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The Ten Thousand Dollar Question (review essay)

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BOOK REVIEW

The Ten Thousand Dollar Question

John Henry Schlegel*


After I accepted the Review's invitation to essay this book, I was talking with a colleague and remarked something to the effect that I guessed that it was time to talk about the relationship between ideas and their social context. He then remarked, "That's the ten thousand dollar question, Schlegel!" and we passed on to other things. Since then, as my title indicates, I have been haunted by his remark. It may be evidence of my subnormal mental equipment, but the matter has always seemed very simple, indeed aphoristically so. Intellectual history is the history of intellectuals. Why? Because outside a detailed social context, ideas are literally unintelligible. Now, aphorisms are intelligible only to true believers, to those who already understand. For those who do not, the problem becomes one of explanation and argument. To attempt that task one needs to start in several places. The first of those places is Laura Kalman's book.

I. LEGAL REALISM AT YALE

The questions "What was legal realism?" and "What happened to it?" have a certain fascination to anyone interested in the history of

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This essay is written for, and with special thanks to, Robert Watson Gordon. He held his tongue years ago, not telling me how awful my first attempts at writing history were, and thus did not call an early halt to a career I have enjoyed, however awful the results. He also began the discussion of which this essay is but a piece. I hope that this attempt better explains my stubborn adherence to my erroneous views than have my previous verbal attempts.

I have profited from conversations with, and the assistance of, my old friend and co-conspirator Fred Konefsky and two new friends, Guyora Binder and Rob Steinfeld. At several key points precision of statement has been immeasurably aided by conversation with David Engel. The ideas probably show the lack of similar interaction with another old friend, Janet Lindgren, who was, however, occupied, as I should have been, writing history instead of talking about it. Owen Fiss and Avi Soifer should be thanked for permitting me to try these ideas out before groups, The Legal Theory Workshop and The Legal History Workshop respectively, at their schools. Special thanks go to Roseann Perrin who patiently made sense of my hen scratchings.

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twentieth century law. Most answers to these questions have been jurisprudential, explaining the deficiencies of nineteenth-century legal thought and ultimately of realist thought as well. But other answers could be given to these questions and Laura Kalman tries to give one. Her explanation, she says, is an attempt to supply "the institutional constraints within which . . . [intellectual] movements operated," to provide a "study of the interrelationship between intellectual theory and institutional factors within the specific context of legal education."1

As an author's statement of intention this is perfectly straightforward, easily identifiable as coming from a student of John Morton Blum. But at the same time, I think that what Kalman has done is both more and different than her expressed intention. She has provided the basis for, and made the first steps toward, a carefully contextualized intellectual history of realism.

Kalman starts out straightforwardly by trying to isolate what "realism" was as an intellectual matter. This exercise breaks no new ground but is distinguished for its clear, concise, but not oversimplified, presentation. She concludes, not surprisingly, that realism was one of a number of movements in the social sciences that substituted functionalism—a mode of understanding human behavior, including legal rules, by stressing the uses to which such behaviors were put—for structuralism or conceptualism—a mode of understanding human behavior by stressing classification of such behavior according to assertedly natural categories.2 As part of this shift from structuralism to functionalism, she identifies three characteristic concerns of realist theory. The first is the best known: the jurisprudential debates about judicial decision-making.3 The second I have tried to tell partly in my own words: the introduction of empirical social science into lawyers' thinking, and the doing of empirical legal research by legal academics, both as part of the attempt to learn what functions legal rules serve, and as part of a conscious strategy of law reform.4 The third is the least known: the reform of legal education based on functionalist insights.5 Kalman chooses to focus on this third aspect of realism, and quite profitably so, for although others have surveyed the territory, namely Brainerd Currie6 and Robert Stevens,7 very little detailed work has been done beyond these initial surveys.

An institutionalist would next choose to establish a base line against which to measure change. The obvious choice is Harvard, and Kalman makes it. The Harvard she shows us is that of a dominant conceptualist

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1. P. xi.
5. Pp. 43-44.
7. R. Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 131-54 (1983).
orthodoxy led by Pound, with a sprinkling of dissidents: Felix Frankfurter, James Landis, Edmund Morgan, T. R. Powell, and George Gardner. Each strayed from orthodoxy in one way or another: Frankfurter and Powell in their forthright emphasis on judicial behavior, Landis in merely discussing legislation, Gardner in his contracts scholarship, and Morgan in his emphasis on students studying problems rather than cases. But none was a realist and all were marginal to the educational enterprise at Harvard. Only Gardner taught one of the central private law courses that dominated the curriculum. Thus, what Pound said in 1928, "There has been no essential change in our teaching methods," and reiterated, somewhat ironically as it turned out, in 1936, "I doubt whether more than four [faculty members] should be regarded as holding . . . the modern view," was probably true.

With that baseline established, Kalman turns to Columbia and Yale. Here the story, by now well known, is of early excitement at Columbia, and then a shift of that excitement to Yale following the selection of Young B. Smith as Dean of Columbia over the objections of the group of realist faculty who left in protest. Beneath that well known story lies the usual one of institutional reach and grasp. Through her patient examination of programmatic curriculum statements and catalogs, and a comparison of these self-serving documents with course books and exams, Kalman shows that while faculty at both schools talked about functionalism and the integration of law and social science, neither group managed to go very far at the curriculum level—although Yale appointed more social scientists, had a looser first-year curriculum, and had more upper-division social science seminars. The actual course books were in fact less functional or integrative than either the committee reports or the catalogs would lead one to expect. Course books joined, and, at times, compared traditional conceptual units, but seldom integrated the pieces into a coherent whole. For example, Karl Llewellyn succeeded in functionally reorganizing the law of sales in terms of transactional patterns. Leon Green, on the other hand, was much less successful in doing the same with torts.

8. Pp. 45-49. Evidence that Pound was the leader of the Harvard conceptualists may be jarring to some but is both fully documented and consistent with my own research on the man. What made Pound tick is still an open question, given the limits of the most recent biographical treatment. See D. Wigdor, Roscoe Pound: Philosopher of Law (1974). Whatever it was, it is clear that, although as a pure intellectual matter Pound's sociological jurisprudence is a direct ancestor of realism, Pound's feud with the realists was not an isolated, inexplicable event.

10. P. 56.
11. P. 57.
Jerome Michael's and Herbert Wechsler's criminal law book in 1940. This book was the first serious attempt to integrate legal and social science material. It was put together, ironically, by people who were anything but realists. Not surprisingly, the examination questions were even less innovative than the course books.

After setting the baseline and identifying realism's actual educational achievements in the years before World War II, Kalman turns to the institutional factors that interest her. This part is the best three-fifths of the book, a long, richly detailed archival history of the Yale Law School. Of course, this section could reduce simply to the standard story of the rise and fall of an institution. And to some extent it does. It describes the rise of innovative legal education in the early thirties, its momentary setback in the late thirties, the fulfillment of great promise in the late forties and early fifties, and the abrupt decline into educational and political conservatism in the mid to late fifties. But somehow the story gets away from this familiar classic tragedy. Slowly a story about the comings and goings of faculty, deans, and presidents, the effect of rising hopes and declining resources, changes into something else. That something else remains somewhat elusive, because Kalman does not name it. So I shall attempt to make it knowable by naming it.

What Kalman begins to write is a socialized, that is, a fully contextualized, history of one of realism's central ideas: the improvement of legal education in light of the insights of functionalism.

Kalman proceeds intuitively from the premise that, in order to understand realism as a theory, one needs to look at what the realists tried to do with it. This focus on what was done with these ideas inevitably results in real concern for individual realists, their interactions with each other, their university and its officers, the various larger publics, and, of course, the great issues of the day.

Here Kalman's story becomes so complex that it is difficult both to summarize and to exemplify. Kalman argues that at Yale, during the late twenties and early thirties, realism, both in the form of empirical research and curricular reform, flourished in the face of increasing, or at least stable, resources. In the late thirties, however, it waned in response to declining resources, the drain of New Deal service and its attendant political hostility, the vocationalism of students, and faculty factionalism. Then, in the immediate postwar years, realism, this time in the form of commitment to functionalism, the social sciences, and social policy, appeared resurgent at a time of continuing financial stringency and intense administrative and political opposition to several left-wing faculty members. But by the late fifties, it withered

17. Pp. 95-96.
19. Pp. 120-44.
again as the deanship and presidency moved to individuals less sympathetic to realism, and as tenure denials and retirements limited the political and educational activism of the realist group. In a coda, Kalman notes that by 1960, liberalizing developments at Harvard brought the two schools into a "convergence." 

