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## Brief Lives

### *Pillars of Justice: Lawyers and the Liberal Tradition*

BY OWEN FISS

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**AUTHOR.** Distinguished Professor of History, University of California, Santa Barbara. B.A., Pomona College; J.D., UCLA School of Law; PhD, Yale University. I thank Christine Adams, Ashraf Ahmed, Guido Calabresi, Dan Ernst, Owen Fiss, Randy Garr, Sally Gordon, Pnina Lahav, Sophia Lee, Sandy Levinson, Serena Mayeri, Corey Meyer, Melissa Murray, and John Henry Schlegel for their help with this Review.



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**INTRODUCTION**

Owen Fiss has led an enviable life. The Sterling Professor Emeritus at Yale Law School is a revered teacher; author of dozens of books and articles on procedure, constitutional law, and legal theory;<sup>1</sup> and one of the most cited legal scholars of all time.<sup>2</sup> Devotion to *Brown v. Board of Education*,<sup>3</sup> the liberalism it fostered,<sup>4</sup> and the Warren Court pervade Fiss's life as a law clerk, lawyer, and professor. They also pervade his writings, even his magisterial Holmes Devise volume on the Fuller Court.<sup>5</sup> In *Pillars of Justice: Lawyers and the Liberal Tradition*, a book written "to inspire and instruct" the young,<sup>6</sup> Fiss introduces us to his legal liberalism, Yale, and heroes — Thurgood Marshall, William Brennan, John Doar, Burke Marshall, Harry Kalven, Eugene Rostow, Arthur Leff, Catharine MacKinnon, Joseph Goldstein, Robert Cover, Morton Horwitz, Carlos Nino, and Aharon Barak. Each of these individuals shares, Fiss maintains, a devotion to *Brown* as a transformative event that made law an anvil for hammering out Americans' most sacred ideals.<sup>7</sup> All also lived lives that provide "guidance for anyone who wonders how he or she might achieve something in this world that is worthwhile and good."<sup>8</sup>

While that sounds portentous, the book is anything but. Fiss's generosity of spirit and capacity for friendship shine through on every page. His marvelous portraits are evocative, moving, and sometimes unexpectedly amusing, as when the young Fiss, eager to discuss a case, raced into Thurgood Marshall's chambers one morning and belatedly "noticed [his] pajamas coming through the bottom

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1. See Owen M. Fiss, *List of Publications*, YALE L. SCH. (Oct. 10, 2015), [http://law.yale.edu/system/files/documents/faculty/ofiss\\_pubs2017.pdf](http://law.yale.edu/system/files/documents/faculty/ofiss_pubs2017.pdf) [<http://perma.cc/C6P5-MGP9>].
  2. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000); Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489-92 (2012).
  3. 347 U.S. 483 (1954).
  4. OWEN M. FISS, *PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION* 1-2 (2017).
  5. See OWEN M. FISS, VIII THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 9-12, 394-95 (1993).
  6. FISS, *supra* note 4, at 1.
  7. *Id.* at 3.
  8. *Id.*

of [his] slacks.”<sup>9</sup> *Pillars* enlists history and biography to explain our duty to further reason through law. And, since, as Fiss recognizes, “[a]ll biography is a form of autobiography,”<sup>10</sup> his essays tell as much about the author as his subjects.

This Review proceeds in two Parts. Part I explores Fiss’s views on his luminaries, *Brown*, legal liberalism, and Yale. I group the discussion into five categories – civil rights idols, sympathetic colleagues, friendly critics, legal cosmopolitans, and students (who make frequent guest appearances and star in the chapter on MacKinnon and in Fiss’s coda, “Toiling in Eden”).<sup>11</sup> Part II discusses the criticisms of *Brown*, the Warren Court, and legal liberalism that are missing in Fiss’s paean. I question Fiss’s version of the history of Yale and his ideal of legal education, and maintain that he overlooks the role of legal realism in creating the school, *Brown*, and legal liberalism. I then query whether legal liberalism remains as viable for the present as Fiss contends. Finally, I query whether his subjects should and can still serve as our models.

### I. THE PILLARS AND THE PORTRAITIST

By situating his encounters in the context of his own autobiography, Fiss enables us to observe one Pilgrim’s Progress. We see the embodiment of the meritocratic ideal rebelling against process theorists in the Slough of Despond – i.e., Harvard – then moving forward armed with his heroes’ rectitude, faith in reason, and legal liberalism. We witness Fiss’s deep attachment to the Warren Court and *Brown*, watch him championing them against all comers on the right and left, and charging students to restore them. For Fiss, the Warren Court and Yale are the Celestial City.<sup>12</sup>

Born in 1938, Fiss grew up in modest circumstances in a Bronx Sephardic Jewish household.<sup>13</sup> Good grades took him to Stuyvesant High School in Manhattan, then to Dartmouth.<sup>14</sup> At Oxford, he studied philosophy with Gilbert Ryle, H.L.A. Hart, Isaiah Berlin, and other greats, until he wearied of witnessing “the insular quality of the inquiries that then dominated the profession,” while reading about the civil rights struggles at home.<sup>15</sup>

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9. *Id.* at 21.

10. *Id.* at 4.

11. *Id.* at 117-27, 189-94.

12. JOHN BUNYAN, *THE PILGRIM’S PROGRESS* (Oxford World’s Classics 2003) (1678).

13. *Id.* at 163-64.

14. See Owen M. Fiss, *Curriculum Vitae*, YALE L. SCH. (Aug. 26, 2015), [http://law.yale.edu/sites/default/files/documents/faculty/fiss\\_cv.pdf](http://law.yale.edu/sites/default/files/documents/faculty/fiss_cv.pdf) [<http://perma.cc/77ZR-ZXF6>].

15. FISS, *supra* note 4, at 4.

His years in law school from 1961 to 1964, however, brought him no closer to the revolution. Fiss enrolled at Harvard “at a time when civil rights and the *Brown* ruling made only fleeting appearances in the curriculum.”<sup>16</sup> His teachers, almost all of them legal process theorists, channeled their patron saint, Felix Frankfurter.<sup>17</sup> Obsessed with the supposedly antidemocratic nature of judicial review—Alexander Bickel’s famed “counter-majoritarian difficulty”<sup>18</sup>—process theorists demanded better reasoning, more principled distinctions, and greater fidelity to the judicial role.<sup>19</sup> They mocked Chief Justice Warren for his questions about “whether a particular legal position was ‘just.’ Sophisticated legal scholars did not speak that way.”<sup>20</sup>

Fortuitously, however, Paul Freund, “in his kind, stately way,”<sup>21</sup> encouraged Fiss to write about the impact of *Brown v. Board of Education* on public school desegregation outside the South.<sup>22</sup> Fiss now escaped the intellectual prison of Harvard—as he portrays it—and found his calling. He would develop a legal process theory that enshrined reason and extolled the Warren Court and the Justices who handed down *Brown* as “public officials situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession.”<sup>23</sup> He would also become an exponent of legal liberalism, trust in the potential of federal courts, particularly the Warren Court, to produce positive, permanent change for the disempowered.

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16. *Id.*

17. For a more extended discussion of process theory and the atmosphere at Harvard during this period, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 30-51 (1996).

18. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 1986) (1962).

19. See, e.g., Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99-100 (1959) (suggesting that the Supreme Court should take fewer cases in order to have time to write adequately reasoned opinions); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286-91 (1973) (setting out the tenets of reasoned elaboration defining the legal process school). See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958) (organizing cases and materials around a process-centric vision of the law).

20. Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 11 (1993).

21. FISS, *supra* note 4, at 4.

22. The essay subsequently provided the basis for his first article. Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

23. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 11 (1986).

A. *Idols: Civil Rights Lawyers and Judges*

Fiss's two clerkships deepened his commitment to this project. Fittingly, his first trip outside New York came as a high school senior in 1955, when he toured the Supreme Court and saw Thurgood Marshall unsuccessfully urging the immediate desegregation of public elementary and secondary schools in the second, remedial phase of *Brown v. Board of Education*.<sup>24</sup> "A tall Black lawyer – set in a sea of white faces – was addressing the Justices, and all eyes were fixed on him," he writes of that "electrifying" moment.<sup>25</sup> At their clerkship interview eight years later, Marshall, then a Second Circuit judge, teased Fiss about his Harvard education, which the judge referred to "with a respectful disdain,"<sup>26</sup> and told stories, as the great raconteur continued to do through the clerkship year. Consequently, Fiss, Marshall's only clerk, uncomplainingly worked "late into the night to catch up on [his] assignments."<sup>27</sup>

During that "thrilling" year,<sup>28</sup> Fiss watched the unassuming Marshall resist Second Circuit powerhouses like Henry Friendly, who disapproved of the Warren Court's criminal procedure revolution.<sup>29</sup> Though it had taken the Senate almost a year to confirm Marshall's appointment, and he lacked the prestigious connections to Wall Street law firms that many of his new colleagues possessed, he bravely defended the Warren Court.<sup>30</sup> Fiss viewed Marshall's 1967 appointment to the Supreme Court as a "transcendent moment" in American history and for liberals.<sup>31</sup>

Alas, Richard Nixon's attack on the Warren Court in 1968 paid off, and the new President, with his four Court appointments, cut short the jubilation. As a result, Justice Marshall spent most of his tenure besieged by the conservative assault on *Brown*<sup>32</sup> and censuring his colleagues' rightward turn.<sup>33</sup> Think, for example, of Marshall's dissent in *Milliken v. Bradley*, condemning the majority's

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24. 349 U.S. 294 (1955); FISS, *supra* note 4, at 164.

25. FISS, *supra* note 4, at 19.

26. *Id.* at 20.

27. *Id.* at 23.

28. *Id.* at 21.

29. See, e.g., Fred P. Graham, *Court Scored by Top Judge Here: A Jurist Nixon May Name Urges Curbs on Liberal Trend*, N.Y. TIMES, Nov. 10, 1968, at 73.

30. FISS, *supra* note 4, at 22.

31. *Id.* at 24.

32. *Id.* at 25.

33. *Id.*

refusal to rule that intentional school segregation in one district justified multi-district busing as an “emasculat[i]on of our constitutional guarantee of equal protection of the laws.”<sup>34</sup> Yet, displays of temper remained rare. The Justice was a “passionate” but “disciplined” individual who loved the law for its “redemptive possibilities” and never lost sight of it as “a source of radical hope.”<sup>35</sup> With Marshall’s retirement in 1991, the country lost the twentieth century’s “most accomplished lawyer.”<sup>36</sup>

If Fiss counts Marshall as the greatest lawyer, he leaves no doubt that William Brennan, for whom he clerked from 1965 to 1966, was the Court’s best Justice. While Fiss acknowledges the important roles of the executive branch, Congress, and the civil rights and welfare rights movements, he claims that it was the Warren Court that transformed the nation:

In the 1950s, America was not a pretty sight. Jim Crow reigned supreme. Blacks were systematically disenfranchised and excluded from juries. State-fostered religious practices, such as school prayer, were pervasive. Legislatures were grossly gerrymandered and malapportioned. McCarthyism stifled dissent, and the jurisdiction of the censor over matters deemed obscene or libelous had no constitutional limits. The heavy hand of the criminal law threatened those who publicly provided information and advice about contraceptives, imperiling the most intimate of human relationships and exposing women to the burdens of unwanted pregnancies. The states had a virtually free hand in the administration of criminal justice. Trials often proceeded without counsel or jury. Convictions were allowed to stand even when they turned on illegally seized evidence or on statements extracted from the accused by coercion. There were no rules limiting the imposition of the death penalty. These features of the criminal justice system victimized the poor and disadvantaged. So too did the welfare system which was administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and the like. It was precisely these evils that the Warren Court, at the peak of its powers, so readily and ably took on.<sup>37</sup>

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34. 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).

35. FISS, *supra* note 4, at 26, 28.

36. *Id.* at 28.

37. *Id.* at 32-33.

Fiss credits the Court's success to Justice Brennan, its frequent spokesperson.<sup>38</sup> His abilities as statesman and lawyer made him the consensus-builder among the Justices and the Court's emissary to the profession. His opinions reflected "the vision that infused *Brown*" and inspired the young.<sup>39</sup> They also showed Justice Brennan's understanding that the more Justices he could enlist on an opinion, the greater authority the decision would command;<sup>40</sup> his concern that the Court speak authoritatively and effectively;<sup>41</sup> his care to avoid confrontations with the executive branch and Congress;<sup>42</sup> his command of the "vast bodies of learning, ancient and modern";<sup>43</sup> and his doctrinal dexterity. Justice Brennan's clerks marveled at his intellect, quickness, warmth, and irresistibility.<sup>44</sup> Though Audre Lorde warned that "the master's tools will never dismantle the master's house,"<sup>45</sup> Brennan used the tools of his trade to do just that.

But despite occasional victories after 1969, like *Roe v. Wade*<sup>46</sup> and *Bakke*,<sup>47</sup> Justice Brennan, like Justice Marshall, frequently found his colleagues immovable. During his second life as Associate Justice, Brennan became the epicenter of the resistance to the counterrevolution spearheaded by Justice, and later Chief Justice, William Rehnquist.<sup>48</sup> At law clerk gatherings, Justice Brennan would "wryly announce the tally of his dissents" to cheers,<sup>49</sup> but he reserved his pride for the instances where he had "miraculously" patched together a majority to save a bit of the Warren Court's handiwork.<sup>50</sup>

Save for such triumphs, many law professors and much of the legal profession perceived the Court "as an alien and hostile institution," increasingly inclined to protect the established order and demean its challengers.<sup>51</sup> Fiss believes

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38. *Id.* at 34-37.

39. *Id.* at 46.

40. *Id.* at 35.

41. *Id.* at 44.

42. *Id.* at 36.

43. *Id.*

44. *Id.* at 45.

45. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 25 (Cherrie Moraga & Gloria Anzaldua eds., 1983).

46. 410 U.S. 113 (1973).

47. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

48. FISS, *supra* note 4, at 40-43.

49. *Id.* at 43.

50. *Id.* at 41.

51. *Id.* at 45.



that this reaction contributed to the popularity of critical legal studies during the 1970s and 1980s, as well as “the nihilism it propagated with the proclamation that ‘law is politics.’”<sup>52</sup> That estrangement also explains for Fiss why Justice Brennan received more plaudits at his retirement than any Justice in history, except perhaps Justice Oliver Wendell Holmes.<sup>53</sup> In celebrating Brennan, “people were in part celebrating the liberal tradition that he helped to create and defend and that now seemed increasingly imperiled.”<sup>54</sup> Yet Fiss remains committed to the Court’s potential and presses us to make Brennan our model. “He resisted, tenaciously, and yet kept the faith – why can’t we?”<sup>55</sup>

At the Justice Department’s Civil Rights Division, where Fiss worked on cases implementing school desegregation and the Voting Rights Act from 1966 to 1968,<sup>56</sup> he encountered two other giants, Burke Marshall and John Doar. They had the task of administering the “civil rights revolution,” which was, he explains, “a most unusual, almost paradoxical revolution: a revolution by and through the law.”<sup>57</sup> The taciturn Robert Kennedy surprised many when he tapped the equally laconic Marshall,<sup>58</sup> a patrician Covington & Burling antitrust partner, to head the Civil Rights Division. But the choice demonstrated how force of character could transform an ordinary lawyer into a social justice warrior. Marshall filed scores of voting discrimination suits throughout the South and negotiated an end to segregation in many communities.<sup>59</sup> Occasionally, he employed force to desegregate institutions, though his commitment to federalism meant he did so less frequently than Fiss and other activists would have liked.<sup>60</sup> When Fiss and others nevertheless claimed Marshall as “our hero,” their paragon resisted.<sup>61</sup> “A hero, according to Burke, is someone who does more than one’s duty, a person who acts in a way that no one has a right to expect or demand.”<sup>62</sup> Civil rights activists and lawyers who risked their lives did that; he

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52. *Id.*

53. *Id.* at 31.

54. *Id.* at 41.

55. *Id.* at 47.

56. *Id.* at 5.

57. *Id.* at 49.

58. “Legend has it that . . . neither [Marshall nor Kennedy] said a word for the first ten minutes [during his job interview].” VICTOR S. NAVASKY, *KENNEDY JUSTICE* 161-62 (1971).

59. FISS, *supra* note 4, at 67.

60. *Id.* at 66-67.

61. *Id.* at 75.

62. *Id.*

himself, his job.<sup>63</sup> Fiss concludes that if Marshall was not a hero, “it was only because he saw the profession of law in such heroic terms” and as “an emphatically principled” endeavor.<sup>64</sup>

So did John Doar. This white Republican worked so hard and with such attention to detail—“Facts, facts, facts’ was his mantra”<sup>65</sup>—that he was absent when his second son was born, and his third waited six weeks before he received a name (Doar eventually chose “Burke”).<sup>66</sup> Doar’s courage was remarkable and repeated: He stood with James Meredith as he integrated the University of Mississippi, successfully prosecuted the murderers of civil rights workers, and supervised the march from Selma. After police clubbed, set dogs on, and arrested protestors enraged by the assassination of NAACP Field Secretary Medgar Evers, some responded with bricks and bottles until Doar intervened. Facing the mob, he proclaimed: “My name is John Doar . . . I am from the Department of Justice, and as anybody around here knows, I stand for what is right. Medgar Evers would not want it this way.”<sup>67</sup> Moved by the bravery that stemmed from Doar’s rectitude, the angry crowd dispersed.<sup>68</sup>

#### *B. Sympathetic Colleagues in Hyde Park and Nirvana*

Next to the likes of John Doar, law professors’ lives might seem thin gruel, but Fiss, who moved to the University of Chicago in 1968 and Yale in 1974, provides absorbing accounts of his supportive colleagues. He became an apprentice to one of Chicago’s few liberals, Harry Kalven, who possessed two qualities rare among academics—authentic genius and a “sunny disposition.”<sup>69</sup> A wordsmith, Kalven denigrated McCarthyism,<sup>70</sup> demonstrated endless “faith in the capacity

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63. *Id.* at 76.

