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A TRIBUTE TO KARL LLEWELLYN

ARTHUR L. CORBIN†

KARL LLEWELLYN died in his sleep the night of February 13. The world is poorer that he is gone; it is richer that he has lived. So quick of mind, so blithe of spirit, so ardent of effort, so kind and affectionate of heart, and yet so understanding and essentially so unprideful of opinion, we shall not soon see his like again. To this ancient he was not merely a student; he was a son and a comrade. His very name bore omens for the future: Life and Love and Learning and Law—each beckoned him to a shining goal, a goal that he attained.

Educated in boyhood in a German teacher's family, he possessed the deep emotion, the poetic insight, the thorough scholarship, and the enduring industry of his teachers—with not a shred of sympathy for the Prussian autocrat and with only hatred and contempt for the frenzied sadism of a Hitler and the cold savagery of a Stalin. In Yale College he was a linguist and a scholar, especially interested in the work of Sumner and Keller in the science of society. Light of weight and slight of stature, he was not an athlete; and yet he was perhaps the only one who could make it interesting for the coach Mosey King in a boxing match. In 1917-18, he made repeated efforts to enter the military service, meeting only rejections. This made possible his continued attendance at the Law School, with added graduate study. As Editor-in-Chief of the *Yale Law Journal,* when students were few and the faculty decimated, he and this faculty member, working hand-in-hand, wrote half of the comments and case notes published in the *Journal* in 1918-19.

Fully resolved to become a teacher and writer of the Law, he yet rejected an immediate position on the Yale faculty, saying that he must first get experience of the law in action. For two years he was a member of the then existing Legal Department of the National City Bank of New York, mastering banking custom and commercial law. Increases in salary did not deter him from joining the law faculty. The Law School was then offering a course entitled "Introduction to Law," in the Department of Anthropology and Sociology in Yale College. Karl took this on as part of his teaching, calling the course "Law in Society." Deeply attached to Yale College and the Yale Law School, he fully intended to continue here as a part of both. An early marriage, however, caused him to transfer to the Columbia Law School and to New York. His associates here at Yale kept open for ten years a standing

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invitation to return, while he was rapidly advanced to a professorship at Columbia.

Karl was not always patient of stupidity; and what seemed to him injustice aroused righteous indignation. These qualities at times caused criticism and conflict, in the midst of much greater admiration and support. Several incidents bear reporting here. As a young assistant in the City Bank, he was called in to advise one of the Vice-Presidents on the law. His advice, firmly insisted on, was so unwelcome that the banking officer demanded his discharge. The head of the Legal Department, who knew that Karl was his ablest assistant, flatly refused the demand.

Sometime near 1928, after Karl had become a Professor of Law, the deanship of the Columbia Law School became vacant. It became known that President Butler (who had the power of appointment) was likely to appoint a certain young faculty member. Nine professors joined in a letter objecting to the appointment. President Butler disregarded the objection and appointed the young man. Five members of the faculty at once resigned. Karl had signed the letter; but he did not resign, saying that the Law School now needed him more than ever.

Some years later, an able lawyer who was a leading member of the Columbia Board of Trustees, took serious offense at some of Karl's criticisms of law as practiced in New York. He made demand on the Dean that Karl be removed from the faculty. The Dean laid his own resignation on the table. He too knew that Columbia needed Karl more than ever. Still later, when Karl was acting as draftsman on the law of Sales for the Commissioners on Uniform State Laws, he became aware that the Sales Act of 1906 needed thorough revision instead of piecemeal amendment. With immense labor and unmatched ability, he prepared a printed document of 275 pages, going over the Act section by section, with reasoned criticism or approval, with review of relevant cases, and with suggested substitutes (sometimes several ones as possible alternatives). It was a feat that no other man could have performed so well, and it laid a firm foundation for the complete revision that later was made. The Columbia trustee who had earlier demanded Karl's discharge made a careful study of this document, and it caused him to make specific confession that his demand had been ill-founded.

The work of complete revision was too expensive for the Commissioners to carry through, especially since Karl was now advising the preparation of a complete Uniform Commercial Code. The American Law Institute assumed joint responsibility for the project, with the requirement that Karl as Reporter on Sales should be assisted by three men representing the Institute, as well as by three representing the Commissioners. This writer served for five years on that Committee, continually impressed by Karl's mastery of the subject and his fertility of suggestion, but also by his instant recognition of a better form suggested by another. Karl had no pride of opinion; his mind was concentrated on obtaining the best result from the joint effort. But every one of his advisers well knew that Karl was the best man of the lot, that his own

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works had laid the necessary foundation, and that the chief credit for what was accomplished belonged to him.

