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LAW AND THE AMERICAN MIND

James R. Hackney Jr.

The historical development of law in the United States is a complex and multifaceted tale. Tracing the development of a single important element of United States law as it relates to overarching cultural and intellectual themes will provide the reader with a clearer understanding of the development of American legal theory.

A major issue in American law and one that clearly reflects broader intellectual trends is accident, or tort, law, specifically liability of manufacturers of consumer products (commonly referred to as products liability law). Product liability law plays a major role in the American economy, dictating the allocation of loss to the consumer or the manufacturer when an accident occurs while a product is being used. How the law determines this allocation has a large impact on whether accident losses are covered as a tax on business or as an economic hardship on consumers. As such, this is a subject of great political significance and debate.

It is impossible to understand how products liability law developed without taking into account the general intellectual trends that influence legal institutions (courts and the legal academy). As with the more general intellectual trends, discontinuities, rather than uninterrupted construction, mark the law's development. Three discontinuous episodes—the classical period, the legal realist movement, and the age of analysis—constitute the cartography of American legal theory that shaped products liability law.

CLASSICAL ROOTS

Post–Revolutionary War legal theory in the United States was rooted in a culture with distinct beliefs and commitments. Legal scholars often refer to this era as the classical period. The legal intellectual community (judges and scholars) was wedded politically to a laissez-faire doctrine and methodologically to a formalist approach.

Formalism is abstract, conceptual, and deductive in nature. It divorces reason from experience, relying solely on rationality. Classical adherents believed that these were preordained principles. One such principle was the belief in individual freedom. This led to the laissez-faire bias against government intervention.

Nowhere was this formalist methodology more evident than in the rise of the legal treatise. The legal treatise was not the invention of American legal theorists; William Blackstone in his famous *Commentaries on the Laws of England* (1766–1769) had established the tradition in England. The allure of treatises in America was that they gave a veneer of objectivity to the common law, an important move at a time when the common law was coming under assault as being political.

The basic claim inherent in the treatises was that legal reasoning was scientific. Judges could deduce the outcome of a case from enduring principles. The "commentaries" of early-nineteenth-century legal theorists crystallized in James Kent's *Commentaries on American Law* (1826–1830), in which he systematically laid out the principles of American law. Careful examination of what classical theorists took as the founding of principles of American law reveals that they simply represented the status quo—either in the form of legal precedent handed down from England or principles derived from laissez-faire ideology. For classical theorists, it was simply a given that government should not interfere with the "natural" social order. This was particularly the case in the economic arena. So it should come as little surprise that laissez-faire ideology would constitute one of the bedrock principles. As early as the founding of the Republic, political theorists had argued for—and indeed structured—government on the basis of individual property rights.

Nowhere is this stance more evident than in James Madison's *Federalist* 10 (1787), in which he warns against the possibility of conflict between the factions. It is a principal justification for a repub-

lican, as opposed to democratic, governmental system. Madison argued that "the most common and durable source of factions, has been the various and unequal distribution of property." These factions fell along class lines: "A landed interest, a manufacturing interest, a mercantile interest, . . . with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views." Out of necessity the government would be called upon to mediate conflicts that arose between factions: "The regulation of these various and interfering interests forms the principal task of modern Legislation."

However, Madison warned against the "rage for . . . equal division of property" as well as other "wicked project[s]." The protections against this wickedness in the antebellum period and continuing though the Civil War would come from the courts under the guise of scientific objectivity. Throughout the antebellum era courts decided a series of cases limiting government intervention, in the form of minimum wage, the right to strike, and employment law. Employers and employees were viewed as individual actors who had freely agreed to contractual arrangements. The first principle, or natural law, was individual freedom. From the principle of individual freedom, classical theorists deduced that all contracts, including employment contracts, were voluntarily entered into. Economic disparities were not relevant. Classical theorists did not think in terms of groups. Those who did not thrive economically were simply, as individuals, not as well equipped as those who succeeded. No thought was given to the prospect that economic relationships were socially constituted and frequently coerced.

