

**Arthur Linton Corbin:
A Giant in the Law with Tenth Circuit Roots**

by

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Nowhere is the confusion between legal and moral ideas more manifest than in the law of contracts.... The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else.
– Oliver Wendell Holmes

A Kansan of modest origin, a public school teacher, he is celebrated as one of the great contracts scholars in the history of American law. A small town lawyer in Colorado, a reformer in legal education, he is best remembered for one of the monumental works of legal scholarship in the Twentieth Century. Arthur Linton Corbin was a true giant in the law and a man who proudly recalled his life and roots in Kansas.

Yet, this man of the Tenth Circuit is little known today. Some may know only of the set of books with the title of *Corbin on Contracts*. In any event, Corbin's story remains one that deserves to be retold to those interested in the history of the law in the Tenth Circuit.¹

Arthur Corbin is best remembered for his scholarly output. These ideas and his interpretations of contracts law have been extensively analyzed by others. It goes without saying that most works on the law of contracts will eventually cite to Corbin's treatise. This citation practice is reflected in the vast Westlaw databases where there are more than 15,000 references to "Corbin" in combination with "contracts" in the case and journal files. Acknowledging Corbin's scholarship as authority is one of those truisms in law practice today.

This essay addresses Corbin's life and his ties to Kansas and the Tenth Circuit. It is, however, written from a bibliographical perspective. Three lesser known examples of Corbin's influence over the growth and development of contracts law are identified. The connecting theme is that of Arthur Corbin and his legal scholarship.

¹ We often know little of the lives of even the most widely read authors. *See e.g.*, Bill Bryson, *Shakespeare: The World as Stage* (Atlas Book, 2007) at 19 where the author observes: "It is because we have so much of Shakespeare's work that we can appreciate how little we know of him as a person.... We hardly know what he was as a person."

The reader who wants more than this brief introduction can turn to the items noted in the selective bibliography.

Brief biography. Arthur Linton Corbin was born on the family farm in Linn County, Kansas, on October 17, 1874. The Corbin family, led by his widowed grandmother, had migrated to Kansas before the Civil War. Corbin's own father was a determined antislavery partisan and served in a Kansas regiment during the war. His family later moved to Lawrence, where Corbin graduated from the local high school. He attended the University of Kansas receiving his B.A. degree and a Phi Beta Kappa key in 1894.²

The Corbin family valued education. His mother was a country school teacher for many years. His sister earned her doctorate from Yale University and returned to spend a life teaching at the University of Kansas. Corbin Hall, a prominent residence hall at the university in Lawrence and one located near the site of the university's first building, was named for Dr. Alberta Corbin.³

Arthur Corbin's own life took a similar path in education. Following graduation, Corbin taught high school in Augusta and Lawrence, Kansas. But a legal education also seemed attractive to him. He sought out the advice of the legendary University of Kansas law school dean, "Uncle Jimmy" Green. Green urged him to read the hornbooks in preparation for a formal law school education.

Corbin did ultimately choose Yale Law School over the University of Kansas, entering in 1897 and completing his degree in two years instead of the three years set in the recently-adopted LL.B. degree course. While attending law school, Corbin "taught in the New Haven school system, played on the varsity baseball team, belonged to numerous student organizations and captured the two choicest awards for scholarship (the Betts and Jewel Prizes) offered by the school."⁴

After law school, Corbin practiced law in Cripple Creek, Colorado, until 1903. During those four years, he served some of that time as an assistant prosecutor. He considered this to be a minor law practice with little of real intellectual rigor. He even writes of realizing "the extent of

² Various aspects of Corbin's life are chronicled in Robert H. Jerry, II, *Arthur L. Corbin: His Kansas Connection*, 32 U. Kan. L. Rev. 753 (1984) and in Corbin's own article, *Sixty-Eight Years at Law*, 13 U. Kan. L. Rev. 183 (1964). Corbin writes that this article is an opportunity "to make a last statement of my conclusions as to legal education and as the nature and growth of 'law.'" Other conveniently published sources include collected memorial papers published in the *Yale Law Journal* at 74 Yale L. J. 207 (1964), 76 Yale L. J. 875 (1967), and 78 Yale L. J. 517 (1969).

³ Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 U. Kan. L. Rev. 183 (1964).

⁴ Arthur A. Charpentier, *Arthur Linton Corbin, 1874-1966*. 1 Corbin on Contracts v. Rev.ed. (West, 1993); and Corbin, *id.* at 184, where Corbin describes the study of law at Yale as "not too arduous."

my ignorance of the nature and growth of law” only upon his return to Yale.⁵

He was offered a position at the Yale Law School as an instructor in contracts law and where he taught for forty years until his retirement in 1943. Corbin remained an emeritus professor until his death in 1967 at the age of 92. He described his life as “sixty-eight years at law.”⁶ While Corbin was, at that very moment, describing a different period of years, the “sixty-eight years” proved to be somewhat prophetic. His death came almost exactly sixty-eight years after his graduation from Yale Law School in 1899.

These many years at Yale did not diminish Corbin’s strong feelings and ties for Kansas and the University of Kansas. In his 1966-67 report to the academic community, Judge James K. Logan, then dean of the University of Kansas School of Law, wrote of Corbin’s efforts undertaken to benefit the law school. Just prior to his death in 1967, Corbin appealed to McGeorge Bundy, president of the Ford Foundation in New York City, for an extraordinary grant of financial support to the School of Law. And he donated his personal copy of *Corbin on Contracts*, complete with the “marginal notes in his own hand,” to the law school’s library.⁷

A Life of legal scholarship. In retrospect, Corbin’s “sixty-eight years at law” seems to be much more than biography. It is, instead, an appropriate description of a life devoted principally to the study of the law of contracts. This life was crowned by the multi-volume treatise on contract law published by West Publishing Company over a number of years beginning in 1950.⁸ Yet Corbin did as much to reform the very methods of teaching and the ways of interpreting contracts law in the years before this treatise was published.

Hired by Yale to teach contracts law, Corbin was first required to use the prominent casebook, *Clark on Contracts*, with his assigned classes. *Clark* was then

widely considered the leading contracts law casebook.⁹ It reflected Christopher Langdell’s idea

⁵ *Supra* note 3, at 185.

⁶ *Supra* note 3.

⁷ James K. Logan, *Law School Dean’s Report*, 16 U. Kan L. Rev. 1, at 4 (1967).

⁸ There may be some small disagreement over the scholarly appraisal of Corbin’s principal work. Bernard Schwartz does not include Corbin in his list of the “Ten Greatest Law Books.” These include, instead, the notable books by James Kent, Joseph Story, Thomas M. Cooley, Christopher Langdell, Oliver Wendell Holmes, Benjamin Cardozo, Jerome Frank, James C. Carter, and Richard Posner. Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law 189-208* (Oxford University Press, 1997). Grant Gilmore has, however, labeled Corbin’s treatise as the “greatest law book ever written.” See Grant Gilmore, *The Death of Contract* 57 (Ohio State, 1974).

⁹ *Supra* note 3, at 185. The development of contracts casebooks is extensively reviewed in an article by E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406 (1987). Farnsworth observes that Arthur Corbin had been teaching for nearly 20 years before his first casebook was published in 1921. But it may have been as late as 1920 before Corbin had “thought through

of the casebook as a tool for teaching the case method in American law schools. The underlying pedagogical approach of Langdell's case method required the identification of a series of first principles which were to be applied by the courts in resolving contractual disputes¹⁰. But, Langdell's ideas were jurisprudential as well.

