

**LEGAL REALISM AT YALE 1927-60.** By Laura Kalman.<sup>1</sup> Chapel Hill, N.C.: The University of North Carolina Press. 1986. Pp. xii, 314. \$35.00.

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As its title implies, this book is to a large extent a history of Yale Law School. To a lesser extent it is a history of Harvard Law School during the same period and of Columbia Law School before 1928 when Young Berryman Smith was chosen over Herman Oliphant to succeed Huger Jervey as dean. The struggle over the deanship was the event that precipitated the exodus from Columbia of William O. Douglas, Hessel Yntema, Leon Marshall, Underhill Moore, and Oliphant. Even taken simply as a history of these institutions, the book is not without interest. It is fascinating to learn that William O. Douglas was paid a salary of \$14,000 in the academic year 1932-33 when he was not quite thirty-five and that, at about the same time, he had turned down an offer of \$20,000 a year from the University of Chicago. As the value of money has declined by a factor of more than nine since then, a contemporary law teacher can only react with amazement and envy. Details of the decanal succession struggles and the internecine squabbles among professors at all three schools provide not only titillation but also comforting assurance that a prior generation of law teachers had every bit as much clay in their feet as those of the present day.

## I

Professor Kalman relates how legal realism—with its roots in Holmes's view of law as the prediction of judicial decisions which were ultimately grounded in policy and Pound's emphasis on law as an instrument of social engineering<sup>3</sup>—received its first development at Columbia and then moved practically en masse to Yale where it reached its zenith. At Yale, so the story continues, legal realism eventually lost its impetus, while at Harvard, which initially almost completely rejected realism, many aspects of the realists' program were eventually adopted. In 1960 when the story ends, we are

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1. Associate Professor of History, University of California, Santa Barbara.  
 2. James B. Duke Professor of Law, Duke University.  
 3. For an overview of Pound's methodological approach, see R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922). Among Pound's important early works are *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 2-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1912); *Justice According to Law* (pts. 1 & 2-3), 13 COLUM. L. REV. 696 (1913), 14 COLUM. L. REV. 1, 103 (1914). Kalman regrettably puts more emphasis on Holmes as an intellectual forerunner of the realists than on Pound.

shown that the curriculum and intellectual climate of the Harvard and Yale law schools had pretty much converged.

In order to tell her story, Kalman begins by explaining what she means by "legal realism," a rubric that covers a very diverse set of phenomena: proposals for curricular reform; for shifts in the focus of law review articles and casebooks; and a variety of theoretical perspectives. Insofar as the phenomena are not amenable to a coherent synthesis, the utility of a single characterization is problematic. Kalman is not unaware of the problem. Nevertheless she struggles to come up with something like a coherent summation of what realism is all about and, in the latter portion of her book, assumes that she has in fact done so.

Kalman associates legal realism with "functionalism," the view that the significance of the phenomena of experience is ascertained (in Felix Cohen's words) "'through a determination of [their] . . . implications and consequences.'" For Kalman "[f]unctionalism . . . reflected an attempt to understand law in terms of its factual context and economic and social consequences." Functionalism was the converse of conceptualism, the view that law consists entirely of rules and that the skill of the lawyer is the ability to reason logically within the universe of rules. The realists purported to be seeking the integration of law with the social sciences. Kalman concludes, however, that "ultimately the realists did not use social and behavioral sciences so much to guide them in making social policy as to justify their skepticism about the conceptualists' rules." While the realists talked about wanting to study the behavior of judges, they rarely attempted to do so systematically. More often, "the realists' functionalism took the form of institutionalism," particularly the form made popular by Thorstein Veblen. Veblen, writes Professor Kalman, exposed "the bankruptcy of classical economic theory . . . with its assumptions of a natural order in which immutable laws had created competition and an 'economic man' who automatically responded to those laws in accordance with his own self-interest." Classical economics "was replete with meaningless abstractions." According to Veblen's disciples "modern economics should abandon these abstractions and focus instead on societal institutions." This was the perspective that many of the legal realists tried to apply to law and legal institutions. They might well have been described as "legal institutionalists."

Insofar as the legal realists were functionalists they were concerned with process. They spent much time debunking the judicial process and emphasizing the great leeway allowed to judges by the conceptual approach to law, which disguised (sometimes even from

the judges themselves) the range of decisional freedom. The realists accordingly opposed the whole idea behind the Restatements of the Law, undertaken in the 1920s by the American Law Institute, which they viewed as an attempt to resurrect conceptualism. Functionalism, as it found expression in legal realism, emphasized “facts.” It preached that law could not be viewed in isolation from society. It tended toward relativism and an emphasis on the particular; it focused on the present. As has already been noted, however, “[t]he realists used the social sciences’ functionalism chiefly to challenge traditional legal rules rather than to formulate new social policy.” Indeed, the realists’ enchantment with the social sciences faded as they came to see how little the social sciences of their day could contribute to the solution of the problems that concerned them.

