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**“cold legal points into points of flame”
Karl Llewellyn Attacks Lynching**

Alfred L. Brophy¹

Abstract

This essay puts into context a Foreword that Karl N. Llewellyn wrote for a NAACP brief urging the Department of Justice to prosecute an Alabama sheriff for permitting the lynching of two young men in July 1933. They were accused of assaulting and murdering a young white woman in Tuscaloosa County, Alabama. The lynchings took place in the wake of the Scottsboro, Alabama prosecutions and many saw the lynchings as a response to Scottsboro and also to the presence of lawyers from the International Labour Defence who tried to represent the Tuscaloosa defendants. The lynchings, it seemed, were designed to send a message to African Americans throughout the state.

Llewellyn’s long-forgotten Foreword, which no previous scholars have written about, expands our understanding of Llewellyn and of the role the methods of Legal Realism could play in the Civil Rights Movement. Llewellyn looked at the facts to argue that community members and government officials worked together to protect white supremacy from “challenge *even in the courts of law*.” Such facts turned “cold legal points into points of flame” and made the case for federal intervention.

The brief, thus reflecting the methods of Realism, focused on close examination of facts to see the world fresh and to make the case for reform. It also suggests that the Civil Rights Movement and Realism may have drawn inspiration from a common well of cultural ideas to go back, see the world as it is, and to hold up those facts to the public, and in that way to change the law and legal practices.

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In 1933, in the wake of the trials at Scottsboro, Alabama, the NAACP reached out to Karl Llewellyn to ask him to assist in making the case for federal prosecution of lynchers. The immediate trigger was the lynching of three young African American men in Tuscaloosa in August 1933 and the refusal of the Alabama attorney general to prosecute the Tuscaloosa County sheriff who turned the young men over to the lynchers – and may have acted in concert with the lynchers.²

The young African American men were accused of having participated in or covered up the rape and murder of a twenty-one year old white woman, Vaudine Maddox, on June 12, 1933. The International Labour Defence (ILD), which had provided defense lawyers for the Scottsboro trials, sent three lawyers to defend the men.³ At a hearing at the Tuscaloosa County Courthouse on August 2, the accused said they did not want the ILD lawyers. Tensions were running high that day in Tuscaloosa. Judge Henry B. Foster, who was presiding over the case, had asked for the National Guard to appear at the courthouse to keep the peace. Later that day, the Guard protected the ILD lawyers as they went to the train station to go to Birmingham.⁴

A few weeks later, on August 14, Tuscaloosa's Sheriff, R.L. Shamblin, began to transport the three young men from the Tuscaloosa County jail to Birmingham, ostensibly for their safe-keeping. Shamblin and the prisoners were in one car and another car of deputies followed

² PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 172-73* (2009) (discussing Tuscaloosa lynchings). *See also* ROBIN D.G. KELLY, *HAMMER AND HOE: ALABAMA COMMUNISTS* 88 (1990).

³ DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 275-77 (2007).

⁴ JAMES GOODMAN, *STORIES OF SCOTTSBORO* 203-05 (1993).

behind them. But a few miles out of town, the second car turned back to Tuscaloosa and shortly afterwards the car with the prisoners was overtaken by two other cars. The sheriff then turned the men over without a fight.⁵ The next day the bodies of two men, Dan Pippen and A.T. Hardin, were found in Bibb County, about twenty miles away. The third man, Elmore Clark, was found alive, with severe gunshot wounds.⁶

In Tuscaloosa the local newspaper blamed the lynchings on communist agitators.⁷ But elsewhere the state and national press saw this as official complicity in the lynching. The *Washington News* matter-of-factly observed that “it is being extremely charitable to the forces of law and order in the sovereign state of Alabama to refer to the killers ‘as a mob’.”⁸ The *Richmond Times Dispatch* focused on the sheriff’s lack of resistance. It thought the behavior not worthy of “men defending the dignity or justice of the state.”⁹ The *Raleigh News and Observer*

⁵ SOUTHERN COMMISSION ON THE STUDY OF LYNCHING, *THE PLIGHT OF TUSCALOOSA: A CASE STUDY OF CONDITIONS IN TUSCALOOSA COUNTY, ALABAMA* 20-21 (1933).

⁶ SULLIVAN, *supra* note 2, at 172.

