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# Buffalo Law Review

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## **Of Sheepdogs and Ventriloquists: Government Lawyers in Two New Deal Agencies**

DANIEL R. ERNST†

*American Legal Realism and Empirical Social Science*, John Henry Schlegel's masterful study of how a circle of American law professors, seeking a professional identity within the modern university, tried on but then discarded the garb of social scientists, performs a very difficult historical feat: it presents its subjects' thought with great depth and subtlety but also as a means to an end in a fully rendered social setting, the American law school in the first decades of the last century. For any legal historian trying to work out how to write about ideas not just "in the books" but also "in action," to see them as part of professionals' quest for authority, and to draw upon sociological theory without derailing a narrative throughline, the book has been an indispensable model. It certainly has been for me as I have studied the lawyers of the New Deal. Few of those lawyers appear in Schlegel's book and then only in supporting roles. They worked in vast government buildings rather than academic cloisters.

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But for New Deal lawyers quite as much as for Schlegel's Legal Realists, ideas were their stock-in-trade, employed in pursuit of professional power.

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"Research on state building in the U.S.," writes the political scientist Gerald Berk, "usually holds twentieth-century governance to a single set of standards, namely those of Weberian (or Prussian) bureaucracy: autonomy, hierarchy, legitimate authority, professionalism, and the capacity to monitor and control economic behavior."<sup>1</sup> Typically it emphasizes the United States's departure from a continental European norm. European nations bureaucratized before they democratized, but the United States adopted universal white male suffrage before it created many centralized, locality penetrating bureaucracies.<sup>2</sup> When it came to America, bureaucratic autonomy, the condition in which "a politically differentiated agency takes self-consistent action that neither politicians nor organized interests prefer but that they either cannot or will not overturn or constrain in the future," rarely proceeded from the top down, through orderly hierarchies of specialized, full-time officials.<sup>3</sup> Rather it emerged in the middle of federal executive departments as bureau chiefs and other "mezzo-level" bureaucrats recruited nonpartisan staffs, developed state capacity, and cultivated constituencies.<sup>4</sup>

Scholars of American political development have long recognized that the legal profession has had an outsized role in building the national state. Stephen Skowronek, for

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1. Gerald Berk, *The National Recovery Administration Reconsidered*, 25 *STUD. AM. POL. DEV.* 56, 83 (2011).

2. MARTIN SHEFTER, *POLITICAL PARTIES AND THE STATE*, at 14–15 (1994).

3. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 17 (2001).

4. *Id.* at 167.

example, considered lawyers the “special intellectual cadre” that ran the nineteenth-century state of courts and parties.<sup>5</sup> Further, the sociologist Terence Halliday has distinguished two ways in which lawyers engage in politics, turning on the nature of the authority they assert. “Technical” authority arises from the special expertise of the professional.<sup>6</sup> For lawyers, Halliday mentioned “skill in understanding statutes, drafting contracts, and executing corporate mergers,” which lawyers can exercise “without taking an explicit stand on what the law should contain.”<sup>7</sup> “Normative” authority relates to “broad issues of public policy concerning which every citizen should be in a position to come to a decision.”<sup>8</sup> Lawyers are most authoritative when they invoke their technical authority, but because lawyers have “technical authority in a normative system,” they have “an unusual opportunity to exercise moral authority in the name of technical advice” and “exert enormous influence in great tracts of social life.”<sup>9</sup>

When I started in on a book on New Deal lawyers with such literatures in mind, I expected to find my subjects employing their technical authority to bring the responsible executive and bureaucratic autonomy to the federal government. I pictured them as sheepdogs, nipping at the heels of potentially wayward administrators. By authoritatively interpreting statutes, they would help agency heads keep mezzobureaucrats in line. By requiring that orders be supported by finding of facts on a record, they would keep officials from wandering into the arms of businesses and professional politicians. Sometimes the

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5. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 31 (1982).

6. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 38 (1987).

7. *Id.* at 39.

8. *Id.* at 37 (quoting A.M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* 486 (1933)).

9. HALLIDAY, *supra* note 6, at 40–41.

lawyers behaved just this way, but, even then, they followed their own professional and political instincts rather than simply heeding their master's voice.

