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# The Canon of American Legal Thought

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## PREFACE

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This volume contains the twenty most important works of American legal thought. We have brought together the full texts of these classic writings with a number of aims in mind. Most directly, we hope the collection will be useful to teachers and students of law, for whom the ideas will be familiar, but who may benefit from seeing them in their original context. Put another way, these are the texts that every legal scholar and teacher is presumed to have read at some point—but will likely have encountered only in short excerpts, often in single sentences or paragraphs, among the readings assembled for various basic courses. For students, we hope these articles will serve as a kind of decoder ring for the modes of reasoning their law professors are urging them to adopt in law school. We present each contribution with a short introduction and bibliography highlighting the main ideas developed in the article and situating it in the context of the author's broader intellectual projects, the scholarly debates of his or her time, and the reception the article received.

For lawyers, we hope this collection will take them back to their best days in law school—offering the chance this time to look behind the curtain at the ideas their professors were developing and teaching, and to test them against their own experiences in practice. Many of the tools of legal analysis that judges, lawyers, and policymakers use every day and take for granted originated in these texts as dramatic intellectual innovations. In that sense, the articles will be both familiar and surprising. In returning to the texts themselves, the two of us were struck by the richness, the nuance, and the intellectual sophistication with which so many of the clichés of everyday legal argument were originally formulated. We hope that legal professionals will share our experience that encountering familiar ideas in their original context can give them new life.

In a broader way, we bring these articles together as an argument for the existence of a vigorous intellectual tradition *within* the field of law. Scholars in political theory, social theory, literary and cultural studies, philosophy, economics, public administration all refer to law, and each of these disciplines has its own—outsider's—idea about what law is and how it works. The experience of lawyers and legal scholars reading the work of colleagues in other fields is often a frustrating one. “If only they had a better sense of how law worked from the *inside*,” we often think, or “if only they had gone to law school.” If they had, much of what they would have learned about how to think, analyze, or reason about governance and politics is to be found in these articles.

In assembling and introducing these materials, we have received the generous advice of numerous friends and colleagues. Over the last decade, we have taught these texts to hundreds of American and foreign law students at Harvard, countless of whom have shed light on their contemporary resonance in ways which enriched our interpretation. We are particularly grateful to Arnulf Becker, Brenda Cossman, Dan Danielsen, Janet Halley, Christine Jolls, Duncan Kennedy, Catharine Mackinnon, Ian Malcolm, Martha Minow, David Shapiro, Steven Shavell, and David Trubek, for their comments on our introductory essays, and for invaluable bibliographic suggestions. Our deep appreciation also to our illustrator, Mr. Doug Mayhew, an artist and writer who lives in New York. Mr. Mayhew is represented by literary agents at Glitterati Incorporated, New York.

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## Introduction

### THE SUBJECT: "LEGAL THOUGHT"

This canon traces the history of writing about legal reasoning and legal decision making. These authors seek to clarify and reform the way legal professionals think about the law: the way lawyers interpret legal rules and judicial decisions when advising clients, the way judges reason about cases, the way legal professionals in a wide variety of settings—civil servants, administrators, judges, legislators, teachers, businesspeople, humanitarian advocates, and more—think about the policy objectives and implications of legal rules, and the way legal scholars understand the workings of the legal system. Taken together, these texts tell the history of American legal thought.

That history is different from the history of American law. A general history of American law would need to relate the work of American legal institutions and legal professionals to America's political, social, economic, and intellectual development. The history of legal thought itself would have been only a minor theme. Moreover, American legal history began long before Oliver Wendell Holmes wrote the first article reproduced here. It is also true, of course, that people thought and wrote about legal reasoning before Holmes. There were great jurists, judges, and legal scholars from the country's earliest days who reflected on how judges and legal professionals should reason. But the modes of legal thought that they developed before and directly after the Civil War have largely fallen out of use. Indeed, our authors initially developed the ideas about legal reasoning contained in these texts as a revolt against what they understood to be the dominant modes of legal thought in post-Civil War America. Their revolt was largely successful—these are the ideas about legal reasoning that have endured, and that continue to be taught in America's law schools and deployed by America's lawyers and judges. Holmes represents a watershed—the emergence of a self-consciously American and modern sensibility for legal professionals.

Reading these articles, you will catch fleeting glimpses of changes in the content and context of the American legal system. Here we catch sight of the New Deal, there the postwar expansion of America's internal market, later still the Civil Rights Movement, the growth of the welfare state, the politics of 1968, the Vietnam war, and the rise of identity politics in American life. A history of American law would foreground the impact of such changes on law, and the law's own influence on the course of these large dramas. The authors here were often aware—passionately aware—of the broader political and social context within which they worked, but their immediate goal was to clarify and reform the way legal minds—lawyers, judges, scholars—thought about law itself.

It is a commonplace in American legal education that law school aims not to teach "the law" but to teach how to "think like a lawyer." Throughout the first year, students struggle to make sense of this bromide. What about the law am I

not supposed to be learning? Don't I have to remember the doctrines? What is thinking like a lawyer, beyond thinking clearly, logically, dispassionately? It turns out that "thinking like a lawyer" has a history. In different periods, learning to think like a lawyer has meant acquiring a different set of reasoning skills—argumentative set pieces and classic errors to be avoided. Each of these elements had to be invented, explained, and defended. The articles collected here have each played a major role in the development of what it means to "think like a lawyer" in America today.

To a large extent, in other words, these articles are works of method. A collection of the most significant articles in various substantive fields—taxation, administrative law, constitutional law, and so forth—would look quite different. The articles here were written by legal scholars to address general methodological issues of significance for law students and teachers. They are less concerned with the outcomes of legal reasoning than with the techniques jurists use to reason—have we relied too much or too little on deduction, on principle, on policy? How should we reason from general rules to specific outcomes? How should we identify principles, what should we make of claims for "rights"? How should we reason about policy and purpose? Most of these texts criticize aspects of the way American jurists routinely reason, and most propose one or another new way of thinking for lawyers and judges. The authors identify common reasoning "mistakes"—the same mistakes law students make in their first-year classrooms—and instruct us in how they might be avoided. Of course, the authors differ a great deal about what counts as a mistake, and about how legal reasoning ought to be conducted. There is debate, and there is a history, to the *way* lawyers have been taught to reason.