Kalman concludes that the realists largely failed to notice that “[a]lthough the social sciences were ‘scientific’ in the sense that they were empirical and objective, their implicit message after Freud was that they could not be scientific because human idiosyncrasy overwhelmed all of the world’s rules or categories. Even the most functional of characterizations had to be ill-founded.” In Kalman’s words:

Three paradoxes thus confronted legal functionalism, or legal realism. If decision making was inherently idiosyncratic, as the realists had shown it to be, what could they accomplish by pressing for it to become more efficient and certain—an objective they pursued so intently that they were willing to tolerate the judges they condemned over other decision makers as soon as they had discovered that judges offered the most efficient means of dispute resolution? If decision making was inherently idiosyncratic, what could they gain by taking conceptualistically defined legal rules and redefining them functionally? If it was inherently idiosyncratic, what could they prove with their empirical studies, which the social sciences taught could easily be rationalized away? Given the idiosyncrasy factor, how could a self-consciously ‘functional’ judge, who relied on the empirical data the realists gathered, produce a decision that would increase legal certainty and efficiency? Reality threatened realism.

In several places in the book Kalman goes even further in stressing that exposing the idiosyncratic nature of judicial decisionmaking, its dependence on the personal preferences of the decisionmaker, was the principal intellectual legacy of realism. Indeed, she describes Jerome Frank as “the father of legal realism.” Kalman finds it ironic that “realism seemed to lead only to judicial legislation.” Why then did so many of the realists want to become judges? Kalman suggests that the “intense professionalization” they had undergone “motivated [some of] them to trade in their skepticism for judicial robes.” Others “perhaps . . . believed that, having exposed judges for what they were, they could engage in judicial legislation

with a clear conscience when they became judges. Certainly William O. Douglas did.”<sup>4</sup>

Kalman concludes that in their day-to-day work most realists “seemed blissfully unaware of functionalism’s internal contradictions.” They tried to apply a realistic approach to legal education as well as to legal scholarship. While in their scholarship and general discussions of legal education they assumed that the integration of law and the social sciences was a vital part of functionalism, their specific programs for legal education in the 1920s and 1930s “more frequently treated the integration of law with the social sciences and functionalism as two separate goals.” They thus embarked on a whole series of “law and” social science courses, which were not very popular with students, while at the same time they tried to make the traditional courses more functional. Courses on bills and notes, banking, sales, etc., were combined into a course on “commercial transactions.” Partnerships, corporations, and agency were combined into “business associations.” There were also attempts, not always successful, to organize courses around problems. The key tools in this endeavor were the new casebooks being produced by the realists. There was some attempt to bring social science learning to bear on these newly structured courses; the new casebooks became “Cases and Materials on . . .” rather than merely “Cases on . . .” Nevertheless, Kalman concludes that the change was mostly cosmetic; the social science materials were minimal and not carefully integrated into the legal materials. Kalman believes that Jerome Michael and Herbert Wechsler’s *Criminal Law and Its Administration*, published in 1940, was the first casebook “that integrated law with social science.” Since then similar efforts have appeared. Kalman mentions with approval several casebooks prepared by Yale Law School faculty in the immediate post-World War II period. By this time, paradoxically, realism as an intellectual force was largely spent.

## II

Throughout the book there is the suggestion that the realists did not go far enough, that they should have tried more vigorously (and rigorously) to carry out their program for the reform of legal institutions and legal education. According to Kalman, one of the realist innovations in legal education that might have been carried forward more vigorously involved administrative law courses focusing on specific problems before specific agencies. If memory serves

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4. LEGAL REALISM AT YALE 43.

me correctly, Harvard offered a seminar on FCC radio and television licensing proceedings and on CAB route award proceedings at various times in the 1950s. Having practiced before the CAB in the late 1950s, I can verify that the task of compressing the vast records in these proceedings into a form that would be both manageable and useful to students would have been a daunting one. One could only admire people who tried to do it. At the time, I doubted the intellectual value of the exercise. Now that deregulation has made all of these proceedings historical relics, the intellectual value of focusing on such topical problems seems even more questionable.