Consider the Agricultural Adjustment Administration (AAA). It was created within the US Department of Agriculture and formally subject to Secretary Henry A. Wallace to establish marketing agreements and production controls to give farmers the buying power they enjoyed before the outbreak of World War I.<sup>10</sup> Its administrator, George Peek, had wanted Wallace's job and extracted a promise of direct access to FDR before taking the position.<sup>11</sup> Wallace's assistant secretary was Rexford Tugwell, an institutional economist who, with two other Columbia professors, formed FDR's "brains trust" during the 1932 campaign.<sup>12</sup> Jerome Frank, a corporation lawyer and sojourner among Yale's legal realists, was formally Peek's general counsel, but functionally Wallace's and Tugwell's agent within AAA.<sup>13</sup> Wallace, Tugwell, and Frank shared Wallace's apartment in the first days of the New Deal; for a while thereafter, Frank and Tugwell shared other quarters and became good friends.<sup>14</sup>

Wallace, Frank and Tugwell were all for raising farmers' income but all against allowing food processors to pad their profits. Peek, formerly president of a farm implement company, was much less solicitous of the consumer, even though the statute directed AAA to "protect the consumers' interests" as well as to establish parity prices.<sup>15</sup> But for the

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10. ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 45–49 (1958).

11. VAN L. PERKINS, *CRISIS IN AGRICULTURE: THE AGRICULTURAL ADJUSTMENT ADMINISTRATION AND THE NEW DEAL, 1933*, at 83, 86–87 (1969).

12. KENNETH S. DAVIS, *FDR: THE NEW DEAL YEARS, 1933–1937: A HISTORY* 20, 49 (1986).

13. *THE REMINISCENCES OF JEROME N. FRANK* 23, 74–75, 155–56 (Oral Hist. Rsch. Off., Columbia Univ. ed., 1960); ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* 18–19, 22–25 (1985)

14. *THE REMINISCENCES OF JEROME N. FRANK*, *supra* note 13, at 25, 72, 81, 115.

15. PERKINS, *supra* note 11, 95–96; GILBERT C. FITE, *GEORGE N. PEEK AND THE*

Agricultural Adjustment Act, the marketing agreements would violate the antitrust laws. To ensure that they were within the antitrust exemption, Frank's legal division, which included Alger Hiss, Lee Pressman, and Abe Fortas, carefully reviewed their terms and insisted on access to the books and records of the food processors.<sup>16</sup> Peek and his subordinates, recruited from industry, generally joined in the processors' resentment of the lawyers' "captious legal objections."<sup>17</sup>

Early on, Peek's subordinates complained that the lawyers were assuming a policymaking role invested in the AAA's administrators.<sup>18</sup> Frank replied that the legality of the marketing agreements turned on the scope of Congress's delegation in the Agricultural Adjustment Act and, for agreements beyond it, the reasonableness of their restraint of trade. To resolve those issues, his lawyers could not possibly "draw a nice line between policy and law" and "dismiss all questions of policy as none of our business."<sup>19</sup> Peek pushed back hard; Frank, reassured by Tugwell, held his ground until Wallace forced Peek out in December 1933. For months thereafter, the lawyers proceeded confident that in resisting the administrators they were doing Wallace's

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FIGHT FOR FARM PARITY 21–37 (1954); Agricultural Adjustment Act, 7 U.S.C. § 602(3) (1934).

16. PERKINS, *supra* note 11, at 95; PETER IRONS, *THE NEW DEAL LAWYERS* 124–25, 132 (1982).

17. PERKINS, *supra* note 11, at 93–94; Jerome N. Frank, Gen. Couns., Agric. Adjustment Admin., Dairy Marketing Agreements and Licenses at the American Institute of Cooperation 15 (July 9, 1934) (on file with the Jerome New Frank Papers, Yale University Library). Peter Irons provides the fullest account of Frank at AAA. *See generally* IRONS, *supra* note 16, at 111–32, 156–80 (1982). He also identified disharmony between chief administrators and general counsels as one of "four major sources of political conflict" experienced by New Deal lawyers. IRONS, *supra* note 16, at 10.

