Friedrich Kessler

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All of us who live by the law know from our own experience that everything we do is determined by the society of which, willingly or unwillingly, we are a part. The subject matter of the law, unlike that of other intellectual disciplines, has no independent existence divorced from the society in which a particular legal system is embedded. We are time-bound and we are space-bound; otherwise we are not lawyers.

During the 1930's the Nazi government forced many of the best minds in Germany and Austria into exile. I am sure that no one who has not experienced that fate can even begin to understand the personal tragedy involved. The intellectual problems of the exile—whom, with our 20th century gift for euphemism, we call the refugee—may be somewhat easier for those of us who have had the good fortune to live out our lives in the culture we were born into to comprehend.

It seems to me that the lawyer confronts, in his land of refuge, a situation of appalling difficulty. The great mathematician in residence at Princeton has no need to readjust his theories to take account of American conditions. It is at least arguable that the great psychoanalyst can carry on his work quite as effectively in his London study as he could have done in Vienna. But the legal scholar, translated at midpoint in his career from Berlin to New Haven or Chicago, faces problems of a different order of magnitude.

I assume that the simplest part of the problem is learning and mastering the new system. That merely requires a few years of diligent study—an unpleasant but by no means an insuperable task. What seems to be difficult to the point of impossibility is to fuse the old learning and the old insights with the new learning and the new insights in such a way that each will enrich the other. I have known excellent lawyers who could, with ease, switch back and forth between a civil law system and a common law system but who seemed to keep their separate bodies of learning in watertight compartments within

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their own minds. Fritz Kessler's extraordinary achievement was to become a common lawyer without ceasing to be a civilian.

A German lawyer whose intellectual formation took place during the 1920's and the early 1930's must have been acutely aware of the intolerable stresses which play upon an established legal system during a period of social dissolution. For Germany the trauma of defeat in World War I was followed by a disastrous inflation; the eerie truce of the Weimar Republic led to the erosion of all governmental authority and the acceptance of dictatorship and Hitler. No lawyer who had lived through such a period could have retained any illusions about the stability and permanence of any legal system in a time of troubles. Unprecedented solutions to unheard of problems had become the legal order of the day.

In the early 1930's the orthodox legal establishment in the United States seems to have felt untroubled and secure. After the terrible convulsion of the Civil War this country had enjoyed the longest period of what can, without irony, be described as peace and prosperity that has fallen to the lot of any modern industrial state. The war with Spain and World War I had hardly disturbed our tranquility. Periods of economic recession, occasionally violent, had all been short-lived and seem never to have affected the mass of the population. Against this background of long-continued social, economic and political stability, American law had apparently achieved a sort of legal nirvana. The great treatises of Wigmore, Williston and others had organized, rationalized and purified the major fields into which we divide the Corpus Juris. The American Law Institute was about to complete its strange task of reducing the fundamental principles of the common law to black letter text in the Restatements. The idea of law—a stable law for a stable society—seems to have achieved an extraordinary degree of popular acceptance, among laymen and lawyers alike.

It is true that there were voices of dissent. The ravages of the Great Depression had, for the first time in the history of the Republic, created the beginnings of a native radical movement, although in truth the radicals of the 1930's embraced the American dream quite as enthusiastically as their conservative counterparts. On the legal front the Realists in the law schools were making angry noises, but it was far from clear exactly what it was that they were angry about. The mood of the country was perfectly caught up in the cheerfully meaningless statement that the only thing we had to fear was fear itself. That is, nothing was really wrong, the troubled clouds would

pass away and, once again, everything would be for the best in the best of all possible worlds.

It may be that everything does work out for the best. I am inclined to think that there could never have been a better time for someone with Kessler's gifts and background to have come among us. His German experience and training no doubt made it easier for him than it was for any of his American-born contemporaries to avoid the dogmatic excesses both of the conservatives who fancied themselves to be traditionalists and of the Realists who fancied themselves to be radicals.