Such a summary does not do Kalman's story justice, so rich is the detail she lovingly presents. Indeed, her research puts my own to shame; she has literally looked at everything. To do justice to this richness, to show how it leads toward a socialized history of realism, I wish to ask several questions about the story that I have outlined. First, if empirical social science, or "fact research" as Charlie Clark called it, was so important, why did so many of the Yale realists, especially the postwar realists, do so little of it? Second, if realism had all but died out at Yale by 1940, as Grant Gilmore asserted and Kalman agrees, how then did it spring to life after World War II? Third, if the real triumph of realism in legal education took place at Yale after World War II, how is it that the intellectual victors lost the Countryman tenure case to the possibly pusillanimous, and perhaps perfidious, combination of Shulman and Rostow, and then so quickly folded their tents and stole off into the night?

First, I have tried to show that participation in empirical legal research was part of what realism was from 1928 to 1935. This research activity was a part of the "reception," limited as it has been, into law of the twentieth century notion of science as an empirical inquiry into a world "out there." Using my published work, and other readily accessible material, Kalman quite graciously treats the introduction of social science into law as an obvious part of what realism "was." I do not wish to fault her for following my yellow brick road, but doing so results in a very curious proposition. Prewar realists like Clark and Moore, who did some empirical research but never put it in their casebooks, are faulted, while postwar realists like McDougal or Harper, who did none but managed to find relevant research done by others to put in their casebooks, are praised. For whom is empirical social science a more important part of their philosophy, the producers or the consumers?

24. P. 120.
26. It is, of course, mildly ironic that while law was trying to absorb positivism, the most "advanced" thought in Europe was beginning to build on Heisenberg and the work of topological mathematicians, as well as that of Dilthey and Weber, and thus toward understanding the interactive relationship between the scientist and its subject.
27. P. 153.
Second, one of the great coincidences in the history of legal education is the demise of the realists at Yale in the late thirties and early forties. Douglas went to the SEC and then the Supreme Court. Clark went to the Second Circuit. Arnold went to the Justice Department, the D.C. Circuit, and then into private practice. Moore slowly retreated into his shell. Rodell, a late-arriving youngster, began doing everything but professing law. That left as the surviving core Walton Hamilton, an economist who began doing constitutional law, and Wesley Sturges, whose foray into the Distilled Spirits Institute may not have been wholly a matter of public service. Then war service and other activities left Hamilton and Rodell so out of school affairs that they could only belatedly organize opposition to postwar appointments that they thought would Harvardize the school. 28

No one would deny that Hamilton, Rodell and Sturges were at the center of the group of Yale realists before the war. But it is difficult to know what Sturges' and Hamilton's realism consisted of, or what kind of appointments they would have favored, much less who of the existing faculty they could have counted on for support in this campaign against Harvardization. These are difficult questions that I am not sure anyone can answer with much certainty. I raise them to point up the difficulty that Hamilton, three years from retirement, and Rodell faced in rallying the troops, and to show the uncertain content of their cry to "keep up the tradition of Bill [Douglas] and Thurman [Arnold] and avoid the dissent [sic] to verbal law." 29

There were, to be sure, holdovers to be rallied: Edwin Borchard, George Dession, Fleming James, Myers McDougal and Roscoe Steffen. But no one would put any of these gentlemen at the center of realism in the prewar years, even though they, together with Underhill Moore, Rodell, Hamilton, and Sturges, were more than a majority of the tenured faculty and thus, if unified, could have directed appointments and tenure in the immediate postwar years. Yet it is by no means clear, at least to me, how each would avoid the "dissent into verbal law." Given this underlying continuity in personnel and the uncertain meaning of that continuity, a question arises: Did realism die out by the late thirties, only to be revived after the war, or was the postwar efflorescence, while concededly glitzy, something other than simple revival?

Finally, tenure denials are notoriously difficult to fathom, and political purges in academic institutions equally difficult to document. The matter at Yale is no exception to the rule. But it is interesting that although Yale's presidents in the immediate postwar years loudly despaired of the law faculty's politics, especially "Tommy the Commie" Emerson, "Fred the Red" Rodell, Fowler Harper, John P. Frank, David

29. P. 147.
Haber, and Vern Countryman, by 1955 only the first three were left and yet only in one case did the president arguably call the shot.

Frank, whose constitutional law casebook was thirty years ahead of its time in focusing on constitutional history and whose articles on the Supreme Court still read well, was denied tenure by the faculty partly on the grounds that his scholarship was “superficial.” Haber, who did excellent work with McDougal on a property casebook, Emerson on a political and civil rights casebook, and Harper on lawyers in political trials was refused tenure, though offered reappointment, because he had published nothing but two book reviews in his own name. Incensed, he left. Countryman, recommended for tenure by the faculty and Dean Sturges but opposed by Sturges’ successor Harry Shulman, a good friend of the university president, was denied tenure by the University. Offered an untenured reappointment, he refused and left.

No one could deny the heavy hand of Yale’s president in these matters. In addition to denying tenure in Countryman’s case, President Griswold came to the faculty to protest its reappointment of Haber. Moreover, the overall record of Yale on academic freedom in the McCarthy era is far from enviable. Still, the extraordinary thing is how much of the dirty work was done by the Yale law faculty itself. Frank’s work is anything but “superficial”; it is just not doctrinal. The objection to Haber’s work shows such an inability to do elementary sorting that it smacks strongly of pretense.

In addition, the actions of Harry Shulman—who, while participating in the faculty meeting that recommended Countryman for tenure, as the new dean opposed the grant of tenure—and Gene Rostow—who, although he originally supported granting tenure, wrote the memorandum surveying Countryman’s scholarship on which Shulman relied—cry out for explanation. That explanation must go beyond “doing one’s duty” and “changing one’s mind,” especially since it was Rostow who, with majority faculty support, became dean when Shulman died of cancer less than a year later. Did the Law School change because these three youngsters didn’t get tenure and another left in protest, thus leaving the door open for more conservative appointments? Or did the three youngsters not get tenure because the place had changed?

These three conundrums about the commitment to empirical legal research, the postwar reconstitution of the Yale faculty, and the tenure denials are not simply chicken and egg problems. They relate to how one thinks about realism, and to what realism was. Here Kalman says

34. P. 196.
something directly relevant when talking about Rodell and Hamilton’s opposition to proposed postwar appointments:

What Rodell and Hamilton were trying to save . . . was the point of view that underlay the fact-oriented functional approach and the movement to integrate law with the social sciences. The realists may have had difficulty expressing it in their casebooks in the 1930s, but they all believed that law was non-autonomous and should be treated as a tool of liberal social policy.  

But for the “all,” no one could fault that thought, which both follows from and informs Kalman’s initial presentation of realism. Yet it seems to me that to think of the matter in this way is to slight or ignore or suppress something. Each of the relevant concepts—the functional approach, the integration of law and social science, liberal social policy—depends on the actions of a particular group of law professors for its meaning. These actions give meaning to the concepts which give meaning to the actions. Thus, in a real sense, the concepts are, or at least always can be, contested (and I believe were contested) by the individuals who are at the center of Kalman’s book.

My point is not the one, common since Llewellyn’s debate with Pound, that the realists had differing ideas about various things. Of course they did. At the same time they shared certain ideas that Kalman carefully identifies. But that sharing, that giving of meaning, is not necessarily timeless; it may be highly dependent on the people who do the sharing, so that if the people change, the meaning may change also. Here, then, is where the importance of what I have called socialized intellectual history comes to the fore. Just as it is important to see what ideas do in order to understand what they mean, as Kalman does, so too it is important to understand who the thinkers are, in order to understand what ideas may mean. Why this is so is a matter of general theoretical concern, as well as of particular import for understanding realism. I turn first to the theory.

II. Around a Theoretical Berry Bush

My argument, which is about doing intellectual history generally, starts at several places at once. First is with Richard Rorty, who ar-

38. I have intentionally footnoted this section sparsely because I do not wish to give the impression that it is my own original synthesis of a long list of great texts or even of specific secondary sources. It is not. Although I have read and profited from substantial portions of Richard Rorty’s work, most of my knowledge of the matters discussed in the following pages comes from secondary, and sometimes tertiary, sources. It would be foolish as well as pretentious to list all the relevant articles; sorting out where I found each bit and piece is now an impossible task. I can, however, note that, in addition to those listed in the asterisk footnote, I have profited within the past two or three years from conversations and/or correspondence with, or from reading the works of, Jamie Boyle, Arthur Jacobson, Errol Meidinger, Gary
gues that Descartes made a grave mistake when he postulated the existence of a thinking subject, the cogito, outside of nature whose mind “mirrored” nature, that is, perceived nature as it really was. For Rorty, the history of epistemology since then has been one of decline, for it has consisted of attempts either to tear down or to shore up this mistaken postulate.

The details of this philosophical enterprise are, for present purposes, unimportant. Suffice it to say that in the late twentieth century the debate in the mainstream of Anglo-American philosophy has been reduced to the narrow question of whether the mind may perceive some limited number of “raw” sensations, like pain. Rorty says “no” and rejects the mirror image altogether. Even for those who give another answer, participants in this dispute concede that the mind has a constitutive role that it plays in perception. What the subject perceives “out there” is not what is “really” out there, but only what the mind is somehow “able” to see.

