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Abe Fortas: A Biography

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ABE FORTAS: A BIOGRAPHY. By *Laura Kalman*. New Haven: Yale University Press. 1990. Pp. xii, 499. \$29.95.

Laura Kalman's¹ first book, *Legal Realism at Yale*,² attracted a great deal of attention from proponents of the Critical Legal Studies (CLS) movement.³ To the extent that legal realism and CLS grow from similar intellectual roots, commentators have linked the history of realism to the future of CLS.⁴ If this linking provides any insights into either the contemporary debate raging over the proper place for CLS in the legal academy or the likely impact the CLS movement will have on legal thinking,⁵ it should come as no surprise that *Legal Realism at Yale* has become required reading for jurisprudential scholars. In Kalman's new book, *Abe Fortas: A Biography*, she offers new insights about the connections between the two movements, and implicitly suggests that the CLS movement has more to learn from legal realism.

At first blush, the Fortas biography seems to grapple with different material than Kalman's account of legal realism at Yale. Although the biography shares the same painstaking research, attention to detail, and concern with contextualization⁶ as the earlier work, it does not aspire to a topic as expansive as the "study of the interrelationship between intellectual theory and institutional factors within the specific context of legal education."⁷ Instead, it draws on previously unavailable sources⁸ to tell the story of an important and somewhat enigmatic figure. And certainly it lives up to its billing as "[t]he best work on

1. Laura Kalman, an associate professor of history at the University of California at Santa Barbara, is a member of the California bar.

2. L. KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986).

3. See, e.g., Schlegel, Book Review, 41 STAN. L. REV. 435 (1989); Singer, Book Review, 76 CALIF. L. REV. 465 (1988).

4. Metaxas, *Is the History of "Legal Realism" a Precedent for the CLS debate?*, Natl. L.J., Nov. 3, 1986, at 4, col. 2; cf. Book Notice, 85 MICH. L. REV. 1105, 1109 (1987) (predicting that the contribution of *Legal Realism at Yale* to legal academia would turn on similarities between realism and CLS).

5. See L. KALMAN, *supra* note 2, at 229-31 (concluding that legal realism failed to achieve the transformation of legal thinking to which it aspired).

6. See Schlegel, *supra* note 3, at 436 (calling *Legal Realism at Yale* "a carefully contextualized intellectual history of realism").

7. L. KALMAN, *supra* note 2, at xi.

8. Carol Agger, Abe Fortas' widow, denied other biographers access to Fortas' papers, adding to the anticipation surrounding the release of Kalman's book. See Hamilton, Book Review, 68 TEX. L. REV. 673, 678 n.33, 686-87 (1990) (pointing to limitations in B. MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988) and looking forward to Kalman's then-pending publication); cf. White, *Recapturing New Deal Lawyers* (Book Review), 102 HARV. L. REV. 489, 498-509 (1988) (criticizing Murphy's failure to delve into Fortas' personal life though recognizing the primary sources as "nearly inaccessible documents").

Fortas to date.”⁹

Yet, in many respects the biography offers much more: by documenting the rise and fall of one of the realist movement’s best students, it acts as a sort of sequel to Kalman’s earlier book. If *Legal Realism at Yale* is the contextualization of a school of thought, *Abe Fortas: A Biography* is the personal history of the pupil’s coming of age. To that extent, the new book also has important things to say to the contemporary legal community.

The first three chapters of Kalman’s biography trace Fortas’ education and early career, making clear that it would be difficult to find a better student of realism than Abe Fortas. Not only was he educated at Yale during the heyday of the realists, but Professors Jerome Frank, William O. Douglas, and Thurmond Arnold became his mentors. Realism had a profound impact on Fortas during his legal education (pp. 14-26) and Fortas clearly aligned himself with the realist faculty when he taught at Yale from 1935 to 1938 (pp. 49-61). Kalman claims persuasively that the “New Deal liberalism” that attracted Fortas after graduation was for him “the political analogue of legal realism” (p. 29).

Fortas went on to have one of the greatest careers of any of the students trained by the realists. Editor-in-chief of the *Yale Law Journal* (p. 15), professor at Yale (p. 49), holder of a series of government jobs during the New Deal, including the post of Under-Secretary of the Department of the Interior at the age of thirty-two (pp. 77-101), co-founder and name partner of a successful Washington law firm (pp. 125-96), close advisor to a U.S. president (pp. 199-227, 293-318), and Supreme Court justice (pp. 249-92) — Fortas’ career reached the acme of practically every area of the profession. No student educated during the heyday of realism accomplished more.

Supporters of realism might cringe at this claim because they know the rest of the Fortas story. He allowed his most important clients to become close friends in a manner which clouded his judgment.¹⁰ Because his willingness to advise President Johnson from his seat on the Supreme Court compromised his judicial integrity, Fortas was pressed to resign from the Court (pp. 370-76). Ultimately his resignation helped to undercut the liberal social reforms he spent his career supporting.¹¹ Though he was a man with great strengths, he also had

9. This quotation by Professor G. Edward White of the School of Law at the University of Virginia appears on the book’s dustjacket. Kalman’s biography is only the second full-length treatment of Fortas’ life. Professor Murphy’s book was the first. B. MURPHY, *supra* note 8.