Karl chose as his Associate Reporter, Miss Soia Mentschikoff, who had graduated in law at Columbia and had become a junior partner in a leading New York law firm. This associate was soon recognized as possessing a legal mind and judgment equal to that of any other member of the Committee. For almost twenty years she has now been Karl's wife and his associate as a professor on two law faculties.

No man now living has had a more varied and successful experience than Karl Llewellyn as a teacher and writer of the law. Besides his long experience at Yale and Columbia, he has served as visiting professor at Harvard and California; and for some years he and Soia have been professors of law at the University of Chicago. Soia was herself a visiting professor at the Harvard Law School before women were admitted there as students.

Karl's legal writings are too numerous for full review in this tribute. But no man has an abler or more varied output. Foremost, perhaps, is his work as Chief Reporter (with many committees of assistants) on the Uniform Commercial Code, a huge undertaking with a magnificent result. Such strain and labor were involved in the process that it may well have shortened his life. He encountered strong opposition from men who could not bear to see a variation in what they believed to be established "rules." Seldom, if ever, did they include a man who had taken part at Karl's side in the preparation of the work; but they made legislative enactment difficult. Nevertheless, Karl has lived to see the adoption of the Code in fifteen States; and it will steadily make its way in the courts, even in States where it has not yet been enacted.

When the committee on revision of the Sales Act was beginning its work, the Director of the Institute, William Draper Lewis, queried whether Karl would succeed as its Reporter; he received strong reassurance. When that work was completed and Karl presented and explained it to the learned Council of Judges and Lawyers, Lewis said to this writer that Karl's presentation was the best one that he had heard in his twenty-five years as Director of the Institute; and he had then taken part in every such presentation by all the Reporters of all of the Restatements.

As evidence of Karl's versatility, mention may be made of a volume on the law of the Cheyenne Indians, in collaboration with a professor of Anthropology. He published a small booklet of poems; and he wrote a "ballad" set to music, called "The Common Law Tradition," a title that he gave to his most recent legal volume. Some learned scholars, who must have read very carelessly or not at all, regarded his "Ballad" and his short pamphlet of six lectures entitled *The Bramble Bush* as destructive attacks on our system of law. So far is this from being true, both the ballad and the lectures are the expression of Karl's understanding, approval, and admiration of the Common Law system and its evolutionary process of making and remaking the law of our daily lives. His "ballad" is a musical and finely metrical and rhymed paean of joyful admiration of the Common Law Tradition and of the many

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great Judges, expressly named therein, who have kept the law a living institution, moving with our civilization and doing justice as men can see it.

The pamphlet entitled *The Bramble Bush* contains a number of lectures delivered by him to first year law students, and other lectures delivered to more advanced students. Probably his title militated against the wide use of these lectures in other law schools. It is often disadvantageous to use figurative language in a legal document, especially if its figurative character is so obvious as to distract from the substance dealt with. To one who is not distracted by the title or by the informal and occasionally racy language used, these lectures are extremely stimulating and informative. No doubt to the beginning student, who has just blundered his way into the legal labyrinth, trailing no silken thread behind him, the lectures contain much that he cannot instantly understand and accept; but introductory lectures that he can thus understand and accept are hardly worth the time that it takes to read them. For the first few months, in any law school that is not wasting his time by beguiling his mind with "hornbook law," the beginner's mind is confused and may see no comforting and clarifying light. Like the man who was so "wondrous wise," he is in a "bramble bush" and his eyes are "out." Karl tries to show him the remedy—it is "more of the same." There is indeed no easy way out. But there *is* a way; and Karl shows how it must be found, shows it better and more clearly than any other "introductory" lectures known to me. His lectures are themselves another "bramble bush"—as they must be to push forward the process of "scratching in." The beginner may wonder a bit and may not be altogether pleased; but he has not been misled, and if he follows the lead he will see light.

It is not possible here even to list the many articles published and lectures given by Karl Llewellyn. The substance of many of them, with modifications and further development, has been embodied in a volume of 500 pages, published in 1960, entitled *The Common Law Tradition: Deciding Appeals.* Many times I have contemplated writing a full review of this work; but for many reasons it has been impossible. Fortunately, such a review is unnecessary, by reason of the incisive review by Judge Clark (with his law clerk Mr. Trubek) in the *Journal* of December, 1961.[1] They know and greatly appreciate Karl Llewellyn's mind and work. They say of this last work: "in many aspects this book is magnificent"; "There are gems of legal wisdom"; "There is the whole original trend of research into what appellate courts are actually doing in their decisions"; "The book at times is exciting reading. Llewellyn's deep faith in the grandeur of the Law and her practitioners ennobles all of us"; "The starting point of the study is the observation that the rules of law alone do not decide cases"; "an excellent discussion of the 'Leeways of Precedent' "; "it also persuasively demonstrates that courts are not controlled or

1. Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961). The quotations which follow may be found at pages 257 to 259 of the article.

