
**BETWEEN MANAGERIALISM AND THE LEGAL
COUNTERCULTURE:
THE YALE PROGRAM IN LAW AND MODERNIZATION IN THE HISTORY OF
THE GLOBAL 1970S**

AFRODITI GIOVANOPOULOU ¹

Often described as a period of seismic shifts in world history, the 1970s bear the definitive marks of a conflictual era. Focusing on the unraveling of the postwar liberal consensus, historians of the United States have portrayed this decade as nothing short of an “Age of Fracture,” during which larger narratives about American democracy, the relationship of the individual to the whole, and the relationship between state and society came undone.² International historians point to a dramatic reconfiguration of the international order during the same decade, which saw the completion of a society of nominally equal sovereign states, once aspiring to produce a New International Economic Order but eventually defeated by the 1973 oil crisis and the rise of neoliberalism.³

The microcosm of the Yale Program in Law and Modernization illuminates the overlapping themes of protest, disruption, disillusionment and backlash that characterized the 1970s. Established with a significant grant from USAID, the Program, in the years of its operation between 1969 and 1976, was designed as a space of research on America’s legal modernization projects in the global periphery. Soon enough, a diverse cast of characters, united in their interest in the Third World but otherwise quite contrasting in terms of their backgrounds, goals, and aspirations, inhabited this space. Some had direct policy experience working for the American government, while others became interested in the Third World through oppositional politics and a deep suspicion about the possibility of improvement through legal reform. While originally presented as a vessel for designing sound policy-making under the aegis of the USAID and aiding the Third World through managerial socio-legal engineering, the Program unexpectedly transformed into the breeding ground for what would eventually become Critical Legal Studies, and was soon terminated.

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¹ SJD (Harvard Law School); PhD Candidate (Columbia University, History). For helpful comments and suggestions on previous versions of this Essay, I wish to thank Richard Abel, Lisa Kelly, Duncan Kennedy, Zinaida Miller and David Trubek. Many thanks also to Jake Mazeitis for excellent research assistance. Errors and omissions are mine alone.

² See Rodgers (2011, 10-14).

³ See, e.g., Anghie (2015), Bockman (2015), Dietrich (2015), Gilman (2015); and Whelan (2015).



This essay analyzes the Program's history in the context of the culture, politics and ideology of the era, in an effort to highlight both the particularity and the broader significance of the events that transpired on Yale's campus in the late 1960s and early 1970s. It argues that, at its core, the Yale Program on Law and Modernization stood at the crossroads of two larger historical forces: an increasingly contested managerial sensibility, which informed America's legal relationship to the Third World in the decades following World War II, on one hand, and the irreverent ethos of a rapidly forming legal counterculture, on the other. The two shared a common legal language in that both consciously drew on the legal realist tradition. Legal realism had gone awry as a Cold War language of governance, but countercultural scholars reappropriated and reinvented it as a language of critique.⁴ The clash of the two on Yale's campus, itself riven by conflicts between meritocratic rationalization, on one hand, and political protest, on the other, resulted in significant personal loss for the program's participants but also significant intellectual renewal for the legal academy as a whole.

A managerial sensibility, spawned by the legal realist New Deal administrative state, influenced America's hegemonic ambitions abroad soon after the Second World War but was questioned as decolonization accelerated. This sensibility, which I will call "pragmatic legalism," inspired the design of international institutions and America's engagement with the decolonizing world through the legal ideology of "social engineering."⁵ The Yale Program in its inception adopted that perspective as it deliberately brought together social scientists and lawyers to research law's role in development in the name of societal progress and modernization through legal reform. Yet this pragmatic legal ideology was questioned both within the foreign policy establishment and by the growing waves of protest and contestation that defined the late 1960s. Pragmatic legalism was criticized by the American foreign policy establishment as ineffectual or harmful to America's hegemonic interests, while scholars within the Yale Program in Law and Modernization offered a much more radical critique that targeted the politics and ideology of legal modernization. Those wedded to the language of pragmatism fought to hold the "vital center" against critiques by both constituencies; these defenders were largely to be found in universities, as academic institutions increasingly became enamored of the nascent American security state in the throes of the Cold War.

This growing conflict at the level of legal ideology corresponded to and was fueled by a much larger movement of cultural contestation. The clash of these two conflicting legal sensibilities marks a distinctive cultural moment in 1970s America when the hegemonic Cold War liberal consensus was falling apart, confronted not only by Cold War liberalism's own failures and blind-spots but also by the ethos of

⁴ See Horwitz (1992).

⁵ Giovanopoulou (2021).



a radical counterculture.⁶ The parallels between legal and cultural contestation reveal the extent of this challenge against Cold War liberalism. The legal realist ethos, once an avant-garde moment of legal “high modernism” in the 1930s, had been tamed and domesticated in the context of the Cold War, theorized anew as legal process at home and pragmatic legalism abroad, much as modernist art became a tool for the promotion of America’s Cold War narrative in the 1950s.⁷ The 1960s counter-culture challenged this 1950s home-front obedience to the Cold War project in diverse ways. Similarly, “countercultural” legal scholars in the Program challenged Cold War legal thought, using a blend of legal realism with European critical theory against legal realism’s own postwar offspring.

