1969

Arthur Linton Corbin

Friedrich Kessler
Yale Law School

The Yale Law Journal

Volume 78, Number 4, March 1969

This issue of the *Law Journal* is dedicated to the memory of Professor Corbin, for his immense contributions to the Yale Law School and to the study of law.

Arthur Linton Corbin

Friedrich Kessler†

If one would praise a figure of Corbin's stature, one must focus on but a part of the man and his work.[1] I will confine myself here to Corbin's role as an innovator—to the profound influence he had upon educational reform within the Yale Law School, upon the study of contract law, and, more generally, upon the understanding of the common law itself.

His achievements are all the more remarkable since he was a self-taught man. When Corbin was a student at the Yale Law School (1897-99), the legal education available to him was very poor. The bulk of the students had only high school diplomas, and Yale College undergraduates interested in law were advised by their teachers to complete their studies at Harvard. The instructors at the law school, fine and outstanding men, as Corbin recalled, were usually judges and lawyers who taught only part time and were consequently unavailable to their pupils. These men believed that the common law could be reduced to a few fundamental principles which students had to learn by rote before they could fruitfully study cases. William C. Robinson's condensation of Blackstone,[2] a century and a quarter out-of-date, made reference to a few cases in footnotes, but the students were not encouraged to read them. Only Judge Baldwin, whom Corbin greatly admired, supplemented his lectures in Constitutional Law with cases—fifteen all in all.

† Sterling Professor of Law, Yale University. This tribute is adapted from an address delivered in memory of Professor Corbin at the Yale Law School Association's Alumni Weekend, April 27, 1968.

1. For the published works of Professor Corbin, see 74 YALE L.J. 311 (1964).
2. W. ROBINSON, ELEMENTARY LAW (1882).

The result, according to Corbin, was that the students acquired little capacity to analyze a complex set of facts and none whatever to compare diverse decisions and form an independent opinion. They were never told that the changed conditions of life had left many of the old rules and doctrines referred to in Robinson unsupported. The students were taught to deride the Harvard "case system": one of their instructors told them that the "unfortunate Harvard system" produced case lawyers who could not argue from principles but had to depend on finding a case "on all fours." That judges had a part in making and remaking the law was held out as a preposterous idea.

When Corbin returned as an instructor, after four years of practice and high school teaching in the mining town of Cripple Creek, Colorado, the law school began to change rapidly. Yale College juniors and seniors were permitted to take law school courses for credit toward both degrees. Corbin took over the teaching of contracts and adopted Williston's casebook as soon as it appeared. In 1910, while the youngest member of the faculty, he succeeded in persuading the others to tighten entrance requirements, to select a faculty of full time teachers and "producing scholars," and to introduce the case method.

The most important of the new appointments were Hohfeld's in 1914 and Judge Swan's, as dean, in 1916. When W. W. Cook was added in 1916, the nucleus of the new faculty was complete. In the interest of clear analysis and communication, they adopted the terminology developed by Hohfeld in his "Fundamental Legal Conceptions." But Corbin went beyond Hohfeld. He recognized that Hohfeld's analysis "solves no problem of social or juristic policy, but [that] it does much to define and clarify the issue that is in dispute and thus enables the mind to concentrate on the interests and policies that are involved, and increases the probability of an informed and sound conclusion."[3]

Corbin, Hohfeld, Swan, and Cook did not build a modern law school without opposition. When, in "The Law and the Judges" in the *Yale Review* of 1914, Corbin advanced the heretical thesis that judges make law, an irate alumnus demanded that he be fired immediately. Within a year after Dean Swan's appointment, disgruntled alumni distributed a bitter letter, signed the "Committee of Eleven," charging that Swan had Harvardized the law school. But the powerful backing of William Howard Taft, Kent Professor of Law in Yale College, who taught a course at the law school and believed in the case method, effectively neutralized the opposition.

3. *Foreword* to W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS xi (1964 ed.).

The First World War had a dampening effect on the rapid growth of the law school, by depriving it of part of the faculty and most of the students. The *Law Journal,* which had turned over a bright new leaf with volume 26, encountered a serious shortage of both editors and contributors. Yet both school and journal survived, and the quality of the *Journal* in fact improved, with Corbin and Karl Llewellyn, then Editor-in-Chief, writing half of the comments and case notes.

The war over, Judge Swan's deanship was one of exceptional intellectual and material growth, laying the foundation for the further development of the law school in the thirties. In this later period, Yale, together with Columbia, became the high fortress of legal realism under the deanship of Hutchins and Clark. Corbin did not join the realist movement; he was rather critical of its tenets, and particularly of the position that decisions were not determined by rules and principles. Nonetheless, Corbin's skepticism did not prevent his realist colleagues from consulting him whenever they had to deal with a problem in contracts. During the high tide of legal realism at the law school, Corbin remained a respected figure and a steadying influence. He successfully countered the demands of the "rearrangers" to have an avant-garde school *à tout prix.* He kept the school from becoming either a part of the Institute of Human Relations or a graduate school with five students as acolytes allotted to each instructor. He also disapproved the plan to add twenty new faculty members—five as full professors of administrative law, one for each federal regulatory commission.

