A Companion to Philosophy of Law and Legal Theory

Second edition

Edited by

Dennis Patterson

WILEY-BLACKWELL

A John Wiley & Sons, Ltd., Publication

This edition first published 2010

Edition history: Blackwell Publishing Ltd (1e, 1996)

Blackwell Publishing was acquired by John Wiley & Sons in February 2007. Blackwell's publishing program has been merged with Wiley's global Scientific, Technical, and Medical business to form Wiley-Blackwell.

Registered Office
John Wiley & Sons Ltd, The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, United Kingdom

Editorial Offices
350 Main Street, Malden, MA 02148-5020, USA
9600 Garsington Road, Oxford, OX4 2DQ, UK
The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, UK

For details of our global editorial offices, for customer services, and for information about how to apply for permission to reuse the copyright material in this book please see our website at www.wiley.com/wiley-blackwell.

Library of Congress Cataloging-in-Publication Data

A companion to philosophy of law and legal theory / edited by Dennis Patterson. – 2nd ed.
p. cm. – (Blackwell Companions to Philosophy)
Includes bibliographical references and index.
ISBN 978-1-4051-7006-2 (hardcover : alk. paper)
1. Law–Philosophy. 2. Jurisprudence–United States. I. Patterson, Dennis M. (Dennis Michael), 1955–
KF379.C66 2010
340′.1–dc22
2009037493

ISBN: 9781405170062

A catalogue record for this book is available from the British Library.

Set in 10/12.5pt Photina by Toppan Best-set Premedia Limited
Printed in Singapore

01 2010

17

Postrealism and Legal Process

NEIL DUXBURY

During the past two decades, the intricacies of American legal realism seem to have been relentlessly explored. Finding an American law professor who does not have his or her peculiar "take" on the subject would be something of a minor miracle. Depending on whose commentaries one reads, legal realism may be seen to represent a variety of turning points in American legal thought. Accordingly, realism marked the birth of social scientific legal study (Schlegel, 1979, 1980); it demonstrated the essentially political nature of the legal process (Horwitz, 1992); it even – in the eyes of certain of its detractors – constituted a jurisprudence of nihilism and tyranny (for an account of this critique, see Purcell, 1969; Duxbury, 1992). This essay will not assess these or any other interpretations of realist jurisprudence. Rather, its purpose is to analyze the ways in which certain postrealist jurisprudential tendencies have either built upon or departed from basic realist insights.

Modern Legal Theory and the Impact of Realism

In the United States, interest in realist jurisprudence was revived significantly with the emergence of critical legal studies in the late 1970s. While there are certain fundamental differences between the realist and critical traditions in American jurisprudence, legal realism never embodied a commitment to grand-scale social and legal transformation, which has been espoused by at least one major proponent of critical legal studies (Unger, 1987a, 1987b, 1987c). However, realists and critical legal theorists alike acknowledge the inevitability of indeterminacy in law. Whereas legal realists recognized and generally lamented the existence of legal indeterminacy, representatives of critical legal studies have endeavored to demonstrate the peculiar consequences of indeterminacy. According to critical legal theorists, it is owing to the existence of indeterminacy that law is an ineluctably political practice. Unlike their realist forebears, proponents of critical legal studies have shown a greater eagerness to uncover the political implications of indeterminacy in law.

Law and economics – particularly as developed at the University of Chicago – is commonly regarded as methodologically and ideologically very different from critical legal studies. Yet certain commentators on law and economics have tended to treat it just as critical legal studies has been treated: that is, as an outgrowth of the realist

jurisprudential tradition. "In the law schools," Edmund Kitch has claimed, "law and economics evolved out of the agenda of legal realism. Legal realism taught that legal scholars should study the law as it works in practice by making use of the social sciences, and economics was one of the social sciences to which academic lawyers turned" (Kitch, 1983, p. 184). Whereas Kitch treats law and economics as a continuation of the realist legal tradition, Arthur Allen Leff regarded it as "an attempt to get over, or at least to get by, the complexity thrust upon us by the Realists" (Leff, 1974, p. 459). My own view is that the law and economics tradition ought to be regarded neither as an attempt to develop nor to undermine the lessons of realist jurisprudence. A proper understanding of the development and the jurisprudential impact of law and economics requires that the tradition be understood primarily in relation to developments in economic as opposed to legal theory (see Duxbury, 1995, ch. 5).