This laissez-faire ideology, masked under the guise of objectivity, is epitomized in the U.S. Supreme Court opinion in *Lochner v. New York* (1905). *Lochner* involved the constitutionality of a New York state regulation limiting the number of hours bakers could work in a week. The regulation was passed under the guise of the state's police powers—governing the safety, health, morals, and general welfare of the public. However, the Court held that the legislation was an unwarranted intrusion upon the employers' and employees' freedom to contract. The Court's focus was on the liberty interests of the parties to enter into an agreement. The Court held that bakery workers did not need the state's protection because "there is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations." With the *Lochner* case, the Court effectively continued the antebellum tradition of minimal state interference in business enterprise, arguing that upholding the New York regulation would effectively place the state in a position of "supervisor, or *pater familias*, over every act of the individual."

Classical thought thus helped sustain the existing distribution of wealth, protecting the powerful. It also provided a measure of certainty regarding legal "principles." The benchmarks for classicists were certainty and objective truth.

The quest for legal science, as manifest in the treatise movement, would become a fixture in modern legal theory. However, conceptions of science changed and were contested over time. For example, the classical theorists disdained the burgeoning social sciences because their approach ran against the grain of formalist practice, giving greater weight to experience and observation than to "scientific" theory. For modern theorists, however, the social sciences, particularly economic theory, would play a major role in legal theory.

THE REALIST ANECDOTE

While classical theory dominated eighteenth- and early-nineteenth-century thought, its premises were severely shaken as Charles Darwin's theory of evolution began to take hold in the American mind. During the classical period intellectuals could rest assured that at least certain bedrock principles were available from on high. Darwinism, the new scientific paradigm, marked a break from this view because the theory of evolution, juxtaposed to creationism, implied that there was no preordained path for human development. In fact, human progress owed more to chance than to destiny. The certainty associated with classical theory was eclipsed by the historical and relativist ethos that marks the realist period.

This new scientific ethos was reflected philosophically in American pragmatism, whose beginnings are commonly identified with the Metaphysical Club. This turn-of-the-century "club" included among its members Charles Sanders Peirce, William James, Chauncey Wright, Nicholas St. John Green, and Oliver Wendell Holmes, all of whom were Harvard University affiliates. They met periodically to present papers and critique one another's ideas. It would be an understatement to say that this group was eclectic. Its members' interests were as colorful as varied. However, they did articulate certain shared themes that marked their times and that stand in stark contrast to classical theory, the central

ideal being the contingent nature of truth. This theme owed much to Darwin's *Origin of Species* (1859), and it influenced a host of fields, including legal theory.

Oliver Wendell Holmes, a legal theorist and later U.S. Supreme Court justice, was the first to systematically introduce pragmatist concepts into American legal theory. In a direct assault on classical theory, Holmes set forth this pragmatist formulation in *The Common Law* (1881):

> What has been said will explain the failure of all theories that consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the *science* of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency. (emphasis added; p. 36)

In other words, the law is contingent—its contours and precepts dependent on time, place, and context. The law was not located in the ether waiting to be discovered. Indeed, judges exercised a policy function, basing their decisions upon "what is expedient for the community concerned." Expedience could not be measured by any particular a priori principles, including laissez-faire ideology. In the *Lochner* case, it was Holmes, who in dissenting from the majority's opinion argued, "This case is decided upon an economic theory which a large part of the country does not entertain." Moreover, "a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." Common law judges are obligated to render judgment based on the social-historical context of the particular dispute at issue, not from any particular set of "fundamental principles."

Holmes viewed the historical development of accident law as exemplifying this approach. Before *The Common Law* there was no systematic approach to conceptualizing accident law. Holmes's endeavor was essential in answering one of the key policy questions raised in accident law: whether those who caused harm, irrespective of fault, would compensate accident victims. Doctrinally, a system that required that fault be proved was labeled negligence. If fault was not required, the regime was "strict liability" (enhancing the likelihood of victim compensation).