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dictated by prior authority"; "He finds . . . that the law is in motion, that courts are constantly creating the law"; the judges have "a choice which calls for the exercise of judicial creativity." Unlike Cardozo, who found this choice in a statistically small number of cases, Llewellyn stresses the presence of the creation-potential in almost all cases;[2] "This creative activity and the forces that guide and channel it form the main subject-matter of the book. Llewellyn believes that judicial creation, albeit present in the mine-run of cases, does not lead to arbitrary or unreckonable decisions." All these comments I here confirm.

These reviewers make some reasonable criticisms of Karl's verbal style—his use of hyphenated terms of indefinite content, never adequately defined.[3] But their principal criticism is directed at his failure to put much greater emphasis upon "a vital aspect of the judicial process, namely, the personal outlooks, values, even bias of the individual judge." They say that he "seems . . . to reject the notion of judicial freedom." He has "divorced 'creativity' from the hard choice of values, and the freedom to choose among them, which is an important part of creativity." "Nowhere in this vast book does Llewellyn give precise, operational indications of how a judge should exercise sense, situation sense, or whatever sense it is that leads toward the immanent law. Yet he tells the judge, again and again, that he, the judge, and he alone, possesses this capacity to sense the correct resolution of the tangled human problems which come before him."[4] They (very justly) fear that such advice will mislead the judges (though not the lawyers and the law professors) into a belief in a "false certainty" of the law and in their own near infallibility. They write: "If judges are easily convinced that they possess the key to objectivity, or a sixth sense for right and justice, will they not gain a false confidence in their own conclusions—conclusions that are in fact based on the humble stuff of subjective preference?"[5]

To this reader of *The Common Law Tradition,* some of the above quoted sentences seem wholly inconsistent with those quoted earlier herein. I found nothing in the book to indicate that "certainty" either does or can exist, or that the book's contents will lead any judge to believe that he has the key to objective wisdom or infallibility. Cardozo wrote that in the beginning he sought "certainty" and found that the quest for it was futile. He was "trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience."[6] *The Common Law Tradition* does not teach that in any case the solution is certain, although it suggests that "eight times out of ten" the outcome of an appeal

2. Citing LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 77-91 (1960).

3. Clark & Trubek, *supra* note 1, at 261 & n.22.

4. *Id.* at 257, 256, 263, 262.

5. *Id.* at 270.

6. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

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may be predictable.[7] Cardozo's ratio was higher than that. Nor does it teach that any judge's "subjective preference" is any more "commanding" as a determination of "justice" than were the "pale and glimmering reflections in [Cardozo's] own vacillating mind and conscience." The book is not a critique of individual judges or individual decisions or any branch of our substantive law.

Karl Llewellyn must have felt a traumatic shock to learn that "he tells the judge, again and again, that he, the judge, and he alone, possesses the capacity to sense the correct resolution of the tangled human problems which come before him."[8] What Karl does in *The Common Law Tradition* is to make a comprehensive examination of the judicial method of our appellate courts. He finds the method and the results, "on the whole" and "in the large," reckonable. He finds great differences in "style," both in the product of individual judges and in the gross output of different periods. He glories in the "grand style" of the leading jurists of the early Nineteenth Century. He sadly notes a decay in quality during the latter half of that Century, and he joyfully observes some recurrence of the "Grand Style" in the new Century (now on the wane). His book, no doubt, came as a pleasant surprise to many an appellate judge who had learned to expect little but adverse criticism from the schools. Karl had done his full share in that criticism; and he still remained ready to tear to pieces the reasoning and the result of any specific case, whether exhibiting mere lack of analytical capacity, or the narrow "subjective preference" of a cock-sure radical, or the hidebound tenacity of a dogma-worshipper. One does not now see many of these last two varieties. Criticism must more often be directed at bad analysis and insufficient comparative background, for which the blame should often be laid on incompetent briefs and the constant succession of variant problems from all the fields of life.

Karl's years of critical and constructive research led him to the conclusion that "on the whole" and "in the large" our appellate courts have done well, that due to "studying factors"[9] their results are "reckonable," not variable with mere subjective preferences unaffected by the similar preferences of other men, and that they need and deserve reassurance. If such a degree of "reckonability" exists, it is important that the public, the lawyers, and the law students should know it; and this is true even though Karl may exaggerate the "crisis" of a widespread lack of confidence and respect. Such a reassurance must come from a comprehensive examination by a research scholar. Karl Llewellyn is one upon whom we can rely. His lifetime was spent as a teacher of students and a critic of court decisions.