64. *Id.* at 77.

65. *Id.* at 52.

66. *Id.* at 53.

67. *Id.* at 56.

68. *Id.* *Pillars of Justice* contains few source notes, and I confess to wondering whether this scene unrolled as Fiss described. It did. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963*, at 826-27 (1988); Claude Sitton, *27 Are Arrested in Jackson Riots After Evers Rite: Police Use Clubs and Dogs To Drive Back Negroes—U.S. Aide Calms Crowd*, N.Y. TIMES, June 16, 1963, at 1.

69. *Id.* at 82, 87.

70. *Id.* at 84.

of the law to work itself pure,”<sup>71</sup> defended “young turk” professors,<sup>72</sup> and delighted in students. “Can you imagine – a law professor of great scholarly distinction who truly loved students?” Fiss asks,<sup>73</sup> though he later says this description applies to himself as well.<sup>74</sup>

Yale was very different – liberal and quirkier. Fiss was first vetted for a job there in 1966. “Your professors at Harvard say you belong at Yale. What do they mean by that?” began one interviewer.<sup>75</sup> Whether Fiss received an offer, he does not say. He was lucky to spend the late sixties and early seventies elsewhere. During that period – sometimes referred to by survivors as “The Dark Ages” or “The Dark Years”<sup>76</sup> – Yale became a most unhappy place. The students, alive with concerns of the sixties, rebelled against the faculty,<sup>77</sup> sometimes with the support of the younger professors.<sup>78</sup> The senior faculty denied tenure to most juniors in what became known as “the slaughter of the innocents”<sup>79</sup> or “the ‘bloodbath.’”<sup>80</sup> Many at Yale became demoralized. When Fiss arrived in New Haven in 1974, Alexander Bickel – Yale’s most famous constitutional theorist – was dying, and senior professors were retiring or jumping ship.<sup>81</sup>

Nevertheless, Fiss fell in love with the place. With a convert’s zeal,<sup>82</sup> he pelted deans with “fissiles” for the next forty years, “accusing them of betraying the most sacred traditions of the school.”<sup>83</sup> To him, Dean Eugene Rostow, who led the school through one of its periodic transformations between 1955 and 1965, embodied Yale’s virtues. Though Rostow had branded *Korematsu v. United States*

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71. *Id.* at 89.

72. *Id.* at 87.

73. *Id.* at 85.

74. *Id.* at 193.

75. *Id.* at 190.

76. Laura Kalman, *The Dark Ages*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES 154, 197 (Anthony T. Kronman ed., 2004).

77. LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 68-97 (2005).

78. *Id.* at 261-66.

79. *Id.* at 234.

80. *Id.* at 314 (quoting Douglas Lavine, ‘Has the Faculty Lost Its Fizz?’ *Yale Law: Fork in the Road*, NAT’L L.J., June 29, 1981, at 26-27).

81. FISS, *supra* note 4, at 110.

82. *See id.* at 94, 191.

83. *Id.* at 191.

“a disaster,”<sup>84</sup> he always retained “faith in the Court as an instrument of public reason.”<sup>85</sup> And, in contrast to Harvard, Yale “embraced” *Brown*.<sup>86</sup> Under Rostow, Fiss maintains, the school “emerged as a great national institution, a bastion of the liberal tradition”<sup>87</sup> and “an academic law school.”<sup>88</sup> Rostow’s creative hiring enabled Yale to thrive.<sup>89</sup> He rebuilt and expanded the faculty by hiring dynamos like Bickel, Charles Black, Robert Bork, Guido Calabresi, Ronald Dworkin, Abraham Goldstein, Joseph Goldstein, Leon Lipson, Ellen Peters, Louis Pollak, Charles Reich, and Harry Wellington.<sup>90</sup> The faculty Rostow hired “was as brilliant, diverse, and eclectic a group of legal scholars as has ever been gathered at one law school in the country.”<sup>91</sup> As Fiss muses in his essay on Joe Goldstein, Yale also made the scholar “sovereign.”<sup>92</sup>

Such an institution can only prevail if professors are good citizens, and Arthur Leff was Yale’s “finest.”<sup>93</sup> When Fiss arrived at the battered school in 1974, he was astonished to find Leff, one of its most brilliant and beloved members, brewing coffee in the faculty lounge. That was just Leff’s “modest way of expressing the central tenet of his theory of citizenship: the highest duty of the citizen-scholar was to talk about ideas with others.”<sup>94</sup> So Leff wittily and wisely did. He joined the Legal Theory Workshop that Fiss and Bruce Ackerman launched. To maintain its emphasis on ideas, “it was never allowed to become an adjunct to the appointments process.”<sup>95</sup> Only scholars *not* expected to pass muster for a Yale appointment received invitations to present, and Leff “helped establish the one law that governed the workshop, the law of inverse relationship, which holds that the weaker the paper the better the discussion will be

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84. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 489-92 (1945); see also Sarah H. Ludington, *The Dogs That Did Not Bark: The Silence of the Legal Academy During World War II*, 60 J. LEGAL EDUC. 397, 398 (2011) (noting that Rostow was one of only two tenured law professors to voice disapproval of internment during World War II).

85. FISS, *supra* note 4, at 7.

86. *Id.* at 91-92.

87. *Id.* at 93.

88. *Id.* at 94.

89. KALMAN, *supra* note 77, at 48.

90. *Id.* at 49.

91. Douglas Lavine, ‘Has the Faculty Lost Its Fizz?’ *Yale Law: Fork in the Road*, NAT’L L.J., June 29, 1981, at 1.

92. FISS, *supra* note 4, at 129.

93. *Id.* at 113.

94. *Id.* at 109.

95. *Id.* at 101.

among those in the audience.”<sup>96</sup> He also tirelessly commented on others’ drafts, including “all thirty-two revisions of Bruce Ackerman’s manuscript for *Social Justice in the Liberal State*.”<sup>97</sup> He was the dream reader, rigorous but supportive.<sup>98</sup> Leff behaved this way because he knew that scholarship is “lonely,” and prepublication criticism an act of friendship and collegiality.<sup>99</sup>

Scholars like Ackerman and Fiss especially needed this companionship during the 1970s. They believed that “[t]he right of the judiciary to give meaning to our public values” rested on “the processual norms that simultaneously constrain and liberate those who exercise the judicial power.”<sup>100</sup> And they came to Yale at just the moment that the Burger Court, law and economics, and critical legal studies began menacing the hegemony of legal liberalism. Like Ackerman,<sup>101</sup> Fiss condemned both movements for endangering the primacy of reason and rejecting “law as a public ideal.”<sup>102</sup> Adherents of both schools, Fiss said, resisted “a jurisprudence, confidently embraced by the bar in the sixties, that sees adjudication as the process for interpreting and nurturing a public morality”<sup>103</sup> and did not deserve to participate in the process of defining law’s norms. Law and economics, with its emphasis on the efficiency of law, treated *Brown* and other cases as “a conflict over preferences” and charged judges with “maximizing the satisfaction of these conflicting preferences.”<sup>104</sup> Critical legal scholars reveled in exposing law’s “(to use their favorite term) ‘indeterminacy’”<sup>105</sup> and critiqued simply to promote critique,<sup>106</sup> a “politically unappealing and politically irresponsible” goal.<sup>107</sup> The victory of either movement would mean “the death of the law, as we have known it throughout history, and as we have come to admire it.”<sup>108</sup>

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96. *Id.* at 110.

97. *Id.* at 111.

98. *Id.*

99. *Id.*

100. Fiss, *supra* note 23, at 8.

101. See, e.g., Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929 (criticizing the Chicago school of law and economics and some strands of the critical legal studies movement).

102. Fiss, *supra* note 23, at 2.

103. *Id.*

104. *Id.* at 8.

105. *Id.* at 9.

106. *Id.* at 10.

107. *Id.*

108. *Id.* at 16.

So no wonder that Leff witnessed a “growing, and apparently terrifying, realization” gripping his colleagues as he made coffee – “that there cannot be any normative system ultimately based on anything except human will.”<sup>109</sup> The hopelessness of finding the objective foundations of justice that would make law fair and impartial, he maintained in 1979, meant “everything is up for grabs.”<sup>110</sup> Leff famously continued:

Nevertheless:  
 Napalming babies is bad.  
 Starving the poor is wicked.  
 Buying and selling each other is depraved.  
 Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot – and General Custer too – have earned salvation.  
 Those who acquiesced deserved to be damned.  
 There is in the world such a thing as evil.  
 [All together now:] Sez who?  
 God help us.<sup>111</sup>

### C. Friendly Critics

Fiss saw Leff’s “professed nihilism” as a pose “inconsistent with all that I knew about him.”<sup>112</sup> But their colleague, Robert Cover, the eminent legal historian, definitely lost the faith, Fiss sadly acknowledges. Where Fiss celebrated the anti-apartheid achievements of the federal courts because they grew out of membership in an interpretive community whose rules of adjudication bound and disciplined the players,<sup>113</sup> Cover supported those achievements because they suited his politics, and he wanted to see dissenters forced to knuckle under. He publicly accused Fiss of living in the world of the 1967 Warren Court.<sup>114</sup> Moreover, Cover claimed, by treating “the judiciary as a tribune of public reason, capable of giving means to the highest ideals of the nation,”<sup>115</sup> his friend refused to recognize its coerciveness.<sup>116</sup> Like all judges and Justices, Warren Burger was

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109. See Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1229-30.

110. *Id.* at 1249.

111. *Id.*

112. FISS, *supra* note 4, at 114.

113. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745, 762 (1982).

114. KALMAN, *supra* note 17, at 129-30.

115. FISS, *supra* note 4, at 159.

116. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 48 (1983).

a man of violence, Cover contended. While he would play the game of taking judicial mouthings seriously if it did any political good, the Warren Court was gone and Cover saw no reason to promote its despised successor by portraying Justices as sacred priests. The Justices' admirable commitments in *Brown* reflected their politics, and an opinion simply proclaiming an end to American apartheid would have been just as good, if not better than the one the Court produced.<sup>117</sup> To Fiss, Cover, like critical legal scholars, was destroying the distinction between law and politics<sup>118</sup> and was "betraying" the Warren Court.<sup>119</sup> The "romantic" moment when liberals could count on the federal courts had passed, Cover countered, and was doomed to become "a memory of the sublime sixties."<sup>120</sup>

Critical legal studies founder and venerable legal historian Morton Horwitz, another longtime sparring partner, had become a buddy at Stuyvesant. Fiss and Horwitz traveled to Washington together on that fateful trip to see Thurgood Marshall.<sup>121</sup> For his part, Fiss placed his faith in the law and the expectation that a discourse locating "fundamental values in the Constitution" and tasking Justices with articulating governing principles would "discipline" them and provide standards by which to judge them.<sup>122</sup> Horwitz did not,<sup>123</sup> and their debate extends to *Brown*. For Fiss, *Brown* is law. Judicial review can only be justified by "an appreciation of the role of the judiciary, as a nonmajoritarian institution, to vindicate constitutional principles, including the guarantee of equal protection."<sup>124</sup> *Brown* embodied the antistatutory principle and "condemned . . . any practice, even those that did not make distinctions based on race, that perpetuated the hierarchy among racial groups and that, in particular, subordinated Blacks."<sup>125</sup> For Horwitz, Fiss says, *Brown* is history. It is "a form of politics and, like any political event," depends on the past's "fortuities."<sup>126</sup> Horwitz rescued *Brown's* legitimacy—but only by tying the case to the growth of

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117. KALMAN, *supra* note 17, at 129-30.

118. FISS, *supra* note 4, at 160.

119. *Id.*; see also KALMAN, *supra* note 17, at 130.

120. FISS, *supra* note 4, at 161.

121. *Id.* at 163-64.

122. *Id.* at 173.

123. *Id.* at 169-70.

124. *Id.* at 168.

125. *Id.* at 120.

126. *Id.* at 166.

democracy as an ideal after World War II.<sup>127</sup> “In this way Horwitz saved *Brown* but, I fear, lost the law,” Fiss mourns.<sup>128</sup>

#### D. *Legal Cosmopolitans*

Faced with friends’ doubts about *Brown* and the existence of objective foundations of justice, Fiss looked to others outside the United States to enshrine reason in law.<sup>129</sup> In the mid-1980s, he began traveling to Argentina at the invitation of Carlos Nino, a brilliant and exuberant analytical philosopher and public intellectual.<sup>130</sup> Nino advised President Alfonsín during the reinstatement of democracy after the military junta’s brutal dictatorship,<sup>131</sup> developed Argentina’s human rights policies, and helped plan the first major war crimes trial since Nuremberg.<sup>132</sup> The decision to prosecute the big fish who led the junta while letting the smaller ones off the hook disappointed Nino.<sup>133</sup> Yet just as he played a pivotal role in restoring democracy, in its messiness, to Argentina, Nino worked to bring it and constitutional reform to countless other countries.<sup>134</sup> Fiss loved Nino, who held the position of visiting professor at Yale until his death,<sup>135</sup> “like the brother [he] never had.”<sup>136</sup>

Aharon Barak provided another source of inspiration and helped shape Fiss’s excoriation of the Roberts Court as the forum of antireason, given its inattentiveness to the freedoms of speech, privacy, and due process during the War

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127. *Id.* at 14, 166; cf. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* xii (1998) (arguing that during the Warren Court “[f]or the first time, democracy became the foundational value in American constitutional discourse”); Morton Horwitz & Orlando do Campo, *When and How the Supreme Court Found Democracy—A Computer Study*, 14 QUINNIPIAC L. REV. 1 (1994) (documenting the Supreme Court’s increasing use of the language of democracy).

128. FISS, *supra* note 4, at 14.

129. *Id.*

130. *Id.* at 140.

131. *Id.* at 139-40.

132. *Id.* at 144-46.

133. *Id.* at 146. Sadly, Alfonsín’s successor issued presidential pardons to the convicted big fish. Carlos S. Nino, *The Duty To Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2630 (1991).

134. FISS, *supra* note 4, at 147.

135. *Id.*

136. *Id.* at 150.



on Terror.<sup>137</sup> Fiss dedicated *A War Like No Other* to the legendary Barak,<sup>138</sup> who was spirited out of a Lithuanian ghetto during World War II as a youngster when the Nazis resolved to murder all Jewish children,<sup>139</sup> and who became a professor and dean of the law faculty at Hebrew University, then justice and later President of the Israeli Supreme Court.<sup>140</sup> A *Brown* fan and “a modern-day apostle of the Enlightenment,”<sup>141</sup> Barak created “a body of rulings [that] has become what *Brown* once was—a beacon for all the world,” Fiss writes.<sup>142</sup> His jurisprudence aimed at protecting the human dignity of Israel’s citizens and noncitizens that he considers essential to democracy.<sup>143</sup> In contrast to the American courts that caved in *Korematsu* and have time and again deferred to the government when it cited military necessity after 9/11,<sup>144</sup> Barak claims it is the judiciary’s duty to determine the appropriate balance between civil liberties and national security.<sup>145</sup> For Fiss, Barak’s belief that “‘law is everywhere’ . . . invite[s] us to imagine that every aspect of our public life, even war, can and should be governed by reason, and reason alone.”<sup>146</sup>

### E. Students

Students mostly hearten Fiss too. He had not known many women law students or lawyers or thought much about feminism, he says, before he met Catharine MacKinnon in the 1970s. He had attended three all-male institutions—Stuyvesant, Dartmouth, and University College, Oxford—and gone to Harvard Law School when its dean declared that he restricted women’s matriculation because they “were only looking for husbands” and would not practice law.<sup>147</sup> Fiss is ashamed of his and other male students’ acceptance of such chauvinism.

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137. See OWEN FISS, *A WAR LIKE NO OTHER: THE CONSTITUTION IN A TIME OF TERROR* (2015).

138. *Id.* at Dedication.

139. FISS, *supra* note 4, at 175.

140. *Id.* at 175-76.

141. *Id.* at 14, 186.

142. *Id.* at 14.

143. *Id.* at 180.

144. *Id.* at 183-85.

145. *Id.* at 182.

146. *Id.* at 186.

147. *Id.* at 117. For an account of the challenges faced by Fiss’s women classmates, see JUDITH RICHARDS HOPE, *PINSTRIPES & PEARLS: THE WOMEN OF THE HARVARD LAW SCHOOL CLASS OF ’64 WHO FORGED AN OLD-GIRL NETWORK AND PAVED THE WAY FOR FUTURE GENERATIONS* (2003).

