

BOOK REVIEWS

THE COMMON LAW TRADITION: A COLLECTIVE PORTRAIT OF FIVE LEGAL SCHOLARS

BY GEORGE LIEBMANN

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What is the role and relevance of legal academia in the larger society? Do law professors matter? If so, why and in what context? What attitudes and habits of mind are most conducive to excellence in law teaching? How have law schools and those who make their careers in them changed over the past four decades?

Anyone interested in these questions will find abundant food for thought in George Liebmann's new book, *The Common Law Tradition: A Collective Portrait of Five Legal Scholars*.

At the center of the book are biographical and bibliographical surveys of five law professors from the University of Chicago in the 1960s: its Dean, Edward H. Levi; Harry Kalven, Jr., who collaborated with sociologists on empirical studies of the American jury in the Chicago Jury Project; legendary contracts scholar and father of the Uniform Commercial Code Karl Llewellyn; constitutional law professor Philip Kurland; and the original serious student of the theory and practice of administrative law, Kenneth Culp Davis. Liebmann was a student at Chicago during the time these five men taught, and he appears to have been personally acquainted with all of them. His portraits are therefore admiringly rendered, salted with enough anecdote and personal reflection to keep the reader's attention.

The chapters devoted to the individual portraits of these legal scholars canvass their lives and work. At times they devolve into fairly dry recitations of the career achievements of their subjects and summaries of their major works and the reactions of other scholars to those works. But at their best, these chapters bring their subjects to life and allow the reader to understand not only what these men did with their lives, but why, and why it mattered.

The chapter devoted to perhaps the most interesting of these figures, Ed Levi, discusses not only his academic work on antitrust law and legal process but also his tenure as Dean of the Law School, as Provost and then President of the University of Chicago during the politically and racially turbulent times of the 1960s, and his work in government in the Antitrust Division of the Justice Department and then later as its Attorney General. We learn that although Levi was both a founder of the law and economics movement and a legal realist, his career was devoted, in a sense, to an ideology of being non-ideological. As Liebmann describes it, Levi was a consummate institutionalist and process-oriented conservative. He led an effort to assimilate the teachings of social science into law and favored a jurisprudence of restraint, according courts less latitude in interpreting statutes and more in areas where the common law reigned, but always demanding gradualism and practical accommodation to the needs of the democratic process. In the constitutional arena, "[h]is concerns centered less on individual rights than on the structure of divided and separated government that protected them."

In the 1950s and 1960s, Levi became involved in a number of controversial episodes as a university administrator, and in each, he displayed the mature professional and practical judgment that characterize the best lawyers. In 1951, a star Chicago law student, George Anastaplo, precipitated what eventually became a 5-4 decision in the Supreme Court by refusing on principle to respond to questions concerning affiliation with the Communist Party on his Illinois State Bar application. Levi attempted to dissuade Anastaplo from taking this position, correctly as it turned out: Anastaplo lost his case. In another incident involving the taping of jury deliberations by the Chicago Jury Project, Levi took responsibility for the taping (which had court approval) in the subsequent congressional investigation, helping to defuse the crisis. When racial politics reared its head on campus in the late 1960s—in the form of demands by black radicals for quasi-separatist preferences in admissions, curriculum, housing, and faculty appointments, backed up by sit-ins and boycotts of various kinds—Levi steadfastly refused to compromise and yet managed to avoid further provoking the demonstrators or inflaming the situation. Avoiding mistakes made by other university administrators, he neither used force nor offered amnesty or concessions; he allowed the passions of the agitators to exhaust themselves and then used university disciplinary processes to mete out consequences. Levi explained that:

The university must stand for reason and for persuasion by reasoning. . . It is most unfortunate and in the long run disastrous for a university to exemplify expediency which avoids or solves conflicts by the acceptance of ideas imposed by force. . . This approach requires candor, consistency and openness, but also effective discipline. The discipline will be difficult. But the university owes this much to itself, and it also owes this much to the larger society.

Although not unsympathetic to the goals of the civil rights movement, Levi clearly hoped that the legal system could serve as a muffler or cooling pond of sorts that would help sublimate the passions of the civil rights movement into constructive, responsible, incremental change. As Liebmann explains, "he defined the function of the bar not in the manner of the rights-centered legal activist generation that followed but more modestly, as 'a coordinating influence, a strategic intermediary between the people, between the government and the individual, between ideas and their application.'" Levi also valued intellectual diversity on campus and declined invitations to pursue other sorts through, for example, racial preferences:

Once you determine quality by race or creed, there will be a leveling in this country. Then only

universities outside this country will have intellectual excellence.