At this point, the debate becomes cacophonous, for the question of the “source” of the constitutive aspect of the mind is a fractious one. One might group the participants in this debate quite traditionally as either materialists or idealists. On the materialist side, there are biological explanations, best exemplified by the perspective experiments reported in all Psychology 101 textbooks, and Marxist explanations that emphasize the determinative force of a thinker’s place in the class system.

On the idealist side there are neo-Kantian explanations of various stripes that postulate the existence of certain innate ideas that can be known through some method, some variety of rationality, of which non-catholic natural law is probably the variety best known to readers of this journal. There are even participants in the debate, the so-called structuralists, who assert that their method is neither materialist or idealist but nevertheless yields an understanding of the timeless forms of perception, the structures with which the mind constitutes events.

I wish to leave this cacophony for a while and look at another piece

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39. See R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979). A technical note needs to be added here. As John Stick has argued persuasively, Rorty distinguishes firmly between normal discourse and abnormal discourse. See generally Stick, Can Nihilism Be Pragmatic?, 100 HARV. L. REV. 332 (1986). In the former, no foundational claims are made and no shared criteria exist. This distinction divides philosophy from almost all other disciplines. Based on Rorty’s own arguments, I do not believe that this distinction is tenable, so I have simply ignored the fact that Rorty makes it.
of twentieth century intellectual thought: linguistics. Traditionally, words have been seen as pictures of things, as in some sense coextensive with things. The best current example of this traditional understanding appears in any beginning reader's workbook. In it is a drawing of a cat or a ball or a bike; in the space underneath the picture the child writes the word. Even feelings like happy, sad, or angry, exemplified with children making the appropriate faces, are treated in the same way.

Starting in the early twentieth century, European philosophers of language began to suggest that this picture theory was wrong. Words were not like tags on the furniture at a garage sale; they did not hook onto a world of things somehow "out there." Working with the very simple notion of the word as a sign, these theorists suggested that words operated in terms of their similarity to and difference from other words. A cat was not understood as being a four-legged, furry mammal that meows, but rather was best understood as not a bat or a hat though somewhat like, that is both similar to, and different from, a mouse and a dog. They thus began to suggest that it was not true that the words made sense because the world they represented made sense. Rather, precisely the opposite was true: The world made sense because the words made sense. The words informed or constituted the things of the world; they infested them with meaning.

If words, under this theory, make things intelligible rather than things making words intelligible, the obvious question is: How do words become intelligible? How does this process of understanding through similarity and difference occur? Here, a notion initially associated with the study of sacred texts, but later suggested as the appropriate method in the social sciences by the German philosopher Wilhelm Dilthey, was brought into service: the notion of hermeneutics or interpretation; in particular, of the hermeneutic circle of individuals who together gained understanding. Individuals understood words because they belonged to the circle of individuals who together worked out the similarities and differences in language. The hermeneutic circle consisted of individuals who shared a culture which was delimited by the shared understandings of the words used by the individuals.

This theory in turn became extremely interesting and important to one group of literary critics, the so-called deconstructionists, who began their theorizing from the proposition that texts do not have readers; rather, readers have texts. Texts do not have meanings intrinsic to them; instead readers create or construct the meaning of a text as they read it. Thus, two readers who interpret a text in the same way do so not because they both correctly understand the text's meaning, but be-

40. I must attempt to maintain my already limited reputation for accurate understanding by noting that I do know that originally the concept of the hermeneutic circle was applied only to the interaction between reader and text. I am here simply trying to make sense out of others' attempts to expand the concept beyond that simple interaction.
cause they share a system of conventions of textual interpretation. It is therefore the critic’s job to deconstruct these conventional understandings, to show how these understandings of the text were constructed from the bare symbols of the text, and thus to show how other constructions are not just possible, but inevitable.

Again, I would like to leave the linguists and literary theorists for a moment and look at another piece of the intellectual universe. Leftist political theorizing has had its own history in the twentieth century. In its most orthodox strand it begins with Marxism’s assertion of the primacy of materialist interpretations of the world. The determinative force of economics, specifically the ownership of the means of production, was both demonstrated and given. From one’s place in the system of production, from one’s class position, one derived one’s understanding of the world. In the classic short hand, the base of economic relations determined the superstructure of cultural understanding.

The ostensible failure of the great communist experiment that followed the Russian Revolution, bringing not liberation and economic prosperity, but a totalitarian government at least as repressive as the czarist capitalism it replaced, ultimately doomed this simple and direct Marxism.41 If a great shift in the ownership of the means of production did not bring about liberation, then it was by no means certain that the base determined anything, much less the most ephemeral aspects of the superstructure: intellectual products like philosophy, art, or law. This was a problem, for without some such theory of society, how could a responsible leftist explain the persistence of capitalism or chart a course for its ultimate demise?

This problem, a problem like that faced by liberal capitalist theorists today after the demise of Parsonian structural functionalism with the discovery that structures could be quite dysfunctional, brought forth a cacophony of its own. The details here are tedious, at least to me, but suffice it to say that based on selective readings of the Marx canon, variant understandings of the true theory emerged. (Thus was proved the accuracy of the literary theorists’ understanding of texts and readers.) The key assertion was that of “relative autonomy,” that is, independence from the base, of the superstructure. How relative was, of course, the absolutely important question. Here answers spanned an

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41. There are very complicated problems of timing and influence here that I do not fully understand and that my text does not reflect. Gouldner has demonstrated that there are really two Marxisms in the corpus of Marx’s work, the orthodox materialist Marxism and some heterodox version. See generally A. GOULDNER, THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY (1980). I have never seen or heard a reasonable explanation of why some Europeans at some times drew on the heterodox version. But some of the Frankfurt School’s work, as well as that of Gramsci and Lukacs, antedates any reasonable understanding of the darkest side of Stalinism. The impulse for this work needs explanation, as I doubt whether it can be explained by the “anomaly” that the socialist revolution occurred first in agricultural, almost feudal, Russia, rather than in industrialized, “modern” Western Europe.
enormous spectrum from “not much at all” through determination “in the last instance” to “quite a bit.”

What was important in the debate, however, was the concession of some autonomy, some ability of ideational products to develop “on their own” as it were. This concession, seen by some as a surrender of Marxist materialism to evil capitalist idealism, led others to the notion, also derivable from Marx, that the superstructure influenced (no one said determined) the base. This notion was initially attractive as an explanation of “false” consciousness. The failure of the proletariat to see that revolution was to its advantage was explicable because the superstructure of ideas convinced the proletariat that its lot was, if not fair and just, at least the best for which they could hope.

Two of the strongest threads of this left analysis picked upon relative autonomy and used it to create potential new levers with which to work the demise of capitalism. One argued that capitalism caused alienation, which supported capitalism, and suggested that by overcoming alienation, establishing authentic communication between individuals, capitalism could be overcome. The other argued that the ideologies that we create for ourselves, or, in another version, that are maintained by elites serving their hegemonic interest, limit our ability to imagine new and different forms of social relations, and from acting to establish them.

Here it makes sense to double back to epistemology before going on to intellectual history. If one takes seriously the proposition that the mind is not the mirror of nature, then the source of the constitutive aspect of the mind, the question in western epistemology for hundreds of years, is a nonquestion. The mind can no more mirror its own nature than it can the other nature. The attempt to privilege either the material world, as do behavioral psychologists and classical Marxists, or the ideational world, as do neo-Kantians and structuralists, is equally futile because neither world can be comprehended without the words that constitute it and those words, by the very act of constituting both worlds to render them intelligible, select and emphasize aspects of those worlds. Neither side of the dichotomy between the material and ideational, a dichotomy which itself simply reflects the mirror-of-nature metaphor, is or can be privileged. There is no nature apart from the mirror and no mirror apart from nature.

By the same token, the dispute among left political theorists is equally pointless. Words constitute and give meaning to the base as well as to the superstructure. Neither can be apprehended without in that very act constituting the thing apprehended. Neither can be privileged because neither is intelligible without the constitutive activity of the mind. This the ideology theorists seem to understand, at least in part. The superstructure of ideas constitutes the base just as the base is part of the superstructure.
A problem lurks within this understanding of understanding: If words are understood by the company they keep, by the dialogue of similarity and difference in which they are embedded, how does one understand the hermeneutic circle in which this dialogue takes place? How do understandings of the world arise and change within the circle?

Now in one sense this question is silly. It is an attempt to ask: "What is really going on?" It is a reflection of the mirror-of-nature understanding of the world. But in another sense it is not, for the notion of the hermeneutic circle—that is to say, of a shared culture—can be seen to treat the circle or culture as if it were a natural entity, a directly perceivable thing, rather than a constructed product of human endeavor. Here it is important to turn to the more narrow subject of history, specifically intellectual history.

