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## Legal Realism at Yale, 1927-1960 by Laura Kalman

Paul Brickner

*United States Department of Health and Human Services*

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# Book Review

LEGAL REALISM AT YALE, 1927-1960. By Laura Kalman.\* Chapel Hill, N.C. and London: University of North Carolina Press, 1986. Pp. xii, 314, notes, index. \$35.00 cloth.

A number of somewhat senior members of the bar and others still refer to Yale Law School as a place where sociology, not law, is taught. This outmoded recollection relates back to that period most marked in the first half of the twentieth century when legal realism was a movement espoused by many members of the Yale Law School faculty<sup>1</sup>

In *Legal Realism at Yale, 1927-1960*, Laura Kalman has written a superb and fascinating history of the legal realism movement at Yale Law School. The book is well written and reads easily, but it is not destined to make the *New York Times* best seller list as did one lasting legal realism study published in the 1930s.<sup>2</sup> Professor Kalman's book will appeal to law professors, historians, political scientists, philosophers, educators, and students. Lawyers who were too heavily overworked as law students to see the forest for the trees will be intrigued by the evolutionary processes that tugged at the making of casebooks.

Professor Kalman has created a work that is faithful to the historical method by portraying the subject accurately without editorializing. For example, she does not allude to the near absence of women on the law faculties of the day or mention the paucity of female students. In fact, in addition to Dorothy Swaine Thomas, the first woman to teach a course at Yale Law School, Professor Kalman mentions only two other women by name: Emma Corstvet, Professor Underhill Moore's research assistant, and Mary Beard, the historian.<sup>3</sup>

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\* Associate Professor of History, University of California at Santa Barbara.

<sup>1</sup> See E. POLLACK, *JURISPRUDENCE: PRINCIPLES AND APPLICATIONS* 788 (1979).

<sup>2</sup> J. FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>3</sup> See L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 119, 134 (1986).

One can read *Legal Realism at Yale* on three levels. First, the book begins with an essay about legal realism that taken alone would make an outstanding article. Second, the book describes legal realism as an academic movement at Yale and Columbia. Third, the book is a subtle account of the office politics and the idiosyncrasies and personalities of famous professors and academicians. In this jungle, far deeper and darker than any forest, Professor Kalman declares, "all law is politics."<sup>4</sup>

Neither the law nor legal realism is all politics. Legal realism's impact and effect among law professors and its resulting tensions and alliances create a fascinating mix; however, in concluding that "the members of the legal process school denied realism's most important message, a message so arresting that even the realists never dared face it—that all law is politics,"<sup>5</sup> Laura Kalman appears to miss some of the valuable lessons of her own intriguing study of this significant movement in jurisprudence and legal education.

Before discussing Professor Kalman's description of legal realism, her analysis of its influence on legal education at Yale and Columbia, and the palace intrigue and office politics of the academic community, a few suggestions are in order. Greater use of outside materials would have strengthened *Legal Realism at Yale*. Professor Kalman relied too heavily on the law schools' archives. A somewhat broader base of research material would have provided a wider perspective.<sup>6</sup> In addition, an appendix which indexes the innumerable names in the book with brief biographical statements would have been especially helpful; only a few professors from the 1920s and the 1930s have achieved lasting fame within the profession to permit modern day readers to know them. Also, a general bibliography of works of legal realism and legal education would have been helpful.

Professor Kalman makes no direct attempt to define legal realism or to define a legal realist. Indeed, such definitions are

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<sup>4</sup> *Id.* at 231.

<sup>5</sup> *Id.*

<sup>6</sup> For example, Professor Kalman did not mention Justice Cardozo's view of legal realism. See *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 15 (M. Hall ed. 1947) [hereinafter *SELECTED WRITINGS OF CARDOZO*] ("Now, if neo-realism means this it is a false and misleading cult. ").

necessarily vague. Judge Richard A. Posner, an eminent scholar on the United States Court of Appeals for the Seventh Circuit, observed recently that

