesis of the book is that American jurisprudence since 1870 is characterized not by the pendulum-swing view of history but by complex patterns of ideas. Jurisprudential ideas are rarely born; equally rarely do they die.[1] Indeed, even the event which is commonly considered to mark the birth of the modern American law school—the introduction of the case method of instruction at Harvard—was not really a birth; rather, it interconnected with and complemented certain other late nineteenth-century pedagogic developments aimed at raising the professional standards of the bar.[2] Ideas—along

[1] In the past, I have failed to recognize this. See e.g. Neil Duxbury, 'The Birth of Legal Realism and the Myth of Justice Holmes', *Anglo-American L. Rev.*, 20 (1991), 81–100.

[2] The introduction of the case method at Harvard was preceded, for example, by similar profession-enhancing educational initiatives at Columbia under the deanship of Theodore Dwight. See Chapter 1. Recently, it has been shown that although the pedagogic innovations at Harvard in the 1870s were intended to raise—and ultimately succeeded in raising—

with values, attitudes and beliefs—tend to emerge and decline, and sometimes they are revived and refined. But rarely do we see them born or die. History is not quite like that.

What does it mean to characterize American jurisprudence in terms of patterns of ideas? The pendulum swing vision of American jurisprudential history is premissed on a fairly simple pattern. Formalism and realism perpetually supersede one another: as one dies, the other is born or is reborn. The purpose of this book is to try to show that the history of American jurisprudence since 1870 does not conform to this pattern but displays a variety of patterns. Chapter 1 begins with a discussion of late nineteenth and early twentieth-century legal formalism in the United States. If one attempts to ascertain the jurisprudential significance of this theme at that time, two distinct formalist perspectives emerge. First of all, there evolved a species of formalism in the American law schools. While the Langdellian notion of legal science was not quite as inflexible as many commentators have assumed,[3] it was nonetheless premissed on the belief that law may and indeed ought to be conceived as a small body of formally-interrelated fundamental doctrinal principles—principles which are to be derived from upper-court (often old English) decisions. Secondly, there evolved a rather different species of formalism in the courts. In the late nineteenth and early twentieth-centuries, the United States Supreme Court in particular advanced a peculiarly Social Darwinist-inspired version of *laissez-faire*, arguing that real inequalities of bargaining power ought not to be the subject of regulatory legislation, because such inequalities are a natural and desirable consequence of a free market system which guarantees a formal equality of bargaining rights among citizens. It ought to be stressed that these two types of formalist thought are not taken to represent legal formalism *in toto*. Rather, it is argued that these two strands of thought epitomize legal formalism as it was understood at that time.

These two strands of thought also represent the formalism against which realist jurisprudence reacted. The elaboration of this point requires a good deal of caution. The second half of Chapter 1 represents an effort to demonstrate that there was never a 'revolt against formalism'. The movement away from formalist legal thinking was very slow and hesitant. In fact—and this is the basic point of Chapter 2—the endeavour to expose the shortcomings of formalism was far from successful: in some ways,

standards at the bar, practitioners within the American Bar Association were often very suspicious of the Harvard style of legal education. See William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994), 132–147.

[3] See LaPiana, *Logic and Experience*, 122.

realist jurisprudence failed to progress significantly beyond formalist legal thought; and indeed, to a certain degree, it remained fixed in the clutches of such thought, in so far as the implications of certain realist arguments were demonstrably formalist. A more general purpose of Chapter 2 is to try to provide a sense of what realist jurisprudence was actually about. There was no realist movement. Realism was nothing more than an intellectual mood. Nor is it correct to regard realist jurisprudence as a celebration of uncertainty in law. When various so-called realists highlighted the existence of legal uncertainty, they were merely articulating—and, in some cases, lamenting—what they saw. The image of realism as a jurisprudence of tyranny, as an argument in favour of might equals right, is the fabrication of unsympathetic critics.[4] So-called realists recognized—but struggled to come to terms with the fact—that law is political.