“[W]e were living through a great social upheaval, maybe tantamount to a revolution, inspired by a passion for equality – we were the children of *Brown*. How could we – how could I – have remained silent in the face of practices that so grossly offended the principle of equal treatment?”<sup>148</sup>

He credits the charismatic MacKinnon, then beginning her pioneer work redefining sex discrimination, with helping him to see the relationship between racial and sexual inequality and between sexual inequality and free speech. Since no course on feminism existed, acting “on the assumption – long part of the folklore of Yale – that the best way to learn a subject was to teach it,”<sup>149</sup> Fiss was soon leading a seminar on feminist legal theory where MacKinnon’s work provoked debate. Once the discussion of sex became so charged that the women asked Fiss and the only other male participant to leave.<sup>150</sup> (“We refused.”<sup>151</sup>) Fiss himself wondered about MacKinnon’s “attack on the objectivity of the law.”<sup>152</sup> While he acknowledged that law had discriminated against women, of course he did not agree that it could never be objective.<sup>153</sup> In fact, he claims that “insofar as feminism is presented as a program of legal or constitutional reform seeking to guarantee women equal protection – to extend *Brown* to women – it must presuppose the fairness and impartiality of the law.”<sup>154</sup>

Ultimately, however, MacKinnon and all his other students in the “Eden”<sup>155</sup> that is Yale provide Fiss a hedge against despair. His colleagues joke that students are the best part of the place, but he recognizes the quip’s “kernel of truth.”<sup>156</sup> He considers his students his “proudest achievement,”<sup>157</sup> and relies on them “to realize [his] deepest dreams and hopes.”<sup>158</sup> For Fiss, “the golden age of American law began on May 17, 1954, and continued until the mid-1970s, when a newly constituted Supreme Court began its disheartening project of denying the redemptive possibilities and promise of *Brown v. Board of Education*.”<sup>159</sup> He is certain in his “heart of hearts . . . that someday soon the golden age of American

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148. FISS, *supra* note 4, at 118.

149. *Id.* at 121.

150. *Id.* at 122.

151. *Id.*

152. *Id.* at 124.

153. *Id.* at 125.

154. *Id.*

155. *Id.* at 189.

156. *Id.* at 192.

157. *Id.* at 193.

158. *Id.*

159. *Id.* at 194.

law will once again come into being and will be carried on the shoulders of a new generation, determined to turn the lessons they learned in the classroom into a living truth.”<sup>160</sup> By situating his devotion to the Warren Court and “the golden age of American law” in the context of his own life, Fiss has enabled us to understand why legal liberalism seemed such a revelation to him and why he clings to it so tenaciously.

## II. REFLECTIONS

This book is so good that it seems churlish to observe that a different one could be written about the aging of *Brown* and the Warren Court, the history of Yale, legal education, the future of legal liberalism, and the sacrifices involved. Yet, it seems appropriate because Fiss so enjoys debating ideas. Fiss knows he possesses the truth, and his affinity for absolutes makes him comfortable commanding what “we” should do and determining who deserves to participate in the conversation without worrying that he seems arrogant. “How can it be that he is such a good friend, sounding board and guide at the same time that he remains so resolute, so adamant, in his rectitude[],”<sup>161</sup> colleague Robert Burt once mused. The answer, he suggested, lay in Fiss’s “personal character, joined with his intellectual commitment to equality.”<sup>162</sup> So while mine is a rave review, I also question his quest – in the Fissian spirit.

### A. *The Aging of Brown and the Warren Court*

We begin with Fiss’s treatment of *Brown* and his affirmation that it sparked the civil rights movement through its invocation of the antistatutory principle.<sup>163</sup> In fact, historians of the South believe the civil rights revolution dates back to the interwar period.<sup>164</sup> Nor did *Brown* spark Martin Luther King’s Montgomery Bus Boycott. And where King sought to mobilize civil rights activists through direct action, Thurgood Marshall trusted in the federal courts to end

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160. *Id.*

161. Robert A. Burt, *The Truth About Owen Fiss*, 58 U. MIAMI L. REV. 83, 83 (2003).

162. *Id.* at 96.

163. See *supra* note 125 and accompanying text.

164. See GLENDA ELIZABETH GILMORE, *DEFYING DIXIE, THE RADICAL ROOTS OF CIVIL RIGHTS: 1919-1950* (2008); Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1235 (2005).

Montgomery's bus segregation and branded the boycott "street theater."<sup>165</sup> Yet the reigning narrative still casts *Brown* as the cradle of change,<sup>166</sup> even though many academic lawyers aligned with liberalism and the left, including a number of Fiss's students, have articulated their disappointment with *Brown* and the Warren Court from different political and disciplinary perspectives. Fiss pays these critics little attention.

As a fellow legal liberal, I am also tempted to gild the lily. Marshall's careful design for victory in *Brown* provided the template for public interest litigation. Thus Pauli Murray likened sex discrimination to racial discrimination during the 1960s and pushed the women's movement to emulate the NAACP's strategy.<sup>167</sup> Thus Ruth Bader Ginsburg made Marshall's "step-by-step, incremental approach" her model when she litigated gender equality during the 1970s.<sup>168</sup> Thus gay rights advocates during the 1960s relied on the race-sexuality analogy to situate themselves as a legal minority.<sup>169</sup> Thus Joe Biden called the Supreme Court's 2015 decision in *Obergefell v. Hodges* that the same-sex marriage bans violated the Equal Protection and Due Process Clauses the "*Brown v. Board of Education*" of the gay rights movement.<sup>170</sup> No surprise, then, that Adam Liptak wrote in 2006 that *Brown* remains law's "sacred text."<sup>171</sup> While early Harvard-trained process theorists argued that *Brown* deserved better justification, even they swallowed their doubts to worship at *Brown*'s shrine.<sup>172</sup>

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165. CHARLES L. ZELDEN, THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION 116-20 (2013); see HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA 154-57 (1998).

166. See, e.g., *Brown v. Board of Education*, N.Y. TIMES (May 16, 2004), <http://www.nytimes.com/2004/05/16/opinion/brown-v-board-of-education.html> [<http://perma.cc/YU58-HHXX>].

167. Serena Mayeri, Note, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045, 1056-63 (2001).

168. Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW REPUBLIC (Sept. 28, 2014), <http://newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> [<http://perma.cc/69E2-3JFK>].

169. Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 318, 340-41 (2009).

170. Jordan Fabian, *Biden Compares Gay Marriage Ruling to 'Brown v. Board of Education'*, HILL (July 10, 2015), <http://thehill.com/blogs/blog-briefing-room/247482-biden-compares-gay-marriage-ruling-to-brown-v-board-of-education> [<http://perma.cc/Q4L6-LG65>].

171. Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES (Dec. 10, 2006), <http://www.nytimes.com/2006/12/10/weekinreview/10liptak.html> [<http://perma.cc/8QMG-QYYJ>].

172. KALMAN, *supra* note 17, at 30-36.

So while Fiss's claim must sound strange to those growing up in our nonheroic age, he rightly insists that *Brown* and the Warren Court inspired many (including me) to enroll in law school during the 1960s and 1970s when liberals still dominated the legal academy. The *Yale Law Journal's* editors observed that Earl Warren "made us all proud to be lawyers,"<sup>173</sup> while their Harvard counterparts dedicated an issue to "Chief Justice Earl Warren, who with courage and compassion led a reform of the law while the other branches of government delayed."<sup>174</sup> The Warren Court convinced law students to see the federal courts as the great engine of social change.<sup>175</sup>

Yet time has proven unkind to Fiss's triumphal history. Critical legal studies and law and economics shattered the consensus in the legal academy. Neither the author nor his pillars show much interest in law and economics, except as a danger,<sup>176</sup> and Fiss's target audience is politically left of center. Perhaps a book meant to inspire and instruct that group would have proved even more powerful had it explored the doubts that developed about *Brown* and the Warren Court and explained why we should disregard skeptics.

*Brown* initially kindled hope for change. In January 1954, Thurgood Marshall predicted that school desegregation would occur in "four or five years,"<sup>177</sup> and he sounded positive even after the Court's declaration in *Brown II* that desegregation need only occur "with all deliberate speed."<sup>178</sup> ("How the fuck do you have 'all deliberate speed?'" There's a contradiction in those terms," a journalist recalled him noting privately.<sup>179</sup>) So, too, despite the lack of progress in integrating Southern schools,<sup>180</sup> Linda Brown said in 1964, "That decision carries my name,

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173. Dedication, 84 YALE L.J. 405 (1975).

174. Archibald Cox, *Chief Justice Earl Warren*, 83 HARV L. REV. 1, 1 (1969).

175. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 804 (1971).

176. See, e.g., Morton J. Horowitz, *Law and Economics: Science or Politics*, 8 HOFSTRA L. REV. 905 (1980) (criticizing law and economics); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (same). Nor did they or Fiss seem overly interested in the progressive version of law and economics that was emerging in New Haven. See generally Laura Kalman, *Some Thoughts About Yale and Guido*, 77 L. & CONTEMP. PROBLEMS 15 (2014).

177. Associated Press, 'Upheaval' Doubted if School Bias Ends, N.Y. TIMES, Jan. 24, 1954, at 34.

178. 349 U.S. 294, 301 (1955); see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 746-48 (1987).

179. CARL ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 237 (1993).

180. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS '63, at 63 (1963).

and through this decision many of the people of my race were helped to obtain better and equal opportunities.”<sup>181</sup> Even the attorney for Kansas eventually sounded happy he lost the case,<sup>182</sup> which journalist Anthony Lewis claimed in 1964 “launched ‘the racial decade in America’—ten years of irreversible revolution in the pattern of Negro-white relations.”<sup>183</sup>

And, by Fiss’s move to Yale at *Brown*’s twentieth anniversary, real progress had occurred. Some conservatives had traded in talk that African American Southerners “are, by comparison with the Whites, retarded”<sup>184</sup> for the rhetoric of colorblindness.<sup>185</sup> Fiss recognized early that the right’s claim that *Brown* embraced the antidiscrimination principle imperiled legal liberalism and its insistence that the decision committed the state to battle subordination.<sup>186</sup> But the new language represented progress. By the mid-1970s, many also saw that *Brown* and its progeny, along with civil rights legislation, had increased the power of state institutions to defeat racial inequality.<sup>187</sup>

From there, it was downhill. By the time *Brown* turned twenty-five, Linda Brown, now the parent of school-age children, was intervening in litigation challenging the continued Topeka school segregation.<sup>188</sup> Her case had not yet come to trial by the time of the decision’s thirtieth birthday,<sup>189</sup> a somber occasion for

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181. A.L., *The Brown Case*, N.Y. TIMES MAG., May 10, 1964, at 93.
182. Paul E. Wilson, *Brown v. Board of Education Revisited*, 12 U. KAN. L. REV. 507, 523-24 (1964).
183. Anthony Lewis, *Since the Supreme Court Spoke*, N.Y. TIMES MAG, May 10, 1964, at 9; see also Relman Morin, *School Desegregation: A Look at Past 10 Years*, L.A. TIMES, May 17, 1964, at E6.
184. Ben DiMiero, *National Review’s Ugly Civil Rights History: Conservative Magazine Tries To Re-Appropriate the Civil Rights Movement*, MEDIA MATTERS (Aug. 28, 2013), <http://www.mediamatters.org/blog/2013/08/28/national-reviews-ugly-civil-rights-history/195638> [<http://perma.cc/NVR6-FDM7>].
185. NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 235 (2005).
186. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 172-73 (1976); cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 864 (2007) (Breyer, J., dissenting) (explaining that since *Brown*, “the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools”).
187. Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 S. CT. REV. 59, 90 (2010).
188. *Brown v. Board of Education*, 84 F.R.D. 386 (D. Kan. 1979); *Topeka Case Still Alive*, N.Y. TIMES, May 17, 1984, at B18; *This Time It’s Brown’s Daughter Versus the Board of Education*, ST. LOUIS POST-DISPATCH, Dec. 31, 1989, at 7D.
189. RAYMOND WALTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 273 (1984) (“[I]ntegration has been a failure in four of the five *Brown* school districts.”); Walter Goodman, *Brown v. Board of Education: Uneven Results 30 Years Later*, N.Y. TIMES, May 17, 1984, at B18.

civil rights activists.<sup>190</sup> She had lost at the district level by *Brown's* thirty-fifth.<sup>191</sup> By its fortieth, Linda Brown had prevailed at the Tenth Circuit, where a majority ruled that “there is a current condition of segregation in Topeka . . . causally connected to the prior *de jure* system of segregation.”<sup>192</sup> But by that point, the disenchantment with his landmark decision probably had Earl Warren spinning in his grave—or, perhaps, glumly walking around Heaven “with all deliberate speed.”<sup>193</sup>

Leave aside the resegregation that a more conservative Court had permitted, even encouraged, since the mid-1970s,<sup>194</sup> and focus on the original decision itself. One did not need to be a process theorist to find *Brown* fuzzy. Did it make *school* segregation or, as the Court subsequently seemed to suggest without explanation,<sup>195</sup> *all* segregation unconstitutional? Did it put an end to legally enforced segregation or require integration?<sup>196</sup>

By the 1980s and 1990s, moreover, white critical legal scholars less sympathetic to *Brown* than Horwitz charged that it underscored the peril of the rights-consciousness it promoted. Until then, in a rare instance of accord, liberals and the more radical left both largely cheered the Warren Court.<sup>197</sup> Now the left lambasted it for providing the underclass big promises and little protection. So what if the Warren Court launched the rights revolution? “Rights are indeterminate,

190. Jacqueline Trescott, *Unfinished Business: Marking an Anniversary at the NAACP Fund Dinner*, WASH. POST, May 18, 1984, at B1. “I knew we had problems ahead,” Marshall said of *Brown* to Carl Rowan in 1986, “but I sure as hell never imagined we’d get to this sad state of affairs.” ROWAN, *supra* note 179, at 250.

191. *Brown v. Bd. of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987).

192. *Brown v. Bd. of Educ.*, 892 F.2d. 851, 886 (10th Cir. 1989).

193. See William Celis 3d, *Forty Years After Brown, Segregation Persists*, N.Y. TIMES (May 18, 1994), <http://www.nytimes.com/1994/05/18/us/40-years-after-brown-segregation-persists.html> [<http://perma.cc/4JXE-DZ36>].

194. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597 (2003).

195. KLUGER, *supra* note 178, at 750–51 (1987).

196. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 294–98 (2000) (discussing the Supreme Court’s careful distinction between the two and choice of wording in its opinion).

197. See Joan Roelofs, *The Warren Court and Corporate Capitalism*, 39 TELOS 94, 94 (1979) (“Contemporary left-wing critics of American institutions either ignore the Supreme Court, or accept the liberal view of it. That view, particularly as applied to the Court during Warren’s Chief Justiceship (1953–1969), is that the Court was benign, that it acted as a counterweight to oppressive measures of the ‘political’ branches, that it did not participate in ‘cold war’ policies, that its major decisions had nothing to do with economic developments, and that its influence has been highly ‘progressive.’”).

rights limit our imaginations, rights inhibit political and social change,”<sup>198</sup> contended critical legal scholars. The emphasis on individual rights favored procedure over substance, served as a pressure valve permitting injustice, damaged the development of community, and prevented transformative social change. The legal system awarded an occasional victory like *Brown*, then handed down a *Brown II* deferring exercise of the right.<sup>199</sup> Perhaps *Brown* itself was no win. Since making “separate but equal” truly equal proved costly, the Court preserved the status quo and deprived African Americans of “just cause for complaint” by ruling separate unequal.<sup>200</sup>

Consequently, when Fiss discussed the “we” who “undertook the Second Reconstruction and tried to build the Great Society,” derogated critical legal scholars and others who made all normative issues subjective,<sup>201</sup> and declaimed the duty of all to follow the Warren Court in using law to shape equality and public morality,<sup>202</sup> critical legal scholars and postmodernists proved unmoved.<sup>203</sup> Some derogated his use of the constitutive “we” and scorned Fiss for ignoring the extent to which the individual, law, and truth were socially and culturally constructed. Critical legal scholar and feminist Clare Dalton, for example, shunned his invitation “to join his community of faith” as long as she used “his prayer book” at worship.<sup>204</sup> Fiss’s “authoritarian strategy . . . is attempting to force us to relive *the past* . . . and not just the past, but *his past* as *The Law*,”<sup>205</sup> griped one postmodernist who sought to bury normativity.<sup>206</sup>

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198. William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, at 266, 294 (Michael J. Lacey & Knud Haakonssen eds., 1992).

199. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1057 (1978).

200. Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 717 (1992).

201. Fiss, *supra* note 23, at 15.

202. *Id.*

203. For a discussion of the relationship between critical legal studies and postmodernism, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 126 (1995).

204. Clare Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN’S L.J. 1, 7 (1989).

205. Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1677 (1991); see also Louis Michael Seidman, *J. Skelly Wright and the Limits of Legal Liberalism*, 61 LOYOLA L. REV. 69, 89 (2015) (pointing out the “unacceptably authoritarian” nature of legal liberalism to its critics).

