

Law & Political Economy Reading Group

**The required readings for each week are in bold, all other readings are optional

Part I: Intellectual History of the Realist Tendency American Legal Thought

Week 1: Introduction and the Road to Realism

- **Grewal, Kapczynski, Purdy, Toward a Manifesto:** <https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/> (Links to an external site.)Links to an external site.
- **Oliver Wendell Holmes, "The Path of the Law" 10 Harvard L. Rev. 457 (1897) (20 pages)**
- **Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," Political Science Quarterly, Vol. 38, No. 3 (Sep., 1923), pp. 470-494**
- James Gordley, *The Jurists*, pp. 195-96, 204-15, 275-81
- Barbara Fried, *The Progressive Assault on Laissez-Faire*, pp. 15-28
- Morris Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927), pp. 12-21, 27-30
- Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale L. J. 16 (1913) (skim--there are a lot of block quotes you can skip past)

Questions:

-What exactly is Hale arguing against with his extended discussion of whether a worker is coerced into selling his labor?

-Are Hale and Cohen arguing that law is just ideology to cover up power relations? If so, are they just watering down Marxism/post-Marxist critique or are they adding something to it (or taking something away)?

-Why does Holmes think it is important to deny that law is just a matter of logic? What does this have to do with his argument that the law is focused on what *judges* do rather than what's on the books?

-Holmes talks about "universal law" at the end: does his account indicate that judges can figure out what this law is but they are just doing a bad job of it now?

-What does Holmes's account of how law works and how we should think about it have to do with Hale/Cohen's account of the role of law in structuring "private" power?

-What should we make of Holmes/Hale/Cohen: are they just of historical interest now that classical legal thought has been defeated? Are their arguments compatible with neoliberal frameworks (or any other right-leaning understanding of society/law)? If so, are they only of historical interest? If not, why not?

Week 2: Legal Realism

- **Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 Col. L. Rev. 809 (1935) pp. 809-849**
- **Joseph William Singer, Legal Realism Now, 76 Cal. L. Rev. 465 (1988), pp. 468-503, 532-42**
- Karl Llewellyn, A Realistic Jurisprudence: The Next Step, 30 Colum. L. Rev. 431 (1930), pp. 443-65.
- Hanoch Dagan, The Realist Conception of Law in *Reconstructing American Legal Realism and Rethinking Private Law Theory*, pp. 14-67.

Questions:

- What does Cohen take from Holmes and what does he take from Hale?
- What is Cohen's point about fair value? Can it be squared with neoliberal thinking?
- Cohen refers to the development of functional/pragmatic approaches in a number of disciplines in the early 20th century: in mathematics, anthropology, logic, moral philosophy, religious studies, etc. If you're familiar with the history of these disciplines, consider whether you agree with his analogy to the functional turn in law. If the analogy makes sense, what can we learn from the trajectory of that discipline in thinking about the trajectory of legal analysis?
- Cohen's examples of transcendental nonsense all involve formalisms in favor of capitalists. He talks about formalism as a cover for "class prejudices". Is transcendental nonsense/formalism inherently biased in this way? Or is this just a matter of emphasis for progressives like Cohen? Is he obscuring the values of formalism by focusing on its ideological uses? Consider, in this regard, the fact that Cardozo and Brandeis--both lions of realism and progressivism--are two targets of his ire.
- Cohen insists on transparency about moral reasoning, but what sort of moral reasoning does he recommend to replace formalism?
- Singer's article is a book review. What is the view of realism he is opposing? What does he think is right about it, and what wrong?
- Does Singer's account of realism comport with the few realist pieces you've read?
- Singer argues that liberal moral theories and neoliberal economic theories have attempted to impose formalism/neutrality on realism. What is his argument? If you're familiar with these tendencies of thought, do you agree with his account? Is Singer correct that they distort realism?
- Singer describes the critical core of realism that he wants to preserve as tragic. What does he mean? Is there an optimistic version of his argument?

Week 3: Law and Neoliberalism (could be moved to the end of this section)

- **David Singh Grewal and Jedediah Purdy, Introduction: Law and Neoliberalism, 77 L. & Contemporary Problems 1 (2014).**

Week 4: Historicizing Law and Markets

- **Ellen Wood, *The Origins of Capitalism- A Longer View*, Part 1.1 “The Commercialization Model and Its Legacies;” Chapter 5.**
- Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, “The Hundred Year’s Peace” p. 3-5; “Self Regulating Markets and the Fictitious Commodities,” p.71-80; “Political Economy and the Discovery of Society,” pp.116-136; “Birth of the Liberal Creed: Class Interests and Social Change” and “Market and Man,” pp.158-186.
- Elizabeth Anderson, When the Market Was “Left” in *Private Government*, pp. 1-36.

