CARL H. FULDA:* A FRIEND'S TRIBUTE

TED BOEHM**

Carl Fulda's warmth and intellectual excitement sired my affection and admiration. There must be no delusion: to think about Carl now would never be objective for me. This tribute is unabashedly subjective and I would not have it otherwise.[1] To deny the means to speak of him in the first person would be at once crippling and stilted.

Fulda became my instant friend at Ed Peters' house, not long after he came to Columbus. I first noticed his flattering interest in me; after that everything between us came easy! A backyard gabfest stretched into months of neighboring, of socializing at law school, university and grade school gatherings (our kids were together too), just plain visiting, and then ultimately to plans of family travel.

Next to his energy and enthusiasm, the most notable thing about Carl was his frequent laugh, often loud. Hardly a movie-type man (a peculiar leathery look of his skin was marked by numerous cutaneous imperfections which disappeared after the first five minutes of acquaintanceship), his generous grin was a source of constant sparkle. He shared with me his sense of wonder over the latest tales and jokes from the workaday world. He laughed at stuffed shirts, his friends and others, sometimes called them names, and kidded the university and professional and political world around us. Seldom awed by postures, at a ponderous lecture by a solicitor general (sometime back, this was), he passed me a scribbled note: "He has no terminal facilities." The message was read as it moved from hand to hand along a row of people in the audience; a ripple of suppressed titters proved that Carl's wit had said it well again.

Carl never complained directly to me that he was a victim of Hitler's Nuremberg policies.[2] That they affected him, I have no

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* [Ed. note] The Board of Editors wish to recognize Carl Fulda's contributions as professor at Ohio State College of Law from 1954-1964 by publishing these remarks by two of his former Columbus associates.

** Member of Ohio Bar.

[1] For Carl's vita see 1 WHO'S WHO IN AMERICA 1078 (38th ed. 1974). For another treatment, see Professor Emeritus Robert E. Mathews, *In Memoriam, Carl H. Fulda*, 53 TEXAS L. REV. 419 (1975).

[2] Ludwig Anton Fulda (1862-1939), Carl's father, was a prominent playwright, poet, and lecturer in Germany during a period spanning the turn of the century. He translated works of Moliere, Rostand and Ibsen. Nominated for the Schiller Prize in 1893, it was denied him by the Kaiser because he had offended the throne in a play called "The Talisman." He received

doubt. His resentment surfaced and showed up in passion and anger when implications of the speakers rule disputes at Ohio State presaged, to him, a dangerous drift. He was alarmed. Not merely naturalized, Carl had become a dyed-in-the-wool American. With a big laugh, he told me that, on a trip to teach at Tübingen somebody on the airplane had patronizingly inquired if he had ever been in Europe before. That pleased him. Summers abroad demonstrated that he had reached the ultimate: reared in the German tradition where the professor was a special man, entitled to respect and deference, Carl had returned as an American professor, to lecture to Europeans on American law. His face showed his joy as he spoke about it.

Carl's handwriting was strong and shapely and highly legible, and his writings were the same; forceful, balanced, free of the muddled, heavy verbiage too often observed in academia. He sought practical counsel from others, including my long-time partner.[3] He mailed a draft and a note, seeking, in his characteristic bold hand, my "merciless criticism." (The full-bodied content and flowing style were beyond improvement.) He invited me to participate in a seminar; he relished the classroom dispute between us over the interlock between Federal and state law in a tax case,[4] the subject for the day's study. Soon after his debut in Columbus, he published a short note and introduced "Iron Curtain Laws" into Ohio legal literature, popular jargon which aids the researcher in the Banks Baldwin index to the Ohio Code.[5] His short summary did not anticipate the heavy weather the statute has faced.[6]

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numerous notices in American periodicals for four decades, 1890-1930. *The Visit of Ludwig Fulda*, 40 CURRENT LITERATURE 199 (1906); 5 NEUE DEUTSCHE BIOGRAPHIE 717 (1961). After World War II, Carl Fulda received modest remittances of royalties from his father's literary works.