As in the academic world more broadly, so in legal academia the question of America’s global power offered a critical venue for this cultural and ideological confrontation. Across the United States, campuses were rattled by the civil rights movement and protests against the Vietnam War. While critical approaches to law are mostly remembered for deconstructing domestic legal institutions, the Program represents the undeniable international origins of legal critique, inspired precisely by America’s use of legal managerialism in governing the world. The Program’s history, then, underscores the significance of the legal history of America’s hegemonic engagements abroad for understanding the history of twentieth-century American legal thought as a whole. That American legal thought was harnessed, challenged, and reinvented in the crucible of empire remains a largely untold story.

This essay will proceed in three parts. Part I locates the origins of the Yale program in the managerial sensibility of which it became an expression. Part II contextualizes this history as a legal historical instantiation of the 1960s counterculture. Part III interprets the Program’s termination as a result of the clash between these two forces, seen against the backdrop of a campus animated by its close ties to the foreign policy establishment and an accelerating drive towards meritocratic rationalization. The Conclusion will reflect on the salience of the Program’s history for both existing historiography and the current moment, as regards America’s global presence and the present state of the legal academic left.

ANTECEDENTS: THE YALE PROGRAM’S ORIGINS IN “PRAGMATIC LEGALISM”

With a rising wave of decolonization sweeping the globe, the United States embraced development as a privileged way of engaging the Third World, reviving domestic and colonial developmental experiences along the way.⁸ The ideology of

⁶ On the decay of postwar liberalism see Brinkley (1998); and Katznelson (1989).

⁷ See Menand (2021).

⁸ In this essay I will use “development” as a broader term than “modernization,” since not all American-led growth programs implemented abroad in the postwar period involved large-scale

development long antedated the wave of decolonization that started in the 1940s and the post-war Cold War. As was true of the British and French imperial projects, the United States had already implemented development schemes in its dealings with its own colonial possessions at the turn of the twentieth century.⁹ Efficiently managing society to promote growth was a distinctive element of early twentieth-century Progressivism, with its emphasis on “social engineering;” and it was just as applicable to the New Deal’s approach in the American South and West after the Great Depression.¹⁰ Planners in the State Department, most notably those with colonial experience, advocated for a developmentalist perspective on the question of decolonization as early as the 1940s.¹¹ Similarly, graduates of New Deal planning experiments and of the Marshall Plan made their way to Latin America shortly after the end of World War II, well before the founding of the USAID.¹² Soon developmentalism was enlisted in several U.S. anticommunist campaigns abroad, from the Helmand Valley to Manila.¹³ By the 1960s, the gospel of modernization had reached the Mekong Delta in an effort to “win the hearts and minds” of the Vietnamese people.¹⁴

While scholars have frequently overlooked the legal foundations of this developmentalist approach, sometimes assuming that this move to modernization was a turn away from law’s influence on foreign policy, this renewed attention to development should properly be understood as a critical component of a broader postwar legal foreign policy sensibility, which I have described as “pragmatic legalism.”¹⁵ “Pragmatic legalism” was institutionalist in its orientation; it was frequently skeptical of broad abstract conceptions of the international order, preferring a fluid understanding of state sovereignty, and was characterized by much greater appreciation for the role of the social sciences in governing the world.¹⁶ Pragmatic legalists approached law as a flexible instrument through which to reorganize the international society rather than an instrument through which to constrain the conduct of international politics.¹⁷ Over the course of the postwar period, this pragmatic legalist approach was applied to America’s relationship with

modernization, bureaucratization and industrialization. Some, instead, envisaged small-scale community development. See especially Immerwahr (2015).

⁹ Anghie (2012); Ekbladh (2011); Castañeda (2009).

¹⁰ Historians are, of course, perpetually in search of the definitive elements of American progressivism. See Rodgers (1982). On the idea that managerialism and scientific rationalization lay at the heart of the Progressive worldview, see Lustig (1982).

¹¹ For instance, Francis Sayre, a former High Commissioner to the Philippines, advocated for a developmentalist approach during his tenure at the State Department and the United Nations Trusteeship Council. See Giovanopoulou (2021).

¹² Offner (2019, 6); and Alacevich (2009).

¹³ See Cullather (2010, 108-133 and 159-179).

¹⁴ Ekbladh (2011, 190-225).

¹⁵ See Giovanopoulou (2021).

¹⁶ Giovanopoulou (2021), who draws on Bilder (1962) and Kennedy (2005).

¹⁷ Giovanopoulou (2021).

allies such as Great Britain, former enemies like Germany and Japan, and also the Third World.

Pragmatic legalism was a practical synthesis of early twentieth-century sociological jurisprudence and legal realism, which suffused the postwar foreign policy establishment as a result of the influence they exerted on the legal culture of the New Deal.¹⁸ The New Deal saw an increasing influx of lawyers who turned to government service to pursue social and economic reform. Many were students of Felix Frankfurter and Roscoe Pound at Harvard Law School or had ties with Yale Law School, which, in the interwar period, was a legal realist stronghold.¹⁹ Legal realists shared an interest in the legal culture of native peoples and the relationship between indigenous and imperial legal cultures: Felix Cohen, for instance, became known as the author of the “Indian New Deal” for his reform work at the Department of the Interior, while Karl Lewellyn dedicated two volumes to studying the legal culture and, in particular, the dispute resolution processes of the Cheyenne.²⁰ After the outbreak of World War II, however, the New Deal legal establishment turned its attention from domestic economic and social reform to reforming international society. Those who moved into the world of international affairs included well-known foreign policy figures like Dean Acheson, but also well-known New Deal lawyers, such as Adolf Berle (of the famous Berle & Means corporations work) and David Lilienthal, the legal architect of the Tennessee Valley Authority.²¹ This developmentalist sensibility followed them in their engagements abroad.

