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THE LEGALIST REFORMATION
STUDIES IN LEGAL HISTORY

Published by the University of North Carolina Press
in association with the American Society for Legal History

Thomas A. Green & Hendrik Hartog, editors
TO BERNARD BAILY
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THE LEGALIST REFORMATION
INTRODUCTION

In the words of one commentator, the city of New York during the past century has witnessed “the coarse, yet closest, attempt of . . . [people] of all colors, skins, faiths and tongues to live together in community.” The thesis of this book is that the law of New York—law proclaimed largely by state court judges rather than by legislators or federal officials—has been the principal instrument facilitating this attempt. A further hypothesis, which this book will suggest but not document, is that the legal ideology adumbrated by New York judges has, at the threshold of a new millennium, become the standard of justice for all those people in the world who, like New Yorkers, are striving to coexist.

I did not begin my research on this book with my present thesis, or indeed with any hypotheses whatever, in mind. I decided to write the book, not because I knew what I wanted to say but because the literature of American legal history contained an enormous gap. While books and articles had been written about twentieth-century federal constitutional and regulatory law, no one had written a monographic, historical synthesis of the century’s developments in state constitutional law or in the common law.

This book offers such a synthesis. But it also aims to do more. Resting on a foundational assumption that historians should rediscover forgotten data rather than rehash what is already familiar, I opted against generating my synthesis out of materials included for pedagogical and argumentative reasons in leading casebooks. Instead, I decided to reconstruct in all its detail and complexity the law, both public and private, of a single jurisdiction. By focusing on one state, I could give attention to the often highly revealing secondary opinions of the state’s highest court, as well as the opinions of intermediate and trial court judges. Statistical analysis of the work of trial courts also became possible. Ultimately, my decision to focus on a single state enabled me, and I hope will enable my readers, to delight in the discovery of new knowledge and insight.

New York was the obvious state to investigate. It was home to many key twentieth-century legal players, such as Benjamin N. Cardozo and Karl Llewellyn. For most of the century, New York was the most populous state and the economic and cultural leader of the nation. It was in one important respect
also more typical of the nation as a whole than any other single state: with its metropolitan center on the Atlantic coast, its upstate industrial cities little different from those of the Midwest, its expanding suburbs, and its rural farmlands and environmentally protected woodlands, New York contained locales similar to those in all the rest of the nation except the Deep South and the Far West. One would accordingly expect to find a wider variety of the sociopolitical forces that shape law in New York than in other jurisdictions. Of course, those forces might converge differently in New York than elsewhere; indeed, New York City’s position as the world’s first multicultural metropolis and as a center of world finance and commerce probably meant that legal changes occurred in New York before they did elsewhere. Of course, we cannot be certain that the law of New York either anticipated or otherwise paralleled the law of other jurisdictions. But until other scholars examine in detail California, Texas, and at least one southeastern state, the conclusions about New York law set forth in the pages that follow should serve as preliminary hypotheses about more general, nationwide developments in the law beyond those that occurred in the Supreme Court of the United States.

A second assumption I brought to my research was the common lawyer’s faith that analysis of judicial opinions is key to understanding law. Accordingly, I read widely in some 620 volumes of the *New York Supplement* and in decisions from the Second Circuit Court of Appeals and the New York District Courts published in the *Federal Reporter* and in *Federal Supplement*.

In an effort to limit the scope of my research, I imposed some arbitrary limitations. When I began research in the mid-1980s, I decided to end the book in 1980; correspondingly, I chose to begin in 1920. I also decided not to read cases dealing with criminal procedure or with most of the substantive law of crime. I believe, however, that I have read most of the remaining cases.

My third assumption was that statistical analysis can help in understanding the impact of doctrine on society. With the aid of student research assistants, I accordingly gathered a random sample of approximately fifty thousand unreported trial court cases. The sample included about one hundred cases per year from each of the four federal district courts in the state and one hundred cases per year from trial courts in each of four counties—New York County, which comprises the island of Manhattan; Nassau, a suburban county on Long Island; Erie, an upstate industrialized county containing the city of Buffalo; and Tompkins, an upstate rural county.