Intellectual history really is not a discipline. The prevalence of articles and symposia attempting to assess the discipline is as good evidence as one can find that, like Oakland, there is no there there. Intellectual history is a conglomeration of two topics: the growth of Western thought, and great thinkers and their thoughts, a kind of non-technical history of philosophy admixed with a nonbiographical biography of great thinkers. Always in danger of being reduced to vulgar Hegelian idealism, it has generally been on the ropes, as it were, since the rise of social history in the late fifties and early sixties. Just what is intellectual history about? I do not purport to be able to answer that question, but I do know that into this mess wandered the legal historians.

Legal history, conceived as it traditionally has been as the history of legal doctrine and only derivatively of judicial institutions, was essentially a piece of intellectual history, albeit one ignored by the intellectual historians because it was "too technical." Against this traditional conception, the work of Walter Nelles and then of Willard Hurst and his followers argued forcefully that law was best seen as a social enterprise of people using legal rules as problem solving tools. The better known work of Hurst was mainstream liberal in its orientation, so that in the late sixties and early seventies when that politics was made problematic, so too was his method. Enter, stage left, breathing fire and smoke, the "new doctrinal barbarians," the Critical Legal Scholars.

The first barbarian attack, which set the tone for all later attacks, was

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42. Two of the best are: New Directions in American Intellectual History (J. Higham & P. Conkin eds. 1979); Modern European Intellectual History: Reappraisals and New Perspectives, supra note 38.


that of Morty Horwitz in *The Transformation of American Law*, as pure a bit of doctrinal history as could be found. Horwitz argues that nineteenth century legal doctrine can best be understood as having been made, in crucial respects, in order to aid nascent industrial capitalism. Although the smell of Marxist instrumentalism in Horwitz's book has since been condemned, the method of doctrinal analysis that Horwitz used, a kind of seeing through rules for what is "really" going on, has become fashionable to the extent that it can almost be said that everyone is doing it.

The explanatory substructure that later emerged to support this shift back to doctrinal analysis was a combination of the epistemological, literary, and linguistic theory, and the ideological branch of left-wing political theory identified earlier. It goes something like this. Doctrine functions as an ideology through which we perceive the political world; to understand and unmask that ideology one needs to examine doctrine and how it is used to make hierarchy and domination seem natural. Because language is constitutive of and gives meaning to the world of things, this study of doctrine is not the study of empty abstractions, as Hurst, in his late realism, would assert. Rather, the study of the world of words, of the world of meanings, is the study of the world of things.

Now, I do not wish to say that these ideas about the role of, and the method for, the study of legal ideas is wrong in any transcendental or positivist sense of truth. Accepting Rorty's demolition of the mirror image as I do, my argument must avoid either conclusion. I only wish to suggest that I find the argument, which is by no means limited to legal history, to be both peculiar and unpersuasive.

Start with "peculiar." It is very tempting to combine ideological theories of late twentieth-century Marxism with literary theory. Both treat the relevant intellectual products as "made up." Ideology makes up the world just as readers make up the meaning of text. And yet there is a deep hostility to these two branches of modern thought. Ideology theorists generally believe in the ultimate rational knowability of the world apart from human perceptions of it. They may not all be positivists, but they are all rationalists. As such they implicitly, if not explicitly, reject Rorty's destruction of the mirror and with it the literary theorists' assertion that ultimately texts are not.

This is because left-wing ideology theories trade on the notion of unmasking to reveal, if not truth, at least the world or nature. For example, the theory that the rhetoric of management prerogatives is an ideology designed to blind workers to their ability to manage the workplace themselves implicitly asserts that without the ideological mask workers would see their own real capabilities and act on them. But it

46. I do not wish to deny that sensible management would want its workers to believe
is this unmasking that contemporary epistemological, linguistic, and literary theory denies is possible. Thus, defending a methodology for legal history that yokes ideology theory with Rorty and literary theory is somewhat inconsistent and so, at the least, peculiar.

To note the peculiarity of such a yoking is not to suggest the desirability of abandoning either the notions of legitimation or of ideology. Ideologies are, by definition, attempts to say that what is contingent and constructed by the participants in the society, the grandest of all hermeneutic circles, is in fact natural, a part of the nature the mind is supposed to be able to mirror, and thus to legitimate the power that ideology bestows on selected individuals. Contemporary epistemology and linguistic theory are tolerably useful tools with which to attack this claim of naturalness.

At the same time, however, an ideology is not a false construction of the world, as ideology theorists wish to suggest. There are no true constructions, only constructions, including the one that informs this essay. While it is understandable why the party of the left in this century would attempt to cloak its ideological understandings in the garb of truth as has the party of the right, it is peculiar, if not perverse, to attempt to do so at the same time as the party of the left is trumpeting developments in contemporary thought that suggest that truth is an empty category.

That leaves “unpersuasive.” It seems to me that Rorty, the linguists, and literary theorists are basically correct. We do perceive the world with language so that without a way to say it, it simply isn’t. (Not it simply isn’t true, but it simply isn’t.) That’s where the hermeneutic circle comes in. Things are because some group of people say they are; that was ultimately Thomas Kuhn’s point. Understandings of the world change not in response to more accurate pictures of the world but because the individuals who do the picturing either find a new understanding more conducive to their work or are in the thrall of others who find that new understanding conducive to their interest, or both. The mind does not mirror nature, it mirrors, distortedly, other mirrors. To this extent the return to doctrinal legal history makes good sense.

At the same time, the notion of the hermeneutic circle, the key concept for rendering intelligible all doctrinal legal history, and the rendition of that circle as a set of mirrors of words, is simply implausible. Here, I must proceed somewhat indirectly by first examining and re-

that they were not able to manage production themselves, nor that in some sense workers could in many cases oversee production as well as, or better than, management does. Rather, I wish to note, first, how the theory relies for its power on the unmasking of the ideological construct to reveal the reality of worker capability and, second, how contemporary theory would deny the reality of worker capability until the workers themselves recognize it.

47. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). I recognize that I am thus extending Kuhn’s meaning as I have extended Rorty’s. Kuhn was probably attempting to take a neo-Kantian position by substituting the disciplinary group for the individual knower.
casting the notion of the hermeneutic circle and then criticizing it in light of epistemological theory.

First, examination and recasting. The circle of individuals who understand the world similarly, of individuals who share the same culture, is not one circle but dozens of them. Despite television and newspapers most people live in multiple hermeneutic circles. I cannot even completely list my own. There is the small group with whom I write and talk, the larger group of critical legal studies scholars, the group of largely nonquantitative, interpretivist law and society scholars, the entire law faculty at Buffalo, my family, the group of musicians with whom my wife plays, the guys in the locker room at the Y where I swim, and so on and so on. Unmoved, I attend to each of these circles at different times, in different places, and in different ways, for they overlap and yet each is different, most noticeably in its membership, in the subjects discussed, and in the "level" at which even similar subjects may be discussed in different circles.

This multiple, overlapping quality of hermeneutic circles suggests a plausible explanation of how understandings about the world arise and change. All people bring to any particular circle understandings not shared by the rest of the members. Those understandings enable some people to see things that others do not while at the same time membership in the circle allows one to try to convince others, through argument, the giving of good (though never dispositive, for there is no unconstructed thing out there to be known) reasons for one's understanding.

At the same time though, the recognition of a multiplicity of circles deprives the circle metaphor of much of its power and shows that it is ultimately misleading. The hermeneutic circle is not so much a circle, a closed figure with an inside and outside, as a Mobius strip or a Klein bottle, a figure which one is simultaneously on both sides of, both inside and outside. One sees because one is inside and sees differently because one is outside at the same time. Thus, understandings about the world arise and change because the hermeneutic circle consists of people who are simultaneously both within and without the discourse that is the circle. They are people who constantly have available to them other, though not necessarily radically different, understandings of the world.

These alternative understandings are used by individuals in the pursuit of social goals that are not, in any meaningful sense, always their own. These understandings get accepted by the other members of the circle in the course of argument informed by inequalities of power or skill, which often are uniform and predictable at a given point in time, as well as by luck. In such circumstances, agreement is a mix of the

48. John Stick provided this image, which is in fact better than the Mobius strip, though understood, I suspect, by fewer people.
freely given and the subtly coerced by the wish to remain a member of
the group, or occasionally the not-so-subtly coerced by agents of state
or “private” power. Likewise, the outcome of these arguments always
will, of course, further define both membership in, and the content of
the understandings shared by the hermeneutic circle. This is a process
of inclusion and exclusion, though of course fit is always a matter of
degree, and thus any group understanding is always open to change.

Thus examined and recast, the notion of the hermeneutic circle is
available for epistemologically sensible criticism. The circle, in fact, is a
socially constructed, not a natural, entity. It arises in time and declines
in time, a product of human activity and not of the Zeitgeist. The circle
is socially constructed in two ways. First, its members, through the ac-
tivity of inclusion and exclusion, make up the circle, both its member-
ship and its more or less shared understandings.

