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LEGAL REVOLUTIONARIES AT YALE IN A TIME OF POLITICAL AND SOCIAL CHANGE

BRYANT G. GARTH ¹

My comment on the fascinating personal accounts of experiences with the Yale Law and Modernization program will be in part personal. My own career and research interests are part of the ripple effect of that program and of the scholars who participated in it. After offering that personal account, I will try to look at the context for the Law and Modernization initiative in relation to the changing role of law and lawyers in the US and the way in which that role was exported as part of Cold War strategies. I will suggest that the battles around the Law and Modernization Program provide strong evidence of the crisis during an era of relative idealism (not inconsistent with US hegemonic designs abroad and social control policies at home) connected to modernization and what Trubek and Galanter termed liberal legalism.² What's more, the program nurtured leaders in producing scholarship designed to update or replace liberal legalism, legal missionaries, and legal imperialism. Much of what we know as Law and Society, Critical Legal Studies, and other critical approaches came from these scholars and the events around Law and Modernization.

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I was a freshman undergraduate at Yale at the time of the beginnings of the Law and Modernization program in the Law School in 1968, although I had no sense of the program then. My undergraduate experience was all about the left, the critique of pluralism, European critical theory, and US critical histories. I told my historian advisor that I was thinking of law school (after he told me there were no positions in history), and he warned me about the conservatism, telling me among other things that law faculty tended to drive American cars. When there were demonstrations and strikes around the Bobby Seale trial in New Haven in 1970, followed by the demonstrations and strikes against the Cambodian invasion, I remember a forum where a law student said they could not strike because of the importance of their legal education for solving social problems. In retrospect, there was a sense among non-law students and activists, I think, that elite law was not very relevant to what was going on outside.³ From the perspective of those within the law school, however, the accounts of the Law and Modernization cohort suggest that the students were nevertheless way in front of the general faculty.

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² See Trubek and Galanter (1974).

³ See Kalman (2005).



I went to law school at Stanford. I was, of course, swept into the discussion about whether progressive courts could give us a right to welfare⁴, or whether the effects test in equal protection could promote social justice in employment, again through the courts. But there was nothing that connected to my undergraduate education or what I read in left periodicals. Indeed, after the coup in Chile, I went to a class conducted by a liberal professor the next morning, and he said Allende just went too far. I took one law and society course, offered by Lawrence Friedman, and enjoyed it, but that was the time when lawyers promoting social science asked very positivistic questions such as, if people cross the street against the light, will others do the same thing. I also took a law and economics class, which seemed very alien. I did not interview with corporate law firms, thinking I would stay with a small firm in Palo Alto where I worked during law school; and one day I saw a notice for a fellowship in Florence with Professor Mauro Cappelletti, a Stanford and University of Florence professor who had not been at Stanford in my time there.

Cappelletti had an arrangement, not uncommon in the Cold War, by which he could offer a one-year Fulbright award to an American law graduate each year, part of a process of encouraging US law graduates to be more open to international connections and alliances. I applied and filled out the Fulbright form without knowing that the recruitment was to serve as a research fellow on a Ford Foundation Project on Access to Justice, co-directed by Cappelletti and Earl Johnson, Jr., the former director of the OEO Legal Services Program and then a law professor at USC. Three US law graduates were recruited, and the formal Fulbright went to one already in private practice. I started earlier with the fall semester at Stanford after I graduated. Then Cappelletti and I moved to Florence where we were joined by the two others.

While at Stanford in the fall of 1975, Cappelletti gave the Mitchell lecture in Buffalo, and he returned, if I remember correctly, with offprints from Marc Galanter, then at Buffalo. One was "How the Haves Come Out Ahead" (1974) and the other was Trubek and Galanter, "Scholars in Self-Estrangement" (1974). From my perspective, this was the first sign that my legal education had anything to do with any kind of critical theory. I remember especially that near the end of "Scholars" there was a quote from Max Horkheimer, who was cited as "suggestive." I had no idea any law professors had heard of Horkheimer. The citation predisposed me to take this work seriously, and in my three years on the Access to Justice Project, I worked to build their perspective into the publications. Both Trubek and Galanter were participants in the project as well.