The book exhibits a certain amount of naïveté that I find puzzling. One of the principal explanations that Kalman provides for the failure of legal realism to accomplish more is that, even at Yale, the “contributions [of the realists] broadened the curriculum but left representation of the wealthy at its heart.” Harvard, even after its acceptance of some of the realist program, “remained a trade school centered around the problems of big business and the wealthy.” I find these statements difficult to take seriously, particularly since Kalman does not say expressly what sort of legal education would have been better. Given the way American society and the economy were then organized, and to a very substantial extent are still organized, what else could one expect? Would Kalman feel better if most large economic enterprises had been government owned and the realists had focused on governmental economic organizations? And if that would be more comforting to her, then what conceivable effect would it necessarily have had on the structure of law and legal education? Publicly owned economic units have legal problems very much like those of non-governmental economic units and their managements do not behave much differently than the managements of large non-governmental organizations owned by a large, amorphous class of shareholders.<sup>5</sup> If, on the other hand, the point Kalman wishes to make is that the realists were oblivious to the problems of the common man, then she is mistaken. Certainly in working for the reform and regulation of the securities industry—activities which Kalman herself refers to in her book—people like William O. Douglas, Jerome Frank and Abe Fortas thought they were working for the benefit of what they believed

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5. If civil rights was not the burning issue in the 1920s and 1930s that it was in the 1940s and 1950s (when incidentally, as Kalman notes, *id.* at 194-200, many Yale Law School faculty members took courageous positions during the “Red Scare”) that does not reflect on legal realism. It is anachronistic to castigate people for not having the concerns of a later day. Likewise, it does not seem to be noteworthy that the older realists “tended to be middle class intellectuals.” See Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153, 174 (1986). What else are university professors but middle class intellectuals?

to be the common man. And one must not forget Jerome Frank's role in establishing the federally protected right of labor to engage in collective bargaining. Indeed, both securities regulation and collective bargaining became important parts of the law school curriculum.

I would have preferred a more thorough discussion of the intellectual underpinnings of legal realism. Professor Kalman's suggestion that legal realism's main legacy was its emphasis on the idiosyncratic nature of judicial decisionmaking is much too simplistic. The development of legal realism was just one reflection of the vast social and intellectual ferment that Western civilization in general, and the United States in particular, were undergoing at the turn of the twentieth century. One factor that had an enormous effect on legal education and legal scholarship was the change in the nature of the "big-time" practice of law. This was the period in which the Cravath, Swaine & Moores and Sullivan & Cromwells were developing, a period in which law firms were helping to create United States Steel, Bethlehem Steel, and Westinghouse Electric Corporation.<sup>6</sup> The major New York law firms were becoming institutions, and not merely associations of lawyers practicing together. More important, these law firms were entering into continuing, institutional if you will, relationships with large corporate entities. Instead of being someone who was consulted occasionally when litigation flared, the New York corporate lawyer and his law firm were regular participants in the on-going business decisions of their clients. Some of the more eminent members of the bar became intimately and prominently involved in matters of business policy and strategy.<sup>7</sup> The corporate lawyer had to provide a legal structure through which his client could achieve its business objectives. In helping to organize huge conglomerations of capital, he had to chart a course between the Scylla of state corporate law and the Charybdis of burgeoning federal regulation, particularly the Sherman Antitrust Act of 1890 and the Clayton Act of 1914. The cor-

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6. The Cravath firm's association with Bethlehem Steel began in 1903. 1 R. SWAINE, *THE CRAVATH FIRM* 693-704 (1946). For a detailed description of the firm's involvement with Bethlehem Steel see 2 R. SWAINE, *THE CRAVATH FIRM* (1948). Paul Cravath started representing Westinghouse in the late 1880s. 1 *id.* at 588-89, 649-50. References to the firm's involvement with Westinghouse are scattered throughout the remainder of Volume 1 and throughout Volume 2.

7. The reorganization of Bethlehem Steel between 1901-06 makes interesting reading and shows the prominent part played by many leading New York lawyers in the process. 1 R. SWAINE, *supra* note 6 at 693-704. Paul Cravath's involvement in the reorganization of the Westinghouse Companies in 1907-08 and the resulting fight over control is particularly worth reading. 2 R. SWAINE, *supra* note 6, at 32-45. *Cf.* C. MILLS, *THE POWER ELITE* 288-90 (1956).

porate lawyer was interested in constructing organizational forms that would last. He was therefore enormously interested in making long-term predictions about official behavior. From the point of view of this type of lawyer, law *was* a set of predictions of judicial behavior.

At the same time that the nature of legal practice in the large urban centers was changing, the study of human behavior was becoming a major focus of intellectual activity. Kalman makes a brief reference to John Watson, perhaps the best-known figure in the development of behavioral psychology as a major academic field in the United States. Both Watson and the more recently acclaimed B.F. Skinner were influenced in turn by the work of the Russian Ivan Petrovich Pavlov.<sup>8</sup> Given the important changes in the nature of large-firm legal practice and the contemporaneous emergence of behavioral psychology, it is not surprising that a behavioral approach to legal scholarship interested a significant group of academic lawyers at elite law schools.