Although one of the most incisive and sympathetic studies of realist jurisprudence is the product of a British legal scholar (Twining, 1985), it is worth noting that legal philosophers in the United Kingdom have tended to be indifferent, if not hostile, to the realist tradition. British critical legal theorists, for example, appear to have been little inspired by realist jurisprudence. While British legal theory has hardly failed to flourish owing to the general disinclination of its representatives to consider realism as a subject deserving of sustained attention, it is worth speculating on the reason for this disinclination. My own suspicion is that the reason British legal theorists tend not to treat realism seriously may be traced to H. L. A. Hart's assessment of the subject in his classic positivist text, *The Concept of Law* (1961). In that book, Hart criticizes realist rule-skeptics – and Jerome Frank in particular – for focussing only on the duty-imposing function of rules in the process of judicial decision making and ignoring those secondary rules that confer judicial and legislative power. According to Hart, it is crucial to appreciate – and legal realists appeared not to appreciate – that there must exist specific power-conferring rules that facilitate the appointment of legal officials. Realists tended to consider rules as if they were nothing more than manipulable tools to be used arbitrarily in the process of adjudicating disputes. They said little if anything about the fact that there must exist a definite body of rules that confer on certain people the capacity to adjudicate disputes in the first place. Those legal philosophers – and this includes the majority of British legal philosophers – who have been educated primarily in the positivist jurisprudential tradition appear generally to accept Hart's criticism of realist legal thought.

Not surprisingly, it is to the United States that one must look in order to understand how jurisprudence has developed directly in response to the lessons of realism. During the latter half of this century, there have emerged, I believe, two distinct traditions of "postrealism" in the United States. The first of these traditions might conveniently (if somewhat vaguely) be labeled *policy science.* The second, and more significant, of these traditions is commonly termed *legal process.* I shall consider each of these traditions in turn.

Policy Science

Policy science, as a form of jurisprudence, was the joint creation of the political scientist, Harold D. Lasswell, and the Yale law professor, Myres S. McDougal. In the late 1930s,

Lasswell and McDougal began teaching a course together at the Yale Law School in which they explored the possibility of expanding upon the lessons of legal realism. Their particular concern was to develop the law school curriculum in such a way as to facilitate the promotion of democratic values. Whereas legal realists tended not to explore the political implications of their arguments (indeed, this is precisely why realism suffered from so much political misinterpretation), Lasswell and McDougal endeavored to outline an explicitly pro-democratic approach to the development of legal policy. The framework for this approach is set out in their oft-cited article, "Legal Education and Public Policy," first published in 1943. According to one commentator, this article marks "the clear beginning of the postrealist period" in American legal scholarship (Stevens, 1971, p. 530).

One of the objectives behind Lasswell and McDougal's article is to highlight what they considered to be the shortcomings of realist jurisprudence. They focus especially on the inability of most realists successfully to utilize social scientific methods for the purpose of legal study. "Heroic, but random, efforts to integrate 'law' and 'the other social sciences,'" they observe, "fail through lack of clarity about *what* is being integrated, and *how*, and *for what purposes* ... The relevance of 'non-legal' materials to effective 'law' teaching is recognized but efficient techniques for the investigation, collection and presentation of such materials are not devised" (Lasswell & McDougal, 1943, p. 263). Whereas so-called realists had been concerned merely with integrating law and the broader social sciences, Lasswell and McDougal were more concerned with demonstrating how such integration could be made to serve a specific purpose.

But what purpose? Lasswell and McDougal's answer to this question is very specific. The purpose of integration is to demonstrate to legal decision makers, present and future, that the social sciences constitute an invaluable source of normative guidance. Legal realists, they argued, made the mistake of assuming the possibility of a value-free social science. In fact, they insisted, far from providing some sort of value-free framework, the social sciences constitute a collection of conceptual tools to which legal decision makers of the future will be able to resort in order to make legal values explicit. Enlightened by the social sciences, in other words, lawyers of the future will come to acknowledge that they are dealing not only with law but also with policy (hence the term "policy science").

