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Karl's Law School, or The Oven Bird in Buffalo

ALFRED S. KONEFSKY

The idea for my reflection on "The Oven Bird's Song" originated in a conversation I had with David Engel almost thirty years after the publication of his article. When I was cleaning out my office files in anticipation of retirement, I discovered copies of David's first two drafts of the article, versions that had yet to incorporate — in title or text — the Robert Frost poem. I walked down the hall to David's office and presented these early drafts to him. He seemed very pleased to see, once again, the evidence of his preliminary work, and said "You remember this was my job talk when I interviewed here," to which I responded: "I know, we hired you anyway." And it was in the midst of our laughter at that moment that a conference and this volume of essays were born.

My task is to focus locally rather than globally and to try to situate David Engel and "The Oven Bird's Song" within the intellectual life and context of the Buffalo Law School. In order to do that, we need to know a little about the institution that David joined in 1981, so that we might better understand both what brought David and "The Oven Bird" here and why the law school welcomed the addition of David and his intellectual project at that moment.

To take the full measure of my assignment, I think we have to go back a little further in time and ask how the Buffalo Law School became the Buffalo Law School of the 1970s and '80s, and in order to do that, I believe we have

University at Buffalo Distinguished Professor Emeritus, SUNY Buffalo Law School, The State University of New York. I am very grateful for the valuable comments on versions of this essay offered by Samantha Barbas, Anya Bernstein, Michael Boucai, David Engel, Patrick Long, Lynn Mather, Frank Munger, John Henry Schlegel, Robert Steinfeld, Matthew Steilen, Barry Sullivan, and Winnifred Sullivan. As usual, Dianne Avery contributed exceptional editorial and substantive suggestions. The standard disclaimer as to final responsibility applies.

to ask disarmingly simple questions: What do we want a law school to be, or what do we want out of a law school; and in a related sense, what do we want law to be, or what do we want out of law? David’s journey and Buffalo’s journey were very dependent on the answers to these questions, and in an attempt to answer them I think we have to recur to the early twentieth-century origins of an alternative vision of what legal education and legal scholarship might be, as distinct from the traditional Langdellian wisdom of the case method, the casebook, and its emphasis on rules, principles, and legal doctrine. There is no legal doctrine in “The Oven Bird’s Song,” so why tolerate it in a law school at this time and in this place? The answer, I believe, can be traced to the influence of a singular figure in American legal education, writing at the outset of the Legal Realist movement: Karl Llewellyn. In a sense, along with a handful of other law schools (Wisconsin included), Buffalo became Karl’s law school – a law school in which “The Oven Bird’s Song” seemed a natural outgrowth of what legal study should aspire to or become. We now take it for granted (it’s almost a cliche) that one way or the other we are all legal realists (or “new” legal realists), but how we got there can be found in part in Llewellyn’s tearing away the mask of legal education about 100 years ago, and I want to sample briefly some of his observations and criticisms of law schools and explore why “The Oven Bird’s Song” can be seen as a fulfillment of Llewellyn’s promise of a new age of legal education.

Over the course of his life, Llewellyn had lots to say about legal education, and he was not always consistent. He sometimes changed his mind; for instance, at times he defended the case method and found it useful in a modified form while at others he was intensely critical of it, particularly when reflecting on it as the Great Depression in the 1930s stripped away its pretenses. Yet, over time, for all his withering criticism (he complained of the “critical aloofness” of law schools and described them as “blind, inept, factory-ridden, wasteful, defective, and empty. If you prefer verbs: it blinds,
it stumbles, it conveyor-belts, it wastes, it mutilates, and it empties"), he began to formulate a transformational vision of what legal education could be. He wanted to know what lawyers did because he wanted to prepare law students for the rigors of practice in an economically threatening time, and he thought law schools were failing miserably at their job. His idea was that theory could be practical, that is, understanding how things worked would be a very good thing for a law student to grasp in the real world, and simply focusing on legal rules and doctrines did students a disservice. And though he could be very practical, shrewd, hardheaded, and analytical, and was incredibly fluent in legal doctrine, Llewellyn, like many theorists of education, viewed education as primarily a moral enterprise. In *The Bramble Bush*, his series of lectures published in 1930 for entering law students (Lord knows what they made of it, let alone whether they truly were prepared to understand it), in a chapter called "Law and Civilization," he observed:

By and large the *basic order* in our society, and for that matter in any society, is *not produced by law*. And one of the most misleading claims that has ever been put forward for law's contribution to civilization is the notion that it is law from which the basic order flows. The basic order grows, I repeat, not from law, but (at least every generation) *from the process of education*. With that process law may have much to do. But the much is not too much.7

Therefore, in Llewellyn's eyes, education was a moral imperative, and his anger at the perceived failure of legal education was drawn from his belief that law schools were failing society and also failing law students in their preparation to serve society. "I think it is to law that we owe the conception of *justice*," he remarked.

I am not wholly sure of this. There is a very remote chance that the matter runs the other way, that we owe law to the concept of justice. There is a greater chance that both are shoots of the same root. Still, I think law as a discipline may claim the concept. It should, if it can, for the concept marks a noble achievement.9

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7 There are a number of editions of *The Bramble Bush*. I have chosen the most recent, which also has the virtue of having a perceptive introductory essay by Stewart Macaulay. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 116 (Quid Pro Books, 2012).
8 In this regard, see Philip W. Jackson, *What Is Education?* (University of Chicago Press, 2012), pp. 20, 94.
Having been charged with the responsibility for the concept of justice, law schools were in danger of abandoning their duty. What was to be done to prepare students to serve their society and assist law in attaining justice?

In a trenchant little essay entitled "On What Is Wrong with So-Called Legal Education," published in 1935 in the Columbia Law Review,10 Llewellyn engaged in a wholesale assault on the form and substance of legal education, and offered proposals for remedying its evils.11 Unlike The Bramble Bush, which sought to explain and defend the process of legal education, this 1935 article sought to demolish the apparatus that had been established since 1870. The moral edginess was still present: "Ideals without technique are a mess," he memorably observed, "[b]ut technique without ideals is a menace."12

Social change, however, was taking place right under the very noses of law schools, and they had better adjust or perish. The nature of practice was shifting and the standard modes of education were going to be inadequate to face this brave new world. What was to be done? He had a number of suggestions: "The need is," he said, "in some fashion, for an integration of the human and the artistic with the legal. Not an addition merely; an integration."13 How was that to be accomplished?

As Anders Walker has recently pointed out, Llewellyn, reacting to the impact of the Great Depression, "did not target interdisciplinary scholarship" as frivolous or useless, though he had once in the not too distant past been an avid defender of the case method. "While some reformers called for an increased attention to clinical work and practical skills, Llewellyn joined a cadre of pro-New Deal law teachers who advocated interdisciplinary, policy-centered coursework."14 Ironically, in the face of economic crisis and diminishing job prospects, "Llewellyn did not," Walker observes, "view a more interdisciplinary focus to be less practical."15 What was the point of introducing a wider lens into traditional legal study? It was to set legal rules and disputes into context. Llewellyn argued in his 1935 Columbia essay that "to set rules into their social context, into the context of how men do things, and of what difference the rule makes to those men – this is to give body to a rule for any student. It has graphic value, it has movement value, it has memory value."16 According to Llewellyn, "[t]he fact is that legal rules mean,