He chose to do his principal work in the area of contract law. It is clear from his earliest articles that he had decisively rejected what had come to be accepted as the orthodox or classical version of American contract law, formulated principally by Williston in his great treatise and in the Restatement of Contracts whose preparation Williston had dominated. That is to say, Kessler rejected the Willistonian formulation not only as a normative statement of what American contract law ought to be but as an historical statement of what in fact it had been. Undoubtedly Kessler felt himself much more at home, intellectually, with Arthur Corbin whose own lifelong work on contracts, which culminated in the publication of his treatise in 1950, had been in effect devoted to destroying the Willistonian version of contract theory. Indeed Kessler felt such veneration for Corbin as a friend and as a scholar that in the 1960's he devoted much of his time and thought to a project, which has not been realized, of redoing (as distinguished from updating) the entire Corbin treatise. And yet Kessler, in his analysis of contract, ultimately parted company with, or went beyond, Corbin. Corbin's great accomplishment had been to dispel the illusion that there was or ever had been or ever could be a unitary theory of contract or a single doctrine of consideration and so on. Corbin, who had little interest in or use for abstract doctrine, stopped with his atomistic disintegration of received theory and counseled that we should devote ourselves, principally or perhaps exclusively, to the study of what he liked to call the "operative facts" of cases. To Kessler the idea that there could be salvation in studying the "operative facts" seemed to be quite as much an illusion as the idea that there could ever have been a unitary theory of contract. Toward the end of a remarkable article on contracts of adhesion,[1] Kessler (without naming Corbin) commented that: "The prevailing dogma, . . . in-

1. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

sisting that contract is *only* a set of operative facts, helps to preserve the illusion that the 'law' will protect the public against any abuse of freedom of contract."[2] In Kessler's view a broader philosophical base was needed.

A somewhat detailed analysis of the contracts of adhesion article will throw light not only on Kessler's own ideas and the theoretical structure toward which he was working but also on his unique contribution to American legal scholarship. The preliminary point should be made that many of the ideas in the article have, in the 1970's, become legal commonplaces which everyone accepts and no one disputes. These ideas were by no means commonplaces in the 1940's. It is, at least occasionally, the happy fate of profoundly original thought to become old-hat within a generation of being first set down.

In "Contracts of Adhesion" Kessler first sketched the development of a theory of contract which largely depended on the autonomy, or freedom of the will, of the contracting parties. He linked that development with the development of free enterprise capitalism as that system had come to be in the 19th century. "[F]reedom of contract," he commented, "is the inevitable counterpart of a free enterprise system. As a result, our legal lore of contracts reflects a proud spirit of individualism and of *laissez faire*."[3] However, "[t]he development of large scale enterprise . . . made a new type of contract inevitable—the standardized mass contract." Such contracts, which have many useful features, are, typically, what Kessler called "contracts of adhesion"—that is, "take it or leave it" contracts imposed by enterprises in a strong bargaining position on their customers or clients who have no choice but to deal on the terms dictated by the stronger party. Courts and commentators, wedded to a unitary theory, had failed to give overt doctrinal recognition to the emergence of a radically new type of "contractual" arrangement. Instead, they had sought to pursue the policy of protecting the weaker against the stronger party by indulging in tortured interpretations of contractual clauses. "Society had thus to pay a high price in terms of uncertainty for the luxury of an apparent homogeneity in the law of contracts."[4] As a concrete illustration of his thesis, Kessler took the law of insurance—particularly the situation of the applicant for insurance who suffers loss before the insurance company has got around to "accepting" the "offer" and issuing a formal policy. Under our classical contract theory the insurance

2. *Id.* at 641.
3. *Id.* at 630.
4. *Id.* at 633.

company could not, of course, be liable in such a situation. And yet many courts had indeed held the companies liable—if not in contract then in tort. Kessler's conclusion was:

> [T]he courts pay merely lip service to the dogma that the common law of contracts governs insurance contracts. With the help of the law of torts they nullify those parts of the law of contracts which in the public interest are regarded as inapplicable. Disguised as tort law the courts recognized a liability for *culpa in contrahendo* thus making new law with regard to the formation of insurance contracts.[5]