“Realist” can mean cynical, reductionist, manipulative, hostile to law, political, left-wing, epistemologically naive—but also progressive, humane, candid, mature, clear-eyed. These usages reflect the polemical character of so much writing about law. Legal realism is also used to refer to the work of particular academic lawyers, mainly on the Yale and Columbia faculties during the 1920’s and 1930’s, and to specific (and diverse) ideas held by those men.<sup>7</sup>

Perhaps the imprecision of this recent definition reinforces an earlier statement by Pollack:

It has frequently been said that there is no single description of American legal realism. Being a method rather than a system, there are as many descriptions of the movement as there are realists, since each theorist espouses a distinguishably different viewpoint. Notwithstanding these differences, there is an observable common pattern in their pronouncements—that the law is what the courts and the officials do regarding legal cases.<sup>8</sup>

Other definitions of realism are similarly general in nature:

The American realists stem from the judge-centred approach of J.C. Gray and the skepticism of Holmes, J., and emphasize the uncertainty of the law and the importance of the attitude of the judges; what these officials do about disputes is the law. Realism had some affinities with the pragmatism of William James and the work of John Dewey. After Holmes the main figures were Llewellyn, Cook, and Jerome Frank (qq.v.). Their approach is a combination of analytical, positivist, and sociological. The importance of their work was to concentrate attention on litigation, judges and judicial attitudes, empiricism, the influences which affect judges (of which the words of statutes and cases are only some), and on the operation of law

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<sup>7</sup> Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986-87).

<sup>8</sup> E. POLLACK, *supra* note 1, at 787

in society Law is a means to social ends, but must be evaluated in terms of its effects.<sup>9</sup>

In 1931, Roscoe Pound noted that

the new juristic realists hardly use realism in a technical philosophical sense. They use it rather in the sense which it bears in art. By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be, or as one feels they ought to be. They mean by realism faithful adherence to the actualities of the legal order as the basis of a science of law<sup>10</sup>

Nevertheless, Jerome N. Frank, later Chairman of the Securities and Exchange Commission and Judge on the Second Circuit, viewed legal realism in part from the perspective of living in "the real world" to use a phrase favored by trial lawyers:

If anyone doubts the truth of this picture [of uncertainty in the law and inability to predict the outcome of cases]; let him spend several years in law offices and court rooms, noting the effect on court decisions in actual lawsuits (relating to property or contract or anything else) of perjury, mistaken testimony, coached witnesses; of lazy, stupid, energetic, brilliant or crooked lawyers; of honest, intelligent, biased, ignorant, lazy or dishonest judges; of appeals to bigotry or thick-headedness of juries.<sup>11</sup>

With this untidy background of legal realism, Professor Kalman presents a superb analysis of legal realism relating to legal education. Jerome Frank applauded the "hunch" or "gut reaction" to decision making that Judge Joseph Hutcheson advanced,<sup>12</sup> but Justice Cardozo deplored it.<sup>13</sup> While some advanced Jerome Frank's psychoanalytical approach to law, "one critic of the realists pointed out [that] the logical implications of

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<sup>9</sup> D. WALKER, *THE OXFORD COMPANION TO LAW* 1037 (1980).

<sup>10</sup> Pound, *The Call for a Realist Jurisprudence*, 44 HARV L. REV. 697, 697 (1930-31).

<sup>11</sup> Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 48 (1931-32).

<sup>12</sup> See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274 (1928-29).

<sup>13</sup> See *SELECTED WRITINGS OF CARDOZO*, *supra* note 6, at 15.

'gastronomic jurisprudence' were that law schools should teach their students how to psychoanalyze and bribe judges."<sup>14</sup>

At Yale and Columbia, the case method and the quest for legal certainty and fixed rules of law clashed with the Legal Realists' desire to incorporate the ideas of Charles Beard and Charles Merriam into the curriculum. The Realists followed a functional approach to analyzing various subjects in legal education. In a functional approach, for example, the law of partnerships was combined with the law of corporations into one course covering business entities.<sup>15</sup>

Legal realism also brought about the inclusion of courses and professors from differing fields of scholarship. By 1931, the faculty of Yale Law School included a psychiatry professor and an economist. In 1932, Columbia Law School had a finance professor and a political scientist.<sup>16</sup> These functional and multi-disciplinary changes proved both revolutionary and lasting in their impact.