While the realists went their daring ways, Corbin worked on his treatise, begun in 1925, on the *Restatement of Contracts,* and on the Revised Sales Act. His retirement in 1943 enabled him to devote all his energies to the completion of his treatise, to the work on yearly supplements, and to the new *Restatement.* Work on the treatise stopped only in 1964 when Corbin lost his eyesight. At the time he stopped working, he was almost ninety years old.

Corbin's contribution to the law of contracts and to the common law in general was no less than his influence on the law school at which he taught. The uniqueness of his wider contribution lies in his approach, the characteristics of which become clear when we compare Corbin's treatise with that of Williston. Williston follows the tradition of most American legal treatises. He rarely explores the policies underlying the concepts and rules which he masterfully interprets.[4] The

4. E. PATTERSON, JURISPRUDENCE 221 (1953).

index to his great treatise makes no reference to the mores of the community, and freedom of contract is given an inconspicuous place.

Corbin, in marked contrast, stresses the openness of the system, the tensions within the system, the decisive role of judicial creativity. Cardozo is his hero. It is significant to understanding Corbin's approach to the common law that his treatise cites Cardozo's famous lines on judicial creativity and uncertainty in the law time and again. In the chapter on public policy, the great passage appears twice within a few pages:

> As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.[5]

Corbin saw the growth of the law as an evolutionary process. "What is the test," he asks, "of right and wrong, of truth and error, of sound law and bad law? The final test," he answers, "is survival in conflict. The fittest survive."[6] The law's principles consist of such generalizations as may tentatively be made from a vast number of individual instances.

> The fact that generalization based on the cases can never be more than tentative working rules need not seriously disturb either the practicing lawyer or his bargaining client. All our footsteps through life are guided by nothing better than tentative working rules. However well settled the rules may be, their application in life is always uncertain.[7]

This approach is eminently suited for an understanding of the common law and avoids the dangers of distorting it. The common law is not "axiom-oriented but problem-oriented." It does not consist, as Langdell and even Williston assumed, of a "limited number of fixed general principles"[8] through which particular rules can be deduced with the help of "stringent" logic. To be sure, the system as a whole contains enclaves of "axiom-oriented subsystems"[9] within which propositions can be used as premises for logical deductions. But the vast field of

5. A. Corbin, Contracts §§ 1374-75 (1962).
6. *The Law and the Judges*, Yale Rev., Jan. 1914, at 247.
7. *Id.* 239.
8. J. Stone, Legal System and Lawyers' Reasonings 323 (1964).
9. *Id.* 332.

contracts with its inherent tensions is not such a subsystem even where it is supposedly governed by the Uniform Commercial Code. The UCC does not measure up to John Stuart Mill's ideal code in which the method of judicial reasoning is wholly and exclusively the method of syllogistic reasoning. The Code is subject to conflicting interpretations, and the comments, rather than vouchsafing uniformity, are often incomplete, not always reliable, and contradictory.[10] The common law of contracts uses open-textured concepts advisedly. Consideration, for instance, as Corbin observes, defies exact definition: it is not one but many doctrines serving different policies.

Not surprisingly, then, Corbin's treatise is full of suggestions to help the courts return to and cultivate what Karl Llewellyn called the Grand Style of decision making and abandon the Formal Style, with its rigid and narrow adherence to formal logic. In a remarkable passage criticizing the techniques used by courts in handling the impossibility problem, Corbin adds:

> This is not to say that attempts at generalization should cease or that the process of logical deduction should be abandoned. It is merely asserted that all generalizations should be regarded as tentative working rules, continually to be tested and reexamined in the light of the sources from which they are drawn: the customs, business practices, feelings and opinions of man—the prevailing mores of the time and place.[11]

In solving problems, the judicial process in common law countries does not move in the "logical dimension of derivation but rather in the historical dimension of linking cases with precedents."[12] It builds on past experience. This technique forces a responsible court continuously to reexamine in the light of the case at hand the justice of results reached in a relevant line of precedents. This reexamination is all the more compelling since "for every question worth calling a problem, at least two contradictory solutions and propositions can be found in past decisions." As a consequence, the common law, despite its emphasis on stare decisis, must continually renew itself. It has to rely not merely on rules, but on principles, maxims, purposes and policies. And principles are more than mere abstraction from rules. They contain meta-legal elements and are often the result of creative choice based on wisdom and experience.

10. Furthermore, the philosophies of draftsmanship underlying articles 2 and 3 are quite different.
11. CORBIN § 1331.
12. J. ESSER, GRUNDSATZ UND NORM 183-84 (1956); STONE, *supra* note 8, at 332.

