

ARTHUR LINTON CORBIN—A TRIBUTE

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The following remarks were delivered by Professor Kessler at the Yale Law School dinner honoring Professor Corbin on his eightieth birthday.

We are fortunate tonight to be able to celebrate with you, Professor Corbin, your eightieth birthday. We have been given the opportunity at the same time to express our genuine respect and deep affection for you and also to testify to the profound impact which your work has had on all members of the legal profession. It is the meaning of your work to all of us, whether we be judges, practicing attorneys, teachers or law students, to which I should like to address these few remarks.

The most significant and impressive aspect of your work is that it bears the stamp of an imaginative reformer. Your eminent success shows that one need not be a philosophical radical like Bentham to exercise deep and lasting influence, and that progress in the science of law does not depend on making law a natural science. You accomplished your goals with the help of the rare gifts of patience and moderation, by the willingness to conserve what, in your view, was worth conserving and the ability to appreciate the latent wisdom in many a prejudice and fiction. You are aware that changing the law is a complex and risky undertaking. The confusion attending the consideration doctrine, for instance, which as you have repeatedly pointed out is not one but many doctrines, cannot be eliminated simply by abolishing the doctrine root and branch without providing for substitute concepts to preserve those of its features which are regarded as desirable. An abolition of the consideration doctrine in toto would still leave us with the problems which the consideration doctrine attempts to solve, namely, the difficult task of finding the line of demarcation between enforceable and nonenforceable promises.

When you began your life's work of rebuilding the law of contracts, an iconoclastic attitude was very much in vogue. Some members of the realist movement, carried away by their enthusiasm, were ready to identify justice with rhetoric, even to debunk it as "meaningless noise," and to regard law as nothing but an argumentative technique. You realized that this shallow positivism was bound to result in making power and authority an unanswerable argument. Preserving your intellectual independence, you have not hesitated to make constant reference to notions of justice and fairness. Yet you have been equally strong in pointing out that the law-making processes cannot dispense with carefully worked out concepts and rules, even if we have to admit that they are not eternally valid but are subject to erosion. Without

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clearly formulated rules and concepts the law-making processes may easily deteriorate, to use the language of Scrutton, L.J., into "well meaning sloppiness of thought."¹

As a law reformer you have set for yourself the dual aim of improving upon the law by increasing its rationality, and at the same time making sure that our legal system and the attitude of lawyers adequately express the ideals of the community with regard to fairness and justice. Indeed, it is most reassuring in our age of unreason, when irrational, "non-logical" factors within legal systems have been given so much emphasis, to find that a scholar of your learning and perceptiveness after sixty years of intimate contact with the law and its social foundations still firmly maintains his faith that the element of rationality can be vastly increased both within our legal system and in the mores of the community to which the law seeks to give expression.

Rationality in your scheme of things has taken on a fourfold meaning.

It means, first, modernization and refinement of legal language and of the tools of legal analysis. To use the language of Hohfeld, to whose work you have frequently paid tribute, much unnecessary confusion has been caused by the uncritical use of "chameleon hued words." The failure of many a decision to differentiate between "right" and "privilege" may serve as an illustration. But you have always been careful to point out that Hohfeld's scheme does not complete the work of definition and classification. Inspired by the natural scientist, whose technique you admire, you believe also that lawyers should take pains to improve their skill in factual analysis, but that they should also refrain from needlessly multiplying the tools of analysis.

Secondly, rationality presupposes a clear realization that concepts no less than rules are but shorthand judgments of policy. Consequently, concepts, doctrines, principles, and institutions are in constant need of reexamination to determine whether they are fulfilling their purported function, whether indeed their function is worthy of fulfillment, and whether, perhaps, the rule, the concept, or even the institution should not be replaced by another which better fulfills the function and more adequately reflects the mores of the community with regard to fairness and justice. As you observed many years ago in a little article which bore the significant title *Hard Cases Make Good Law*:

"When a stated rule of law works injustice in a particular case; that is, would determine it contrary to 'the settled convictions of the community,' the rule is pretty certain either to be denied outright or to be undermined by a fiction or a specious distinction It was largely the crystallization of the rules of the common law that caused the constant appeals to the conscience of the king and his chancellor, and developed the system of law that we know as equity. Even the common law judges themselves had a 'conscience.' When their stated rules developed hard cases, the rules were modified by the use of fiction, by exceptions and distinctions, and even by direct overruling."²

1. *Holt v. Markham*, [1923] 1 K.B. 504, 513.

2. 33 *YALE L.J.* 78 (1923).

Rationality presupposes, thirdly, that courts when rendering a decision should articulate their notions of fairness and justice and should not cover up their policy judgment and their creative work by resorting to lifeless conceptualism and empty syllogism. "[A] better brand of justice 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 asserts an instinctly felt justice by avoidance of them that is only half-conscious, accompanied by an extended exegesis worthy of a medieval theologian."³ The community should be able to participate in the law-making processes, and the expert should be able to test the soundness of a solution by intelligent and careful field research.

Rationality means, fourthly, that our legal system should be kept an open system, thus making certain that progress will not be stifled. All rules of law, and this cannot be overemphasized, are "working rules." Our legal system, viewed as the sum total of working rules, is a system of opposites, full of tensions and complexities which make for its dynamic richness, and which should not be glossed over to create a superficial appearance of harmony and consistency. Not only public law but also private law is the battleground of conflicting ideologies, and this is true not solely because issues of constitutional law loom rather large in American private law. Your great treatise on contracts abounds with illustrations describing the conflicts between and the evolution of new working rules within a dynamic setting of thesis, antithesis, and synthesis. A few illustrations must suffice.