Holmes recognized that the choice between negligence and strict liability had major policy implications. In pre-industrial America, the choice seemed relatively straightforward. Negligence was favored over strict liability because "the public generally profits from individual activity" (p. 95). This worldview fit very nicely with a society composed principally of dispersed, individual actors and small business enterprises and that was entranced with laissez-fair ideology. However, with the rise of industrialism at the turn of the century, Holmes and other American intellectuals reassessed the merits of strict liability. The re-evaluation was consistent with a view that legal rules are historically contingent.

Oliver Wendell Holmes Jr. (1841–1935). Holmes served as a justice of the Massachusetts Supreme Judicial Court (1888–1902) and the U.S. Supreme Court (1902–1932). © BETTMANN/CORBIS

Holmes reconfirmed the need for policy-based legal rules: "For the rational study of the law . . . the man of the future is the man of statistics and the master of economics" ("Path of the Law," p. 469). With industrialization on the horizon, the merits of strict liability had to be revisited. Specifically, in the context of employer liability for harms to employees, Holmes noted, "If any one thinks it can be settled deductively . . . he is theoretically wrong" (p. 467). To determine the merits of strict liability, one must take into account the societal shift from "isolated, ungeneralized wrongs" to a milieu in which most harms involve "certain well-known businesses." Industrialization and its effects would

have a profound influence on how products liability was viewed.

Law and legal theory were swept up not only in the pragmatism of the time but also in the period's progressivism in a stark contrast to their laissez-faire roots. The turn-of-the-century symbiosis between pragmatism and progressivism is reflected in John Dewey's philosophy. Dewey constructed his philosophy, in part, upon ideas initially put forth by members of the Metaphysical Club, particularly Charles Sanders Peirce and William James. He believed that philosophy should facilitate critical inquiry and promote social reform. His philosophy blended well with progressivism and its emphasis on social improvement through governmental action. Critical inquiry required a "heightened consciousness of deficiencies and corruptions in the scheme and distribution of values that obtains at any period" (*Experience and Nature*, p. 73). Uncovering those deficiencies required that would-be social reformers collect evidence concerning society's various ills.

With the spread of corporate power in America, the corporation naturally became a focal point. Between 1860 and 1900 investment in American industrial plants increased from $1 billion to $12 billion, and employment increased from 1.3 million employees to 5.5 million. Correspondingly, there were a large number of workplace injuries. In the railroad industry, each year one in every twenty-six laborers was injured, and one in every three hundred was killed. Additionally, manufacturing output was reaching a larger consuming public and, correspondingly, was responsible for an increasing number of product-related injuries (West, *American Evasion of Philosophy*, p. 79). Dewey expressed the general concerns of progressives when he bemoaned the "socially unnecessary deaths, illnesses, accidents and incapacitations that come from the bad economic conditions under which so much of modern industry is carried on" (Dewey, "Elements of Social Reorganization," p. 749).

Progressive economists, particularly institutionalist, also criticized corporate power. Institutionalist economists included such figures as Thorstein Veblen, John R. Commons, Wesley Clair Mitchell, Robert Hale, and Henry Seager. Institutionalists emphasized the vagaries of finance capitalism and argued that big business was more focused on profit than product, and that cost considerations overshadowed concerns over employee and consumer safety.

Thorstein Veblen was a particularly harsh critic. He set forth his views in the seminal work *The Theory of Business Enterprise* (1904). He accused business of being more concerned with profit than product. The classical justification for a laissez-faire approach—that business owners deserved the profits they reaped due to their contributions to society—no longer held true. Modern business focused on mass marketing and sales, not production. This dictated a changed relationship with consumers:

> In the older days, when handicraft was the rule of the industrial system, the personal contact between the producer and his consumer was close and lasting. Under these circumstances the factor of personal esteem and disesteem had a considerable play in controlling the purveyors of goods and services. (pp. 51–52)

Consumers were now pitted against manufacturers. Progressives expressed a similar view on the relationship between employees and corporations.