The story told here is also distinct from the history of American *jurisprudence*, sometimes called "philosophy of law" or "legal theory." There is a lively history of thinking about what law is, how it differs from politics or morality, how its normative claims can and should be sustained, or how law relates to justice and power. Scholars have developed arguments about these questions in all sorts of ways, drawing on materials from philosophy, sociology, anthropology, linguistics, history, ethics, religion, political or social theory, and more. Legal scholars who study the nature of law and participate in these jurisprudential debates form a sophisticated subspecialty within the legal academy. They cannot help looking at law from a certain distance, developing the best theory they can to account for what law is and should be. Jurisprudence asks questions about the nature of "law"—as an institution, as a social or political form, even as a form of speech. They are not first and foremost concerned to describe or reform the modes of reasoning legal professionals use in their everyday work. Of course, debates about legal theory often do affect the reasoning tools used by lawyers and judges. When a "theory of law" becomes common sense among working jurists, it can affect the arguments they find persuasive, useful, or professional. But an excellent legal theory can also remain simply an excellent theory, tested only by the academic standards and professional judgments of the field of jurisprudence itself.

Many of the authors whose work is collected here have also been participants in debates about jurisprudence. But these articles have also, and more significantly, had an impact on the modes of reasoning, on the shared background assumptions and broad consciousness or intellectual style of lawyers, judges, and other jurists. The phrase "modes of reasoning" may be a bit narrow. Legal professionals in each historical period also share a broad set of background assumptions about law, economics, society, or ethics. Their work betrays a shared

consciousness about professional work and a shared intellectual style. Many of these articles reflect moments when a theory of law stopped being simply a good theory and crossed over into common sense. Theoretical propositions became shared background assumptions about society. The twists and turns of theoretical debate came to be used by professionals in everyday argument, and what once counted as a shrewd or nuanced theoretical move became as well a persuasive professional thrust or parry.

These articles have had a decisive impact on the modes of argument that seem persuasive to legal professionals. Where they have invented new modes for reasoning about what to do if you are a judge, you will not be a professionally proficient judge if you are not familiar with their arguments. Where they advance criticisms of existing modes of legal reasoning, you will not be a proficient practitioner unless you understand that your professional audience will be skeptical of the arguments these authors have criticized. As a result, these articles chart the rise and fall of faith in modes of argument among American legal professionals.

Writing about legal theory is a far less reliable guide to the methodological faith of legal professionals. Although it can sometimes happen, ordinarily there is little reason to expect that an argument which has been decisively criticized in the legal theory literature will stop seeming persuasive to legal professionals. The criticisms advanced are different, the coherence demanded of legal theory will be different. These articles remain significant not because they mark changes in the popularity of various legal theories in the academy, but because their authors have invented and destroyed methods for legal analysis.

#### THE NARRATIVE LINES

The book tells two stories. The first focuses on the emergence of specific arguments and analytic moves, all of which remain in the eclectic toolkit of contemporary legal reasoning. In this story, nothing is lost—each article contributed a methodological tidbit to a shared professional legal consciousness that has become ever more diverse in its specific elements. For this story, the interest in returning to the texts that first proposed these analytic moves lies in making what has become familiar new again. It is fascinating to see the force, sophistication, and nuance of these ideas before they became simple argumentative gambits.

The second story would be more familiar to the protagonists themselves. It traces the passionate effort by succeeding generations of legal scholars to reform and improve the practice of legal reasoning by displacing the analytic methods of their predecessors with new thinking. This is a dramatic story of the repeated establishment and collapse of professional consensus. It is a story of methodological rivalry and generational rebellion expressed with polemic force. Both narratives are true. We might say that legal reasoning today is an eclectic practice built from the methodological sediment laid down in successive projects of wholesale criticism and reform.

#### *The First Story: A Collage of Methods*

Each of the articles in this volume promotes some modes of legal reasoning and criticizes others. Thus, for example, Holmes warns against reasoning from history or deducing what to do from what was done in England. He urges judges to

focus instead on developing rules and interpretations that are sensible, solve problems, and reflect the latest in statistical and economic analysis. He warns lawyers advising clients about what the law *is* not to get caught up in the law's abstractions, mistaking deductions from principle for predictions about what courts will actually decide. And he offers a famous heuristic—to know what the law actually is, think about it from the point of view of a “bad man,” who is only concerned to know when the state will bring force to bear upon him. All these ideas continue to be taught to lawyers today. And so it goes, throughout this Canon. Many of the articles focus on possible errors of deduction. Hohfeld argues against the loose usage of words like “right” or “freedom,” from which too much can be deduced by sloppy reasoning. Properly understood, legal terms like “right” should only be used with reference to their logical correlatives—a “right,” he argues, exists only to the extent the law establishes a corresponding “duty,” and it would be a mistake to deduce any obligations from the right *other* than those reflected in the corresponding duties. Generations of law students have been taught, and continue to be taught, to avoid the Hohfeldian errors of loose deduction, to keep their minds focused on the existence of duties when they speak of rights, and to recognize that the law protects interests—in property, say—through a limited set of legal relations, by establishing rights and duties, or privileges. The errors of overdeduction, and the correlative virtues of a focus on consequences, on enforcement, on remedies and duties, on the social and distributive effects of legal analysis are developed in different ways throughout the Canon.