During the last century—a period in which the great values underlying our law of contracts found their articulation—freedom of contract and freedom of trade came to be regarded as inseparable allies. The realization came only gradually that the two great principles are not always compatible and that a choice frequently must be made between them. All too often courts have shown a rather blind preference for freedom of contract, sometimes giving it, as an English scholar astutely observed, the impressive name of "sanctity" of contracts.⁴ Consequently, the great ideal of freedom of contract has frequently turned out to be its own enemy, as well as that of freedom of trade. We are witnessing the paradox of freedom of contract being often bargained away in the name of freedom of contract. Requirement and output contracts, exclusive dealer franchises, tie-in clauses and resale price maintenance agreements, to mention only a few illustrations, have created perplexing limitations on freedom of contract. Furthermore, statutory sanction has been given to inroads upon freedom of contract: the McGuire Act makes a resale price maintenance arrangement with regard to branded articles binding even on a so-called non-signer.⁵ Thus, with the help of contract, a return to "status" is being effected.

3. 3 CORBIN, CONTRACTS § 561, p. 164 (1951).

4. Parry, *Economic Theories in English Case Law*, 47 L.Q. REV. 183, 199 (1931).

5. 66 STAT. 631, 15 U.S.C. § 45 (1952); provided of course, state law so ordains.

Our law of contracts, to continue with the list of antinomies, has to mediate between private and social interest, between the desire for individualization and the need for uniformity and security, between the individualistic ideal of dealing at arm's length and the humanitarian ideal of good faith and fair dealing.

Many doctrines in the law of contracts continue to reflect the philosophy of dealing at arm's length, with its presuppositions that each contracting party looks out for his own interest and that no duty of disclosure is thrust upon him. But, on the other hand, due to a change in ethical notions, ever increasing emphasis is placed on the ideal of good faith and fair dealing. This however, if carried to its logical conclusion may mean an enormous increase in control over private volition which may in turn result in the imposition of a tyrannical stranglehold on the behavior patterns of the community. Furthermore, expansion of the good faith concept may result in the erosion of the fundamental moral principle of responsibility for one's own actions. To give one example, the doctrine that promises once given should be kept may be abandoned in favor of expanded versions of its logical antithesis, the doctrines of impossibility and frustration. Yet, whatever its pitfalls, we can no longer doubt the necessity of increasing the scope of the doctrine of good faith, particularly in areas where we do not have a workable system of competition. However necessary it may be for rational business planning, the advent of the standardized mass contract with its many exculpatory clauses has forced us to realize that "harsh" and inequitable terms can be avoided by shopping around only if there exists effective competition. In the absence of such a system, arm's length dealing all too frequently leads to unconscionability, and there exists a constant need for the application of good faith.

To end this account of existing tensions somewhat arbitrarily, the ideal of reciprocity, which appears under the name of consideration or mutuality, has presented us with complex problems of value analysis. Every new case turning on consideration raises again the question whether and to what extent a modern system of law can afford to withhold protection from agreements which are not bargains. The *Restatement of Contracts* has attempted to solve this problem by introducing two concepts of consideration and glossing over their incompatibility by giving one a different name. Your discussion of consideration, Professor Corbin, has laid bare the tension between the rule of Section 75 and the rule laid down in Section 90, and your discussion of the measure of damages under Section 90 will add greatly to the achievement of a synthesis.⁶

To sum up, in your approach rationality does not mean only formal rationality, a carefully worked-out hierarchical system of analytical concepts and formalistic jurisprudence. In addition, it also connotes substantial rationality, a projection of the working rules against the larger background of the moral sentiments and the social structure of the community. Substantial rationality demands that working rules achieve their meaning not only within their self-

6. 1 CORBIN, CONTRACTS § 205 (1951).

defining, conceptualistic context but also in their correspondence to the facts of human experience.

Your pragmatic approach to the law, your insistence that the law is a social action system the effectiveness of whose control mechanisms will largely depend on the mores of the community, raises perplexing problems which go to the very foundations of our legal system and to the heart of our jurisprudence. Indeed, your approach makes it a matter of utmost importance for lawyers, judges, and legislators to reexamine their presuppositions concerning the function of law as an instrument of social control and the relationship of legal and non-legal sanctions as coexisting forces within the community. This re-examination will make it necessary to undertake very serious and careful value analyses in order to deepen our knowledge of the underlying forces which mould the patterns of social behavior and integrate a living community. Such studies, far from falling within the exclusive jurisdiction of the professional social scientist, must be part and parcel of the working tools of the lawyer and judge. Without them, we must surrender our cherished view of law as a great and effective educational force; law would be nothing more than the formalized reflection of already existing "standard patterns of overt behavior." Only with a thorough understanding of the manifold and at times competing and conflicting value patterns operating in a particular segment of the community can a judge serve as educator and can the law operate as a medium of social progress. Such indeed is the greatness of our foremost judges who are able to seize on certain value currents, articulate their grounds for preference of these particular mores, and then introduce them as working rules within our legal system. The great achievements of the common law are in no small measure due to the happy fact that it has escaped the strait jacket of rigid and minute codification. Our open system of rules and counter-rules has enabled its great judges to be creative and occasionally daring. Thus, Cardozo, for whom you have often expressed your admiration, was able to shape the mores of the community, to employ the law as an instrument of social progress, and not merely to mirror in his decisions existing patterns of behavior or, still worse, values which are already well on the way to extinction.

It is in the work of lawyers who have created a synthesis of tradition and progress that the law finds both its justification and its fulfillment. Perhaps there is no more fitting reward to you, Professor Corbin, than the knowledge that your work already has elevated and undoubtedly will continue to elevate the law to this plane.