Legal academics, particularly legal realists, adopted many of these perspectives on corporate power. For legal realists, the policy concern was setting up a legal regime that would curtail corporate power and benefit accident victims. Tort law scholars focused on employee injuries and consumer accidents, arguing respectively for workers' compensation policies (guaranteeing that workers injured during the course of employment would receive compensation) and strict products liability (ensuring that consumers injured by products would be compensated).

The spearhead for the workers' compensation movement was the American Association for Labor Legislation (AALL). It was founded in 1906 as an offshoot of the American Economics Association, which was heavily influenced by institutional economists. The AALL based its arguments for workers' compensation on the grounds that, in cases involving a worker and a corporation, the corporation should bear the loss of injury. This view was motivated by sentiment against corporate power. It was also influenced by another Progressive Era tenet: social insurance.

Progressives believed that social insurance policies should be established to avoid the economic dislocation associated with life's misfortunes. This had implications for a range of public policy issues, including workers' compensation, unemployment insurance, health care, and accident compensation. In keeping with the belief that policy should be dictated by empirical realities, progressives gathered statistical evidence in each of these areas. Researchers investigated industrial accidents and "measured" the human suffering. Their studies had a journalistic flavor. Statistics were augmented with narra-

tives chronicling the effects of accidents on peoples' lives. The purpose was to spur on a revolution in social consciousness. Much as Dewey believed that philosophy without a connection to social justice was barren, progressive activists for workers' rights believed in marshaling facts for a larger purpose. The same belief informed the work of legal theorists.

Legal theorists continued their break with formalist jurisprudence initiated by Holmes. A touchstone of this break, and connected with the rise of legal realism, was the sociological jurisprudence movement. Adherents of sociological jurisprudence, including Benjamin Cardozo (another prominent legal theorist and later U.S. Supreme Court justice), shared an affinity with legal realists in wanting to examine the law in social and historical context. The connection between sociological jurisprudence and pragmatism is found in Cardozo's admonition that "the juristic philosophy of the common law is at bottom the philosophy of pragmatism" (*Judicial Process*, p. 102). A pragmatist perspective on legal rules required judges to recognize that principles were not "floating in the air" just waiting to be revealed. The law was the product of policy choices. In examining a legal case, the judge should look at its context. Legal certainties were ephemeral and the law was in flux, a product of the times.

Nowhere was this relativistic view more prominent than in products liability law. Under classical jurisprudence, parties to a products liability dispute would be individuated and abstracted from their social context. For example, a classical jurist would look at the manufacturer of a product and the victim as "A" and "B" ("seller" and "purchaser"). From there, à la *Lochner*, he would apply deductive reasoning from the primary principle, freedom of contract, thus determining whether liability was warranted. No attention was given to power dynamics in the relationship, and distributive consequences (the effects on the relative wealth of victims and manufacturers as groups) were accepted as "natural."

Cardozo, sitting as a judge on the highest court in New York State, chipped away at classical abstractions. The landmark opinion was *MacPherson v. Buick Motor Co.* (1916) and it illustrates how taking a realist view of the world radically changes jurisprudential perspective. The case involved a consumer who had been injured in an automobile manufactured by Buick but sold by a dealer. In defending itself, Buick argued that since the car had been purchased from the dealer there was no contract between Buick and the victim, and therefore no liability. This is quintessential classical reasoning. Buick was obviously right that face-to-face negotiations had never occurred between it and the consumer. If one were to take an abstracted, individualized worldview, no relationship existed between Buick and the injured party.

Examining the social context yielded a more complex connection. Cardozo recognized that consumers and manufacturers were not operating in a vacuum but within a complicated network of social-power relationships. Given the nature of these relationships, an analysis based solely on contract would be partial.