Corbin didn't find either the formal Langdell case method approach or the then popular casebooks to be very useful in teaching the law of contracts. Late in his life, he cogently expressed how misdirected legal education was when he first studied the law: "[t]he assumption had long been that "the law" was definite, a system of plain rules that were merely to be learned and applied."¹¹

Corbin believed there must be a better and more productive way to teach contracts law. His own legal scholarship, displaying most of the hallmarks of the 20th century movement known as American legal realism, soon proved to be that better way. The legal realists generally criticized the exclusive reliance on the case method or any form of doctrinaire, abstract, or formalistic teaching or scholarship. The legal realists, furthermore, argued that the traditional casebook should be modified to include statutory materials, law review articles, and other notes, questions, or problems. These new collections of teaching materials dramatically differed from the existing casebooks that relied exclusively on court decisions and opinions.¹²

Corbin's first casebook was published by West Publishing Company in 1921. For Corbin, this casebook reflected his own considered views that the law evolved through the identification and application of rules and principles. For this alone, Corbin would not appear too revolutionary. But Corbin saw the growth of the law as an evolutionary process. Corbin described this process in one of his earliest law review articles where he concluded that "[t]he law's principles consist of such generalizations as may tentatively be made from a vast number

many of the hard questions of organization and scope that confront a treatise writer." See Farnsworth at 1425.

¹⁰ The study of law, at the time Corbin returned to Yale to teach, was described this way: "The instructors at the law school, fine and outstanding men, as Corbin recalled, were usually judges and lawyers who taught only part time and were consequently unavailable to their pupils. These men believed that the common law could be reduced to a few fundamental principles which students had to learn by rote before they could fruitfully study cases." Friedrich Kessler, *Arthur Linton Corbin*, 78 Yale L. J. 517 (1969).

¹¹ The emphases are in the original letter written to Donald Bostwick. See Donald Bostwick and M.H. Hoeflich, *Arthur Corbin and the University of Kansas School of Law: Four Letters*, 54 U. Kan. L. Rev. 1115, 1121 (2006).

¹² An introduction to American legal realism, as a school of jurisprudential thought, can be found in many sources. The interested reader seeking basic information might turn to Bailey Kuklin and Jeffrey W. Stempel, *Foundations of the Law: An Interdisciplinary and Jurisprudential Primer* (West 1994). For a readily available electronic source, see Legal realism, http://en.wikipedia.org/wiki/Legal_realism (last visited Sept. 3, 2009).

of individual instances.”¹³ But he also added a noteworthy caveat:

The fact that generalizations based on the cases can never be more than *tentative* working rules need not seriously disturb either the practicing lawyer or his bargaining client. All our footsteps through life are guided by nothing better than *tentative working rules*. However well settled the rules may be, their application in life is always uncertain.¹⁴ (emphases added)

Arthur Corbin frequently referred to his own research as an effort to find “working rules”; and his scholarship as an attempt at identifying “tentative working rules.”¹⁵ In that sense, Arthur Corbin probably was a legal scholar firmly within the legal realist movement. But the label may also be an illuminating way of classifying the lifetime of work exemplified by Corbin’s “sixty-eight years of law.”

Analyzing the reach of contracts law. Corbin’s published legal scholarship, however, went far beyond textbooks for law students and legal education. He saw a need for an organization devoted to the systematic analysis of American law. Such an organization might prove to be influential not only to the legal profession but to the broader American public as well in an educational capacity. To that end, Corbin helped organize the American Law Institute in 1923.

The American Law Institute is an organization comprised of prominent judges, law professors, and attorneys. Among the Institute’s most familiar efforts are the various *Restatements* of the law designed as tools for clarifying much of the complexity of the developing American case law. Arthur Corbin served as co-reporter for the first *Restatement of Contracts* which was published by the Institute in 1932.¹⁶ It became a work of scholarship that reflected much of what Corbin found to be important in contracts law:

The *Restatement* was not and could not be a mere rewording of the rules and principles that had previously been stated in other words, a mere putting of “old wine in new bottles.” The work required a “choice” among varied and conflicting rules and principles, the abandonment of some and the substitution of new ones in new words. You may be sure that the learned doctors did not always agree upon the choices that were made. There is no doubt in some places some degree of improvement was made. Discussions were

¹³ Friedrich Kessler, *Arthur Linton Corbin*, 78 Yale L. J. 517, 520 (1969).

