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Book Review of The Strange Career of Legal Liberalism, by Laura Kalman

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prevent information from being communicated). Enhancing the importance of what the justices had to say on this issue was the evidence the Pentagon Papers contained that the United States government had deceived the public about the war, information highly relevant to the intense political debate that was raging at the time over when and how to end American military involvement in Vietnam.

Although the *Post*'s Sanford Ungar produced a highly readable journalistic account of the legal and political battle over the Pentagon Papers (*The Papers and the Papers: An Account of the Legal and Political Battle over the Pentagon Papers* [1972]), David Rudenstine's book is the first true history of these notable cases. It is also a major contribution to the rather thin literature on the legal and constitutional history of the Vietnam conflict, a field that cries out for exploration by scholars interested in more than just whether Lyndon Johnson and Richard Nixon abused presidential power by waging a war never declared by Congress. Ironically, Rudenstine makes an important contribution to our understanding of the disintegration of the imperial presidency in the wake of Vietnam, providing a useful supplement to Stanley Kutler's monumental *The Wars of Watergate: The Last Crisis of Richard Nixon* (1990). He argues persuasively that "The Pentagon Papers affair . . . led directly to the unraveling and final disintegration of the Nixon presidency" (p. 6).

Rudenstine makes some other interesting and novel arguments as well. It has always been somewhat difficult to understand why the Nixon administration fought so hard to enjoin publication of the Pentagon Papers, since dissemination of the information they contained served mainly to embarrass its Democratic predecessors. Disputing the theory that this lawsuit was part of a campaign to intimidate the press, Rudenstine insists that Justice Department lawyers, led by Assistant Attorney General Robert Mardian, pressed the president to initiate a prior-restraint action because they genuinely believed release of the papers would threaten important national security interests. Nixon acceded to their entreaties because Henry Kissinger convinced him he would appear weak in the eyes of foreign leaders if he did not do something about this massive leak of classified information.

Rudenstine agrees with those who contend that publication of the Pentagon Papers did not harm the military, defense, or international interests of the United States. He insists, however, that although the papers were largely historical in nature, they did contain some information that could have inflicted injury. Thus, the concerns of Mardian and the national security officials who supported the Justice Department's prior-restraint action were not entirely groundless. Although he stresses the significance of the Supreme Court's decision in the case, he minimizes the significance of the massive release of government secrets that it facilitated. Rudenstine thinks this affected debate on the Vietnam War but had no impact on the course of the war itself.

For the most part, Rudenstine effectively supports his contentions. Only his argument that the Pentagon Papers contained information truly damaging to national security is unpersuasive. Forced to convince the Supreme Court that they did, Solicitor General Erwin Griswold (who admittedly lacked adequate research time) could identify only eleven items in forty-seven volumes that he thought supported such a contention. Although the last four volumes did contain diplomatic documents, release of which could have hampered American diplomacy, the significance of most of the information contained in the Pentagon Papers was historical and political. This material should not have been withheld from the public by classifying it as "secret."

Mardian's objective was a judicial ruling that the government could restrain publication of anything on which someone had slapped a security classification stamp. Rudenstine skillfully elucidates the extent to which his extreme views determined the government's litigation strategy and impaired its chances of success in court. He also admirably points out that what is generally viewed as a case about the First Amendment was considered by the man who argued it for the *New York Times*, Yale Law School Professor Alexander Bickel, to be primarily a dispute about separation of powers. Rudenstine notes that several judges accepted Bickel's contentions if not his approach.

Although impressive in many respects, Rudenstine's book is marred by a number of small but troubling errors. For example, he misspells the name of political scientist Samuel Popkin, refers to Republican Senator John Tower as a Democrat, and misidentifies the John Marshall Harlan Papers at Princeton as the John Marshall Papers. Although such mistakes are bound to raise concerns about his scholarship, this is a competently researched monograph, solidly grounded in judicial opinions, unpublished legal documents, manuscript collections, and numerous interviews. The pace at which Rudenstine discusses legal arguments and judicial opinions is somewhat plodding, but otherwise he writes well. This book is a readable and worthwhile monograph that merits the serious attention of both constitutional historians and students of the Vietnam era.

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LAURA KALMAN. *The Strange Career of Legal Liberalism*. New Haven: Yale University Press. 1996. Pp. viii, 375.

This is a rewarding and insightful book that seeks to explain where, intellectually and politically, contemporary liberal legal academics stand and how they got there. Laura Kalman defines her subject, "legal liberalism," as a "trust in the potential of courts, particularly the Supreme Court," to effect desirable and nationwide social change, especially improving the conditions of favored groups such as blacks, women,

and workers (p. 2). The "strange career" of her title refers to the twisting efforts of liberal legal academics to sustain over time the activist constitutionalism of the Supreme Court under Earl Warren against a series of challenges to its efficacy and legitimacy.