It is important to emphasize that this book’s focus on private-law doctrine and on cases in trial and appellate courts does not stem from a belief that law is

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autonomous or that legal change occurs independently of political, economic, or cultural change.3 Indeed, my fourth assumption is precisely the opposite—that law is deeply embedded in the culture and political economy of its time. Thus I have studied New York law not for its own sake but for what it reveals about the people of the state and their economy, politics, and society.

On the basis of these four assumptions, my goal became to create a narrative, drawn initially out of legal sources, about how private and public law, politics, and ideology changed in tandem in New York between 1920 and 1980.4 As I pursued research toward this goal, it became increasingly clear that, in the early decades of the twentieth century, the state was the scene of virulent struggle between a mainly upstate, White Anglo-Saxon Protestant (WASP), upper and middle class and an impoverished, New York City–centered, mainly Jewish and Roman Catholic, immigrant underclass. It also became clear that I would write a narrative about how people born into the underclass used the law to alter the dynamic of conflict and thereby gain admission into the mainstream of New York life.

At the outset of the century, two overlapping sets of beliefs, with roots deep in the American past, supported the status quo. One was a sort of populist localism, by which the countryside of upstate New York had governed itself for several generations. This populist paradigm locates political power in small, homogeneous, participatory communities, which govern themselves democratically and band together to prevent centralized bureaucratic institutions from interfering in their local governmental processes. Populist localism explains well how the small towns of upstate New York constructed a conservative coalition to govern themselves and the state as a whole from the mid-nineteenth well into the twentieth century.5

The other prop of the status quo was a set of racist beliefs that certain ethnic and religious groups, notably WASPs, were better suited than others, especially southern and eastern European Catholics and Jews, to participate in American civic and economic life. These beliefs, which also were deeply rooted, in this instance in the past of North Atlantic civilization, ultimately culminated on one side of the ocean in Nazism. Since most Americans espoused antistatist beliefs, few became Nazis. But the parallelism between and common roots of Nazism and American racism were nonetheless evident. As Hitler himself observed in 1933, the “American people were the first to draw practical and political conclusions from differences among races and from the different value of different races” and through immigration laws “prevented the entry of those races which seemed unwelcome to the American people.” And as Time maga-
zine added in publishing Hitler’s comment, Germany as of 1933 had merely “reduce[d] her Jewish inhabitants to the social and political position occupied by Negroes in the southern U.S. and Orientals in the West.”

Inasmuch as American democracy was conceptualized in terms of local self-rule, and homogeneity was deemed essential to that self-rule, localist populism and ideas of ethnic and religious hierarchy overlapped. White, Protestant Americans had established self-governing communities within the territorial boundaries of the United States, whereas Catholics, Jews, and African Americans, it was thought, had not. If the existing communities were to be preserved, it seemed that the latter groups, which had never established their own communities, had to be excluded. Thus for the WASP groups on one side of the social divide in early twentieth-century New York, racially exclusionary policies and the preservation of democracy appeared to go hand in hand.

Populist localism and ideas of ethnic and religious hierarchy were doomed over time, however, as the center of population and power in the Empire State shifted away from small, upstate hamlets and gravitated increasingly to New York City and its growing suburbs. In 1860, the counties that would later constitute Greater New York, plus the adjacent counties of Nassau, Suffolk, and Westchester, constituted only 31 percent of the population of New York State. By 1890, that figure had risen to 45 percent. In 1900, the city and the three adjacent counties for the first time embraced a majority of the state’s population. By 1910, they contained 56 percent and, by 1940, 64 percent. Thus the small, homogeneous, participatory, WASP communities that had governed New York in the nineteenth century ineluctably became outnumbered in the twentieth.

