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Laura Kalman. *The Strange Career of Legal Liberalism.* New Haven: Yale University Press, 1996. vii + 375 pp. $42.50 (cloth), ISBN 978-0-300-06369-1.

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Legal Liberalism in Crisis

Laura Kalman, a professor of history at the University of California–Santa Barbara and a lawyer, has produced a well-crafted history of legal liberalism, the belief that courts can promote widespread social reforms. With insight, erudition, balance, humor, and even drama, Kalman traces the career of legal liberalism for the last six decades, chronicling its highs and lows, twists and turns, strengths and weaknesses, achievements and failures.

Her book tells the following story: Legal liberals, allied with political liberals, attained their greatest influence during the 1960s, when a liberal-activist Warren Court wrought a constitutional revolution. The Court relied on their writings, and legal liberals dominated the law schools. But all was not well. Legal liberals had to defend the Warren Court against charges that its decisions were counter-majoritarian and not well-grounded in legal principles, and the encompassing charge that judicial review, whether practiced for good outcomes or bad, was anti-democratic. A few years after Earl Warren resigned in 1969, the Supreme Court, though still activist, became increasingly more conservative, prompting legal liberals to turn to other disciplines, especially history, to revive legal and political liberalism. They pursued these inquiries in attempts to reconcile judicial review with democracy and to construct paradigms buttressing liberal jurisprudence. Their excursions into other realms were not always welcomed by scholars intent on protecting their turf, however.

Kalman's book is divided into two parts. Preceded by a prologue, the five chapters of the first part offer an "intellectual history of legal liberalism" (p. 9), identifying and defining several legal theories and scholarly fashions and describing legal liberalism's use or abuse of them. With abandon, legal liberals experimented with and discarded scholarly fads. Some scholars criticized their efforts; others supported them. The right and left buffeted them. A few "legal liberals" redefined themselves; others incorporated their critics' reasoning and methodology. Nor were they immune from internecine disputes.

To tell this story, Kalman has immersed herself in the literature of law, history, sociology, anthropology, political theory, political science, literary criticism, and philosophy. She begins tracking the course of legal liberalism within the intellectual history of American legal scholarship with the legal realists of the 1920s and 1930s and then considers the process theorists of the 1940s and 1950s, who reacted against them. Rejecting classical legal theory, those who called themselves legal realists–the principal progenitors of legal liberalism–espoused a humane and enlightened jurisprudence based more on experience and social reality than what they deemed stale and arbitrary logic. They borrowed from the social sciences to make law an instrument of social policy, and they deemed the Constitution to be a living document. Turning away from what they saw as the excesses of legal realism, scholars of the legal process school favored a jurisprudence governed by neutral legal principles and an overarching respect for law, not by a judge's experiences or social views. Kalman then moves with panache through the dizzying spectrum of legal liberals' intellectual experiments, which she sums up by the word "interdisciplinarity" (p. 110)–including the "law and" movement; pragmatic pluralism ("consensus"); interpretivism; critical legal studies; post modernism ("theory"); hermeneutics; deconstructionism; originalism; and neo-pragmatism.

By 1980 legal liberalism and the law schools were in turmoil, largely precipitated by the siren call of interdisciplinarity (p. 356). Law as a scholarly discipline lacked a sense of community, a consensus. This lack of shared values and goals became more acute as they faced a new intellectual challenge: a conservative jurisprudential counter-revolution was in the ascendant, with originalism as its core doctrine. Originalism invoked the Founding Fathers, who were still revered by

judges, lawyers, and most Americans; because it claimed to be majoritarian, it promised to restrain judges, thereby negating the notion the Constitution was a living document whose development lay in judges' hands. The individual ethic of rights, cherished by legal liberals, was giving ground to the role of community and the vision of the common good. By 1985, legal liberalism "appeared dead, a historical relic." "Almost precisely as this point," states Kalman, "history came to the rescue" (p. 131).

To redeem itself, legal liberalism had to develop alternative interpretations of the Founding era. Therefore, legal liberals turned to political theory and to history, in particular the constellations of ideas and doctrines known as communitarianism and civic republicanism. Having first absorbed communitarianism from political theorists, they had to locate its historical roots; to discover them, they had to demonstrate the Founding Fathers' devotion to civic republicanism. In this quest, they found most attractive the work of the intellectual historian J.G.A. Pocock. As Kalman notes, Pocock dubbed the Founding Fathers "the culminating generation of civic humanists and classical republicans" (p. 151); his republicanism, she declares, "bespoke commitment to common interest, civic virtue, responsibility, community values, deliberative democracy, and self-determination" (p. 154). With Pocock as their muse, legal liberals integrated virtue with jurisprudence and converted republicanism into "a law-centered paradigm" (p. 154). Since republicanism did not perceive democracy primarily as majority rule, it deflected the counter-majoritarian argument against judicial review. The republican synthesis also promised to create a consensus in the polarized legal academy, thereby restoring Warren Court liberalism and "provid[ing] progressives with even more than they had received from the Warren Court" (p. 160).

