

Legal Realism: An LPE Reading List and Introduction

Samuel Aber¹

Legal realism was a movement in legal thought that began, roughly, in the late 19th century and flourished alongside Progressivism in the first decades of the 20th. It challenged formalist laissez-faire approaches to the law and called for a jurisprudence more consciously attuned to social realities and empirical research. Since then, the realists have received a variety of interpretations and substantially influenced American law. The bibliography below is intended to provide an overview of writings by and about legal realists that emphasizes the elements of realism that are most relevant to a Law and Political Economy approach to law. The text that follows is a brief introduction to realism's context, some of its characteristic arguments, and its legacies. It too is primarily oriented toward realism as a precursor of LPE. It tries to be thorough but certainly does not claim to be comprehensive.

I. From Formalism to Realism

The legal realists tried to bring the law into contact with its true stakes. They examined the social consequences of legal rules, the nature of judicial decisions, and questioned the traditional legal ideas of the nineteenth century and the Gilded Age. As a movement in legal thought, it encompassed a variety attitudes and approaches to the law. This heterogeneity is, indeed, one of the few things that scholars of realism's history, from its skeptics to its fellow travelers, seem to agree on. Later we will tease apart two main strands of realist thought, and focus on one that is most relevant to our purpose. First, though, it will be worthwhile to take a look at realism as a whole. This will mean examining its origins in the history of American legal thought, and in particular in the intellectual reaction against "formalism" in the law, or what is sometimes called "Classical Legal Thought." Realists perceived legal formalism as the hegemonic way of theorizing about law in their time,² and they were deeply dissatisfied with it.

A rough sketch of legal formalism might go like this. Classical legal thinkers, ascendant at the bar from about 1880 through the 1930s, sought to legitimize legal authority by making law out as an autonomous domain of neutral and universally valid principles. The law, for them, was a coherent whole determined by a few foundational premises. As Duncan Kennedy writes: "The late nineteenth-century mainstream saw law as 'a system,' having a strong internal structural coherence based on the three traits of exhaustive elaboration of the distinction between private and public law, 'individualism,' and commitment to legal interpretive formalism." Lawyers and judges in this formalist interpretive tradition often reasoned deductively from concepts like "property" and "contract" to determine the outcomes of cases. These concepts were defined *a priori* and thought, by the nature of these definitions, to provide sufficient ground to straightforwardly decide a case. Here

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² The extent to which this was so, just like the extent to which laissez-faire is an accurate descriptor for the American state in the 19th and early 20th century, is disputed. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 309-310 (1995); William J. Novak, *The Myth of the "Weak" American State*, 113 AMER. HIST. REV. 752 (2008). But I think the importance of each of these perceptions *for the realists* is what matters here.

is realist critic Felix Cohen's hyperbolic but helpful characterization: "The law *must* (or *cannot*) be thus and so, because the *nature* of contracts, corporations or contingent remainders so requires."

In this way, the objectivity of judges and the neutrality of legal decisions—core desiderata of the classical legal tradition—were supposedly assured. Deciding cases like this meant, self-evidently, excluding the political opinions and moral values of judges. There was no room to allow such things into a decision, for the decision followed ineluctably from the judge's premises and the conceptual structure of the legal system as a whole.

II. The Politics of Realism: Realism and Laissez Faire

So far this has mainly been a story with very abstract characters: two opposed theories of law. A little more historical texture is called for, in the form of both actual cases and the social circumstances in which they were announced. We can speculate that the appeal of Classical Legal Thought may have depended on the certainty and stability it promised during the relatively turbulent decades of the late nineteenth century, which saw widespread labor organization, immigration, urbanization, and continuing industrialization. Of course, this "stability" came at the expense of particular interests who sought to assert themselves at this time, labor unions chief among them. The substantive ideological assumptions of classical jurists were arrayed against these sorts of market actors. "Liberty," for the formalist, meant freedom from interference by the state. The Constitution contained a fundamental right to freedom of contract, as announced in *Allgeyer v. Louisiana* in 1897—a right which would become the grounds of the Court's notorious anti-regulatory ruling in *Lochner v. New York* in 1905. To regulate the employment relationship was unconstitutionally to interfere with the right to freedom of contract.