206. See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).



Also left unmentioned by Fiss is that by the 1990s, many African Americans doubted *Brown*. To be sure, some critical race theorists like Patricia Williams affirmed the value of rights, and implicitly, *Brown*.<sup>207</sup> Others, however, claimed that integration just deepened antagonism between the races because, as Alex Johnson said, *Brown* “fails to acknowledge the existence of a unique African-American community with its own *nomos* and values.”<sup>208</sup> Critical race theorist and former NAACP lawyer Derrick Bell came to recognize law’s inability and refusal to erase racism.<sup>209</sup> School desegregation devastated black administrators, teachers, schools, and communities, some now contended.<sup>210</sup> Justice Clarence Thomas wrote that *Brown*’s suggestion that “black students suffer an unspecified psychological harm from segregation” reflected “an assumption of black inferiority.”<sup>211</sup> Meanwhile, after braving white mobs to desegregate Central High School in Little Rock and prompting the litigation leading to *Cooper v. Aaron*,<sup>212</sup> Elizabeth Eckford announced she no longer believed “integration was one of the most desired things” and appreciated her “blackness” now.<sup>213</sup> Little Rock police shot and killed her son, Erin.<sup>214</sup> At fifty-one, Linda Brown now admitted she was disheartened and tired.<sup>215</sup>

So, too, we do not hear from Fiss that legal historians piled on as *Brown*’s fortieth birthday neared. Civil rights reform was Cold War policy, maintained

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207. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. REV. 401, 431 (1987) (“‘Rights’ feels so new in the mouths of most black people.”).

208. Alex Johnson, *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1403 (1993).

209. Compare DERRICK BELL, AND WE ARE NOT SAVED (1987) (arguing that African Americans must continue to press the courts for relief), with DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1993) (recognizing law’s inability and refusal to erase racism).

210. DAVID S. CECELSKI, ALONG FREEDOM ROAD: HYDE COUNTY, NORTH CAROLINA AND THE FATE OF BLACK SCHOOLS IN THE SOUTH 15 (1994).

211. *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

212. 358 U.S. 1 (1958).

213. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 208 (2002).

214. David Margolick, *Through a Lens, Darkly*, VANITY FAIR (Sept. 2007), <http://www.vanityfair.com/news/2007/09/littlerock200709> [<http://perma.cc/5YG7-ETY7>]; Associated Press, *Son of a Civil Rights Trailblazer is Killed*, L.A. TIMES (Jan. 3, 2003), <http://articles.latimes.com/2003/jan/03/nation/na-littlerock3> [<http://perma.cc/M73Q-U2FV>].

215. William Celis III, *Aftermath of '54 Ruling Disheartens the Browns*, N.Y. TIMES (May 18, 1994), <http://www.nytimes.com/1994/05/18/us/aftermath-of-54-ruling-disheartens-the-browns.html> [<http://perma.cc/DVK3-2C3M>].

his former student,<sup>216</sup> legal historian Mary Dudziak.<sup>217</sup> *Brown* reflected liberals' realization that racism undermined America's anticommunist crusade and democratic pretensions,<sup>218</sup> and the forces that made *Brown* possible meant that the image of change proved more important than reality.<sup>219</sup> Michael Klarman contended that *Brown* halted the mellowing of race relations in the South and hardened white resistance.<sup>220</sup> Given such dour evaluations and the sense that it had received quite enough attention already, other legal historians of the civil rights movement began moving beyond *Brown*.<sup>221</sup>

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216. Email from Mary Dudziak, Asa Griggs Candler Professor of Law, Emory Univ. Sch. of Law, to author (Aug. 25, 2017, 9:05:10 PM PDT) (on file with author).

217. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) [hereinafter Dudziak, *Desegregation*]; MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) [hereinafter DUDZIAK, COLD WAR CIVIL RIGHTS].

218. Dudziak, *Desegregation*, *supra* note 217, at 65-70, 73-113.

219. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 217, 11, 104; Dudziak, *Desegregation*, *supra* note 217, at 118-19. Other historians in the twenty-first century would demonstrate how the Cold War limited the options of civil rights lawyers. Kenneth Mack has shown how Thurgood Marshall and others rewrote the NAACP's history in the context of the Cold War and *Brown* to say that the eyes had always been on the school desegregation prize. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 268-69 (2005). Risa Goluboff demonstrated that in the fifteen years before *Brown*, "the world of civil rights was conceptually, doctrinally, and constitutionally, up for grabs." Risa L. Goluboff, THE LOST PROMISE OF CIVIL RIGHTS 5 (2007). That world included workers' rights and challenges to state-supported private segregation. According to Goluboff, however, after World War II ended, the anticommunist climate of the Cold War, their own relative indifference to economic inequality, and other factors sent NAACP lawyers off on an "increasingly single-minded" drive to topple state-mandated segregation that resulted in the "marginalization" of cases involving African American industrial workers. *Id.* at 218, 227. *But see* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 135-54 (2014) (arguing, as another former Fiss student, that the NAACP's labor constitutionalism remained intact during the 1960s and led to a paradigmatic victory in NLRB case law against racialized economic oppression in *Hughes Tool*, 147 N.L.R.B. 1573 (1964)); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 L. & HIST. REV. 327 (2008); Email from Sophia Lee, Professor of Law and History, Univ. Penn. Law Sch., to author (Aug. 25, 2017, 9:52:11 AM PDT) (on file with author).

220. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter*, 83 GEO. L.J. 433 (1994); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

221. Risa L. Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312 (2013).

Meanwhile, political scientist Gerald Rosenberg contended that *Brown* did nothing positive at all. Why did lawyers cling to their “endless attempt to canonize”<sup>222</sup> it and ignore fruitful ways of achieving change, like involvement in electoral politics and grassroots mobilization?<sup>223</sup> In *The Hollow Hope: Can Courts Bring About Social Change?*, Rosenberg presented data to argue that they “seldom” could.<sup>224</sup> As he acknowledged, that was a tough sale to make to law professors.<sup>225</sup> Some professors, including Fiss, ignored the noise and continued lighting candles to the Warren Court, legal liberalism, and judicial activism as the decision entered its fifth and sixth decades.<sup>226</sup>

Some, but by no means all. When Fiss’s colleague, Jack Balkin, asked “the nation’s top legal experts” to rewrite *Brown* close to its fiftieth anniversary, all revised it substantially.<sup>227</sup> One would expect nothing less from law professors, but the eagerness to tamper with “sacred text” proved striking.<sup>228</sup> And although former NAACP Chairman Julian Bond insisted that *Brown* was “the cause for sober celebration, not impotent dismay,”<sup>229</sup> Charles Ogletree concluded that “the important goal of full equality in education following slavery and Jim Crow segregation was compromised from the beginning.”<sup>230</sup> Lani Guinier similarly grieved that the brilliant *Brown* lawyers proved “unable to kindle a populist revolution” that taught Americans racism was evil.<sup>231</sup> Perhaps instead of focusing on ending de jure school segregation, Marshall and the Supreme Court should

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222. Gerald N. Rosenberg, *Brown Is Dead! Long Live Brown!: The Endless Attempt To Canonize a Case*, 80 VA. L. REV. 161 (1994).

223. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 343 (1991).

224. *Id.* at 341.

225. “That old dead horse of judicial efficacy rears up with a vengeance that is sometimes quite frightening.” Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 L. & SOC. INQUIRY 761, 776 (1992).

226. See, e.g., JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 187* (1994) (calling *Brown* “the most important Supreme Court decision of the century, maybe ever”); Richard Sobel, *A Colloquy with Jack Greenberg About Brown: Experiences and Reflections* 14 CONST. COMMENT. 347, 362-63 (1997) (denouncing Rosenberg’s “preposterous” attempt to discredit judicial activism).

227. *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 34 (Jack M. Balkin ed., 2002).

228. See *supra* text accompanying note 171.

229. Julian Bond, *With All Deliberate Speed: Brown v. Board of Education*, 90 IND. L.J. 1671, 1672 (2013).

230. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* xv, 307 (2004).

231. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 117 (2004).

have devoted their energies to making separate education for African Americans genuinely equal to that provided to whites,<sup>232</sup> or focused on eradicating the state-sponsored residential segregation that existed throughout the United States.<sup>233</sup>

Fiss also neglects the broader critique of the Warren Court emerging by the twenty-first century. Consider criminal procedure and sex discrimination. Even had its successors not gutted *Miranda*<sup>234</sup> and *Mapp*,<sup>235</sup> the Warren Court's attempts to reduce the gulf between rich and poor defendants increased the divide, according to William Stuntz.<sup>236</sup> Its efforts launched an army of diligent but overworked public defenders who relegated indigent clients, a disproportionate number of whom were black or brown, to "prison America"<sup>237</sup> by prompting them to accept guilty pleas that reduced the period of their incarceration instead of fighting for acquittals.<sup>238</sup> In focusing on regulating police behavior and criminal procedure instead of substantive criminal law, the Warren Court made criminal trials "more elaborate."<sup>239</sup> The rush toward plea bargaining, however, which

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232. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFILLED HOPES FOR RACIAL REFORM* 21-27 (2004); Irving L. Joyner, *Pimping Brown v. Board of Education: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160, 185-200 (2013).

233. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 242 (2017).

234. *Miranda v. Arizona*, 348 U.S. 436 (1966) (creating a police duty to inform suspects in custody of their Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel); see, e.g., *New York v. Quarles*, 467 U.S. 649 (1984) (justifying an exception to the duty to provide *Miranda* warnings where a defendant is a threat to public safety); *North Carolina v. Butler*, 441 U.S. 369 (1979) (establishing that there is no need for express written or oral waiver of a suspect's *Miranda* rights); *Harris v. New York*, 401 U.S. 222 (1971) (allowing the use of confessions obtained without *Miranda* warnings to impeach defendants who take the stand in their own defense).

235. *Mapp v. Ohio*, 367 U.S. 643 (1961) (establishing that evidence obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures must be excluded from state criminal law prosecutions); see, e.g., *Herring v. United States*, 555 U.S. 135 (2009) (establishing that the "good faith" exception to the exclusionary rule applies when police error is the result of isolated negligence); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (establishing a "special needs" exception to the protection against warrantless searches); *United States v. Leon*, 468 U.S. 897 (1984) (establishing a "good faith" exception to the exclusionary rule).

236. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 218 (2011); see, e.g., Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15 (2016); Anders Walker, "To Corral and Control the Ghetto": *Stop, Frisk, and the Geography of Freedom*, 48 U. RICH. L. REV. 1223 (2014).

237. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

238. GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 194-204* (2003).

239. STUNTZ, *supra* note 236, at 236.

it largely ignored,<sup>240</sup> and which the Burger Court promoted,<sup>241</sup> made trials less frequent.<sup>242</sup> The Warren Court's concentration on policing the police also made crime a political flashpoint and prompted legislators competing for the "tough on crime" moniker to define crimes and sentences more punitively to cause the mass incarceration of people of color and the poor.<sup>243</sup>

Further, as Justin Driver noted, the Warren Court sometimes demonstrated a constitutional conservatism that liberals overlooked.<sup>244</sup> In the realm of sex discrimination, it handed down *Hoyt v. Florida*,<sup>245</sup> holding that a state statute automatically exempting women from juries did not violate the Equal Protection Clause. Given *Brown*, feminists made a smart strategic decision to litigate sex discrimination by analogizing it to racial discrimination.<sup>246</sup> But Fiss's student, Serena Mayeri, showed that, at the same time Fiss was meeting MacKinnon in the mid-1970s, the troubled economy and rise of conservatism were exposing the limitations of the race-sex analogy.<sup>247</sup> It turned out that in key decisions, like *Geduldig v. Aiello*<sup>248</sup> and *Personnel Administrator of Massachusetts v. Feeney*,<sup>249</sup> the Court used the race-sex analogy to women's disadvantage.<sup>250</sup> And though Fiss counts *Roe* and *Bakke* as partial wins,<sup>251</sup> the courtroom successes of abortion and affirmative action contributed to backlashes against both.<sup>252</sup>

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240. *But see* *Boykin v. Alabama*, 395 U.S. 238 (1969) (insisting, at least, that the plea be voluntary); *United States v. Jackson*, 390 U.S. 570 (1968) (striking down the death penalty clause of the Federal Kidnapping Act because it encouraged guilty pleas). *See generally* Comment, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

241. MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 57-58 (2016).

242. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 816-17 (2006).

243. *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2006-07 (2008).

244. Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101 (2012).

245. 368 U.S. 57 (1961).

246. SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 105 (2011).

247. *Id.* at 105; Email from Serena Mayeri, Professor of Law and History, Univ. of Pa. Law Sch., to author (Oct. 10, 2017 2:44:19 PM PDT) (on file with author).

248. 417 U.S. 484 (1974).

249. 442 U.S. 256 (1979).

250. *See* MAYERI, *supra* note 246 at 95, 141.

251. They "survive by the narrowest of margins" and "define the outer limits of the law, without generative power of their own." FISS, *supra* note 4, at 41.

252. *See, e.g.*, Sigal Alon, *How Diversity Destroyed Affirmative Action*, NATION (Dec. 16, 2015), <http://www.thenation.com/article/how-diversity-destroyed-affirmative-action> [http://perma.cc

These trends raised the question of whether relying on the federal courts to achieve social change was in fact a good strategy – or made sense only when Congress and the President saw themselves as the judiciary’s partners and the Court’s work reflected majority will. Indeed, borrowing from political scientists, some scholars in the twenty-first century argued that Fiss and other cheerleaders got it wrong. The Warren Court was not nonmajoritarian or countermajoritarian, but majoritarian and possessed substantial support.<sup>253</sup>

Although Fiss shows some awareness of this possibility,<sup>254</sup> he suggests that “in 1968, history took a new turn”<sup>255</sup> and conservatism triumphed when the Senate thumbed its nose at the Court by rejecting LBJ’s nomination of liberal Justice Abe Fortas as Chief Justice. Thus Nixon was able to name Warren’s successor, a disaster for legal liberalism, given the Burger Court’s “crucial role in establishing the conservative legal foundation for the even more conservative Courts that followed.”<sup>256</sup> But that implies the inevitability of Chief Justice Warren Burger, when in fact, many – and crucially, many in the Senate – still backed the Warren Court and legal liberalism. Fortas was vulnerable, not just because he sided with the Warren majority, but because of his role as presidential adviser from the bench and his financial indiscretion.<sup>257</sup> Had LBJ nominated Brennan or another liberal instead of Fortas, confirmation might have occurred,<sup>258</sup> Nixon might have had but three vacancies, and constitutional law might have followed a liberal direction longer. Talk about lost opportunities!

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/4SB8-3FB6]; David Lauter, *Affirmative Action Split the U.S. and the Courts*, L.A. TIMES (Dec. 15, 1999), <http://articles.latimes.com/1999/dec/15/local/me-44160> [<http://perma.cc/KG99-XXMN>]. *But see* Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L. J. 2028, 2034 (2011) (challenging accepted wisdom that *Roe v. Wade* is “the sole and sufficient cause of political polarization around abortion”).

253. See, for example, Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511 (2007), which responds to Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

254. FISS, *supra* note 4, at 33 (“At critical junctures [the Warren Court] looked to the executive and legislative branches for support. . . . Yet it is also true that the Warren Court spurred the great changes of the period.”).

255. FISS, *supra* note 4, at 37.

256. GRAETZ & GREENHOUSE, *supra* note 241, at 344.

257. LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* 148–50, 166–68 (2017).

258. *Id.* at 177–79, 312.

## B. Yale Law School

If *Brown*, the Warren Court, and legal liberalism are close to Fiss's heart, so too, of course, is Yale. In this Section, I query his version of the school's history, beginning with his dismissal of legal realism and his claim that Eugene Rostow made the modern school "a bastion of the liberal tradition."<sup>259</sup> I also question his vision of legal education.

### 1. Legal Realism at Yale

Oddly, "legal realism" receives just one mention in *Pillars of Justice*, where Fiss writes it off as a "school of thought that advanced the unremarkable proposition that judges are people and are subject to the same impulses that govern all of us."<sup>260</sup> By dismissing realism, whose history and impact on Yale and the legal academy I briefly summarize, Fiss skews Yale's and legal liberalism's histories. Admittedly, I have a dog in this fight because I have written two books about Yale that place legal realism at the core of its identity,<sup>261</sup> but to think of Yale without legal realism is akin to imagining Harvard without process theory.

Fiss's dismissal of legal realism is also strange because law professors tend to treat realism as the jurisprudential divide between the old order and modernity. Adopting a "generous" definition of legal realism,<sup>262</sup> academics describe as "realist" anyone who participated in undermining classical legal thought<sup>263</sup> by developing "a more philosophically and politically enlightened jurisprudence."<sup>264</sup> Thus Holmes marked himself a legal realist when he proclaimed that "[t]he life of the law has not been logic: it has been experience"<sup>265</sup> and pilloried Harvard's Christopher Columbus Langdell as "the greatest living legal theologian," whose "ideal in the law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as system."<sup>266</sup> (Langdell had declared law a science and that all

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<sup>259</sup> FISS, *supra* note 4, at 93.

<sup>260</sup> *Id.* at 20.

<sup>261</sup> See LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 98-144 (1986) [hereinafter KALMAN, LEGAL REALISM AT YALE]; KALMAN, *supra* note 77, at 19.

<sup>262</sup> AMERICAN LEGAL REALISM, at xiii (William W. Fisher III et al. eds 1993).

<sup>263</sup> See, e.g., *id.*; MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169-70, 182-85 (1992); DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT, at ix-xxvi (2006).

<sup>264</sup> AMERICAN LEGAL REALISM, *supra* note 262, at xiv.