Other articles are preoccupied with developing and illustrating modes of legal analysis *other* than deduction through which lawyers and judges can legitimately embrace Holmes's insistence on formulating practical policy to manage the clash of social and economic interests that lie behind legal decisions. Law students struggle to understand the relationship between “the rules” and the vague arguments that lawyers call “policy.” Should “policy” begin only in the exception—when legal deduction runs out—or should it be a routine part of legal analysis? If the latter, how should lawyers reason about policy? What should go into reasoning about “policy”—how much ethics, how much empiricism, how much economics? Which of the arguments laypeople use count as professionally acceptable arguments of “policy” and which do not? Which mark one as naïve, an outsider to the professional consensus? What is it about policy argument that makes it seem more professional, more analytical, more persuasive, than talking about “mere politics”?

Fuller, Hart and Sacks, Coase, Calabresi, Galanter each proposed specific types of policy argument that have become routine methods of judicial reasoning. Law students are drilled in making Fullerian arguments about the “functions” of formal rules, and Hart and Sacksian arguments about “institutional competence.” They learn from Coase to attend to the *reactions* of market actors to background rules, which may well affect, even reverse, their impact. They learn to argue, alongside Macaulay and Galanter, in ways that foreground the gap between “law in the books and law in action,” and the different impact of legal norms on differently situated parties. And so on. Each new method of professional policy argument was proposed—and continues to be taught—as a corrective to common errors and misunderstandings in the ways lawyers typically reason about policy. Each resolves the tension between deduction and policy reasoning differently—and each of their resolutions has found its way into the background consciousness of today's legal professional. Thinking like a lawyer is not only the mastery of the



legal reasoning techniques of deduction and policy developed by these authors. One must also be adept at criticizing the reasoning of other legal professionals. Law teachers drill first-year students to recognize specific errors in deductive reasoning and policy analysis—errors identified by these authors. For example, as we will see, Coase criticizes policy arguments rooted in the welfare economics of Pigou, particularly arguments for the “internalization” by economic actors of the “social costs” of their activities, requiring railroads, for example, to pay for the damage sparks from their wheels cause to crops along the tracks. He argues that there is no way to tell, a priori, whether the railroad’s sparks or the farmers’ proximity “caused” the cost to be incurred. Rather than focusing on cause, we should focus on allocating the joint costs of rail transport and crop raising in such a way as to maximize social welfare. He offers a series of tantalizing suggestions for understanding when and how legal liability might or might not affect the efficient allocation of resources. When analyzing a case in first-year contracts, tort, or property class, when one student argues that the defendant should be made to internalize the costs of his or her activity, the other students will have been trained, if all goes well, to counter with an argument from Coase.

Most of the authors represented here focus on the legal reasoner as a *ruler*—the modes of analysis are oriented to figuring out what to do when you have to decide, on the basis of legal materials, on actions that will affect others, for good and ill. Interestingly, these articles tend not to focus on the reasoning of legislatures, or on the routine reasoning of trial court judges or juries. The focus, and the paradigmatic case of “thinking like a lawyer”, remains the appellate judge. We might say that legal professionals learn to “think like rulers” by learning to think like appellate judges. And for most of these authors, the paradigmatic work of the appellate judge is the interpretation of private common-law rules. For most, legal reasoning means the work of finding, enunciating, and applying private rules of common law on the basis of argument—deductive argument and policy argument.

Treating the private-law reasoning of appellate judges as the paradigmatic mode of rulership is puzzling. Even lawyers do all sorts of other things in their professional lives—they counsel clients, work in administrative agencies, advise legislatures—sit as legislators. Much, even most, professional legal work concerns statutes and administrative rules. Even appellate judging is at least as often about statutes, or the Constitution, as it is about private-law rules. It turns out that modes of legal reasoning developed for common-law appellate work influence the ways legal professionals do all these other activities. Whether this is a good thing or simply a professional deformation, it arises in part from the preoccupations of the authors of these canonical works. Professional modes of reasoning have developed by focusing on the appellate private-law site, and this setting has influenced the professional expertise that has emerged.

Only late in the Canon—Wechsler, Michelman, Crenshaw—do we find public-law, largely constitutional-law, adjudication in the foreground. Even here, the focus remains largely on the appellate judge. As a result, it continues to be true that “thinking like a lawyer” means thinking like an appellate judge, and American legal thought is the collection of arguments, techniques, and common sense the profession has developed for appellate judicial work.

At first glance, the diversity of arguments aggregated in the tradition of American legal thought seems a professional virtue—the mature legal professional today is adept at a wide range of different reasoning methodologies. Yet it is safe to say that none of the authors who developed these ideas would have

celebrated this kind of diversity. For each, the *choice* among modes of reasoning was enormously important. In part, the eclecticism they spawned may result from a shared disinterest in dogmatic general theories about law. Few of the authors argued that the reasoning modes they preferred were entailed by a general theory—about law, or justice, or American society. They tended not to say: “If you think this, you must reason like this.” They did not develop general theories of law or society to ground exclusive claims for their own reasoning inventions.

Rather, these authors seemed far more interested in criticizing modes of reasoning they found unpersuasive than in establishing their own dogmatic method. These works tend to be *critical* in tone, castigating legal professionals for specific analytic errors. They propose modes of legal reasoning as an antidote, sometimes almost as an afterthought. Similarly, although many of the articles criticize methods of legal reasoning—associated, say, with deduction—they usually offer no general theoretical account of the limits of deductive reasoning, and no coherent ethical or instrumental theory to ground the alternatives they propose. Rather, they criticize specific types and examples of deductive reasoning, and propose other reasoning techniques as more persuasive, useful, professional. For the paradigmatic work of judicial reasoning, each article offers thoughts about what has turned out not to be persuasive, and some ideas for argumentative styles that might work in the future. The eclecticism of American legal thought is the hard-won virtue of a skeptical, rather than a dogmatic, tradition. The diverse strength of modern American legal reasoning grows as it assimilates criticisms and proposals, the more the merrier. If some of these authors can be used to criticize others, so much the better—where the criticism turns out to be persuasive, one will have corrected for the blind spot of another. The result for American legal thought is an eclectic set of deductive and policy arguments and errors, rather than a coherent single theory about law or legal method.