We can understand the Program as an instance in which this pragmatic legal sensibility migrated from the world of foreign policy back to the elite academic institutions that had originally produced it. Prior to arriving at Yale (where he had been an undergraduate and a law student), William Felstiner, one of the Program’s co-founders, had served as a legal advisor to the USAID mission to Greece and Turkey and subsequently as assistant director to the USAID mission in India. After clerking for Judge Charles Clark, the “dean of the realists,” co-founder David Trubek joined the Office of the General Counsel on Latin America and worked for USAID in Brazil, led by “consummate pragmatist,” William D. Rogers.²² Trubek was attracted to the project of reforming capital markets regulation—a domain of legal regulation to which legal realists had devoted considerable attention in the context of the New Deal and which was at the forefront of American modernization projects in the 1960s.²³ The Program consciously embraced the goal of promoting

¹⁸ Id.

¹⁹ See especially Kalman (1986).

²⁰ See Tsuk Mitchell (2007, 4); and Llewellyn and Hoebel (1941). See also Mehrota (2001).

²¹ On Dean Acheson, see Beisner (2006); Smith (1972). On Berle, see Schwarz (1987).

²² Trubek (2021).

²³ Kalman (2005, 259). Famously, Jerome Frank served as Chairman of the Securities and Exchange Commission (SEC). On his jurisprudential take on the work of the SEC, see Frank (1941). On the importance of capital markets regulation for modernization projects, see Trubek (2021).

research on the insights that foreign policy experience had offered: that lawyers in the developing world were overly formalist in their approach to lawyering and ended up functioning as a “barrier to development” and “progress.”²⁴

In this respect--its conscious focus on reforming lawyers’ sensibilities, understood as significant vectors for change--the Program offered an updated vision of the pragmatic legalist approach to modernization. To be sure, law is inextricably tied to modernization projects. Any development project requires legal skills and craftsmanship: lawyers are necessary to draft contracts, form the public-private partnerships, and deal with the public procurement issues. Through such initiatives in the 1960s, however, reforming the lawyers’ approach to law and reimagining it more as agile problem-solving than inflexible and dogmatic rule application became a conscious subject of governance. Legal education was naturally of particular interest to sociological jurisprudence, as the Progressive jurists were highly conscious of the importance of recruiting lawyers in the service of “social engineering.”²⁵ This component of sociological thought, i.e. targeting the legal profession as the architect of change, became firmly grounded in the ethos of modernization. Training the legal profession to adopt a more pragmatic spirit, “modernizing” the thinking patterns of lawyers and judges, was understood as a mode of pursuing development.²⁶

This migration of legal intellectual sensibilities from the foreign policy establishment back to academic institutions like Yale formed part of a broader and increasingly close relationship between higher education and the foreign policy establishment, which became especially pronounced during the Cold War era. While the initial infiltration of young lawyers into the New Deal administration was casual and informal—Felix Frankfurter effectively functioned as a “recruitment agency” for the New Deal—the postwar affinity between academic institutions, think-tanks and the foreign policy establishment was the product of a much more conscious and concerted effort. Historians have lately become especially interested in exploring the ties between academic institutions and America’s nascent security and intelligence state during and after the Second World War.²⁷ They have, for instance, unearthed the invention of “Area Studies” as a Cold War instrument in the Middle East.²⁸ Foreign policy-oriented think-tanks and foundations, such as the Ford Foundation, similarly played an outsized role in funding elite academic institutions from the 1960s onward; Harvard’s President Nathan Pusey explicitly turned to the Ford Foundation to support the of “training

²⁴ Trubek (2021).

²⁵ See Pound (1954).

²⁶ A predecessor to the Program in this regard was Trubek’s CEPED, an earlier program he had set up that focused on reforming legal education in Brazil. See Trubek (2016).

²⁷ See Wertheim (2020).

²⁸ See Khalil (2016).

of Asians.”²⁹ As the Program’s history demonstrates, legal academia was seen as a potentially productive avenue through which to wage the Cold War effort, alongside other disciplines.

TRANSFORMATION: THE RISE OF A LEGAL COUNTERCULTURE

While the Program’s roots originated in this managerial, pragmatic legal sensibility, which saw law as a helpful tool in governing the world, the Program eventually adopted a strikingly different register: one that not only criticized the politics of modernization but also was suspicious of law’s cozy relationship to power. This contrasting sensibility cultivated in the Program laid the foundations for the development of a vocal legal counterculture, manifested in the formation of Critical Legal Studies a few years later. The culture, politics and distinctly international character of the Program all appear to have played a role in cementing the development of this legal counterculture, which thrived on both continental theory and legal realism.

I use the term counterculture here more literally than metaphorically, to refer to a blended mood of cultural contestation and leftist politics which—at varying degrees—characterized a broad swath of the 1960s youth. Historians have described the 1950s as a period characterized by a pervasively conservative culture at the level of everyday life, which, combined with the unprecedented affluence of middle-class Americans, celebrated consumerism and domesticity as the epitome of individual freedom in the West.³⁰ This was the culture of America’s “home-front” as it waged its Cold War campaign against the Soviet Union.³¹ High art was also enlisted in the Cold War struggle: by contrast to the conservative, traditional motifs at the level of every-day life, artistic modernism was promoted as an instantiation of America’s respect for freedom of expression.³² The 1960s counterculture mounted a challenge to the ethics and aesthetics of the political establishment, advocating for sexual liberation, political resistance, and a rebellious style.