The localist-racist ideas that had sufficed for governing upstate communities simply could not work in New York City, which was neither small nor ethnically and religiously homogeneous. Of all the cities of the world in 1900, New York had the second largest population. It also was the first place in America, if not the world, in which a multiplicity of diverse groups from Europe, Africa, the Americas, and even Asia came together in large numbers. On Manhattan, native-born white Americans, African Americans, descendants of German and Catholic Irish immigrants, Italians, Jews, Chinese, and people from various parts of Latin America lived adjacent to each other within the space of a few square miles for most of the twentieth century.

At the outset of the century, intolerance, bigotry, and fear characterized relationships among these diverse peoples. Then, under the guidance of such judges as Benjamin N. Cardozo, Henry J. Friendly, Stanley H. Fuld, Learned Hand, Irving Lehman, Harlan Fiske Stone, and Edward Weinfeld, the law
step-by-step created procedures to facilitate tolerance and productive inter-
change. Although New York has hardly achieved utopia, its strivings for com-
munity have gained increasing relevance as technology has brought the peoples
of the world into closer proximity to each other and led to the emergence of
demographic patterns like New York’s in other cities and settings.

The law has obvious importance in regulating the interactions of diverse
groups. At the turn of the century, racism against African Americans infected
the South, for example, partially as a result of law, while discrimination against
Asian Americans prevailed in California, where racism and the law were inex-
tricably intertwined. As diverse groups faced each other in twentieth-century
New York, innumerable legal issues involving race, ethnicity, and religion like-
wise arose.

In the main, courts and judges resolved the issues. In part, the judiciary
assumed its role through default. Because no one group constituted a clear ma-
Jority in New York, it usually was difficult to get the legislative process geared
up to resolve issues of intergroup relations. Unable to build a majoritarian
coalition behind any particular program, the legislature often had to take a
pass. The courts, however, could not pass; litigants presented intergroup con-
licts to them, and they had to decide the cases. Thus courts and judges became
quite powerful.

Courts also became powerful because much social conflict manifested itself
in the form of private-law litigation between individuals. For every dispute be-
tween government and a minority religious group, between an employer and
a labor union, or between those who would grant the state broad regulatory
powers and those who would hold it to narrow standards, there were hundreds
of cases between individuals involving common-law issues of tort, contract,
property, and procedure. And many of these cases, like the one brought against
a German corporation by a Jewish refugee who claimed his employment con-
tract was breached when he was fired solely on grounds of religion, required
courts, typically without legislative guidance, to resolve issues of social policy.

A final important reason for legislative passivity and judicial activism was
ideology. Legislatures, it is suggested, resolve intergroup conflicts in accor-
dance with prevalent ideological beliefs, and the two prevalent ideologies of
the early twentieth century—localist populism and racial hierarchy—were
useless in resolving the intergroup conflicts faced by the people of New York
City.

Progressive reformers and others seeking fairer treatment of the underclass
needed a new ideology—one that would justify government activism on be-
half of the downtrodden. Some progressives accordingly embraced Marxism
or its democratic socialist variants, which were the only reform ideologies in existence at the outset of the century. But Marxism failed in the main function for which Marx had designed it, as a predictive device. The difficulty was that no chance ever existed that the proletariat would seize power in New York and achieve the victory for which Marx had called. The Empire State was not Russia, where a politically active proletariat could grab power forcibly in one or two large cities and from those cities dominate a politically passive countryside.

Moreover, Marxism was not an option for most leaders of the progressive cause. First, some of them, like Herbert and Irving Lehman, were born wealthy, while others, like Alfred E. Smith, aspired to wealth and attained it before they died. Some Bolsheviks, of course, had also been born, if not to wealth, at least to comfort. Unlike the Bolsheviks, though, leaders like the Lehmans did not feel guilty about being rich; they saw their wealth instead as a device for engaging in philanthropic activities and promoting social good. Second, the progressive leaders had all achieved power not by directing tightly knit radical groups but by winning democratic, majoritarian elections. Although the role of money in 1920s political campaigns was slight compared to its role today, money was not trivial, especially in urban settings. Money was an element of political success, and leaders who had won elections in the past and hoped to win more elections in the future could not deprive themselves of access to it.

