



Formative Years

GEORGE W. LIEBMANN

THE COMMON LAW TRADITION: A COLLECTIVE

PORTRAIT OF FIVE LEGAL SCHOLARS

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INDIVIDUALS ARE DEEPLY AFFECTED by the experiences of their formative years. That is one lesson of this concise volume written by George Liebmann, a partner in a small firm in Baltimore, Maryland. Although this is largely an intellectual rather than a personal history, Liebmann does recount his own perception of Karl Llewellyn as a first-year law student at the University of Chicago in the fall of 1960:

He more or less exploded into the lecture hall, notwithstanding a visible limp, and put to one side his celebrated blackthorn walking stick. This object, which looked like none seen since, resembled a thinner version of a cave-man's club; at least that was its effect on impressionable law students. It was made clear that students when called upon were to rise to recite in the Continental manner. A series of graded sanctions were applied to those who failed to do so with sufficient promptness, the

first a loud bellow of "hind legs, please." If this did not produce a sufficiently prompt result, the blackthorn stick was swung down on the lectern, producing a startling crash.¹

I was there a year later and can confirm that it happened, although neither Liebmann nor I understood that this performance was carefully constructed. It was not done, as is so often the case today, to amuse the students, but rather to convince them that they were now embarked on the study of a subject so serious that their fates, and the fates of their fellow man throughout the world, hung in the balance. It did not occur to us that this vital source of energy would die just a few months later, in the early winter of 1962.²

The heart of this book is mini-biographies of five members of the University of Chicago faculty in the early 1960s, including Llewellyn. The others – Edward H. Levi, Harry Kalven,

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¹ Page 149.

² February 13, 1962. William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973), p. 112.

Jr., Philip Kurland, and Kenneth Culp Davis – were similarly influential legal scholars and teachers. Llewellyn himself has been the subject of a full biography, rare for teachers of law.³ Liebmann tells his story, along with those of the others, to make a point.

This book is a commemoration of a place and a time in American law teaching, but more importantly of an outlook. The outlook was empirical and tolerant, two words rarely used to describe today's legal academy. These common values were carried into expression by a group of men (and one woman⁽⁴⁾) who did not think of themselves as part of a cult or faction, and who were not ruled by the herd instinct.⁵

Although the individual biographies are brief (57 pages on average), they are densely written and researched, with extensive reference to published books, law review articles, newspaper articles, Congressional testimony, and (in Levi and Kurland's cases) personal papers. They contain outlines of biographical facts, but they focus not on the lives of these five men but rather on their work and their influence on the academy as both teachers and faculty leaders during a particularly important period in the history of American law schools. Law and law teaching mattered to Llewellyn, as they mattered to Levi, Kalven, Kurland and Davis. They also matter to Liebmann, who is a practicing lawyer who cares about law, and thus cares about law teaching.

No brief summary can do justice to these densely packed essays, but for those unfamiliar with these five names, here are thumbnail sketches.

Edward H. Levi, born in 1911, was a grad-

uate of the Laboratory School, College, and Law School of the University of Chicago. Alone of this group he was both an academic and a man of affairs, serving toward the end of his career as Attorney General of the United States (1974–77) in the Ford administration.

After his graduation from the law school in 1935 he went to Yale as a Sterling Fellow, joining the Chicago faculty in 1936. In 1940 he went to work at the Antitrust Division of the Department of Justice, where Thurman Arnold was the presiding Assistant Attorney General. Antitrust was to be a life long interest.

In 1948 he published *Introduction to Legal Reasoning*, an introduction to the common law method of decision illustrated through an analysis of three different lines of cases.

After returning to the Law School in 1945, Levi became Dean in 1951 at the age of 40, a position he held until 1962. As Dean, Levi led the law school to renewed prominence in the 1950s. He put together, with support from the Ford Foundation, an ambitious law and social science project which, among other things, produced groundbreaking (and occasionally controversial) work on the American jury system. As an intellectual colleague and leader, he prodded, stimulated, and protected a tolerant and engaged faculty culture. His Antitrust course, taught jointly with Aaron Director, with whom he disagreed about a great many things, was an early progenitor of what became law and economics.

