

The Jurisprudence of Style

In the contemporary domain of American legal thought, there is a dominant conception in which lawyers and judges craft their argumentative practice. More colloquially, this is called “thinking like a lawyer.” Despite the widespread popularity of this conception, it is rarely described in detail, much less given a name. Justin Desautels-Stein tells the story of this curious absence in American Legal Thought, and why that story matters. Drawing upon and updating the work of Harvard Law School’s first generation of critical legal studies, Desautels-Stein develops what he calls a jurisprudence of style. In doing so, he uncovers the intellectual alliance, first emerging at the end of the nineteenth century and maturing in the last third of the twentieth century, between American pragmatism and liberal legal thought. Applying the tools of legal structuralism and phenomenology to real-world cases in areas of contemporary legal debate, this book develops a practice-oriented understanding of legal thought.

Justin Desautels-Stein is Associate Professor of Law at the University of Colorado Law School.

Cambridge Historical Studies in American Law and Society

Recognizing legal history's growing importance and influence, the goal of this series is to chart legal history's continuing development by publishing innovative scholarship across the discipline's broadening range of perspectives and subjects. It encourages empirically creative works that take legal history into unexplored subject areas, or that fundamentally revise our thinking about familiar topics; it also encourages methodologically innovative works that bring new disciplinary perspectives and techniques to the historical analysis of legal subjects.

Series Editor

Christopher Tomlins, *University of California, Berkeley*

Previously Published in the Series:

- Angela Fernandez, *Pierson v. Post: The Hunt for the Fox*
 Rebecca E. Zietlow, *The Forgotten Emancipator: James Mitchell Ashley and the Ideological Origins of Reconstruction*
 Robert Daniel Rubin, *Judicial Review and American Conservatism: Christianity, Public Education, and the Federal Courts in the Reagan Era*
 Matthew Crow, *Thomas Jefferson, Legal History, and the Art of Recollection*
 Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909*
 Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857*
 Leia Castañeda Anastacio, *The Foundations of the Modern Philippine State: Imperial Rule and the American Constitutional Tradition in the Philippine Islands, 1898–1935*
 Robert Deal, *The Law of the Whale Hunt: Dispute Resolution, Property Law, and American Whalers, 1780–1880*
 Sandra F. Vanburkleo, *Gender Remade: Citizenship, Suffrage, and Public Power in the New Northwest, 1879–1912*
 Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism*
 Ely Aaronson, *From Slave Abuse to Hate Crime: The Criminalization of Racial Violence in American History*
 Stuart Chinn, *Recalibrating Reform: The Limits of Political Change*
 Ajay K. Mehrotra, *Making the Modern American Fiscal State*
 Yvonne Pitts, *Family, Law, and Inheritance in America: A Social and Legal History of Nineteenth-Century Kentucky*
 David M. Rabban, *Law's History*
 Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900*
 Steven Wilf, *Law's Imagined Republic*
 James D. Schmidt, *Industrial Violence and the Legal Origins of Child Labor*
 Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941*
 Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004*
 Davison Douglas, *Jim Crow Moves North*
 Andrew Wender Cohen, *The Racketeer's Progress*
 Michael Willrich, *City of Courts, Socializing Justice in Progressive Era Chicago*

Cambridge University Press
978-1-107-15665-4 — The Jurisprudence of Style
Justin Desautels-Stein
Frontmatter
[More Information](#)

Barbara Young Welke, *Recasting American Liberty: Gender, Law and the Railroad Revolution, 1865–1920*
Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*
Robert J. Steinfeld, *Coercion, Contract, and Free Labor in Nineteenth Century America*
David M. Rabban, *Free Speech in Its Forgotten Years*
Jenny Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*
Michael Grossberg, *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in the Antebellum South*

The Jurisprudence of Style

*A Structuralist History of American Pragmatism
and Liberal Legal Thought*

JUSTIN DESAUTELS-STEIN
University of Colorado



Cambridge University Press
978-1-107-15665-4 — The Jurisprudence of Style
Justin Desautels-Stein
Frontmatter
[More Information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi - 110025, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107156654

DOI: 10.1017/9781316661444

© Justin Desautels-Stein 2018

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2018

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data

Names: Desautels-Stein, Justin, 1975– author.

Title: The jurisprudence of style : a structuralist history of American pragmatism and liberal legal thought / Justin Desautels-Stein, University of Colorado.

Description: Cambridge, United Kingdom; New York, NY, USA : Cambridge University Press, 2018. | Series: Cambridge historical studies in American law and society |

Includes bibliographical references and index.

Identifiers: LCCN 2017036749 | ISBN 9781107156654 (alk. paper)

Subjects: LCSH: Law – Philosophy. | Structuralism. | Liberalism. | Pragmatism | Law – United States – Philosophy.