Manufacturers, although they did not contract directly with consumers, were responsible for putting products into the stream of commerce. They also exercised power over dealers. Moreover, if the policy objective of legal rulings was preventing accidents from occurring in the first place, who better to assume responsibility than the manufacturer? If manufacturers were held liable to consumers for harms caused by their products, they would have an incentive to make those products safer. Manufacturers could also further the social insurance goal by passing on increased liability costs to all those who purchased products, thus sparing individual victims.

This set of considerations would have been political anathema to classical theorists because redistributive policies disturbed the ("natural") status quo. In addition, while contextual and temporal analyses were unsettling to classicists, they were vital for legal realists, as shown by Cardozo, echoing Veblen, in his *MacPherson* opinion:

> Precedents drawn from the days of travel by stage-coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be. (p. 1053)

Once again, legal certainty was not a priority.

The same focus on social context and temporality influenced the adoption of strict products liability. California Supreme Court Justice Jesse Traynor was the principal architect of strict products liability. In a series of opinions from 1944 through 1962 he laid out the argument for the doctrine, beginning with historical context:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between producer and consumer of a product has been altered. . . . The manufacturer's obligation to the consumer must

> keep pace with the changing relationship between them. (*Escola v. Coca Cola Bottling Co. of Fresno*, p. 443)

Unlike their forerunners in the classical era, realists believed that group affiliation (consumer versus manufacturer) had particular relevance and that the average consumer "no longer ha[d] the means or skill enough to investigate for himself the soundness of a product." Concern over consumers was not limited to the information gaps in an increasingly technological society. Realists focused on the human toll due to industrial accidents. Traynor emphasized this point in *Escola*, noting that "the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured."

Through the 1960s, legal theory, as laid out in academia and judicial opinions, reflected the combination of philosophical pragmatism and progressivism articulated by Dewey. Post-1960s legal theory would continue to be linked to larger American intellectual and political movements. This relationship can be seen clearly by looking at the forces that led to "the age of analysis" and how they influenced legal theory.

THE AGE OF ANALYSIS

After World War II both progressivism and philosophical pragmatism came under heavy assault, owing in large part to contemporary geopolitics. The emergence of the Soviet Union crystallized political opinion regarding progressivism. Conservatives, most notably F. A. Hayek in *The Road to Serfdom* (1944), argued that societies adopting progressive policies would inevitably become totalitarian. This argument had particular force in a political culture where the specter of Soviet Communism and Nazi atrocities was dominant.

Not only did the fear of totalitarianism affect the perception of progressive policies, it also influenced views on philosophical pragmatism (as well as legal realism and institutional economics as offshoots of philosophical pragmatism). In a culture thirsting for certainty, at least respecting the "rightness" of democratic capitalism, critics claimed that philosophical pragmatism's relativism fell short. If everything depended on context, then it was impossible to claim that any political system was favored. The uncomfortable position in which this placed academics was nowhere more evident than in Mortimer Adler's 1940 declaration at a gathering of over five hundred intellectuals that "we have more to fear from our professors than from Hitler" (in Purcell, *The Crisis of Democratic Theory*, p. 218).

While the merits of these attacks were weak, they did put those associated with philosophical pragmatism on the defensive. This created intellectual space for the "analytic turn"—a historical movement that began in the 1940s and culminated in the 1970s, marked by the ascendancy of analytic philosophy (logical positivism, logical empiricism, and linguistic philosophy). Although analytic philosophy, particularly logical positivism, had some affinity with pragmatism, the differences are more noteworthy. Most significant, analytic philosophy rejected the focus on historical consciousness and context that marked philosophical pragmatism. There was a departure from the socially engaged philosophy urged by Dewey. In its stead, emphasis was placed on formalism and logical erudition.