Second, we who do not belong make up the circle as we decide its
actual membership and content, for neither aspect of the circle is given
to us. This point, of course, is nothing more than a restatement of the
initial assertion that the mind does not mirror nature. But it is a crucial
restatement, for it is important to understand that the hermeneutic cir-
cle does not arrive at truth or true interpretations or good interpreta-
tions or even the only interpretations we can reach. The circle is not an
answer to the question of how we know, but a simple statement of the
conditions under which we do know. Knowing is a social activity, not
necessarily open to all; knowing is a matter of agreement, not necessar-
ily freely given; and knowing is a matter of argument, not necessarily
rationally decided.

Thus examined, recast, and criticized, the notion of the hermeneutic
circle can be used as the basis for explaining the unpersuasiveness of
doctrinal intellectual history. Granted, legal doctrine functions as an
ideological rendering of the world. But this is also true of the columns
in the newspaper or the talk of the guys at the Y. And granted that the
study of the world of words, by virtue of the constitutive character of
language in giving meaning, is a study of the world of things. But there
is not one world of words, nor one world of meanings.

Each hermeneutic circle has its own world of words and is thus fixed
in time and space and person. To understand and render intelligible
any world of words (which is the intellectual historian’s task), one needs
to understand and render intelligible this fixing in time and space and
person, recognizing that each is a matter of more or less. To privilege
one such world of words, to assert implicitly, by neglecting these mat-
ters of social context, that the doctrinal world is the world, is simply to
assert once again that the mind can mirror nature. That assertion is no
longer persuasive.

If doctrinal legal history is thus difficult to defend in light of late
twentieth century epistemological, linguistic, and literary theory, then
on what basis might one construct an adequate legal, that is, intellectual, history? I would proceed from the core notions of that theory. Histories, like all other attempts to make the world understandable, are arguments. They consist of a text—the thing to be understood—and a context—that which is without the text.

The text need not be written or even spoken; it may be actions of one kind or another, or, as in the case of this article, a diffuse and often implicit set of texts. But it is a text so long as it is asserted to be meaningful. The context may be actions or even texts, for the context of any text is not a given. Indeed, it is always arguable what the context of any text may be. Because words have no intrinsic meaning, because there is no lever and no place to stand outside of the conventions of a given hermeneutic circle, it is always the context that enables the text to have meaning. Without a context any text is, as I said at the outset, literally unintelligible.

Now, the context, of course, does not give the text its intelligibility, for the text does not have an intelligibility. Rather, it provides the wherewithal for individuals to make arguments about the text's meaning, and thus to create understanding. Such arguments can, as a logical matter, be made out of materials wholly internal to any text (narrowly conceived, as two words or more). In that sense the New Critics and their descendants were correct when they acted on Archibald MacLeish's dictum, "A poem must not mean [b]ut be."49

But I doubt whether much argument "is" rather than "means," and so purely internal textual analysis seems unlikely to yield much understanding for the intellectual historian. Thus, I also doubt whether much, if any, history of law based largely on doctrinal or other mandarin literature (or for that matter a purely social history) can withstand serious analysis. Not that such work isn't interesting or suggestive, for one can always hypothesize contexts that make the doctrinal or social texts meaningful. But where those contexts are lacking, the history is incomplete, and without such hypothesization, well taken and fully argued, it is also unintelligible.

One should not, of course, take the rendering of understanding or intelligibility literally. This rendering cannot be a matter of recovering the true meaning of the text (for there is no such true meaning) or, by the same reasoning, the real context. At the same time, this rendering is not a matter of making up just any meaning. This is so because the lack of a true meaning implies the impossibility of making up an arbitrary meaning, since arbitrariness is a function of willfully ignoring truth, and also, because only meanings intelligible to an audience count as meanings.

Now, historians have always said that the meanings to be recovered

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are just that, recovered: the meanings that texts or events had for the people who witnessed them. In fact, that is, of course, impossible. First, at a past time a text did not have a meaning, but as many meanings as individuals could have argued for, and second, we cannot recover even that range of meanings, for those meanings are not true things that our minds can mirror. They were constructed with funhouse mirrors then, and now there are more and different mirrors. But again, we cannot just make up any meaning we wish, and for the same reasons. What we can do is argue for meaning that is as intelligible now as what it was then.

A further caveat is in order. Of course one may make an unintelligible argument or even constitute history as the telling of unintelligible tales. History might go the way of literary criticism, making ever more problematic the understanding of any text. Even it if does not, I suspect that some tales about intellectuals cannot be made intelligible. C. S. Peirce may be one example; Kant, another. Each may have participated in no real group other than the timeless chatter of the idea computers that is the intellectual historian’s stock in trade. For other intellectuals, the vagaries of document creation and preservation that have made great hunks of the past unavailable may make the recovering of context simply impossible. But so long as intelligibility is the name of the game, epistemology, linguistics, and literary theory suggest that rendering the hermeneutic circle, understanding fully the culture of other thinkers’ doing and thinking, is the key to understanding an intellectual text.50

III. Horwitz as an Example

Perhaps an example that is better known than Laura Kalman’s book will help to render all of this theory more intelligible and thus prepare

50. Rob Steinfeld notes problems with my notion of the historian’s craft that are related to the size of the group that constitutes a given hermeneutic circle. In general, the larger the group, the more indistinct and disembodied the images and meanings of the group and consequently the immense practical problem for the historian in rendering those images and meanings more distinct through a process of disaggregating the large group into assertedly representative small groups. Yet for some purposes, for example those relating to national political discourse, groups may be very large; indeed, the greatest portion of the population of the United States may be taken to constitute a single circle.

This observation seems to me to be both a sensible understanding of the limits of the method I discuss, and a further example of the principle that all methods both create and limit what is knowable. I am not bothered by this application of the principle to myself. What I have presented is an argument for a particular way of understanding history. I will not be at all surprised when that argument proves unpersuasive to historians who can say something interesting about the world that does not respond to my strictures on historical understanding. It would be a mistake to attribute my resignation on the matter either to a residual, anything-goes “hippieness,” or to a liberal’s recognition that all theories have their limits and proper place, and thus it is for the active inquiring mind to set those limits. Rather, my ideas are reflections of what Arthur Jacobson described to me, in a personal conversation, as an understanding that “the world is divided into many little neighborhoods. Woe is it to anyone who tries to talk 85th Street to the dudes on 107th.”
for return to the discussion of that book. An easy one is Horwitz’s *The Transformation of American Law*. As mentioned earlier, Horwitz argued that changes in nineteenth century legal doctrine could be seen as intended to accommodate or advance industrial capitalism. In a real sense he was making a social argument, although a problematic one because of the “distance” between the text (doctrine) and the context (industrial development).

Horwitz was beaten around the head and neck by numerous individuals for his assertion. Those who were left of center often liked his conclusion, but decried the “functionalism” of the argument, and suggested that it was equally plausible to see the identified pattern of changes as simply the working out of mandarin ideas by mandarin intellectuals influenced by other mandarins and their ideas. Such a suggestion was not a denial that these ideas may have aided capitalist economic development, but only an assertion that such an explanation was not a good one.

I confess that I too privately dumped on Horwitz, though for different reasons. But “functionalism” aside, Horwitz’s argument makes better sense when one shows, as Fred Konefsky has shown in this very journal, the web of social relationships that cemented together the industrial elite and the lawyers who made the rules. At that point the relationship of text and context becomes both “closer” and less problematic. Questions of pure service aside, it is not surprising to find that a group thinks alike, that thoughts, actions, and interests coincide, when that group is intimately involved in social relations. Evidence for the existence of a real hermeneutic circle makes sense of the related, but not necessarily identical, ideas of the lawyers and industrialists. Lemuel Shaw helped along industrial capitalism because he and his friends believed in it. They were it. Indeed, the matter verges on the tautological. The coincidence of thoughts, actions, and interests is what defines groupness, and its absence is more remarkable and in need of explanation than its presence.

Thus, groupness can often aid in making a text intelligible. This is true not just for groups of thinkers but especially for individuals. Why an intellectual does something may at times be obvious. But most often action is more or less opaque. Lemuel Shaw did not wake up one day and say, “Martha, I’ve figured it out. It’s instrumentalism that will make this country grow!” He decided the cases that were brought to his court one at a time. To understand his action, or any action by an

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51. I read Horwitz as asserting that somehow the world spirit worked out this nice fit between legal doctrine and industrial capitalism. That is silly; the world spirit and the tooth fairy are cousins. But the mistake is illuminating. Horwitz’s argument is easy to turn into classic Hegelian idealism.


53. I have stolen this wonderful imaginary picture from Fred Konefsky, who said it about Joseph Story.
intellectual, be it writing a book, teaching a course, making an argument to a judge, or yes, chucking it all and moving to the woods, one need have recourse to the groups in which the intellectual participates; it is in those groups, those pieces of hermeneutic circles, that the action in question takes meaning. It is within this web of personal interactions and understandings, this mesh of individual and group biography, that the action’s meaning was formed. Strip individuals of participation in that web, as was the case in Horwitz’s book, and the actions of intellectuals are literally unintelligible. They are perceptible as the ironic chatter of self-referential mandarins, a room full of literary theorists endlessly decentering each others’ texts. But human activity is not usually quite so pointless; at least, I doubt so.