10 Llewellyn, "On what is wrong."
11 Incidentally, though Llewellyn's essay originated as a speech at Harvard, the Harvard Law Review refused to publish it, causing him to comment archly that "their editor's canons of taste and policy did not jibe with mine." Ibid, 651.
12 Ibid, 662.
13 Ibid, 663.
15 Ibid, 166.
16 Llewellyn, "On what is wrong,"669.
of themselves, next to nothing." 7 When you introduce social context, instead, "[y]ou also make critique of the rule take on its human content. You make critique inevitable, because the human content, once introduced, will never be denied." 8 So, he asserted, it was time to "integrate the background of social and economic fact and policy, course by course, or fail of our job." 9 And he called for "wak[ing] faculty-members up to the job of integrating background—social or philosophical—into every course." 20 "The professor's job lies," he said, in preparing "the fact-background necessary to give to a policy-inquiry interest; to a rule, meaningfulness; to a counseling-question, body; to a critical evaluation, hands and feet." 21 In a talk at Duke Law School a year later, Llewellyn doubled down on his insights, commenting: "I think the most lamentable thing about American legal education is it has taken into account neither the society in which the job must be performed nor what we are educating for." 22 He suggested that "one of the things that goes to make lawyers is to make the law a cultural study. That is, curiously, today the most practical way to train for the trade," 23 and he called for "the development of a realistic sense on the basis of fact." 24

We have some sense of what Llewellyn meant by all of this in action, not simply in the classroom. An insight into his method and commitment to context is found not just in his prolific writing, but also in a recently discovered episode involving the NAACP. In 1933, after a post-Scottsboro lynching in Alabama, the NAACP submitted a brief to the Justice Department urging federal prosecution of the local sheriff, under an existing civil rights statute, for allowing or facilitating the lynching. When the brief was submitted and published, it included a foreword written by Llewellyn. 25 In searing language, he argued:

The enclosed brief is a product of a situation. Behind the cold points of law is a crying need of fact. Pages (31) to (41) will burn like acid in any unsuspecting reader's mind. Lynching is now being used, deliberately, to "teach" Negroes that outside organizations must not be permitted to defend them in court, though they be on trial for their lives. It is no longer a question of the individual defendants. Nor is it a question of the crime of which

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the individual happens to be accused. It is, for the lynchers, a question of covering institutions as they are against implicit challenge *even in the courts of law.* "Keep this case from being another Scottsboro Case" – by driving the defendants' legal counsel out of town; and then by lynching the defendants. *With official connivance.*

It is against this background that the story of the Tuscaloosa lynching, on pp. (8)-(13), is to be read. It is this background that turns cold legal points into points of flame. The brief makes clear that the Federal Government has power to intervene. The brief makes clear that it is the duty of Federal officials to take action. When the baser elements of Southern communities turn, *not in sudden passion, but as a policy,* against the law, when even the decent elements of the same communities can “understand” such happenings (pp. (39)-(41)), the time has come for intervention of a stronger power. The statutes have provided for that intervention. *Will the Government act?* 26

"[C]old legal points into points of flame"; "cold points of law" in “crying need of fact.” Here on display are the elements and language of the legal realist agenda generally and, in particular, its link to Llewellyn’s critique of legal education. Facts, situations (think situation sense and the Uniform Commercial Code27), background, communities, understanding – all in a piece of appellate advocacy.

What does all of this have to do with David Engel, “The Oven Bird,” and the Buffalo Law School? David arrived in Buffalo in 1981 at a critical moment in the history of the school, and he arrived with his Sander County ethnography in tow from the American Bar Foundation, to be met and surrounded immediately by a sea of law and society and critical legal historian types. But the school’s commitment to law and society and interdisciplinary work had two separate but related histories, one stemming from a period of time in the 1930s contemporaneous with Llewellyn’s attempt to refashion legal education, and a more immediate one stemming from the decade of the 1970s.