[3] Carl quoted William E. Rance in a letter June 10, 1958, to Prof. S. Chesterfield Oppenheimer. Personnel file, Carl H. Fulda, College of Law, Ohio State University [hereinafter cited OSU/LSA (law school archives)]. He also suggested to the editors that Bill be asked to review Ernest W. Williams, *The Regulation of Rail-Motor Rate Competition* (New York, 1958). They did; he did; the result was published in 108 U. PA. L. REV. 283 (1959).

[4] Lyeth v. Hoey, 305 U.S. 188 (1938).

[5] Younger people may not know that the term "iron curtain" came from Winston Churchill's speech at Fulton, Mo., in 1946. Banks Baldwin's Code uses the jargon. 1974 Index, p. 224. Fulda, *Legatees Behind the Iron Curtain*, 16 OHIO ST. L. J. 496 (1956) was matched by a longer treatment, Margolis, *Beneficiaries Behind the Iron Curtain*, 7 WEST. RES. L. REV. 179 (1956), which suggested the constitutional question.

[6] Zschernig v. Miller, 389 U.S. 429 (1968) struck down the Oregon Iron Curtain statute of 1957 on the ground that it was state legislative interference into the conduct of foreign affairs, a Federal executive prerogative. Two Ohio lower court cases reached the same result. First National Bank v. Fishman, 16 Ohio Misc. 185, 43 Ohio Op. 2d 384, 239 N.E.2d 270 (Hamilton Co. Probate Ct., 1968); and Mora v. Battin, 303 F. Supp. 660, 49 Ohio Op. 2d 133 (N.D. Ohio, E.D. 1969), where a three-judge district court applied the Zschernig case to Ohio probate law

Carl Fulda was never my *classroom* teacher. (He graduated from Yale Law School about the same time I finished my wonderful years at the College of Law at Ohio State.) For a balanced view of that facet, I turned to my younger friend, himself a law professor, a former practitioner, an experienced candidate for judicial office. My confidant, a Coif graduate, remembered Carl with evident admiration and affection. He recalled that Carl was rigid and austere in class, a tough, uncompromising, hard driver, impatient with submarginal student performance. Far advanced in learning, a demanding teacher, Carl was said to be "a concrete theoretician," and a "pragmatist." My friend recalled Carl's tale of the New Deal days when the Administrative Procedure Act was being considered. Carl explained that both the American Bar Association and the American Political Science Association had been requested to submit suggestions. The scientists never produced a bill; the theoreticians couldn't come to an agreement. The hard-nosed practical people of the bar, he said, faced with a deadline, produced a draft which became the basis for the statute. The lesson was plain: Carl emphasized that lawyers must deal with reality, answers, and time, whatever the defects.

There was joy to be found in looking through Carl's records, to count anew the string of triumphs which converted him into a scholar and carried him into half a dozen nations around the world. And it is especially gratifying to air a confidential description and a prophesy by Dean Frank Ransom Strong, prepared for the eyes of the Ford Foundation:

> [Carl Fulda] is, in my considered judgment, a scholar in the best sense of this term - outstanding in intellect, creative and imaginative in his thinking, superbly trained in the best tradition of both the civil and the common law, contagiously enthusiastic and tenaciously thorough in his research, and unusually effective and literary in written expression . . . . [He] is a mature, proven scholar . . . (with) abundant experience in legal research and writing . . . .[7]

The Dean went on to predict that Carl's work "will constitute a major contribution to the literature of the field and thus to the educa-

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and found the statute defective.

Courts in other states seem to be struggling to get around the rule of Zschernig case. Among others, see Shames v. Nebraska, 323 F. Supp. 1321, 1332 (D.C. Neb. 1971); Estate of Sam Leikind, 22 N.Y. 2d 346, 239 N.E.2d 550 (1968); Estate of Esther Kish, 52 N.J. 454, 246 A.2d 1 (1968).