The relative absence of dogmatism in these materials is refreshing. But it is not clear that a relentlessly skeptical and critical tradition supports methodological pluralism this smoothly. Across the last century, the Canon reflects a growing awareness of eclecticism and of the difficulty of knitting together so many diverse modes of legal argument and criticism in a logically coherent or theoretically satisfying way. Some authors respond explicitly to this challenge, proposing modes of reasoning to accommodate, even celebrate, the increasing diversity of legal argument. The Hart and Sacks “legal process” approach is perhaps the most well-developed effort at synthesis. Thereafter, it seemed more difficult to contain the methodological diversity. By the time we get to Kennedy’s semiotic analysis of legal rhetoric, the emergence of contradictory modes of professional argument is presented as a narrative about the “death of reason.” For other authors, the eclecticism of contemporary legal reasoning seems problematic for other reasons—because it threatens a rising tide of instrumental styles of policy argument, a loss of ethical moorings, or a loss of legal autonomy from other professional disciplines. Several of the later articles propose antidotes—reviving the language of principle and right, or of morality, or of political or social theory to buttress the specificity of legal reasoning against instrumentalisms imported from other disciplines.

For all this diversity, we might still group the legal methods developed in the Canon in bunches. One convenient way to do that would be to focus on the “schools of thought” which have emerged in the American legal academy over the last century. It is difficult to make sense of “schools of thought” in American

law by reference to their *beliefs* or legal *theories*. It may be true that supporters of “Law and Economics” or “Critical Legal Studies” or “Legal Process” share some beliefs or adhere to a common theory of law, but in our experience efforts to state the theory cleanly seem unpersuasive explanations for what holds scholars together in such schools. Rather, it seems that schools of thought emerge among people who are focused on a particular set of common methodological mistakes, and on the promise of a particular set of innovative reasoning moves. Schools of thought in American law are less cults of belief than congregations practicing a common set of critical and reconstructive methods. American legal thought as a whole has managed simply to incorporate the critical and constructive insights that preoccupy each of the schools.

Looking back, we might divide the Canon loosely into eight schools: Legal Realism, Legal Process, Law and Economics, Law and Society, Critical Legal Studies, Modern Liberalism, Feminist Legal Thought, and Critical Race Theory, each associated with a specific argumentative style that remains part of the modern repertoire. Some of the authors are polemicists for their school; more often, however, the school label has come later, an attribution by others seeking to organize the legal field. The term *legal realism*, for example, was used by some authors in the 1930s to describe methodological affinities in their work. It was also used by their enemies, often in a quite different sense. The term remains in the legal vernacular to refer to those debates and affinities, and also to denote a series of loose reasoning tendencies—a heightened awareness of deductive errors in doctrinal analysis, the routine use of criticisms of analytic positivism, enthusiasm for purposive and functional styles of reasoning, and efforts to tolerate and affirm legal pluralism and social custom. In a similar fashion, the *Legal Process* school refers to a set of authors, their allies and opponents, as well as to specific modes for arguing about the purposes of law, the principles and policy considerations that should guide legal analysis and that foreground the importance of procedures and the priority of institutional competence and legitimacy in a plural legal system. The *Law and Economics Movement* was a self-conscious school of thought and an academic movement, seeking adherents, promoting and organizing its ideas in the legal academy. For most lawyers, the term is associated with the broad tendency to bring modes of reasoning from the field of microeconomics—about efficiency, market failures, transactions cost management and more—into mainstream legal argument. The argumentative styles developed by legal realists were picked up and extended in various ways by the *Law and Society* and *Critical Legal Studies* movements. *Modern Liberalism* is associated with the use of quite general Kantian ideas in legal argument, with the reinvigoration of argument about “rights,” with the development of acceptable ways to bring ethical argument and argument about substantive conceptions of the good life into legal argument. *Feminism* and *Critical Race Theory* are associated with bringing arguments about identity politics into conventional legal analysis, and with criticisms of more mainstream legal analysis, including civil rights, for responding inadequately to claims for gender and racial justice.

For nonlawyers, what it means to “think like a lawyer” in the eclectic vocabulary developed here may seem strange. The particular methods of reasoning drilled into law students are likely to be only partially familiar. It may be surprising to see legal thinkers paying so much attention to the *limits* of deduction and to see them integrating such a wide range of specific policy arguments into legal reasoning. For those who think of law as the institutional enactment of a theory—a political

theory or moral theory perhaps—the unstable eclecticism of legal argument may itself be surprising. That legal thinkers worry more about becoming comfortable with multiple, overlapping modes of analysis than with rooting out contradiction or promoting fealty to a comprehensive theory may be unexpected. It often comes as a surprise to those outside the law that lawyers by and large treat legal pluralism—a multiplicity of rules, arguments, institutional and normative solutions—not only as an obvious fact, but as a virtue rather than a vice. The voracious interdisciplinarity appetite of legal analysis, importing all manner of arguments from neighboring disciplines, often deploying them in unfamiliar ways, may also startle. Legal reasoning is not a matter of beliefs or theories implemented, nor is law a world of ethical commitments or sovereign commands mechanically made real. Law turns out to be a professional practice—a practice of arguments learned, made, developed over time, accepted, and rejected.

This way of understanding the Canon, however, has limits. For one thing, the authors of these articles did not generally write as if they meant simply to add a few new criticisms and a few new reconstructive moves to the list of arguments one might plausibly make. As we will see, these articles generally have a far more messianic tone. Still, it tends not to be the tone of self-confident and proselytizing general theory. These are not fancy theoretical castles with consequences. Each author identifies a set of specific argumentative mistakes in the everyday professional practice of the day, and treats the discovery of these errors as a revolutionary insight for legal reasoning. To *avoid these errors* (not to “apply this theory”) will change everything. New repertoires of legal argument arise as wholesale efforts to avoid past error. Our author’s passion about professional method can be hard to understand, but often, lying just beneath or even breaking through the surface are sharp political commitments. To reason *that way* is politically unacceptable. The method errors of the profession invalidate the political tendencies of its rulership. Rulers with different political affinities, be they progressive, liberal, conservatives, or simply the views of sensible people of the establishment, should reason differently. It is these broader political claims and this apocalyptic tone that give the Canon its drama as a terrain of intellectual struggle.