A key text in analytic philosophy, A. J. Ayer's *Language, Truth, and Logic* (1936), illustrates the flavor of the argument. Ayer divided all propositions into two categories, empirical and analytic. Empirical propositions could be verified through observation. Analytic propositions were tautologous, such as those found in mathematics. For example, the analytic proposition $2+2=4$ is necessarily true. Nevertheless, it has absolutely no relationship to real-world phenomena. One can compare it to the empirical statement that there are four cups on the table; this statement is not necessarily true, but is verifiable through observation.

To understand the role of analytic philosophy in shaping the post–World War II intellectual climate, one should note the types of arguments that were not included. Ayer and others believed that ethical statements could not be dealt with scientifically. These types of statements Ayer deemed unanalyzable and mere "pseudo concepts" in *Language, Truth, and Logic*, adding that the "presence of an ethical symbol in a proposition adds nothing to its factual content." Ayer illustrated the point: If I were to say, "You acted wrongly in stealing that money," it could be reduced to, "You stole that money," because the ethical admonition adds nothing to the statement (pp. 107–108). Of course, this would also render statements such as "poverty is unjust" as "unanalyzable." The drift away from ethical concerns marked a sharp contrast to the considerations at the forefront of philosophical pragmatism.

This general philosophical shift filtered down into the social sciences, including economics and legal theory. Whereas economics had been heavily influenced by institutional economics in the realist era, with the analytic turn it was displaced by a new

"classical" economics. This neoclassical economics had distinct methodological and political consequences for American legal theory.

Neoclassical economics is highly abstract and based on a few key assumptions, including a laissez-faire philosophy reminiscent of the classical era. These features made neoclassical economics an extremely attractive intellectual discipline in post–World War II America. The neoclassical economists' assumptions are simple: (1) humans have preferences as to outcomes; (2) we attempt to have our preferences met given constraints; (3) decision-making information is readily available; and (4) if we all act in our own self-interests, society will be better off.

Neoclassical theory has the virtue of being axiomatic, or self-evident. If you take the first three assumptions to be true, the fourth (which is the policy conclusion) is necessarily true. In this sense, it resembles the type of analytic statement admired by Ayer. But neoclassical economists are not making abstract statements about the world, although much of their work is couched in mathematics. They are making statements about how markets operate. However, there is no claim that the statements are empirically verifiable. For some, such as the great American neoclassical economist Frank Knight, there is no need for empirical verification, because the truths of the assumptions are intuitive. However, for those not so given to leaps of faith (particularly logical positivists), some form of empiricism is necessary.

Neoclassical economists, following the prompt of the Nobel laureate Milton Friedman, attempt to evade the dictates of analytic philosophy by asserting that neoclassical economics should be judged by the success of its predictions. If it does well at predicting economic phenomena, which seems to be the case, then the truth of its assumptions is irrelevant.

While neoclassical economics does not meet the criteria laid out by analytic philosophy, it comes closer to doing so than institutional economics. The methodology behind institutional economics was primarily inductive. Thus, unlike the deductive analysis of neoclassical economics, it failed the analytic test. It also did not qualify as an empirical science. Neoclassical economists used the two drawbacks to discredit institutional economics as unscientific.

Institutional economics was also infused with ethical imperatives that are antithetical in the analytic era. Institutional economists endeavored to champion the cause of the poor and others who suffered as a result of industrialism. Neoclassical economists criticized this aspect of institutionalism as mixing politics with science. Just as A. J. Ayer believed that statements about ethics lay outside the realm of philosophy, neoclassical economists asserted that ideals concerning what constitutes the just society were outside the bounds of economic science. This criticism ensured the downfall of institutional economics. A similar fate awaited legal realism, the intellectual cousin of institutional economics. In place of legal realism, today law and economics (an offshoot of neoclassical economics) plays the dominant role in American legal theory.

One of the first incursions of law and economics into legal theory came about in tort law. Legal theorists, beginning with the 1991 Nobel laureate Ronald Coase, began thinking about tort law issues from an economic point of view in the 1960s. They took the same assumptions used by neoclassical economists and applied them to situations involving legal disputes. A classic example is the case of pollution. Polluting on someone else's property was always considered to be a tort, and there was some general agreement that one who did so should be held strictly liable. Ronald Coase, utilizing neoclassical economics, made the observation that even if the polluter was not held liable, if the parties were allowed to reach a bargain regarding pollution, the best outcome (from a societal perspective) would be reached.