Duncan Kennedy, who was a student affiliate at the Program, makes explicit the importance of the twin pillars of cultural critique and political awakening against this managerial sensibility, both for him personally and for the Program as a whole. Part of his own transformation was a cultural critique of the “uptight, closed down, frozen quality of the liberal...*who ran everything*” [emphasis added.]³³ This mood pervaded the Law School, whose students “engage[d] in flamboyant dress and behavior,” expressing the “cultural radicalism” of the period.³⁴ The culture of the 1960s was a significant unifying force, alongside the predisposition

²⁹ See Keller and Keller (2001, 179).

³⁰ See Suri (2010); and May (2008).

³¹ Ibid.

³² Menand (2021).

³³ Kennedy (2021).

³⁴ Tushnet (1991, 1531).

to critique political structures of domination, which helped the Program's participants engage more closely with one another, transcending the traditional classroom hierarchies. David Trubek and Richard Abel, two core Yale faculty affiliated with the Program, "culturally transcended the system." They were "astonishingly countercultural" in the way that they treated students as peers in the classroom.³⁵ Such was the potency of the classroom dynamics that David Trubek attributes his own ideological transformation not only to reading world systems theory but also to challenges by students and peers.³⁶

To be sure, this was an "international" counterculture, which on American campuses paradoxically formed as a result of a larger process of internationalization with Cold War characteristics.³⁷ The international dimensions of the Program corresponded to the internationalization that many American educational institutions underwent at the time, the result of a more conscious understanding of the global influence that American education could exert and a further reflection of the deepening relationships between academic institutions and America's Cold War narrative.³⁸ Law schools also participated in this internationalizing trend: for instance, the degree of the Doctor of Juridical Sciences (SJD), initially designed for Americans preparing to be legal academics, was repurposed in the postwar period and assumed a "missionary function" of training foreign teachers and, in this way, disseminating American ideas about legal education abroad.³⁹ As the Program's history reveals, however, the decision to internationalize to exert ideological influence also attracted foreign students who opposed the status quo and helped to radicalize others. Boaventura de Sousa Santos came to the United States as a doctoral student after studying in West Berlin and teaching under the constraints of the Portuguese dictatorship. He became interested in Marxism thanks to the Yale Law School's "informal curriculum," developed and delivered at the school's basement by international students hailing from "Israel. [...] Africa, [...] Australia, [...] New Zealand."⁴⁰ In attracting radical students to the very center of America's hegemonic liberal establishment, the Program's history offers parallels to earlier processes of anti-imperialist formation that occurred at the heart of empire, in "anti-imperial metropolises" such as interwar Paris.⁴¹ Students were critical actors in these earlier moments of anti-imperial upheaval, as they were in the late 1960s.

Ongoing radicalization and cultural proximity rapidly translated into the creation of a legal counterculture of post-realist sensibilities. As Kennedy described

³⁵ Kennedy (2021).

³⁶ Trubek (2021).

³⁷ Suri (2009, 45-48).

³⁸ Keller and Keller (2001); and Kabaservice (2004).

³⁹ See Hupper (2015, 395).

⁴⁰ Santos (2021) [roundtable, not article.]

⁴¹ See, among others, Goebel (2015), who pays particular attention to students radicalizing at the heart of the French Empire as important vectors for decolonization.

them, this was a “rag-tag of left-over 60s’ people and people with nostalgia” for the great events of the 1960s.⁴² Just as the counterculture originated in mainstream society even while aspiring to transform and transcend it, so this legal counterculture developed its distinct legal voice in conversation with the legal voice of its predecessors, against whom they took up arms. Just as high art engaged with the failings of modernism and became self-consciously post-modernist, so the Program’s sensibilities can be understood as post-realist: both participating in the tradition of legal realism and reacting against its postwar fate—that it had been depoliticized and tamed at home (as “legal process”) and shamelessly instrumentalized abroad (as “pragmatic legalism”).⁴³

As Tushnet explains, while the senior faculty at Yale had absorbed the “New Deal understanding” of legal realism, the junior faculty at Yale went back to the roots of legal realism and found them to be “more radical than legal realism appeared to be in the New Deal understanding.”⁴⁴ In their critical reappropriation of legal realism, legal counterculturals blended realism with continental critical theory: Marx, Weber, Marcuse, Levi-Strauss and others.⁴⁵ The references to legal realists abound among the Program’s affiliates, displaying particular fascination with the figure of Karl Lewellyn (Richard Abel taught Llewellyn’s work on family law instead of using a traditional casebook and used “The Cheyenne Way” as a model for his own analysis of disputing in Kenya; David Trubek coauthored a piece with Judge Charles Clark on the early and late Lewellyn; Duncan Kennedy first discovered legal realism through Llewellyn’s “Toward a Realistic Jurisprudence”).⁴⁶ While some have interpreted this invocation of legal realism by scholars associated with the subsequent Critical Legal Studies movement more as rhetoric and legitimation than a genuine exercise in critical reappropriation, the point remains that the legal counterculturals consciously understood themselves as developing their legal voice in relationship to the legal realist tradition, the legal tradition on which the establishment had drawn, normalized and instrumentalized.⁴⁷

⁴² Kalman (2005, 282).

⁴³ I build on the parallel between modernism approaches to legal reasoning and modernist approaches to art in the vein of Berman (1992).