[7] Ford Foundation, Confidential Reference Form, prepared by Frank R. Strong, November 25, 1958; OSU/LSA.

tion of law students everywhere . . . ." His prophecy came to be supported by a mountain of published reviews of Carl's book, *Competition in the Regulated Industries: Transportion.* Little, Brown & Co., his publishers, proudly paraded laudatory extracts from ten prestigious law journals. The book was a "pathbreaking yet detailed synthesis . . . unreservedly recommended . . . ,"; "a gold mine for the student and the practitioner alike . . . "; "a useful and coherent account . . . "; "highly readable, carefully documented . . . , an indispensible background for understanding . . ."; "clear, succinct, well ordered and well indexed . . . . [a] chaos of decisions [has been transformed] into an understandable pattern . . . ." More was said: the volume was "an invaluable piece of searching analysis . . ." reflecting "painstakingly careful scholarship, incisive and critical analysis and a clear perspective . . . [in a] clear and refreshingly unpretentious style . . . "; "a major contribution to a better understanding of complex problems . . ."; "a valuable research aid . . ."; "at a most opportune time . . ."; "[the basic considerations have been brought] into a sharp focus . . . ."[8]

Carl's move to Ohio State from Rutgers was caused, so to speak, by his own excesses. Dean Strong had recognized Fulda as a desirable addition to the faculty, but felt that the College lacked sufficiemt money to coax Carl to come to Columbus. There was hope. Professor John Honnold wrote from Philadelphia,

> Carl's most serious problem at Rutgers is that they have an evening school as well as a day school, and every one must do his share toward carrying the burden of the evening division. Carl throws himself so fully into his class work that it is very hard for him to get unwound after an evening class; the result is a serious problem for him. Consequently, I believe he would be willing to make some sort of salary concession (if it) would not too seriously interfere with the support of his family. For that reason I believe he could be enticed away . . . . I have on various occasions presented Carl's name for appointment here (at the University of Pennsylvania Law School). The principal problem has been [that there have been no vacancies where he can be fitted in.[9]

Just before he arrived in 1954, Fulda wrote Frank Strong that

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[8] A series of sizable quotations from ten different reviews were organized into an undated sales flyer by Little, Brown & Company. The quotations came from *California Law Review, American Bar Journal, Cornell Law Quarterly, Yale Law Journal, ICC Practioners' Journal, Rutgers Law Review, Pennsylvania Law Review, Northwestern University Law Review* and *Texas Law Review.*

[9] Professor John O. Honnold to Strong, March 17, 1954. OSU/LSA.

he inferred, somehow, that the "students (at Ohio State College of Law) seem to be relatively free from the bar examination complex and therefore more receptive, to what, for lack of a better term, might be called 'cultural courses' . . . . [I guess that the Ohio] rules for admission to the Bar are so constructed as to prevent that complex from arising . . . ."[10] I know not, but my guess is that Carl was wrong on both inferences: two decades later, the struggle still goes on. As his French speaking wife Gabrielle (Gaby, we fondly called her) might have said, *"Plus ca change, plus c'est la meme chose"*.

Carl's interest in the scholastic orientation of Ohio's students and the examining bent of the bar examiners would likely be his current concern. A voracious reader, he would know that Emeritus Dean Strong, by now teaching at North Carolina, has become deeply involved in teaching law teachers how to teach;[11] and that the professions good friend Doctor Watson (not a Conan-Doyle contemporary) is saying that somehow, too much time consumed in school by the socratic method contributed as a partial cause for Watergate:

> There remains however the need to understand better the complicated emotional reactions which join as well as interfere with intellect when one is searching for elusive Truth. Regrettably, law schools do little; (they seem, by emphasis on the purely intellectual, (to) actively inhibit (the) growth (of this knowledge). This deficiency in legal education is a partial cause for Watergate, for which law schools must have some responsibility. To graduate students into situations with a known professional risk for which they developed no coping capacity . . . is poor training, and it leads to lots of casualties and catastrophies.[12]

If a high priest of law teaching worries about law, and the practical failures of law school education shake the foundations of a huge political hierarchy, to say nothing of the Republic itself, bandaid prescriptions have been supplied from other sources. *Item*: the Supreme Court of Indiana has published minimum standards for re-

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[10] Fulda to Strong, June 1, 1954 (from Newark, N.J.). OSU/LSA.

