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### It's Your Law

Karl N. Llewellyn

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## BOOK REVIEWS

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*It's Your Law.* By Charles P. Curtis. Cambridge: Harvard University Press, 1954. Pp. 178. \$3.75.

This is a book to read slowly, to buy and to reread at intervals.

It does not in my view do the particular job it was aimed at, to wit, that of interpreting the institution of law to the intelligent layman.<sup>1</sup> But then nobody else has ever managed that, at least in English.<sup>2</sup> What Curtis does instead is to open up to lawyers their own work in law and with law. Curtis comes with long experience but with gifts. He sees fresh. He tells without embarrassment of what he sees: the bitter and the beautiful. He sucks his prose, as he has long demonstrated, from a spring whose waters glisten. "Justice is a chilly virtue." So the book begins.

"... The relations which a lawyer has with his client on the one hand and his court on the other are somewhat bigamous."<sup>3</sup>

"... Our thinking is done on an alternating current, so to speak, from induction to deduction and reverse."<sup>4</sup>

"A book of legal forms is the legal cousin of an anthology of popular ballads."<sup>5</sup>

As we are presented with the recited standard canons of interpretation: "We are thrown into the same state of mild confusion as we are when the waiter hands us the menu."<sup>6</sup>

"Have you ever watched a lawyer drafting a legal document for you? Only a good poet manipulates words at once more tenderly and more ruthlessly..."<sup>7</sup>

"Did the conduct of this person unduly stretch the tether of this word?"<sup>8</sup>

<sup>1</sup> That job is done better than anywhere else by the first chapter, "The Advocate"; but "The Lawyer," once the point has been made that contracts govern parties and that good drafting avoids litigation, becomes a chapter for lawyers on interpretation and drafting. "The Trial Court," after an admirable introduction on the functions of the jury, moves into an interesting discussion of the bearing of ethics and cultural anthropology on law—from which any thinking lawyer can profit and which I should like to review for twenty pages. The last chapter, "Courts of Appeal," is a powerful and fascinating treatment of the function of the Supreme Court of the United States, stimulating to the lawyer, accessible to the non-lawyer—but only of that Court, and of that Court only on the constitutional side.

<sup>2</sup> Radin, *The Law and You*, in the New American Library Mentor series (1948), is the best I know.

<sup>3</sup> P. 20.

<sup>4</sup> P. 22.

<sup>5</sup> P. 44.

<sup>6</sup> P. 56.

<sup>7</sup> P. 59.

<sup>8</sup> P. 62.

"It is as important that we be our own judge as it is important that we do not act as our own attorney."<sup>9</sup>

"My uncle used to say that the jury served the great purpose of ridding the neighborhood of its sons of bitches."<sup>10</sup> "Likewise a jury will often protect virtue against the consequences of a stumble."<sup>11</sup>

"The Constitution is not really a single document, except typographically. Different parts of it are addressed to different persons."<sup>12</sup>

"The Bill of Rights tells us only what we can go to law for, not what we can vote for."<sup>13</sup>

"We too often forget that the reason for the great power of the Supreme Court is not that it interprets the Constitution to us, but that it reads our immanent patterns of behavior into our Constitution, and as it reads them into it, the Court explains them to us, and so makes us the more aware of them."<sup>14</sup>

On the advocate's part in life, I have read nothing which packs as much into as little space. Calamandrei is sophomoric in comparison. Curtis is dealing not with the techniques of persuasion but with their use: "The heart of advocacy, as with other things of the spirit, lies in its ethics."<sup>15</sup> One main insistence is that the advocate (and the negotiator is soundly seen as an advocate: spokespersonship is the basic pervading idea) *must* do dirt for his client which he would not do for himself. Thus, when acting as a trustee, Curtis took advantage of the statute of frauds in a fashion which was personally abhorrent to him and which any decent commercial man knows to be immoral. It was his duty, he thought. A later decision which makes the legal duty clear gives him no moral comfort.

This type of relentless insight and refusal to fudge issues is a useful thing, and rare.<sup>16</sup> Curtis goes on to wrestle with such other problems of divided loyalty as that raised by court and client and that raised by absence of candor in argument. He hugely oversimplifies. Some of the toughest divided loyalty problems I know turn up, for instance, in a lawyer's relations to various conflicting aspects of his not really single government or corporate or partnership client. But the way to get any such material out into the open for study is Curtis' way: look at it clean and then say what you see, and recognize that sometimes *any* choice may carry pitch—at which point "I do not know that any set of rules ever has been, or ever can be, worked out for the successful operation of a conscience."<sup>17</sup>

<sup>9</sup> P. 84.