Konefsky’s ability to supply this connection does not explain why Shaw chose the exact rules he chose. Here the problem of “functionalism” appears in full force. Ideas are said not to be explicable in functional terms because many different ideas logically can serve or have served the “interests” of various social actors or groups. Law thus serves not a functional purpose directly aiding capitalist accumulation, but the ideological purpose of convincing the populace, or at least some of it, that the existing law is legitimate.

Of course, the difference between a functional purpose and an ideological one is much like that between cause and condition in late nineteenth century discussions of causation. A dysfunctional ideology is somehow not a real thing; it’s a kind of crank notion suitably found in the scrap heap of history. But the distinction is made in good faith and I will so take it. Still, I confess to finding this analysis quite troubling, for it is based on a strange combination of the notions of function and necessity.

Functional explanations are sometimes dismissed, as if it were simple-minded to assert that the products of human activity, such as law, have or serve functions. While I can understand how one might be upset at the politics of the postwar functionalists, that distress is not an objection to functionalist explanations. A hammer and a crescent wrench may both be used to drive nails into wood. But a bit of work at the task is likely to demonstrate that only one of these tools was functional for, the indicated task, and I dare say that an anthropologist in ten thousand years will have little difficulty coming to the same conclusion.

Now most products of human activity are substantially more complicated to explain than hammers and crescent wrenches. Indeed, it may be said that such complex products have multiple functions. But that fact only implies that the task of understanding the function is more difficult for complex entities.

Are functional relationships therefore necessary relationships? Clearly not. To say that a given shift in legal doctrine, or a given collec-
tion of rules, had a function is not to say that only this doctrine or these rules could have served that function. Thus, I doubt that one could disprove a functional argument by demonstrating that in similar cultural circumstances something else happened. For example, one has not disproven the association of an emerging negligence standard in the United States with the "needs" of industrial capitalism by showing that in Germany an equally needy industrial capitalism saw the shift to strict liability from a preexisting negligence standard. Absent a rather strong commitment to sociological or historical positivism, it is apparent that something—a tool, a doctrine, or an ideology—can be functional without being necessarily so, just as crescent wrenches and hammers as a logical matter can both be used for pounding nails though only one is most functional for the purpose.

I think this conclusion follows from what I said earlier about epistemology, language, and discourse. Humans do things, including the production and use of ideas, for their own purposes. If concepts do not hook onto the world of things, all sorts of ideas might be used in furtherance of any purpose. Thus, as a logical matter, there is no "tilt," no natural result, no obvious function to be inferred, from the choice of an argument. And indeed, the reverse is true; words actually chosen for a particular purpose do not necessarily entail the consequences intended.

This logical indeterminacy of language does not, however, imply a lack of coherence in choices made, their unintelligibility in context, or the implausibility of functional arguments. Indeed, precisely the opposite is true. Within a particular group, a given hermeneutic circle, there may be a "tilt," a natural result, an obvious function to be inferred to the choice of argument, as is the case with economic arguments in law today, and it is the context of these arguments that makes that "tilt," natural result, or function apparent. Take, for example, the negligence/strict liability dichotomy. In neither case did workers get what they surely wanted: higher wages, employment security, and a safer work place. In both cases the workers got what the industrialists and those working on their behalf seemed to think was least costly, a matter on which reasonable minds still differ, as the continuing debate about negligence and strict liability indicates. Thus, either legal rule, indeed both, could be functional to the goal of industrial development through cost reduction as seen by industrialists and their friends.

I trust that my argument so far will not be taken as suggesting that Horwitz's account, as aided by Konefsky's research, or for that matter

54. A word needs to be said about "tilt." About ten years ago, Horwitz pushed the idea as a way of explaining why some ideas are chosen, or lead to determinative results. (He was never quite sure which.) The idea was defended by Wythe Holt, see Holt, Tilt, 52 GEO. WASH. L. REV. 280 (1984), apparently as a continuation of his earlier persuasive defense of Horwitz's work. See Holt, Morton Horwitz and the Transformation of American Legal History, 23 WM. & MARY L. REV. 663 (1982). While the term never caught on in discourse, I think that it captures a great deal and so I use it here.
any functional account, generates truth. What I have said over and over in private, I say now in public. Positivism, whether in law, sociology, or chemistry, is silly. Neither history nor molecular biology yield truth. There are other ways to tell the story of Chief Justice Shaw and his friends, indeed other stories have been told. It is not the case that one of them is true and the others false, merely because they are falsifiable. Each is an argument, a way of trying to make intelligible the actions in question. Each is better or worse as its advocates see it, but in no other way. To the extent the arguers share criteria of betterness, they may agree on the question; to the extent they do not, they will not, and that is that.

This state of affairs does not mean that one must descend into the relativist purgatory to which William Buckley would consign all liberals, and thus leave radicals powerless in the face of the totalizing drive of late twentieth-century liberalism to turn all questions into balancing exercises. Relativism as a purgatory is parasitic on truth as heaven. Without one, there cannot be the other. Arguments may be as deeply held as individuals wish to make them. The “can't helps” of a time and place are no less compelling for being of a time and place, except to individuals who are from another time or place. Within the hermeneutic circle, answers are taken as if true because the answers define truth for that circle. And it must be remembered that all arguments are made within such a circle for it is the circle that enables the arguments to have meaning.55

IV. Back to Legal Realism at Yale

That the insertion of a real social context can make intelligible an argument like that made by Horwitz does not mean that such context is only, or even primarily, useful in supporting or attacking functional arguments. A more common use is probably that of simply aiding the understanding of a text. This use is the case in Laura Kalman’s book, where the text is really the large corpus of realist writings, a canon with its grace notes. Kalman’s rendition of this canon is the single best introduction to the jurisprudence of realism that we have, the kind of thing that one could give to a good student and have that student come back in two hours ready to do serious work on the subject. How, then, does the context she brings forward enable meaning to be given to this text?

Let me start by identifying the problem Kalman faced. Everyone knows that realism was against conceptualism, though of course, no

55. As I work through this section for the umpteenth time, I am haunted by echoes of conversations with members of what might be called the Buffalo Coalition for the Study of the Social Construction of Local Reality. This loose non-group, which includes Jim, Dianne, Bob, Guyora, Barry, David, Alan, Tom, George, Al, Fred, Janet, Isabel, Errol, Betty, Frank, and Rob, has aided my work in innumerable ways. This is public thanks.
one knows what either is. Somehow realism embodied functionalism, empirical social science, and a commitment to exposing the judicial process as something other than that which classical jurisprudence had claimed it to be. But no one really knows what the first or the second was to legal thinkers in 1930. While it is clear that the first was meant to be an antidote to classical jurisprudence, that conclusion does not explain what classical jurisprudence was, or why anyone was against it, any better than Gilmore and Kalman’s classic rendition: “‘The judges who thought this way and wrote this way set their faces against change.’ They left social engineering to the Robber Barons.”

Somehow that tone of politics, reform, and social policy was a part of it all, but what part has never been clear to anyone.

Kalman sets out to clarify this muddle: first, by looking at how these ideas worked out as jurisprudence, and then by looking at how they worked out as professional education. The approach has a wonderful pragmatic ring to it—ideas are what ideas do. But while that fine pragmatic insight seems to have been followed wholeheartedly, it was, at the same time, pursued only halfway. In Kalman’s analysis, it is the text as she has rendered it that measures, and thus gives meaning to, the activities of the faculty of Yale as they tried to use realism to change legal education. And similarly, it is the institutional factors—money, administrative support, the New Deal, student vocationalism, and faculty factionalism—that explain the failure of the human grasp to match the theoretical reach. Why is it not precisely the other way? Why not assume that there will always be institutional shortfall and that it is the activities of the faculty, taken in the light of this expected shortfall, that give meaning to the text?

I think that Kalman understands this problem. At one point, she recognizes that none of the institutional factors would go away after the War, and indeed that postwar developments would take place in the face of a university administration that in its political conservatism would be, if not actively hostile to the school, at least not supportive and encouraging, she suggests:

If realism had had stronger intellectual legs, it might have run more sturdily at Yale. Realism in the 1930’s, as applied to legal education, was a flawed movement intellectually; its weaknesses were enhanced by institutional factors at the law school most receptive to it. Not until the postwar era would a stronger form of realism arise that could withstand institutional buffeting.57

Yet Kalman never specifies the intellectual weaknesses of prewar realism, beyond an earlier reference to the paradoxes of a movement that emphasized the inherent idiosyncrasy of decisionmaking, but sought to

57. Pp. 143-44.
make the process efficient and certain. Nor does she describe the intellectual strengths of the postwar version. But here again the reach is to the basic text to explain the activities of the faculty. Such a reach is perfectly normal for anyone dealing with intellectual history. But texts are not self-defining (nor are contexts for that matter) and by treating her text as self-defining, Kalman misses giving realism a meaning that I think it should be given.