### *The Second Story: The Fall, Rise, and Fall of Methodological Consensus*

This story takes up the historical drama of the Canon’s formulation. In general terms, we might say that these materials reflect two moments of consensus in American legal thought, punctuated by periods of intense criticism and diverse invention: a late nineteenth-century consensus of “classical legal thought,” the criticisms and reform proposals of Holmes, Hohfeld, and the legal realists, a second postwar “legal process” consensus, and the emergence during the late 1960s and afterward of divergent critiques of the legal process, each associated with proposals for new modes of legal reasoning—law and economics, law and society, modern liberalism, critical legal studies, and, somewhat later, feminism and critical race theory.

The first period of late nineteenth-century consensus among American legal professionals is reflected in the Canon only retrospectively, as the mode of legal reasoning *against which* all of the articles from Holmes to Llewellyn were written. The predominant mode of thinking from about 1860 through the First World War was denounced as “formalism” or “mechanical jurisprudence” by the legal realists in the first half of the twentieth century. This mode of thought is now routinely

labeled “classical legal thought,” a term originally proposed by our colleague, Duncan Kennedy. Classical legal thought was the product of collaborative intellectual effort and real innovation among legal scholars and judges. It combined ideas about the nature of law and legal authority with propositions about how to conduct doctrinal analysis and legal interpretation. Legal professionals working in its shadow shared a loose but recognizable common sense. Jurists working in the classical mode tended to see legal authority fragmented among diverse entities—legislature and judiciary, state and individual—each exercising absolute powers within the sphere of its authority. The job of legal analysis was to police the boundaries. It was an era of sharp analytic boundaries—between public and private, law and politics or law and morality, between state and civil society. Diverse legal institutions and instruments reflected the logic of their specific place in this scheme. Doctrinal reasoning meant interpretation of the boundaries between authorities and of the nature of differing legal institutions—private law, contract, equity, public law, and so forth.

At the same time, classical legal scholars proposed to unify, modernize, and simplify the doctrinal corpus of the common law by careful scholarly analysis. Preclassical legal reasoning seemed an unruly hodgepodge of ideas about the public good, equity, and the utilitarian value of precedent. Efforts by classical legal jurists to replace the preclassical style of legal analysis with something more analytically tight and orderly were “formal” in several senses. Classical jurists seemed to imagine that specific legal rules and case outcomes could be reliably deduced from a relatively small number of basic principles which themselves reflected the nature of various legal authorities. They also aspired to link the principles guiding various legal areas into a single unified system, rooted in a small set of fundamental concepts—in particular, the “will” or “autonomy” of legal authorities, including private contracting parties or property holders, acting legitimately within their respective spheres.

The first articles in the Canon attack this consensus. They do so on numerous grounds. For Holmes, classical legal scholars’ attempts to achieve conceptual unification made things more mysterious, not less. In “The Path of the Law,” the first article in the Canon, Holmes argues that the classical claim that the decisions of rulers should be based on a search for principles in historical precedent is an impractical, even absurd, basis for sound decision making. Rulers should be attentive to consequences rather than concepts. For Hohfeld, who shared the aspiration for analytic rigor and systematization in the use of legal terminology, the problem with legal reasoning in the classical period was an overwhelming tendency to deductive error. Classical efforts to deduce rights from principles, or results from rights, misunderstood the correlative nature of rights and duties. Rights could only be found where a decision had been made to impose a duty, a decision which would need to be made on grounds *other* than deduction from the right. At the same time, efforts to deduce rights and duties from the broad principles of liberty, autonomy, or freedom ignored the fact that law could protect liberty in various ways—with rights and duties, but also with privileges. Again, the decision maker faced a choice which could not be resolved by deduction. For Dewey, the difficulty was that classical legal descriptions of judicial decision making misrepresented the way practical people reason—and the way they should reason—when solving problems. All of these attacks supported a broad argument for the inevitability of argument about what came to be termed “policy” within the law and the need for modes of legal reasoning that could guide policy analysis.

Across the first half of the twentieth century, the modes of legal reasoning associated with classical legal thought were also associated with the politics of laissez-faire. This association resulted from the development by courts of the idea that the “right to property” and “freedom of contract” were constitutionally protected principles derived from the autonomy of property holders and private citizens, which could not constitutionally be limited by legislative regulation of the economy. At least within the judiciary and among legal academics, much of the energy behind the effort to root out the classical style of legal reasoning came from this political association. Scholars and judges who wished to promote or uphold social legislation found themselves motivated to criticize the reasoning of judges operating in the common sense of classical legal thought. Hale, Cohen, and Llewellyn illustrate the passion with which legal realists attacked the methods of classical legal reasoning.

The result was a wholesale assault on the jurisprudence of forms, concepts, and rules. Canonical texts written in the decades prior to the Second World War develop the idea that decisions about “policy” pervade judicial reasoning—the result, they argue, of circularities, contradictions, gaps, conflicts, and ambiguities in the legal materials—prior cases, statutes, available legal principles, and rules—available to the judge facing a decision. The canonical articles of the period develop numerous analytic moves for identifying conflicts and ambiguities in what seemed perfectly plausible and conventional examples of legal reasoning. Once identified, these inner conflicts, and the resulting indeterminacy of conventional legal reasoning, provide the opportunity for the introduction of policy. The legal realists proposed a variety of modes of legal reasoning to supplement formal rules, fill gaps, resolve conflicts and ambiguities, and replace deduction from broad principles like “will” or “autonomy.” Judges should look to social realities, to the changing nature of the industrial workplace, to the facts of social interdependence. They should expand the use of broad standards, like “good faith” or “reasonableness.” They should think purposively, attentive to the social purposes and functions of legal rules, replacing deduction from the principle of autonomy with functional attentiveness to the realities of social interdependence. The legal realists were enthusiastic about interdisciplinary borrowings from political science, statistics, sociology, and economics—legal oughts could be wrought from facts. They were generally more deferential to the technical expert than to the judge.