[11] Strong, *Pedagogic Training of a Law Faculty*, 25 J. LEGAL ED. 226 (1973). Emeritus Dean (now Professor) Strong leveled a bitter charge; he decried "the notorious financial anemia of law school budgets . . . [There is need] to obliterate the damning view of the past that legal education can be inexpensive . . . night law schools . . . bear much of the responsibility for this widespread but utterly absurd notion . . . ." at 233, 237 passim. Dean Strong was formerly President of the Association of American Law Schools, and is generally recognized as one of the greats in the teaching branch of the profession.

[12] Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 23 J. LEGAL ED. 441, 442, 445-48 (1974). Dr. Watson is Professor of Psychiatry, University of Michigan Medical School, and Professor of Law University of Michigan Law School.

quired subject matter study as preconditions to admittance to the bar exams in the Hoosier state. The implication seems to be that the law schools have spent too much time on subjects of dubious nexus with daily practice.[13] *Item*: in New York, federal courts now require minimum federal trial practice qualifications, responding to charges that too many lawyers are not properly trained in trial practice to provide the minimum quality representation required by due process of law.[14]

Mistrust of the propensities of some law teachers was highlighted by one of their best. Dean Prosser's trenchant satire, *"The Decline and Fall of the Institut,"* is one of the most effective sarcasms ever to pass before my eyes.[15] It reflected the kind of bar questions I hear my colleagues asking: in an increasingly complicated practice, what is the purpose of law school study of, say, the legal system of Upper Swobodia, half a world away, at best representing a remote culture? Does that kind of acculturization help the practitioner in his search for conscientious competence? And aside from the individual's choice, since the public pays the bill, or most of it, did this training help the creaking machinery of justice, this morning, in this county or federal district?[16] And most personally, what of the risk to the lawyer's own pocketbook arising from incompetence, of which some part might be traceable to spending educational time on material not related to reality?[17] Overworked lawyers in Mansfield, Medina, Mas-

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[13] Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. LEG. ED. 449 (1974). The entrance requirement was adopted in December, 1973.

[14] As one example, see the report by Pincus, *Law School Clinical Training for Professional Responsibility and Competence*, 6 ALI-ABA CLE Review #29, 1 (July 18, 1975). William Pincus is President of the Council on Legal Education for Professional Responsibility of New York City.

[15] Prosser, *The Decline and Fall of the Institut*, 19 J. LEG. ED. 41 (1966). This delightful satire, done with consummate skill, ought to be studied as a demonstration in good writing. Quite apart from its message, which is persuasive, perhaps convincing, it is just plain good reading. As this goes to press, headlines by the American Bar Association ask a related question: "Malpractice Crisis: Are The Lawyers Next?" 20 ABA News, No. 6, p. 1 (July, 1975).

[16] The public has an interest in competence of counsel in the administration of criminal justice; incompetent representation is a ground for reversal of a conviction. Annot. 74 A.L.R.2d 1390 (1960). The standard has been raised from the old farce and travesty rule so that now, representation must be reasonably competent, at least in the Fifth Circuit. United States v. Beasley, 479 F.2d 1124 (5th Cir. 1973).