Questions:

- How does Ellen Wood understand the transition to capitalism? How does she define the transition differently from other historians and political theorists? (The "commercialization model.") What effect does her history have on her definition of capitalism itself?
- For those who read (or have read) Polanyi, where do their accounts diverge? How does Wood characterize Polanyi's argument, and why is it so important to her that his account of "market society" relies on technological determinism?
- How does Wood explain the historical emergence of the nation state in relation to capitalism?
- Why does the distribution of political power in early Modern England matter so much in this account?
- Where does law figure in Wood's account of capitalism and the nation state? What connections do you see between this chapter and what we've read so far in the reading group?
- Where does Wood see vulnerabilities in the infrastructure of capitalism? How might it inform an LPE research agenda?
- In both chapters that we read, Wood incorporates "anti-Eurocentric" critiques while holding firm to her argument that capitalism first emerged in England. How persuasive do you find her argument that "capitalism was a domestic product"?

Week 5: Socializing Law and Markets

- **Lauren Edelman and Robin Stryker, A Sociological Approach to Law and the Economy in *The Handbook of Economic Sociology*, pp. 529-42.**
- William A. Darity et al., Stratification Economics: A General Theory of Intergroup Inequality in *The Hidden Rules of Race: Barriers to an Inclusive Economy*, pp. 35-51.

Questions:

- How do Edelman and Stryker compare their position to that of law & economics? We might focus especially on the concept of law being "endogenous".
- How does thinking about law as something that can be "mobilized" (533-34) change one's perspective? Is this equivalent to realism or does it add something?-How does E&S's way of thinking about law interact with their way of thinking about the market/economy? How does this compare with law and economics?
- What is the difference between a "facilitative", a "regulatory", and a "constitutive" legal environment, according to E&S? Do you agree that this is a distinction worth making?
- How do rational choice models of regulation come up short, according to E&S?
- Do E&S sufficiently account for the structural limits on the ability for oppressed groups to mobilize the law in their favor?
- What role does the concept of the group play for Darity et al? How does it interact with their concept of the individual? How does this framework differ from most economic analysis? The comparison to Becker's theory of discrimination might be especially salient here.
- How does Darity et al's version of "real conflict theory" map onto Hale's concept of economic action as coercive/conflictual?
- Darity et al use a couple quasi-legal concepts to conceptualize racial hierarchy: e.g. "proprietary" claims on whiteness, whiteness as a "cartel". (In fact, these are borrowed from critical legal scholarship!) What work do these analogies to legal concepts do? How might a realist understanding of law alter our understanding of the analogy?
- Does the Darity et al framework treat racism as natural or socially constructed? Does it sufficiently account for the way that racialization has benefited/been encouraged by ruling classes? What possibilities does it present for dismantling racial hierarchies?

Week 6: Critical Legal Studies

- **Roberto Mangabeira Unger, Legal Analysis as Institutional Imagination, 59 Modern L. Rev. 1 (1996)**
- Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, 41 Md. L. Rev. 563 (1985)

Questions:

- What does Unger diagnose as the problems with contemporary legal analysis? How does it compare to the problems with classical legal analysis that the realists critiqued?
- What does Unger draw out as worthwhile in contemporary legal analysis? How does he see the rationalizing tendency of legal analysis as stifling these tendencies?
- Who is legal analysis for, on Unger's view? How is this different from, say, Felix Cohen?
- What is Unger's proposed alternative? What is mapping and what is criticism and how do they relate? Are they actually distinguishable concepts?
- Unger seems to move away from Singer's concept of law and legal analysis as tragic. How so? Whom do you find more convincing?

-Is it *possible* to engage in legal analysis in the way Unger envisions? Would it require abandoning our very idea of what courts and legal categories are? Or is it just fancy dressing for more progressive versions of what exist now?

Week 7: Feminist Legal Theory

- **Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, *Stanford Law Review*, Vol. 43, No. 6 (Jul., 1991), pp. 1241-1299.**
- **Wendy W. Williams, Notes from a First Generation, *University of Chicago Legal Forum*: Vol. 1989, pp. 1-17.**
- Robin West, Jurisprudence and Gender, excerpt pp. 1-43.