As has been well chronicled, the Buffalo Law School in the late 1930s and '40s centered, at least initially, on the hiring of Frank Shea as Dean. Shea, a protégé of Felix Frankfurter, was brought in to get the law school accredited, and one of his many accomplishments (with Frankfurter’s assistance) was to start a pipeline from the Harvard Law School to Buffalo (which often turned out to go back to Harvard) – a faculty pipeline fueled by the occasional former Holmes or Brandeis Supreme Court clerk, some of whom brought with them their interests in law combined with other disciplines, or went on to other

disciplines themselves. If one thinks of Holmes, the skeptic and pragmatist ("The life of the law has not been logic: it has been experience"), or Brandeis and his obsession with facts (just substitute context for facts), one can see that the preconditions were set for viewing law in a more expansive way. Some of the scholarship done here at the time grappled with history, sociology, the development of the administrative state, tax policy, labor relations—not always the standard fare for legal academics then (though the Realists were beginning to make inroads into some forms of empirical social science).

These traditions were revived in the early 1970s, when the law school had the temerity to hire as Dean Red Schwartz—a sociologist without a law degree—and brought to Buffalo some of the most significant figures in the early history of the formal Law and Society movement and its Association. Folks like Marc Galanter and Bob Gordon wrote early classics in the genre while at Buffalo, but by 1977 a wholesale exodus had occurred, and Red, Marc, and Bob—on his way to critical legal studies and a rejection of functionalism—and others had left. A new Dean, Tom Headrick, with a law degree in addition to a PhD, was in place on a new university campus, in a new law school building that was no longer located downtown as in the past. At the dedication of its cornerstone, the school’s mission was tied directly to other university disciplines blessed as the wave and promise of the future by one of the leading practitioners of one of the leading local law firms, who observed:

39 Oliver Wendell Holmes, Jr., The Common Law 1 (Little, Brown, and Company, 1881).
41 See John Henry Schlegel, American Legal Realism and Empirical Social Science (University of North Carolina Press, 1995).
Professional training alone, however, is not enough. The new law school must produce graduates who are educated and involved citizens in addition to being trained professionals. For this purpose the availability of relevant studies here on the campus must be put to use. Indeed, it is almost certain that one can no longer be considered a capable lawyer or public official unless he has been at least exposed to the greater problems of the world today, unless he has thought long and deeply about such present concerns as war and peace, environment, sociological, historical and political problems, the viability of democracy, culture and the arts, and the place of man in the universe. 

Armed with a 150-page single-spaced strategic plan, along with a fifty-page mission statement, Tom Headrick dedicated his tenure as Dean to the proposition that Buffalo should not be what was termed a “garden variety” law school; but instead should be a fully interdisciplinary “Buffalo model” that stood out for its distinctiveness, an island in a sea of convention. The problem now, however, was that some of the important contributors to that mission were gone, and the question was whether that new vision -- or, for that matter, any vision -- would long endure.

Intentionally or not, the place was crawling with people with historical interests of one type or another, though not all were full-time legal historians. Though that little corner of the world fit comfortably within the law and society canon, it was somewhat removed from the work of Galanter and others in the burgeoning law and society movement. And with law school appointments committees' penchant for replicating themselves, it was not exactly clear--what direction the school would take. Of the thirteen people whom David thanks in the acknowledgments of "The Oven Bird's Song," six are from Buffalo, and five of those six had historical interests, or wrote on historical topics, or were full-time legal historians. On the faculty at the time were about ten or a dozen people who at one point or another wrote on historical subjects, and a few more would soon join the faculty. This is the

34 Manly Fleischmann, Present at the Re-Creation (Remarks ... At the Cornerstone Ceremonies of the Law School of the State University of New York at Buffalo, May 11, 1971), 12-13 (copy on file with the author).
35 "Long Range Plan of the Faculty of Law and Jurisprudence, State University of New York at Buffalo, June, 1973," Box 20, Folder 1, Law Special Collection 02, University at Buffalo Law School Records, 1898-2008, Charles B. Sears Law Library, The State University of New York at Buffalo.
environment that David joined, and in which substantial cross-fertilization took place, to the benefit of what might appear at first blush to be different approaches to sociolegal phenomena. So why was his article found so congenial here? Or is David’s work so ecumenical that it speaks to a whole range of social science disciplines (in their various empirical configurations) that inform law and society (anthropology, sociology, political science, psychology, history, and maybe even law), and that each discipline gets to interpret “The Oven Bird” in its own image? Is it the case that one of its attractions and strengths is its accessibility to so many sides of the law and society coin?