Over the years, the clash was resolved, and in the years following World War II, the emphasis on realism at Yale decreased, while the impact of nonlegal subjects increased at other schools including Harvard. The influence of the Legal Realists on our system of legal education has been significant and concrete. Professor Kalman describes with interesting detail the development of law school curricula and casebooks.

*Legal Realism at Yale* contains the names of distinguished legal scholars and law professors. While some names endure because of the lasting value of their work or because they have achieved recognition and distinction elsewhere, most of the names will be a bit of a puzzle for many readers not steeped in the history of the particular law school or in the history of legal education in the period that she covers. While William O. Douglas, Harlan Fisk Stone, Abe Fortas, and Felix Frankfurter have achieved lasting fame within the legal profession by their appointments to the Supreme Court, Arthur L. Corbin, Karl Llewellyn, Roscoe Pound, Christopher Columbus Langdell, James

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<sup>14</sup> L. KALMAN, *supra* note 3, at 7 (citing Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1252 (1933-34)).

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 75.

Barr Ames, Eugene V Rostou, and Erwin N. Griswold remain known by virtue of their impact on the legal education community. Most readers probably do not recognize other beautiful names, such as Hessel Yntema and Myres McDougal.

In a sense, the most interesting aspect of Professor Kalman's study involves the personality conflicts. Lawyers love to fight. Human aggression speaks loudly in the courtroom where indoor battles are fought daily. After all, Justice Brandeis explained that he "would rather fight than eat."<sup>17</sup> The unplanned theme of combat in the ivory tower provides great reader interest. For example, in 1928, William O Douglas and other faculty members resigned from Columbia Law School in protest over the failure of Columbia's President, Nicholas Murray Butler, to consult with them on the appointment of a new dean.<sup>18</sup> Earlier, Butler's criticisms of the law school had caused Harlan Fisk Stone to resign as dean.<sup>19</sup>

In an endnote, Professor Kalman recounts the censorship of the *Yale Law Journal* by Professor Harry Shulman, the *Journal's* faculty advisor. Professor Fred Rodell wrote a book review containing one sentence critical of Felix Frankfurter. Shulman urged the students not to publish the book review unless the sentence was deleted or revised. Freedom of the press, freedom of expression, and free criticism fell by the wayside, but the *Columbia Law Review* published the review in full, criticism of Justice Frankfurter included.<sup>20</sup>

In another endnote, Felix Frankfurter quoted Learned Hand's view of Jerome Frank's long opinions by using the word "shit." Learned Hand had said, "I see how [Frank] comes out, and I pay no attention to the shit."<sup>21</sup> Frankfurter must have written in a moment of indiscretion, since he was sensitive to history and should have known that his papers would be preserved in archives at Harvard or in Washington. Those respectful of privacy should not record words not meant to be quoted. Nevertheless, good footnotes can liven up jurisprudential histories.

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<sup>17</sup> L. BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 91 (1984).

<sup>18</sup> L. KALMAN, *supra* note 3, at 74.

<sup>19</sup> *Id.* at 69.

<sup>20</sup> *Id.* at 280 n.51.

<sup>21</sup> *Id.* at 284 n.92.

Two questions come to mind that do not fall within the time frame of *Legal Realism at Yale*. One is whether Cardozo's lectures at Yale Law School, entitled "The Nature of the Judicial Process,"<sup>22</sup> had any impact on the development of the legal realism movement at Yale Law School. The other is whether the lasting impact of legal realism at Yale had any discernible influence on two distinguished jurists who were educated in New Haven, Justice Potter Stewart and Justice Bryon White. A word in the epilogue or a footnote on these early and late matters might have added a bit more breadth to this excellent legal and historical study

*Paul Brickner\*\**

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<sup>22</sup> B. Cardozo, *The Nature of the Judicial Process*, reprinted in *SELECTED WRITINGS OF CARDOZO*, *supra* note 6, at 107.

\*\* Administrative Law Judge, U.S. Department of Health and Human Services, Cleveland, Ohio; Vice-President, Ohio State Board of Education. B.A., University of Richmond, 1962; J.D., Case Western Reserve University, 1966; LL.M., Cleveland State University, 1983.