By the Second World War, the intensely critical impulses of Legal Realism had faded from American legal thought. Although they had been successful in eliminating “classical legal thought” as the established common sense of the legal establishment, the legal arguments associated with the classical style remain vigorous in American legal thought today. Deduction is alive and well, there remain as many rules as standards, and the principle of autonomy and the distinctions between public and private or state and society, from which classical legal thought developed a unified, will-based theory of everything, all remain. In another sense, however, after the realist period, it was widely accepted that there was no going back to the “formalism” of the classical era. Legal norms did not fit together in a coherent system, nor were they distinct from other social, customary, and ethical norms. The question of the relationship between legal and other norms needed to be resolved in policy terms.

Two central ideas made classical legal thought seem obsolete as a mode of consciousness, however resilient many of its specific legal arguments and modes of reasoning have remained. Those two ideas were legal pluralism and policy. By

the 1950s, it had become common sense that legal materials did not generate unique solutions to individual cases. The materials conflicted, were vague, had significant gaps, and would be interpreted differently—and equally legitimately—by different legal actors. Moreover, the official legal system coexisted alongside a range of other normative social and customary orders, which gave a uniform official norm any number of diverse possible meanings on the ground. Lawyers would need reasoning tools which would permit them to be comfortable and effective in a world of legal pluralism. At the same time, it had become obvious that routine legal work involved a great deal of policymaking. It was not all deduction—you needed some way to talk and think about consequences, ethics, statistics, and more. Neighboring disciplines of sociology, economics, or psychology seemed impossible to ignore. Lawyers would need to become adept at policy argument, and at determining when policy and when rule.

The canonical materials from the 1940s and 1950s address these issues. Fuller, for example, proposes a method for reinterpreting legal rules, including the most formal of rules, “consideration” doctrine, as expressions of underlying policies. In doing so, he brings policy analysis in from the cold. No longer is it just for the exceptions or the gaps, it has become integrated into quotidian legal reasoning. At the same time, he models a method of legal reasoning which interprets legal questions to fall not on one side or the other of a line, but on a continuum between two or more opposing policies. He transforms the paradigmatic activity of legal reasoning from *distinguishing* to *balancing*. Also during this period, Hart and Sacks embrace legal pluralism and policy analysis by developing methods of reasoning about the requirements of process and the priority of respect for legitimate institutional settlements that permit the judge to cultivate an agnosticism about substantive outcomes. Over the twenty years following the Second World War, these ideas were consolidated as a second moment of broad consensus in the American legal establishment about how legal professionals should reason.

The “Legal Process” consensus was in turn itself shattered by the emergence of an array of methodologies associated variously with economics, sociology, liberal theory, and the work of critical legal studies scholars. Although the pathbreaking articles—Coase, Macaulay—that would lay the intellectual groundwork for the Law and Economics or Law and Society assaults on the Legal Process consensus were written in the 1950s, their effect was felt most sharply in the late 1960s and early 1970s. Moreover, like classical legal thought, the Legal Process School did not disappear; the modes of analysis associated with it remain alive. Nevertheless, in the few years around 1968 it lost its claim to be the dominant mode of analysis—to be what it meant, and all of what it meant, to “think like a lawyer.” Scholars launched a variety of different method bundles to displace it, each intensely critical of the Legal Process consensus, each committed to its own new mode of legal analysis. As in the Legal Realist period, these new methodological proposals were launched with fury, even contempt, for the common sense of the Legal Process period. First, like classical legal thought before it, the Legal Process consensus suddenly seemed riddled with unsatisfactory argument—circularities, elisions, contradictions. Something more rigorous seemed necessary. Second, we find again, only just barely beneath the surface, a conviction that the Legal Process methods were associated with politics that had become objectionable, in this case the complacent politics of the Eisenhower center-right.

In the name of intellectual rigor and new politics, the sixties generation launched a series of quite different new methods for legal work and new

proposals for professional common sense. Some were plainly more instrumental than the legal process—rooted in empirical science, sociological insight, or economic analysis—and less committed to the continuity of existing institutions and procedures. These new methods came to have political associations of their own—sociology became the domain of the left, economics of the right and right-center—although these methodological ideas might easily have been used to express other political commitments. Meanwhile, for others, new developments in philosophy, political and social theory, linguistics, anthropology, and literary criticism made it possible to reinvent the vocabulary of liberalism to reflect the reality of legal pluralism and the inevitability of judicial policymaking. For critical legal studies scholars, and later for feminists and critical race theorists, the collapse of the Legal Process consensus opened the door to a range of new inquiries into the blind spots and biases of the legal order. Scholars interested in developing self-consciously leftist or progressive modes of legal thought felt free to separate themselves both from the heritage of Marxist political thought about law and from the tradition of social reform begun by the New Deal and continued by liberal legal professionals through the Civil Rights Movement and the Great Society programs of the 1960s.

We end the Canon in the early 1990s, but of course, efforts by legal scholars to invent new methods and propose new common sense for legal professionals have not ended. Much of the new work of the last decade, however, continues to till already well-ploughed methodological fields. Within the tradition of Law and Economics, a generation of more liberal scholars has emerged, focusing on the possibility that regulation might be efficient, that market failures and transaction costs are more prevalent than Calabresi and Melamed—or Posner—had imagined, and that “culture and human frailty,” in Robert Elickson’s words, might be of central importance. Within the sociological tradition, we find a new interest in the social and communicative effects of norms. Empirical work testing the effects of policy and the impact of rules has become more rigorous. Rational choice and public choice models have been imported from the social sciences. A school of “neoformalists” has emerged, rebuilding many of the argumentative moves of classical legal thought. Critical work analyzing the rhetorical structures of legal argument and the social or political biases of conventional forms of legal knowledge has moved outward from private law into legal history, international law, labor law, family law, local government law, public and constitutional law, criminal law, study of the legal profession and more. The traditions of feminist and critical race theory continue to be the sites of intense productivity.

