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THE DETERMINANTS OF LEGAL DOUBT

Frederick Schauer*

THE CASE LAW SYSTEM IN AMERICA. By *Karl N. Llewellyn*. Edited by *Paul Gewirtz*. Translated from the German by *Michael Ansaldi*. Chicago: The University of Chicago Press. 1989. Pp. xxxvii, 127. \$24.95.

Like *The Bramble Bush*,¹ Karl Llewellyn's *Präjudizienrecht und Rechtsprechung in Amerika*² was written not for the specialist but for the neophyte. But where *The Bramble Bush* was designed for the beginning American law student, *Präjudizienrecht in Amerika* was aimed at the German lawyer seeking to understand from a civil law background something about the American common law system.³ And just as *The Bramble Bush* (and *The Path of the Law* thirty years earlier⁴) was far richer theoretically than one would normally expect from an introduction for the novice, so too is *Präjudizienrecht in Amerika* a work of much more theoretical interest and novelty than the standard discussion of the rudiments of American law aimed at non-American audiences.

Präjudizienrecht in Amerika is hardly an unknown work. Extensively reviewed when published,⁵ and discussed in much of the secondary literature on Llewellyn in particular and Realism in general,⁶ it is properly considered one of Llewellyn's major works. Still, because it was written and published only in German, it was until now largely inaccessible to most of those who are interested either in Legal Realist theory or in the development of Llewellyn's thought.

With the publication of Michael Ansaldi's careful and fluid translation of *Präjudizienrecht in Amerika*, this gap in the corpus of Llewellyn in English has been filled. The book, published under the

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1. K. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

2. K. LLEWELLYN, *PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA* (1933).

3. The book was based on a series of lectures delivered by Llewellyn in Leipzig, in 1928-1929.

4. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

5. A list of reviews is set out at p. x n.3. Two of them, Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934), and Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199 (1933), have become important parts of the literature in their own right.

6. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). Parts of the book had been translated into English by Dawson and included within J. DAWSON, *COMPARATIVE LAW* 187-200 (1951).

translated title, *The Case Law System in America*, and edited by Paul Gewirtz, should eliminate any excuse for students of Realism to ignore this important work, and should as well provide a useful synopsis of much of Llewellyn's thinking for those whose exposure might previously have consisted only of *The Bramble Bush* and isolated excerpts from *The Common Law Tradition*.⁷

The Case Law System in America, as befits its provenance as a series of lectures to a German audience, contains much that genuinely is only an introduction for the novice. Consequently, most American readers can skim with little fear of loss the various parts of this short book that deal with the structure of American courts (pp. 27-34), the nature of the citation system (pp. 16-22), and the technicalities of civil procedure (pp. 34-42). Much more of the book, however, is far removed from simple factual exposition, and sets forth insightfully, creatively, and controversially many distinctly Llewellynesque ideas about how the American system of common law decisionmaking actually operates.

Perhaps the most important of these ideas, important precisely because it has been so little heeded, is Llewellyn's recurrent call for sociological inquiry into the nature of legal decisionmaking (pp. 9-12, 89-113). A sociological approach to legal decisionmaking stands in opposition to the now common normative mode of legal scholarship, in which prescribing desirable results to judges is the norm and everything else the exception. By contrast, throughout this book, as in much of the rest of his work, Llewellyn urges those who wish to understand the legal system to assess externally and empirically the actual nature of judicial decisionmaking, and to do so systematically rather than anecdotally. As this book makes clear, it is undoubtedly Llewellyn's view that such inquiry would show the extent to which there are indeed patterns of dealing with precedent as well as predictable patterns of judicial decisionmaking. These patterns, however, diverge more often than not from those that might be perceived simply from a literal reading of judicial opinions.

As Professor Gewirtz's introduction makes plain (pp. xvii-xxii), there is another dominant theme of this book: the continuing interplay between, on the one hand, a greater degree of judicial freedom in the use of precedents than classical legal theory would acknowledge and, on the other, the way in which a wide range of acculturating forces is likely to lead to that freedom being exercised by judges in largely parallel ways. The interplay of judicial freedom and acculturating forces results in more constraint than an exclusive focus on judi-

7. K. LLEWELLYN, *supra* note 1; K. LLEWELLYN, *THE COMMON LAW TRADITION — DECIDING APPEALS* (1960). And surely the most commonly read part of the latter work is the article originally published as Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

cial freedom or leeway would acknowledge, and consequently more ability to predict judicial decisions than one who had assimilated only the crudest and most caricatured forms of Realism would expect. Llewellyn's focus, then, is on the recurring patterns of lawyerly behavior, and on the degree of constraint and predictability that such recurring patterns facilitate. This concern shows the extent to which Llewellyn was among the most moderate of the Realists.