For Lasswell and McDougal, the study of law along scientific lines would require of law students not that they embrace any old values, but that they affirm explicitly the values to which they ought already to be committed, that is, the individualistic values of American liberal democracy. Realist jurisprudence – indeed, American jurisprudence in general – had remained conspicuously inarticulate on the matter of how to relate "legal structures, doctrines, and procedures ... clearly and consistently to the major problems of a society struggling to achieve democratic values" (Lasswell & McDougal, 1943, p. 205). The spread of despotism throughout Europe offered a sharp reminder that the acceptance of democracy can never be taken for granted; and it was recognition of precisely this fact that led Lasswell and McDougal to develop their argument that the fundamental goal of postrealist jurisprudence ought to be "the better promotion of democratic values" (Lasswell & McDougal, 1943, p. 264). They outline their argument thus:

> We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy making.* The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity. (Lasswell & McDougal, 1943, p. 206)

Thus, in Lasswell and McDougal's view, the primary reason for developing an interdisciplinary approach to legal education is to use the social sciences as a medium through which to immerse the law student in those values which are deemed to represent the values of democracy.

But how is this immersion to be achieved? That is, how is the law student to be exposed to these values? And still more importantly, what are these values? It is to Lasswell and McDougal's credit that they do not sidestep these questions. However, their effort to answer them reveals the basic problems inherent in their perspective.

The pivotal value to which law students ought to be exposed, they assert, "is the dignity and worth of the individual," for it is only through respect for this value that students may come to recognize that "a democratic society is a commonwealth of mutual deference – a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture or class" (Lasswell & McDougal, 1943, p. 212). Apart from this basic respect for the distinctness of the individual, law students will also be encouraged to recognize other "general values in which they participate as members of a free society" (Lasswell & McDougal, 1943, p. 246). These values are the shared values of "power, respect, knowledge, income, and safety (including health)" (Lasswell & McDougal, 1943, p. 217). In later writings, Lasswell and McDougal gradually modified and expanded this list: "knowledge" was replaced by the separate categories of "enlightenment" and "skill"; "income" was broadened to "wealth"; "safety" to "well-being"; and "morality" – later changed to "rectitude" – was added to their list. These values, for Lasswell and McDougal, constitute the basic values of human dignity. The primary purpose of postrealist jurisprudence, they claimed, was to demonstrate to students that their recognition of these values as self-evident is of fundamental importance for the maintenance and furtherance of a properly democratic order.

How, then, was policy science supposed to work? That is, how might Lasswell and McDougal's basic values of human dignity ever come to feature centrally in the law school curriculum? Their answer to this question seems to be that one can do little more than proselytize: law professors must be encouraged to reorient their teaching along policy science lines. New courses must be devised, and old ones revised, along policy science lines. All curricular revision ought to be guided by one simple criterion: whether or not current doctrines and practices in particular areas of law serve to promote or to retard the basic values of human dignity (Lasswell & McDougal, 1943, pp. 248–62). The fundamental obstacle facing the policy science proposal, however, was that it bore little resemblance to anything that either students or teachers actually wanted from legal education. Lasswell and McDougal wrote in highfalutin terms about the need for

radical pedagogic change in the American law schools. But no one was prepared to seize the initiative with them. Indeed, at most law schools less prestigious than Yale, resources simply did not exist which would have permitted the seizing of such an initiative, even if anyone should have wished to do so. Another Yale law professor hailed their 1943 article as "a forgotten classic" in the history of modern American legal scholarship (Kronman, 1993, p. 202). To my mind, however, the article is more eccentric than classic. It offers a highly idiosyncratic vision of legal education perfected. If policy science had not hailed from Yale, it is doubtful that it would have generated even marginal academic interest.