All of this work has affected the repertoire of legal reasoning techniques and common-sense arguments. Some of these works may well turn out to have been canonical—to have proposed modes of legal reasoning which mark a sharp and significant break in method, or which give rise to a new school of thought. But it remains too soon to say which those will be. This, of course, raises the question of what makes the articles collected here “canonical.”

#### IN WHAT SENSE ARE THESE WORKS “CANONICAL”?

It is not surprising, if American legal thought has a history, that the history would be traced in a set of canonical materials. If American jurists reason in a limited set of specific ways, those ways would need to have been developed and



promoted. The Canon collects moments of methodological innovation which have left lasting traces in the legal reasoning practices of American lawyers and judges. If American legal professionals have lived through moments of shared consensus and methodological dispute, the Canon preserves texts that best exemplify moments of consensus or were most significant in disrupting them in favor of something new. Working closely with these texts, we have increasingly come to the view that these articles have endured not only because they were innovative or exemplary, but also because of their quality. Indeed, it is hard not to conclude that many ideas now common in American legal reasoning were developed in more sophisticated and nuanced terms by those who first proposed them than by those of us in the profession who now use them routinely. These are landmark works of scholarship. Each was methodologically innovative, and the innovations of each gave rise to further productive work. Their authors were protagonists in the most significant debates of the twentieth century about the direction for American legal thought.

We included these articles in the Canon after wide consultation among colleagues in the legal academy. We began to compile the list more than a decade ago, for use in a summer workshop series for new law teachers. At that time, we canvassed our colleagues at Harvard Law School for their views on what were the dozen most important works of legal scholarship, works with which every law teacher should be familiar. We compiled responses, sent our tentative list around again, shared it with friends and colleagues at numerous other schools. The list inevitably grew. Over the last decade, we have taught these materials to dozens of law teachers and hundreds of law students, and sought their comments on the selection. The articles we selected were those that garnered the most consensus for inclusion in our informal collegial consultations, those which have consistently taught most successfully, and those that seem to stand most clearly for particular methodological innovations. Our sense is that these are the articles legal scholars would name if asked to list the articles they imagined a majority of their colleagues would also name as canonical. Although citation frequency is one useful measure of significance, we have not relied heavily on it in making our selections. Citation fashions change, and citation practices travel in packs. Most legal citation is not directed at methodological precursors. Nevertheless, in one well-known 1996 study of recent legal citation, articles included here comprised five of the ten most cited articles, seven of the top fifteen.<sup>1</sup> Authors included here were represented twenty-six times in the top hundred articles.

The remarkable thing has been the degree of consensus about the list. Certainly, others would have substituted one or another article, and there were judgment calls. We might well have gone beyond the Hart and Sacks and Wechsler pieces to include any number of significant legal process classics—by Henry Friendly, Paul Bator, Henry Wellington, Alexander Bickel, or Felix Frankfurter. Owen Fiss might well have displaced Abram Chayes to represent liberal innovations in the procedural field, just as he might have displaced Robert Cover to represent liberal engagement with ideas about interpretation. Cass Sunstein might have displaced Frank Michelman to represent the turn to republicanism in liberal political theory. We might well have included Derrick Bell's article "Serving Two Masters" to mark the inauguration of critical race scholarship, rather than the introduction to the critical race canon. There were plenty of legal realists to choose from; we settled on Felix Cohen and Karl Llewellyn only with difficulty. Fran Olsen's "The Family and the Market: A Study in Ideology

and Legal Reform” might have replaced Catharine MacKinnon’s *Signs* articles. In our introductions to each canonical article, we have tried to indicate the *also-rans* and to sketch the reasoning which lay behind the judgments we made about whom to include.

Many fields of legal scholarship are absent—legal history, international law, criminal law, family law, administrative law, local government law. Public law generally is underrepresented—we have not included Ely, Tribe, Bickel, Monaghan, Bork, Amsterdam, Brest, or Gunther, whose work largely went unmentioned in our search for the canonical works of American legal thought more generally. Had we sought to represent particular substantive fields, there would have been a good argument for including Richard Stewart’s “The Reformation of American Administrative Law,” or any of several Supreme Court forewords in the *Harvard Law Review* which shaped thinking about constitutional law. Corporate law might have suggested Henry Manne’s “Mergers and the Market for Corporate Control”; local government law, Jerry Frug’s “The City as a Legal Concept”; alternative dispute resolution, Mnookin and Kornhauser’s “Bargaining in the Shadow of the Law”; negotiation, Fisher and Ury’s “Getting to Yes.”

Some innovations that once seemed crucial, but were not sustained, were understandably no longer on the tips of tongues. We were sorry, for example, to find little mention of Charles Reich’s 1964 essay “The New Property” among colleagues today. For many of the authors we did include, it would have been possible to settle on different texts. For many, Fuller’s “The Forms and Limits of Adjudication” or “Reliance Interest in Contract Damages” or “Morality of Law” will have been more significant—the first for legal process scholars, the second for contract law scholars interested in the move to make contract doctrine more responsive to social interdependence and bargaining power differentials, the latter for those interested in rebuilding a liberal ethical posture for legal reasoning. We have included “Consideration and Form” because it most clearly marks Fuller as a broad methodological innovator, illustrating a new way to think about policy analysis in legal reasoning that would become dominant across all fields of law in the ensuing years. We made similar judgments about other scholars, often inflected by our experience teaching the materials. For example, Llewellyn’s “Some Realism About Realism” might well have been replaced by “A Realistic Jurisprudence—The Next Step,” “On the Good, the True, the Beautiful, in Law,” or “What Price Contract—An Essay in Perspective,” each of which would also have a claim to canonical status.