⁷ The *Tuscaloosa News* wrote that:

An outside agency inflamed the people to such a point that the community was tense with fear of racial disorders in which many lives would be lost, so when a handful of men took the matter into their own hands and put those Negroes to death, *a certain relief was undeniably felt by even the most thoughtful and law-abiding of our citizens.*

Memorandum Brief for the Attorney General of the United States, In re: Prosecution of R.L. Shamblin, Sheriff of Tuscaloosa County, Alabama... at 41 (quoting TUSCALOOSA NEWS (September 29, 1933)). See also HERBERT SHAPIRO, *VIOLENCE FROM RECONSTRUCTION TO MONTGOMERY* 224 (1988) (quoting same passage); *Lynched by the Carpet Baggers of 1933*, TUSCALOOSA NEWS (August 14, 1933), quoted in *PLIGHT OF TUSCALOOSA*, *supra* note 5, at 23 (discussing role of modern-day “carpet baggers” in stirring the lynching sentiment).

⁸ WASHINGTON NEWS (Aug. 16, 1933), quoted in Brief, *supra* note 7, at 22.

⁹ RICHMOND TIMES DISPATCH (Aug. 15, 1933), quoted in Brief, *supra* note 7, at 22.

asked, if the blame was on the ILD lawyers for inflaming public opinion, “why did not [the Sheriff] take greater precautions?”¹⁰ There were calls for action to prosecute the lynchers. The African American press and the NAACP asked for federal prosecutions, pleas that became bolder when an Alabama grand jury returned no indictments on October 2, 1933.¹¹

On October 13, the NAACP delivered a brief to the Department of Justice supporting the prosecution of Sheriff Shamblin.¹² The brief, authored by Charles Hamilton Houston, Leon Ransom, and Edward Lovett, made two points. First, it argued that lynching was a serious problem because it intimidated African Americans wholesale, and second, that the federal government could prosecute lynchers under a Reconstruction era statute. The brief manifested the growing strength and assertiveness of the NAACP and the civil rights movement. It assembled evidence to suggest that government actors were complicit in the lynchings and that the federal government should use its power to intervene. The NAACP had achieved some victories already – from striking down a racially restrictive covenant in 1917, to freeing African American tenant farmers who had been railroaded into death sentences in *Moore v. Dempsey* in

¹⁰ RALEIGH NEWS AND OBSERVER (Aug. 15, 1933), quoted in Brief, *supra* note 7, at 22.

¹¹ PLIGHT OF TUSCALOOSA, *supra* note 5, at 26.

¹² Charles Hamilton Houston to Attorney General, October 16, 1933, in Anti-Lynching Campaign Correspondence on Lynching in Tuscaloosa, Alabama, Folder: 001527-008-0108 (August 1, 1933 - October 31, 1933), in Papers of the NAACP, Part 7: The Anti-Lynching Campaign, 1912-1955, Series A: Anti-Lynching Investigative Files, 1912-1953, Library of Congress, at 47 [hereinafter Tuscaloosa Lynching, NAACP Papers] (transmitting brief). See also *Old Law Gives U.S. Power to Act in Lynchings*, PITTSBURGH COURIER 2 (October 28, 1933); Nancy Cunard, *Scottsboro and Other Scottsboros* (1934), in *ESSAYS ON RACE AND EMPIRE* (2002).

1922,¹³ to defeating Judge John Parker's nomination to the Supreme Court in 1931,¹⁴ and it was operating on a lot of different fronts, defensively, to protect African Americans accused of crimes in the early 1930s. It was working on the Scottsboro cases¹⁵ and Jess Hollins' case in Oklahoma.¹⁶ The NAACP was moving outward to encourage more active protection, not just defending those accused of crimes. It vigorously sought the prosecution of lynchers. The brief it filed with the Department of Justice is an important piece of the story of the NAACP's growing strength and its growing ambitions, too.

Something else is significant about this brief. Shortly after delivering it to the Justice Department, the authors suggested that the brief be printed and distributed widely.¹⁷ When the NAACP printed the brief for distribution, it added a Foreword written by Karl Llewellyn, a Columbia Law School professor.¹⁸ Llewellyn was a sensible choice, because of his position of power and because of his prominence in the Legal Realist Movement, and because he had previously spoken out on liberal causes. For instance, Llewellyn gave a radio address opposing

¹³ 261 U.S. 86 (1922).