Questions:

-Is Crenshaw primarily writing a critique of advocacy strategies and critical scholarship aimed at removing structures of oppression (i.e. of racist feminism or misogynistic anti-racism)? Or is her critique primarily aimed at structures of oppression

-How does conventional feminist analysis marginalize black women's experience of domestic violence? How does conventional anti-racist analysis marginalize black women's experience of domestic violence?

-How does conventional feminist analysis marginalize black women's experience of rape? How does conventional anti-racist analysis marginalize black women's experience of rape?

-Why does Crenshaw focus on violence against black women? Does that seem too narrow a focus for the broader ambition she has for critique of paradigm and structure? How are rape and domestic violence connected to broader structures of oppression, according to Crenshaw?

-Crenshaw focuses on a number of non-legal phenomena: domestic violence shelters, social research practices, feminist and anti-racist advocacy groups/strategies, the music industry and its relationship to African-America cultural traditions, etc. Is this analysis distracting or does it help us get a handle on how law shapes and is shaped by the surrounding world? How does this approach relate to previous work we have read on how law fits with society?

-What does Crenshaw's article have to do with "economics"? How do we relate her framework to an analysis of more purely straightforwardly economic phenomena?

-Williams contrasts symmetrists with asymmetrists. What are each of these positions? How do they differ?

-What role does generational difference do in Williams's explanation? How might Williams's observation help us think about the position of the legal analyst as something other than disinterested observer?

-What does Williams see as the commonality between symmetrists and asymmetrists? Do you think there is good reason to hope for a synthesis of their projects?

-What role does legal realism play in Williams's analysis?

Week 8: Critical Race Theory

- Cheryl Harris, “Critical Race Studies: An Introduction,” 49 UCLA L. Rev. (2001) pp. 1215-1240.
- Patricia Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,” *Harvard Civil Rights-Civil Liberties Law Review* 22 Harv. C.R, pp. 401-434.
- Richard Thomson Ford, Political Identity as Identity Politics, 1 Unbound: Harvard Journal of the Legal Left 53 (2005) pp. 1-5
- Derrick Bell, “Brown v. Board of Education and the Interest-Convergence Dilemma” *Harvard Law Review* Vol. 93, No. 3 (Jan., 1980), pp. 518-533 (16 pages)

Questions:

- Bell begins with a discussion of Wechsler's critique of *Brown*. What is Wechsler's critique? Does Bell think Wechsler gets wrong? What does Bell think Wechsler gets right?
- What does Bell think the "neutral principle" was in *Brown*?
- Why does Bell think *Brown* was decided as it was, despite decades of failed attempts? What three factors does he point to that explain this "break from the past"?
- What does Bell think the then-recent decisions that backed off from mandating busing district re-drawing tell us about whose interests are served by desegregation litigation?
- What is Bell's proposal for "interest-convergence remedies"? What might Williams say about them? What do you think?
- Is Bell's argument really that courts *aren't* countermajoritarian? If so, are anti-racism and majoritarianism in conflict in the US context?
- What lessons does Williams draw by comparing her situation renting a new apartment to her colleague Peter Gabel's? How does informality play out differently for Williams and for Gabel?
- What does Williams think the CLS critique of rights gets right? What is the value of rights that she thinks her CLS colleagues fail to see?
- What does Williams argue is the difference between rights and needs? What might a CLS author say in response?
- What does Williams think is the connection between rights talk and the need for white people to recognize black people? How does this compare to a black nationalist or separatist theory? Do you agree with her view? What might Bell say about it?

Part II: Visions of a Democratic Form of Legal Analysis

Week 9: Law in a Democratic Society

- Reread Grewal, Kapczynski, Purdy
- Angela Harris, “Where is Race in Law and Political Economy?”, <https://lpeblog.org/2017/11/30/where-is-race-in-law-and-political-economy/>
- K. Sabeel Rahman, *Democracy Against Domination*, Introduction.

Questions:

- How does LPE scholarship resemble what we've read already? How is it different?
- How does Angela Harris put a critical race analysis in conversation with a critical analysis of the economy?
- One way that LPE is different from what came before is its central concern with combatting neoliberal ideology. How does neoliberalism shape the LPE project? Is the argument between neoliberals and LPE-ers and argument *within* the realist tradition or are neoliberals not really realists? Does it matter?
- What does Rahman argue was the central shortcoming of the New Deal? How does he approach reshaping the New Deal approach?
- What work does reframing the problem of inequality as a problem of domination do? Do you think Rahman is right to make that move or does it obscure forces that create inequality that cannot be reduced to relations of domination?

