

KARL N. LLEWELLYN

CHARLES E. CLARK†

MY ASSOCIATION with Karl Llewellyn goes back many years to early days at Yale. I first knew him when, as student editor of the *Yale Law Journal*, he carried that publication almost singlehandedly through World War I, while I, as graduate treasurer, tried, not too successfully, to maintain its solvency. We came into close accord in 1919 when I joined the Yale faculty, of which he was already a member. Then and later when he returned from a brief period of practice in New York City and until he left for Columbia in 1925 we were in daily collaboration or friendly rivalry as the most junior members of a lively and ambitious group. Perhaps my sharpest remembrance of that era is of his always forceful and pungent form of expression, both oral and written. I can recall a considerable envy of that facility—indeed one which I always retained. To be fertile in original ideas while at the same time to possess a unique skill in forceful expression is a rare combination. Karl had this in unusual measure.

As all now know, he touched and adorned an unusual number of different fields of intellectual endeavor. He was the outstanding expert in commercial law; and I came to rely upon his advice in that field not only in my teaching days, but also later on the bench. I recall once seeking his aid as to the meaning of a provision of the Uniform Trust Receipts Act which he had drawn; he declined to assist, however, saying that he did not know the answer and that it was up to the judges to put meaning into it! This was a good reminder of his principle of pedagogy not to tell his students truths, but to force them to seek out the answers themselves. Among other careers he was an anthropologist, a job analyst of new legal careers, an organizer of professional activities, an initiator of the beginner into law via his famous *The Bramble Bush*—the list is long and unique. I shall not attempt to compare and evaluate his contributions. Without doubt his work as creator of the Uniform Commercial Code will endure, and this may prove his most permanent claim to fame. But I should like to comment briefly on another area of lasting contribution, namely that of legal philosophy as leader of the American realists.¹

It now seems rather fashionable to decry the realist movement as essentially negative in character, lacking the artifact of an affirmative system. To

† Judge, United States Court of Appeals for the Second Circuit.

¹ See, e.g., LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222 (1931); Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 *COLUM. L. REV.* 581 (1940).

me the implied criticism seems essentially meaningless or at least unimportant. Such relegation of legal realism to the lower strata of human thought doubtless results from the seeming modesty and unabstract nature of its purpose: It sought merely a more direct and immediately practical, or less pretentious, view of the judicial process, of what judges actually did in deciding cases, than was professionally customary. In fact it was both a necessary, even if unassuming, and a health-giving and freeing movement, which made the process of decision more honest and straightforward, less stuffy and pretentious. One might well think that after the cool winds of legal realism, never again could the judicial process be bemused by words or rest upon the pretense rather than the substance. That should be the ease, but unfortunately it is not; every generation, it seems, needs a new distillation of practical evaluation of the business of judging.² So today in the regrowth of judicial abstractions, and particularly in the new stress upon the felt need of certainty in adjudication, it would seem almost as though the important work of Llewellyn and his fellow realists was being lost in a new wave of judicial and philosophical mysticism. Our trade is so susceptible to semantic delusions that the danger of being seduced is never lost.

In his last and greatest work, *The Common Law Tradition*,³ Llewellyn decried the concession by some noted leaders in the movement that it had served its purpose and that its day was now past.⁴ In this he was eternally right, as I have tried to show elsewhere.⁵ Indeed I had thought to find some perhaps unconscious departure from his own teachings of realism in this latest contribution,⁶ a possibly doubtful conclusion which I recall here only because it led to a characteristically generous and lighthearted letter from him, initiating a pleasant exchange now, unfortunately, never to be brought to completion. Of course against this I would testify to the striking, positive characteristics of the work, including its almost mystical faith in the common law and devotion to it, the profusion of valuable practical ideas about the arts of both advocacy and judging and all the panorama of legal principles, ideas, dicta, and conclusions which go to make up that remarkable book.

These musings upon his accomplishments seem pale, indeed, beside the vital human being that he was. What a gusto for living he had! How he threw

² This is developed in Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L. J. 255 (1961); and Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEXAS L. REV. 211 (1961).

³ LLEWELLYN, *op. cit. supra* note 1.

⁴ *Id.* at 508-09, and n. 1, questioning some remarks of Judge Thurman Arnold in *Judge Jerome Frank*, 24 U. CHI. L. REV. 633, 635 (1957), as well as those of other writers of "waning fervor." Compare Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 123 (1962).

⁵ See note 2 *supra*.

⁶ See Clark & Trubek, *supra* note 2, *passim*.

himself into happy occasions with his songs, those of his own composition, as well as the authentic folklore (as he stoutly maintained) of a Frankie and Johnnie.⁷ Thus it was an experience to go with him to the theatre as his boyish exuberance and enthusiasm bubbled over for all to see. Alas, we shall not see his like again! One can only cherish these vivid memories.

⁷ Thus I recall his bringing down the house at a Yale smoker in the early days by a sea chantey depicting the supposed drinking habits of the faculty during Prohibition, thus:

I'll drink up an orchard,
Says young Eddie Borchard.
Then blow, blow, blow the man down.
Oh let's wait till it's dark,
Says cautious old Clark. So blow, etc.
I'm great at absorbin'
Says Arthur L. Corbin. Then blow, etc.
I'll drink till I bust,
Says gallant old Gus [Lorenzen]. Blow, blow, etc.

Many of us can recall several dying A.A.L.S. banquets he has brought to life by his verve and enthusiasm.