¹⁴ Arthur L. Corbin, *The Law and the Judges*, 3 Yale Rev. 234-50, at 239 (1914).

¹⁵ *Supra* note 3, at 187.

¹⁶ Robert H. Jerry, II., *Arthur L. Corbin: His Kansas Connections*, 32 U. Kan. L. Rev. 753, 759 (1964).

useful and effective, and the result constituted *one more move in the evolutionary development of law*. (emphasis added)¹⁷

For Corbin, furthermore, publication of the *Restatement of Contracts* didn't crystallize the law of contracts. His own 1937 law review article summarized the "recent developments" in contracts law.¹⁸ In that article, Corbin writes that "[t]here is only one way to record accurately the progress of any branch of the law over a period of time; that is to review all of the cases and statutes affecting it that have been litigated or enacted during the period."¹⁹ This restated Corbin's long-held belief that any interpretation of the law is merely a tentative draft.²⁰

Other bibliographical mysteries. Even though Arthur Corbin's legal scholarship was extensively published and remains widely available, there are several bibliographical mysteries which have arisen from the gaps in his own personal papers. Scott Gerber, a legal historian at Ohio Northern University, has written of two such unusual but significant bibliographical matters. The first is an aborted contracts casebook proposed by Corbin but never finally published. The second is the actual loss of Arthur Corbin's personal papers. Adding to the mystery surrounding the existence of Corbin's personal papers is an open question, first identified by Joseph M. Perillo, about the disappearance of Corbin's handwritten draft revision of the first *Restatement of Contracts*.

Gerber writes of finding correspondence between Corbin and Lon L. Fuller, a noted legal philosopher at Harvard Law School, which explored the possibilities of a collaborative contracts casebook. Gerber first learned of the proposed contracts law casebook during a search for Arthur Corbin's personal papers. But it was only in a file of Fuller's papers at the Harvard Law School that the idea of a proposed casebook was first discovered.

¹⁷ *Supra* note 3, at 186.

¹⁸ Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 Harv. L. Rev. 449 (1937).

¹⁹ *Id.*

²⁰ Corbin emphatically believed "[t]hat the truth is that *all* rules of law and human society are no more than tentative working rules, based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life." *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 Yale L. J. 311 n.1 (1964).

The casebook would have brought two of the “giants of American legal education” together as collaborators.²¹ Fuller was, most of all, a legal philosopher. He is best remembered for his book, *The Morality of Law*, and his law review article, “The Case of the Speluncean Explorers.”²² Fuller remains influential today for the view that an acceptable legal system must also reflect an underlying moral system.

The proposed collaboration never came about. Fuller published his own casebook, *Basic Contract Law*, in 1947. The new casebook was organized with an opening chapter focusing on contracts remedies. Corbin published the third edition of his own casebook the same year with its opening materials focusing on the formation of contracts. Gerber concludes that it was “Langdell’s ghost” that actually doomed the casebook collaboration. But it was also due to a significant disagreement about the way the law of contracts should be taught.

The mystery of Corbin’s missing personal papers first came to Scott Gerber’s attention through email correspondence with Fred Shapiro, a librarian at the Yale Law Library. Shapiro had first written that there were no Arthur Corbin papers at Yale Law School. But, in later correspondence, Shapiro observed that “[p]erhaps the strongest indication that they [i.e., the papers] existed at one time is the fact that Laura Kalman cites to Arthur Corbin papers in her book ...”²³

Following an extensive search for the lost Corbin papers, Gerber concludes that most of the personal papers were probably lost in a 1959 fire at Corbin’s home. The loss of most of Corbin’s personal papers also leads Scott Gerber to this conclusion:

... one of the cruelest ironies in the history of American law will be perpetuated. Arthur Linton Corbin, *the* leading opponent of the parol evidence rule, will have his own legacy judged solely by the “four corners” of his published work. (citations omitted)²⁴

And, finally, Joseph Perillo has compiled a small amount of correspondence between Corbin and Robert Braucher over Corbin’s suggested revision of the first *Restatement of Contracts*.

