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Legal Realism at Yale, 1927-1960

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LEGAL REALISM AT YALE, 1927-1960. By *Laura Kalman*. Chapel Hill: University of North Carolina Press. 1986. Pp. xi, 314. \$35.

Legal realism developed as a challenge to the Langdellian case method of legal education, which originated at Harvard and spread to law schools throughout the country.¹ Realists criticized the case method's emphasis on studying appellate opinions as the sole method for teaching law students to identify general legal principles. The case method strove to isolate from their context in society the rules and principles of law that influenced judges. The American Law Institute's Restatement of the Law project is a good example of this conceptualist approach. The Harvard professors serving as ALI reporters were told to "simplify unnecessary complexities," and the rules they identified were printed in "especially bold black letters" (p. 14). In the extreme, the realists felt, this passion for legal rules and principles resulted in scholarly efforts of dubious value, such as Harvard law professor Joseph Beale's attempt to reduce the entire field of Conflict of Laws to two principles.²

Legal Realism at Yale, 1927-1960, by Laura Kalman,³ is another in the Studies in Legal History series published by the University of North Carolina Press in association with the American Society for Legal History.⁴ The author's intent in writing the book, she declares in her prologue, was to provide a "case study of the interrelationship between intellectual theory and institutional factors within the specific context of legal education" (p. xi). To this end, she examines both jurisprudential and institutional aspects of legal realism.⁵ Kalman first

1. Christopher Columbus Langdell, dean of Harvard Law School between 1870 and 1895, thought of law as a science, best taught as a system of rules and principles. Langdell looked for these rules in appellate cases, which he collected and organized in casebooks. His "case method" helped to make the university the center of legal education. P. xii.

2. P. 25. These principles were territoriality and vested rights. Beale came under heavy attack from realists who thought his restatement of Conflict of Laws, J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935), sacrificed inevitable complexity to his desire for one logical set of rules.

3. Laura Kalman (B.A., Pomona; J.D., UCLA; M.A., M.Phil., Ph.D., Yale) is associate professor of history at the University of California, Santa Barbara.

4. There are to date seventeen titles in the Studies in Legal History series. See, e.g., R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY (1985); M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986) (reviewed in 85 Mich. L. Rev. 1109).

5. Realism was a phase of American intellectual history as well as a new method of legal education. See, e.g., W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS (1968); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Dawson, *Legal Realism and Legal Scholarship*, 36 J. LEGAL EDUC. 406 (1983); Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); Purcell, *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

provides a competent discussion of the context and characteristics of legal realism, comparing it to the dominant conceptualist approach. She explains and evaluates the contributions of many of the more important realists, including Jerome Frank, William Douglas, Arthur Corbin, and Karl Llewellyn. She then considers realism in its pedagogical aspect, tracing the effect of the realists' ideas on scholarship, curricula, casebooks, examinations, and faculty selection in the law schools.

In *Legal Realism at Yale*, Kalman finds the origins of realism in the skepticism that led Oliver Wendell Holmes to suggest that judges made law in response to "the felt necessities of the time" (p. 17). Kalman describes the contrast between the conceptualists who maintained that judges simply found and applied existing legal rules to the facts before them, and realists who pointed out the role of human idiosyncrasy in decision making. Realists stressed facts over concepts, and contended that law must be studied in social context. They eagerly sought contributions to legal theory from other disciplines, attempting to integrate law with psychology, sociology, economics, history, and other social sciences.

Yale proved to be the law school most receptive to realism. Although Kalman provides some mention of legal realists who were doing "colonial service"⁶ at lesser law schools, she focuses her inquiry on the realists' progress in New Haven. To a somewhat lesser extent she examines legal realism at the Harvard Law School, both because of Harvard's preeminence in legal education and because "so much of legal education at Yale has represented a rebellion against the Harvard approach that it would be impossible to understand Yale without studying Harvard" (p. xi).

Kalman argues that the legal scholars of the 1920s and 1930s who called themselves realists and who quite consciously reacted against the type of legal education provided at Harvard nonetheless failed to carry out the reforms they advocated. Their casebooks and examinations used the traditional conceptualist approach, and the faculty did little to integrate the social sciences with law.⁷ It was the Yale law professors of the 1940s and 1950s who, though not calling themselves realists, produced books and taught in conformity with realist theory.⁸

6. See Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980).

7. P. 229. Kalman does note the exceptions to this frequent failure of realist professors to make their casebooks reflect their stated interest in the social sciences. For example, in 1930 Karl Llewellyn's textbook was titled *Cases and Materials on the Law of Sales*, rather than *Cases on the Law of Sales*, with the "Materials" including annotations about business organization, marketing practices, bills of lading, etc. Cases were only 33% of the book's pages. P. 79. But for the most part, Kalman argues, the realists neglected social sciences and social policy, and their casebooks "never realized the vision that had started the revolution." P. 95.

8. Kalman mentions in particular Yale law professors Harry Shulman, George Dession, and Myres McDougal. Pp. 150-52.

The impact of realism on American legal education owes much to these "second-generation" realists, whose casebooks for the first time successfully integrated legal materials with learning from the social sciences. Harry Shulman's 1949 *Cases on Labor Relations*, for example, was written in collaboration with an economist. The book, a collection of arbitration decisions, cited all the relevant economic literature and was designed for use not only in law schools, but also in business schools and departments of economics, political science, and sociology (p. 151). By 1960, Kalman concludes, the contribution of the realists to legal education was substantial, and students were leaving law school with a better understanding of the social context of law (p. 229).