<sup>11</sup> P. 92.

<sup>13</sup> P. 138.

<sup>15</sup> P. 5.

<sup>10</sup> P. 91.

<sup>12</sup> P. 128.

<sup>14</sup> P. 146.

<sup>16</sup> Contrast George Wharton Pepper, reviewing Curtis in 41 Va. L. Rev. 139 (1955), and, proud Churchman though he is, resting smugly on the mere legal duty as if it were not outrage for law to force a trustee to undercut the very "morals of the market-place."

<sup>17</sup> P. 145.

On the old problem of believing in your case—"making it a cause"—our author provides the usual wisdom based on an adversary system, and turns then to some very nice quotations on Stoic philosophy to argue for some detachment, which means some non-sinking of the advocate's whole self in the case, as being one of the best assets any advocate can offer to a client. Yet he recognizes that preparing and especially trying or arguing a case involve with some regularity at least a temporary unnoticed pressure and suction into Belief in Our Right. The whole is unresolved—as much so as in the quotation from Brandeis<sup>18</sup> in which that great man ducked the problem by talking as if settling a case did not involve advocating it. Personally, I think much clarity gained if we recognize that we have not only in the ethics of this matter but also in the manner of handling the advocate's job, two recognized, legitimate, and useful lines of feeling, action, and thought, which just happen to conflict in many particular cases. I like to call them the romantic, in which the spokesman merges himself in the cause, and the classic, in which he rides above it, while yet serving it fully. The distinction would have gone far to deepen and unify the first chapter of the book.

The second chapter contains an admirable discussion of theories of interpretation of statutes, with a thoroughly sound attack on the "intent of the legislature at the time of passage" theory in either its unsophisticated form or its "what they would have intended if this had been before them" revised version; and manufactured "legislative history" comes in for due pillory. I do feel that the author's emphasis on the text and the present problem, oriented to what the legislature might be expected to do today, leaves two things inadequately dealt with. The first is the fact that no language of regulation makes sense save in terms of some purpose to be achieved; a purpose not commonly explicit on the face of a statute. The second is that a legitimate distinction is to be drawn (though current theory is still slow to draw it) between what one may call a current statute, where conditions have not greatly changed since enactment, and what one may call an aging statute, where the relevant conditions have changed: compare, on many points, the Negotiable Instruments Law.<sup>19</sup>

The chapter misleadingly labelled "The Trial Court" gives a superb summary of the jury's many functions, and a brisk suggestion of where it is at its best. It brings back into attention Jerome Michael's magnificent emphasis on

<sup>18</sup> At p. 25.

<sup>19</sup> This chapter also soundly stresses the office lawyer's role as law-maker for particular parties via documents. It suggests, though without full development, the greater structures built by this coral-insect work. Compare Dubois, *The English Business Company After the Bubble Act 1720-1800* (1938); Hurst, *The Growth of American Law*, 301 ff., 342 ff. (1950); Llewellyn, *Bramble Bush* 146 ff. (2d ed., 1951). The universality of the process appears in the amazing story whose doctrinal results are reported in Wigmore, *The Pledge Idea*, 10 *Harv. L. Rev.* 321, 389 (1897); 11 *Ibid.* 18 (1897).

the fact that to get to the jury on any orthodox principles, the case must be one which *reason cannot alone* decide.<sup>20</sup> It then by way of reaching for what shapes the jury's behavior tours the relations of ethics to law and of the lessons of cultural anthropology to ethics: mostly solid stuff, and useful, sometimes striking. But that is my home bailiwick, where I am harder to please than would warrant detailed justification.

The last chapter, on the Supreme Court's work re the Constitution is, as one would expect from Curtis' prior writing, excellent. Something of tone and substance is suggested in the quotes above.

Three brief criticisms: It would have been pleasant if the scattered and sometimes warring remarks about "justice" had been brought together. I noted some on pp. 1, 21, 63, 123, 126-7.