It is the great virtue of Kalman's book that all I need to outline my meaning, to write the same book differently, is in her book. I would begin by noting that it is not insignificant that the postwar law professors "spoke only infrequently of legal realism in their articles and casebooks." Looking at who they were explains some of that.

If one compares the Yale faculty before the war with that after it, some quite obvious things stand out.

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<td>*Thurman Arnold</td>
<td>*Boris Bittker</td>
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<td>*Edwin Borchard</td>
<td>*Edwin Borchard [retires 1950; replaced by Richard Donnelly]</td>
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<td>*Charles E. Clark</td>
<td>*George Dession</td>
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<td>*Arthur Corbin George Dession</td>
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<td>*Walton Hamilton</td>
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<td>Fleming James Frederick Kessler</td>
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59. P. 164.
60. This list was created from the 1937 and 1947 AALT directories. See Association of American Law Schools, Directory of Teachers in Member Schools, 1937-1938, at 15 (1937); Association of American Law Schools, Directory of Teachers in Member Schools, 1947-1948 (1947). Biographical information used below is from these and subsequent directories.
In 1937 the party of realism could count on Arnold, Clark, Douglas, Hamilton, Sturges, Steffen, and perhaps Borchard and Moore, six to eight of a tenured faculty of fourteen. Ten years later the same group was seven to nine of fourteen: Dession having replaced Arnold; Emerson, Clark; Harper, Douglas; and Rodell, a net addition. It was enough to see to the appointment of Countryman and Frank. But in five years Borchard, Hamilton and Moore had retired and Steffen left, so the crew was really down to five out of fourteen. Granted there were four youngsters on the way up—Countryman, Frank, Haber, and Mueller—but as it turned out not one made the grade, Mueller having left in disgust over the Countryman affair.61 And of the five only Dession, Rodell, and Sturges could be said to represent the prewar faculty. What had happened? Quite simply, the individuals in the hermeneutic circle had changed, and changed significantly.

At the same time I think this first approximation of the change quite seriously misstates its timing. To get at the matter of timing I would suggest looking at the deadlock that occurred on the Yale faculty when it came time to choose a dean to succeed Charles Clark.62 Douglas, everyone’s first choice, was appointed to the Supreme Court. The faculty then split into two groups. The large faction, headed by Corbin, coalesced round Harry Shulman. The small faction, led really by no one, consisted of Arnold, Dession, Hamilton, Rodell, Steffen, and Sturges (who resigned to go to the Distilled Spirits Institute in the middle of the fight). This group first supported Arnold (who also resigned in the middle of the fight, but to join the Justice Department) then Steffen, and finally simply opposed Shulman for being “too conservative a jurisprudent.”63

61. P. 199.
63. P. 142.
Why the Yale Corporation did not simply override an opposition that was really only four out of eighteen faculty was probably due to anti-Semitism, as well as the lukewarm support Shulman received from men like Corbin, who would have preferred a "more positive individual."\footnote{64} It is an interesting but irrelevant question. What is both interesting and relevant is how Shulman could be too conservative a jurisprudent. After all, a few years later, he and Fleming James published a casebook on torts aimed directly at answering the question of "distributing losses in the socially desirable manner contemplated by the more direct methods of social insurance."\footnote{65} This book was followed by a labor law casebook, published in collaboration with an economist, that concentrated on arbitration of disputes during collective bargaining, and was replete with relevant economic literature.\footnote{66} Why did this little group have to fight Shulman in 1939, then have to fight to resist the "Harvardization" of the faculty in 1945, and finally give in, graciously, to Shulman's appointment in 1953?\footnote{67}

In 1939, when Felix Frankfurter was asked what he thought the Yale faculty needed in a new dean, he said that it should be someone who would reverse the tendency toward "overjazzing."\footnote{68} "Realism had entailed too much emphasis on shocking the students and debunking the law and too much cynicism."\footnote{69} He also faulted the "smartaleck, wisecracking attitude" of the Yale faculty and suggested the need for "moral leadership" to combat "the formation of cliques [and] internal politics."\footnote{70} In contrast, Sturges, one of the obvious objects of Frankfurter's remarks, always wanted to appoint to the faculty "people with 'color.'"\footnote{71}

In a strange way there is a meeting of the minds here. Sturges and Co. wanted just that "overjazzing," that "color" that Frankfurter, who supported Shulman, and men like Corbin, Lorenzen, Moore, and probably Borchard of the old people, and Shulman, McDougal, and James of the young, were opposed to, lest the school become, in Corbin's wonderful, deeply revealing words, "a second rate school of 'political science.'"\footnote{72} There were cliques and internal politics from the beginning, but I doubt whether "moral leadership" would have made a difference, and whose leadership could have been more moral than that of Charlie Clark? I think the differences that divided the faculty were

\footnote{64}{Pp. 142, 275 n.192.}
\footnote{65}{P. 151 (quoting H. SHULMAN & F. JAMES, CASES AND MATERIALS ON THE LAW OF TORTS viii (1st ed. 1942)).}
\footnote{66}{P. 151.}
\footnote{67}{P. 197.}
\footnote{68}{P. 142.}
\footnote{69}{Id.}
\footnote{70}{Id.}
\footnote{71}{P. 148 (quoting Myers McDougal).}
\footnote{72}{P. 139.}
about realism as it was understood by individuals with differing interests, personalities, likes, dislikes, goals, and fears.

Among the realists, realism was contested turf. From the beginning there was no real contest about the jurisprudential insights that were the center of the critique of formalism or conceptualism. But there were disputes about what to do with those insights, and those disputes centered around functionalism, social science, and social policy.

Functionalism was a way of reconstructing what the critique of formalism destroyed. It asserted that if one only understood the facts, the rules would follow directly. Though this proposition can be seen in other activity, I think it illuminating that at Yale before the war only Corbin, in the articles that led up to his treatise, was much of a functionalist, and that Douglas's functional casebooks were at best the use of functionalist categories to provide a basis for comparing various legal devices—much as Sturges attempted to do in his nonfunctionalist creditors' rights casebook.

Equally revealing, Arnold and James' Cases on Trials Judgments and Appeals, although organized as functionally as any casebook, was full of the most bizarre and inexplicable cases. Arnold's message was clear: functional classification made no difference in an irrational process. Yet some of the young people saw things differently. Shulman and Chamberlain's labor book, and McDougal and Haber's great property book, are of course the major, if later, examples.

Social science was contested too. In the beginning the matter was simple. Go out and count up a storm. The stated purpose may most often have been to increase the efficiency of the judicial process, but the research was basic research about law and lawyers. Moore's may have been extreme in its methodological rigor, but it was mainstream in its attempt to understand law. Here Arnold's break with the empirical research enterprise should not be misunderstood. Arnold's rejection of this way of doing things had significant consequences at Yale; at the least, it contributed to Moore's estrangement from the core group, and possibly Clark's as well.

But Arnold's later work, especially The Symbols of Government and The Folklore of Capitalism, and that of his collaborator, Edward S.

73. See, e.g., Corbin, Contracts for the Benefit of Third Persons in the Federal Courts, 39 Yale L.J. 601 (1930).
74. See pp. 85-86.
76. P. 81.
77. P. 151.
80. Schlegel, From the Yale Experience, supra note 25, at 511-12.
82. T. Arnold, The Folklore of Capitalism (1938).
Robinson, *Law and the Lawyers*, was a deeply social scientific, though not quantitative, understanding of law. Contrast this approach with the use of social science in the McDougal and Haber, Shulman and Chamberlain, or even the Harper *Family Law* casebooks, where social science brings to law the facts about social life for the lawyers to use in fashioning their rules.

So, too, with social policy, though here the intellectual turn is more complicated. Little explicit discussion of social policy appears in Yale scholarship before World War II, although examination questions suggest that more explicit discussion may have gone on in class than the casebooks suggest. Clearly all of them, even Arnold, had ideas about wise social policy, as Clark demonstrated in the Federal Rules, and Douglas in the Securities Acts. Explicit discussion was somehow not needed; for these men, "the facts" were a "prerequisite to reform." But little more than the facts was necessary because, for all their railing at the malefactors of great wealth, these men shared an "all-men-of-good-will" ethic. The facts were the only necessary prerequisite to reform; after they had seen the facts even the Robber Barons would do right.

But after the Stalinist and Nazi dark, an all-men-of-good-will ethics was impossible. For the younger generation, and for older, left-wing scholars like Emerson and Harper writing after the war, explicit discussion of social policy was necessary, since by no means were all men of good will. Thus, in a real sense, although no one adopted the jargon, McDougal and Lasswell in fact won, for their explicit message was that law had to be discussed in terms of social policy, namely democratic values.

This brief review of functionalism, social science, and social policy suggests that realism's meaning was contested, as individuals who talked with each other, and who were identified in the public mind as realists attempted, generally through example, but also through such public testimony as appointments and, I think, tenure as well, to give meaning to realism. They did not fight in print, but clearly their disputes raged in private. As the participants changed, so too did the meaning of the contested concept.