The Access to Justice Project, as it turned out, coincided with the rise of the Law and Society Association and empirical research in support of a reformist liberal legalism agenda. The Ford Foundation sponsorship of the project and the "three

⁴ See Reich (1964).

waves” of reform identified by the project were also indicative. Those waves were legal aid, class actions and public interest law, and alternative dispute resolution, consistent with the reformist agenda and revealing fatigue with the aggressive legal strategy of waves one and two through the promotion of alternative dispute resolution. I produced a doctoral dissertation and book, *Neighborhood Lawyers for the Poor* (1980), which edged toward a more critical perspective and was cited by Richard Abel in his "Law without Politics: Legal Aid under Advanced Capitalism" (1985). By the late 1970s, when the project concluded, the counterattack on the welfare state was in full swing.

The rise of neo-liberal economics was bolstered by the Ford Foundation trained “Chicago Boys,” who implemented such policies under Pinochet in Chile and began a global wave of deregulation, privatization, and neo-liberalism. With the rise of the human rights movement and democratization in Chile and elsewhere, US support moved from neo-liberal authoritarians like Pinochet to democracies that maintained neo-liberal economics. The leaders were later termed “Technopols” to emphasize that modernization post Cold War included “Freeing Politics and Markets in Latin America in the 1990s” – free markets plus democracy -- as stated by the subtitle of the book.⁵

My own experience thus overlaps with several themes of the Law and Modernization cohort, including the sense that liberal legalism and modernization theory were obsolete, given the changing times. I could certainly see that what we were promoting for Access to Justice was becoming more and more unlikely, and the attack on modernization theory was part of my undergraduate education. I was aware there was a contest to produce a politics and governing ideology to replace the complex of political and scholarly approaches that united the Liberal Establishment in power in the 1960s. The government of Allende in Chile, as a notable example, mattered both in the South and the North.

A theoretical perspective on law and social change

My perspective on Law and Modernization draws on a book with Yves Dezalay entitled *Law as Reproduction and Revolution: An Interconnected History* (2021). The starting point, which draws on Pierre Bourdieu and Harold Berman, is that law and the legal field serve power by providing legitimacy and rules that serve existing power arrangements and, in exchange, the powerful generally comply with the rules that essentially serve their interests. The law typically becomes embedded in and largely protects political, economic, and social hierarchies. Over time, not surprisingly, the connection, also enshrined in legal scholarship, leads to complacency and a kind of scholarly laziness produced by an entrenched legal elite thriving under the current regime. The weight of legal scholarship follows power, even though what individual scholars produce depends on many complex factors and individual histories. What we call a legal revolution occurs when the field of

⁵ Dominguez (1997).

law, including legal scholarship, shifts its support from one regime to another. As Berman showed in his histories of the Gregorian and Protestant revolutions (1983), these legal revolutions end up reproducing social and other hierarchies embedded in the law and legal institutions, which survive through this moderated change.

Challenges arise within the scholarly community through a two-part process: first, within the scholarly world ambitious newcomers note the weakness of the scholarship supporting the status quo; second, they build alliances with alternative political groups who challenge the existing regime. A successful legal revolution thus involves an alliance between political challengers and legal upstarts, who also provide some legitimacy to the challengers. The legal ideas that work for the challengers can take many different forms. The legal upstarts may challenge the hierarchies of the legal field as well, but when successful they typically refurbish and join the hierarchy and what it represents. An obvious example is the New Deal: the legal realists drew on social science to question the dominant scholarship, joined the New Deal to gain influence, legalized from within what had been a threat to corporate power and the ability of corporate lawyers to resist governmental action seeking to control corporate power, and then became the core of Washington D.C. law firms that helped re-establish the hierarchy, with elite law graduates in partnership positions (still serving corporate clients) at the top.⁶ “Social change” through law in the form of a legal revolution is therefore both reproduction and revolution, brokered by newcomer legal challengers who ultimately sustain the hierarchies they join.