As Attorney General, Levi was involved in numerous issues with contemporary resonance. He responded to allegations of abuse of law enforcement, intelligence, and investigative resources during the Nixon years; adopted many of the internal Justice Department guidelines that still govern certain activities of federal law enforcement agencies; helped initiate the process of sentencing reform that culminated years later in the Sentencing Guidelines; managed controversies over school busing; and grappled with issues relating to special prosecutors and what became independent counsels (he believed the Independent Counsel Act unconstitutional). Although many of these issues and controversies could benefit from more in-depth and multi-dimensional treatment than Liebmann affords them, even a cursory description impresses the reader with the variety and significance of the issues Levi confronted.

Of special interest given President Bush's two recent Supreme Court appointments, Liebmann suggests that Levi was instrumental in securing the appointment to the Supreme Court of John Paul Stevens, with whom he had taught a course in antitrust law. When Justice Douglas resigned, Levi counseled President Ford that it would be unwise to choose a nominee from within his administration, expressly taking himself out of the running. He then evaluated a number of leading candidates, and in internal administration deliberations apparently tipped subtly in favor of Stevens, praising his "discipline and self-restraint." Years later, however, Levi also steadfastly supported the failed confirmation of Robert Bork, whom he had been responsible for hiring as Solicitor General. The superficial paradox appears to be explained by the fact that Levi valued quality and intellect above ideology and displayed a laudable, but from today's perspective old-fashioned, loyalty to persons he esteemed, regardless of the partisan politics of the moment.

The other four professors surveyed in *The Common Law Tradition* covered less ground in their careers, but their work and attitudes shared much in common with Levi's. The profile of Harry Kalven, perhaps the weakest of the five, emphasizes the broad range of his academic interests: in addition to being a celebrated torts professor, Kalven wrote influential works on income taxation, automobile insurance, juries and jury reform, and the First Amendment, the latter of which receives extended treatment from Liebmann. Kalven devoted a substantial part of his professional energy to the Chicago Jury Project, an extensive empirical study of the functioning of civil and criminal juries whose wealth of data is credited in part with sustaining support for the jury system. Such work reflected what Liebmann describes as the central animating principle of Kalven's thought: a concern "with values and doctrine, but doctrine conditioned by immersion in fact."

Karl Llewellyn comes across in Liebmann's account as a more colorful character. An expatriate American who joined the German army in World War I and earned the Iron Cross before the U.S. entered the war, Llewellyn was an idiosyncratic master stylist, part poet and part legal technician, who passionately advocated the serious study of legislation and then put his principles into

practice as the father of the Uniform Commercial Code. From his continental experiences, he also urged the study of comparative law. He inspired first-year law students with rousing words about their chosen profession. He believed the law "is one part of wisdom: trade, culture, and profession in one. . . a pitiful, brave flame. Some warmth, some light, some touch of burning courage. What have you more to ask—or to ask to be?" He also participated actively in the affairs of the real world, advocating strongly, for example, on behalf of Sacco and Vanzetti (whom the light of history has now shown, along with other causes celebres of the American Left, to be guilty of the offenses for which they were executed).

Llewellyn shared the deep faith of the other subjects of Liebmann's book in the common law process and in the values of judicial restraint. As Llewellyn himself described it, he "put [his] faith, rather, as to substance, in a means; in that ongoing process of effort to come closer to the Good, that ongoing process of check-up and correction, which is the very life of case law." As Liebmann notes, "Law, for him, was not a method by which the enlightened imposed their views on society. . . . Courts as well as legislature were under a duty to be democratic in their approach and to enforce society's preferences, not their own." Thus, Liebmann concludes, somewhat sardonically, that "[h]is philosophy is one of bottom-up jurisprudence, of respect for private ordering, and of government by consent of the governed. Hence its current lack of appeal."

Phillip Kurland began his career in the Department of Justice and in private practice, but within several years of graduation from law school had found his way back as a law teacher. His career as a professor was marked by a passionate interest in the Supreme Court and its jurisprudence—Kurland was the founder and editor of *The Supreme Court Review*, a publication dedicated to responsible analysis and criticism of the Supreme Court—and in matters of religious freedom. Indeed, his crowning achievement was the publication of the *The Founder's Constitution*, a collection of source materials for constitutional interpretation grouped by the section of the Constitution to which they pertained. But Kurland was no originalist. Rather, "[h]e believed in the relevance of history, not as a literal guide for the present, but as a means of exposing the interests at stake, and for its assistance in elevating discourse from the immediate to the general. He believed also in the common law, case-by-case method, and in the assimilation of the past that the method required." As Liebmann remarks, "This made him a conservative in the Burkean sense, quite a different thing from the legal conservatism now fashionable."