10. In addition, the biography suggests that Fortas used his connections with government officials, even with adjudicators, to further clients’ causes. Pp. 158-66. “However strenuously he denied it, [political] influence did figure in Fortas’ practice, though there was no evidence he used it in an unethical way. And when convinced his cause was in the public interest, he exerted influence more vigorously still.” P. 166.

11. One compelling feature of Fortas’ life — and thus Kalman’s biography — is its progression from legal realism to the New Deal to the Great Society. As an insider to each of these

great weaknesses.

Kalman's biography does an excellent job of painting a portrait of Fortas that makes his downfall believable. But the book stops just short of making normative claims about the relation between Fortas' legal philosophy and his personal judgment. Kalman begins Chapter Twelve with a dilemma: how would Fortas, once a participant "in a revolution questioning the existence of principled [judicial] decision making," (p. 249) reconcile his beliefs with his role as justice? Not insignificantly, the chapter ends with the statement that "[d]espite his attempt to present himself as 'a man of law,' Fortas rarely believed that law commanded him to act against his own wishes" (p. 276). Kalman does not suggest that others would necessarily resolve this dilemma similarly, and she certainly does not claim that every realist student who might have served in the judiciary would meet Fortas' fate. She does assert, however, that realism's influence on Fortas colored his judicial thinking.¹²

Of course, many realists would disagree with Fortas' belief that law rarely constrains judicial actors. In fact, there is little reason to believe that more than a minority of the scholars claiming to be realists would stand by this proposition. Yet the skeptical strand of realism — perhaps best embodied by Jerome Frank's comment about judges' digestion¹³ — figured centrally in Fortas' legal philosophy.¹⁴ To the extent that the proponents of CLS have pushed claims of radical indeterminacy to even greater extremes than Frank and other skeptical realists did,¹⁵ CLS students are more likely than realist students to face tensions between legal philosophy and professional judgment as they progress through their careers. If contemporary thinkers want to direct CLS students away from Fortas' mistakes, they could benefit from reading Kalman's book.

This is not to suggest that current students of CLS are likely to follow Fortas down a path to "corruption."¹⁶ Even if Fortas did give

movements, Fortas had a close view of the central liberal agenda of the mid-twentieth century. Whatever his personal failings, Fortas' unquestioned competence, unswerving dedication, and hard work for this agenda will certainly make him an appealing character for a large percentage of the readers of this book.

12. Kalman explicitly addresses the tensions between Fortas' judicial approach and his dedication to realism. Pp. 271-76.

13. See J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 161-62 (1949) (discussing the value of "gastronomical jurisprudence").

14. In this context, it is worth noting that the skeptical Frank had a formative influence on Fortas. P. 31.

15. See, e.g., Kelman, *Trashing*, 36 *STAN. L. REV.* 293 (1984); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 563 (1983).

16. In this regard, the following attack on CLS seems vastly overblown:

What [the legal profession] cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic. . . . The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may

in to indiscretion, his failings resulted as much from hypocrisy as from any dedication to realism or liberalism. Kalman sums up Fortas' hypocrisy in her prologue: "As a public servant and officer of the Court, [Fortas] prescribed rules for society. As a private individual, he bent them" (p. 2). He devoted his career to great liberal causes while conducting his personal affairs, especially regarding women, in a less than progressive manner.¹⁷ He relied heavily on others as mentors, but he never acted as mentor to anyone himself; he tried to protect friends from intolerant superiors, but he behaved tyrannically toward his own staff members, from the time of his editorship of the *Yale Law Journal* straight through his law practice.

Undoubtedly some of Fortas' professional limitations developed from personal character flaws. Still, judges, government officials, lawyers, and other legal actors who believe that law does not constrain them may be prone to reject all checks on personal, and sometimes illegitimate, desires. Ultimately the readers of the Fortas biography are left with an uneasy lesson: recognition of rules' coercive effect on others, when combined with a radical disregard for rules in one's own life, can result in tremendous power but with monstrous effects. Nearly every contemporary scholar teaching, studying, or even thinking about legal skepticism could benefit from a hard look at Fortas' life. If Abe Fortas is indeed the progeny of legal realism at Yale, readers of Kalman's earlier work cannot afford to ignore this new book.

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have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals. If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.

Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

Though Fortas' professional ethical transgressions give observers some pause, Kalman's biography indicates Fortas' indiscretion stemmed as much from personality as training. The book also documents, in some detail, Fortas' ability as a lawyer. Furthermore, there is no reason to suspect that a lawyer trained by a nihilist is any more likely to become a "crook" — whatever Dean Carrington meant by the term — than a more traditionally educated lawyer is, even if the transition from radical politics to mainstream institutions poses philosophical challenges.

17. Kalman notes that Fortas prided himself on his extramarital affairs and his prowess with women. Pp. 194-95. But rather than criticizing this conduct, Kalman explains it away, saying "[i]t was an era in which Washington valued conquest more than chastity . . . Further, Fortas genuinely liked women. . . . [B]ut a relationship with one did not preclude others." P. 196.