John Henry Schlegel (who inhabits the SUNY Buffalo Law School building to this very day, in a kind of epigrammatic Llewellynesque outsized way) recently proclaimed that “[h]istorians, at least my kind of historians, like what Clifford Geertz called ‘thick description,’” and that they have explanations or understandings or interpretations, rather than theories. They once had causes, but causation has fallen a bit out of style. For historians, things relate, cohere, suggest, lead to; they expose, clarify, elucidate, inform, reveal, illustrate. Buried by these words is a loss that our language tries to ignore. Historians really know a lot of things. One should never be allowed to forget this fact. But for us the difficulty comes, and so the serious work begins, when one leaves the archives or other sources and so it is time to say what those things mean. The question of meaning is the heart of historical practice.38

Likewise, David is on record, while reflecting on “The Oven Bird’s Song,” as having been somewhat influenced by Geertz and “thick description,” and also writing “at a time when interpretive techniques had become more important for sociolegal researchers.”39 And, along the lines of Schlegel’s observation, David thought “it seemed much more important to explore questions of meaning – not only what people did but how they explained and thought about what they did.”40 Though I agree with much of what Schlegel has to say, I would put it a little differently. I view my function as a historian as recreating the world as the actors have experienced it (almost by definition a contextual enterprise) – a kind of, if you will, ethnography of the dead

40 Ibid.
(without, of course, having to talk to them or interview them, and certainly not
having to be on site with them). To the extent that it involves thick describe-
tion, one can immediately understand why David’s work on “The Oven Bird’s
Song” would appear so interesting, challenging, and captivating to a historian,
and why a natural synergy would seem possible.

A lot has been said and will be said in this volume about what “The Oven
Bird’s Song” is about, and I do not want to intrude any more than is necessary
into that part of the conversation. It is a story about law and litigiousness (or
perceptions of litigiousness) in a small, rural community, and the apprehen-
sion and antipathy a portion of that community brought to both the specter
and reality of personal injury claims, experiencing the claims as a betrayal of
its core values. Most personal injury litigation (and there was precious little of
it) was viewed as being brought on behalf of newcomers, outsiders who didn’t
understand the prevailing cultural attitudes in the place they had recently
come to inhabit. By contrast, contract litigation was not frowned on by the
same community and not seen as a threat to its cultural integrity. David sees
these attitudes as stemming from the substantial social and economic changes
that were underway in Sander County: Attitudes about law were shaped by
social forces and differentially distributed within the community. Formal
dispute-processing was acceptable in some circumstances but not in others,
and that sorting followed from where one stood in the social and economic
structure of the locality. Fears of upheaval and disintegration were displaced
onto those who had recently joined the community. And the reigning elites
exercised social control by disapproving of or stereotyping those who had been
injured and who might contemplate seeking legal redress. The predominant
culture emphasized that victims of injuries should generally just “lump it” and
move on. Personal injury claims were deemed anti-communal; debt collec-
tion cases were not. The result was a series of social classifications that had an
impact on whether legal rights were asserted, and some of the classifications
were readily recognizable in certain corners of the worlds of sociology,
anthropology, history, and political science: insiders and outsiders, inclusion
and exclusion, core and periphery, and haves and have-nots (about which
Llewellyn wrote in *The Bramble Bush*, by the way\(^4\)).