Legal formalism and laissez-faire social and economic thinking were thus linked in the era of Classical Legal Thought. Both, crucially, rested their legitimacy on a set of formal ideals, and indeed on a formally equal, rights-bearing legal or economic subject. Free and equal individuals, dealing freely and equally in a competitive marketplace, bargaining for their mutual benefit and motivated by their own self-interest: not only did this give rise to the best possible outcomes for individuals and society as a whole, but it was also fair. Classical Legal Thought ensured that, according to its own terms, bargains struck in the marketplace were always just. Wealth inequality became a conspicuous problem in the early twentieth century, but, as the conservative Justice Pitney wrote in *Coppage v. Kansas* (1915), "It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." The line has the virtue of lucidity, if not of beauty.

The turn of the twentieth century also saw formal ideals challenged in other spheres. The pragmatist movement, for example, advanced a set of philosophical ideas related to the realists' legal concerns. To put it much too briefly, pragmatists like John Dewey were skeptical of claims about concepts possessing transcendental validity; the truth of an idea was rather best understood as a function of how useful it was, of what sort of consequences it had in the real world. "Liberty" thus had meaning only as it could be understood in relation to actually existing power relations; it did not

pre-date the state or society as the “ready-made possession of individuals,” as classical legal thinkers posited. Thus claims about an individual’s liberty interests had to be justified in the context of a particular set of democratic social arrangements—that is, with reference to the relative liberties obtaining in the social whole. One can see here how realists and pragmatists attempted to push against the thoroughgoing individualism of Classical Legal Thought by calling attention to the way certain key values—liberty, power, etc.—were distributed at a structural level. In this way, their anti-formalism parallels LPE’s interest in shaking off the hegemonic assumptions, derived largely from neoclassical microeconomics, that dominate so much of the law today.³

Still, it is important not to understate the democratic potential that a formalistic jurisprudence seemed to hold out at one time. What Henry Maine called “the movement from status to contract,” a notion close to the heart of classical legal thinkers, could be seen as a movement of whiggish liberation—a movement from social hierarchy to republican equality, from rule by others to individualistic self-rule. The related ideal of “free labor” moved Radical Republicans during the Civil War and Reconstruction. (Though the hideous uses to which the labor contract was put in the Reconstruction South are reason enough to deny the notion that liberation can be built on the strength of legal forms alone.) The idea was, in any case, that in the marketplace and the courtroom, men (for coverture still prevailed under common law) would meet each other as equals.

For the realists and their intellectual allies, it was not enough. Worse, it was a hypocrisy, even for the white men to whom its supposed universalisms exclusively applied. In the light of rapidly concentrating private power and vastly inequalitarian social circumstances, even the weak promises of formal equality were left unfulfilled.

III. Two Strands of Legal Realism

All legal realists thus began from the conviction that formalist accounts of the law were inadequate. Realism as a whole can be understood as committed to challenging the idea that law should operate as an autonomous domain, one that makes its decisions by turning its judicial eye inward—to the world of legal concepts—rather than outward to the society it governs. As Oliver Wendell Holmes, a forerunner of realism, put it: “The life of the law has not been logic: it has been experience.” Roscoe Pound introduced the distinction between “law in books” and “law in action,” and he argued that one could not actually understand the law without reference to the latter. A similar idea is the basis of, for example, Felix S. Cohen’s critique of the “transcendental nonsense” of legal concepts:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged. Thus it is that the most intelligent judges in America can deal with a concrete practical problem of procedural law and

³ See *Neoliberalism: An LPE Reading List and Introduction* for more on this point.

corporate responsibility without any appreciation of the economic, social, and ethical issues which it involves.