Richard Posner and Guido Calabresi, both former law professors who later ascended the judicial bench, would later expand on Coase's analysis. One of the central areas of debate was whether or not, and in what context, tort law should be based on strict liability or negligence. In resolving this fundamental policy issue, law and economics is now the dominant paradigm, supplanting legal realist arguments. Posner was prescient in noting the shift. He referred to legal realism as the "branch of legal scholarship that emphasizes facts rather than logic." In arguing for its displacement, he stated, "one displaces a scholarly approach not by showing that it has limitations but only by producing a better approach" ("The Costs of Accidents," pp. 637–638).

This displacement would mean a wholesale reevaluation of strict products liability law. Indeed, on the basis of law and economics analysis there has been legal reform aimed at shifting the basis for products liability from strict liability to negligence. While this might seem to be a relatively narrow doctrinal shift, of concern primarily to lawyers, it has huge policy implications. As mentioned earlier, how

one fashions liability rules determines victims' compensation and businesses' financial obligations.

Aside from the policy implications, the debate surrounding products liability reflected the general shift in American legal theory. The discussion moved to abstract concerns over "efficiency," "perfect information," and individual "rational actors." These abstractions hark back, although in a very different form, to the classical era.

CRITICAL LEGAL THEORY

There has been a powerful reaction to the new "classicism" in modern legal theory. Beginning in the 1970s a group of scholars adopting the rubric "critical legal studies" to denote the work began asserting the claim that the law is predominantly a political, as opposed to scientific, endeavor. These scholars, including such theorists as Duncan Kennedy, Morton Horwitz, Roberto Unger, and Mark Tushnet, echoed the legal realist critique of classical theory. However, they were very much influenced by Continental thinkers such as Max Weber, Karl Marx, Jürgen Habermas, and Michel Foucault—to name only a few.

Critical legal studies reflects the postmodern turn in Western thought and, like much postmodern theory, questions the very notion of objectivity. This turn also manifested itself in American academic philosophy with the rise of neopragmatism. Neopragmatism, particularly of the type articulated by Richard Rorty, has a strong affinity to the pragmatism of the early 1900s (including a commitment to social engagement) and has many adherents in the legal academy.

Critical legal studies theorists believe that the law is an inherently political enterprise. Their primary focus is on the legal system's class bias, which they claim favors the wealthy. For example, in the field of torts Morton Horwitz has argued that the rise in negligence in American law constituted an industrial subsidy designed to favor business interests. This reflects the general critical legal studies argument that the fundamental issue left unconfronted by "depoliticized" law is the distribution of wealth in society, the very issue James Madison warned against raising.

The basic critique made by critical legal studies scholars, while initially focusing on class analysis, has implications for a host of unadressed issues in American law and legal theory. For instance, critical race theorists, such as Derek Bell, Richard Delgado and Patricia Williams, might raise issues of racial subordination, and feminist theorists, Catharine MacKinnon and Martha Minow, might raise issues of gender inequality.

CONCLUSION

America began as a country deeply rooted in classical theory—formalist and biased against government intervention. The rise of pragmatism called into question these classical tenets, the world was not as simple as the classicist had assumed. In order to understand and remedy social ills one had to undertake contextual analysis and at times champion government intervention. Analytic philosophy in many ways marks a return to our classical roots. Postmodernism represents a revolt against this neoclassicism. As one might expect, changes in American law and legal theory reflect these transformations in "the American mind." In this regard, law and legal theory are quintessential examples of the pursuit and exchange of knowledge.

See also **Law (Colonial)** *(volume 1);* **The Professional Ideal; Constitutional Thought** *(volume 2); and other articles in this section.*

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