²¹ Scott D. Gerber, *Corbin and Fuller’s Cases on Contracts (1942): The Casebook That Never Was*, 72 Fordham L. Rev. 595 (2003).

²² Lon L. Fuller, *The Morality of the Law* (Yale University Press, 1965); *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949). Peter Suber has labeled the law review article as “the greatest fictional legal case of all time.” Peter Suber, *The Case of the Speluncean Explorers: Nine New Opinions* ix (Routledge, 1998).

²³ Scott D. Gerber, *An Ivy League Mystery: The Lost Papers of Arthur Linton Corbin*, 53 S. C. L. Rev. 605, 607 (2002).

²⁴ *Id* at 638. Gerber specifically cites to Corbin’s analysis of the parol evidence rule in his article *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L. Q. 161 (1965), one written late in Corbin’s life.

The suggested *Restatement* revisions were included in a paper handwritten by Corbin. Corbin noted that this revision was the culmination of the years he devoted to the research and writing of his multivolume treatise on contracts. He also claimed to have sent the handwritten draft to Herbert Goodrich, then director of the American Law Institute.²⁵

The handwritten revision was, apparently, not used by E. Allan Farnsworth, the final *Restatement* reporter, because Farnsworth believed Corbin's treatise to be "a more influential source."²⁶ As with other Corbin papers, the original handwritten draft of a proposed new *Restatement* has been lost.

Concluding thoughts. Arthur Linton Corbin will be long remembered as a scholar with an enormous national reputation. He was also a man who fondly remembered his roots in Kansas and the Tenth Circuit. His is a story of achievement and accomplishment that go well beyond the very modest roots in Kansas. It is a story that deserves retelling to those interested in the full range of the history of the states that make up the Tenth Circuit.

For more information. For the interested reader, a comprehensive bibliography of his body of writing was compiled by the Yale Law Journal's editorial staff.²⁷

Other useful writings include: Donald Bostwick and M.H. Hoeflich, *Arthur Corbin and the University of Kansas School of Law*, 54 *University of Kansas Law Review* 1115 (2006); Arthur L. Corbin, *The Alumnus and the Law*, 32 *University of Kansas Law Review* 763 (1984); Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 *University of Kansas Law Review* 183 (1964); E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 *Mich. L. Rev.* 1406 (1987); Grant Gilmore, *The Ages of American Law*. (Yale University Press, 1977); Robert H. Jerry, II, *Arthur L. Corbin: His Kansas Connections*, 32 *University of Kansas Law Review* 753 (1984); Laura Kalman, *Legal Realism at Yale, 1928-1960* (University of North Carolina Press, 1986); Friedrich Kessler, *Arthur Linton Corbin*, 78 *Yale Law Journal* 517 (1969); and Louis H. Pollak, *Arthur Linton Corbin*, 76 *Yale Law Journal* 875 (1967), which includes memorials by Louis H. Pollak, Ashbel Green Gulliver, Fleming James, Jr., and Friedrich Kessler.

²⁵ For a complete examination of this issue, see Joseph M. Perillo, *Twelve Letters From Arthur L. Corbin to Robert Braucher Annotated*, 50 *Wash. & Lee L. Rev.* 755 (1993). In a letter to the Yale Law Review editors compiling a bibliography of his published writings, Corbin describes this as a "'one-man revision' of the entire Restatement.'" Hereinafter note 27, at 322.

²⁶ *Id.* at 756.

²⁷ *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 *Yale L. J.* 311 (1964). One significant item was omitted from this bibliography: Arthur L. Corbin, *The Alumnus and the Law*, 32 *U. Kan. L. Rev.* 763 (1984), a new printing of an alumni address delivered by Corbin on June 5, 1906, at the University of Kansas. This 1906 address is early evidence of the development of some of Corbin's ideas in his later legal scholarship.

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