<sup>265</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

<sup>266</sup> Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880).

available materials of that science were contained in printed books;<sup>267</sup> then, as dean of Harvard, he turned students towards a close reading of appellate opinions that forced them to derive a few fundamental rules, principles, and concepts that the clever lawyer and judge could reconcile.<sup>268</sup>) The realists also encompassed sociological jurists during the early twentieth century like Roscoe Pound and Felix Frankfurter of Harvard, Benjamin Cardozo, and Louis Brandeis.<sup>269</sup> This camp further includes those who labeled themselves realists during the movement's heyday in the late 1920s and 1930s.<sup>270</sup> Seen in this broad way, realism set the agenda for modern legal thought.<sup>271</sup>

Whether or not you accept this big tent definition of legal realism,<sup>272</sup> it was not jurisprudentially distinctive. Well before the realists, Pound urged lawyers to switch their focus from law in books to law in action,<sup>273</sup> the effects of legal doctrine and the social sciences illuminating them, in his famous – and unoriginal<sup>274</sup> – call for the proto-realism he named sociological jurisprudence.<sup>275</sup> But in a turnabout,<sup>276</sup> Pound made every effort to keep sociological jurisprudence from tainting legal education when he served as Harvard Law dean from 1916 to 1936.<sup>277</sup> At the same time, the prospect of legal certainty dwindled as an intellectual revolution against abstraction after Darwin's discovery of evolution shifted

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267. CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vi (1871).
268. BRUCE KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, at 193, 204-05 (2005).
269. HORWITZ, *supra* note 263, at 169-70.
270. Even then, who the realists are is a subject of contention. N.E.H. HULL, *ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* 178-217, 343-46 (1997).
271. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 65 (1995) (contrasting its unparalleled influence with the “indeterminacy of its conceptual and thematic boundaries”).
272. Not all 1920s and 1930s realists would have done so. *Id.* at 76-77 (underlining the insistence of realists, in particular Llewellyn, in separating their intellectual enterprise from that of forerunners such as Justices Holmes and Cardozo).
273. Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12, 20 (1910) (critiquing the insistence on legal formalism and underlining the need for judicial discretion and flexibility).
274. HULL, *supra* note 270, at 78 (noting the variety of sources from which Pound formed his sociological approach); *see also* DUXBURY, *supra* note 271, at 54-58 (cataloging the influences on Pound's critique of legal formalism).
275. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 1), 24 *HARV. L. REV.* 591, 594 (1911); *see also* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 *HARV. L. REV.* 489, 489 (1912).
276. DUXBURY, *supra* note 271, at 62.
277. *See* KALMAN, *supra* note 17, at 45-61 (recounting tensions at Harvard Law School during this period).



the spotlight from the study of structure to operations, or function,<sup>278</sup> and litigation exploded, along with the casebooks revealing a welter of conflicting precedents.<sup>279</sup>

Enter the Yale realists to ride to the rescue, which makes Fiss's minimization of their work all the more confusing. After promising beginnings at Columbia<sup>280</sup> and Johns Hopkins petered out,<sup>281</sup> Yale led the charge. Taking the helm in 1927, twenty-seven-year-old Dean Robert Maynard Hutchins launched Yale's venture into realism – and product differentiation. He hired three professors without law degrees – a psychologist, a political scientist, and an economist – and announced that faculty and students would engage in interdisciplinary scholarship.<sup>282</sup> Stuck in a backwater between two great law schools in two great cities, he had to do something to win attention for Yale.

Hutchins's successor, Charles Clark, who steered the law school through the 1930s while drafting the Federal Rules of Civil Procedure, inherited and added to a marquee of figures who gave the school its identity. Call the roll of professors ranked as realists during the 1920s and 1930s, and you find many at Yale, in addition to Clark and Hutchins: Thurman Arnold, Walter Wheeler Cook, William O. Douglas, Abe Fortas, Jerome Frank, Leon Green, Walton Hamilton, Karl Llewellyn, Underhill Moore, Wesley Sturges, and Leon Tulin. All legal realism required was the visibility it received when Frank attacked the fruitless search for legal certainty by Pound and his fellow Harvardian, Joseph Beale, in the controversial 1930 book, *Law and the Modern Mind*.<sup>283</sup> Meanwhile, Llewellyn asserted that “‘sociological jurisprudence’ remains bare of most of that [which] is significant in sociology.”<sup>284</sup> Given the pettiness of academic politics, the charges and countercharges between Pound and the realists escalated until Llewellyn and Frank read what had come before out of the canon and spawned a false sense of rupture between the realists and their intellectual progenitors.<sup>285</sup>

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278. *Id.* at 15-17 (sketching the move away from structuralism to functionalism in the 1920s).

279. *Id.* at 17.

280. JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 300-03 (1955); see also Brainerd Currie, *The Materials of Law Study*, 8 J. LEGAL ED. 1, 2 (1955) (pt. 3).

281. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 147-210 (1995).

282. KALMAN, *supra* note 17, at 105-12.

283. JEROME FRANK, LAW AND THE MODERN MIND 4-5 (6th prt. 2009) (taking aim at Roscoe Pound's “patently superficial” response to popular skepticism of legal practice).

284. Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930).

285. HULL, *supra* note 270, at 176-219.

Irreverence and impertinence pervaded the realist corpus during the 1930s. Langdell and Harvard proved irresistible targets; “Pound-pounding,”<sup>286</sup> an indoor sport. Realists condemned the American Law Institute’s Restatement, which worked to lessen legal uncertainty by clearly and simply restating the law and its correct principles.<sup>287</sup> Many of its authors were Harvard professors, including Beale, who reduced the field of conflicts to the principles of vested rights and territoriality.<sup>288</sup> The realists mocked him in doggerel and with neologisms (“ibealistic,” “Bealy-mouthed”).<sup>289</sup> The realists made scholarship fun—if you were not their quarry.

But legal realism at Yale had a serious side. It sought to increase law’s predictability by acknowledging that legal rules and principles, as traditionally derived by the Restatement’s authors and others, did not guarantee legal certainty, and by demonstrating how those rules and principles actually took shape.<sup>290</sup> By highlighting the role of human idiosyncrasy in judicial decision making, focusing on factual context, and borrowing from the social sciences, most realists hoped to make law a more predictable, efficient policy tool.<sup>291</sup> They distinguished between the judge’s decision about a case and his opinion, which they sometimes treated as its rationalization.<sup>292</sup> They preached functionalism and the classification of doctrines, rules, principles, and concepts by factual context.<sup>293</sup> A realist scholar, for example, might observe that in contractual disputes, whether the activity involved building a house or providing services routinely affected the judicial determination of whether substantial performance had occurred.<sup>294</sup> Classification according to facts, then, could restore order from chaos and make

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286. Stephen Presser, *Revising the Conservative Tradition: Towards A New American Legal History*, 52 N.Y.U. L. REV. 700, 712 n.29 (1977).

287. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 6-10, 21-24, 46 (1997); see also KALMAN, LEGAL REALISM AT YALE, *supra* note 261, 25-28 (reviewing the various critiques at Yale, which was “recognized . . . as the center of opposition to the restatement”).

288. JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW* (1916).

289. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 25-26.

290. Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 57-58 (1930).

291. Not all realists were reformers, but most were, though some left the impression they did not care much about anything. See KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 20-21.

292. See, e.g., Max Radin, *The Theory of Judicial Decisions: Or How Judges Think*, 11 ABA J. 357, 359 (1925).

293. See, e.g., KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 22-24, 29-31; Arnold, *supra* note 290, at 57-58.

294. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 151 (1928).

the future course of law clearer. In emphasizing factual context as well as legal concepts, realists created a new legal geography.<sup>295</sup>

Once they saw the notion of a rational man operating in a free market ruled by an invisible hand was fantasy, confronting the myth of laissez-faire and realizing private law was public law logically followed.<sup>296</sup> The realists' assault on the boundary between public and private was part and parcel of their functionalism, and grew from their concern with marketplace operations.<sup>297</sup> Private law interested them more than it did Frankfurter and other predecessors,<sup>298</sup> and in observing that coercion is at the heart of all bargains, public or private, realists also transformed the distinction between public and private into a continuum.<sup>299</sup> The use of institutional economics by Columbia's Robert Hale and Yale's Walton Hamilton to shatter this distinction pointed to another realist goal that would haunt Yale Law School and legal scholarship: "integrating" law with the social sciences and enlisting interdisciplinarity in making law a policy tool.<sup>300</sup> Hutchins and Clark used such empirical methods to discover "the actual operation of the law" and to justify the school's smallness and selectiveness.<sup>301</sup>

*Pace* Fiss, then, realists pointed to the role idiosyncrasy sometimes played in decision making, preached that factual context was as important as legal doctrine, and promoted the social sciences. Their jurisprudential program should have caused no consternation among lawyers and judges who had lapped up Pound, Brandeis, Frankfurter, and Cardozo. But it did. Traditionalists and sociological jurists portrayed the realists as nihilists who undermined the usefulness of legal rules without putting anything in their place,<sup>302</sup> explained judicial opinions on the basis of what judges ate for breakfast,<sup>303</sup> and imbued all decisions of authorities, no matter how illegitimate, with the authority of law.<sup>304</sup>

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295. Thurman W. Arnold, *The Jurisprudence of Edward S. Robinson*, 46 YALE L.J. 128, 128-83 (1937).

296. BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 13 (2001).

297. DUXBURY, *supra* note 271, at 106-07.

298. *Id.* at 200 ("[L]egal realism remained a private law jurisprudence in a public law world . . .").

299. *Id.* at 109-11.

300. *Id.* at 130.

301. KALMAN, *supra* note 77, at 33-34.

302. See, e.g., Josef Kunz, Book Review, 8 OHIO ST. U. L.J. 243, 244 (1942); Philip Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669, 672 (1936).

303. FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 129 (2009) (suggesting the unfairness of this caricature for Frank, who is most often held responsible for it).

304. EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 161-62 (1973).

Most importantly for Yale's history, the realists shocked many by combining pedagogy and politics. They worked to transform traditional legal education, which Harvard left alone,<sup>305</sup> and became linked to the Roosevelt Administration.<sup>306</sup> At the same time that he scandalized white Southerners as General Counsel of FDR's Agriculture Adjustment Administration,<sup>307</sup> for example, Jerome Frank bellowed that legal realism made the New Deal possible<sup>308</sup> and baited Harvard by branding Langdell "a brilliant neurotic" who seduced American legal education by introducing the case method.<sup>309</sup> "To study . . . eviscerated judicial expositions as the principal bases of forecasts of future judicial action is to delude oneself"<sup>310</sup> and was like training "prospective dog breeders" with "stuffed dogs," Frank claimed.<sup>311</sup> He advocated the case method's replacement with a clinical-lawyer school that would place the clinic and office at the core of the curriculum and include academics who had practiced law for a significant period.<sup>312</sup> His Yale contemporaries treated Frank as a beloved iconoclast and did nothing for the moment to implement his expensive program.<sup>313</sup> But clinical education became important in the academy,<sup>314</sup> especially at Yale,<sup>315</sup> and the school later named its primary clinic after him.<sup>316</sup>

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305. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 45-58.

306. *See id.* at 129-36; Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL, *supra* note 76, at 74, 85-89; Marcus J. Curtis, *Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence*, 27 YALE J.L. & HUMAN. 157 (2015).

307. ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL, 1933-1935, in 2 THE AGE OF ROOSEVELT 77-81 (1951).

308. Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1063, 1064 (1934).

309. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 225 (1949). For a demonstration that Frank and the realists were unfair to Langdell, see Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 LAW & HIST REV. 277, 304-06 (2004).

310. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 912 (1933).

311. *Id.*

312. *Id.* at 914-16.

313. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 172-73.

314. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 214 (1983).

315. *See* discussion *infra* Section II.C.

316. *Jerome N. Frank Legal Services Organization (LSO)*, YALE L. SCH. (2017), <http://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/jerome-n-frank-legal-services-organization-lso> [<http://perma.cc/4F2V-6HD9>].

While sharing Frank's Harvard-bashing,<sup>317</sup> most Yale realists sought a modest makeover of education that kept appellate opinions and legal doctrine central and created an agenda for the future. Where traditionalists reveled in using analytical skills to teach students that all cases were "consistent," realists employed theirs to reveal inconsistencies and to prove that law was neither easily predictable nor determinate.<sup>318</sup> At a time of constitutional and administrative law ferment, realists showed their students that law was not autonomous and that social, political, and economic forces all shaped and were shaped by public *and* private law. They gave old courses new "functional titles": Corporations and Agency became yoked together in Business Organizations.<sup>319</sup> They exalted the functional approach in their casebooks, where they sometimes organized topics according to fact pattern, instead of legal concept (for example, by relegating Mrs. Palsgraf to the section on traffic and transportation, instead of proximate cause).<sup>320</sup> They flirted with the social sciences by changing the titles of their casebooks from "Cases on X" to "Cases and Materials on Y"<sup>321</sup> and conducting expensive, frequently dreary, empirical research into legal institutions.<sup>322</sup> Though most agreed that realists made ineffective use of the social sciences,<sup>323</sup> with but few exceptions,<sup>324</sup> they did put interdisciplinary legal research and education front and center on the agenda. Future academic lawyers worked at integrating the law school with the university. That so many now possess a PhD and JD is just one testament to realism's impact.<sup>325</sup> The realists created the template for the modern law school and set the agenda for contemporary legal education.

Thus, Yale realists dressed up law study in the 1930s, when their school found its contemporary niche as the anti-Harvard, a boutique spot for legal intellectuals and policy wonks.<sup>326</sup> Naturally, Cantabridgians criticized them, and Frankfurter complained that their "overjazzing" of legal education and their

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317. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 119.

318. Leon H. Keyserling, *Social Objectives in Legal Education*, 33 COLUM. L. REV. 437, 446 n.28 (1933).

319. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 9, 85-86.

320. *Id.* at 87-88.

321. STEVENS, *supra* note 314, at 158.

322. SCHLEGEL, *supra* note 281, at 211.

323. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 95; SCHLEGEL, *supra* note 281, at 211.

324. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 92-93.

325. *See infra* Section II.B.

326. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 113-15.

“smartaleck, wisecracking” cynicism just reflected their Harvard inferiority complex.<sup>327</sup> Reasonable people can disagree about whether Frankfurter was right, but the realists breathed new life into Yale.

Yale became a liberal bastion and the center of the academic study of law during the New Deal, not during Rostow’s deanship, as Fiss claims. While academics elsewhere also joined the New Deal, Charles Clark differed from most deans by glorying in Yale’s association with it.<sup>328</sup> The faculty defined itself by its progressive politics, legal thought, and approach to education. Postwar professors continued laboring in a deep-rooted vineyard. They championed civil liberties and civil rights by, among other things,<sup>329</sup> joining with the NAACP to litigate *Brown*;<sup>330</sup> bringing early decisions championing the right to birth control;<sup>331</sup> defending communists and government employees accused of disloyalty during the Second Red Scare;<sup>332</sup> and urging abolition of the House Committee on Un-American Activities.<sup>333</sup> As in the thirties, their controversial work took guts,<sup>334</sup> and Yale Law professors’ politics tested its university’s presidents.<sup>335</sup>

Since legal realism gave Yale its mystique, it is no wonder that the school has absolutely reveled in its relationship to it. As Rostow, himself “a shovel-carrying [l]egal [r]ealist” who joined the faculty during the heady 1930s,<sup>336</sup> maintained, the movement had long “represented the prevailing approach to legal studies at the Yale Law School to a greater extent than has been the case in any other law faculty of the world.”<sup>337</sup> Ronald Dworkin told the *New York Times* in the 1960s that “if you wanted to get rid of realism at Yale you’d have to flush out the place

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327. *Id.* at 142.

328. *Id.* at 131-34.

329. *Id.* at 148-49, 158-63, 195-99.

330. *Id.* at 203.

331. DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 152-80 (1994).

332. KALMAN, *LEGAL REALISM AT YALE*, *supra* note 261, at 194-99.

333. *Id.* at 158.

334. *Id.* at 147-64, 195-99.

335. *Id.*; Gaddis Smith, *Politics and the Law School: The View from Woodbridge Hall, 1921-1963*, in *HISTORY OF THE YALE LAW SCHOOL*, *supra* note 76, at 138.

336. Leon Lipson, *Eugene Rostow*, 94 *YALE L.J.* 1329, 1330 (1985); see also Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 *ROCKY MOUNTAIN L. REV.* 123 (1962) (explaining Rostow’s advocacy for legal realist principles).

337. EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW*, at xv (1962).

for three years and fumigate the halls.”<sup>338</sup> Look on Yale’s website today and you will find the boast that legal realism has made doctrine “less conceptual and more empirical” and “has reshaped the way American lawyers understand the function of legal rules and of courts and judges.”<sup>339</sup>

Acknowledgment of the significance of realism to Yale is missing from *Pillars*. While Fiss’s particular brand of process theory played a role in creating legal liberalism and the contemporary Yale, legal realism did as well. Indeed, legal realism sustained *Brown* and the Warren Court until Fiss and others remodeled process theory to celebrate them. Why does Fiss think Yale “embraced” *Brown*? For better or worse, it was the ultimate realist opinion.<sup>340</sup> It was functional because the Court justified it by stressing the special nature of education.<sup>341</sup> It relied on social science, though its (in)famous footnote 11 proved flawed.<sup>342</sup> It showcased law’s potential to change policy. Indeed, Kenneth Mack has shown the great civil rights lawyer Charles Hamilton Houston, Thurgood Marshall’s mentor, was steeped in legal realism,<sup>343</sup> yearned to integrate law and the social sciences,<sup>344</sup> and called for “the functional teaching of law.”<sup>345</sup> Legal liberalism certainly encompasses more than legal realism, but realism constitutes one crucial “pillar” of legal liberalism.