In 1962 he became Provost and eventually President of the University of Chicago in 1968, serving until he became Attorney General in 1974.

3 Ibid.

4 Soia Mentschikoff, wife of Karl Llewellyn, Reporter for Article 5 of the Uniform Commercial Code, and after Karl's death Dean of the University of Miami School of Law.

5 Page 1.

Harry Kalven was, like Levi, a graduate of the University of Chicago's Laboratory School, College, and Law School. He joined the law faculty in 1945 and remained there until his untimely death in 1974. Kalven was a teacher and scholar pure and simple, both beloved by his students and a prolific author. His principal subjects were torts and the protection of free speech. His major works were *The Uneasy Case for Progressive Taxation* and *Public Law Perspectives on a Private Law Problem: Auto Compensation Plans* (both with Walter Blum), *The Negro and the First Amendment*, *The American Jury*, and the posthumously published *A Worthy Tradition*.

Karl Llewellyn was older than the others, having been born in 1893. He came to Chicago in 1951 after a long and distinguished career at Columbia. He is perhaps most famous as a principal architect of the Uniform Commercial Code, particularly Article 2, but he was also widely published in the law reviews. Early in his career he wrote the quixotic *The Bramble Bush*, delivered as a series of lectures at Columbia in the 1930s. He was recognized in fields as diverse as commercial law, law and anthropology, and jurisprudence. His status as a writer and scholar was not without controversy: toward the beginning of his career, *The Bramble Bush* caused him considerable inconvenience and isolation as a budding academic; toward the end of his career at Chicago he published *The Common Law Tradition: Deciding Appeals*, the result of over thirty years of effort, and as Liebmann writes, "large sections of which are virtually unreadable."⁶

Philip Kurland was born almost thirty years after Llewellyn, in 1921. He graduated from the Harvard Law School in 1944, editor-in-chief of its law review. He clerked for

Jerome Frank on the Second Circuit and for Justice Felix Frankfurter. After a short time in practice and brief stints at the University of Indiana and Northwestern, he was recruited to Chicago by Levi in 1953. He remained there until his death in 1996. At Chicago he was an engaged member of the faculty, as well as founding editor of the *Supreme Court Review*.

Levi recruited Kenneth Culp Davis to the University of Chicago in the 1950s after he had taught at West Virginia, Texas, Harvard, and Minnesota. He is most noted today for his treatise on administrative law, which remains an important reference book on procedure before federal administrative agencies. Davis had his own distinctive style: He liked big, simple themes, which he pursued with a single-minded tenacity. As Kurland observed in a private letter to Frankfurter: "It is the student who is probing for the weaknesses of Davis's proclamations rather than the other way round."⁷ But as Liebmann points out, Davis's tenacity was used on behalf of powerful and important ideas: important procedural rights such as the right to notice, to present evidence, and to a hearing, among others.

Those who associate Chicago with law and economics may be surprised to find no practitioner in the group, but that is one of Liebmann's points. During this period of Chicago's ascendancy, law and economics was not a particularly important part of the school's intellectual culture. *The Journal of Law and Economics* was not founded until the early 1960s, with Aaron Director as Editor, and even then it got off to a slow start. Director, an economist not a lawyer, had a peripheral position in the Law School's culture. Economics was just one of many perspectives that a lawyer should consider, even

6 Page 169.

7 Page 251, quoted from a Kurland letter to Frankfurter.

in subjects with an explicit economic impact such as antitrust. It was Levi, not Director, who taught the bulk of their shared Antitrust course.