¹⁴ GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969* (2005); KENNETH W. GOINGS, *THE "NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER* (1990).

¹⁵ *Powell v. Alabama*, 287 U.S. 45 (1932). *See also* ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* (1980).

¹⁶ *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

¹⁷ Charles Hamilton Houston to Walter White, October 13, 1933, in *Tuscaloosa Lynching: NAACP Papers*, *supra* note 12, at 54. Walter White to Joel Spingarn, October 1931, in *id.* at 51.

¹⁸ Mabel Shaw for Karl Llewellyn to Walter White, October 25, 1933, in *Tuscaloosa Lynching, NAACP Papers*, *supra* note 12, at 61 (transmitting Llewellyn's Foreword).

the execution of Sacco and Vanzetti¹⁹ and he also collected signatures on a petition urging the Massachusetts governor to appoint a committee to investigate the trial.²⁰ Llewellyn's Foreword may not have been quite what the NAACP was hoping for, because Roy Wilkins, then assistant secretary wrote of the NAACP wrote to Walter White and said, "I don't think we can reject it with much grace since we requested Professor Llewellyn to write it."²¹ Nevertheless, the Foreword has Llewellyn's vibrant prose and provides an important window into the methods of Legal Realism.

The Foreword,²² which is reprinted in its entirety in the appendix, reveals Llewellyn's focus on facts and the way that facts illuminate what local law is and what the response should be to those facts. He was explicit about this when he wrote that "Behind the cold points of law is a

¹⁹ WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 110 (1973); AMERICAN LEGAL REALISM 50 (William W. Fisher et al. eds. 1993) (discussing Llewellyn's politics). The address is reprinted as "Remarks on the Sacco-Vanzetti Case" in William Twining's *The Karl Llewellyn Papers* 105-10 (1968).

²⁰ N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 159-60 (1998) (discussing Llewellyn's petition for executive review of the procedures in the Sacco-Vanzetti trial, signed by sixty-one law professors); *Professors of Law Urge Sacco Inquiry*, NY TIMES, May 10, 1927, at 9. Among Llewellyn's other advocacy of liberal causes is a short piece, which has also escaped commentary so far as I can tell, suggesting legislative and litigation responses to the labor injunction. See Karl N. Llewellyn, *An Anti-Injunction Program: Wanted: Labor Strategy to Meet The Strategy of Capital*, NEW LEADER (March 24, 1928). This is not listed in the Karl Llewellyn papers.

²¹ Roy Wilkins to Walter White, October 1931, Tuscaloosa Lynching, NAACP Papers, at 59.

²² Karl Llewellyn, *Foreword*, in Memorandum Brief for the Attorney General of the United States, In re: Prosecution of R.L. Shamblin, Sheriff of Tuscaloosa County, Alabama..., *supra* note 7, at 1, reprinted in Appendix.

crying need of fact.”²³ The cold points of law were the citations to Reconstruction-era statutes and cases interpreting them that made it a crime to interfere with another’s civil rights.²⁴ It was the facts surrounding lynchings in Alabama that would, Llewellyn thought, “burn like acid in the unsuspecting reader’s mind.”²⁵ For the lynchings in Tuscaloosa and elsewhere around the south ensured that African Americans would not challenge white supremacy, especially not in court.²⁶ The facts were that the law was not being enforced; lynching had produced a new reign of terror, which taught African Americans not to seek relief in court. Lynching terrorized African Americans (and those who might help them) and this was done with government complicity. The lynchings and the southern reaction – the social facts – controlled African Americans: “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.”²⁷ The lesson was that institutions – like Jim Crow segregation – should not be challenged “even in courts of law.”²⁸ All of this was done with “official connivance.”²⁹

Tuscaloosa was a case in point of a much larger story. Such background turned the “cold

²³ *Id.* at lines 1-2.

²⁴ *See* Brief, *supra* note 7, at 3-8, 14-18. *See also* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866 (2012).

²⁵ Llewellyn, *Foreword*, *supra* note 22, at lines 2-3.

²⁶ *Id.* at lines 5-7.

²⁷ *Id.* at lines 3-5.

²⁸ *Id.* at line 7.