It isn't just that the law *should* be motivated to change social circumstances; Cohen's point is that the law *already* "involves" a huge array of "economic, social, and ethical issues." These issues, Cohen and other realists repeatedly argued, were best addressed directly, explicitly, and without legalistic mystification. Bracketing them was at best negligent and, at worst, a way of concealing the ideological biases of judges.

How precisely to "appreciate" the issues touched by the law and what social ideals by which to judge it were—and are—more controversial questions. Not surprisingly, it was in the effort to formulate answers to these that different realisms differentiated themselves one from another. As noted above, I'll follow Morton Horwitz in distinguishing two strands of realism: "scientific" and "critical" realists.

"Scientific" realist explanations, advanced by scholars and lawyers like Roscoe Pound, Jerome Frank, and Karl Llewellyn (though he is a complicated figure), tended to reach for the social sciences of the day. They sought more empirically grounded accounts of judicial decision-making. When normative decisions were required, scientific realists might be more likely to identify with the technocratic side of Progressivism and presume that empirical social scientific research could help the law to nudge society toward optimal outcomes. Today they can sometimes seem dated or amateuristic in the social scientific models they apply, as in Frank's quasi-Freudian analysis of judges' decisions. It is these realists who are most identifiable with the claim (you might hear or have heard it in your first year of law school), that the realists reduced law to "what the judge ate for breakfast." (This is indeed based on something Jerome Frank once wrote.)

On the other hand, the "critical" realists focused more on challenging the conventional assumptions at the core of Classical Legal Thought and laissez-faire liberalism. The insights of critical realists like Robert Lee Hale, Morris Cohen, Felix S. Cohen, and Louis Jaffe (see their articles below) revealed that many of what were taken to be the axiomatic legal distinctions of formalist jurisprudence did not hold up under scrutiny.

IV. Critical Realism and its Characteristic Moves

I want to illustrate some of the characteristic argumentative "moves" of critical legal realism through brief reprisals of a couple of their most penetrating critiques of legal formalism. These critiques remain especially useful today because they rethink central legal concepts where they tend most tenaciously to support laissez-faire economic ideology.⁴ Liberty and property are two of the most important concepts to these ways of thinking. The former might be said to be both a moral value of laissez faire—an end—as well as a means, because it's claimed that it is by leaving individuals with a maximum of liberty that the best economic and social outcomes are achieved.

⁴ This primer focuses more on the political and policy implications of Classical Legal Thought and legal realism; but if the deconstructive moves of the realists are useful to us today, it is in part because neoliberalism is indeed a kind of new legal formalism and a revived, but transformed, laissez faire.

Self-evidently, the story goes, this means a minimum of government interference in the natural freedom marketplace.

But a legal realist like Robert Lee Hale did not see things in this way. Like other realists, Hale (a trained economist himself) drew on the spirit and ideas of the rising institutional economics movement, which challenged the traditional static, individualistic economic models and instead emphasized the role of cultural and social institutions in the economy. For institutionalists like John Commons, it was evident that the state was already “interfering” in the economy. It set the economic ground rules on which even the most laissez-faire capitalism would have to depend: the law of contracts, the law of property, the law of torts, trusts and estates, bankruptcy, and so forth. The particulars of these ground rules, as Duncan Kennedy later showed in a *Critical Legal Studies* elaboration of Hale, are responsible for distributing power across society in all sorts of subtle and occasionally unpredictable ways, often far beyond the paradigmatic context of arms-length bargaining.

Hale’s original argument was laid out in his seminal *Coercion and Distribution in a Supposedly Non-Coercive State*. Here Hale demonstrated that the supposed opposite of liberty—coercion—cannot be coherently grasped as the mere absence of state action. If the function of private property rights is the ability to exclude others from using your property, then private property only exists in a modern market economy by virtue of the state’s willingness to back up your claim to exclude them.