Does Karl reject "the notion of judicial freedom"? Has he "divorced 'creativity' from the hard choice of values"?[10] He testifies to the contrary:

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7. Clark & Trubek, *supra* note 1, at 259.
8. *Id.* at 262.
9. These factors are discussed in LLEWELLYN, *op. cit. supra* note 2, at 19-21.
10. Clark & Trubek, *supra* note 1, at 263.

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> [I]t has been needful to stress and stress again the fact of movement, daily movement, movement of necessity on every opinion-day, almost of necessity in every other case or so, as any appellate court works with and on those materials of doctrine which it has received. It has been needful to stress as well that avoidance of such movement is not only unusual, and rather difficult, but that it also, and of necessity, rests on and requires a choice, a choosing among various legitimate and inviting possibilities, possibilities which are great and small, which above all are manifold— —a choosing for which an appellate court must account, case by case, to its conscience, and for which it should account, no less case by case, to its constituents. Nevertheless, our exorcism of these malignant phantasms of immobility must not lead to overlooking the body and detail of phrased doctrine which it is the office of all movement to improve and strengthen.[11]

We must indeed pray that in making these "choices" our appellate courts will not be motivated by mere political subjective preferences, or by preferences dictated by special groups with special interests and desires—political, economic, religious, or racial. In spite of occasional and notable aberrations, we can be thankful that the judicial office itself influences those who fill it to make wise choices, sometimes described as "objective," choices that are of necessity the result of the combination and cross-fertilization of "subjective preferences." These preferences should themselves be broadly based, thought out by men of high analytical capacity, with critical, skeptical, and humble minds. Only thus can a panel of human judges make a wise choice, render a sound judgment, and express a truly helpful guiding "rule" for the future. In no other sense than this is wisdom ever "objective"; in no other sense than this is a "just solution" or a "right rule" ever "immanent" in a specific "fact-situation" or in the vast complex human civilization in which it is embedded.

A statement by Levin Goldschmidt, quoted by Karl with approval, if read without critical analysis, might be regarded as indicating his belief that every case is governed by a "natural" or "immanent" rule of law. The quotation is this:

> Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.[12]

Read as a whole, analytically and critically, without preconceptions put into the terms "natural" and "immanent," this means no more than that the judge must apply his reason to the specific fact situation before him in relation to the conditions of life out of which it came and by which it is surrounded. The judge must compare the specific situation with other similar (though

11. LLEWELLYN, *op. cit. supra* note 2, at 392.

12. *Id.* at 122, quoting from Goldschmidt, Preface to KRITIK, DES ENTWURFS EINES HANDELSGESETZBUCHS, KRIT. ZEITSCHR F.D. GES. RECHTSWISSENSCHAFT vol. 4, no. 4.

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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. By this process he does not find a rule ready-made; the "rule" by which he "justifies" his decision is the result of his own creative reasoning process, an inductive not a deductive process. It is a tentative, not an "eternal or changeless" generalization. It rests on the not so very "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.

If Goldschmidt means more than this (either clearly or dimly), he cannot be approved, and Karl's theory of the "situation-sense" does not accord with him. Karl supplies many suggestions with analyses of cases; they are found embedded throughout the book. I will quote one from his chapter entitled "Conclusions for Courts." It is taken from his discussion of the use of the case reports, the best storehouse of accumulated human experience in existence. What is needed, he says,

> is first to read the reports for what they are: human histories about situations which have arisen in our society. And, second, to group together for instruction—in a way which other literature rarely, in equivalent time, permits—six or a dozen or forty significantly comparable histories, to be thought about together: whether in terms of situation, or in terms of process, or along any other line.[13]

Other life histories must be included if they are available; it is thus that the human mind can develop an applicable "situation-sense," one that other human minds can verify or reject, amend or displace—other minds of fellow judges on the same bench, judges in later cases, and research scholars throughout the land. This is the principal teaching, supported by a richness of detail found nowhere else, of *The Common Law Tradition.*

13. LLEWELLYN, *op. cit. supra* note 2, at 357. At page 127, Karl adds the following gloss on the Goldschmidt quotation:

> Only as a judge or court knows the facts of life, only as they truly understand those facts of life, only as they have it in them to rightly evaluate those facts and to fashion rightly a sound rule and an apt remedy, can they lift the burden Goldschmidt lays upon them: to uncover and to implement the immanent law.

But let no judge assume that the rule that he or any predecessor has "fashioned" is the final word—a right and changeless immanent rule. The "burden" must still be borne.

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