Yet the final choice of a good judge, however indeterminate, is not at large. Arbitrariness is kept in bounds by steadying factors, such as the community's sense of justice, the judge's training, his workmanship and the prospect of "free and unrestrained criticism." It is therefore imperative that the judge be as articulate as possible in expressing his value judgments so that his preferences can be tested by further research and weighed by the democratic process. "A better brand of justice," Corbin claims,

> may be delivered by a court that is clearly conscious of its own processes, than by one that states hard-bitten traditional rules and doctrines and then attains an instinctively felt justice by an avoidance of them that is only half-conscious, accompanied by an extended exegesis worthy of a medieval theologian.[13]

The constant entry of these meta-legal factors explains why the legal order is continuously able to renew itself so as to preserve the consensus necessary for its support. This consensus makes for moderation in change; without it, he insists, the retroactive effects of judicial participation in the lawmaking process would be intolerable. In resorting to working rules, the judicial process avoids the dangers of dogmatism on the one hand and the anarchy of mere personal preferences on the other. Working rules are not to be scorned because they are tentative; they guard the rationality of the system.

The rationality achieved, however, is of a material rather than a formal nature. It reflects "the settled convictions of the community." "That judge is wise and just," Corbin asserts, "who draws from the weltering mass the principle actually immanent therein, and declares it as the law."[14] This description of the judicial process is not metaphysical. Corbin does not subscribe to the philosophy that values are inherent in facts and the judge has only to discover them. To be sure, he frequently argued that facts, not legal doctrines, play the major role in judicial decision;[15] but his use of the term "immanent" means that

> [t]he judge must compare the specific situation before him with other similar (though never identical) situations and thus find a "type-situation" that enables him to construct a tentative working rule that can be applied to all of them. He can do this only by his human reasoning process. . . . [T]he "rule" by which he "justifies" his decision is the result of his own creative reasoning process, an inductive not a deductive process. . . . It rests on the not so very

13. CORBIN § 561.
14. *The Law and the Judges*, YALE REV., Jan. 1914, at 250.
15. CORBIN § 1303.

> "solid foundation of what reason can recognize" and produce. It is drawn from a group of related situations and is to be corrected or replaced by other generalizations by other judges and scholars as new situations and new life conditions press on their attention.[16]

Professor Corbin, as the passage above illustrates, calls the method used in legal reasoning inductive and rejects the notion that the process is deductive. But, I submit, on his own showing it is neither. Professor Corbin understood intuitively that the reasoning of common law lawyers has preserved a way of argument already investigated in antiquity under the name of rhetoric or dialectical reasoning.[17] It was well-known to the Roman jurists and throughout the middle ages until it waned with the advent of Cartesian philosophy. Legal reasoning is neither "logical demonstration, nor inductive generalization, nor apprehension of self-evident truth."[18] The rules used as propositions are not "primary and true," or, as Corbin was fond of saying, "eternal or changeless." They bring into vision the experience preserved in precedents. They are true to the extent that their creators are trustworthy. They claim to be worthy of persuading the expert and ultimately the right-minded man, but they are true only for the time being.

Professor Corbin refrains from making things clearer than they are. A remarkable passage in the sixth volume of his treatise, dealing with the allocation of the risk in the impossibility situation, states: "Where neither custom nor agreement determines the allocation of a risk, the court must emphasize its equity powers and pray for the wisdom of Solomon."[19] To paraphrase Mill, Corbin did not commit the typical error of "a man of clear ideas" who imagines that "whatever is seen confusedly does not exist." When he met with complexities, he attempted to dispel the mist, and fix the outlines of the dim form which looms behind.[20] All too often we are inclined to overrate intellectual prowess. Again in the language of Mill, "Courage, verbal acuteness, command over the forms of argumentation and a popular style will make out of the shallowest man, with sufficient lack of reverence, a first rate negative [teacher]."[21] Corbin's work is that of a positive teacher. His treatise

16. *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805, 811-12 (1962).

17. *See* C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963); T. VIEHWEG, TOPIK UND JURISPRUDENZ (1963); STONE, *supra* note 8, at 325 *et seq.*; J.P. DAWSON, THE ORACLES OF THE LAW 498 (1968).

18. Hart, *Introduction* to C. PERELMAN, *supra* note 17, at x; *see* J. WISDOM, PHILOSOPHY AND PSYCHOANALYSIS 149, 157 (1953); E. LEVI, INTRODUCTION TO LEGAL REASONING (1949).

19. CORBIN § 1333.

20. 1 J.S. MILL, DISSERTATIONS AND DISCUSSIONS 378 (1868).

21. *Id.* 359.

owes its greatness not merely to his careful and penetrating analysis of case material and doctrine, but also to his rare human qualities, his sturdy independence, and strength of character. It reminds us that a great teacher needs to be a moral being first and foremost. The old saying *pectus facit judicem* applies with equal force to him.