Property rights may even be seen as a delegation of state sovereignty, as Morris Cohen, another key critical realist, argues. On his view, property rights effectively smuggle the power of state coercion into the supposedly “private” sphere: “Dominion over things is also *imperium* over our fellow human beings.” The distribution of this coercive power through property rights severely restricts the liberty of some by restricting the range of “free choices” that are available to someone at any given moment. Hale shows how other people’s property—capital needed to produce goods, shelter and sustenance needed to survive, land needed to grow food—encircle the worker. She will therefore always need to submit to someone else’s will to access the means of her survival. In other words, the relative power of individuals to extract resources from one another in a bargaining context (say, drawing up a labor contract) will depend mostly on the parties’ relative abilities to exclude one another from their property claims. The individual worker has some coercive power of her own—she can withhold her labor—but she can do so to a much lesser extent than the factory owner or landlord, given that everyone is potentially an unskilled worker, but only a relative few own factories, patents, or arable land.

What was perhaps most novel in Hale’s analysis was the way he cast this as “the *law-made* dilemma of starvation or obedience” (emphasis mine). Much of the above might seem intuitive, but consider how different a picture of the marketplace emerges from this realist-institutionalist framework than from the classical economic one. In Hale’s eyes, the structure of markets is such that liberty has very little to do with it. It is coercion—*legally constituted* coercion—all the way down. And if this is the case, the point cannot be to maximize “liberty” by minimizing regulatory “coercion.” Any argument to that effect is simply incoherent, for state coercion is already deeply implicated in maintaining any given distribution of property rights.

We can go a little further and pick some characteristic realist moves out of this summary. One of the most prominent is the tendency to reduce conceptual differences in kind—say, between public sovereign power and the private rights of a property owner—to mere differences in degree. Public power and private power, and *a fortiori* public law and private law, are intimately related on a realist analysis like Cohen's. So, too, the formalist notion that law and politics are cleanly distinguishable spheres. We cannot simply say that the law has laid neutral ground rules, and so the law's hands are clean of all that rises on top of them. To the contrary, statutory and common law rules are made, unmade, and developed all the time. Besides, as Justice Holmes said, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Once we accept the realist analysis, the only coherent way to begin an analysis of legal problems is to ask not whether, but *how* to structure and distribute power.

V. We Are All Realists Now; or, Who's a Realist Now?

In some ways, legal realism's influence has arguably been so pervasive that it has become difficult to discern it in the legal landscape. Joseph Singer argues that realist influence is evident in nearly all areas of modern legal thought, most of all in the way that it permanently altered the nature of persuasive legal arguments. Today, instead of appealing to the inherent nature of abstract concepts, all modern lawyers argue in the language of line drawing, balancing competing interests, and policy consequences. In this broad sense, nearly everyone who applies social science to the law, or argues that law ought to serve some goals derived from considerations outside of a strictly defined legal domain, is a realist. Thus the wealth-maximization-oriented jurisprudence of "Chicago School" law-and-economics scholars evinces the influence of the realists, as does the work of Critical Legal Studies scholars, critical race theorists, and feminist legal scholars. So, too, with those who apply empirical methods to the study of the law.

At the same time, realism's legacy is a subject of dispute. Some authors in the readings below examine different claims to the realist mantle. Mark Suchman and Elizabeth Mertz explore a couple of the leading contemporary movements of empirical legal studies, which emphasize qualitative and quantitative research about legal outcomes and the social effects of the law in place of narrower doctrinal scholarship. Victoria Nourse and Gregory Shaffer argue that law and economics, rather than fundamentally realist, is in fact a kind of "new formalism," against which various kinds new anti-formalisms have emerged. In this sense, law and economics scholars might be seen as working on the general terrain tilled by realism, but not as doing anything especially "realist" themselves.