Third, leaders like Cardozo, Smith, and the Lehmans could not win elections or govern thereafter by appealing only to lower-class, ethnic, and religious minorities; to wield effective political power, they needed to form coalitions that included allies and supporters from the old WASP establishment, such as Franklin D. Roosevelt. Although occasional WASP patricians were attracted to Marxism, most were not.

Thus a totally new ideology was needed for governing the increasingly urban and pluralistic culture that was emerging in twentieth-century New York. But as badly as they needed new ideas, key progressive leaders as late as the 1920s and even the early 1930s had difficulty elaborating them. In part, that was because they were men of affairs and pragmatists, not ideologues. Smith, for example, won elections on grounds of honesty; Roosevelt, as a leader who would work hard, would learn, and would take new approaches in office; and Herbert Lehman, as a great administrator. At the same time, however, all three commanded deep loyalty among their followers and aroused strong hatred on the part of opponents. Pragmatism, rhetorical skill, honesty, administrative skill, and an openness to new approaches did not produce the loyalties and hatreds of which Smith, Roosevelt, and Lehman were the focus. The loyalties

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and hatreds stemmed, instead, from what these progressive leaders symbol-
ized in the eyes of their supporters and opponents—a new, slowly emerging,
urban-based, but still inchoate ideology of social justice and reform hostile to
populist localism, Nazism and racism, and Marxism.

Since progressive leaders proved unable to elaborate their new ideology dur-
ing the 1920s or for most of the 1930s, a new approach to politics was con-
structed only in the late 1930s, when New Yorkers reacted to the flagrant vi-
lations of human rights and human dignity by Hitler’s regime in Germany.
Even then, the new ideology was not articulated by bookish intellectuals such
as Karl Marx or scholarly political leaders such as Thomas Jefferson or James
Madison. No one book like Mein Kampf proclaimed even an extremist ver-
sion of the new ideology. Instead, the new ideology was proclaimed mainly by
judges and lawyers, who then used it to transform judge-made doctrine over
the course of the next three decades. Later, the ideology spread worldwide as
the three alternative political paradigms that had existed in early twentieth-
century New York collapsed on a global scale.

The new ideology was a product more of action than of ideas, although
ideas sometimes influenced the direction of action or emerged in the aftermath
of action, as explanations or justifications for what had been done. Above all,
the new ideology was legalist in nature, in that it resulted from the arguments
of lawyers seeking to influence judges or other government officials and from
the endeavors of all three—lawyers, judges, and officials—to build support
for what they had done. As we shall see in the chapters that follow, the new
ideology often emerged and played itself out in common-law tort, contract,
and property cases as well as in matters involving judicial resolution of public
law matters.

I propose the term “legalist reformation” to characterize the new ideology
because it encapsulates the two main elements of the movement I am portray-
ing, which began in New York in the late 1930s and continued in the decades
thereafter. The movement was reform-oriented: its goal was social change and
the expansion of existing hierarchies to include people who had previously
been made subordinate. Yet it was also legalist: it did not repudiate the com-
mitment to the rule of law which late nineteenth-century elites, in their search
for order, had adopted as an alternative political theory to democratic majori-
tarianism and evangelical Protestantism. For legalist reformers of the twen-
tieth century, the rule of law not only served as an established cultural norm
but also offered greater promise of social change than any other political or
philosophical alternative.

The legalist reformation developed in connection with and in the after-

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math of the New Deal. But despite the vast scholarly literature on the New Deal, the legalist reformation has never been studied in all its complexity in a theoretically sound fashion. The central goal of this book is to grasp this new approach, which came to dominate New York and American, and ultimately global, sociolegal culture, by observing its emergence, piece by piece, in the late 1930s and thereafter.