All five of these academics were very different, but they were united by a time and by their reaction to that time. As Liebmann says in his conclusion,

the men we have considered here ... came to maturity in the 1930s, during the Depression and the shadow of war. These were experiences that produced some disillusioned revolutionaries, some bitter reactionaries, but caused others to engage in hard thinking about how to reform, how to rebuild, and how to avoid the destructive passions of an ideological age. Our five main subjects all were such constructive people.⁸

The contrast between the social and historical context for that generation of legal academics and that of today's could not be more stark. The men and women of that generation had been witness to the vulnerability and partial restoration of the political and legal foundations that we today take as a given. Many of them had strong personal connections to Europe, and they had all watched the fall of Germany's advanced legal system to the predations of the Nazis, the at times problematic but ultimately successful reconstruction of legal order in Western Europe, and the continuing aftermath of World War II east of the Iron Curtain. For someone like Llewellyn, who had fought for the German Army in World War I (where he was awarded the Iron Cross), or Levi, of German Jewish extraction, or Max Rheinstein (a German-trained comparative scholar and colleague), a refugee from the Nazis, these events must have been sobering in the extreme. In the United States, the collapse of the economy had shattered historic

American optimism. Twenty-first-century Americans live in an age that assumes perpetual economic prosperity and the ability to hand out "the Rule of Law" like a grant from the Agency for International Development. For this earlier generation, who had witnessed the rule of law on trial and working in the immediate shadow of this terrible history, the project to understand and sustain an open, tolerant, and free legal system was not an abstract, academic exercise but rather an urgent and important challenge.

They hoped to meet this challenge by developing a better understanding of how a system of rule of law, particularly common law, works. That was the theme of Levi's *Introduction to Legal Reasoning* and Llewellyn's *Common Law Tradition*. Llewellyn hoped that somehow, by carefully cataloguing the myriad ways by which common law judges both followed and disregarded precedents, a clear pattern would emerge. Alas, it did not, and their project, along with the similarly inspired project of the legal process scholars at Harvard, did not bear clear fruit. Many of the most talented voices of the next generation, freed from a sense of urgency as the unpleasant memories faded, turned away from, rather than into, law, and sought insight in economic and social theory. They did so not so much out of a disinterest in law, but out of a belief that to continue the efforts of the previous generation was unlikely to lead them anywhere.

Instead, the next generation of lawyers faced a different set of challenges to the legal system – challenges stemming from the demands of social change – challenges that Liebmann's set of common lawyers were unprepared to address or explain. Leibmann argues that *Brown v. Board of Education* presented a critical jurisprudential challenge for all of his principals. They liked the result,

⁸ Page 305.

but they did not like the reasons the Court offered. If judges could create law simply because they liked the result, then the distinction between law and politics was impossible to identify and the results could simply be responsive to the politics of the moment. This dilemma continues to afflict those who seek a view of law that distinguishes it from politics. Leibmann has his own theory about the origins and progeny of *Brown*, a theory that dominates the twenty-one page Conclusion. Perhaps, as Liebmann argues, this dilemma could have been avoided if the Court in *Brown* had justified its decision with a requirement of race blind laws, but (as he himself recognizes) that would have required that the Court subject itself to constraints it was and remains unwilling to accept.⁹

Throughout, the book seeks to compare these law professors of the early 1960s with those of today. Liebmann is clearly right that law schools and law teaching have changed immensely since the 1960s, but he may be overly nostalgic in his comparison. While the book describes in some detail the activities of five prominent legal academics at one prominent school in the early 1960s, it does not describe in any detail the work of the legal academy of today.