Modern critical scholars, including and especially those who focus on the ways in which race, gender, and economic equality are reflected in and entrenched by the law, might therefore be said to be the truest inheritors of realism's critical strain. Hale's analysis of property and bargaining power can and has been used to show how legal rules distribute power disproportionately to white people and to men. One's power to act to, say, leave an abusive partner, is substantially constrained by the legal rules and practices that structure gender relations: family law, employment law, the criminal law of domestic and sexual violence, available social welfare supports, and so on. Further, a focus on power and race can help to highlight how despite formal protections, the coercive police power of

the state is deployed disproportionately against people of color, or how legal rules structure cities, markets, and political institutions in ways that systematically exclude communities of color. But different modern legal movements will have different ideas about their relationship to realism. In general, it is maybe enough to suggest that they do not all mean the same thing by the term. This is perfectly legitimate, given the variety of realist thought.

Law and Political Economy also deserves a place in this story. Its emphasis on critical realist insights about the law's constitutive role in the distribution of power reflects the direct influence of realist thought. So too does LPE emphasize the importance of law, and its close relationship to political concerns, without merely reducing it to a mode of politics by other means. It emphasizes the role of democratic rather than technocratic decision-making, and thus takes up a Deweyan approach to policymaking and legal thinking. In beginning to coalesce around, for example, anti-monopoly and public utility regulation as ways to combat concentrations of private power, LPE draws on the best aspects of the realist and Progressive movements in answering the difficult questions about what the law can and should be.

Bibliography

Sources are categorized as follows: “Writings by Realists” and “Secondary Sources.” Within each category, the sources are organized chronologically. For a deeper and more thorough introduction to realism as a whole, I recommend Joseph W. Singer, *Legal Realism Now*, the first entry in the “Secondary Sources” section.

Writings by Realists

- Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)
 - Pound’s classic article introduces the distinction between “law in books” and “law in action” that was foundational for legal realists as well as later legal movements, such as Law and Society.

- Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), <https://www.jstor.org/stable/pdf/2142367.pdf>.
 - In this seminal realist article, Hale makes the case that property rights should be understood as a form of government coercion against those who are excluded from a given piece of property. His point is to denaturalize property rights; they don’t exist prior to the state, but rather depend upon it for their existence. What is more, the power to exclude others from one’s property—and the accompanying ability to extract resources from them in order to access it—is based on a delegation of state coercive power to private individuals. This argument has profound implications for state “intervention” in an economy in order to regulate it in the public interests. The point cannot be to maximize “freedom” by minimizing regulatory “coercion,” for state coercion is already deeply implicated in maintaining a given distribution of property rights. The point is balancing interests and distributing the “coercion” in such a way as to achieve the appropriate policy ends.

- Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1260&context=clr>.
 - Cohen demonstrates that the distinction between public sovereignty and private property is illusory. Private property in fact represents a delegation of sovereign power to property owners: “dominion over things is also *imperium* over our fellow human beings.” One of his characteristic argumentative strategies is to show how the state sovereign power already backs and enables the distribution of certain property rights, and then to show that it is merely a matter of degree that distinguishes the state’s redistribution of property of a certain kind (e.g., land) from another (e.g., a manufacturer’s additional profits from a state-imposed tariff). Having dispensed with the formalist justifications for absolute property rights—and the laissez-faire economy they imply—Cohen makes a plea for an earnest consideration of the real problem: that of “the precise lines along which private enterprise must be given free scope and where it must be restricted in the interests of the common good.”

- Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), <http://moglen.law.columbia.edu/LCS/cohen-transcendental.pdf>.
 - This article offers a devastating critique of the formalist legal reasoning of what Cohen calls the “classical conception of law,” which he accuses of “hid[ing] from

judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy.”

- Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937), <https://www.jstor.org/stable/1334222>.
 - Jaffe writes in defense of New Deal legislative regimes that delegate rule-making authority to associations of workers and producers in a given industry. In one case involving the coal industry (*Carter Coal*), the regulation had been declared an unconstitutional delegation of legislative powers to private groups. In defense of such regimes, Jaffe shows how such “delegations” already take place in numerous areas of the law, and how law is, in substance, made and deeply influenced by private individuals or associations all the time. He urges a realist approach that acknowledges this fact and seeks to make such delegations as democratic and reasonable as possible, rather than employing formalistic distinctions that occlude the existence of some of them and block others arbitrarily.
- John Dewey, *Liberty and Social Control*, in THE PROBLEMS OF MEN (1946), <http://cdn.constitutionreader.com/files/pdf/constitution/ch105.pdf>.
 - This short essay takes up the supposed opposition between liberty and equality and gives it a pragmatist interpretation. Dewey’s position is more or less as follows: liberty in the abstract, formal sense is meaningless, and liberty under actual historical conditions inevitably involves considerations of power. Thus, when we talk about liberty—in general as well as in more particular forms like “civil liberties”—we must consider questions about the common good and distribution. If we don’t, arguments for liberty will merely be arguments for preserving the status quo. Liberties must be socially justified as part of a system of politics and as arising in a given set of social arrangements—not merely as the “ready-made possession of individuals.” This leads us to the insight “that social control, especially of economic forces, is necessary in order to render secure the liberties of the individual.”

Secondary Sources

- Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988), <https://www.jstor.org/stable/3480619>.
 - This is probably the place to start reading about legal realism and its relationship with the present. (It very substantially informed the introduction above and can provide additional depth on almost every point included there.) Singer wants to show that “we are all legal realists now.” He revisits what he takes to be the core legal realist arguments on his way to demonstrating that the influence of the realists is evident in nearly all areas of modern legal thought, most of all in the way that they permanently altered the nature of persuasive legal arguments. Instead of appealing to the inherent nature of abstract concepts, modern lawyers argue in the language of line drawing, balancing competing interests, and policy consequences. He describes the realist influences on the law and economics movement, the “legal process” school, rights theory, and Critical Legal Studies.

- Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEG. STUD. FORUM 327 (1991), <http://duncankennedy.net/documents/The%20Stakes%20of%20Law%20or%20Hale%20and%20Foucault%20-%20J%20Leg%20Stud.pdf>.
 - Kennedy, primarily via Robert Hale, offers an account of law as constitutive of social power through its establishment of the “ground rules” on which all types of social disputes and behavioral decisions take place. He takes particular interest in the role of law in constituting bargaining power not just in economic relations between labor and capital, but also in the relations between men and women, people of color and white people, and so on. Kennedy then introduces an interpretation of Foucault’s analysis of power that helps us to see how the study of law and legal institutions can elucidate the complex way in which each, in tandem with other institutions, is constitutive of power relations throughout a given social body. The piece presents a good example of legal realism’s influence on the Critical Legal Studies movement.

- MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)
 - Horwitz’s task in this book is to show the rise of legal realist thought as a response to the formalist “Classical Legal Thought” of the nineteenth century. Horwitz casts this formalism, which sought to deduce the outcomes of cases from the legal definitions of abstract concepts like “property,” as the result of intellectual efforts to separate law from politics. Law, in this view, works as a kind of buffer against democratic or political exercises of power. Legal realism, especially the “critical” realists, worked to break down the law/politics distinction and show the sophistical nature of this classical jurisprudence. Horwitz argues that these intellectual efforts were directly inspired by the striking economic and social changes—industrialization, the rise of giant monopoly firms, mass migration—facing the United States at the turn of the century. And he suggests that realist thought succeeded in transforming the politics of law, at least for a time, to better meet these challenges.