²⁹ *Id.* at line 9.

legal points into points of flame.”³⁰ Those facts made the case for federal prosecution. For the brief demonstrated that “baser elements” of southern society adopted a policy of lynching – and that “decent elements” of southern society understood or perhaps even accepted lynching.

Together that showed it was time for federal intervention.³¹

Llewellyn’s Foreword to the NAACP’s brief is important for several reasons.³² First, the brief helps us understand Llewellyn’s vision of Legal Realism in practice. Where so much has been written about what Realism was,³³ – from skepticism of legal rules³⁴ (or phrased somewhat differently as a “philosophy of legal incertitude,”)³⁵ to empirical studies of how legal rules

³⁰ *Id.* at line 12.

³¹ *Id.* at lines 14, 16.

³² So far as I can determine, no one has ever written about Llewellyn’s Foreword. A few scholars have written about the NAACP’s brief and its importance to the NAACP’s anti-lynching campaign. See GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS, HISTORICAL JUDGMENTS RECONSIDERED* 89, 268 (1983); SULLIVAN, *supra* note 2, at 462 n. 60. And others have written about Llewellyn’s work with the NAACP. See, e.g., TWINING, *supra* note 19, at 110, 124. Yet I can find no references in the secondary literature to Llewellyn’s Foreword.

³³ See, e.g., AMERICAN LEGAL REALISM, *supra* note 19, at xi - xiv; WILLIAM WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* 198 (1998) (discussing key elements of realism).

³⁴ Brian Leiter, *American Legal Realism*, in BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, at 51, 52-53 (Martin P. Golding & William Edmundson eds. 2005).

³⁵ NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE*, 68 (1995); cf. Brian Leiter, *Is There an 'American' Jurisprudence?*, OXFORD J. L. STUD. 367, 375-78 (reviewing DUXBURY, *supra*, and suggesting that Realists had a more practical agenda than Duxbury suggests).

operated,³⁶ to a psychological mood³⁷ – here we see how its intellectual leader put it into practice in civil rights advocacy and how he viewed the civil rights cause through the lens of Realism.³⁸ This helps fill in a picture of Llewellyn’s ideas and how Legal Realists critiqued the status quo and then worked to construct a new legal world. The brief put in practice the Realist mission by demonstrating the distinction between the paper rules and the rules in action. There were state criminal laws applicable to lynching (assault, battery, kidnaping, murder) but these laws were of no or little effect given the public-private partnership of racial terror. It’s that connivance that spelled out the real “law,” the law in action, and therefore called out for a new legal response – a new legal reality.³⁹

³⁶ SCHLEGEL, *supra* note 38, at 81 (discussing methodology of reform that held “if the facts about social conditions were known, improvement of those conditions – that is, reform – would follow”).

³⁷ DUXBURY, *supra* note 35, at 79 (“realism constituted a general sense of unease concerning legal formalism”). Laura Kalman says the Realists “pointed to the role of human idiosyncrasy in legal decision making, stressed the uselessness of legal rules and concepts, and emphasized the importance of greater efficiency and certainty in law administration.” LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 3 (1986). Llewellyn responds to the characterization of Realists focused on the “uselessness of legal rules” in the 1951 introduction to the *Bramble Bush* when he retracted what he called “those thirteen short words. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* xi (1930) (1951 ed.). Those words were “what those officials do about disputes is, to my mind, the law itself.” *Id.* at 3.

³⁸ John Schlegel suggests that Realism be viewed not as a school of jurisprudence but rather in terms of what Realists did. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 8 (1995). I follow Schlegel’s suggestion in focusing on what Llewellyn did in this brief to critique the failure to prosecute those involved in the Tuscaloosa lynching and to stir support for federal prosecutions of lynchers, as well, one supposes, as to stir support for the anti-lynching movement more generally.

³⁹ Facts were used in this brief in much the same way that Brandeis and other Progressive lawyers had used them two decades before. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 67-68 (1976). See also FELICE BATLAN, *WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863–1945* (2015).