Why should the proposition that law is political be considered in any sense troublesome? One particular outgrowth of realist jurisprudence, policy science, was premissed on the notion that, in the United States at least, the political nature of law ought not to be considered troublesome at all. Chapter 3 is devoted to the work of Harold Lasswell and Myres McDougal, the principal proponents of policy science. So long as lawyers subscribe to the right kind of politics, Lasswell and McDougal believed, the use of law to promote political objectives ought not to be discouraged. One of the primary purposes of policy science was to suggest how legal education might be reformed so that future lawyers could be better educated in the values of American democracy. By the end of the Second World War, McDougal in particular was beginning to develop policy science as a theory of international law. Not only should the law schools of the post-war era be concerned with promoting American democratic values within the national legal profession, he argued, but post-war scholars of international law in the United States ought to be promoting these values throughout the world. There rests, accordingly, two assumptions at the heart of the policy science perspective: first of all, that in the United States there is no reason to fear the political nature of law since American liberal democratic values are good values; and secondly, that if other countries could be persuaded to import these values into their own legal systems, the future of humanity would seem much less insecure.

Policy science turned out, for a variety of reasons, to be an unsuccessful jurisprudential venture. Part of the problem with policy science was that its credibility depended on acceptance of the proposition that a legal framework which promotes American or American-style democratic values is very likely to be a desirable one. In fact, any political system—

[4] See Neil Duxbury, 'The Reinvention of American Legal Realism', *Legal Studies*, 12 (1992), 137–77.

even the American system—is subject to change, and sometimes change will be welcomed, at other times it will be opposed. Given the inevitability of change—and given that change may be for better or for worse—should law always follow the vagaries of politics?

In the years following the Second World War, certain American lawyers were beginning to argue ever more forthrightly that, while political concerns inevitably feature in the legislative arena, they ought never to determine the course of adjudication. Judges, after all, are not elected; they cannot be voted out of office for reaching political decisions of which citizens and lawyers generally disapprove. Furthermore, political adjudication is attractive only when courts adjudicate in an enlightened fashion. Those who advocate such adjudication offer only a jurisprudence for good times.

But if judges ought not to decide cases politically, what should they do? The central message of the process tradition in American jurisprudence is that judges ought to place their faith not in politics but in reason; and this requires that they endeavour to base controversial decisions on apolitical principles—principles, that is, which are so broad and general that they will command the respect of both sides to a dispute. According to representatives of the process tradition, courts, unlike the other institutions which make up the legal process, are peculiarly competent at elaborating such principles. This turn towards principle in American jurisprudence is sometimes regarded as a response to the lessons of legal realism. Given that most so-called realists had little to say about how to restrain political adjudication—given, furthermore, that certain realists appeared not to want to restrain such adjudication—many post-realist lawyers became ever more preoccupied with the endeavour to promote the virtues of principled judicial decision-making. Chapter 4 is an attempt to demonstrate, however, that the quest for principle in American jurisprudence ought not to be regarded merely as a response to realism. The process tradition, it is argued, certainly developed alongside and may even have preceded realist jurisprudence. The pendulum swing version of American jurisprudential history—the image of one 'movement' dying and being replaced by another—fails to capture the intellectual development which actually occurred.

This argument is taken further in Chapter 5. Commentators on law and economics in America have tended to conceive of it as a jurisprudential sub-discipline which is somehow related to legal realism. For some commentators, law and economics ought to be understood as a continuation of the realist tradition. For others, it represents a rebellion against that tradition. In fact—and this is the premiss of Chapter 5—it is neither. Even during the New Deal period, most of the legal–economic analysis which was being undertaken in the United States had no connection with realist

jurisprudence. Indeed, law and economics at this time was comprised of little more than various isolated lawyers and economists doing their own things. There was certainly no law and economics movement. When, eventually, a law and economics movement did emerge in the United States, it grew not out of the realist tradition, but out of developments in neo-classical price theory. Neo-classical economics first made its mark on antitrust and certain other patently 'market-based' areas of law, and was then gradually broadened out and applied to legal fields which had commonly been assumed to lack a significant economic dimension. The principal objective of Chapter 5 is to try to demonstrate that to understand properly the significance and the appeal of—not to mention the controversy generated by—the modern law and economics tradition in the United States, it must be conceived not against the backdrop of American jurisprudence, but in relation to developments in economics, primarily at the University of Chicago, since the 1930s.