- NEIL DUXBURY, *PATTERNS OF AMERICAN LEGAL THOUGHT* (1997)
 - Duxbury’s book offers a more ambiguous account of legal realism and its legacies than is commonly told in American law schools. (His story presents something of a challenge to Horwitz.) He rejects the picture of American legal history as characterized by “pendulum” swings from formalism to anti-formalism. Rather, he sees elements of both persisting through essentially all 20th century jurisprudence. He takes realism to be something more akin to a critical “mood” than a single, coherent movement, and challenges its influence on New Deal policymaking. He rejects the notion that law and economics is the heir of realism in anything more than a trivial sense (though also rejecting the suggestion that it is just a new formalism), while granting that Critical Legal Studies had taken up the mantle of some distinctly realist insights—as well as inherited some distinctly realist pitfalls. See especially chapters 2 (on Realism), 5 (on Law and Economics), and 6 (on Critical Legal Studies and related movements).

- DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1998), <http://duncankennedy.net/documents/Photo%20articles/The%20Rise%20and%20Fall%20of%20CLT%20in%201.pdf>.

- This is Kennedy’s classic legal-intellectual history of Classical Legal Thought, its jurisprudential consequences, and the processes by which it eventually gave way to the more heterogeneous jurisprudence of the mid-20th century.
- BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998)
 - With economist and legal scholar Robert Lee Hale as her subject, Fried describes the core elements of the realist critique of laissez faire, and in particular on the traditional formalist notions of liberty and property that undergirded it. Fried situates Hale’s thought in the context of the larger Progressive political aims, as well as among the intellectual projects of the institutional economists and the legal realists. Hale argued, for instance, that coercion, in the form of background constraints on socially available choices, is as present in the private as the public sphere. Hale also argued that there was no coherent justification for allocating surplus value to the owners of capital, in particular because the problem of monopoly rents was much more widespread than mainstream economics allowed.
- Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009), <https://www.lawschool.cornell.edu/research/cornell-law-review/upload/Nourse-Shaffer-final.pdf>.
 - Nourse and Shaffer argue that there are various versions of “new legal realism” that, like the old legal realism, have emerged in response to a modern formalism: neoclassical law and economics. They describe a few of these new realisms, like “behaviorism” (emphasizing psychology and behavioral economics approaches), “contextualism” (emphasizing ethnographic and other qualitative empirical methods), and “institutionalism” (emphasizing the empirical study of institutions that develop the law, including from critical perspectives). They then chart a way forward, arguing that what is needed is a new realism that combines some of these approaches while not succumbing to the pitfalls of reductivism that, on their view, afflicted the old realists.
- Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Realism: Empirical Legal Studies and New Legal Realism*, 6 ANNUAL REV. L. & SOC. SCI. 555 (2010), <https://www.annualreviews.org/doi/abs/10.1146/annurev.lawsocsci.093008.131617>.
 - Suchman and Mertz discuss two emerging movements in legal scholarship that claimed to be successors of legal realism: Empirical Legal Studies and the New Legal Realism. The former emphasizes the use of quantitative research methods and greater empirical “rigor” in answering legal questions; the latter takes a more “big tent” approach, concerning itself with more qualitative questions about the relation between the law and the social context in which it operates. The authors also place these movements within the longer context of legal studies movements claiming the mantle of legal realism’s successor: law and society, the legal process school, law and economics, and Critical Legal Studies.
- K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION*, Ch. 3 (2016)

- In this chapter, Rahman synthesizes the historical relationship between Progressivism, legal realism, the antitrust and anti-monopoly traditions, and the public utility idea. These Progressive concerns emerged from the dramatic socioeconomic changes underway in American society around the turn of the 20th century—changes that were leading to the increasing prevalence of concentrations of private economic power. Rahman notes that the doctrine of laissez faire, to which the Progressives responded, had itself emerged out of a conflicting set of social concerns and did not ever in fact forbid all state regulation of the economy. Democratic Progressive critiques of laissez faire sought to show that democratic control of industry, and the democratization of economic power relations, were essential and even traditional components of American social policy.