Why would Fiss want to ignore Yale’s realist history? One reason is that he is a product of Harvard, an institution that, paradoxically, has historically shown little sympathy for legal realism while marginalizing Yale’s contribution to it.<sup>346</sup> Further, as Arthur Leff said, realism remained frightening even after the New

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338. Victor S. Navasky, *The Yales vs. The Harvards (Legal Division)*, N.Y. TIMES MAG., Sept. 11, 1966, at 144.

339. *Our History*, YALE L. SCH., <http://law.yale.edu/about-yale-law-school/g glance/our-history> [<http://perma.cc/3YF6-CBTB>].

340. See William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795 (2004).

341. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954). This is not to say, however, that the Warren Court was always a “realist” one. As we have seen, for example, it subsequently relied on *Brown* to suggest segregation everywhere was unconstitutional. See *supra* text accompanying note 197.

342. See Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 292-95 (2005).

343. See KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 43 (2012); Mack, *supra* note 219, at 308-18.

344. MACK, *supra* note 343, at 43.

345. *Id.* at 45.

346. KALMAN, LEGAL REALISM AT YALE, *supra* note 261, at 55-66; Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1062-74 (1993).

Deal.<sup>347</sup> It was partly the realist legacy that left professors despairing about the possibility of objective foundations of justice.<sup>348</sup> Some worried that realism unduly empowered unsympathetic judges and justices, especially after legal liberals lost the Court in 1969.

Moreover, *Pillars* is aspirational. Fiss's Harvard professors turned to legal process theory as a way to discipline law in the post-realist world. They sometimes implied that much as they approved of the Warren Court's politics, students must "choose between rejecting progressive judicial positions for lack of coherent, principled rationales and abandoning the commitment to principle in frank or disguised result-orientedness."<sup>349</sup> Like other legal liberals,<sup>350</sup> Fiss has worked ceaselessly to prove his teachers wrong. Indeed, during the 1970s, thanks partly to him, Yale emerged as the center of "the new legal process," a politically liberal and avowedly reformist version of legal process theory that concentrated on continuing the conversation in search of public values.<sup>351</sup> The new legal process tamed the insights of legal realism,<sup>352</sup> and expanded without exploding the traditional legal process ideal of law as collectively exercised reason. Even so, though, realism remains an important part of Yale's history and legal liberalism.

Fiss may also wash realism out of his school's past because critical legal scholars, a number of whom attended or taught at Yale during "the Dark Ages,"<sup>353</sup> honored realism's exposure of indeterminacy by rooting their movement in it and adopting its cheekiness.<sup>354</sup> Some at Yale dismissed critical legal studies by writing it off as warmed-over legal realism;<sup>355</sup> Fiss, despite his fondness for Horowitz, excoriated its effort "to unmask" law.<sup>356</sup> Critical legal studies drove many of Fiss's Yale colleagues bonkers too. It represented a threat because it insisted law was politics; it went beyond legal realism to demonstrate that law veiled the value systems of all decision makers, not just individual judges'; its critique of

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347. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 454 (1974).

348. *Id.*

349. *With the Editors . . .*, 83 HARV. L. REV. at xxvi (1969).

350. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

351. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 239-41 (1983).

352. KALMAN, *supra* note 77, at 291-94.

353. *Id.* at 282.

354. *Id.* at 282-83.

355. *Id.* at 288-89.

356. *Id.* at 172.



rights challenged the Warren Court's rights revolution; it shredded its challengers; and it reeked of the 1960s' New Left and counterculture.<sup>357</sup> Critical legal studies "never took hold at Yale, or perhaps to put it more cynically was not allowed to take hold there, certainly not in its most virulent form," Fiss acknowledges.<sup>358</sup> (I maintain that the cynic's view is correct.<sup>359</sup>) As he recognizes, during the late twentieth century, "Yale Law School became the home of what was generally, though not entirely with affection, referred to as 'central [center?] liberalism.'"<sup>360</sup>

Of course, not everyone considered Yale centrist. When Fiss testified against the Supreme Court nomination of his former colleague Robert Bork in 1987,<sup>361</sup> Republican senators wanted to know whether he really had told his students that he knew no one who had voted for Ronald Reagan, as the *Wall Street Journal* reported.<sup>362</sup> Fiss's answer: He probably had but was just jokingly showing how out of touch he and other academics were.<sup>363</sup> Nor was Yale just the home of centrist liberalism. Gathering all those liberals together may have had the unintended consequence of galvanizing some students on the left and right to attack them. Why else would Yale become the cradle of critical legal studies and the Federalist Society?<sup>364</sup>

## 2. *Legal Education at Yale and Beyond*

With or without legal realism, I believe Yale is almost as glorious as Fiss portrays it. The professors who "define the school"<sup>365</sup> are, and should be, Rostow taught him, quirky and wacky. "The Yale faculty is indeed crazy, but crazy in the best sense: intellectually restless, unwilling to accept conventional accounts of

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357. *Id.* at 281-89.

358. FISS, *supra* note 4, at 173.

359. KALMAN, *supra* note 77, at 287-90.

360. FISS, *supra* note 4, at 173.

361. *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 2491-2513 (1987) (statement of Owen M. Fiss, Professor, Yale Law School).

362. *Id.* at 2720-21; L. Gordon Crovitz, Editorial, *Meet the Legal Extremists*, WALL ST. J., Sept. 22, 1987, at 32.

363. *Nomination of Robert H. Bork*, *supra* note 361, at 2720-21.

364. STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 138-39, 166 (2008).

365. FISS, *supra* note 4, at 97.

anything; boldly and defiantly crossing all disciplinary boundaries; and determined to push and push the law, sometimes even beyond all sensible limits,” Fiss proudly declares.<sup>366</sup> While he studied civil rights litigation at Chicago, at Yale he began writing “articles with titles like . . . ‘The Forms of Justice.’”<sup>367</sup>

Scholarship and teaching are mutually reinforcing. Strikingly, despite its small size, Yale produced more academic lawyers than any other law school in the country between 1995 and 2011,<sup>368</sup> though, as Fiss observes, most graduates become practitioners.<sup>369</sup> Many professors possess advanced degrees in other disciplines, although, Fiss disarmingly confesses, “none of us perceive the absence of such training as a limitation on our capacity to profess on those subjects.”<sup>370</sup> Yale professors are supposed to allow their imaginations to take flight in the classroom. Fiss becomes “notorious at the Yale Law School for throwing out the Federal Rules of Civil Procedure on the first day of his procedure class,”<sup>371</sup> and his students nickname it “Metaprocedure” (“to distinguish it from ‘real’ procedure”).<sup>372</sup> The Yale catalogue is full of offerings like “Tragic Choices” and “Myth, Law, and History?”<sup>373</sup> though Fiss reports that Yale pays ample attention to skills training as well.<sup>374</sup> It has long possessed one of the country’s great clinical programs.<sup>375</sup>

While most law schools encourage faculty members to publish what they please, at Yale “this ethos is extended to the classroom, allowing each professor the freedom – relinquished only at the rarest moments – to decide what to teach, how to teach, even when to teach.”<sup>376</sup> The school functions in a state of “organized anarchy,” Fiss observes.<sup>377</sup> In a telling anecdote, Fiss wryly recalls his anger when Leff asked the Dean for a list of courses that required covering, then taught

366. *Id.* at 190.

367. *Id.* at 95.

368. *Top Producers of Law Teachers at the Leading Law Schools Since 1995*, BRIAN LEITER’S L. SCH. RANKINGS (Jan. 31, 2011), [http://leiterrankings.com/new/2011\\_LawTeachers.shtml](http://leiterrankings.com/new/2011_LawTeachers.shtml) [<http://perma.cc/8QWS-5HPJ>].

369. FISS, *supra* note 4, at 95.

370. *Id.* at 98.

371. Paul W. Kahn, *Owen Fiss: Heroism in the Law*, 58 U. MIAMI L. REV. 103, 106 (2003).

372. FISS, *supra* note 4, at 134.

373. *Id.* at 95.

374. *Id.* at 96.

375. Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504 (1999).

376. FISS, *supra* note 4, at 99.

377. *Id.* at 98.

one. “Imagine discussing a teaching program with the Dean? The Registrar maybe, but never the Dean.”<sup>378</sup> Like Kobe beef cows, Yale’s academics deserve to live like kings. It is “a professor’s job to decide what is educationally desirable and the Dean’s to find funds to support this decision.”<sup>379</sup>

That means there are no Friday afternoon classes, necessary courses are not offered because no one wants to teach them, it is hard for students “to construct a sequence of courses that leads to a progressively greater proficiency in a particular subject,”<sup>380</sup> and the curriculum seems redundant, Fiss admits. One semester saw five seminars on judicial review — “several called just that, and others hidden behind Yale-sounding euphemisms such as ‘Constitutional Theory’ or ‘Slavery, the Constitution, and the Supreme Court.’”<sup>381</sup> So what?

At Yale the essential educational experience consists of the exchange of ideas between students and faculty, and the character and quality of that exchange depend on what each participant has to say. Every member of the faculty could teach a course on judicial review, and indeed use the same cases and material, and yet, I can assure you, there would be no true redundancy.<sup>382</sup>

His Yale is an oasis in, while setting the standard for, the legal academy. Since the Great Recession, the legal profession—as measured by the plunge in law school applications, the growing student-debt burden, and disasters in Big Law—has seemed at times on the verge of implosion.<sup>383</sup> Fiss says nothing about such problems, and liberal elite law graduates can still draw inspiration from this book even if they struggle with upwards of \$200,000 in loans.<sup>384</sup> Fiss does not need to address such issues because Yale navigates serenely across troubled waters. By virtue of its many famous graduates in law and politics, it

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378. *Id.* at 113.

379. *Id.* at 131.

380. *Id.* at 100.

381. *Id.* at 99.

382. *Id.*

383. See, e.g., STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013).

384. Can liberal graduates of “lesser” law schools, who have the same debt burden, make it? They lack the credentials to become law professors, and the few public interest jobs that still exist probably go to graduates of elite schools.

is a celebrity in its own right.<sup>385</sup> It is “insulated” from the decline in applicants.<sup>386</sup> Thanks to the shrewdness of Dean Guido Calabresi in negotiating the school’s financial semi-independence from the university during the 1980s,<sup>387</sup> the school is loaded.<sup>388</sup> “What other institution in all the world,” Fiss rightly once asked a colleague, “would so generously support all our endeavors in Latin America – so ambitious, so unprecedented, and so expensive?”<sup>389</sup> Moreover, when I taught at the law school during the spring 2001 semester, I found its students every bit as spectacular and exhilarating as he maintains.

Yet their considerable stress, then as now,<sup>390</sup> suggests that Yale may be an “Eden” only for its teachers – and, perhaps, for white male law students with well-educated, usually well-off, college-educated parents who remain the yardsticks against which to measure others. Fiss recognizes that MacKinnon’s lesson that sex inequalities remain everywhere still rings true, though he argues that feminism has had so many successes that it “has in some ways lost its radical

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385. Kalman, *supra* note 76, at 211-12.

386. Karen Sloan, *Outgoing Yale Law Dean Says School Is “Reinvigorated,”* NAT’L L.J. (May 11, 2017), <http://www.law.com/sites/almstaff/2017/05/11/outgoing-yale-law-dean-says-school-is-reinvigorated> [<http://perma.cc/6JAG-3GKT>].

387. Kalman, *supra* note 76, at 209.

388. Jingui Cui, *Robert Post Leaves a Flourishing Yale Law School*, YALE DAILY NEWS (Apr. 27, 2017), <http://yaledailynews.com/blog/2017/04/27/robert-post-leaves-a-flourishing-yale-law> [<http://perma.cc/EUV4-AZ59>]; Sloan, *supra* note 386.

389. Owen M. Fiss, *The Odd Couple*, 125 YALE L.J. 801, 805 (2016).

390. See *Falling Through the Cracks: A Report on Mental Health at Yale Law School*, YALE L. SCH. MENTAL HEALTH ALLIANCE 34 (2014), [http://law.yale.edu/system/files/falling\\_through\\_the\\_cracks\\_120614.pdf](http://law.yale.edu/system/files/falling_through_the_cracks_120614.pdf) [<http://perma.cc/Q5LH-8WP5>] (“Regardless of their mental state at matriculation, many students perceived the ‘pressure cooker’ environment of the law school as encouraging over-commitment, isolation, and a widespread perception that activities promoting mental health are indulgent or unnecessary. While Yale has a reputation as an unusually warm and caring law school, students suggested that the ‘illusion of a stress-free environment’ carries with it ‘an implicit undertone’ that there is something wrong with students who are struggling psychologically.”).

edge” and “has been normalized.”<sup>391</sup> Its victories, he notes, include the addition of feminist legal theorists to the Yale faculty<sup>392</sup>—although not MacKinnon, despite a 1990 student boycott of classes aimed at winning her tenure.<sup>393</sup> Yet he writes movingly of a luncheon with women who

described in painful detail the dynamics in my first-semester procedure class that they felt had the effect of silencing women students: sharp responses by me to some women students; my willingness to recognize students, usually men, who repeatedly volunteered comments in class; my failure to pose questions that might reasonably be expected to elicit a response from women; and a tendency to recognize only the men who happened to cluster around the podium to talk to me after class.<sup>394</sup>

And as Fiss admits, despite increased enrollment of women and the presence of more women on the faculty, recent studies demonstrate that plenty of women find the school alienating and feel the sting of discrimination,<sup>395</sup> though that problem is hardly unique to Yale.<sup>396</sup> The same is true for students of color, LGBTQ students, first-generation college graduates, and those conservatives who concerned the Senate Judiciary Committee.<sup>397</sup> In a warning that may apply

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391. FISS, *supra* note 4, at 125.

392. *Id.* at 125-26.

393. KALMAN, *supra* note 77, at 338-39.

394. FISS, *supra* note 4, at 126-27.

395. *Id.* at 127; Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 399 (2006); Paula Gaber, “Just Trying To be Human in this Place”: *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165, 165 (1998); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1313-14 (1988); *Yale Law Women Speak Up About Gender: Ten Years Later*, YALE L. WOMEN 14 (2012), <http://yalelawwomen.org/wp-content/uploads/2013/03/YLW-Speak-Up-Study.pdf> [<http://perma.cc/WT2U-EHG6>].

396. See, e.g., Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 137-38 (1988); Lani Guinier et al., *Becoming Gentlemen: Women’s Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1, 98 (1994); Working Grp. on Student Experiences, *Study on Women’s Experiences at Harvard Law School*, HARV. L. SCH. 5 (2004), <http://www.law.harvard.edu/students/experiences/FullReport.pdf> [<http://perma.cc/APJ9-KJHV>].

397. Will Bloom et al., *No, Law School Didn’t Teach Us To ‘Engage’ With Racists*, NATION (Aug. 1, 2017), <http://www.thenation.com/article/no-law-school-didnt-teach-us-to-engage-with-racists> [<http://perma.cc/466W-X7DW>]; Comm. on Diversity and Inclusion, *Report of the Committee on Diversity and Inclusion*, YALE L. SCH. (2016), [http://law.yale.edu/system/files/documents/pdf/Deans\\_Office/diversity\\_inclusion\\_report\\_3\\_23\\_2016\\_to\\_community.pdf](http://law.yale.edu/system/files/documents/pdf/Deans_Office/diversity_inclusion_report_3_23_2016_to_community.pdf) [<http://perma.cc/88RS-4YRK>]; ; Victor Wang & Qi Xu, *Law School Addresses Faculty Diversity*, YALE DAILY NEWS (Apr. 21, 2016), <http://yaledailynews.com/blog/2016/04/21/law-school-addresses-faculty-diversity> [<http://perma.cc/WAR8-MFFK>].

to all of them, Fiss cautions that the forces responsible for women's marginalization may "lie far beyond the reach of the Law School, or, for that matter, any educational institution."<sup>398</sup> If he is right, it may not matter that the school finally has its first woman dean and that fifty-three percent of the members of the class of 2020 are women and forty-eight percent are students of color.<sup>399</sup>

The mix of practice and theory at Yale is questionable, too. That Dean Calabresi,<sup>400</sup> then his successors,<sup>401</sup> had the shrewdness and financial wherewithal to make Jerome Frank's vision a reality proved crucial. The clinical program became central to the school's mission. Calabresi and subsequent deans understood that the intellectual's law school especially needed a strong clinical program. The clinic enabled students to demonstrate idealism and acquire the "experiential" training demanded by the ABA,<sup>402</sup> a great thing for legal liberals at a time of scarce resources. Yale students and graduates, for example, played a key role in challenging President Trump's executive order barring refugees and immigration from predominantly Muslim countries.<sup>403</sup>

But does a strong clinical program make five seminars on judicial review in one semester in a small school more palatable? Would a little less anarchy and a little more organization hurt Yale so much? To be heretical, I am reminded of something Jerome Frank would say. When he admitted that some of his ablest Agricultural Adjustment Administration lawyers were Harvard Law graduates,

398. FISS, *supra* note 4, at 127.

399. *Dean Gerken Welcomes Most Diverse Class in YLS History*, YALE L. SCH. (Aug. 21, 2017), <http://law.yale.edu/yls-today/news/dean-gerken-welcomes-most-diverse-class-yls-history> [<http://perma.cc/WB5U-GP3P>].