⁴⁴ Tushnet (1991, 1533); and Kalman (2015, 262); cf the history of legal realism that Morton Horwitz provides in his classic work, *The Transformation of American Law*, in which he distinguishes between two versions of realism, one scientific-managerial, the other critical. See Horwitz (1992). See also Ernst (1993, 1065).

⁴⁵ Abel (2021), Kennedy (2021), Trubek (2021), Tushnet (1991, 1524-1525).

⁴⁶ Abel (2021), Kennedy (2021), Trubek (2021).

⁴⁷ The idea that the invocation of legal realism was primarily aimed at legitimation is primarily associated with G. Edward White (1984, 650).

CONFRONTATION: POLITICS AT YALE AND ELSEWHERE

As the 1960s counterculture suffered a backlash from the establishment, so the Yale legal counterculturals soon found themselves in exile.⁴⁸ The events that transpired at Yale Law School in the mid-1970s--described as the "most ritual slaughter of the innocents"--can be seen as the uneven confrontation of these two larger historical forces: the pragmatic legal sensibility of the establishment on one hand, and the rapidly consolidating legal counterculture on the other.⁴⁹ This confrontation became particularly explosive because, by the late 1960s, the pragmatic legalism of the foreign policy establishment was under serious assault, arguably accentuating the stakes of its defense as an institution increasingly associated with the establishment. In addition, the confrontation took place against the backdrop of an increasingly "modernizing" campus, which found itself on unstable ground after the political battles of the late 1960s, manifesting in students' questioning of issues such as grades, governance, patriarchy and racial disparities in admissions.⁵⁰

In the late 1960s American foreign policy elites became increasingly ambivalent about the role of law in foreign policy, as decolonization radically challenged the postwar status quo. The continuing frustrations of the Vietnam War and of other highly contested interventions across the global periphery caused increasing skepticism about whether law could be productively shaped to serve America's interests. Even erstwhile pragmatic legalists, like Dean Acheson and Adolf Berle, expressed doubts about projects aimed at further legalizing international affairs, which they saw as excessive at a time when pre-existing tensions were intensifying and international society increasingly appeared as disaggregated. When confronted with the task of justifying the intervention in the Dominican Republic, for example, Adolf Berle brushed aside invocations of "Byzantine legalistics"; for him, looking for legal justifications in the face of crisis was less an application of international law than a performance of "international mockery."⁵¹ Acheson, similarly, denounced the "arrogance of international lawyers"--explicitly targeting Yale's Myres McDougal and Michael Reisman--who pushed for robust UN Security Council action against apartheid regimes.⁵² The "vast, external realm" was, in Acheson's estimation, in the throes of a "revolution" of such magnitude that it rendered confident enforcement actions of this type prohibitive.⁵³ The robust, pragmatic vision of modernization became similarly discredited in the context of this larger crisis for the foreign policy establishment, one that was eventually

⁴⁸ Keys (2014, 57); and Suri (2009, 53).

⁴⁹ The terminology belongs to Schlegel (1984, 392).

⁵⁰ Kalman (2015, 232).

⁵¹ Koskenniemi (2002, 497-500). On the history of Cold War politics in the Americas, see Santos (2021).

⁵² Acheson (1971).

⁵³ Acheson (1966, 348).

resolved with the twin ascent of neoliberal reform ideology and the language of human rights.⁵⁴

Legal academics increasingly took it upon themselves to defend, elaborate and reorient the legal tradition of the postwar foreign policy establishment in the face of this growing crisis, especially at Yale. The so-called New Haven school of jurisprudence, founded by Myres McDougal and Harold Laswell and perpetuated by Michael Reisman, continued to disseminate and update their version of pragmatic legalism even when the American foreign policy establishment was growing ambivalent about it. McDougal, who had been a young New Dealer involved in the operations of the Lend Lease Administration, had systematized the diverse legal insights on which pragmatic legalists were operating into a concrete legal theory of governance. By the mid-1940s, he had purged legal realism of its critical elements, advocating its transformation into a “policy science” that would be fit for (governing) the “world community.”⁵⁵ He also clashed with advocates of international relations realism like Hans Morgenthau, who viewed international law as “primitive.”⁵⁶ Modernization and development were part of the foreign policy establishment vision McDougal and his associates sought to preserve, cultivate and strengthen: no sooner had the Yale Program on Law and Modernization terminated its “subversive” operations, than Yale’s cooperation with USAID continued under the aegis of Reisman.⁵⁷

The twin attacks on the foreign policy establishment and campus hierarchies mounted by student radicals found sensitive targets on Yale’s campus, which in the 1960s had only increased its ties to the establishment and was being reimagined as a bastion of liberal meritocratic ideals. Two figures of high authority at Yale, both legal scholars, had direct ties with the highest echelons of the foreign policy establishment. Eugene Rostow (Walt’s brother) had served as a dean of the law school in the 1960s, and later as a member of the Lyndon Johnson’s State Department. Such was the weight of the 1960s experiences that Rostow repudiated his Democratic politics and became a neoconservative supporter of Republican initiatives and an ardent critic of detente.⁵⁸ An even more influential figure, a former administrator in the Lend Lease program and the Marshall Plan, was former Harvard Law professor Kingman Brewster, who served as Yale’s President

⁵⁴ See especially, Ekbladh (2011) and Garth (2021). On the rise of human rights ideology after Jimmy Carter assumed the presidency, see Moyn (2010); and Keys (2014).