Thus this book will examine New York case law in the twentieth century as a series of cultural markers that reveal a society in which, before the late 1930s, issues of race, ethnicity, religion, and gender were virtually never mentioned in judicial decisions, conflict was conceptualized largely along class lines, and repression of underclasses was the norm. New Yorkers began to follow a path away from that repressive society in the World War II era, when, as both the public law and the common-law cases show, they began to reconceptualize social conflict in terms of the power of majorities and the rights of minorities. Along that path, the people of New York rejected ideologies that favored racist and localist government, on the one hand, and Marxist revolution, on the other. As they negotiated their new path, people also used law to elaborate in a step-by-step process that lasted several decades a new ideology in action—an ideology of liberty, equality, human dignity, and entrepreneurial opportunity that today has matured into the hope of the progressive world.

This mature ideology, it is essential to note, is not some fixed and final entity to which the world has now ultimately turned in a concluding stroke toward peace, freedom, and equality. Indeed, since the late 1960s, when African Americans, feminists, and political conservatives began demanding new ideologies, the contingency of the legalist reform legacy and its internal contradictions have become apparent. But neither those on the right and the left who attack the legalist reformation nor those in the center who continue to defend it have rejected its main aspirations for liberty, equality, human dignity, and opportunity. Accordingly, this book reflects my understanding that, just as the legalist reformation emerged gradually amid the conflicts and contradictions of the New Deal, World War II, and early Cold War eras, so today it is evolving gradually as those who have inherited it perceive new contradictions within it and differ over how to resolve them.

Nonetheless, I remain convinced that the birth and maturation of the legalist reformation represented a milestone in American legal history. Cardozo, Roosevelt, and other legalist reformers all have an enduring and deserved place in the pantheon; the most successful of today’s leaders, such as William H. Rehnquist and William Jefferson Clinton, are not their equals. Leaders like Cardozo, Roosevelt, and the Lehmans earned their special place in history by

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participating in the genesis of something special; in contrast, today’s politicians and judges, however smart, engaging, or eloquent, are merely working out details. All legal thinkers today are the heirs of mid-twentieth-century legalist reform, however much they may disagree about the meaning of their inheritance.

Although we must not fall prey to the vice of reifying legalist reform, we thus should recognize that the concept reflects a cluster of values that remain at the core of American legal and political thinking even today. These values initially emerged in New York law in the second quarter of the twentieth century and were more fully elaborated during the third quarter. It is to the emergence of those values in their full economic, social, and cultural context that this book next turns.

This context will be presented in the initial chapters of each of the three parts of this book: the first, entitled “1922,” will portray life in New York in the opening decades of the twentieth century and then turn to political events beginning in 1922 that put into power new socioeconomic groups who slowly modified specific legal doctrines into rules more favorable to their interests. The second, entitled “1938,” will trace changes in New York society and culture and in the global economy in the World War II era—changes that transformed the law of the state in profound ways. Finally, a chapter entitled “1968” will focus on the cataclysms of that year in the United States—cataclysms marking the commencement of a process of cultural change that ultimately would affect the course of New York and, indeed, all American law.

Interspersed among these three chapters are a series of chapters focusing on legal doctrinal developments connected with the matters described in the contextualizing chapters. For example, the three chapters that follow the “1922” chapter display New York legal doctrine in the first third of the twentieth century as a reflection of the economic, social, and cultural cleavages between conservatives and reformers that lasted into the 1930s. The six chapters following the “1938” chapter, in turn, focus on transformations of legal doctrine, especially in private law, that began in the late 1930s and, in some cases, endured throughout the rest of the century. Similarly, the four chapters following the “1968” chapter analyze changes in legal doctrine occurring in its aftermath.

Finally, the book ends with an epilogue entitled “A Golden Anniversary,” which merely suggests how the legal ideology initially adumbrated by New York judges, lawyers, and officials over the course of the twentieth century became relevant to the world at large as the century ended.