Classification: LCC K230.D47 A33 2018 | DDC 340/.1 – dc23

LC record available at <https://lcn.loc.gov/2017036749>

ISBN 978-1-107-15665-4 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

For Amy

Contents

<i>Acknowledgments</i>	<i>page xi</i>
Overture	I
Legal Structure	18
The Jurisprudence of Style	21
The Legal Context	25
The Problem with Pragmatism	28
PART I LEGAL STRUCTURALISM	
1 The Rise and Fall of the Harvard School	35
On the Road to Legal Structuralism	36
The Rise of Legal Structuralism (1975–1984)	40
The Rise of the Poststructuralist Jurist	61
2 Toward a Jurisprudence of Style	71
Maurice Merleau-Ponty: Thought as Practice	74
Michel Foucault: Practice as Structure	79
Roland Barthes: Structure as Ideology	88
3 The Context of Legal Thought: Structure and Style in Time	94
Persona: Structuralists and Jurists	95
Office: Training Jurists in the Language of Liberal Legalism	97
Speaking of History	101
Structuralist Legal History	108
PART II LIBERAL LEGAL THOUGHT	
4 The Classical Style	123
So Says the Jurist	128
Summing Up the Classic Liberal Style	148

x	<i>Contents</i>	
5	The Modern Style	152
	So Says the Jurist	154
	Summing Up the Modern Style	169
6	Liberal Legalism and the Context of Legal Thought	172
	General Contexts	173
	Particular Contexts	180
	The Context of Legal Thought	183
	PART III PRAGMATIC LIBERALISM	
7	American Pragmatism	197
	A Naturalizing Sensibility	205
	An Antinomian Sensibility	214
	Is Philosophical Pragmatism an Antinomian Naturalism?	219
	Doing What Works: The Cultural Sensibility of American Pragmatism	227
8	Liberal Legalism Is Dead; Long Live Liberal Legalism	239
	Theorizing Pragmatism and Law	241
	Pragmatic Liberalism as a Style of Argumentative Practice	244
	Pragmatic Liberalism as a Grammar of Conflict	256
9	<i>Trompe l’Oeil</i> Liberalism	262
	The Illusion of Eclectic Problem Solving	265
	The Illusion of Settled Law	277
	The Illusion of the Now	285
	Coda	292
	<i>Index</i>	299

Acknowledgments

This book has its beginnings in a law school class with Roberto Unger. The name of the course was *Contemporary Legal Analysis*, a survey of Unger's book *What Should Legal Analysis Become?* Never before had I found a course either so confusing or so enriching. It was one of those classes that forever changes the way you put the world together, as this book attests. At the same time, I was taking a course on rational choice theory with Amartya Sen, in which he introduced the class to Richard Posner's work on pragmatism and economics. A short while later, David Kennedy showed me a draft for his forthcoming *Dark Sides of Virtue*, a work of another pragmatist variety. Further still, Unger ended his course with an ode to William James. Pragmatism, it seemed, was everywhere a Cambridge fog. It was this amorphous and plentiful pragmatism that sparked my first interest in James, Dewey, and Rorty, and their legacies in law. I am grateful for my teachers' willingness to put up with all of those early questions.

After graduation, my interests in pragmatism continued with David Kennedy's ongoing support. His Institute for Global Law and Policy was an early and lasting site for intellectual warfare of the best kind, and I'm sure that my work was bettered with his generosity. After arriving in Boulder, I was lucky to find in Pierre Schlag, Jack Schlegel, and William Simon a trio of commentators who seemed willing to read just about anything I'd send their way. This was, and still is, deeply appreciated. Over the past few years a new and formidable influence on my approach has been that of Chris Tomlins. His theorization of legal history and all of his work in the *Law as . . .* symposia have been tremendous and a real benefit to my intellectual development. Last in this list of signal figures is Duncan

Kennedy. It is difficult to characterize the immensity of Duncan's impact on this book, both in substance and in style. His endless energy and willingness to dig out my many mistakes have been indispensable, just as have been his warmth and encouragement.

Along the way, there have been friends, readers, and commentators in too many venues to adequately address. But among those that have helped make this book a better one (I hope), and in addition to those I have already mentioned, are Paulo Barrozo, Jon Baker, Charles Barzun, Arnulf Becker Lorca, William Boyd, Ming Hsu Chen, Amy Cohen, Adrienne Davis, Dan Ernst, Maks del Mar, Frank Garcia, Ben Golder, Bernard Harcourt, Janet Halley, John Haskell, Martti Koskenniemi, Alex Kinsella, Andrew Lang, Doreen Lustig, Sam Moyn, Fernanda Nicola, Amy Ost-diek, Umut Ozsu, Ben Moritz, Kristina Moritz, Akbar Razulov, Annelise Riles, Brishen Rogers, Spencer Weber Waller, Catherine Wells, Emilyn Winkelmeyer, and Ahmed White. For helpful research assistance, I thank James Kin, Ethan Tacket, Alec Gibson, Daniel Chavez, and Michael Gannon.

Finally, my deepest gratitude goes to my children, Dakota and Noah, my wife, Amy, and my parents. In its fundamentals, this is a book about the quest for harmony in law, and the illusions that haunt that quest. But it is in the company of my family that I have learned harmony's most crucial lessons, and for that I am forever grateful.