[17] If the duty to maintain professional competence is not enough by itself (CODE OF PROFESSIONAL RESPONSIBILITY, CANON) 6, 23 Ohio St. 2d 35 (1970), there slumbers at least the selfish necessity inherent in the increasing probability of civil liability for malpractice. Thus a lawyer can be held liable for an inheritance that beneficiaries did not receive because of faulty drafting of a will. Lucas v. Hamm, 56 Cal. 2d 583 364 P.2d 685, 15 Cal. Rptr. 821 (1961). In another case, an attorney was held liable for $100,000 because of his failure to conduct adequate

sillon and Mentor must be aware of heightened standards implicit in the impending demise of the locality rule.[18] How will that affect legal education?

Having wondered about how to teach, and what to teach, amid Prosser's description of the dire consequences of young turk irresponsibility, now we see that, lately the problems are going public. Dean Goostree in the general alumni magazine, *Capital*, emphasized Capital University Law School's impressive track record:

> of the 342 students who have taken the Ohio Bar examination from 1967 to the present only six have failed to pass it in their first attempt. Three of these have repeated the examination and passed the second time. The other (three) students have not tried a second time. Percentage wise, 99.1 percent of all candidates have passed the bar, with 98.25 percent passing it the first time they tried. Very, very few law schools can match this record . . . .[19]

Pretty obviously, this accolade to Carl Fulda by his lawyer-neighbor won't be the means to set straight the what and how of legal

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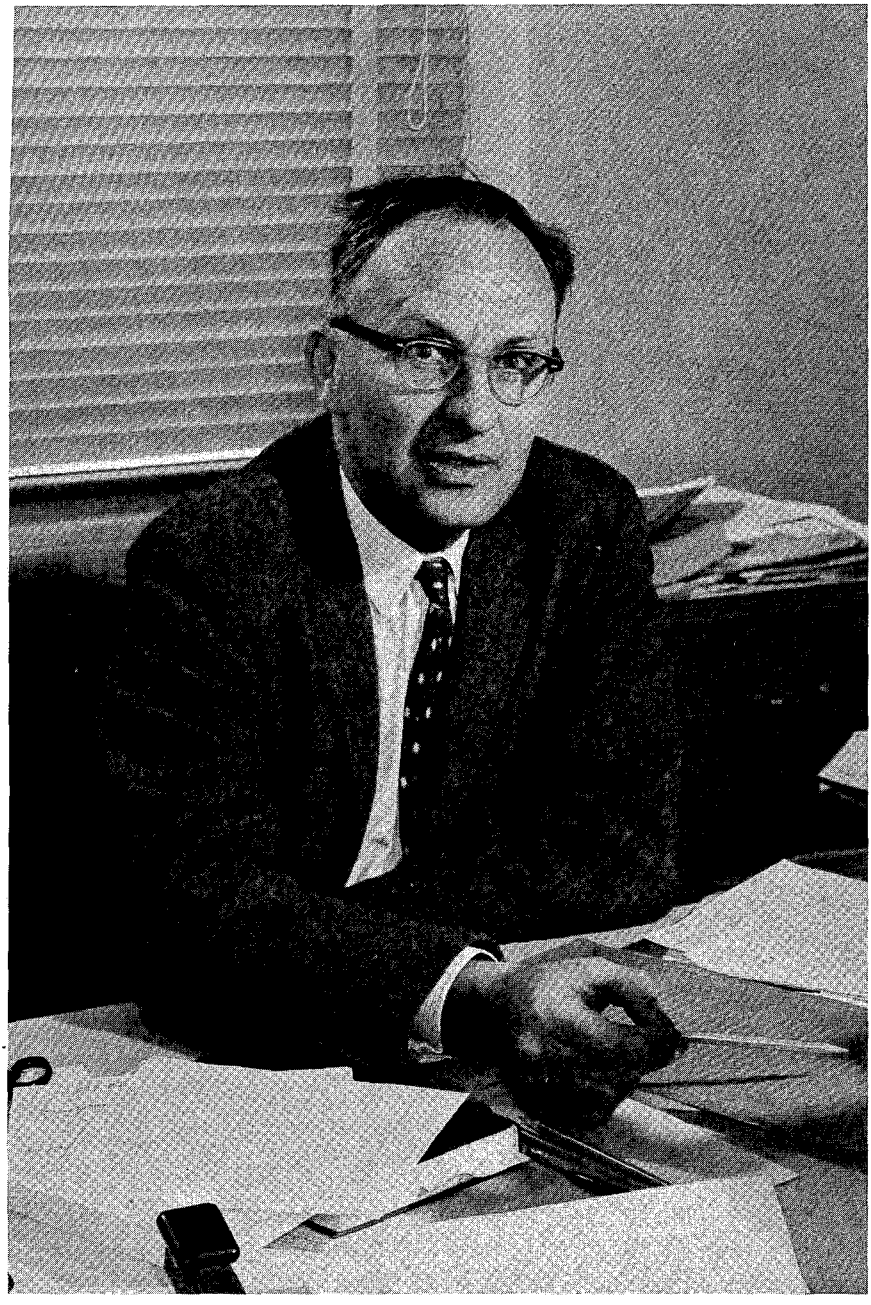
legal research into a community property question in divorce litigation. Smith v. Lewis, 13 Cal. 3d 315, 530 P.2d 589 118 Cal. Rptr. 621 (1975). In another field, erroneous tax advice arising from negligence has been held to be the basis for recovery against a practitioner. Bancroft v. Indemnity Ins. Co. of N. America, 203 F. Supp. 49 (D. La. 1962) (CPA held liable for bad advice on tax effects of a corporate reorganization); L.B. Laboratories Inc. v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952) (CPA held liable for delay in filing); Linder v. Barlon, Davis & Wood, 211 Cal. App. 660, 27 Cal. Rptr. 101 (1962) (CPA held not liable, under the facts, for paying tax on non-taxable widow's death benefit); Rassieur v. Charles, 354 Mo. 117, 188 S.W. 2d 817 (1945) (CPA held liable for extra tax cost in treatment of security transactions); Groh, *The Responsibilities and Legal Liabilities of the CPA in Tax Practice*, 25 J. TAXATION 196 (1966).