As late as the 1960s, Kalman writes, legal academics overwhelmingly favored the results of the Warren Court and debated only "the means it used" (p. 49). Their disagreements constituted merely "a family quarrel between Warren Court activists and process theorists, two wings of the realist tradition" (p. 48). In the 1970s, however, things changed. The entry of significant numbers of women and minorities into the profession heightened diversity; *Roe v. Wade* and affirmative action split liberals deeply; the country grew increasingly conservative, cost conscious, and wary of government; Ronald Reagan's administration reshaped American politics and effectively advanced "originalism" as a device to delegitimate liberal constitutionalism; and a reconstructed Supreme Court moved rightward and began experimenting with its own brand of conservative judicial activism. Those challenges proved especially distressing to liberal academics because, at the same time, a range of ideas, methods, and stances that were eventually yoked together under the label of postmodernism invaded the law schools from other academic disciplines. The ideal of interdisciplinary scholarship and the apparent utility of postmodernist modes fired the imagination of many legal liberals, but the new approaches exacted a high price. Postmodernism scattered them intellectually, undermined their normative assumptions, robbed them of the hope for objectivity, and led them toward ever more debilitating theories and ever more profound crises.

Against this background, Kalman's book examines some of the major debates that filled the law reviews. She focuses on the oblique but powerful claims of the attacking conservative originalists, the uses of the era's heralded theoretical turns (cultural, hermeneutic, linguistic, and historical), and the strained if serviceable responses of the counterattacking Republican revivalists and neo-Federalists. One of the book's major contributions is the way it situates for those outside the legal academy some of the disparate, puzzling, and sometimes seemingly perverse claims that law professors have recently advanced and debated.

At the heart of Kalman's book lies a deep concern with the perplexing relationship between law and history. Reflecting on the historical turn in constitutional rhetoric during the past two decades, she probes for a coherent line to identify and distinguish between proper historical and legal scholarship while at the same time exploring ways in which historians may legitimately illuminate and assist the work of lawyers. Professionally trained in law as well as history, Kalman tells us that she feels like "something of an outsider to both disciplines" (p. 9). Although her remark finesses the substantial differences that separate practicing lawyers from law professors, it does point to the amazingly tenacious disciplinary assumptions that often wall off supposedly related academic fields, and it suggests further the extent to which multidisciplinary training can be professionally enervating as well as intellectually liberating.

More particularly, Kalman's remark highlights the fact that the work of the historian and the lawyer—in spite of their multiple and intimate overlaps in both subject and method—are not only distinct but, in critical ways, inconsistent. Her dual training allows her to understand the professional ethic of each field and to experience deeply their conflicting injunctions and aspirations. Although she offers some optimistic words about their compatibilities, she remains understandably vague and uneasy. "Once again," Kalman concludes at one point, "historians and law professors are talking past each other in their dialogue of the deaf" (p. 229).

Inevitably, a book of such complexity has its flaws. Kalman's definition of legal liberalism, for example, does not encompass the "objective" foundations of law that the book seems to see as intrinsic to it. Further, she too readily accepts the importance of Alexander Bickel's statement of "the counter-majoritarian difficulty" (*The Least Dangerous Branch* [1962]) without exploring the contingent social factors that made his formulation seem so new, central, insightful, and self-evident. Finally, the book provokes fascinating questions that readers will wish Kalman had pursued in greater depth. Why have American academics revived grand theory so vigorously? Why do legal academics continue to focus so inordinately on the words of the Supreme Court rather than on the court's role in the complex dispute-settling and norm-enforcing practices that give the law its practical meaning and significance? To what extent have postmodern modes led legal academics away from exploring more deeply the meaning of the late Robert Cover's blunt reminder—starkly distinguishing, among other things, the work of the lawyer and historian—that "death and pain are at the center of legal interpretation" (p. 118)?

Kalman has written a sophisticated and highly informative book that provides an illuminating map of key debates that helped drive legal academic discourse during the past three decades. It will be essential reading for anyone interested in the intellectual history of the contemporary law teaching profession or the perplexing interplay between between law and history that original intent constitutionalism inspired in the 1980s.

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MICHAEL J. SANDEL. *Democracy's Discontent: America in Search of a Public Philosophy*. Cambridge: Belknap Press of Harvard University Press. 1996. Pp. xi, 417. $24.95.

This book contains a long, often insightful, but flawed jeremiad. As have so many other recent social critics,