Kurland's process-oriented conservatism and Frankfurter-style judicial restraint caused him to be a trenchant critic of the Warren Court. He felt that the Court was engaged in an arrogant jurisprudence by fiat, heedless of the soft but vital constraints of persuasive reasoning and respect for precedent. Yet, in 1987, he testified against Robert Bork, primarily because he objected to Bork's recourse to an overarching philosophy of originalism. Despite Kurland's belief in judicial restraint, his highest belief was in a style of restrained and modest legal reasoning that abjured grand theories or all-purpose approaches to interpretive questions. Liebmann tells us that "[h]e deplored 'the widespread development of legal theory to determine rules of law,' favoring instead 'a system of induction from examples to rules.'" Kurland pledged fealty to "the liberal tradition," which he described as "a tradition born in

doubt rather than faith and maintained by skepticism rather than belief.”

Finally, Kenneth Culp Davis, the great treatise-writer on administrative law, is portrayed as bulldog in the classroom and one of the original scholars tasked with coming to grips with the vast administrative state wrought by the New Deal. Serving while a junior professor as a staff attorney on the Attorney General’s Committee on Administrative Procedure, Davis began the empirical study of administrative process for which he would long be known. Davis placed his faith in procedural restraints and guarantees of regularity in the exercise of governmental power that, by the end of his life, he found wanting in judicial process, especially at the Supreme Court level. Davis felt that “[t]he two best procedures clearly are Congressional procedure and rulemaking procedure.” He felt adjudicative processes, whether in courts or in agencies, were inferior “because of the typical absence of factual studies even when needed and because nonparties who may be importantly affected are typically denied notice and opportunity to submit written materials.” He remarked that “[t]he astonishing but undeniable fact is that the Supreme Court in its own lawmaking commonly violates the standard that courts of appeals unanimously require from agency lawmaking. . . forbidding an agency to depart from a precedent without acknowledging it is doing so and explaining why.” Davis’s lodestars were transparency, procedural fairness and regularity, and fact-based decisionmaking. His celebration of “practical men” could well serve as a fitting coda to Liebmann’s survey not only of Davis’s life but also of the other four Chicago professors covered in Liebmann’s book:

Practical men never work out detailed values in advance; they keep their ‘system of values’ vague and flexible, and then they make value choices in concrete contexts. . . decision makers have a better sense for values when they can draw significantly from immediate facts and circumstances than when they try to think about values in the abstract. . . rational decisionmaking usually includes the further development of values. Practical men do not artificially separate values from the compounds in which they come, and I am not convinced they should usually try to.

Although the chapters dedicated to Levi, Kalven, Llewellyn, Kurland, and Davis form the physical heart of the book, much of its soul resides in the Introduction and the Conclusion. This is where Liebmann synthesizes the larger lessons of these men’s lives and explores themes that run through their careers which cast into relief the current state of the legal academy, clearly a subject of central concern to Liebmann.

In part Liebmann’s book is a paean to a traditional and process-oriented form of judicial restraint. He explains that one of the important themes that unites all of his subjects is that “[t]hey were convinced that the law served best when it served its own values, and that predictability, incremental change, conformity to community needs and customs, and respect for ascertainable legislative will were high among these.” Indeed, *The Common Law Tradition* serves as a timely reminder that responsible voices from the legal academy, including on the Left, were dismayed by Warren

court activism and warned of the threat to judicial legitimacy it posed. The five professors profiled by Liebmann all criticized on principled, legal process grounds major decisions of that era, including in sensitive areas such as desegregation. All five indeed were openly critical of the reasoning of *Brown v. Board*. In the result-focused climate of legal discourse evident today in the recent confirmation hearings of Judge Alito, many actors in the political process (and in the academy as well) would do well to recall that one might level good-faith criticism at cases whose outcomes one considers desirable. Liebmann’s scholars remind us that legal reasoning is not, and should not be, simply a tool by which a judge arrives at his preferred result; it is a method that, when practiced properly, has an integrity all its own.

Liebmann’s book also invites the reader to reconsider the importance of statutes, administrative processes, local government, and empirical research in the world of law and legal scholarship. These were all areas of major professional interest to the scholars profiled. Liebmann comments that the country’s major law reviews are filled with articles that would not “be of the slightest use to practitioners” and that “none contain fully worked out proposals for statutory reform. Legislation remains a subject untaught in our law schools; state and local government remain stepchildren of our curriculum.” He notes that from the New Deal era forward, many of the most significant legislative reforms—which in most meaningful respects have a greater power to transform society and solve its problems than do judicial decisions—were originated and given life, at least in substantial part, by legal academics, whereas the most significant legislation of the modern era (welfare reform comes to mind) have been reflexively opposed by most of the professoriate.