Unlike law and economics, critical legal studies in the United States has clear connections with the realist jurisprudential tradition. Such connections, it is argued in Chapter 6, can be easily exaggerated: critical legal studies is not merely realism revived. It is also argued—and this is the one point in this study where the pendulum swing vision of jurisprudential history seems not entirely inappropriate—that critical legal studies is in large measure a reaction to what is termed a search for consensus in American jurisprudence. This search is epitomized by the process tradition and, to a lesser degree, by neo-classical law and economics. Critical legal studies, with its roots in New Left politics, represents both a critique of the consensus assumptions embodied in liberal legal thought and also an attempt to visualize and speculate on the possibility of establishing a different set of social and legal arrangements founded on a new, post-liberal consensus. Quite what this new consensus would be comprised of—that is, what the fundamental values shared by members of the post-liberal society would be—is far from clear in the literature of critical legal studies. Certain recent developments in American jurisprudence, in feminism and race theory in particular, reveal an essential distrust of the critical legal project. This distrust stems from the fact that critical legal scholars have generally failed to indicate how the consensual foundations of the post-liberal society would accommodate the values, experiences and concerns of women and minorities.

It would have been easy to conclude this book with a denouement, by declaring critical legal studies to be 'dead'. As intimated earlier, however, it is a central premiss of this book that intellectual historians ought to be wary of using words like birth and death. By studying the emergence and decline of ideas—by showing, for example, how the emergence or decline of one idea may be connected to the emergence or decline of another, or

by demonstrating how, sometimes, apparently closely related ideas are in fact hardly connected at all—we are able to find our way to the heart of jurisprudence. Ideas have histories, and jurisprudence is a much more enlightening and engaging enterprise when it focuses on those histories. When we concern ourselves with the history of ideas about law, we are likely to appreciate not only how certain ideas come to be discredited, but also, equally importantly, why they were ever considered to be significant in the first place.

1

The Challenge of Formalism

During this century, American legal thought has frequently been categorized in terms of historical periods. The correct demarcation of these periods has often been a matter for debate, though there seems to be some consensus that the first period ran from the 1780s (the end of the War of American Independence) to the 1860s (the outbreak of the American Civil War). This period saw the evolution of a distinct legal profession in the United States, as well as the emergence of the first generation of legal treatise writers.[1] Furthermore, this was the period during which the common law courts, in an effort to shape social and economic development, gradually broke with their traditional practice of deciding cases purely on an *ad hoc* basis and began 'to frame general doctrines based on a self-conscious consideration of social and economic policies'.[2] After the Civil War, American law began to enter into a period of formalism. Eschewing the general policy-making role, the courts returned to a narrower, deductive approach to decision-making whereby legal relationships were treated as somehow subsumed under a small collection of fundamental legal principles.[3] This formalistic conception of the judicial process was reflected also in the scientific orientation of the modern law school, as prompted by the first dean of Harvard, Christopher Columbus Langdell. The period of legal formalism waned during the first three decades of this century and was gradually replaced by a third period, the period of American legal realism,[4] which emerged largely as a reaction to legal formalism both in the courts and at Harvard.

This chapter addresses the second period of American legal history, the period of legal formalism. Not surprisingly, formalism may be regarded as the antecedent of the third period of American legal history, realism; and it is by treating formalism thus that it is possible to set the scene for the emergence of realism in the 1920s and 1930s. The purpose of this chapter,

[1] See Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965), 99–265.

[2] Morton J. Horwitz, *The Transformation of American Law 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977), 2.

[3] Duncan Kennedy, *The Rise and Fall of Classical Legal Thought 1850–1940* (Cambridge, Mass.: unpublished mimeograph [on file with author: copy supplied by Professor Kennedy], 1975), v. 10–13.

[4] See Grant Gilmore, *The Ages of American Law* (New Haven, Conn.: Yale University Press, 1977), 68–98.

however, is not simply to describe or to trace a particular course of events. While legal formalism constitutes the backdrop to legal realism, while it forms the intellectual tradition against which so-called legal realists 'rebelled', the nature of the rebellion was by no means as straightforward as some commentators have cared to suggest. Indeed 'rebellion', I shall try to show, is rather too strong a word to describe the intellectual progression which occurred.