The brief fits with several pieces of what Llewellyn had identified as central tenets of Legal Realism. In the several years before he wrote the Foreword Llewellyn had been engaged in an exchange with Roscoe Pound over the nature of Realism. It began with Llewellyn's "A Realistic Jurisprudence -- The Next Step" in April 1930 in the *Columbia Law Review*,⁴⁰ which led to Pound's response, "The Call for a Realist Jurisprudence,"⁴¹ and then to Llewellyn's response "Some Realism about Realism: Responding to Dean Pound" in the June 1931 *Harvard Law Review*.⁴² Out of that exchange, which to twenty-first century ears sounds like a dispute in which it is hard to figure out the points of contention, there emerged a picture of what Legal Realism was. One central concern of Realism was a focus on facts.⁴³ Llewellyn defined Realism as individuals "working and thinking over law and its place in society."⁴⁴ In "Some Realism about Realism" Llewellyn identified a series of propositions that Realists allegedly shared. Five of those key tenets are relevant to the Foreword. Those five propositions are that law was "a

⁴⁰ Karl N. Llewellyn, *A Realistic Jurisprudence -- The Next Step*, 30 COLUMBIA L. REV. 431-465 (1930).

⁴¹ Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

⁴² Karl N. Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARVARD L. REV. 1222-1264 (1931).

⁴³ Dean Pound wrote that Realism sought "accurate recording of things as they are, as contrasted with things as they are imagine to be, or wished to be." Pound, *supra* note 41, at 697; see also *id.* at 700 ("beginning with an objectively scientific gathering of facts"). Brian Leiter phrases the "core claim of American Legal Realism" as "in deciding cases judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons." Leiter, *supra* note 34, at 52.

⁴⁴ Llewellyn, *supra* note 42, at 1234.

means to social ends and not ... an end in itself”;⁴⁵ the sense that society was in flux and law should be re-examined to figure out whether it fit with society’s needs; a distrust of traditional legal rules in so far as they purport to describe what courts or people are doing; the evaluation of law in terms of its effect; and a sustained attack on the law along those lines.

In short, as Morton Horwitz characterized it, Realists believed that the law was out of touch with reality.⁴⁶ Or, as one might phrase it somewhat less elegantly, Legal Realism showed what was really going on. And, one might add, Realists were seeking to have law respond to that reality. Indeed, at the end of his life, Llewellyn wrote that Realism was a method, a “technology,” that enjoined its employers to “see [law] fresh,” “see it as it works” and “what-it-is-for.”⁴⁷ Such an injunction sounds remarkably like what those unhappy with the status quo had been saying since Ralph Waldo Emerson’s “American Scholar” Address.

That was true for the NAACP brief. It sought to see life as it really was and then urge application of a federal statute. The brief focused on what courts and other law enforcement officials did rather than what they said.⁴⁸ Llewellyn turned to the facts to figure out what the “real rules”—the practices of local authorities and citizens, what we might call social reality—were. He erased the distinction between public and private action to show that African

⁴⁵ *Id.* at 1236.

⁴⁶ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 174 (1992); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE* 72 (2010) (quoting future Supreme Court Justice Robert Jackson comment during the Court-Packing debate that “the Supreme Court has lost touch with reality”).

⁴⁷ KARL LLEWELLYN, *THE COMMON LAW TRADITION* 145 (1960).

⁴⁸ Llewellyn, *Next Step*, *supra* note 40, at 434; GERALD POSTEMA, *LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD* 106 (2011).

Americans were subjected to a brutal regime of white supremacy. Often it began with private action, but the officials looked the other way when they weren't outright participating in the lynching. The brief was well-suited to the Realist analysis because the issue was how lynchings were used as a part of the local "law" to keep African Americans in place – and how the government needed to respond. The brief made not just cold points of law come alive, it also showed the relevance of Realist analysis, for it gave purpose to the distinction drawn between "working rules" and "paper rules."⁴⁹ The brief showed what the working rules of *local* law were – what was really going on – and used that to argue for federal executive action.⁵⁰ Llewellyn was taking legal doctrine – and statutes – seriously and adopting a concept of the law that incorporated the idea that African Americans should be protected from violence. That is, Llewellyn urged prosecution of lynchings to uphold the rule of law. Llewellyn implicitly invokes paper rules here, and calls for them to trump law's actual practice. The question is, is Llewellyn appeal to "paper rules" done because of their superiority to "real rules"? It seems likely, given that he is advocating the prosecution of lynchings, that the paper rule is put in service of other values, such as the protection of African Americans and the maintenance of the rule of law.