Kessler then reviewed examples of what he considered to be "inevitable" "inconsistencies and contradictions within the legal system resulting from the uneven growth of the law and from conflicting ideologies" —such as the fragmentation of consideration theory and the continuing growth, as a counter-principle, of the idea which came to be known as promissory estoppel and won a grudging acceptance in § 90 of the *Restatement of Contracts*. In the last few pages of the article he moved to broad philosophical ground:

> The individualism of our rules of contract law, of which freedom of contract is the most powerful symbol, is closely tied up with the ethics of free enterprise capitalism . . . .
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> With the decline of the free enterprise system due to the innate trend of competitive capitalism toward monopoly, the meaning of contract has changed radically. . . . Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms . . . .[6]
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> In the happy days of free enterprise capitalism the belief that contracting is law making had largely emotional importance. Law making by contract was no threat to the harmony of the democratic system. On the contrary it reaffirmed it. The courts, therefore, representing the community as a whole, could remain neutral in the name of freedom of contract. The deterioration of the social order into the pluralistic society of our days with its powerful pressure groups was needed to make the wisdom of the contract theory of the natural law philosophers meaningful to us . . . .[7]

For a pluralistic society, a pluralistic theory of contracts was needed: "[F]reedom of contract must mean different things for different types of contracts."[8]

5. *Id.* at 635; on *culpa in contrahendo,* see p. 678 *infra.*
6. *Id.* at 640.
7. *Id.* at 641.
8. *Id.* at 642.

There are three aspects of Kessler's thought in the contracts of adhesion article to which I would like to draw particular attention.

The first is his linkage of the development of classical contract theory and in particular of the great symbol, freedom of contract, to the development of "free enterprise capitalism" and of the economic theory of *laissez faire*. That there was such a linkage has come to be one of the truisms of much current legal writing. Kessler must have been one of the first scholars to have made the point explicitly that late 19th century economic theory and late 19th century legal theory had much in common and that both could be taken as having instinctively reflected the extraordinary changes in the methods of production and distribution which, in the industrialized countries of Western Europe and in the United States, had followed the industrial revolution of the 18th century. At least in this country he was, so far as my own knowledge takes me, the first to develop this idea, which has had profound consequences both on our understanding of our legal past and on our evaluation of our legal present.

The second point is his insistence that by the 1940's American contract law, reflecting the society which gave it birth, had already entered what would undoubtedly be a protracted period of crisis and breakdown. It was by no means true that the only thing we had to fear was fear itself. What we had to fear was the innate tendency of the economic system toward increasing monopoly and the "deterioration" of the social order into contending pressure groups. Under such economic and social pressures, the greater part of our late 19th century theory of contractual obligation would have to be reworked. Kessler used the insurance cases to demonstrate how the reworking process was in fact being carried out. The basic point of his argument was, however, that the inevitable process could be carried out, or could happen to us, in various ways. A poor way of doing it was for the courts to continue to give "lip service" to outmoded doctrines while, at the same time, they discovered and followed complicated routes of escape to avoid the results which the doctrines evidently commanded. That was what most of the courts had been doing in the insurance cases. A better way, Kessler suggested, would be to recognize that radically changed circumstances require radically new doctrines. Once we have recognized that, we can at least go about fashioning our new rules rationally. Rationality is no guaranty of a successful outcome but it is certainly to be preferred to the pretense that we are standing by the old rules while in fact we are, with varying degrees of disingenuity, avoiding their application. That pretense leads to a vast

amount of unnecessary confusion about what the law really is—a confusion which afflicts not only laymen but lawyers, judges and even law professors.

The preceding discussion brings us to our third point, which is the altogether remarkable way in which Kessler's analysis of American contract law was enriched by his civil law background. I earlier quoted a passage from his discussion of the insurance cases in which he wrote: "Disguised as tort law the courts recognized a liability for *culpa in contrahendo* . . . ."[9] *"Culpa in contrahendo"* is not, I assume, a term of art with which most American lawyers are familiar (except for the happy few who had the good fortune to study their contract law with Kessler).