Law schools today are better funded, their faculty are more extensively educated, and they do a much wider variety of things. Today some law faculty continue to pursue their work well within the tradition of the five scholars described in the book. But there are a variety of models today: scholars trained in fields other than law (like Director) are certainly more prevalent at top law schools than they were during the period Liebmann describes, and still others are public intellectuals, engaging with the media, host-

ing blogs, and focusing their efforts on audiences outside the legal profession. While it is clear that “non-traditional” methods are the rule as much as the exception today, there is no basis for concluding that the intellectual style of the five figures Leibmann describes was representative of all law teachers in their time. Given the profound changes in the technology and business of mass media, it is hard to know whether the professors of old consciously eschewed public roles or if the predecessors of today’s public intellectuals were prevented by the higher costs of publication and the more limited access to the media from attracting any public attention. It is certainly a fallacy to claim that academics during the earlier period isolated themselves from public life; Levi himself was prompted to venture forth from the ivory tower to assume so politically influential a role as Attorney General of the United States, and Kurland readily testified against the confirmation of Robert Bork during his highly politicized Supreme Court confirmation hearings.¹⁰ Any definitive conclusion about the differences between law teachers circa 1960 and law teachers today will require a survey of the work and careers of today’s law teachers that is at least as careful as Liebmann’s picture of the work of these five individuals, a task that, given how many of us there are, and how many *kinds* of us there are, is unlikely to be successfully undertaken anytime soon.

If one were to undertake to replicate Liebmann’s methodology for the law professors of say, the year 2000, one would first have to select the five-person panel to examine. Who are today’s Levi, Kalven, Llewellyn, Kurland, and Davis? Given the wider range of styles, methods and interests, what should the criteria for selection be? Would the pan-

⁹ Pages 307–08.

¹⁰ Pages 222–23.

el be Arthur Miller, Bruce Ackerman, Richard Epstein, Alan Dershowitz, and Larry Tribe? Or should it be John Langbein, Robert Ellickson, Alan Schwartz, David Currie, and Mary Ann Glendon? And what should be done with the ubiquitous Richard Posner, only a part-time law professor, but clearly a prominent candidate no matter what the style, method, or interest chosen?

Although Liebmann successfully demonstrates many differences between the law teachers of today and those of the post-war generation, his strong juxtaposition may in the end prove to be misleading. In the longer run, the legal profession and those who wish to understand the law cannot turn aside from the important questions that challenged these five figures. Today's legal thinkers have faced neither the menace and defeat of Nazi Germany nor the privations of the Great Depression, but that is not to say that they have grown up in a world free from social and economic challenges. The America that today's academics live in may be the world's superpower, but its status as such does not insulate us from the questions and uncertainties of change. The growing influence of non-western commercial interests (and the growing social influence that will certainly follow) presents its own set of challenges to the western social and legal order. We may not be living through the Great Depression or World War II, but neither do we live in an era of Utopian amiability and simplicity.

While many new approaches vie for attention with the common law analytical and academic traditions that Liebmann celebrates in the persons of his five protagonists, it would be a violation of the culture of tolerance that Liebmann himself lauds to

dismiss them as unworthy adjuncts, if not replacements, for the common law analytical method championed by the book. The common law tradition and the wealth of human experience it embodies has much to teach a troubled world, especially one in which so many societies are emerging from regimes of faction and force into a future that many hope will be governed by law. Simple ideas like notice, hearing, the right to present evidence, impartial and professional decision makers, receptiveness to new and unfamiliar possibilities, a decisional environment free from ideology and passion, a rational explanation for decisions; these arguably universal ideas, embedded in common law practice, have done much to elevate the human condition. These five figures understood that even given all their imperfections, they are valuable attributes of a legal culture and the society it serves, and should be defended and protected.

Although this book is a history, George Liebmann's choice to write an intellectual history means that his primary subjects are not the five individuals he profiles but rather the ideas and motivations that pushed them to do the work they did. Although some or all of that work may have been overtaken by academic progress and changing times, one can't say the same for those underlying questions. This book stimulates its reader to think hard about the important and unavoidable questions that challenged the five principals, and the role of law teachers and scholars in understanding and sustaining a culture that supports the rule of law and the human possibilities it enables. Because it is a story of an empirical, tolerant outlook, it is a story with as much salience for today as for the time and men it describes. *JB*