18. Memorandum from Jerome N. Frank, Gen. Couns., Agric. Adjustment Admin., to George N. Peek, Adm'r, Agric. Adjustment Admin. (Sept. 8, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

19. Memorandum from Jerome N. Frank, Gen. Couns., Agric. Adjustment Admin., to George N. Peek, Adm'r, Agric. Adjustment Admin. (Oct. 25, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

bidding.<sup>20</sup> Only when they set their professional authority against the political might of the Cotton South over the rights of sharecroppers did Wallace balk and acquiesce in the “purge” of Frank, Pressman, and others.<sup>21</sup>

For a contrast, consider the National Recovery Administration (NRA). The National Industrial Recovery Act authorized the president to promulgate codes of fair competition for individual industries. As at AAA, an extremely able group of lawyers (including Thomas Emerson, Milton Katz, and Stanley Surrey) advised administrators overwhelmingly recruited from business.<sup>22</sup> Once again, the basis for the lawyers’ claim of authority was statutory: did a code advance the policies of the statute or did it let industrialists enjoy monopolistic profits?<sup>23</sup> Once again, when lawyers insisted on defining the antitrust exemption, administrators accused them of exceeding their role. One, who thought of NRA codes as “charters of self-government,” claimed not to see that the agency’s lawyers had raised “a *legal* objection” to a code.<sup>24</sup>

NRA differed from AAA in at least one important respect. At AAA, Frank plausibly claimed to be implementing the policies of Secretary Wallace. At NRA, a

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20. Letter from Jerome N. Frank to Felix Frankfurter (Dec. 20, 1935) (on file with the Jerome New Frank Papers, Yale University Library); IRONS, *supra* note 16, at 128–32; THE REMINISCENCES OF JEROME N. FRANK, *supra* note 13, 167–68.

21. DAVID EUGENE CONRAD, THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL 136–53 (1965).

22. S. DOC. NO. 73-164, at 191, 197, 209; see KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA’S NEW DEAL 94–95 (1995).

23. NIRA also forbid codes “designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.” National Industrial Recovery Act, 15 U.S.C. § 703(a)(2) (1934), *invalidated* by A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

24. Dudley Cates, *A Current Appraisal of the National Recovery Administration*, 172 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 135 (1934); Memorandum from Dudley Cates to Hugh S. Johnson (Aug. 18, 1933) (on file with the Records of the National Recovery Administration, National Archives at College Park, Maryland).

Brookings Institution study found, “there existed no real policy-making body.”<sup>25</sup> The Administrator, Hugh S. Johnson, was a former cavalry officer and had overseen the draft during World War I.<sup>26</sup> He approached FDR’s charge to NRA “to get many hundreds of thousands of the unemployed back on the payroll by snowfall” as urgently as he had the creation of the American Expeditionary Force.<sup>27</sup> To arrest the downward spiraling economy, Johnson instructed his subordinates “to get the codes in” at once and deal with abuses if and when they arose.<sup>28</sup> Negotiations took the form of “plain horse trading and bare-faced poker playing,” as administrators agreed to price controls and production limitations in exchange for pledges of minimum wages, maximum hours, and the observance of the right to organize and bargain collectively.<sup>29</sup>

General Counsel Donald Richberg agreed that industrialists had to be coaxed into code-making and directed his lawyers to acquiesce in even dubious provisions.<sup>30</sup> Despite this retreat, lawyers found that administrators, “looking in desperation for some source of

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25. Leverett S. Lyon et al., *The National Recovery Administration: An Analysis and Appraisal*, in THE INST. OF ECON. OF THE BROOKINGS INST. 3, 61 (1935).

26. JOHN KENNEDY OHL, HUGH S. JOHNSON AND THE NEW DEAL 10–15, 20–35 (1985).

27. *Text of Roosevelt Statement on Aims of Industrial Bill*, HARTFORD COURANT, June 17, 1933, at 1.

28. Press Release No. 2993, Hugh S. Johnson, Nat’l Recovery Admin., Address before the Worcester Chamber of Com., Worcester, Massachusetts 5 (Jan. 25, 1934) (on file with the Library of Congress).

29. Hugh S. Johnson, *The Blue Eagle from Egg to Earth*, SATURDAY EVENING POST, Jan. 26, 1935, at 91; BERNARD BELLUSH, THE FAILURE OF THE NRA 45–48 (1975); COLIN GORDON, NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920–1935, at 174 (1994).