Functionalism, really a product of Columbia and not of Yale, became more important as irrationalist jurisprudence was replaced by social planning; social science shifted from being a way to understand law

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84. P. 151.
85. P. 152.
88. P. 178.
to a way to aid social planning; social policy turned from being an almost unnecessary addition to discussion to the centerpiece. Arnold, Clark, and Douglas left; Moore, Hamilton, and Sturges retired; Dession died; and Rodell, a relic, slipped farther into hostile irrelevance and ultimately an alcohol-aided haze. First Shulman, James, and McDougal came to prominence; then Emerson, Harper, and Rostow; finally Bittker, Ralph Brown, and Gilmore. Time passed; people passed; ideas passed.

I do not think it profitable to discuss whether, after Sturges tried to revive the old energy by bringing Arnold, Clark, Felix Cohen, Fortas, and Frank back as lecturers, what Yale settled into was realism or something else. It is interesting to know that the postwar faculty never talked about realism as evidence that they understood that something had changed, but that is all. Realism is just a name. Like "chicken soup," it means what we choose to call it. It is not "Rationalism" or "Reality" but like, that is similar to and different from, Holmesian Skepticism and Critical Legal Studies.

But what is important for intellectual history is to understand how working from that name to a definition, and from that definition to classifying intellectual work as more or less like that definition, without paying attention to changes in people and their concerns along the mobius strip of discourse, can lead to missing significant changes in that intellectual work. Starting with a definition, as is so normal for anyone dealing with intellectual history, it is easy to assume continuity of meaning and thus to miss changes in the cast of characters that might suggest that ideas had taken on a new emphasis or meaning. But to miss the changes in the cast of characters, as Kalman has, is to lose something of the social context of ideas, and thus of the ideas themselves. As a result she tells a different story from the one I would tell, one different from the one I think ought to be told.

89. P. 149.
90. My story would, I believe, have to come to grips with two matters that Kalman's story treats as unproblematic. Exactly how did Hamilton and Rodell manage to turn around the proposed Harvardization of the faculty in 1945 and, even more crucially, how did Sturges rather than Shulman manage to end up dean in 1946?

My guess is that the answer to these questions turns on a detailed understanding of the academic politics of the individuals who were socially marginal to the realist enterprise in the pre-war years and who were still a part of the faculty in 1945 and 1946: Borchard, Dession (though he was clearly a participant, see pp. 119-20), James, McDougal, J. W. Moore, Underhill Moore, Steffen, Bittker, and Rostow. Part of the understanding was given to me by Myers McDougal in a conversation on Oct. 1, 1987, however, it should be made clear, that McDougal disagrees with my reading of Yale's history. Shulman was the leader of the untenured faculty in 1934, when McDougal started teaching at Yale. In 1946, Shulman did not want the deanship because he was making too much money as permanent arbitrator in industry, and would have had to give up the post if he became dean. I suggest that, given that there is no greater bond than the one uniting untenured faculty under fire, support for Shulman in 1939 was based less on realism than on group solidarity, and that in 1946, Sturges' election was by default rather than reflecting the real strength of realism on the faculty. At the same time I am cautious about these conclusions, for if I have any quarrel with Kalman it is in her reliance on Myers McDougal as an informant. Though obviously a marvelous storyteller, he has much
V. Two Further Examples

Further examples of what I see as the importance of fully socializing intellectual history may aid my argument, and suggest the excellence of Kalman’s work. Two books that are generally agreed to be excellent examples of intellectual history face problems somewhat like the one in Legal Realism at Yale: Martin Jay’s study of the Frankfurt School and Mark Poster’s study of Sartre’s encounter with French Marxism. Kalman faces far less difficult problems of pure philosophical exposition, the intellectual historian’s métier I am afraid, but on the whole, I believe, does a superior job.

Jay’s subject is most similar to Kalman’s. It covers a group of individuals—Max Horkheimer, Theodor Adorno, Franz Neuman, Herbert Marcuse, and Paul Lazarsfeld—are the names American lawyers have the greatest chance of recognizing—working in a single organization—the Institute for Social Research in Frankfurt, Germany—often in close physical proximity throughout the same basic period. Membership in the group changes over time (a matter of some significance, I think), and its members engage in a good deal of social science research. Jay begins with a brief recounting of the relevant political situation, the founding of the research organization, the biographies of its principal members, and then does a detailed, largely chronological survey of the principal intellectual products of the group, interrupted only occasionally to offer the biography of a new participant, note the departure of an old participant, or explain a major change in the organization’s location, structure, or finances.

I do not think the flatness of my account of this book is misleading. The individuals are of no small importance in the history of twentieth-century thought; all were critical Marxists active in Germany before the advent of the Nazi regime, who made a hasty escape in 1933 and sought refuge first in England, France, and Switzerland, then in the United States. They appear in the book as if they were Benedictine monks in their separate cells talking only in hushed tones on the way back from vespers. Though the texts are often extremely difficult, and thus well worth detailed explication, the effect is much like a spider web hung in midair. Beautiful, but somehow inexplicable.

I doubt whether the effect was necessary. The social upheavals the group went through meant that archives such as were available to Kalman were simply unavailable to Jay. But he was able to interview most of the living participants and had access to some correspondence. I suspect that examined in some detail, the social context, and not simply the ructions associated with the Nazi regime, but more importantly the

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interactions of people and places, may well illuminate these difficult
texts.

I offer only three suggestions of what might be important, but I
think they are enough. First, Karl Mannheim, in some ways one of the
Frankfurt School's principal intellectual adversaries, "shared office
space at the Institut [with the group] before 1933"; surely that was not
an unenlightening encounter.\footnote{M. Jay, supra note 91, at 63.}
Second, several of the group's original members were quite orthodox Marxists; these individuals slowly sepa-
rated from the group, occasionally breaking quite completely and bit-
terly.\footnote{See id. at 150-51.} This process of intellectual and personal inclusion and exclusion, defining both the group and the meaning of critical theory,
surely had some impact on the intellectual corpus.

Last, there were clear intellectual splits between Horkheimer and
Adorno and Marcuse and Neuman.\footnote{See id. at 155-58.} It is at least possible that these splits have some relationship to the decision of Horkheimer to return
to Germany after the war, and of Marcuse and Neuman to remain in the
United States. Why Jay chose not to discuss these matters is, however,
unimportant. What is important is to recognize how attention to them,
and others like them, might have made critical theory more intelligible.

Poster's book has similar problems. His subject is less like Kal-
man's: it is essentially about one significant man, Jean-Paul Sartre, and
a major shift in intellectual outlook, indeed a classic twentieth century
intellectual encounter. Poster begins with a brief setting of the scene,
and then proceeds strictly chronologically, first describing develop-
ments in the social, political, and intellectual life of the left in postwar
France, much of which has to do with the comings to and goings from
the French Communist Party, and the twists and turns in its dogma, and
then recounting Sartre's writings during the period. The form is invari-
able, like a voltaic pile consisting of alternating strips of context and
text, but somehow the result generates no current. There is no
electrolyte.

Here again I do not think it is for lack of a good subject. The sight
of France's premier intellectual selling left-wing newspapers on the
street corner in Paris is clearly as captivating as that of Underhill Moore
sitting on a camp stool counting cars in New Haven. My guess is that
the problem, as was the case with Horwitz, is that the context is too far
away from the text. French intellectual life is, so I am told, lived in
cafes and apartments. It cannot be lived in the Sorbonne because the
place has so few offices that faculty share them as if in a time-sharing
condominium.

This vibrant, highly social, and deeply intellectual life is completely
absent in Poster's book, as is, for all practical purposes, Simone de
Beauvoir, Sartre's long-time lover and intellectual compatriot. Perhaps that is the missing electrolyte. I can only speculate, however, for the book offers few clues, despite its excellent, clear summaries, and analyses of very difficult texts. Again, why Poster neglects the task that I believe needs to be done is unimportant. What is important is to understand that his neglect leaves one with only one possible answer to the question, "Why did Sartre confront Marxism?"—"Because it's there." Somehow I doubt that answer.

V. Ending

How does one conclude after this many pages on this particular subject? David Kennedy once told me something to the effect that postmodern legal scholarship, like postmodern fiction, will not come to a conclusion; it will just end. As far as I can tell, though others may disagree, there is not a single postmodern bone in my body. Nevertheless, I think I am about to end, not conclude. Conclusion is impossible. If there is no epistemologically privileged position, then I cannot know that intellectual history is better written in the fullness of such social context as one can muster. But by the same token, I am not limited to mere belief, as the notion of belief is parasitic on the notion of knowledge. Well, if I cannot know and am not limited to belief, then I guess that I am sure that I am right. At least I have given my best arguments. If you are not persuaded, try some arguments of your own. In the alternative, there is always thumbwrestling.