The thesis of this chapter is that the commonly accepted idea of a 'revolt against formalism' in late nineteenth-century American intellectual life is, certainly so far as jurisprudence is concerned, a myth. The great proto-realist champions of anti-formalism—most notably Oliver Wendell Holmes, but also Benjamin Cardozo, John Chipman Gray and Roscoe Pound—were, on many jurisprudential issues, resolute formalists; just as many of the legal realists who followed in their footsteps seemed equally unable to rid themselves of similar formalist prejudices. In the first part of this chapter, I shall examine what, in the context of late nineteenth and early twentieth-century American jurisprudence, legal formalism might be taken to mean. In the second part, I shall consider how, before the advent of legal realism, American jurisprudence began, if only hesitantly, to question the premisses of formalist legal thinking.

LEGAL FORMALISM: THE LAW SCHOOL AND THE COURTS

During the late nineteenth century, legal formalism was but a fragment of a larger picture. Formalism—the endeavour to treat particular fields of knowledge as if governed by interrelated, fundamental and logically demonstrable principles of science—dictated most nineteenth-century intellectual pursuits. In particular, positivism, classical economics and evolutionary biology exemplified a general endeavour on the part of nineteenth-century intellectuals to elevate specific areas of investigation to the status of genuine sciences. The same trend was also to be detected in disciplines as diverse as history, political science, psychology, ethics and law. By the late nineteenth century, however, cracks were beginning to appear in the formalist edifice. In economics, the evolutionist premisses of the Spencerian classical approach were subjected to the criticisms of Thorstein Veblen who, in his development of an 'anthropological' economic perspective, set the scene for the emergence of institutional economics in the early twentieth century; in philosophy, positivism was challenged by pragmatism; and in history, the nineteenth-century framework of narrow scientific inquiry was superseded by a contextual or 'historicist' methodology.[5] From discipline to discipline, a distinct notion

[5] See Morton White, *Social Thought in America: The Revolt Against Formalism* (Oxford: Oxford University Press, 1976; orig. publ. 1949).

of anti-formalism began to prevail. The anti-formalist tendencies exhibited by the different branches of the social sciences bore 'a strong family resemblance, strong enough to produce a feeling of sympathy in all who opposed what they called formalism in their respective fields'.[6]

One might assume, from the above, that the so-called 'revolt against formalism' was a reaction against the idea of science. But such an assumption would be incorrect. While anti-formalists challenged particular formalist conceptions of science, especially social science, they did not wish to dispense with the scientific framework altogether. The historicist James Harvey Robinson, for example, attempted to demonstrate the scientific character of history, but at the same time to distinguish his own contextual approach from the narrow and uncritical scientific empiricism of formalist historians such as Leopold von Ranke.[7] Thorstein Veblen, similarly, criticized classical economics from the perspective of what he termed 'business science'.[8] Many legal realists, too, in their reaction against formalism, attempted effectively to displace one dominant conception of legal science by replacing it with a different conception.

But what was this dominant conception of legal science? There were, in fact, two broad formalist conceptions of science which dominated legal thought during the post-Civil War period in American legal history, although only one of these conceptions might properly be termed a specifically-legal science. There was, first of all, in the universities, the emergence of the Landgellian science of law; and secondly, in the courts, there was the entrenched faith in *laissez-faire*. These, together, constituted the basis of legal formalism. As such, they provided the impetus and inspiration for the jurisprudential tendency which, during the 1920s, became known as legal realism. Yet, realism criticized Langdellianism and *laissez-faire* quite severely, both traditions were ultimately to survive the attack. Let us consider each of these traditions in turn.

The Tradition of Langdell

The story of the beginnings of Langdellian legal science must, for any American lawyer, be an historical commonplace. By the 1820s, American law was well on the way to developing an identity of its own. In contrast with their previous convention of deciding each and every case by the straightforward application of the English common law, the courts of most states were, by this time, in the process of developing their own indigenous legal principles and precedents. While English cases remained the principal

[6] White, *Social Thought*, 12.
[7] See ibid. 28–29.
[8] See Joseph Dorfman, *Thorstein Veblen and His America* (New York: Viking, 1934), 155–6.