30. See THOMAS E. VADNEY, THE WAYWARD LIBERAL: A POLITICAL BIOGRAPHY OF DONALD RICHBERG 124–35 (1970); Memorandum from Blackwell Smith to Members of the National Recovery Administration Legal Division, Policy Matters (Sept. 11, 1933) (on file with the Blackwell Smith Papers, American Heritage Center, University of Wyoming).

advice detached from any one of the special interests represented in the code bargaining process," sometimes turned to them. On such occasions, their advice went "beyond the issues of law, far into the realm of general policy."<sup>31</sup>

Conflicting signals from the top allowed lawyers to acquire this authority. Johnson acted as "a mere arbitrator among warring groups with their relative strengths determining the final formulation of policy."<sup>32</sup> After his behavior became intolerably erratic, he was forced out in September 1934.<sup>33</sup> His replacement, a board representing the conflicting factions, did little better.<sup>34</sup> In April 1934, Associate General Counsel Blackwell Smith had been named "assistant administrator of policy" as well as *de facto* head of the legal division;<sup>35</sup> he and his lawyers never succeeded in imposing their policies on the code authorities before *Schechter* rang the curtain down.<sup>36</sup>

At AAA and NRA, lawyers were not or not simply committed to making federal bureaucracies more closely approximate Max Weber's ideal type.<sup>37</sup> Recall my government-lawyer-as-sheepdog metaphor. Sheepdogs react reflexively to their masters' commands; the New Deal lawyers displayed rather more agency. "We young fellows were well aware of the varied crew that manned the New Deal ship of state and that some of our crusading efforts had to be directed inwards," Alger Hiss recalled of his AAA

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31. Lyon et al., *supra* note 25, at 63–64.

32. LEVERETT S. LYON & VICTOR ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE* 1040 (1940).

33. *See* OHL, *supra* note 26, at 240–54.

34. BELLUSH, *supra* note 29, at 158–75.

35. *Id.* at 155 n.2; *see* VADNEY, *supra* note 30, at 129.

36. LYON & ABRAMSON, *supra* note 32, at 1038–39 n.6; Lyon et al., *supra* note 25, at 742. On May 27, 1935, the U.S. Supreme Court declared the National Industrial Recovery Act unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

37. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 956–58, 974–75 (Guenther Roth & Claus Wittich, eds., 1978).

days.<sup>38</sup> “For example, Peek was out of step with what we believed was the ‘true’ spirit of the New Deal; Wallace and Roosevelt, our leaders and champions, of course exemplified the ‘true’ spirit. So Peek’s discomfiture and exit seemed to us part of the script.”<sup>39</sup>

Jerome Frank provides an unusually revealing view of one of the New Deal lawyers’ tactics, the projection, in something approaching an act of ventriloquism, of their normative preferences onto the law, which they then invoked in an assertion of technical authority. Like other New Deal lawyers, Frank regularly asserted a technical expertise grounded in positive law. Milk licenses, for example, had to “be measured by the yardstick of conformity with the language of the statute.”<sup>40</sup> Unlike other New Dealers, however, he publicly propounded a theory of law that eroded the distinction between technical and normative expertise.

“Perhaps there is no greater obstacle to effective governmental activity than the prevalent notion that the ‘law,’ at any given period of time, is moderately well known or knowable,” Frank told a national gathering of social workers in June 1933.<sup>41</sup> Statutes and judicial opinions were “extremely defective instruments of prediction as to what courts will decide in particular future cases.”<sup>42</sup> In fact, judges

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38. Letter from Alger Hiss to Lawrence J. Nelson (Aug. 21, 1979), in LAWRENCE J. NELSON, *KING COTTON’S ADVOCATE: OSCAR G. JOHNSTON AND THE NEW DEAL* 87 (1999).

39. *Id.*

40. Jerome N. Frank, Gen. Couns., Agric. Adjustment Admin., Dairy Marketing Agreements and Licenses at the American Institute of Cooperation 15 (July 9, 1934) (on file with the Jerome New Frank Papers, Yale University Library).

41. Jerome N. Frank, Gen. Couns., Agric. Adjustment Admin., Realistic Reflections on “Law” as a Constructive Social Force (June 16, 1933) (on file with the Jerome New Frank Papers, Yale University Library).