Liberal legalism and corporate lawyers

Liberal legalism was not just a set of ideas. It was part of what Geoffrey Kabaservice termed the Liberal Establishment. Kabaservice included in his portrayal Kingman Brewster, McGeorge Bundy, John Lindsay, Paul Moore, Eliot Richardson, and Cyrus Vance. Brewster, Vance, Lindsay, and Richardson were lawyers, and all were patricians central to the era in which the Eastern establishment opened schools and governments to excluded groups through support for welfare state policies enhancing equal opportunity. This group was deeply embedded in Yale Law School in the late 1960s. Brewster was the President of Yale University, Vance was a key trustee, Bundy was part of JFK’s best and brightest and then the President of the Ford Foundation, and Lindsay was the Mayor of New York City. What united this social and academic elite was the belief that the establishment in its own interest had to make room for new groups and expand opportunity in the post-war and Cold War period. They served the government and brought together the resources of the elite universities, the metropolis, the foundations, and the corporate law firms.

⁶ Shamir (1995).



The reaction of the Kennedy Administration to the emerging civil rights movement of the 1960s is instructive. The lawyer selected to head the Department of Justice's Civil Rights Division under Kennedy was Burke Marshall, a partner of the Washington, D.C. corporate law firm of Covington and Burling—"a first-class lawyer who would do the job in a technically proficient way," according to Byron White, then the Deputy Attorney General.⁷ He moved to Yale as a law professor in 1970. The administration naturally looked to partners of elite corporate law firms for stature and leadership to manage difficult problems at home and abroad. As Hilbink shows, Marshall and others in the administration were Ivy League gentlemen who wanted to persuade reasonable individuals in the south—their presumed counterparts—to open up the system to African Americans. They "assumed that the system maintaining their status was basically sound."⁸ The advisors followed the strategy of trying to gradually expand participation, but this moderate strategy, which depended on god will, was not working in the South.

The White House then invited 250 — "very elegant lawyers" to Washington, notably excluding the leftist National Lawyers Guild. Kennedy asked the elite lawyers to help keep everything "calm."⁹ The administration then formed a committee—the Lawyers Committee for Civil Rights Under Law (LCCRUL)—chaired by Bernard Segal, later President of the ABA and a corporate lawyer in Philadelphia, and Harrison Tweed, former President of the National Legal Aid and Defenders Association (NLADA), chair of the American Law Institute, and named partner in the Wall Street firm Milbank Tweed. The committee was a prestigious group dominated by corporate lawyers known for their public service. The natural order in their social world was that these corporate lawyers from elite law schools would help solve the problem and simultaneously reinforce the ideal of lawyer statespersons serving both their clients and the public good.

When the famous Freedom Summer began to take shape in 1964, it presented a challenge to all the players in this domain. The corporate lawyer-dominated LCCRUL opted to bring lawyer volunteers to the South with a narrow mandate -- to represent ministers and try to persuade white southern lawyers to represent individuals arrested for civil rights activities. The more activist side of the liberal establishment went further. The ACLU teamed up with the American Jewish Congress, the American Jewish Committee, the Congress of Racial Equality, Father Robert Drinan (a Jesuit priest, lawyer and civil rights activist) and others to coordinate lawyers and students going to the South. They sought to connect to the new generation activists, terming their alliance the Lawyers Constitutional Defense Committee (LCDC). They recognized that genteel strategies were not working. But they also kept the Lawyers Guild at a distance.

⁷ Hilbink (2006, 78).

⁸ Ibid.

⁹ Ibid.

After the Freedom Summer, the groups that provided assistance recognized the desirability of a more permanent presence in the South. Making the case to foundations, the more activist LCDC emphasized its connection to and ability to “appreciate the political purposes and strategy of the operative civil rights organizations.”¹⁰ The more establishment Lawyers Committee (LCCRUL), in contrast, emphasized its connections to the federal government and its elite professional profile. When it came time to choose which group to support in 1967, the Ford Foundation opted for the Lawyers Committee.

