Anthony D'Amato

Karl Llewellyn

Karl Nickerson Llewellyn (*b.* May 22, 1893, in West Seattle, Washington; *d.* February 13, 1962, in Chicago, Illinois) was one of the most famous professors of law in the decades following 1930 because of his short book *The Bramble Bush* (1930), which generations of law students read as their introduction to the law. Today his book is not often read—perhaps because many of the bold points Llewellyn made have now become conventional wisdom. For instance, he then observed that many law students regarded their civil procedure course as "the technical tools of the trade and nothing more; as books of etiquette through which one learns to use the legal oyster fork for legal oysters and to avoid the knife when picking bones from legal fish." Instead, Llewellyn urged, procedure, evidence, and trial practice should be viewed as "conditioning the existence of any substantive law at all." Each substantive course should be read "through the spectacles" of procedure. Concentration on procedure and "due process" is a common phenomenon now, perhaps, though Llewellyn's reminder is still noteworthy for the *entering* law student or the would-be law student.

Llewellyn was also known as a leading "legal realist," one of a number of critics of law of his generation who were skeptical about the proposition that U.S. law operated as an objective system of rules. Rules, according to Llewellyn and to his friend Judge Jerome Frank, only tell us what a judge *says* in his opinions, but not what he *does*. Rules of law do not point unambiguously to a given result in a dispute. An illustration is Llewellyn's marvelous compilation of the "canons of construction" of statutes—a long list of "canons" taken from cases that come in paired opposites. For instance:

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If language is plain and unambiguous, it must be given effect;	but not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.
Every word and clause must be given effect;	but if inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage.
A proviso qualifies the provision immediately preceding;	but not when it is clearly intended to have a wider scope.

. . . when all allowance has been made for judicial conservatism, for the technical ritual of the law, for judicial ignorance, the fact remains that everywhere, and especially in the business field, what courts have done and will do is, in the main, understandable only in terms of what men do.

KARL LLEWELLYN

Llewellyn Studio

Karl Llewellyn poses with his wife, Soia Mentschikoff. Like her husband, Mentschikoff was a noted legal scholar; she was one of the principal authors of the Uniform Commercial Code and became the dean of the University of Miami Law School.

As a realist, Llewellyn advocated a focus upon what judges actually do in disputes and what influences them to do what they do. To be sure, a preexisting rule of law may influence a judge; but so may what the judge had for breakfast. Yet, having made this point, Llewellyn and other U.S. realists never quite succeeded in articulating an alternative set of jurisprudential values to the idea of law as a coherent system of preexisting rules. This helps explain why the U.S. realist movement is not now the prevailing school of thought in U.S. legal education. For instance, is the conclusion to be drawn from the insight about the influence of food on judging that the lawyer should attempt to learn what the judge had for breakfast? And if the meal is unfavorable to the lawyer's case, should he or she purchase for the judge a different breakfast? This may be of dubious practicality, but we could extend the concept to condone bribery, undue influence, or the exploitation of conflicts of interest. Suppose in a civil action that the plaintiff's lawyer knows that the defendant, who is being sued on a sales contract, happens to be a homosexual. Suppose further that the plaintiff's lawyer knows that the judge who is hearing the contracts case has a personal abhorrence for homosexuals. Under the "realist" theory, the plaintiff's lawyer, in attempting to win the case for his or her client, might do better by mentioning to the judge that the defendant is a homosexual than he or she would do by simply reciting the rules of sales contracts (which might, indeed, not be favorable to the client's cause). If *anything* can "realistically" persuade a judge, why not use anything? Llewellyn and others have attempted to answer such an argument by saying that the sexual preferences of the defendant are *irrelevant* to the case in hand and would be excluded by the ordinary rules of

evidence. Therefore, they conclude, there is no point in worrying about this problem. On the contrary, the term *irrelevant* obviously begs the question, and indeed the entire point of realism is to make such a matter "relevant" at least to what the law student should learn in law school. If a prejudiced judge can actually be persuaded upon knowing that one of the parties to a case is a homosexual, and if legal education is to train lawyers to make persuasive arguments, then it would appear to follow that law students should attempt to find ways to bring such facts into the trial. Courses in evidence should thus be reshaped to fit the reality of the "realism" theory.

But theoretical problems aside, Karl Llewellyn was universally acknowledged to be one of the most provocative speakers and teachers of his generation. He wrote in a salty style that is still fresh and continues to draw students of law to his books and articles.

Llewellyn was graduated from Yale Law School and, after teaching at Yale for two years, he went into practice in New York City. When he returned to Yale, his writings reflected the new legal sociology as well as his own preoccupation with commercial law and banking law. His interest in the intersection of law and social science led to his move to Columbia Law School in 1924, where he produced *The Bramble Bush* and a leading casebook on *Sales*. He was active in the Legal Aid Society and the American Civil Liberties Union and worked with the National Association for the Advancement of Colored People, organizations that were just getting started in the early 1930s. He ventured into anthropology with a book coauthored with E. A. Hoebel entitled *The Cheyenne Way* (1941), a study of dispute resolution among the Cheyenne Indians. Attracted in 1951 to the University of Chicago by Edward H. Levi, dean of the law school, he continued to explore the relationship of law to the humanities and to the social sciences. A few days before he died he gave a lecture on appellate advocacy to the Indiana Bar Association. After sustained applause at the end of his lecture, he reapproached the podium and said, "Now listen you folks, applause doesn't count; what counts is action."

For the long haul, for the large-scale reshaping and growth of doctrine and of our legal institutions, I hold the almost unnoticed changes to be more significant than the historic key cases, the cumulations of the one rivaling and then outweighing the crisis-character of the other.

KARL LLEWELLYN

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