⁵⁵ See McDougal (1947, 1345-1355); and Saberi (2014).

⁵⁶ Morgenthau (1967, 265, 307); on the distinctions between the New Haven School and international relations realism, see especially Chimni (2017).

⁵⁷ It is hardly surprising that the representatives of the New Haven school would be interested in development. McDougal’s own legal doctrinal origins lay in property, which he explicitly approached from a developmentalist perspective. See McDougal (1999). Reisman himself devoted much of his work to international economic law, and especially international investment law and business transactions.

⁵⁸ See Kalman (2005, 250-251).

between 1963-1977. Brewster openly criticized the Vietnam War and worked to defuse student protests against the war on Yale's campus. His vision for Yale during his tenure was to transform it from a patrician institution educating the young sons of the elite to a meritocratic, rationalized institution operating on the basis of academic excellence.⁵⁹ Brewster's vision, however, directly clashed with ongoing conversations among law school student radicals who, in the late 1960s had been advocating that grades be abolished and racial disparities be addressed in admissions processes.⁶⁰ In this way, they challenged the liberal image of meritocracy espoused by the Yale administration by pointing to substantive injustices to which the logic of academic excellence was blind and through which old hierarchies were being silently reinforced and new ones imposed. Law school faculty strongly supported the administration, glorifying the liberal image of meritocracy, with regard to both demands.

The case of the Yale Law School junior faculty becomes increasingly transparent when seen in the light of these explosive historical circumstances. Increasingly anti-establishment, operating on a campus that revered the establishment traditions and was beholden to the image of liberal meritocracy, having established close ties to the young radicals who mocked that very image and hoped to continue the spirit of campus unrest that had defined 1968, Yale's junior faculty associated with the Program on Law and Modernization were caught in developments and controversies that were at once particular to Yale and also much larger manifestations of political, ideological and cultural struggles.⁶¹ The extent of their intellectual prowess became evident in the decades to come, as they went on to enjoy remarkably productive careers. Through operating the Yale Law School in Exile "Mafia" --as John Henry Schlegel once called them--and helping to found Critical Legal Studies, the legal counterculture that had begun forming on Yale's campus became a diffuse tradition that helped renew American legal academia as a whole.

CONCLUSION: LEARNING FROM THE YALE PROGRAM ON LAW AND MODERNIZATION

The history of the Yale Program on Law and Modernization suggests a need for contemporary scholars to think more deeply about the present foreign policy establishment, the status of the left in the legal academy, and the role of international affairs in shaping legal research and legal thought in the academy as a whole. The history of the Program highlights the international legal and doctrinal origins of Critical Legal Studies. While the popular memory of Critical Legal Studies understands its birth as a combined reaction to the War in Vietnam, the civil rights movement and the frustrations of Johnson's "War on Poverty," much of

⁵⁹ See Kabaservice (2004, 261-271).

⁶⁰ Kalman (2015, 86-88; 201).

⁶¹ See Kalman (2005, 262).

the doctrinal production in the context of Critical Legal Studies concerned domestic law and institutions. The Program's theorizing of law and modernization in fact suggests that legal questions pertaining to America's hegemonic ambitions in the world were crucial to theorizing law anew in the 1970s, a tendency that seems marginal at best in the present status of the American legal academy, even though the failures and blind-spots of America's global agenda persist to this day.

The Yale Program on Law and Modernization also offers a living example of just how much the international dimensions, which were productive of and important in shaping the history of American legal thought, have been overlooked by scholars studying other cases. An example would be the history of Progressivism and the question of how empire shaped the history of Progressive legal thought, an issue entirely ignored by scholars. While historians have detailed the intellectual flow and "Atlantic crossings" that spawned Progressivism in the United States and Europe, the fact that the United States was operating a trans-Pacific empire at the same time is rarely mentioned in the history of Progressive legal thought.⁶² The history of the Program can hopefully inspire scholars to look more carefully for the traces of empire when examining how American legal Progressivism evolved.

The history of the Yale Program in Law and Modernization also invites reflection on the present state of the American foreign policy establishment, which is once again being confronted with the tragic results of its failed assumptions. As the United States is concluding the more militarized aspects of some of its engagements abroad, confronted with devastating criticisms and the disastrous results of the unfolding tragedy in Afghanistan, there will likely be a need to reformulate the ideals of the liberal internationalist imaginary. There is a distinct possibility that legal development will be restored to the center of the liberal internationalist imaginary, marking a shift from military strategies, which have been the object of intense criticism, to the much more ambiguous world of development. Early into the first months of Joseph Biden's presidency, for example, Samantha Power, a lawyer and law professor with previous ties to the language of international humanitarianism that dominated American foreign policy at various times over the course of the past thirty years, was named the 19th Administrator of the USAID. Power has already developed a legalistic vocabulary of eliminating corruption (a strategy with a neoliberal heritage) to define the primary target of USAID.⁶³ If legal development is to become central again for America's liberal internationalist vision, then the Program's history might offer a cautionary tale on the inevitable dilemmas and frustrations that lie ahead for American foreign policy.

Finally, the Program's history offers a point of contrast and comparison to the present status of left critique in American legal academia. As in the 1970s, so today the waves of contestation are reaching elite academic campuses, as student

⁶² See, Kloppenberg (1986); Rodgers (1998).