In her discussion, Kalman treats legal realism as an American phenomenon. She does not discuss or even mention the important European antecedents to realism.<sup>9</sup> Nor is there any mention of what are generally called the Scandinavian legal realists. They include the Swedes, Axel Hagerstrom,<sup>10</sup> A.V. Lundstedt,<sup>11</sup> and Karl Olivecrona,<sup>12</sup> and the Dane, Alf Ross.<sup>13</sup> These were very sophisticated men who applied a behavioral perspective to legal problems in a much more systematic and rigorous fashion than their American counterparts.

Ross eventually attempted to define law itself in terms of a predictive model. Following a suggestion of H.L.A. Hart,<sup>14</sup> based on the distinction between the external and internal points of view, it has become fashionable to dismiss the work of the Scandinavian

8. An interesting discussion of Pavlov's work and its effect on major figures in American behavioral psychology such as Watson and Skinner is contained in 11 INT'L. ENCYC. OF THE SOCIAL SCIENCES 480-87 (1968).

9. See, e.g., Herget & Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987). Roscoe Pound, who was profoundly influenced by von Ihering (1818-92) and Ehrlich (1862-1922), was an important figure in introducing to American legal scholars the work of these and other continental scholars.

10. See A. HAGERSTROM (1969-1939), INQUIRIES INTO THE NATURE OF LAW AND MORALS (C. Broad trans. 1953).

11. A. LUNDSTEDT (1882-1955), LEGAL THINKING REVISED (1956).

12. K. OLIVECRONA, LAW AS FACT (2d ed. 1971); LAW AS FACT (1939). Despite the common title and underlying theme these are really two different books.

13. A. ROSS, ON LAW AND JUSTICE (1956) (first published in Danish in 1953); TOWARDS A REALISTIC JURISPRUDENCE (A. Fausboll trans. 1946). See also Ross, *Tu-Tu*, 70 HARV. L. REV. 812 (1957).

14. Hart, *Scandinavian Legal Realism*, 1959 CAMB. L.J. 233. This was a review of A. ROSS, ON LAW AND JUSTICE, *supra* note 13.

realists as irrelevant because it is based on a logical fallacy. Hart argued that, from the internal position of the judge (as opposed to the external position of an outside observer, such as a scholar), it is logically impossible to consider law as a set of predictions. A judge, after all, is engaged in the enterprise of deciding particular cases, not of predicting how he would decide these cases. The judge is concerned with ascertaining what rules of law are binding upon him and what other factors, if any, he should take into account in making his decision. In other words, deciding is different from predicting, particularly in a normative context in which the judge is concerned with determining what he should do. I have elsewhere argued that Hart's criticism, which was immediately accepted as the definitive criticism of this aspect of realism, is much too glib.<sup>15</sup> There are important ways in which a predictive approach to law can be applied even to the perspective of a judge of a court of last resort. This of course is not the place to continue that discussion. What is important for present purposes is that Kalman ignores some of the questions raised by legal realism, as well as various aspects of the social and intellectual environment in which legal realism arose.

### III

Legal realism has left many important legacies. Most legally trained people now accept that there is a fair amount of indeterminacy in the law. The realists' concern with process continues to the present day.<sup>16</sup> The realists were also concerned with facts. As Kalman intimates, Herman Oliphant seems to have subscribed to the view that if one really knew all the facts underlying a legal problem, the correct solution would be apparent, at least to a person who had the requisite understanding of society and knowledge of the social sciences.<sup>17</sup> A similar faith appears in the work of Karl Llewellyn.<sup>18</sup> In its less extreme forms this stress on the primacy of factual con-

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15. Christie, *The Universal Audience and Predictive Theories of Law*, 5 LAW & PHIL. 343 (1986).

16. Kalman describes the more modern concern with legal process "as a reaction against legal realism." LEGAL REALISM AT YALE 223. That may well be. The realists were interested in examining the operation of the legal process as a prolegomenon to reform. Scholars like Henry Hart and Albert Sacks (the authors of the influential but "unpublished" *The Legal Process* (mimeograph ed. 1958)) were interested in legal process as a means for providing, through process, an objective element in judicial decisionmaking. LEGAL REALISM YALE 220-24.

