LEADING CHANGE IN THE LEGAL PROFESSION: AN INTRODUCTION

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When I wrote *The Lost Lawyer*[1] thirty years ago, my thinking was inspired by my experience as a teacher of contract law. I had already been teaching the subject for more than fifteen years.

The first-year contracts course has a statutory component, greater or less depending on the inclinations of the teacher. Fundamentally, though, it is a course in the common law. It is meant not only to introduce students to the substance of the subject (consideration, offer and acceptance, conditions, damages and the like), but also to acquaint them with the case-based and temporally-extended process of reasoning through which the common law evolves, even when it goes under the name of statutory interpretation.

The more time I spent teaching contracts, the more interested I became in the nature of this process itself. What is precedent? Why does it have the authority it does? How do judges employ precedent to advance or resist different lines of argument? Are there better and worse uses of it? What makes for success—for excellence—in common law judging?

The more I thought about this last question, the clearer it seemed to me that excellence in judging depends on the possession of what Aristotle calls "practical wisdom."[2] Many, perhaps, will agree. It seems an obvious thing to say. But this obvious conclusion opened, for me, a range of philosophical and institutional questions that have occupied me ever since.

What *is* "practical wisdom?" How is it acquired? What are its marks? Is it a form of expertise or an art? What distinguishes art from expertise? What is the relation between "practical wisdom," which sounds like an intellectual capacity, and balance, moderation and compassion, which are temperamental qualities, or traits of character?

These are the questions that moved me to write *The Lost Lawyer*. I wanted to answer them, as best I could, and to explore the place of practical wisdom in the professional self-understanding of lawyers, today and in the past.

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1. ANTHONY T. KRONMAN, THE LOST LAWYER (Harvard Univ. Press paperback ed. 1995).

2. *Id.* at 41.

I first arrived at a negative conclusion. Whatever "practical wisdom" may be, it is *not* science or ideology. Those who think that cases can be decided solely, or perhaps even mainly, on the basis of principles from which conclusions can be drawn with anything approaching philosophical rigor, misunderstand the 'genius' (if I may call it that) of common law (or any) adjudication. I pointed out that the economic analysis of law, on the right, and critical legal studies, on the left, both encourage a reductive and anti-professional view of this kind.

I found it much more difficult, though, to say what "practical wisdom" *is*. Aristotle was a helpful guide, as he has been since my days as an undergraduate many years ago. A more important guide, though, was Karl Llewellyn. I felt that Llewellyn, more than any other American legal scholar, understood the urgency and difficulty of the questions with which I was grappling and offered useful suggestions in the context of the law. That Llewellyn was, first and foremost, a scholar of contracts and commercial law[3] made him particularly congenial. It was his great jurisprudential masterpiece, though, that proved for me to be a source of rich and lasting inspiration.

The Common Law Tradition: Deciding Appeals[4] is a quirky, magnificent work. It is not much read today. I drew from it two points of particular importance.

One is that "practical wisdom" is contextual, not abstract. It depends upon, and is nourished by, the situation in which it is exercised. Llewellyn calls this "situation sense."[5]

The second is that "situation sense" is acquired and employed in a "tradition," as the title of Llewellyn's book suggests,[6] and that learning to work within a tradition is analogous to the acquisition of a "craft," an analogy that Llewellyn exploits throughout his book.[7]

These ideas took shape, as I say, in the context of my experience as a teacher of the private law of contracts. By the time I began to write *The Lost Lawyer*, though, I was already wondering about their relevance to public and, above all, to constitutional law.

The crucial figure for me, in this regard, was Alexander Bickel. Bickel had been my teacher in the early 1970s. I resisted his views but came in time to see their close connection to my own developing ideas, in particular to the notions of "practical wisdom," "situation sense," "tradition" and "craft."

For Bickel, the central virtue of constitutional adjudication is "prudence." (I developed this point in an article in the *Yale Law*

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3. *Id.* at 24.

4. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (Quid Pro Books 2015).

5. *Id.* at 38–39.

6. *Id.*

7. *Id.* at 132–133.