The brief did two things. First, it appealed to a federal civil rights statute as part of the rule of law. Second, it linked private and public action that terrorized African Americans, to describe the constraints on African Americans. This moved Realism outside of the courts to the

⁴⁹ POSTEMA, *supra* note 48, at 106.

⁵⁰ A similar answer was delivered by the Southern Commission on Lynching's report. It asked a series of questions about official complicity in the lynching. Then it concluded that "The formal – not necessarily the real – answer to those questions lies within the subsequent 'no bill' presentments of this special investigating body." PLIGHT OF TUSCALOOSA, *supra* note 5, at 25.

area of executive action. There is much to the question about the philosophy of Realism – but Llewellyn’s Foreword points to the very political nature of Realism’s technology at least in the 1930s: that a clear view of facts disclosed that something was wrong, that the “law” (community action sanctioned by government officials) was being used to terrorize African Americans and keep them from exercising their rights. This could not be right and it called for “intervention of a stronger power.”⁵¹

The second reason the Foreword is important is it expands our sense of Llewellyn’s interests and the scope of Legal Realism. About a year later the NAACP asked Llewellyn to join its legal team,⁵² yet we rarely hear Legal Realism discussed as part of the Civil Rights Movement.⁵³ Moreover, some of the Realist ideas paralleled those of leading civil rights

⁵¹ Llewellyn, *Foreword*, *supra* note 22, at Line 17.

⁵² MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* 32 (1987). Llewellyn also wrote Senator Board in 1935 in support of anti-lynching legislation. See SONDR KATHRYN WILSON, *IN SEARCH OF DEMOCRACY* 165 (1999). And later Llewellyn served on the NAACP’s national legal committee. See, e.g., Walter White to Herbert H. Lehman, October 26, 1944 (listing Llewellyn on the “National Legal Committee”), available at: http://www.columbia.edu/cu/lweb/digital/collections/rbml/lehman/pdfs/0958/ldpd_leh_0958_0157.pdf

⁵³ William W. Fisher, *Legal Education and Legal Theory, 1920-2000*, in 3 *CAMBRIDGE HISTORY OF AMERICAN LAW: THE TWENTIETH CENTURY AND AFTER* 34, 35-37 (2008) (identifying Progressive politics as influence on Realism and the belief that court opinions concealed “from the public at large and indeed from the judges themselves the considerations, often unsavory, that underlay them”). Several works have drawn connections between Realism and the Civil Rights Movement. See Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 *HARV. L. REV.* 1607 (1995); Roger A. Fairfax, *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 *HARV. BLACKLETTER L.J.* 17-44 (1998).

Part of the issue is that Realists wrote primarily about private law and that public law was not nearly as important in the era before the New Deal as it was during and afterwards. However, the method of Realism, to look closely at what was going on and then use that for

lawyers, like Charles Hamilton Houston.⁵⁴ Yet, Llewellyn's Foreword shows that Legal Realists and civil rights lawyers were engaged in a common mission of reform, even if they proceeded on different fronts. For the brief links the Legal Realists' critique of law as out-of-touch with the critique of law advanced by the civil rights movement. It also revealed that the local law was badly out of touch with basic notions of rule of law and justice for African Americans. The brief showed that the law as enforced (or not enforced) by prosecutors had left African Americans vulnerable to the mob. Even worse, that the mob was working in conjunction with government officials, such as the sheriff and maybe even the prosecutor, perhaps even a judge, to teach African Americans to stay in their place. It showed what "law" really was for African Americans, the dramatic limits of civil rights law to protect them, and the ways that another "law" was enforced through mob violence and official complicity. It also showed, through doctrinal analysis, that federal action was possible and that the social reality required federal action.

Realism, then, was the legal-academic expression of Progressive era and New Deal era values that looked straight through to social and economic reality and sought a law that was responsive to that reality. The Foreword also fits into the general trajectory of some of Llewellyn's better-known work, such as *The Cheyenne Way*, which depicted law as general, demonstrative, and compassionate. Llewellyn's Foreword invites further scrutiny of the ways the Legal Realist critique and civil rights advocacy were aimed at the same kinds of problems.

reform, was a technology useful to the Civil Rights Movement. And many in the movement, not the least of them W.E.B. DuBois, used it with dramatic effect.

⁵⁴ See MCNEIL, *supra* note 32.