400. KALMAN, *supra* note 77, at 327.

401. Lavinia Borzi, *Law School: Too Yale To Fail?*, YALE DAILY NEWS (Apr. 7, 2014), <http://yaledailynews.com/blog/2014/04/07/law-school-too-yale-to-fail> [<http://perma.cc/2NYT-HXDT>].

402. See *Managing Director's Guidance Memo: Standards 303(a)(3), 303(b), and 304*, A.B.A. 1 (2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_standards\\_303\\_304\\_experiential\\_course\\_requirement\\_.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_.authcheckdam.pdf) [<http://perma.cc/SKB2-LKU7>].

403. See Clyde Haberman, *For Yale Law Group Fighting Trump's Travel Ban, Echoes of 1991*, N.Y. TIMES (Mar. 6, 2017), <http://www.nytimes.com/2017/03/06/us/for-yale-law-group-fighting-trumps-travel-ban-echoes-of-1991.html> [<http://perma.cc/9QW8-3PWC>]; Miriam Jordan, *A Travel Ban's Foe: A Young Firebrand and Her Pro Bono Brigade*, N.Y. TIMES (May 7, 2017), <http://www.nytimes.com/2017/05/07/us/travel-ban-lawyer.html> [<http://perma.cc/9A39-9LER>]; Charlie Savage, *Liberal Lawyers Plan Wave of Resistance to Trump Policies*, N.Y. TIMES (Jan. 30, 2017), <http://www.nytimes.com/2017/01/30/us/politics/lawyers-trump-travel-order.html> [<http://perma.cc/9J33-5LUD>].

Frank would add, “[T]hat may well be *in spite of and not because of their method of instruction.*”<sup>404</sup>

And is Fiss’s vision of education sustainable, even at Yale? Of Rostow’s recruits, only Joe Goldstein possessed a PhD, and most of Fiss’s heroes lack one. Like other deans, Rostow hired those with high grades, law review service, clerkship(s), and, at Yale, perhaps a bit of coursework in another discipline in England or the United States.

Yale subsequently changed the ballgame. Along with the new legal process, Yale espoused interdisciplinarity as its strategy for achieving excellence in the 1970s, when the school still played second fiddle to Harvard.<sup>405</sup> “What we teach,” Harry Wellington, the dean from 1975 to 1985 boasted, “is dictated primarily by the scholarly interests of the faculty. This approach to the curriculum is why Yale is what it is: the most theoretical and academically oriented law school in America.”<sup>406</sup> As recently as the 1990s, the average law professor at an elite school still possessed the traditional credentials of an excellent record at a comparable law school, law review membership, the right clerkship(s), perhaps a publication such as a student note, and experience in practice.<sup>407</sup> Just five percent of tenure-track law faculty members then possessed PhDs.<sup>408</sup> In contrast, Yale hired a critical mass of JD-PhDs in the 1970s and continued doing so ever after.<sup>409</sup>

When Yale became the country’s preeminent law school in the 1990s,<sup>410</sup> it began reshaping the world of academic lawyers and legal education. The legal academy delights in playing “follow the leader,” and more schools climbed on the JD-PhD bandwagon. Today, the movement to hire JD-PhDs is in full swing at elite and nonelite law schools alike.<sup>411</sup> In 2014 and 2015, more than two-thirds of entry-level hires at the top twenty-six schools were JD-PhDs.<sup>412</sup> “The age of

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404. Jerome N. Frank, *What Constitutes a Good Legal Education*, 19 A.B.A. J. 723, 727 (1933); Frank, *supra* note 310, at 921.

405. So clearly established was the school’s standing as second best that on the first day that Rostow’s successor, Louis Pollak, entered the dean’s office, he found a welcome sign bearing the slogan Avis Rental Cars popularized in its chase after Hertz, “We Try Harder.” KALMAN, *supra* note 77, at 56.

406. *Id.* at 309.

407. Justin McCrary et al., *The Ph.D. Rises in American Law Schools, 1960-2011: What Does It Mean for Legal Education*, 65 J. LEGAL EDUC. 543, 549, 562 (2016).

408. *Id.* at 549.

409. KALMAN, *supra* note 77, at 305-06.

410. *Id.* at 352-55.

411. Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 510, 536 (2016).

412. *Id.* at 506.

the PhD law professor is upon us,”<sup>413</sup> one study proclaimed recently, and JD-PhDs will soon control the hiring process at the top law schools<sup>414</sup> – if they do not do so already.<sup>415</sup> Robin West warns that “the faculty member with no experience at all in the practice of law is increasingly the norm,”<sup>416</sup> and the empirical data suggest that professors’ experience in practice is declining.<sup>417</sup>

This hiring pattern has resulted in wonderful theoretical and interdisciplinary research and has brought the law school closer to the rest of the university.<sup>418</sup> And interdisciplinary work can transform law practice: think of the impact of law and economics on antitrust.<sup>419</sup> Yet the interdisciplinary turn also deepened the longstanding divide between academic lawyers and the bench and bar.<sup>420</sup> Richard Posner griped that Wellington turned the traditional doctrinal legal scholar into “a paltry fellow, a Philistine who has shirked the more ambitious task of mastering political and moral philosophy, economics, history, and other social sciences and humanities so that he can discourse on large questions

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413. Blake Edwards, *The Age of the PhD Law Professor Is Upon Us, Study Says*, BLOOMBERG (Feb. 19, 2016), <http://bol.bna.com/the-age-of-the-phd-law-professor-is-upon-us-study-says> [<http://perma.cc/EC4R-J7YG>]; see LoPucki, *supra* note 411.

414. LoPucki, *supra* note 411, at 540.

415. My law professor friends speak of anxious discussions at faculty meetings, in which their colleagues worry that their hiring committees are disadvantaging job candidates who lack a PhD and “just” possess the traditional credentials.

416. ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 151 (2014).

417. LoPucki, *supra* note 411, at 521-31.

418. Not everyone agrees, of course. For a negative evaluation of contemporary legal scholarship, see, e.g., Lynn M. LoPucki, *Disciplinary Legal Empiricism*, 76 MD. L. REV. 449 (2017); and Lynn M. LoPucki, *Disciplining Legal Scholarship*, 90 TUL. L. REV. 1 (2015). Nor do I mean to suggest that law professors require a PhD to produce good theoretical and/or interdisciplinary work.

419. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1925 (1993).

420. See, e.g., RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993); Harry T. Edwards, *Another ‘Postscript to ‘The Growing Disjunction Between Legal Education and the Legal Profession’*, 69 WASH. L. REV. 561 (1994). On the longstanding nature of the divide, see Laura Kalman, *Professing Law: Elite Law School Professors in the Twentieth Century*, in *LOOKING BACK AT LAW’S CENTURY* 337 (Austin Sarat et al. eds., 2002).



of policy and justice.”<sup>421</sup> Despite his pride in his faculty, Wellington worried about that, too.<sup>422</sup> And, Michael Dorf observes:

Chief Justice John Roberts encapsulated what has become the conventional wisdom among judges disaffected with legal scholarship when he said this in 2011: “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in Bulgaria.”<sup>423</sup>

Such hyperbole aside, the long-term impact of all these JD-PhDs on legal education and scholarship is far from clear. Do all those advanced degrees create a fragmentation within today’s law professors as they strain to master two disciplines, each with its own professional code?<sup>424</sup> Do they isolate law professors tethered to one discipline from their colleagues in another? Do they increase their distance from students who plan to practice law? Do they dim academics’ ability to think like lawyers? Mark Tushnet jokes about “the ‘lawyer as astrophysicist’ assumption” that general law-school training enables alumni to absorb and employ any other discipline.<sup>425</sup> That means lawyers know they can “read a physics book over the weekend and send a rocket to the moon on Monday.”<sup>426</sup> Who else would possess such refreshing chutzpah?<sup>427</sup> But chutzpah can empower. We PhDs are often cautious as we patrol our special turf,<sup>428</sup> and we sometimes reject “prescriptivism.”<sup>429</sup> Do those advanced degrees, then, make a career like Fiss’s or his subjects’ less possible? Will those who possess them train students at Yale and elsewhere to restore his “golden age” and to make Justices Marshall, Brennan, and Barak their models?

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421. Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1119 (1981).

422. Harry H. Wellington, *Challenges to Legal Education: The “Two Cultures” Phenomenon*, 37 J. LEGAL EDUC. 327, 329 (1987).

423. Michael C. Dorf, Book Review, 66 J. LEGAL EDUC. 186, 191 (2016) (reviewing RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016)).

424. Based on my experience writing evaluation letters of legal historians in law schools for promotion to tenure, for example, I sense that a book is now *de rigueur*. If I am correct, history-department norms have spread to the law school. How do those expectations affect the interaction of legal historians with their non-legal historian colleagues?

425. Symposium, *Constitutional Scholarship: What’s Next?*, 5 CONST. COMMENT. 28, 31 (1988).

426. *Id.* at 68.

427. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 165 (2006).

428. See, e.g., Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 87-88 (1997).

429. Balkin & Levinson, *supra* note 427, at 175.

### C. *The Future of Legal Liberalism*

Even if they do, what success are students likely to enjoy? We legal liberals sometimes have had a hard time letting go of the past. “Earl Warren is dead,” two academics wrote in 1988, yet “[a] generation of liberal legal scholars continues, nevertheless, to act as if the man and his Court preside over the present.”<sup>430</sup>

As Fiss’s contemporaries have begun retiring, their vision has finally started to fade.<sup>431</sup> “We live in chastened times,” Kenneth Mack said in 2012.<sup>432</sup> The idea of a heroic liberal Justice has taken a giant hit, both because of the Court’s conservatism and the uncertainty that even liberal Justices can deliver lasting social reform. Conservatives turned to the past to bolster their claims in *Parents Involved* that *Brown* enshrined a principle of color-blindness and “history will be heard,”<sup>433</sup> and, in *Shelby*, that “history did not end in 1965.”<sup>434</sup> Liberal and left constitutional theorists looked more towards the future. It was no accident that when the millennium arrived, some liberal (or as they now frequently preferred to style themselves, progressive) academic lawyers, like Cass Sunstein, Richard Parker, Larry Kramer, Robert Post, and Reva Siegel distanced themselves from legal liberalism, and instead began championing judicial minimalism;<sup>435</sup> popular constitutionalism;<sup>436</sup> and, somewhat more optimistically, democratic constitutionalism.<sup>437</sup> Those theories supported politically liberal and left-liberal positions. But professors like Fiss who spoke of legal liberalism and stressed the

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430. Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 189 (1988).

431. David Fontana, *Not Your Law School Graduation Speaker: Progressive Law Students Won’t Hear from the Lions of the Warren Court Again This Week*, SLATE (June 4, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/06/the\\_warren\\_court\\_generation\\_is\\_dying\\_who\\_is\\_taking\\_their\\_place\\_at\\_commencement.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/the_warren_court_generation_is_dying_who_is_taking_their_place_at_commencement.html) [http://perma.cc/QQD8-2QGK].

432. Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 HARV. L. REV. 1018, 1018 (2012) (reviewing TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011)).

433. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007).

434. *Shelby Cty. v. Holder*, 570 U.S. 2, 10 (2013).

435. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2d ed. 2001).

436. See, e.g., RICHARD PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5 (2001).

437. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

Warren Court's nonmajoritarian nature were more proudly court centered than their successors. Fiss bucks the headwinds in calling for a return to the sixties, a "decade" that I agree lasted from *Brown* until the mid-1970s, and to legal liberalism. Though many concede that *Brown* and the Warren Court represented milestones, some consider both problematic.

Still, there will always be revisionists. Thankfully, the chance to promote new interpretations keeps us all employed. Reliance on courts recently paid rich dividends for same-sex marriage advocates.<sup>438</sup> Moreover, the dawn of the Trump era means Fiss's summons to the legal-liberalism ramparts is more timely than ever. On the one hand, we live in even more "chastened times" than we did in 2012: expert knowledge is dismissed as "fake," self-interested, partisan, and elitist.<sup>439</sup> On the other hand, it sometimes seems as if lawyers and judges are all that stand between us and the abyss.<sup>440</sup> Given the conservatism of the executive branch and Republican skill at gerrymandering legislative districts, liberals can only hope to exert influence in the courts, at least until Trump fills all his judicial vacancies.<sup>441</sup> That may not be saying much, but it is saying something. No wonder, then, that in the summer of 2016, Mark Tushnet—a critical legal scholar in the 1980s<sup>442</sup> and advocate of "taking the Constitution away from the courts" in

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438. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

439. TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* (2017); see also Tom Nichols, *The Death of Expertise*, *FEDERALIST*, (Jan. 17, 2014), <http://thefederalist.com/2014/01/17/the-death-of-expertise> [<http://perma.cc/8QG4-BD5A>].

440. Matt Moody, *Lawyers Are Heroes of the Trump Resistance*, *VAULT* (Jan. 31, 2017), <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/lawyers-are-heroes-of-the-trump-resistance> [<http://perma.cc/C7PT-B6Q9>]; Elie Mystal, *University of North Carolina Bans Civil Rights Center from Protecting Civil Rights*, *ABOVE L.* (Sept. 11, 2017), <http://abovethelaw.com/2017/09/university-of-north-carolina-bans-civil-rights-center-from-protecting-civil-rights> [<http://perma.cc/BW9U-EY2X>] ("The counter-revolution—all the hateful people and lawmakers who are popping up to stop kids from feeling safe in the bathroom and terrorize immigrants and elect Donald Trump—is being met by lawyers. Progressive lawyers are leading the charge, but even more-conservative lawyers are in the fight against the excesses of majoritarian will.")

441. See, e.g., Billy Corriher & Anisha Singh, *The Courts Have Halted Trump's Bigoted Policies, but the Senate Wants To Confirm All His Judges*, *CTR. AM. PROGRESS* (June 12, 2017), <http://www.americanprogress.org/issues/courts/news/2017/06/12/433883/courts-halted-trumps-bigoted-policies-senate-wants-confirm-judges> [<http://perma.cc/KH9M-64DH>]; Jamiles Lartey, *Civil Rights in the Era of Trump: Courts Will Be a "Bulwark," Say Leaders*, *GUARDIAN* (Dec. 20, 2016), <http://www.theguardian.com/us-news/2016/dec/23/civil-rights-trump-era-courts-lawsuit-ziglar-vs-abbasi-aclu> [<http://perma.cc/Y4W2-JTPM>].

442. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

2000!<sup>443</sup> – called upon professors who had swung away from legal liberalism to abandon their “defensive crouch liberal constitutionalism” and make Marshall and Brennan their heroes again.<sup>444</sup>

Though Tushnet might disagree,<sup>445</sup> the argument for embracing legal liberalism has grown stronger since Trump’s November victory. After neo-Nazis and other white supremacists marched on her synagogue and university,<sup>446</sup> University of Virginia Law School Dean Risa Goluboff, another Fiss student,<sup>447</sup> found hope in Thurgood Marshall’s example.<sup>448</sup> We do need more lawyers like Marshall and Justices like Marshall and Brennan. As another revered legal liberal, Frank Michelman, would say, judges’ actions “may augment our freedom. As usual, it all depends.”<sup>449</sup>

Selling a Brennan or Marshall to Republican *and* Democratic politicians, though, is unlikely. Even as confirmation hearings feature nominees – beginning, ironically, with Rehnquist in 1971 – ritualistically championing *Brown*,<sup>450</sup> they underline the bipartisan acceptance of a cartoon caricature of a Warren

443. TUSHNET, *supra* note 436.

444. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<http://perma.cc/MZB3-6BBN>].

445. As Tushnet concluded, “Of course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of our worries.” *Id.*

446. Risa L. Goluboff, *Dean Risa Goluboff Reacts to Events in Charlottesville*, U. VA. SCH. L. (Aug. 14, 2017), <http://content.law.virginia.edu/news/201708/dean-risa-goluboff-reacts-events-charlottesville> [<http://perma.cc/6DV2-MSTW>]; Dahlia Lithwick, *You Think It Couldn’t Happen at Your Synagogue? So Did I*, REFORM JUDAISM (Aug. 24, 2017), <http://reformjudaism.org/blog/2017/08/24/you-think-it-couldnt-happen-your-synagogue-so-did-i> [<http://perma.cc/BFG6-PZHG>]; *Summer Newsletter—5776*, CONGREGATION BETH ISRAEL, <http://myemail.constantcontact.com/CBI-Quarterly-Newsletter---Summer-Issue.html?oid=1102546520920&aid=cgnuCdZLET8> [<http://perma.cc/B8PV-GBCF>] (showing that Dean Risa Goluboff is a member of the congregation).

447. E-mail from Risa Goluboff, Dean, Univ. of Va. Sch. of Law, to author (Aug. 27, 2017, 7:01 AM EST) (on file with author).

448. Goluboff, *supra* note 446.

449. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 75 (1986).

450. Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 431-36 (2000). It was ironic because allegations that Justice Rehnquist had spoken out against *Brown* as Justice Jackson’s clerk almost derailed his nomination. *Id.* at 442-46, 451-57; Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631, 634, n.10 (2012) (collecting citations).