Yale Law School was linked to this corporate establishment and the ideal of moderation built into it. For many law students, the most desirable career tracked the pattern of Lindsay, Richardson, and Vance: partnership in a prestigious corporate law firm before a move into public service and an investment in moderate social reform. But, as illustrated by LCDC, that ideal was not as attractive to the generation of new aspirantsto elite positions -- not to mention the many who rejected elite law schools in favor of activism.

Charles Halpern, who graduated from Yale Law School in 1964, is an example of someone following that established Bourdieussian habitus. Halpern was relatively apolitical as an undergraduate at Harvard, attended Yale Law School, and went to work at Arnold and Porter after a federal clerkship. He imagined “a career of working at a law firm, doing pro bono work, and taking stints in government.”¹¹ In the era of the late 1960s, however, Halpern began to feel increasingly attracted to activism and disillusioned with his work for Arnold and Porter, including representing big tobacco. The career for which he had prepared, combining public service and corporate law, no longer appealed. He did not fit the mold of the corporate law firm. Instead, he helped begin the foundation-funded public interest law movement (which attracted optimists into law school again while also ensuring that elite law graduates would be leaders of public interest law).

Others during this period at Yale rejected corporate law, and some took advantage of the Reginald Heber Smith program created in 1967 by the second director of the Legal Services Program, Earl Johnson, Jr., who recognized the questioning of the elite law firms and sought to exploit it. He saw an opening for idealistic law students who were not radicals but did not want to work in corporate law. Johnson sought to recruit “the top rank of graduating law students,” former federal judicial law clerks and young corporate lawyers – seeking to create an “elite corps of lawyers” who would be central to the War on Poverty. Johnson sought to create an outlet for “a group of talented young lawyers rejecting the rhetoric of revolution and signing up for a low-paying job that sought only peaceful, orderly change through established institutions.”¹² The legal services lawyers in the mid-

¹⁰ *Ibid.*, 131.

¹¹ *Ibid.*, 311.

¹² Johnson (2013, 149).



1960s did indeed respond to the call for legal activism, especially through test cases, while encountering strong resistance as conservatives began to fight back under Richard Nixon at the end of the decade.¹³

The challenge from the left remained. Despite the progressive activities of the relatively elite bar in the 1960s and 1970s, as Hillbink (2006) points out, “radical lawyering” that directly challenged elite institutions was thriving. Earl Johnson, Jr., noted that leftist lawyers told those who joined the Reginald Heber Smith program that legal services would only “mitigate” conditions that required more revolutionary action. The most radical lawyers had little faith in law and the legal system. They did not believe that social problems could be solved through the moderate legal reforms favored by the liberal establishment—law itself was a major part of the problem. The lure of radical action further undermined the position of law and its hierarchies—corporate lawyers, elite law graduates—in the U.S. state and economy. More fundamentally, the credibility of corporate lawyer-statespersons was threatened, and their social capital was depreciating.

The rise of foundation-funded public interest law as a counterpart to corporate law in the 1970s, a story in which Yale figured prominently, provided another moderate avenue for lawyer activism. The Ford Foundation ensured moderation by funding public interest firms aiming for elite law graduates and by making sure that the governing boards were vetted by a Public Interest Advisory Committee of leading corporate lawyers to “insure that the highest standards of prudence and professionalism characterize our efforts in this field.”¹⁴ Laura Kalman (2005: 226) aptly notes that the creation of the high prestige, foundation funded, public interest law firms gave an outlet to Yale and other elite law graduates, allowing “students and professors alike to see themselves as both members of, and rebels against, the Establishment.”

The credibility of corporate lawyer-statespersons was ultimately rebuilt, in part through the boards and funding of public interest law. But the governing regime and its supporting lawyers and legal scholarship shifted away from the inclusive welfare state at the heart of the liberal legalism of the 1960s.

Modernization

Modernization theory, identified most closely with Walt Rostow’s *Stages of Economic Growth: A Non-Communist Manifesto* (1960), was the foreign policy counterpart of domestic liberal legalism, except that law initially had little to do with it. As was true of liberal legalism, the theoretical framework obscured deviant practices: Cold War policies at home and abroad and the policing of activists (especially African Americans). Before the creation of law and development or law and modernization, US policies supporting legal education reform, often funded by the Ford Foundation, were part of Cold War policies, at least in India, Indonesia,

¹³ See Hillbink (2006).