The *culpa in contrahendo* idea was familiar in German jurisprudence, having been introduced by Jhering in the 1860's and having subsequently had a considerable influence on the development of contract law, both decisional and statutory, in Germany and other European countries.[10] The idea, stated in a brief and oversimplified form, was that there are many situations in which liability should be imposed on a party whose lack of diligence, carelessness, negligence or other fault (*culpa*) causes the failure of negotiations toward a contract in which he and some other party (or parties) have been engaged. The idea thus assumed what might be called a pre-contractual liability: the fact that *A* and *B* have entered into a process of contractual negotiations imposes on both a duty to go forward in good faith. The failure of the negotiations by the fault of either should lead to the imposition of liability on the party at fault, who should be required to reimburse the innocent party for any losses suffered in reasonable reliance on the assurances, representations or other actions of the party chargeable with fault.

In the contracts of adhesion article Kessler had introduced *culpa in contrahendo* in connection with the American cases which had, on no satisfactory theory, imposed liability on dilatory insurance companies—a situation which the *culpa in contrahendo* idea fitted like a glove. Twenty years later he returned to the subject in a magisterial article which argued, with a wealth of learning, (and, in my own opinion, conclusively proved) that, over a broad spectrum of contract law, American courts have for a long time been reaching results which

9. *See* p. 676 *supra*.
10. *See* Kessler & Fine, Culpa in Contrahendo, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

are entirely consistent with civil law *culpa in contrahendo* theory.[11] However, the American judges, unlike their civil law counterparts, have not had the benefit of anything like a well-articulated theory. They have been condemned to the uncertain fate of explorers penetrating an uncharted wilderness. Consequently the growth of American law in this area has been ragged, uneven, eccentric and needlessly confused. In law as in most other things there is much to be said for knowing not only where you want to get to but also what the best way of getting there is. A decent theory is to a judge what a good road map is to a tourist in a strange country.

Most foreign legal scholars who come to this country are baffled at the enormous investment of time and thought which American law teachers make, not only in their teaching but in the preparation of teaching materials. Kessler's conversion to the American approach was symbolized by the publication of his *Cases and Materials on Contracts,* the first edition, prepared with the help of his colleague, Professor Malcolm Sharp of the University of Chicago Law School, having appeared in 1953. Most casebooks are not much more than cannibalizations of the other casebooks in the field. Kessler's casebook is one of the very few which can profitably be studied as an intellectual construct. His analysis of emerging trends in contract law, which, in the best Socratic method, he chose to leave implicit in his arrangement of the cases, was startlingly original—so original indeed as to mystify and discourage some would-be users of the book. During the late 1960's I worked with Kessler on the revision of the casebook for a second edition, which appeared in 1970. In the course of working my way through the materials, I found myself continually amazed at the regularity with which the insights which had guided him when he first put the materials together in the 1940's had been verified by the case law results of the intervening 20 years. And, from our discussions and correspondence, it soon became clear that his hypotheses on the future course of the law were as fertile and as imaginative in the late 1960's as they had been 20 years earlier. It may well be that prediction is not what legal scholarship is all about. Even so, there are few of us who would not take at least a modest pleasure in seeing our own predictions come true within our lifetimes.

The most innovative feature of the original edition of the casebook was the inclusion of a series of chapters on specialized types of contracts which had been subjected to an unusual degree of governmental

11. *Id.*

regulation and control. Thus there was a chapter on the impact of the antitrust laws on contractual arrangements, a chapter on labor contracts or collective bargaining agreements, a chapter on insurance contracts and a chapter on automobile dealer franchises. The inclusion of this material, which had been entirely foreign to the basic course in contracts in American law schools, reflected the theoretical position which Kessler had taken in the contracts of adhesion article: that the growing pluralism of our society must inevitably be reflected in a growing pluralism of our contract theories. It is also clear, from Kessler's published writings during the 1950's, that his own principal interest had become the impact of governmental regulation and control on the underlying forms of contractual obligation which were affected. It should be added that Kessler's innovative approach to what the basic contract course should be about does not seem to have caught on in the academic marketplace. That may be because there are few instructors who move as easily as Kessler does from contract theory to economic regulation. Or it may be that the tradition of specialized courses in the law school curriculum was too powerful to be displaced. Or that Kessler, as he has done not infrequently, had put forward a novel idea long before most of his colleagues were ready to accept it. It is by no means beyond the realm of possibility that the law school contracts course of the 1980's will have evolved along the lines that Kessler apparently envisioned in the 1940's.