#### WHAT MAKES THIS LEGAL THOUGHT “AMERICAN”?

For many years, this Canon was taught to foreign lawyers in the Harvard Law School’s LLM program, as a way of introducing the ideas that undergird the classroom experiences these foreign lawyers were having in various substantive subjects. Reading these articles with foreign lawyers and legal scholars inevitably raises the question, in what sense are these ideas, legal reasoning techniques, and common-sense assumptions American? These articles represent the course of methodological innovation among lawyers and legal scholars in the United States over the last century. As far as we can determine, they were all written by American citizens working in the United States, so in that simple sense, of course, they are “American.” But that leaves unanswered a number of significant

questions: were these developments unique to legal thought in the United States? Were these American authors influenced by ideas developed elsewhere? Have the legal reasoning techniques and common-sense ideas developed in the Canon had an influence elsewhere? And, perhaps most important, if also the most difficult to answer, are these ideas linked in any way to other aspects of the American legal system that seem unique?

Work on comparative *legal thought* has only recently begun. Perhaps the availability of this Canon will be a spur to further work exploring the history of influences—from elsewhere on American legal thought, and of American legal thought on other legal regimes. In a very preliminary way, however, it does appear that the developments traced by this Canon were not unique to the United States. Before the Second World War, they were often derivative of developments elsewhere. Thereafter, we find more evidence of the influence of American legal thought in legal systems around the world.

The authors in the Canon wrote about American legal method for an American audience—many had little exposure to ideas developed elsewhere and little opportunity to export their own methodological innovations abroad. For some, Holmes perhaps most significantly, the significance of an *American* approach to law, independent of the methods of old Europe—and in particular of common-law England—was paramount. It is easy to find the roots for Holmes's practical sense in the pragmatism he shared with William James and Charles Pierce in the Cambridge "Metaphysical Club." Dewey, the most influential American philosopher before 1945, seems emblematic of the roots for canonical legal methods in the traditions of American pragmatism.

Yet even Holmes was an avid reader of British and continental (particularly German) legal theory, and his thought reflected the efforts by von Ihering and others to break through the analytic paradigm of nineteenth-century legal thought. Although "classical legal thought" had elements that were uniquely American, as a general set of legal methods and basic ideas, it was the common project of jurists across the globe, with roots in continental Europe—particularly in Germany, and to a certain extent France. American scholars were not alone in repudiating its methods; indeed, many of the specific criticisms developed by Pound and the legal realists had their roots in the sociological jurisprudence of France and Germany. These ideas were taken up differently, and had different life cycles in the United States, but much of the opposition to classical legal thought in the United States ran parallel to developments in Europe of the same period. After the Second World War, the influences of European legal thought on the American Canon are less pronounced. The United States was no longer a net importer of legal methods; indeed, there is some evidence of the reverse. Modes of argument associated here with "policy analysis," with economics, sociology, and empirical study have all migrated into other legal systems.

The pattern of influences from and toward American legal thought, even once documented, will provide only a starting point for the far more difficult inquiry into the relationship between these modes of legal reasoning and aspects of the American legal system which seem to make it distinct. Throughout the history of American legal thought, it has seemed evident that modes of argument and analysis were linked to specific political interests or positions. Classical legal thought seemed inseparable from *laissez-faire*, legal realism the expression of the New Deal's social democracy, the legal process embedded in postwar American complacency, and so forth. But these associations, in our view, have been consistently

overstated. The techniques of classical legal thought have been appropriated for all manner of political projects. There has been a sociological jurisprudence of the right, a legal process of the left, a law and economics of center-left liberalism.

The difficulty of associating modes of legal thought with political commitments makes us wary of the further step of associating them with the particular institutions and substantive preoccupations of the American legal system. If you ask a group of foreign lawyers encountering these materials what makes the American legal system unique, they will develop something like the following list: the role of juries; federalism; the prominence of the legal profession in economic and political life; the interdisciplinarity of legal reasoning; the resolution of social and political conflicts in the judiciary; the porous boundaries between law and the worlds of morality, commerce, or political debate; or the litigiousness of American society generally. As they read the Canon, it is not uncommon for them to find the origins for these stereotypes. The attention paid in these materials to legal pluralism—the presence of multiple legitimate legal resolutions within the materials of law, and of multiple legitimate legal jurisdictions and modes of resolution within the legal order—is easy to interpret as an effect of federalism, or a cause for the fuzzy line between law and other fields of inquiry. The attention paid to policy within law, to the need for policy analysis and to the modes of its exercise, is easy to associate with the prominence of judges in political and social conflict, or the interdisciplinarity of legal reasoning.

Tempting as this sort of association may seem, we remain agnostic on this score. What we can say is that these materials reflect the methodological preoccupations and common sense of the American legal establishment. And that knowing these techniques for reasoning—thinking like a lawyer—has given generations of lawyers confidence in their suitability to govern. Whether that is cause, or effect, of institutional or cultural particularities of the American legal system or American society, we leave to our readers' imagination. We offer these materials as a window into the consciousness and sensibility of America's lawyers, judges, and legal scholars about how to rule.

#### NOTE

1. See Fred Shapiro, "The Most Cited Law Review Articles Revisited," 71 *Chicago Kent Law Review* 751, 1996. In Shapiro's study, the Coase and Wechsler pieces included here are the two most cited articles; Holmes, Chayes, Kennedy, Calabresi, and Melamed make the top ten, while Galanter and Macaulay come in at thirteen and fifteen. Shapiro excluded "older articles" from his top list; the dozen most cited older pieces include the contributions from Hohfeld, Fuller, and Llewellyn, and Canon authors account for six of the twelve.