There is a recurrent tendency to "either-or" when the situation is really one of more or less (what the author notes as "sub-contraries," the presence of one of which does not exclude the presence of the other). Thus: "The administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom."<sup>21</sup> All Curtis really means is that the quest for some type of justice comes first, and that truth must be content with the leavings. As a point of personal privilege,<sup>22</sup> I note that (as usual when positions are attributed to me) I was made to suffer under this. I am supposed to have pointed out that the fact that a lawyer's conclusions are given to him, with arguments to find, "requires lawyers to rely *solely* upon the power of persuasion. *No authority. Only persuasion.*"<sup>23</sup> (Italics added.) The author then quotes me in the text and shows by the quote that I was talking about "the emphasis." I wish my other attributors of positions which I do not hold would be that considerate.

The third criticism goes to the use of reference words. Curtis has an annoying habit of making a "he" or an "it" or a "them" jump back over a couple of intervening nouns or even sentences, or of making the word shift base, e.g.: "And the more the lawyer who drafts a document anticipates enforcement by the law, the more he prevents it; and the more it takes the place of law."<sup>24</sup> This irritates because Charlie Curtis can and does otherwise "make words flow happily and freely."<sup>25</sup>

Such things are flyspecks on the essence, no more. The book as a whole comes close to pure joy: pointed, powerful, welcome. Here is a true craftsman's ripe philosophy about a noble craft in many of its aspects: in the office, at the bar, on the bench. The issues are a craftsman's issues; to explore them

<sup>20</sup> P. 103.

<sup>21</sup> P. 21.

<sup>22</sup> The only piece of verse quoted at length (p. 36) is mine. I also claim personal privilege to describe it as very poor verse, indeed.

<sup>23</sup> P. 24.

<sup>25</sup> Cf. p. 46.

<sup>24</sup> P. 43.

helps a craftsman see and do his work, helps the job get done right. Consider Curtis' picture of a document (or statute) as containing words which grant to their addressee authority to apply in the emergent circumstance some reasonable one of the necessarily multiple possibilities of meaning which lie in the words. This is the rationale of the doctrine of a commercial agent's interpretation of his letter of authority, spread out shrewdly to illumine the whole problem of construction of written language. Observe further how the idea presses upon any court the true nature of *its* task: never to determine "the" non-existent, single "true" meaning, in general; rarely indeed to determine even the best meaning; almost always, instead, to determine whether the person addressed has chosen an interpretation which lies within the range of the reasonable *as applied to the matter in hand*. This is sun burning off fog. Or consider the further aid to sound drafting which is given by the picture of arranging words for size and contour, according to need—with due stress on the virtue of vagueness on occasion.<sup>26</sup> Indeed, throughout the book runs wisdom about words which is abreast of the best the semantics boys have been doing, but which is put in simple home-like phrase.

The rich range of quotation is woven into the text with the effect of a Persian rug—whether any strand be homemade or others-grown, it is the strand needed for the pattern at the spot where it appears. And work from medicine, from logic, from the modern philosophers of science joins with passages from Curtis' special favorites, Pascal<sup>27</sup> and Montaigne, to lend color and perspective at the same time that they give bite and drive. For one aspect of his profession and its work which Curtis understands, practices, communicates, is that when rightly handled our law-crafts belong also to the humanities. It is fitting that the book closes by quoting, admiring and correcting Learned Hand's loveliest single writing, his speech on Liberty. There is an error in that speech, and Curtis the craftsman cannot let it go by: even though liberty lies in our hearts, it still needs Constitution, law and courts to save it. Ideals, and even beautiful prose, have need for legal technique.

I repeat, a book to read slowly, word by word—one to buy and to reread often.

K. N. LLEWELLYN\*

<sup>26</sup> Especially at pp. 75–76.

<sup>27</sup> Two points of difference on the literary side: In the fine passage from Pascal (pp. 90–91), *l'esprit de finesse* is more effectively rendered "the spirit of art" than "the subtle mind"; *l'esprit de géométrie* is "the orderly mind," and when applied directly to the work of law it is less "the legal mind" than the "legalistic" or (if that word tastes bad) the "rational" portion of the legal mind. This may be a matter of opinion, but on pp. 79–80 there is a plain blob. Curtis has no business to be misled by Empson into thinking that Ben Jonson's song says the opposite of what it means. The key-word is "might." Turned into dusty prose the lines say: "If I were offered Jove's nectar for thine, I wouldn't make the swap."

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