Court that militantly defied majority will. This caricature has molded the contemporary Republican Party, which has melded together diverse factions in part by making the Warren Court a whipping boy.<sup>451</sup>

Thanks to the burlesque images of it that abound, the Warren Court has become such a symbol of excess that even Democratic Presidents steer clear of nominating a present-day Brennan or Marshall. Moderates Clinton and Obama tried to respect the Warren Court and relegate it to the past by nominating justices slightly left of center, who did not believe the Supreme Court should make law the great engine of social change.<sup>452</sup> Fiss student Jeffrey Rosen<sup>453</sup> cheered this development. By choosing then-Judge Ginsburg and Fiss's Harvard classmate, then-Judge Breyer, Rosen wrote, the Democrats escaped "the ideological excesses" of "Warrenism"<sup>454</sup> and ended "the age of judicial heroics."<sup>455</sup> Candidate Obama stressed that judicial "activists" of the sixties "ignored the will of Congress" and "democratic processes."<sup>456</sup> Nevertheless, liberals hoped he would appoint a "bomb-throwing, passionate, visionary liberal Scalia" like Brennan and

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451. MARK TUSHNET, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS* 228 (2009).

452. MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 80 (2007); Linda Greenhouse, *The Nation*; *Judged in the Shadow of the Ghosts from the Past*, N.Y. TIMES (May 22, 1994), <http://www.nytimes.com/1994/05/22/weekinreview/the-nation-judged-in-the-shadow-of-ghosts-from-the-past.html> [<http://perma.cc/K45Q-EP58>] (describing President Clinton's nomination of then-Judge Breyer); Neil A. Lewis, *High Court Nominee Faces Easy Road Through Senate*, N.Y. TIMES (July 20, 1993), <http://www.nytimes.com/1993/07/20/us/high-court-nominee-faces-easy-road-through-senate.html> [<http://perma.cc/98GP-LZQM>] (describing President Clinton's nomination of then-Chief Judge Ginsburg).

453. Nat'l Constitution Ctr., *Owen Fiss: Lawyers and the Liberal Tradition (HD)*, YOUTUBE (July 13, 2017), [http://www.youtube.com/watch?v=qrbpoSn\\_fao](http://www.youtube.com/watch?v=qrbpoSn_fao).

454. Jeffrey Rosen, *Even Stephen*, NEW REPUBLIC (June 6, 1994), <http://newrepublic.com/article/73758/even-stephen> [<http://perma.cc/GA4P-8Z6N>].

455. *Id.*

456. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 82 (2006); Charlie Savage & Sheryl Gay Stolberg, *Obama Says Liberal Courts May Have Overreached*, N.Y. TIMES (Apr. 29, 2010), <http://www.nytimes.com/2010/04/30/us/politics/30court.html> [<http://perma.cc/7WZR-HR5S>].

Marshall who would shove, not nudge, the Supreme Court to the left.<sup>457</sup> We were disappointed.<sup>458</sup>

The experience of one Obama nominee before the Senate Judiciary Committee proved illuminating. Though the *Wall Street Journal* reported that Elena Kagan had accused the Warren Court of “overreaching” in her Oxford thesis,<sup>459</sup> Republicans mentioned Marshall, for whom she clerked, repeatedly during her hearing. Republican Senator John Kyl asked: Would she, like Marshall, use law to help the disadvantaged? Like other recent nominees, Kagan emphasized her own neutrality and objectivity, responding, “[Y]ou’ll get Justice Kagan. You won’t get Justice Marshall, and that’s an important thing.”<sup>460</sup> That did not answer his question, Kyl observed.<sup>461</sup> We expect nominees to weasel, but the exchange reminds us that few in Washington seek a Warren Court restoration. A *Washington Post* op-ed was semifacetiously entitled “Kagan May Get Confirmed, but Thurgood Marshall Can Forget It.”<sup>462</sup> Appointing Justices like Marshall and Brennan and winning decisions as full-throated as *Brown* may prove impossible. How then, can legal liberalism have a renaissance?

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457. Adam Liptak, *To Nudge, Shift or Shove the Supreme Court Left*, N.Y. TIMES (Jan. 31, 2009), <http://www.nytimes.com/2009/02/01/weekinreview/01liptak.html> [<http://perma.cc/L7VU-YJUW>]; Dahlia Lithwick, *I Need a Hero: Seeking a Bomb-Throwing, Passionate, Visionary, Liberal Scalia for a Seat on the Supreme Court*, SLATE (Feb. 3, 2009, 7:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/02/i\\_need\\_a\\_hero.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/02/i_need_a_hero.html) [<http://perma.cc/ABH2-JS5K>].

458. Jess Bravin, *Kagan Distances Herself from Left-Leaning Movements*, WALL ST. J. (July 9, 2010, 8:15 PM EST), <http://www.wsj.com/articles/SB10001424052748704075604575357511869044130> [<http://perma.cc/FY9Q-FSSH>]; David G. Savage & Christi Parsons, *Supreme Court Nomination: A Historic Appointment; A Latina in the Middle*, L.A. TIMES, May 27, 2009, at A1.

459. Nathan Koppel, *Kagan Criticized the Warren Court in Thesis*, WALL ST. J. (May 18, 2010, 11:21 PM EST), <http://www.wsj.com/articles/SB10001424052748704912004575252791294404162> [<http://perma.cc/NCB2-2V6Q>].

460. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Committee on the Judiciary*, 111th Cong. 106 (2010) (statement of Elena Kagan, Solicitor Gen. of the United States); Mark Walsh, *You’ll Get Justice Kagan, You Won’t Get Justice Marshall*, A.B.A. J. (June 29, 2010 5:08 PM), [http://www.abajournal.com/news/article/sessions\\_to\\_kagan\\_i\\_would\\_have\\_to\\_classify\\_you\\_as\\_a\\_legal\\_progressive](http://www.abajournal.com/news/article/sessions_to_kagan_i_would_have_to_classify_you_as_a_legal_progressive) [<http://perma.cc/2MS3-DQ7A>].

461. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court*, *supra* note 460.

462. Dana Milbank, *Kagan May Get Confirmed, but Thurgood Marshall Can Forget It*, WASH. POST (June 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062805129.html> [<http://perma.cc/CF9U-XXEQ>].

*D. The Prices Paid*

In pondering the last question, it is worth considering, finally, the role of family in Fiss's book and in making legal liberalism and his own eminent professional life possible. I wish Fiss had said more about his family. He does tell us his wife's name, and elsewhere he has characterized Irene Fiss, an educational consultant who founded and directed a progressive New Haven elementary school,<sup>463</sup> as his "muse."<sup>464</sup> He limits his comments about his three daughters to the familiar parental lament that they proved difficult teenagers.<sup>465</sup> In fact, they have given Fiss a passel of grandchildren to whom he dedicates the volume "[f]or the joy with which they infuse my life and for the promise they bring to the world."<sup>466</sup> Yet, despite his restricted remarks about his own relatives, Fiss often mentions how much his subjects love their children and spouses.<sup>467</sup>

Without a doubt, though, his heroes' professional lives took a toll on them and their families, and I found myself wondering whether Fiss would want a grandchild to marry any of them. Because their relationship had become strained and he was rarely home, according to one biographer, Marshall was "among the last" to learn that his first wife had cancer and faced going "from frustration with his crumbling marriage to the reality that his wife was dying."<sup>468</sup> What one former clerk called Brennan's "backslapping leprechaun exterior"<sup>469</sup> covered up his refusal, or inability, to discuss his own inner thoughts and domestic problems. Both Marjorie Brennan, who did the parenting,<sup>470</sup> and a son became alcoholics.<sup>471</sup> Justice Brennan "came home each night to grim dinners in Georgetown, where he turned up the volume on the news radio station to fill the silence left by his sullen wife,"<sup>472</sup> his authorized biographers report. Doar was away from

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463. See Duo Dickinson, *Growing in Place: Cold Spring School in New Haven Expands*, HARTFORD COURANT (Oct. 21, 2015), <http://www.courant.com/new-haven-living/cover-stories/hc-nh-cold-spring-school-february-20151021-story.html> [<http://perma.cc/CB39-ZP3W>]; *History*, COLD SPRING SCH., <http://www.coldspringschool.org/About/History> [<http://perma.cc/9EFC-SRR8>].

464. Owen Fiss, *In the Shadow of War*, 58 U. MIAMI L. REV. 449, 450 (2003).

465. FISS, *supra* note 4, at 129, 155.

466. *Id.* at author acknowledgement page.

467. See, e.g., *id.* at 27-28, 53, 72, 129, 148, 154-55.

468. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 234 (1998).

469. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 248, 206 (2010).

470. *Id.* at 61.

471. *Id.* at 206, 459.

472. *Id.* at 206.

home for weeks at a time.<sup>473</sup> Several of these men died young: Kalven was just sixty;<sup>474</sup> Nino, forty-nine;<sup>475</sup> Leff, forty-six;<sup>476</sup> Cover, forty-two.<sup>477</sup> Nino, Leff, and Cover each left a wife and two children, who had to grow up without a parent.

Work may not have caused all these early deaths. Leff had cancer, and Kalven, Cover, and Nino died of heart attacks. But it likely played a role in Nino's case. Knowing he had trouble at high altitudes,<sup>478</sup> he still flew to La Paz, nearly 12,000 feet above sea level, to draft the country's constitution. Why, a mentor asked, "trying to make sense of this enormous tragedy, did Carlos go to Bolivia?"<sup>479</sup> The grief-stricken Fiss did not reply but later realized that "there can be no doubt about the answer. Carlos was impelled to go to Bolivia, and to Germany, Czechoslovakia, Colombia, and countless other countries by the same sense of civil obligation that drove him in Argentina, and that soon extended to the entire world."<sup>480</sup>

Is such a life as conceivable today as it once was? Fiss profiles only one woman, MacKinnon, and as he acknowledges, the women of his generation rarely got a chance at careers like hers, Nino's, or Doar's. Fiss's class at Harvard included some extraordinary ones, like future Representative Pat Schroeder and D.C. Circuit Judge Judith Rogers,<sup>481</sup> but there were just fifteen of them.<sup>482</sup> Before and even during the 1970s, Yale had few tenured women professors.<sup>483</sup> And, like Marjorie Brennan, women were doing most of the parenting. Some men Fiss

473. FISS, *supra* note 4, at 53.

474. Tom Goldstein, *Harry Kalven Jr. Is Dead at 60; Jury Expert Taught at Chicago*, N.Y. TIMES (Oct. 30, 1974), <http://www.nytimes.com/1974/10/30/archives/harry-kalven-jr-is-dead-at-60-jury-expert-taught-at-chicago.html> [<http://perma.cc/E2RQ-3JDX>].

475. FISS, *supra* note 4, at 147.

476. Marcia Chambers, *Arthur A. Leff Is Dead at 46; Professor at Yale Law School*, N.Y. TIMES (Nov. 4, 1981), <http://www.nytimes.com/1981/11/04/obituaries/arthur-a-leff-is-dead-at-46-professor-at-yale-law-school.html> [<http://perma.cc/W98J-XRLR>].

477. *Robert M. Cover Dies; Legal Scholar at Yale*, N.Y. TIMES (July 20, 1986), <http://www.nytimes.com/1986/07/20/obituaries/robert-m-cover-dies-legal-scholar-at-yale.html> [<http://perma.cc/P6SH-WQA8>].

478. FISS, *supra* note 4, at 147.

479. *Id.*

480. *Id.*

481. See HOPE, *supra* note 147, at 35, 245.

482. Stephen G. Breyer, *Foreword* to JUDITH RICHARDS HOPE, *PINSTRIPES & PEARLS: THE WOMEN OF THE HARVARD LAW SCHOOL CLASS OF '64 WHO FORGED AN OLD-GIRL NETWORK AND PAVED THE WAY FOR FUTURE GENERATIONS*, at xix (2003).

483. Ellen Peters was the first woman to be tenured at Yale Law School—in 1964.



discusses married women with active professional lives, as he himself did. For example, Joe Goldstein's wife and co-author, Sonja, a Yale graduate, specialized in children and the law.<sup>484</sup> More frequently, however, the spouses of Fiss's subjects did not work outside the home, at least while the children were small, or if they did, were conditioned to consider their own careers secondary to those of their spouses. Because Harry Kalven did not drive, his wife Betty chauffeured him around Hyde Park.<sup>485</sup>

The women did hard, hidden work, which is not always done today, and which deserves more of a place in *Pillars of Justice*. Fiss jokes about how he chose where to live in 1974.

No fool, I spent that summer in Washington, D.C., working on the Nixon impeachment. It was Irene who was unloading the crates in New Haven, trying to convince the kids of the wonders of their new hometown, discovering a new pizza restaurant each night, and living in the Covers' third-floor apartment in Davenport College until our house was ready.<sup>486</sup>

Upon reading that sentence, this New Haven pizza aficionada decided that if Fiss relinquished that daily diet, his family's adjustment must have been dreadful. The wives did not just settle the family after their husbands' "call" to Yale, either. They engineered the frequent dinner parties that contributed to the school's clubbiness and collegiality at the same time that they drove carpools, cooked the meals, volunteered, and, sometimes, also worked outside the home. When a professor or a member of his family was ill, they were there. When I interviewed aging Yale faculty members during the late 1970s, I saw how intimately they knew each other—and how much work their spouses had done to make Yale a community. That raises the issue of whether something has been lost—that sense of family that once sometimes characterized the law school world during the days when spouses (mostly wives) helped knit faculty members (mostly husbands) together.

For today, few in the academy and the legal profession, where two-career couples abound, still select a traditional spouse. Of course, that need not limit parental involvement. Yale Law School Dean Heather Gerken has produced at

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484. See JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & SONJA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986); Elizabeth Stauderman, *Biography of Joseph Goldstein*, 19 *YALE L. & POL'Y REV.* 1, 1-2 (2000).

485. FISS, *supra* note 4, at 82.

486. *Id.* at 153.

least eight vampire novels full of life lessons for her tween daughter,<sup>487</sup> and her colleague, Amy Chua, is a proud “tiger mother.”<sup>488</sup> And marriage to a spouse who works outside the home would not necessarily bar a future Nino from traveling globally to pursue constitutional democracy or a Doar from decamping for extended periods. But scheduling pressures might make it more difficult than ever to focus so intently on one’s own career, just as they might also cut down the opportunity to develop deep friendships with colleagues. As Anne-Marie Slaughter came to realize, perhaps no one, man or woman, can “have it all” – a satisfactory work-life balance – in contemporary society.<sup>489</sup> Given the high price sometimes entailed for oneself and/or one’s family, and the fact that most of us no longer possess a traditional spouse, is the quest for Fiss’s great liberal life in law justified, and is success in achieving it likely?

To be sure, Fiss provides us with great role models. And antiheroes, as well as heroes, can work themselves to the bone. Bad things happen to good and bad people. Still, the families of Fiss’s exemplars bore the burden of their absence in death and sometimes, at least in the case of Doar and Nino, in life. As a collection of character sketches, *Pillars of Justice* is as engrossing and engaging as John Aubrey’s seventeenth-century compilation of short biographies in *Brief Lives*. But we should also remember that the lives of some of Fiss’s heroes were all too brief.<sup>490</sup>

## CONCLUSION

As Anthony Powell wrote of Aubrey, Fiss’s “character and gifts” are “both of a most unusual order.”<sup>491</sup> Particularly given the importance of legal realism to Yale, I wish he had acknowledged its place under the umbrella of legal liberalism, and I question his bullishness about legal education. But Fiss reminds us of the wonder of *Brown* and the Warren Court, and the historic role of legal and judicial actors in achieving equal justice through law. Whether Yale students or anyone else can revive legal liberalism remains to be seen. Against the odds, though, Fiss

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487. Heather Gerken, *As a Daughter Becomes a Teenager, a Mother Becomes a Vampire Novelist*, N.Y. TIMES (Apr. 10, 2015), <http://parenting.blogs.nytimes.com/2015/04/10/as-a-daughter-becomes-a-teenager-a-mother-becomes-a-vampire-novelist> [<http://perma.cc/CM5J-N7VR>].

488. AMY CHUA, *THE BATTLE HYMN OF THE TIGER MOTHER* (2011).

489. Ellen McCarthy, *She Famously Said that Women Can’t Have It All. Now She Realizes that No One Can*, WASH. POST (Aug. 26, 2016), [http://www.washingtonpost.com/lifestyle/style/she-famously-said-that-women-cant-have-it-all-now-she-realizes-that-no-one-can/2016/08/26/889944e4-5bf3-11e6-831d-0324760ca856\\_story.html](http://www.washingtonpost.com/lifestyle/style/she-famously-said-that-women-cant-have-it-all-now-she-realizes-that-no-one-can/2016/08/26/889944e4-5bf3-11e6-831d-0324760ca856_story.html) [<http://perma.cc/EWC7-SGTF>].

490. JOHN AUBREY, *BRIEF LIVES* (John Buchanan-Brown ed., Penguin Classics 2000) (1693).

491. ANTHONY POWELL, *JOHN AUBREY AND HIS FRIENDS* 9 (1948).

has resisted cynicism and continued the struggle. He could have written a jeremiad about the world legal liberals have lost. Instead, Fiss inspires us to restore it.