¹⁴ *Ibid.*, 333.

Japan, the Philippines, and South Korea. But the practice lacked a theory and was motivated only by the sense that elite lawyers should be moderate reformers rather than reactionary opponents of reform.

The Foreign Policy Establishment was happy to support these idealistic Cold War initiatives while maintaining that “realism” identified with George Kennan, Hans Morgenthau, and Reinhold Niebuhr meant that the US also needed to protect its Cold War interests through other means. McGeorge Bundy, Walt Rostow, and others of the FPE were closely connected with liberal legalism at home and modernization abroad. As noted by Trubek and Galanter, the Vietnam War unsettled this modernization theory and its claim to benevolence. Left scholars such as Gabriel Kolko made the connection between domestic and foreign policy in books such as *The Triumph of Conservatism* (1963) and *The Roots of American Foreign Policy* (1969).

The patrician social profile of the FPE helps explain the challenges that emerged. Richard Barnet noted (1971: 49):

The temporary civilian managers who come to Washington to run America's wars and preparation for wars, the national security managers, were so like one another in occupation, religion, style, and social status that, apart from a few Washington lawyers, Texans, and mavericks, it was possible to locate the offices of all of them within fifteen city blocks in New York, Boston, and Detroit. Most of their biographies in *Who's Who* read like minor variations on a single theme – wealthy parents, Ivy-League education, leading law firm or bank....

They were counterparts of and often the very corporate partners Kennedy looked to for leadership of programs to improve civil rights. The reform programs all embraced a moderate and moderately idealistic “third way” between capitalism and communism, which looked increasingly obsolete.

The challenge of yale's law and modernization program

Yale's Law and Modernization Program initially was promoted by David Trubek and William Felstiner as a moderate enterprise consistent with liberal legalism at home and modernization abroad. They were Cold War liberals. The social context at home and abroad, and the discussions initially promoted by left-oriented participants in the program, turned it and its participants into a legal avant-garde within elite law and through the diaspora of those who left Yale.

Duncan Kennedy's trajectory is indicative. He began with an “anti-colonial form of politicization, consistent with believing in the American mission to help the newly liberated countries develop economically and autonomously.” But:

that had been shattered by my time in the CIA. So in the CIA, at the height of the Vietnam war, and also at the height of ghetto riots in the United States, I come to the internal realization that I actually was against the government. So I arrived with a frame of mind that the US government, controlled by liberals, of whom I had been. I was a cold war liberal when I arrived. When I left, I was no longer a cold war liberal. In my own understanding, I was a radical, in relation to the liberal establishment, the government and the educational system. And the other was culture. So the culture of the sixties was arriving. Equally powerful impact."¹⁵

Other critics represented the new meritocratic group admitted to the elite schools when they opened up in the 1950s. Like Halpern, they saw that the elite careers they had sought were neither as welcoming nor as public-spirited as they had thought. Finally, the challenge had a scholarly component that challenged the legitimating scholarly discourses that undergirded the establishment. The challenge was both to the weakness of the scholarship and the conclusions it had drawn. The cohort of the Law and Modernization Program was central in working out elite challenges to that scholarship.

The existing scholarship was not only closely attuned to the prevailing ideology but was also, to a great extent, complacent, hidebound, and lazy in adopting new approaches. Richard Abel's quotation of Joseph Goldstein is instructive:

I was going off to do fieldwork in Kenya and it was going to be my first contact with Africa and it was going to be an immersion. It was very exciting. He said, "Why would you want to do that? ... You can just construct by hypotheticals any question you want to raise, there's no reason to do fieldwork at all."¹⁶

Goldstein was equally contemptuous of Abel's work for New Haven Legal Assistance Association, on whose board of governors he served. The appropriate role for a distinguished Yale law professor was setting policy, not working in the trenches.

Mark Tushnet, another Yale law student, later wrote an article criticizing the constitutional law scholarship of the 1970s and after.