Week 10: Democratic Control of Investment

- Robert Hockett and Saule Omarova, *The Finance Franchise*, 102 *Cornell L. Rev.* 1143 (2017)
- JW Mason, *Socializing Finance*, <http://jwmason.org/slackwire/at-jacobin-socializing-finance/>
- Mehrsa Baradaran, *The Color of Money*

Week 11: Democratic Control of Production, Part I (Antitrust and Public Utility)

- Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 *Harv. L. & Pol. Rev.* 235 (2017).
- K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *Cardozo L. Rev.* (2018).
- William Novak *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Ch. 4, “Public Ways,” pp. 115-148.

Questions:

- How is economic concentration related to wealth inequality, according to Khan and Vaheesan?
- Should we be as concerned about intermediate firms selling for lower prices to monopsonists as consumers paying higher prices to monopolists? Are Khan and Vaheesan right to talk about the two in the same breath?
- K/V mention the "countervailing power" of labor and even suggest that it might be more effective in more oligopolistic markets, but then refer only to antitrust law. Are they moving too quickly past a potential counterargument to their approach?
- K/V deal with concentration, bigness, and power as if they're the same thing. But are they? For instance, a local market with only one provider is highly concentrated, but that provider may not be all that big. And it may not have all that much power, at least beyond the local level.
- K/V mention the role concentration plays in the political process. Are you convinced, or might corporate power be a factor even in deconcentrated industries?
- Which policy changes do K/V recommend? How do they view policy differently from the Chicago School?
- Might bigness actually be something that leftists should favor? What advantages does bigness have in building a democratic society? One thing to consider is that firms with broad geographic sweep might be easier to regulate at the federal level, easier to unionize, and perhaps more likely to respond to urban social inclusiveness (think about the national firms that pulled out of North Carolina when the bathroom bill passed).
- Rahman proposes a framework to fit together public utility, corporate governance, and antitrust, drawing from republican political theory. What is that framework and how does it differ from an "economistic" account?
- What does Rahman think the conventional account of realism gets wrong and how does it relate to his notion of the concept of a public utility?
- What is an "infrastructural good" for Rahman? He frames it as a conjunctive concept, but should it be treated as a disjunctive concept?
- Is Rahman too pro-market? Why does he always talk about nationalization as "extreme"?
- Rahman only mentions something like countervailing power towards the end and doesn't about labor mobilization at all. Is this a shortcoming in his approach? Is Rahman really offering a *political* theory of public utility?
- Both K/V and Rahman address telecommunications and electricity provision. How do their recommendations differ? Are they complementary or contradictory? How do you weigh the two approaches against each other?

Week 12: Democratic Control of Production, Part II (Labor)

- **Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2 (2017).**
- Brishen Rogers, "The Limits of Antitrust Enforcement", <https://bostonreview.net/class-inequality/brishen-rogers-limits-antitrust-enforcement>

Questions:

- What is the standard picture of FLSA and its relationship to the NLRA that Andrias is arguing against?
- How did *Lochner* and *Schechter* limit the ambit of the FLSA wage boards? Do these cases still have relevance to the design of collective wage-setting mechanisms?
- What relevance does the early history of FLSA have for contemporary conditions, according to Andrias? Do you think she's right?
- Why does Rogers think applying antitrust law to the labor relationship is inadequate? How does he employ the insights of legal realists to make this argument?
- What do Andrias's and Rogers's contributions tell us about the possibilities for "countervailing power" and how the legal system can enable or restrict it?

Week 12: Decolonizing the Demos

- **Aziz Rana, *The Two Faces of American Freedom*, Conclusion “Democracy and Inclusion in an Era of American Hegemony”, pp.326-348.**
- **Daria Rothmayr, “Uniting the Working Class Across Racial Lines”, <https://lpeblog.org/2018/08/01/uniting-the-working-class-across-racial-lines/>**
- **Amna Akbar, “The Movement for Black Lives Offers an Abolitionist Approach to Police Reform,” <https://lpeblog.org/2018/01/23/the-movement-for-black-lives-offers-an-abolitionist-approach-to-police-reform/>**
- **Angela Harris, “The App and the Operating System: Neoliberalism and “Social Reproduction””, <https://lpeblog.org/2019/02/18/the-app-and-the-operating-system-neoliberalism-and-social-reproduction/>**