The second part of Kalman's book, comprising two chapters and an epilogue, describes the response of historians to the legal academy's "republican revival" and to lawyers' invasion of their territory. Conflict was inevitable. As advocates, lawyers use data and interpretations to resolve modern legal problems; historians use them to study the past. Most historians reject presentism; to lawyers, it is a virtue, perhaps even a necessity. Historians "favor context, change, and explanation"; lawyers "value text, continuity, and prescription" (p. 180). Lawyers embrace bright-line paradigms; historians delight in discovering the past's complexity. Lawyers insist on uncovering a true interpretation of the Constitution; historians are skeptical about finding or even pursuing a single interpretation. In short, lawyers and historians have engaged in a "dialogue of the deaf" (p. 171).

The dialogue between the two disciplines would improve, asserts Kalman, if each better understood and accepted the other's role. Lawyers must respect and appreciate differing historical interpretations and their complexities. Historians must understand that as advocates lawyers might be hamstrung advancing subtle and intricate arguments. Lawyers can use history for public purposes and still retain its accuracy and integrity. Historians can align themselves with lawyers in good public causes, but, upon entering the legal arena, they should play by lawyers' rules.

Kalman encourages academic lawyers to venture beyond the legal academy–expressly into the realm of history–to uncover non-legal sources of authority that can enrich legal discourse and neutralize conservative originalism and the counter-majoritarian argument, neither of which will disappear. She does not, however, want lawyers to abandon their quest for original meanings in the Constitution because historians have recognized the inevitability of originalism in constitutional interpretation and are trying to develop a more nuanced, palatable originalism. Kalman cautions legal scholars to use moderation when exploiting the tools of other disciplines. She recommends several spheres of activity and analysis–for example, doing public history and devising such new traditions of constitutional thought as neo-republcanism and neo-Federalism–in which lawyers can cooperate with historians, bridging the gap between historians' and lawyers' history. The failure of lawyers to practice interdisciplinarity now would be unfortunate, she notes, because historians and others are showing "signs of appreciating what legal scholars are doing, and wanting to help" (p. 246).

Kalman has much to teach lawyers and historians about themselves, one another, and the relationship between their professions. As she is well aware, the differing approaches of the two disciplines make it difficult for them to come together. Kalman gives much evidence of the benefits that academic lawyers have derived from history and other disciplines, but she is less forthcoming about what historians and others have learned from lawyers. Furthermore, except for her liberal zeal, she does not give historians sufficient reasons for joining with lawyers. Her efforts may be doomed. Historians are a self-assured lot, obsessed with their territorial rights. Many historians believe that interlopers only distort or misrepresent their work, or lack the training needed to fathom the past's mysteries. Kalman recognizes these conceits, but is too gentle with historians. She

is not candid enough in illustrating the intolerance that some historians direct against interpretations that they deem disagreeable. These scholars forget that "in [their] Father's house are many mansions."

The depth of Kalman's interdisciplinary reading and her command of this diverse, often difficult literature are dazzling. Even specialists will profit from her formidable bibliographic expertise, displayed in 114 pages of densely printed endnotes. She has mined several key manuscript collections, such as the papers of Felix Frankfurther (process theorist), Alexander Bickel (majoritarian paradigmist), and Raoul Berger (originalist), and her endnotes are filled with nuggets from them. In fact, her endnotes are sometimes more engaging and inspiring than her text. Of special value to academic lawyers are the digressive but relevant endnotes–models of condensation–that review varying historical interpretations. Kalman's index does not do justice to the "embarrassment of riches" flourishing in her endnotes. Even a selected bibliography would have been manna from heaven.

Kalman also is a skilled guide to the "isms" that pepper the intellectual history of legal academia and thus litter her pages. She presents useful definitions of these "isms," usually quoting scholars in their own disciplines. I wish, however, that Kalman had used her own lucid voice more often. Her approach is valid; her commendable fair-mindedness allows specialists to define their own fields, but the end product is a sometimes intimidating mix of voices. Matters are further complicated because readers occasionally must refer to her endnotes for clarification.

Although Kalman's study is balanced, she openly exhibits her mission-driven liberalism and her discomfort with the process theorists' control of the Court and with conservative successes in the 1994 congressional elections. Because she is attached to rights-based liberalism, for example, she salutes Zechariah Chafee for following Plato's example of the "noble lie" (p. 170) in defending freedom of speech, forgetting even a noble lie damns credibility.

Although some historians and legal liberals excoriate originalism, the pragmatic Kalman accepts originalism, which she predicts "may prove [to be] a useful fiction" (p. 8). Such a statement seems strange coming from an historian. But, then, her faith in American liberalism, which for her contains "the right amounts of self-interest and self-sacrifice, idealism and realism" (p. 231), propels her toward a revival of a liberal jurisprudence. Such zeal will probably take like-minded academic lawyers down the same path, rendering cooperation with historians–especially those professing principles of objectivity and seeking to avoid presentmindedness–problematic.

These minor criticisms, aside, *The Strange Career of Legal Liberalism* is a superb guide to the history of American legal scholarship and liberalism and the attempts to ameliorate them through interdisciplinarity. Kalman's deft portrayal of the imposing history of historical scholarship and American ideas, the scholarly fads that have swept academia, and the adventurous interdisciplinary play of historical and legal scholarship, are particularly valuable facets of her study. Both historians and legal scholars will profit from this book, even if they disregard its eloquent and heartfelt plea for civility, collegiality, and collaboration.

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