Kalman's examination of the institutional factors that checked the growth of legal realism at Yale yields her most detailed and convincing argument. She warns that "[h]istorians of intellectual movements tend to forget the institutional constraints within which such movements operated" (p. xi) and she is careful not to make that mistake herself. Her research convinced her that institutional factors might be almost as important as intellectual theory in explaining the differences in approach between Harvard and Yale.⁹

Among the institutional factors receiving Kalman's attention is Yale Law School's relatively poor endowment during many of the years the realists were attempting to introduce changes (p. 121). The school lacked sufficient funds to attract new professors, build classrooms, and improve its library. Many of the better students in the applicant pool preferred to attend Harvard, and Yale also lost promising professors to better-paying schools.

Low salaries weren't the only cause of the faculty defections that hampered realism's advance, however. Kalman is particularly perceptive in examining the conflicts, both personal and intellectual, among faculty members and between the faculty and the Law School's dean. She also demonstrates how the tensions inevitable between a professional school, jealous of its autonomy and reputation, and the university of which it is an often troublesome part, hindered the success of the realists at Yale. Because of an unsympathetic or uncomprehending university administration, Yale's realists were repeatedly denied funds or faculty appointments they thought crucial.¹⁰

9. Kalman does not suggest that institutional factors were ever *more* important than intellectual theory in accounting for the differences in legal education at Harvard and Yale. Rather, she maintains that such factors are often overlooked although they are deserving of study. In her view, institutional factors interacted with flaws in realism as a legal theory and as a method of legal education, causing the realist approach to "break down." P. 121.

10. Pp. 127-28. Charles Clark, on his last day as dean of Yale Law School, recorded his view of what had been his duty to the law school: "My theory of administrative responsibility . . . was that I must represent my department against the needs and demands of other parts of even the same University." P. 122.

Kalman also suggests that a dismaying degree of anti-semitism among Yale's administrators and faculty prevented the appointment of some of the more talented and committed realists available for professorships (p. 143). Aware of the reluctance of some of his colleagues to select Jews for the faculty, Thurman Arnold wryly reported to William Douglas the difficulty the Yale governing board was having in finding suitable candidates for law professorships: "What we want is somebody like Jesus Christ would have been had he had conservative ideas and not been a Jew" (p. 139).

Finally, the conservatism of much of the student body also slowed realism's development at Yale during the 1930s and 1940s. Students avoided many of the more innovative classes and instead clustered overwhelmingly in the "practical" courses thought to be the best preparation for a Wall Street career (p. 136). Students were reluctant to abandon the legal certainty the conceptualist approach offered, and it proved difficult to convince them that the study of law should be more than just memorizing rules. An exasperated Charles Alan Wright, teaching at the University of Minnesota Law School, recorded his frustration in a letter to his former teacher at Yale, Fred Rodell:

I was spoiled at Yale; since everyone I knew there conceded the ridiculousness of conceptualism, I supposed that that devil had been exorcised, and that legal realism, in greater or less degree, was everywhere triumphant. I couldn't have been more wrong. From morning to night, I fight with my classes, with students in to see me, and with some members of the faculty, and all I get from them is: "What was good enough for Langdell is good enough for me." Or "It's easy to decide cases. You just take the facts and look in the law books and get your answer automatically." (Honest to goodness — I asked the student if he thought the law worked like a slot machine and he said "Yes.") Or I will waste a whole class hour going over all the possible policy ramifications of a case, and problems of that sort in it, and someone is sure to come up after the hour: "Mr. Wright, what is the rule of the case?" I find myself alternating between an eager determination to stand this conceptualism on its ear, and a feeling of why the hell am I wasting my time here. [p. 95]

Legal Realism at Yale is meticulously and imaginatively researched. The book draws on the established scholarship on legal realism, but supplements it with Kalman's original research into the primary sources. Kalman interviewed many of the participants in the Yale movement. She analyzed their casebooks and the examinations they gave. She consulted the Deans' files at Harvard and Yale, as well as the correspondence and reports of faculty members. She examined the minutes of the governing bodies of Harvard and Yale and read contemporary newspaper and magazine accounts of legal realism.

Kalman's writing style is clear, and formal without being pedantic. She has a talent for finding descriptive and amusing anecdotes to illustrate her points. However, the book suffers somewhat from a rather

plodding organization. And while the mass of detail offered testifies to Kalman's meticulous research, it tends to obscure the broad outlines of the topic, forcing the reader to struggle for synthesis.

Although Kalman concludes that "pedagogically, the realist movement had not fulfilled its promise" (p. 230), it did have a profound effect on American legal education. The curricula of law schools today reflect the methods of the realists. And the Critical Legal Studies movement, which in recent years has caused a furor among law faculties, is an heir to realism in questioning traditional jurisprudence. The CLS movement, far from repudiating realism, carries on its legacy of questioning the importance of legal rules and principles. It goes beyond realism in its emphasis on the contradictory norms of law and its willingness to question the value of much that the realists accepted, such as the importance of lawyers and dispute resolution. Much of what Kalman reports of the suspicion and controversy the realists engendered among colleagues and law school alumni will be familiar to present-day readers of law reviews and journals of legal education.

The value of Kalman's book lies not only in its careful scholarship, but also in its perspective on contemporary legal education and its fascinating account of institutional politics. Kalman's analysis of institutional constraints on intellectual theory should be useful to those considering intellectual movements in law schools today, such as Critical Legal Studies and the "Chicago School" of economic analysis. Kalman reminds us that what Lenin said of law is true of legal education as well: it is a political instrument; it is politics.¹¹

— *Karin M. Wentz*

11. Kalman declares that realism's "most important message" is that "all law is politics." P. 231.