But at its core, *The Common Law Tradition* is a reminder of the relevance—or at least the potential relevance—of the legal academy. It is clearly written from the perspective of an individual who believes that legal thinkers can and should matter, and that their contributions to society ought to consist of more than theoretical law review articles read only by their colleagues. The book is full of distilled insights into the legal academy and its relationship to the legal profession and society as a whole. In essence, Liebmann offers the University of Chicago Law School of the 1960s as a yardstick by which to measure the evolution and change, largely for the worse, of the legal academy in the ensuing decades.

Liebmann contrasts the practical, real-world impact of the scholarship of his subjects with the airy theorizing of today’s elite professors. Whether building support for the jury system, designing a new architecture for commercial law, or writing foundational treatises, the Chicago professors profiled by Liebmann were applying their legal minds to tasks that would have an impact on how law was practiced in the private sector or in government, the two primary arenas in which law and the daily life of the nation intersect. He believes that, as a result, “their influence on the larger society was more considerable than any comparable group of today’s highly politicized law professors.” Liebmann quotes Anthony Kronman of Yale commenting on the “powerful. . . disdain for practical wisdom” that characterizes today’s law professoriate and Judge Harry Edwards criticizing “today’s legal academics, whose adventures in cloud-cuckoo land are of no interest to the

bar.” Liebmann contrasts this attitude with that of his subjects, all of whom “were vehement in their rejection of the relevance of high theory to the work of lawyers.”

Indeed, in reading Liebmann’s profiles, it is striking to note how many legal academics played leading roles in government during that era. In addition to the five scholars profiled, the pages of *The Common Law Tradition* are peopled by individuals such as Nicholas Katzenbach, Thurman Arnold, Bernard Meltzer, Robert Bork, William O. Douglas, Paul Bator, and Rex Lee, all legal academics whose knowledge and insights found practical outlet and application in significant government service. By contrast, even a quick survey of the individuals commanding the heights of legal policy in the government today reveals, with certain exceptions, a striking absence of talent from the academy. The Attorneys General, Assistant Attorneys General, White House Counsels, Solicitors General, and other major legal policymakers of today—think, for example, of Alberto Gonzales, Harriet Miers, Ted Olson, Bill Barr, Paul Clement, C. Boyden Gray, Hew Pate, Tim Flanigan, David Addington, or David Leitch—by and large come from backgrounds in private practice. The two newest additions to our Supreme Court, John Roberts and Sam Alito, similarly exemplify the trend. It seems almost impossible to imagine a law professor today duplicating Ed Levi’s feat and becoming Attorney General of the United States.

Whether this is because of some difference in the academy, some difference in law professors themselves, or some difference in government and society at large is difficult to say. But most top lawyers and legal minds in the 21st century who have any kind of a practical bent are shunning the academy. And the changes illuminated by Liebmann’s book certainly suggest that is at least in part because the academy shuns them. As a result, the places where law is studied and the places where law is practiced are increasingly divorced from one another. Liebmann appears to feel strongly that all of those places are made the poorer for it.

The current intellectual climate at elite law schools may be partly to blame. Liebmann also uses his portrait of Chicago in the 1960s to indict that climate, which he perceives to be too often doctrinaire, uncivil, and intellectually narrow-minded. During the era Liebmann writes about, “[t]he 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) who did not think of themselves as part of a cult or faction, and who were not ruled by the herd instinct.” The passion for diversity among the scholars he profiles was a passion for intellectual diversity; Liebmann comments that “for too many of [their] academic successors, at Chicago and elsewhere, ‘diversity’ is a cloak for a spoils system whose real aim is conformity of opinion and the homogenization of society.” Liebmann argues that “the atmosphere of pluralism and tolerance,” which fostered reasoned and civil debate, “was the seedbed of th[e] individual creativity” he celebrates in these scholars. By contrast, the universities of today, “and their outside rivals, ‘think tanks,’ are harsher places, dedicated more to fostering competing orthodoxies.” Rather than serve as earnest explorers of practical wisdom, “There are today too many law professors who have field marshals’ batons in their knapsacks.”

There are promising signs that the trend may be turning back toward the ideal celebrated by Liebmann, at least in some places. Harvard Law School under the Deanship of Elena Kagan, for example, now offers courses in legislation, sponsors the Berkman Center, which is meaningfully engaged in the cutting edge issues of law and policy raised by information technology, and has recently hired a number of the country’s most dynamic and creative young conservative legal thinkers. According to *The Common Law Tradition*, the prescription for restoring America’s greatest law schools to health is clear, and the potential benefits to society great: Rediscover and celebrate the value of intellectual diversity; make law school campuses a place where respect, civility, and reason reign in the place of partisanship and ideological strife; and above all, remember that law is the applied, not theoretical, physics of American society.

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