⁶³ See, Power (2021).

movements wage fights for unionization, against sexual harassment, and for Black Lives Matter. Faced with the continuing failures of liberalism in the United States and elsewhere, there has been a desire to reimagine alternative legal arrangements and analyses, as evidenced by the formation of new legal intellectual movements. It is also not clear, however, how those who imagine themselves as a new form of the legal left will proceed. Current conversations revolving around the relationship, for example, between Critical Legal Studies and Marxism and the dissolution of the CLS, demonstrate an increased interest in thinking about the battles waged over the course of the 1970s. The history of the Yale Program in Law and Modernization makes the possibilities, and the dilemmas, of the legal left more transparent. To what extent can the legal left can be politically disruptive when it is culturally embedded within the norms of proper legal academic conduct that completely dominate the present: when we overwhelmingly find ourselves closer to managerialism than the counterculture?

REFERENCES

Abel, Richard. 2021. "Law and Tradition." In this volume.

Acheson, Dean. 1966. "The Lawyer's Path to Peace." *Virginia Quarterly Review* 42 (337).

_____. 1971. "The Arrogance of International Lawyers." In *Fragments of my Fleece*, 115. New York: Norton.

Alacevich, Michele. 2009. "The Currie Mission in Colombia, 1949-1953." In *The Political Economic of the World Bank: The Early Years*, 11-63. Palo Alto: Stanford University Press.

Anghie, Antony. 2012. "Colonialism and the Birth of International Institutions: The Mandate System of the League of Nation." In *Imperialism, Sovereignty, and the Making of International Law*, 115-195. Cambridge: Cambridge University Press.

Anghie, Antony. 2015. "Legal Aspects of the New International Economic Order." *Humanity* 6(1): 145-158.

Beisner, Robert. 2006. *Dean Acheson: A Life in the Cold War*, Oxford: Oxford University Press.



- Berman, Nathaniel. 1992. "Modernism, Nationalism and the Rhetoric of Reconstruction" *Yale Journal of Law and the Humanities* 4 (351).
- Bilder, Richard. 1962. "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs" *American Journal of International Law* 56 (633).
- Bockman, Johanna. 2015. "Socialist Globalization against Capitalist Neocolonialism: The Economic Ideas behind the New International Economic Order." *Humanity* 6(1): 109-128.
- Brinkley, Alan. 1998. "1968 and the Unraveling of Liberal America." In *1968: The World Transformed*, edited by Carole Fink, Philipp Gassert, and Detlef Junker, 219-236. Cambridge: Cambridge University Press.
- Castañeda, Anna Leah Fidelis. 2009. "Spanish Structure, American Theory: The Legal Foundations of a Tropical New Deal in the Philippine Islands, 1898-1935." In *Colonial Crucible: Empire in the Making of the Modern American State*, edited by Alfred McCoy and Francisco Sacrano, 365-366, 369. Madison: University of Wisconsin Press.
- Chimni, B.S. 2017. "The Policy-Oriented or New Haven Approach to International Law: The Contributions of Myres McDougal and Harold Lasswell." In *International Law and World Order: A Critique of Contemporary Approaches (2nd Edition)*, 112-113. Cambridge: Cambridge University Press.
- Cullather, Nick. 2010. "We Shall Release the Waters." In *The Hungry World: America's Cold War Battle Against Poverty in Asia*, 108-133. Cambridge: Harvard University Press.
- _____. 2010. "A Parable of Seeds." In *The Hungry World: America's Cold War Battle Against Poverty in Asia*, 159-179. Cambridge: Harvard University Press.
- Dietrich, Christopher R. W. 2015. "Mossadegh Madness: Oil and Sovereignty in the Anticolonial Community." *Humanity* 6(1): 63-78.
- Ekbladh, David. 2011. "Modernization And The United States in the World, 1952–1960." In *The Great American Mission*, 153-189. Princeton: Princeton University Press.

_____. 2011. "A TVA on the Mekong: Modernization at War in Southeast Asian, 1960-1973." In *The Great American Mission, 190-225*. Princeton: Princeton University Press.

Ernst, Daniel R. 1993. "Review: The Critical Tradition in the Writing of Legal History." *Yale Law Journal* 102(4) (1019).

Frank, Jerome. 1941. "Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act." *New York University Law Quarterly Review* 18 (317).

Garth, Bryant. 2021. "Legal Revolutionaries at Yale in a Time of Social and Political Change." In this volume.

Gilman, Nils. 2015. "The New International Economic Order: A Reintroduction." *Humanity* 6(1): 1-16.

Giovanopoulou, Afroditi. 2021. "Pragmatic Legalism: Revisiting America's Order after World War II." *Harvard Journal of International Law* 62 (101).

Goebel, Michael. 2015. *Anti-Imperial Metropolis: Interwar Paris and the Seeds of Third World Nationalism*. New York: Cambridge University Press.

Horwitz, Morton. 1992. *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*: 208-212. Oxford: Oxford University Press.

Hupper, Gail. 2015. "Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law." *New England Law Review* 39 (319).

Immerwahr, Daniel. 2015. *Thinking Small: The United States and the Lure of Community Development*. Cambridge: Harvard University Press.

Kalman, Laura. 1986. *Legal Realism at Yale, 1927-1960*. Chapel Hill: University of North Carolina Press.

_____. 2005. *Yale Law School in the Sixties: Revolt and Reverberations*. Chapel Hill: University of North Carolina Press.



Kabaservice, Geoffrey. 2004. *The Guardian: Kingman Brewster, His Circle, and the Rise of the Liberal Establishment*, 9, 261-271. New York: Henry Holt.