The typical constitutional law article today has a standard form. The author identifies a doctrine developed in recent Supreme Court cases, notes some difficulties in the internal logic of the doctrine, indicates that the doctrine seems incompatible with the

¹⁵ "Transcript..." (2021).

¹⁶ "Transcript..." (2021).

results of other cases, suggests minor modifications in the doctrine to make it consistent with those cases, and concludes that the doctrine as modified – almost uniformly into a balancing test – provides a sensible way of achieving results without going too far.

As a result, the author manages to show that the cases can be “embodiments of principles of justice, *defined as the standard political principles of the moderate-left of the Democratic Party.*”¹⁷ This kind of homogeneity and complacency was part of what opened up the legal academy to challenge. Richard Abel’s (1973) bold attack on “law books” is a clear statement of that view.

As David Trubek stated, the Law and Modernization program aspired to upgrade legal scholarship:

We're going to create an institutional structure to study law and modernization. We decided we need our own center. We're going to organize the existing knowledge. We're going to conduct more. Here we are, multi-disciplinary empirical studies to verify empirical generalizations. *We're encouraging theory buildings. We're going to train Yale faculty in social science, behavioral science, development and the third world.* Train a small caveat. This research will disseminate new knowledge and support growth of other research centers. So we were very busy and very ambitious... And then we collaborated with the Russell Sage program in law and social science.¹⁸

It was to be interdisciplinary and positivistic with verified empirical generalizations. In this instance, science was part of the challenge to the prevailing approaches at Yale Law School (as it had been for the Legal Realists). Trubek also marshalled European theories to criticize the homegrown modernization framework: “although the seminar started with contemporary development theory and practical problems drawn from my personal experience in Brazil. And by the third time I taught it, we had Weber, Durkheim, Marx and social theory of law and critical material.”¹⁹

The political, theoretical, and methodological challenges to the Yale Law professoriat ultimately were not well-received, and Abel, Trubek, and several others were denied tenure. Law and Modernization was recaptured by more acceptable and conventional scholars. To explain the faculty reaction against the L&M leaders and other junior faculty, this quotation from Jan Deutsch is suggestive:

¹⁷ Tushnet (1979, 1322) (emphasis added).

¹⁸ “Transcript...” (2021) (emphasis added).

¹⁹ Trubek (2021, 8).

What was going on was the students were basically communicating, “Hey, you people are telling us that law is going to save the world. It hasn’t, so what are you talking about? Why are you bugging us? Why are you giving us a hard time as students? We’re supposed to do and learn what you say we’re supposed to learn. We think you don’t know what you’re talking about.” Well, the faculty couldn’t buy that! So, what they decided was that it was the junior faculty that were making the trouble.²⁰

Yale managed to absorb some of the left into a renewed liberal legalism with the help of the Ford Foundation investment in public interest law in the late 1960s, but liberal legalism, the liberal establishment, and modernization theory ultimately did not fare very well in the decades that followed. The demise of the US welfare state killed liberal legalism as then understood – as a liberal establishment strategy to support expansive social programs and an opening to excluded groups -- and the delegitimization of the developmental state helped to kill law and modernization. The role of lawyers and legalism survived but adapted to a governing regime with a very different agenda.

Law and modernization and the production of a “golden age” in us legal theory

There is a perception that the 1980s were a golden age for legal theory in the United States – a time when academic law thrived.²¹ Law and Economics contended with Critical Legal Studies, Critical Race Theory, Law and Society, and Feminist Legal Theory, among others. One reason was increased competition among legal academics, which related to the opening of law schools to more meritocratic entrants. Tenure standards tightened, and academic production became central to the growing lateral market in law teaching jobs. This was also a response to the weakness and complacency of existing scholarship connected to the liberal establishment.

As Duncan Kennedy noted

the story [is one of] understanding the law and modernization seminar as a transition, not focusing on the accomplishments of the list of people that David read or in any of the specific works that they produced, but on the transitional role. The way to understand it, I think very much in the mode of the overlap between autobiography and institutional history, would be to say a bunch of people who were doing something before this moment in New

²⁰ Collier (2018).

²¹ See Hackney (2012).