Perhaps the greatest shortcoming of all concerning policy science as a form of jurisprudence is that it did not improve significantly upon the lessons of legal realism. I would argue, indeed, that Lasswell and McDougal offered little more than a version of realist jurisprudence for good times. Like their realist forebears, they recognized that law is a political phenomenon. But their argument seemed to be that so long as an educational framework was established which would ensure that future lawyers subscribed to the right kind of politics, the use of law to promote political objectives ought not to be discouraged. That law might be used to serve both good and bad political ends seemed not to concern Lasswell and McDougal. For them, the integrity of a law school curriculum redesigned to promote the basic values of human dignity would be enough of a safeguard to ensure that the legal profession did not stray into murky political waters. If law students were provided with a good political education, then they would eventually develop into good legal policymakers. The matter, in Lasswell and McDougal's eyes, really was as simple as that.

Legal Process

As compared with Lasswell and McDougal, many American law professors in the post–World War II era were remarkably less sanguine about the prospects for the development of law as a political tool. The tradition of American jurisprudence known as "legal process" epitomizes the sense of disquiet which various law professors of this period expressed regarding the politicization of law. While it would be inappropriate strictly to characterize legal process as a postrealist tradition – the development of process jurisprudence in the United States parallels if not predates the advent of realism (see Duxbury, 1993, pp. 607–22) – it seems not inaccurate to claim that it was only as legal realism began to wane that the process tradition came to acquire a distinctive identity. Legal process, in short, came alive in response to the challenges of realist legal thought.

What is meant when we speak of "legal process" as a form of jurisprudence? It seems to me that "process," in this context, can be seen to denote two things. First, there is the legal process itself. The process tradition in American jurisprudence presents a very distinctive account of the elements which make up the legal process. Secondly, "process" denotes a specific process of legal reasoning which most process theorists believe ought to dominate constitutional adjudication (or indeed, some would argue, adjudication in general). Let us take these different dimensions of process in turn.

Who Should Do What?

One of the issues at the heart of the process tradition in American jurisprudence is that of institutional competence: viz., within the legal process, which institution should be deemed competent to do what? From the mid-1930s onwards, various law professors – virtually all of them associated in one way or another with the Harvard Law School – turned their attention to this question. In the 1930s, Felix Frankfurter and Henry Hart had written a series of articles in which they warned against the dangers of blurring the distinction between adjudication and legislation. If this distinction does become blurred – and it appeared, during the New Deal era, that this is precisely what was happening – then the integrity of the Supreme Court can no longer be guaranteed:

> A Court the scope of whose activities lies as close to the more sensitive areas of politics as does that of the Supreme Court must constantly be on the alert against undue suction into the avoidable polemic of politics. Especially at a time when the appeal from legislation to adjudication is more frequent and its results more farreaching, laxity in assuming jurisdiction adds gratuitous friction to the difficulties of government... Inevitably, fulfilment of the Supreme Court's traditional function in passing judgment upon legislation, especially that of Congress, occasions the reaffirmation of old procedural safeguards and the assertion of new ones against subtle or daring attempts at procedural blockade-running. (Frankfurter & Hart, 1935, pp. 90–1)

The message which Frankfurter and Hart were endeavoring to promote was simple: adjudication is a peculiar type of institutional activity that ought not to embrace policymaking; and if the integrity of the adjudicative process is to be preserved, judicial self-restraint must dominate the activity of the courts. Within the legal process tradition, nobody took more care in developing the idea that adjudication is somehow a "special" form of juristic activity than did Lon Fuller. For Fuller, "adjudication is a form of social ordering institutionally committed to 'rational' decision" (Fuller, 1978, p. 380). This thesis is elaborated by Fuller in this article, "The forms and limits of adjudication." (Although published in 1978, shortly after his death, this article was circulated in draft form by Fuller among members of the Legal Philosophy Discussion Group at Harvard Law School as early as 1957.) Fuller argues in this article that "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor" (Fuller, 1978, p. 364). As a legal activity – as opposed, say, to the refereeing of a sport or the judging of a competition – adjudication demands, indeed, that decisions be "reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments" (Fuller, 1978, p. 369). Given that adjudication requires that an affected party be able to participate in the process of reaching a decision, that person, "if his participation is to be meaningful," must "assert some principle or principles by which his arguments are sound and his proofs relevant" (Fuller, 1978, p. 369). Only by resorting to principles might disputing parties convincingly assert their rights within the adjudicative process. Indeed, for Fuller, principles and adjudication go hand-in-hand. He attempts to illustrate this point by constructing a particular scenario:

> We may see this process ... in the case of an employee who desires an increase in pay. If he asks his boss for a raise, he may, of course, claim "a right" to the raise. He may argue the fairness of the principles of equal treatment and call attention to the fact that Joe, who is not better than he, recently got a raise. But he does not have to rest his plea on any ground of this sort. He may merely beg for generosity, urging the needs of his family. Or he may propose an exchange, offering to take on extra duties if he gets the raise. If, however, he takes his case to an arbitrator he cannot, explicitly at least, support his case by an appeal to charity or by proposing a bargain. He will have to support his demand by a principle of some kind, and a demand supported by principle is the same thing as a claim of right. (Fuller, 1978, p. 369)

Within the literature of the legal process tradition, this passage is, in my opinion, fairly crucial. Fuller manages here to draw together three distinct process themes: that adjudication is a special form of legal-institutional activity; that the court is a forum of principle; and that principles serve to protect rights. These themes – especially the second and third themes – would, in due course, come to be associated primarily with the legal philosophy of Ronald Dworkin. Before the advent of Dworkin, however, these three themes were developed very gradually by a variety of writers within the legal process tradition. The history of this development is by no means neat, and in an article of this nature it is possible only to sketch what is in fact a fairly complex intellectual history. Any summary of this history would be thoroughly deficient, however, if account were not taken of Henry Hart and Albert Sacks's unpublished manuscript, "The Legal Process" (1958).

At the core of "The Legal Process" rests the observation that law is a purposive process. The basic purpose of legal institutions, according to Hart and Sacks, is to maximize the total satisfactions of valid human desires. "Almost every, if not every, institutional system gives at least lip service to the goal of maximizing valid satisfactions for its members generally" (Hart & Sacks, 1958, p. 115). For Hart and Sacks, this observation may be taken for granted. What is far less obvious, however, is the matter of how the legal process might best pursue the goal of maximization. Successful pursuit of this goal, according to Hart and Sacks, demands an efficient legal system; and one can only have an efficient legal system if most issues of social ordering are left to private individuals and groups, if the law is allowed to intervene in the process of private ordering only when it is required, and if – once the law is permitted to intervene – there exists no confusion as to which legal institution ought to do the intervening. An efficient legal process, in other words, is one that intervenes in the process of private ordering only when necessary and that demonstrates a general awareness of which legal institution is competent to do what. Accordingly, a proper distribution of institutional responsibility between, say, the courts and the legislature demands the recognition that each must refrain from trying to perform functions for which it is not competent.

While Hart and Sacks examine the institutional competence of both legislatures and courts (and other law-applying bodies, for that matter), it is their reflections on the courts in particular which feature most significantly within the history of the legal process tradition. Integral to adjudication, they argue, is "the power of reasoned elaboration" (Hart & Sacks, 1958, p. 161). In other words, courts are expected to reach decisions on the basis of rationally defensible principles. It is not enough that a court should reach welcome or popular decisions; it is more important that those decisions

be principled – that they be sound. But were the American courts of the 1950s and 1960s fulfilling this expectation? Were they adjudicating in a principled fashion? The decisions of the Supreme Court under the Chief Justiceship of Earl Warren indicated that the requirement of soundness was not being taken seriously. Given that many of these decisions were meeting with a good deal of popular support, the question arose as to why this requirement ought to be treated seriously. That is, if a judicial decision seems like a good decision, why should it matter that it is not backed up explicitly by principle? This question Hart and Sacks failed to confront. Refinement of the process tradition in American jurisprudence demanded that someone else speak where Hart and Sacks had fallen silent.