17. Oliphant, *A Return To Stare Decisis* (pts. 1-2), 14 A.B.A. J. 71, 159 (1928). Kalman seems to suggest that Oliphant viewed the judges' response to the facts as fitting into a stimulus/reaction mold. Oliphant rather viewed it as the application of the common sense of a man of the world to particular social problems. In the world of the early common-law judges the method might be characterized as "intuitive empiricism." *Id.* at 160. In the hands of a



siderations manifested itself in the promotion of balancing tests (or in the jargon of social sciences, factor analysis) as a judicial decisionmaking technique. It is ironic, in view of the realists' hostility to restatements, that, in some of the *Restatement (Seconds)*, an attempt has been made to enshrine factor analysis as the paradigm of judicial decisionmaking. Nowhere is the contrast more marked than in the *Restatement (Second) of Conflicts*.<sup>19</sup> One imagines Joseph Beale writhing in his grave. Factor analysis also intrudes into the *Restatement (Second) of Torts*.<sup>20</sup>

To perceive this legacy is not necessarily to applaud it. One does not have to subscribe to a Bealean view of law to appreciate some of the very great difficulties that arise from the attempt to utilize factor analysis in judicial decisionmaking.<sup>21</sup>

Finally, one might note that the timid suggestion of the realists to add social scientists and philosophers to law school faculties has now become fashionable. For the most part the realists envisaged these non-lawyers as teaching advanced courses and seminars, often of the "Law and ——" kind. Now, however, one can find non-lawyers who teach basic first year courses like Torts and Contracts.<sup>22</sup> No one doubts that able people from other disciplines, particularly philosophy and literary criticism, can rigorously dissect a written opinion. They can also bring fresh insights from their respective disciplines. For example, one cannot ignore the contributions that economists have made to our understanding of the effects of legal regulation. The only reservation that I have about the use of nonlawyers as law school teachers is that a case, though it may appear in a Torts casebook, often raises problems from several other fields of law—constitutional law, procedure, etc. I should think that only a lawyer would have the necessary background to identify these related problems and indicate to the students how they relate to the case at hand. Upper class students can do some but not all of

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modern jurist trained in the social sciences the method would become "not merely a conscious empiricism, but also a methodical one." *Id.* at 161.

18. See also K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 183, 222-23 (1960).

19. See, e.g., *RESTATEMENT (SECOND) OF CONFLICTS*, §§ 6(2), 145(2), 188(2) (1971).

20. See, e.g., *RESTATEMENT (SECOND) OF TORTS* § 520 (1977). See also §§ 826(b) and 829A.

21. See Christie, *An Essay On Discretion*, 1986 *DUKE L.J.* 747, 765-72.

22. In the University of Virginia Law School catalog for the academic year 1985-86 (p. 80), Professor Charles Goetz, an economist, is listed as teaching one of seven sections of Contracts. In the Yale Law School catalog for the academic year 1982-83 (p. 37), Professor Alvin Klevorick, an economist, is listed as teaching a small section of Torts. Likewise, in the Yale Law School catalog for the academic year 1985-86 (p. 31), Professor Jules Coleman, a philosopher, is listed as teaching a small section of Torts.

this themselves. I am skeptical of the ability of first year students to do so.

Let me conclude by stating that Kalman's discussion of the intellectual background of legal realism is interesting, though not as deep or comprehensive as I would have liked. The principal value of her book is as an institutional history of Yale Law School. Anyone interested in that subject will find Kalman's book essential reading.

**TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE.** By Ronald D. Rotunda,<sup>1</sup> John E. Nowak,<sup>2</sup> and J. Nelson Young.<sup>3</sup> St. Paul, Mn.: West Publishing Co. 1986. 3 Volumes, \$240.00.

*Ralph A. Rossum*<sup>4</sup>

Most revised editions of constitutional treatises and casebooks are merely updates of the previous edition, with only marginal changes made in the bulk of the text. But there are exceptions. In the process of revising the second edition of their constitutional treatise, Professors Ronald Rotunda, John Nowak, and J. Nelson Young have gone from 1317 pages of material in a single volume to 2581 pages in three volumes. They thereby confirmed their fear, expressed in the first edition, that it "may be impossible to prepare a single volume treatise on Constitutional law."

The authors state that their purpose is to provide an up-to-date summary and analysis of the principal areas of constitutional law. They disclaim originality of argument: "It is far too late in the history of constitutional scholarship for the authors of a treatise such as this to claim full credit for the ideas presented in their work." Appropriately for a treatise, the organization is conventional: they address governmental power in Volume I and limitations on governmental power and the protection of individual rights and liberties, as secured by the Bill of Rights and the post-Civil War amendments, in Volumes II and III. In one of the most valuable features of the work, they append at the end of Volume III the Dec-

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