I am inclined to believe that civilians have always tended to rank correct—or at least coherent—theory higher in the hierarchy of legal values than common lawyers have. We have always been devoted to what I once described as the typically muddle-headed process of thinking known as the genius of the common law.[12] And as Holmes (who was not always faithful to his own precepts) cautioned us long ago, we should, as lawyers, be guided not by logic but by experience—although it is not all that easy to understand how a nonlogical system can, on any theory, qualify as a system of law.

The downgrading of theory, doctrine or rules has been a notable feature of a great deal of 20th century American legal writing. Corbin's impatience with doctrine and his almost obsessive concern with the operative facts of cases may be taken as prototypical of this approach. During the 1920's and 1930's the ill-assorted and diverse group which came to be known as the Legal Realists preached a contempt for doctrine which, at its worst, degenerated into a nihilistic anti-intellectual-

12. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 202 (1965).

ism. Another aspect of the antidoctrinal bias of most of the Realist writing was the vigorous promotion of what came to be called empirical studies, using techniques inspired by or borrowed from our cousins the social scientists—particularly the sociologists. This part of the Realist construct has continued to flourish down to our own time, although its practitioners have long since ceased to describe themselves as Realists. The empirical study idea, in a nutshell, comes down to this: If you gather all the facts (or all the "relevant" facts) about a problem, you will be in a better position to decide the case, draft the statute or what not than you would be if the facts were not available to you. The only trouble with this attractive and apparently common-sensical idea is that, with respect to any problem complex enough to be worth thinking about, it is not true. The facts cannot be gathered; even if they could be gathered, they would, having lost currency, no longer be facts (except in the historical sense) by the time you got around to evaluating them. It was bad enough for a hypothetical 19th century judge to say: It is not I who speak but the law which speaks through me. It would be even worse for a hypothetical 20th century judge (or legislator) to say: It is not I who speak but the facts which speak through me. The illusion of certainty, however arrived at, is always to be shunned.

I think that Kessler was one of the very few men of his generation who, having decisively rejected the doctrinal orthodoxy of the period —the Restatement of Contracts and all that—seems never to have been tempted to go on to some form of antidoctrine as salvation. The nihilists said: If your theory isn't perfect, it isn't anything—tear it down. The social scientists said: Don't give us theory—give us facts. Kessler, undoubtedly influenced by his training as a civilian, said: If our old theories no longer work as they should, we need new theories, but the principal thing is to understand why it is that we are doing what we are doing instead of doing something else.

My impression is that there has been, over the past few years, in the law reviews and in monographs, much more theoretical investigation and inquiry than I can remember having seen in the literature before, say, 1970. I am thinking principally of writing in the field of contract—of which there has been a great deal—but I would be surprised if the same phenomenon has not manifested itself in other fields. I do not mean to suggest that Kessler is responsible for this apparently dramatic resurgence of interest in basic theory, although it is clear, from the regularity with which his articles are being cited, that his work has not been forgotten. But it is true that problems of

the type which, from the 1940's on, engaged Kessler's restless mind and energies have, almost overnight, come to be of consuming interest to a great many excellent minds in the 1970's.

Kessler has always been an intensely private man. He seems to have been uninterested in public acclaim, kudos and the outward trappings of success. He worked by himself, for himself, paying not the slightest heed to the prevailing intellectual and academic fashions. Perhaps, in his far from idle retirement, it may amuse him to be told that the crowd appears to be following hard on his once solitary footsteps.