Realism, as this brief showed, operated in conjunction with the reform culture of the New Deal Era. Realism in the law reviews was a nuanced and sophisticated expression of the impetus toward reform. This impetus stretched across the United States, from the offices of the NAACP in New York, to the novels of John Steinbeck and later Ralph Ellison,⁵⁵ to the folk songs of Woody Guthrie, and ultimately to the chambers of the United States Supreme Court. And the Foreword suggests that Legal Realism's orbit stretched farther than many appreciated at the time and that it reflected a broader movement to bring law and legal practice into alignment with social justice.⁵⁶

Though the Justice Department never acted on the NAACP's suggestion, the brief in the Tuscaloosa lynching case and Karl Llewellyn's Foreword reveal that Realist methodology worked for civil rights leaders to demystify what was going on and make the case for reform based on those facts. They turned cold law into a reform movement that in the next twenty-one years remade the world.⁵⁷

⁵⁵ See, e.g., Alfred L. Brophy, *Invisible Man as Literary Analog to Brown v. Board of Education*, in RALPH ELLISON AND THE RAFT OF HOPE: A POLITICAL COMPANION TO INVISIBLE MAN 119-33 (Lucas Morel ed. 2004).

⁵⁶ Thus where many, like Neil Duxbury's *Patterns of American Jurisprudence*, focus on the limitations of Realism's reforms, linking Realism's methods to the civil rights movement suggests that the Realist agenda was more successful than we have appreciated. DUXBURY, *supra* note 35, at 162 (discussing limitations of Realism's accomplishments).

⁵⁷ See generally KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012); SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915 (2013); ROBERT COTTROL, RAYMOND DIAMOND, AND LELAND B. WARE, BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION (2003). How that technology came into the hands of the Realists and Civil Rights Movement – whether by independent development of those techniques, by drawing on a common core of cultural values, or by one influencing the other – is worthy of a lot of discussion at another time.

Appendix

Karl N. Llewellyn, Foreword, Memorandum Brief for the Attorney General of the United States, In re: Prosecution of R.L. Shamblin, Sheriff of Tuscaloosa County, Alabama, under Section 52, Chapter 3, Title 18, United States Code (R.S. 5510).⁵⁸ [Now 18 USC sec. 242]

1 The enclosed brief is a product of a situation. Behind the cold points of law is a crying
2 need of fact. Pages (31) to (41) will burn like acid in any unsuspecting reader's mind. Lynching
3 is now being used, deliberately, to "teach" Negroes that outside organizations must not be
4 permitted to defend them in court, though they be on trial for their lives. It is no longer a
5 question of the individual defendants. Nor is it a question of the crime of which the individual
6 happens to be accused. It is, for the lynchers, a question of covering institutions as they are
7 against implicit challenge even in the courts of law. "Keep this case from being another
8 Scottsboro Case"-- by driving the defendants' legal counsel out of town; and then by lynching the
9 defendants. With official connivance.

10
11 It is against this background that the story of the Tuscaloosa lynching, on pp. (8)-(13), is
12 to be read. It is this background that turns cold legal points into points of flame. The brief makes
13 clear that the Federal Government has power to intervene. The brief makes clear that it is the
14 duty of Federal officials to take action. When the baser elements of Southern communities turn,
15 not in sudden passion, but as a policy, against the law, when even the decent elements of the
16 same communities can "understand" such happenings (pp. (39)-(41)), the time has come for
17 intervention of a stronger power. The statutes have provided for that intervention. Will the
18 Government act?

19
20 KARL N. LLEWELLYN, Columbia University School of Law, New York.

The Llewellyn papers at the University of Chicago have a photocopy of the Foreword. See Karl Llewellyn Papers, 1893-1983, Subseries 2: Published Works of Karl Llewellyn with Annotations, Box 6, folder 6.

<http://www.lib.uchicago.edu/e/src/findingaids/view.php?eadid=ICU.SPCL.LLEWELLYNK>

⁵⁸ A typescript version of the Foreword is found in Anti-Lynching Campaign correspondence on lynching in Tuscaloosa, Alabama, Folder: 001527-008-0108 (Aug 1, 1933 - Oct 31, 1933), in Papers of the NAACP, Part 7: The Anti-Lynching Campaign, 1912-1955, Series A: Anti-Lynching Investigative Files, 1912-1953, Library of Congress.