Katznelson, Ira. 1989. "Was the Great Society a Lost Opportunity?" In *The Rise and Fall of the New Deal Order, 1930-1980*, edited by Steve Fraser and Gary Gerstle, 185-211. Princeton: Princeton University Press.

Keller, Morton and Phyllis Keller. 2001. *Making Harvard Modern: The Rise of America's University*. New York: Oxford University Press.

Kennedy, David. 2005. "Speaking Law to Power: International Law and Foreign Policy. Closing Remarks" *Wisconsin Journal of International Law* 23 (173).

Kennedy, Duncan. "My Path to Law and Modernization at Yale, 1968-70: A Memoir of Radicalization." 2021. In this volume.

Keys, Barbara J. 2014. *Reclaiming American Virtue: The Human Rights Revolution of the 1970s*. Cambridge: Harvard University Press.

Khalil, Osamah F. 2016. *America's Dream Palace: Middle East Expertise and the Rise of the National Security State*, 77-82. Cambridge: Harvard University Press.

845

Kloppenber, James. 1986. *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920*. New York: Oxford University Press.

Koskenniemi, Martti. 2002. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, 497-500. Cambridge: Cambridge University Press.

Llewellyn, Karl and E. Adamson Hoebel. 1941. *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*. Norman: University of Oklahoma Press.

Lustig, Jeffrey. 1982. *Corporate Liberalism: The Origins of Modern American Political Theory, 1890-1920*. Berkeley: University of California Press.

May, Elaine Tyler. 2008. *Homeward Bound: American Families in the Cold War Era*. New York: Basic Books.

McDougal, Myres. 1947. "The Law School of the Future: From Legal Realism to Policy Science in the World Community." *Yale Law Journal* 56 (1345).



McDougal, Luther III. 1999. "Property and Planning." *Yale Law Journal* 108 (1941).

Mehrota, Ajay. 2001. "Law and the 'Other': Karl N. Llewellyn, Cultural Anthropology, and the Legacy of the Cheyenne Way." *Law and Social Inquiry* (741).

Menand, Louis. 2021. *The Free World: Art and Thought in the Cold War*. New York: Farrar, Straus and Giroux, 2021.

Morgenthau, Hans. 1967. *Politics Among Nations: The Struggle for Power and Peace*, 265, 307. New York: Knopf (4th ed.)

Moyn, Samuel. 2010. *The Last Utopia: Human Rights in History*, 120-161. Cambridge: Harvard University Press.

Offner, Amy C. 2019. *Sorting Out the Mixed Economy: The Rise and Fall of Welfare and Developmental States in the Americas*. Princeton: Princeton University Press.

Pound, Roscoe. 1954. "The Lawyer as a Social Engineer." *Journal of Public Law* 3 (292).

Power, Samantha. 2021. "Statement on Anti-Corruption." Available at <https://www.usaid.gov/news-information/press-releases/jun-4-4021-statement-administrator-samantha-power-anti-corruption>

Rodgers, Daniel T. 1982. "In Search of Progressivism" *Reviews in American History* 10(4) (113).

_____. 1998. *Atlantic Crossings: Social Politics in a Progressive Age*. Cambridge, MA: Belknap Press of Harvard University Press.

_____. 2011. *Age of Fracture*. Cambridge: Harvard University Press.

Saberi, Hengameh. 2014. "Descendants of Realism? Policy-Oriented International Lawyers as Guardians of Democracy." In *Critical International Law: Postrealism, Postcolonialism, Transnationalism*, edited by Prabakhar Singh and Benoit Meyer, 29-30. New Delhi: Oxford University Press.



Santos, Boaventura de Sousa. 2021. In "Envisioning Law, Society and Development in a Time of Change: The Yale Program in Law and Modernization, 1967-75 and its Aftermath" Law and Society Annual Conference.

_____. 2021. "My Law and Modernization Journey." In this volume.

Schlegel, John Henry. 1984. "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies." *Stanford Law Review* 36 (391).

Schwarz, Jordan. 1987. *Liberal: Adolf A. Berle and the Vision of an American Era*. New York: Collier MacMillan.

Smith, Gaddis. 1972. *Dean Acheson*. New York: Cooper Square Publishers.

Suri, Jeremi. 2009. "The Rise and Fall of an International Counterculture." *American Historical Review* 114 (45).

_____. 2010. "Counter-Cultures: The Rebellions against the Cold War Order." In *The Cambridge History of the Cold War*, edited by Melvyn P. Leffler and Odd Arne Westad, 460-481. Cambridge: Cambridge University Press.

847

Trubek, David. 2016. "Law and Development: Forty Years After 'Scholars in Self-Estrangement.'" *University of Toronto Law Journal* 66(3) (301).

_____. 2021. "From Legal Missionary to Critical Scholar: My Law and Modernization Journey." In this volume.

Tsuk Mitchell, Daria. 2007. *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism*. Ithaca: Cornell University Press.

Tushnet, Mark. 1991. "Critical Legal Studies: A Political History." *Yale Law Journal* 100 (1515).

Wertheim, Stephen. 2020. *Tomorrow, the World : The Birth of U. S. Global Supremacy*, 1-14. Cambridge: Harvard University Press.

Whelan, Daniel J. 2015. "'Under the Aegis of Man': The Right to Development and the Origins of the New Economic Order." *Humanity* 6(1): 93-108.



White, G. Edward. 1984. "The Inevitability of Critical Legal Studies." *Stanford Law Review* 36 (649).