Journal in 1985.)[8] The Supreme Court should go slowly; let questions ripen; listen to the other branches of government; engage with them in what Bickel calls a "colloquy";[9] and above all, proceed by modest steps, trying to maintain the "Lincolnian tension" between principle and practice.[10] These are beliefs that lie behind Bickel's famous defense of the so-called "passive virtues."[11]

At the end of his very short life, Bickel declared himself to be a follower of Edmund Burke,[12] the eighteen-century champion of tradition against what he considered the excesses of the French Revolution.[13] Like Bickel, Burke regarded prudence as the most important of all political virtues.[14] Several times, he invoked Aristotle as the greatest champion of this view.[15] If Bickel was a Burkean, then Burke was an Aristotlean. Aristotle's account of "practical wisdom,"[16] moreover, fits closely with Llewellyn's understanding of "situation sense."[17] In my mind, at least, the threads were drawing together; the circle was closing.

Today, I teach constitutional law to first semester students at Yale. I may return to contracts at some point but doubt I will. Constitutional law is now my field. As a teacher of constitutional law, one question interests me above all others. I can put it in the following way.

In a note he wrote to himself in December 1860, Abraham Lincoln described the Declaration of Independence as our "apple of gold."[18] It is held, he says, in the Constitution's "picture of silver."[19] The frame is for the sake of the picture, not the other way around.

This suggests that the Constitution is a means to an end, fixed by the Declaration. That is overly simplistic. Among other things, the political judgments of the Declaration are founded on "self-evident"[20] truths that lie beyond the horizon of politics and time. The Constitution, by contrast, constructs an artful system of delays whose

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8. Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 *passim* (1985).

9. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 70 (1962).

10. *Id.* at 65.

11. *Id.* at 111.

12. ALEXANDER BICKEL, THE MORALITY OF CONSENT 3 (1975).

13. *Id.* at 11–25.

14. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 53 (Frank M. Turner ed., Yale Univ. Press 2003) (1st ed. London 1790).

15. *E.g.*, *id.* at 106, 157.

16. *See* C.D.C. REEVE, ARISTOTLE ON PRACTICAL WISDOM: NICOMACHEAN ETHICS VI (2013).

17. LLEWELLYN, *supra* note 4, at 38–39.

18. ABRAHAM LINCOLN, *Fragment on the Constitution and the Union (Jan. 1861)*, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168, 169 (Roy P. Basler et al., eds., 1953).

19. *Id.*

20. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

premise is that what evolves in time has an authority of its own that abstract reason (of the sort Jefferson employs in the Declaration) can never provide.

The Constitution rests on a belief in what (to put it rather awkwardly) might be called "the valorizing power of time." This is the same belief from which Bickel's allegiance to the passive virtues springs. It is an important theme in Burke's writings as well, though if one is looking for the philosophical source of the Constitution's valorization of time, a better choice would be David Hume, who was not as enthusiastically attached as Burke to the un-American ideas of a titled nobility and established Church.[21]

Everywhere one looks in Hume, one finds the same idea: that the passage of time can do what reason alone cannot.[22] This is the key to his solution to the puzzle of scientific induction and his explanation of political authority (which Hume locates in "custom" and "convention," respectively).[23]

Bickel *was* a traditionalist; he *did* put prudence first;[24] he *rightly* saw that the Constitution is a conservative document that exploits the valorizing power of time, not a radical one, like the Declaration, that invites us to judge events in time from the standpoint of eternity. Bickel's real hero, though, is not Burke but Hume. Hume is the true inspiration for the distinctively American, Madisonian conservatism that Bickel admired. Rightly understood, Llewellyn is a Humean too. His reverence for the common law tradition has the same intellectual and temperamental roots as Bickel's plea for the "passive virtues," [25] and his insistence that the Court embrace, not abjure, the "Lincolnian tension."[26]

Bickel's Humean traditionalism, though, is poorly represented in constitutional theory today. The only form of conservatism that now has wide appeal goes under the name of originalism, which is a faux-conservatism that shares more in common with the radicalness of Locke than the spirit of Hume.

Restoring Bickel's conservatism to a position of honor in our public law, against the sterile claims of originalism, is as urgent a task today as defending the common law virtue of "practical wisdom" against the fake science of the economic analysis of law and the shallow nihilism of critical legal studies, was in the field of private law thirty years ago. They are, indeed, the same task. Or so it seems to me, from my present point of view.

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21. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 5, 122, 627–29 (Elecbook Classics eds., 2019).

22. *See id.* at 629.

23. *Id.* at 466, 586.

24. BICKEL, *supra* note 9, at 133.

25. *Id.* at 111.

26. *Id.* at 65.