42. Memorandum from Jerome N. Frank, Chairman Sec. Exch. Comm’n to Leon Henderson, Comm’r Sec. Exch. Comm’n (July 31, 1939) (on file with the Records of the Securities and Exchange Commission, National Archives, College Park, Maryland).

started “with what they consider a desirable decision and then work[ed] backward to appropriate premises, devising syllogisms” as they went until they arrived at an aesthetically pleasing justification of “what they think just and right.”<sup>43</sup>

Frank implied that the technical expertise of lawyers consists in their ability to predict how a future judge would decide a case. He depicted the process in a December 1933 address to the Association of American Law Schools. In it, he conjured up a paradigmatic New Deal lawyer, Mr. Try-It.<sup>44</sup> One day the young lawyer was asked to determine

whether, under a certain statute, a proposed program for the relief of the destitute would be lawful. Mr. Try-it started with his objective. “This,” he said, “is a desirable result. It is all but essential in the existing crisis. It means raising the standard of living to thousands. The administration is for it, and justifiably so. It is obviously in line with the general intention of Congress as shown by legislative history. The statute is ambiguous. Let us work out an argument, if possible, so to construe the statute as to validate this important program.”<sup>45</sup>

Certainly Mr. Try-It employed one form of Halliday’s technical expertise, “skill in understanding statutes.”<sup>46</sup> Note, though, that statutory interpretation was the *third* step in Mr. Try-It’s analysis. He started with his own belief that “the relief of the destitute” was “a desirable result.”<sup>47</sup> Even verifying that the Roosevelt administration was “for” relief was a secondary consideration.<sup>48</sup>

Frank did not say why Mr. Try-It’s notion of “a desirable result” was a good predictor of what a future judge might

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43. Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1063, 1065 (1934).

44. *See id.*

45. *Id.* at 1065.

46. HALLIDAY, *supra* note 6, at 39.

47. Frank, *Realism in Jurisprudence*, *supra* note 43, at 1065.

48. *Id.*

uphold.<sup>49</sup> His most likely answer, I think, was that lawyers trained in “the functional approach” could divine the “immanent rationality in social life,” which the judge would also heed.<sup>50</sup> If this was indeed Frank’s notion of lawyers’ technical expertise, is it surprising that his adversaries demurred and complained that his “principal interest in the AAA was undoubtedly policy and not law”?<sup>51</sup>

After all, when AAA lawyers attempted to keep cotton planters from evicting sharecroppers under Section 7 of their benefits contract with the agency, several courses of action might have seemed functional.<sup>52</sup> Arguably, the social order of the Cotton South required that sharecroppers received shelter and a share of the AAA’s benefit payments. But arguably, too, it required that planters agree to production controls in future contracts with AAA, which they would reject rather than give their sharecroppers a federally enforceable possessory right. Could AAA lawyers really predict which perception of social need would guide judges when they interpreted the ambiguous language of Section 7?<sup>53</sup>

If bureaucracies and professions always marched toward modernity in unison, then characterizing the lawyers’ contribution to the New Deal as simply the forging of bureaucratic autonomy might suffice. But, like Brian Balogh, I have found that they freely departed from the Weberian

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49. *Id.*

50. See Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1028 (1981). On the functional approach, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 20–35 (1986).

51. LEONARD D. WHITE, *GOVERNMENT CAREER SERVICE 90–91* (1935).

52. The text of Section 7 of AAA’s 1934–1935 cotton contract appears in CONRAD, *supra* note 21, at 58.

53. Here I follow Robert W. Gordon’s discussion of Frank. See Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES* 75, 100–01, 105–07 (Anthony T. Kronman, ed., 2004).

playbook.<sup>54</sup> Working within agencies that were more “bundles of rules, cognitive principles, or instruments” than “order-making machines,” the New Deal lawyers’ goals set them apart from and sometimes against their administrators.<sup>55</sup> Understanding the state they built requires seeing them not simply as agents of American political development but also as self-interested actors in American political history.

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54. See generally Brian Balogh, *Reorganizing the Organizational Synthesis*, 5 *STUD. AM. POL. DEV.* 119 (1991).

55. See GERALD BERK, *LOUIS D. BRANDEIS AND THE MAKING OF REGULATED CAPITALISM, 1900–1932*, at 15–17 (2009).