I have always seen “The Oven Bird’s Song” as a profound essay about
cultural anxiety, which also just happens to be about attitudes about going
to or invoking law. In the process of examining the cultural flux, we learn
about a lot of things, including about law, and particularly its relationship to

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social context. All that formal and intricate and evolved tort doctrine is of absolutely no avail if the prevailing cultural practice and pressure counsels against using it. One might think that one would pursue legal rights and remedies when a sense of community fractures or breaks down, but that does not seem to have been the case in Sander County for those who experienced the sting of exclusion. Talk about legal realism. David mapped how ordinary people interpreted the social matrix in which they were embedded. On the one hand, they are endowed with a system of rights for redress of injury handed down from higher law authorities (courts or administrative bodies or legislatures) that seemed confident that they had identified and provided for the solution to social or policy problems. On the other, people may or may not know of the legal systemic approach to their situations, and even if they do, they may think, given the complex social environment in which they live, that it is meaningless (David's search for meaning again), because it does not represent a meaningful or realistic approach to what ails them. What is interesting is that the local social elites want the "ordinary people" who have been injured to ignore what the lawgivers have offered from the top down, and they have instead inserted their elite ideology on the ground to limit effectively or constrain the choices of those most in need.

In reading David, I often wonder what a good old-fashioned neo-Marxist would think of all of this. What would E. P. Thompson have looked for in interrogating class, and gender, ethnicity, and race? Where do these attitudes come from and how are they formed? One of the troubling implications of David's portrait of Sander County is its import for what we might traditionally describe as the literature on the rule of law. The threat to the rule of law in democracies is often conceived of as emanating from the abuse of formal, governmental or state power—flaunting traditional understandings, violating rules, engaging in inappropriate exercises of discretion. But David's work may reveal the soft underbelly of the rule of law in a democracy, that is, the extent to which ordinary people are meant to feel or experience in their communities

that the rules or laws are not really available to them, that there is danger in vindicating their rights because the social context in which they live disapproves of legally constituted regimes of protection and social responsibility, legal protections ostensibly provided by the democratic state. (It is a little reminiscent of the role of private actors in the Reconstruction South, in collaboration, of course, with state actors and courts.) The handful of lawyers we encounter in Sander County seem somewhat uncomfortable in their role in the system of dispute processing, even those who approve of deterring people from claiming or suing. “We have met the enemy and he is us.” We cannot begin to grasp that possibility of the subtle subversion of the rule of law unless we start to unpack the deep insights into the relationship between legal culture and social culture that David has provided.

I want to end where I began, by returning to Karl Llewellyn’s vision of a law school (which includes legal scholarship) and tying it to David’s work in “The Oven Bird’s Song” and elsewhere, and to the revival of law and society here at Buffalo after the departure of some of its standard-bearers. It seems quite clear that “The Oven Bird’s Song” is a pretty close embodiment of the model set out in Llewellyn’s call for reformation of legal education. From the idea that “[b]y and large the basic order in our society ... is not produced by law” (a pretty fair conclusion to draw from Sander County, though “basic order” ironically may have something to do with the reaction to law), to the assertion that the academic discipline of law must remain a steward of the concept of justice, to the insistence that law belongs in the humanities as well as aspiring to be humane, to the argument that the best and most useful method for legal education in making a continuing social contribution to the larger culture and the greater good is to provide an understanding of background, facts, and context (with its multiplicity of definitions and meaning), to the use of interdisciplinary approaches—all these measures seem to be hallmarks of “The Oven Bird’s Song.” It is humane in its treatment of the “ordinary people” who live in its pages; it raises questions about the justness

46 Walt Kelly, Pogo: We Have Met the Enemy and He Is Us (Simon and Schuster, 1972).
of a system – social or legal or economic – that turns its back on the people who are injured as that system continues to function; it movingly catalogs the fate or plight of those considered to be outside the mainsprings of power and influence; it brings up questions about the efficacy of law itself (what is a lawyer supposed to do when faced with the knowledge of how the community operates?); and, though it is careful not to judge and treats all its ethnographic encounters with tact and delicacy (it is David, after all), it is also a moral argument challenging the effectiveness of law in society – and ultimately, in Llewellyn’s sense, it teaches or educates. It is quite an accomplishment, which was shared with pride in the institution at which it was finally written. And ultimately, it asked in a law and society sense not just whether law matters, but rather of what matter law is made. Llewellyn would have approved.