Haven, between 1967 and 1972, and afterwards were instrumental in the creation of those things, the new international postmodern legal pluralism, fluid development, black society, critical legal studies.”²²

This group participated heavily in upgrading of legal scholarship, from Duncan Kennedy’s revisiting of legal formalism, showing analytical skills that even those who rejected his politics admired (evident in his hiring at Harvard), Richard Abel’s later challenge, on the basis of sophisticated sociological theory, to the legal profession’s self-serving understanding, Boaventura de Sousa Santos’s use of left sociological tools and political struggle to push the Kelsenian legal world in Latin America to accept a stronger role for lawyers and law in promoting social activism, and David Trubek’s connections to legal theory, empirical research on dispute resolution, and other innovative approaches at home and in law and development revivals.

Crucial to the story, however, was the political competition that fueled academic production. The liberal establishment had lost much of its credibility as the strategy of social inclusion encountered resource limits, economic crises, and the conservative backlash against affirmative action and women’s rights. This loss of credibility could be exploited by elite law professors, and the cohort of scholars around Law and Modernization were important actors in this golden age. These and other legal scholars offered theories to connect with emerging political trends. Critical Legal Studies also helped maintain the prestige and notoriety of the elite law schools and their professors, even though most legal practitioners could essentially ignore the leftist critiques, and many professors reviled CLS. Law and society scholars, including many of those linked to the Law and Modernization diaspora, thrived in part because they could maintain their alliances with dominated social groups, their commitment to social science methodology, and their defense of the social welfare state, even though most law and society scholars were not at elite schools. And identity groups gained stature through critical race theories that were inspired by CLS and law and society.

The ascendent political movement most threatening to the liberal establishment came from the right and found a place in the legal academy as “law and economics,” which gained increasing influence in the 1980s and ultimately became the pivotal connection between the legal academy and the new regime in Washington. The other movements still existed, to be sure, but their power was limited compared to scholars who sought to gain credibility with conservative economists through approaches such as “nudge theory.” The legal revolution of the 1980s was an alliance of conservative politics and a new law and legal scholarship (with unchanged institutional hierarchies including law schools and corporate lawyers).

²² “Transcript...” (2021).



It was a classic successful legal revolution, as Ann Southworth (2008) and others show.²³ The movement against the welfare state in the 1960s and 1970s began as an anti-legal establishment (and liberal establishment) phenomenon supported by neo-liberal economists. The law and economics movement and the legal scholarly revolt fostered by the Federalist Society and brokers such as Ed Meese brought elite law and legal institutions back into the core of governance. Now elite law schools and lawyers make up a divided establishment connected to the two political parties but also united in many ways -- including the hierarchy that puts corporate lawyers and elite law schools at the top.

US foreign policy was closely connected. The export and re-import of neo-liberal economics promoted in large part by authoritarian governments and structural adjustment policies helped revive some aspects of the liberal establishment through the investment in the human rights movement, but it did not succeed in toppling neo-liberal policies at home or abroad. Instead of modernization theory, we had the Washington Consensus after 1990, aided by a new law and development scholarship in the service of that consensus.

Conclusion: then and now

The Law and Modernization Program and the scholarly cohort associated with it, including many not mentioned in this article, were part of a brief moment in US life when it looked like something beyond the welfare state might take shape, promised by the Age of Aquarius, Woodstock, the Summer of Soul, Martin Luther King and Malcolm X, and the presidential campaign of Robert Kennedy. The Program helped to kill the antiquated scholarship and politics of the liberal legalist welfare state and the program of reform abroad through modernization. The theories and ideas produced by that challenge did not find winning political sponsors, but they played a crucial role in developing critical approaches that helped upgrade legal scholarship, and they continue to inspire new generations seeking alternatives to today's complacent establishment theories of originalism, Supreme Court hegemony, and neo-liberal economics. Much has changed, but remarkably, the position of the elite law schools and the leading corporate law firms managed not only to survive multiple challenges but also to inspire imports around the globe.²⁴

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²³ See Teles (2008).

²⁴ See Wilkins, Trubek, and Fong (2020).



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