The Affirmation of Principle

The question which Hart and Sacks failed to confront – the question of why principles matter – was tackled head-on by Herbert Wechsler in his classic article, "Toward Neutral Principles of Constitutional Law" (1959). In that article, Wechsler argues that during the first half of this century, and especially during the New Deal era, the Supreme Court paid little attention to principles. Indeed, in decisions such as *Lochner v. New York* (198 US 45 (1905)) and other famous early twentieth-century liberty of contract cases, the Court had demonstrated a commitment to judicial activism by reading policy preferences into the Fourteenth Amendment of the U.S. Constitution. Activist constitutional adjudication, Wechsler observed, was equally prevalent in the Supreme Court during the 1950s. Between the early decades of this century and the 1950s, however, something had changed. The early twentieth-century liberty of contract cases are generally considered to represent the unwelcome face of judicial activism. By reading an economic preference – a preference for *laissez faire* and Social Darwinism rather than for economic interventionism – into the Constitution, the Supreme Court of the *Lochner* era was demonstrating just why political adjudication may be considered undesirable. But by the 1950s, political adjudication appeared to be serving good rather than bad ends. For Wechsler, the segregation decisions – and *Brown v. Board of Education* (347 US 483 (1954)) in particular – demonstrated this point. Those decisions, he believed, had "the best chance of making an enduring contribution to the quality of our society of any … in recent years" (Wechsler, 1959, p. 27). Yet he also believed that those decisions were, in a peculiar way, unsatisfactory. They were unsatisfactory because they were not sufficiently principled.

In elaborating this point, Wechsler focused specifically on the case of *Brown v. Board of Education*, in which the Supreme Court held that racial segregation in American public schools denies black children equal protection of the laws as guaranteed by section 1 of the Fourteenth Amendment. The Supreme Court had reached its decision in *Brown*, he observed, "on the ground that segregated schools are 'inherently unequal,'" having "deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development" (Wechsler, 1959, p. 32). Yet there existed no evidence to support this argument. Indeed, Wechsler suggested, the reality may be that integrated schools are racially hostile schools in which blacks suffer by being made to feel inferior. It may even be the case that, where

segregation does exist, blacks enjoy a "sense of security" in their own schools (Wechsler, 1959, p. 33). In offering this argument, Wechsler was not attempting to justify racial segregation. Rather, he was attempting to demonstrate that the Supreme Court needed to do rather more than it had done in order to justify integration. But what should the Court have done? According to Wechsler, the Court ought to have demonstrated that the constitutional invalidation of state-enforced segregation was founded on a principle that would favor the interests of neither blacks nor whites – a principle such as that the state ought not to impede freedom of association.

Even Wechsler himself seemed not entirely convinced that freedom of association was the principle at stake in *Brown.* But then, the hesitancy of his conclusion is not especially important. What is far more important, for the purpose of understanding the legal process tradition as a strand of postrealist legal thought, is an estimation of why Wechsler felt that resort to principles is crucial in the context of constitutional adjudication. His argument is perhaps most easily grasped if one contrasts the *Lochner*-type liberty of contract decisions with the segregation decisions. In the former set of decisions, the Supreme Court was adjudicating in an activist fashion, using the 14th Amendment to validate a preference for *laissez faire* over economic interventionism. In the latter set of decisions, the Supreme Court was again engaging in judicial activism, this time using the Fourteenth Amendment to validate a preference for racial integration over segregation. Both sets of decisions were political: the first set was welcomed, the second set castigated. For Wechsler, these two sets of decisions illustrate that where a politically appointed judiciary reaches decisions on the basis of policy preference, one must expect judicial preferences to change with the political climate. Where political change occurs, in other words, the political objectives behind judicial activism are likely also to change. The consequence of this is that while the decisions of an activist Supreme Court may be welcomed when the politics of the Court are considered to be favorable, its decisions are equally likely to cause outcry when the political perspective of the Court appears to change for the worse. Judicial activism thus turns out to be a constitutional jurisprudence for good times. For Wechsler, however, a jurisprudence for good times is an unsound basis for constitutional adjudication: it would be hypocrisy, after all, if one were to applaud activism when the courts are engaging in good politics and then to cry foul once the courts begin to pursue political objectives with which one disagrees. To put the point very simply, if one wishes to welcome the political adjudication which produced *Brown*, one must also accept the political adjudication which produced *Lochner.*