[18] The standards of requisite quality seem to be mounting: the availability of transportation and the ease of communication may have liberated the small centers from the risk of substandard professional services. There have been signs of the imminent demise of the locality rule. Two jurisdictions no longer measure professional duty by the standards of the smaller community, but by a wider area coextensive with all the facilities readily available and accessible. Brune v. Balinkoff, 354 Mass. 100, 235 N.E.2d 793 (1968); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967), noted in 46 N.C.L. REV. 680 (1968); Stewart *The Locality Rule in Medical Malpractice Suits*, 5 CALIF. WES. L. REV. 134 (1968). Lawyers are not generally engaged as parties in a conspiracy of professional silence, the practice that has partially sparked the trend toward minimizing use of the local area rule. *See* Avey v. St. Francis Hospital, 201 Kan. 687, 442 P.2d 1013 (1968); Stewart, supra at 132. How long will it be until malpractice in the legal profession will be measured by a broader area standard? Such change might also call for a duty to consult with specialists available in the area. For a partial answer, see Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865 (1968).

[19] Lewis Holm, *Capital University Law School*, 59 CAPITAL no. 1 (April, 1975), (a magazine circulated generally to alumni). The Holm article was originally published in Lutheran Standard, September 17, 1974. Comparable analyses for other schools are not readily available from statistics maintained by the Supreme Court. It would require an impractical effort to determine the relative records of other law schools.

education even if the why test implicit in Dean Goostree's low-pitch trumpeting were acceptable to all. My purpose here has been to set Carl up: to organize another delightful evening, to enjoy again his warmth and friendliness and enthusiasm, to watch his biases meld with his pragmatic approach to abstraction. If I could, I'd send him this material, invite him over for a martini, and wait for the joy to begin. The resulting encounter would be merely another in twenty years of delights, with more sure to follow, if Carl could also be around for the fun.



CARL H. FULDA
August 22, 1909—January 5, 1975