Hence, for Wechsler, the importance of principles. If guided by general neutral principles, constitutional adjudication is likely to exhibit a greater degree of consistency, and in consequence command a greater degree of respect, than if it were guided by considerations of policy. This faith in principle marks off the legal process tradition from the realist tradition in American jurisprudence. So-called realists recognized the problem of judicial indeterminacy; but they had little idea as to how such indeterminacy might be controlled or eradicated. Within the process tradition, we find a solution to this problem: indeterminacy can be controlled through the constraining force of principle. It almost goes without saying that there exist plenty of objections to this solution. Perhaps the main objection is that the solution overlooks the fact that principles themselves may be indeterminate – they may appear sometimes to conflict (for

example, where a claim to privacy is pitted against the right to freedom of speech) – and that, in cases of such indeterminacy, there exists no principled way of determining which principle should prevail. Despite this objection and others, however, process writers after Wechsler – writers such as Alexander Bickel, John Hart Ely, and Ronald Dworkin – have continued to refine the legal process perspective (see, for example, Bickel, 1961; Ely, 1980; Dworkin, 1986). As with the criticisms of this perspective, consideration of these refinements lies beyond the scope of this essay. Rather than consider the various twists and turns of the legal process tradition, my aim here has been to demonstrate how process jurisprudence constituted a response – a highly problematic response, but, nevertheless, a response – to a problem which legal realism did little more than acknowledge and which policy science basically glossed over: the problem, that is, of how to monitor and control the impact of politics on law.

References

Bickel, A. M. 1961. The Supreme Court, 1960 Term – Foreword: The Passive Virtues. *Harvard Law Review* 75:40–79.

Duxbury, N. 1992. The Reinvention of American Legal Realism. *Legal Studies* 12:137–77.

Duxbury, N. 1993. Faith in Reason: The Process Tradition in American Jurisprudence. *Cardozo Law Review* 15:601–705.

Duxbury, N. 1995. *Patterns of American Jurisprudence*. Oxford: Oxford University Press.

Dworkin, R. 1986. *A Matter of Principle*. Oxford: Clarendon.

Ely, J. H. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.

Frankfurter, F., and Hart, H. M. 1935. The Business of the Supreme Court at October Term, 1934. *Harvard Law Review* 49:68–107.

Fuller, L. L. 1978. The Forms and Limits of Adjudication. *Harvard Law Review* 92:353–409.

Hart, H. L. A. 1961. *The Concept of Law*. Oxford: Clarendon.

Hart, H. M., and Sacks, A. M. 1958. The Legal Process: Basic Problems in the Making and Application of Law. Unpublished manuscript. Cambridge, MA: Harvard Law School.

Horwitz, M. J. 1992. *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*. New York: Oxford University Press.

Kitch, E. W. 1983. The Intellectual Foundations of "Law and Economics." *Journal of Legal Education* 33:184–96.

Kronman, A. T. 1993. *The Lost Lawyer: Failing Ideals of the Legal Profession*. Cambridge, MA: Belknap Press.

Lasswell, H. D., and McDougal, M. S. 1943. Legal Education and Public Policy: Professional Training in the Public Interest. *Yale Law Journal* 52:203–95.

Leff, A. A. 1974. Economic Analysis of Law: Some Realism about Nominalism. *Virginia Law Review* 60:451–82.

Purcell, E. A., Jr. 1969. American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory. *American Historical Review* 75:424–46.

Schlegel, J. H. 1979. American Legal Realism and Empirical Social Science: From the Yale Experience. *Buffalo Law Review* 28:459–586.

Schlegel, J. H. 1980. American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore. *Buffalo Law Review* 29:195–323.

Stevens, R. 1971. Two Cheers for 1870: The American Law School. *Perspectives in American History* 5:403–548.

Twining, W. 1985. *Karl Llewellyn and the Realist Movement*. London: Weidenfeld & Nicolson.

Unger, R. M. 1987a. *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy. Part I of "Politics," A Work in Constructive Social Theory*. Cambridge, MA: Cambridge University Press.

Unger, R. M. 1987b. *Plasticity into Power: Comparative–Historical Studies on the Institutional Conditions of Economic and Military Success. Variations on Themes of "Politics," a Work in Constructive Social Theory*. Cambridge, MA: Cambridge University Press.

Unger, R. M. 1987c. *Social Theory: Its Situation and Its Task. A Critical Introduction to "Politics," a Work in Constructive Social Theory*. Cambridge, MA: Cambridge University Press.

Wechsler, H. 1959. Toward Neutral Principles of Constitutional Law. *Harvard Law Review* 73:1–35.