There can be little doubt that shared experiences bring shared perspectives. Because appellate judges are universally drawn from the ranks of practicing lawyers, and because practicing lawyers are almost universally characterized by having spent three years in American law schools more similar to each other than they are different, it should come as little surprise that the universe of appellate judges does not replicate in all respects the characteristics of the universe of human beings. Partly because of the internalization of professional norms of lawyering and judging, partly because such norms serve to create and reinforce a somewhat autonomous professional culture,⁸ and partly because of the self-selection that leads some people to become lawyers and others not (to say nothing of the social forces that lead some people to have the opportunity of becoming lawyers and others not), and some lawyers to become judges and others not (to say nothing of the social forces that lead some lawyers to have the opportunity of becoming judges and others not⁹), the range of likely appellate judicial reactions to a given problem is narrower than that of the population at large. Moreover, this narrowness is exacerbated by the way in which the methods, institutions, and structures of appellate decisionmaking themselves exercise a constraining force beyond that exercised by the similarity of perspective among the individuals inhabiting those institutions.

Still, there is another story to be told, and it is one that Llewellyn consistently avoids. Just as lawyers share much in common, so too do they differ in psychological makeup, political perspective, personal background, and self-understanding of their role. Although Llewellyn pays lip service to these and other sources of difference, he continuously focuses on the ways in which appellate judges see things similarly rather than differently.¹⁰

8. See generally N. LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (E. King & M. Albrow trans. 1985).

9. The parallel structure of the parentheticals should not be taken to be making a parallel statistical claim. To the contrary, it is quite possible that the opportunity to become a judge given that one is a lawyer is far greater than the opportunity to become a lawyer given that one is a resident of the United States.

10. Jerome Frank, Llewellyn's contemporary, and many modern scholars do not ignore the existence of differences among judges or the effect of those differences. J. FRANK, *LAW AND THE MODERN MIND* (1930); see also M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 45-51, 103-07 (1987); Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518 (1986); Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate*

The extent to which differences in background, social situation, psychological makeup, and political outlook make a difference in the outcome of judicial decisionmaking is likely to be a function of the size of the space within which judicial discretion operates. Here again Llewellyn's jurisprudential conservatism (which bears no necessary relation to political conservatism) comes through, a conservatism even more apparent now than perhaps it was then. Foreshadowing the contemporary work of Priest and Klein and others,¹¹ Llewellyn notes in this book that "we may pretty safely say, almost every case on appeal to a court of last resort could be decided just as easily, legally speaking, for the plaintiff as for the defendant" (p. 8). This to Llewellyn is decidedly not a statement about the essentially indeterminate nature of legal reasoning. Rather, it is a statement about the incentives that lead some issues to be disputed and others not, some disputes to be tried and others not, and some trial court decisions to be appealed and others not.

It is hard to get around this dilemma. If the proper outcome of the case were not really a matter of doubt, how is it that an honest, competent judge in the court of first instance could decide it "incorrectly"? Again, if the outcome of the case were not really in doubt, how is it that an honest, competent attorney could burden his client with the time and expense of an appeal if the trial court has rendered a "correct" judgment? The very fact that there is an appeal usually proves that doubts exist among professionals, unless the attorney is using the appeal merely as a dilatory tactic. [p. 8]

At this point in the argument Llewellyn appears agnostic about what it is that makes a case such that it could be decided, "just as easily, legally speaking, for the plaintiff as for the defendant" (p. 8). Throughout the book, however, he appears less agnostic, often expressing views sympathetic to the position that rules with an "invariant wording" (p. 73) would with little doubt "encompass many cases" (p. 73). "Insofar as these cases were known to the lawmaker before the rule was laid down, and insofar as circumstances have remained unchanged since that time, one can work with the rule deductively" (p. 73). Only when "the possibility of doubt arises" (p. 73) does the situation become different.

Similarly, Llewellyn claims that there are cases [such] that no one has any doubt about how to handle [them], but that no one had in mind when the rule was created. Nonetheless anyone who looked at the case and the rule at the same time would "recognize" that

History of the Conference on Critical Legal Studies, 36 STAN. L. REV. 391 (1984); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

11. Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); see also Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

the case *must* be governed by the rule. Here I maintain that no real "interpretation" of the rule is taking place. [p. 74]

None of this is crystal clear in the book, and interpretations other than my own are plausible. Still, much of this strikes me as making the essentially positivist (in Dworkin's sense¹²) claim that there is a body of doctrine called "the rules of law," that those rules have centers and peripheries that largely track the centers and peripheries of the meaning of their component linguistic parts, and that cases lying within the centers are such that competent lawyers recognize them as such; the consequence being that such cases are rarely disputed and even more rarely appealed to courts of last resort. As a result, the cases that are so disputed and appealed are the skewed sample of cases lying on the peripheries of the legal rules, such peripheries being themselves determined by recourse to linguistic meaning and little else.

The remarkable modesty of this claim becomes apparent upon consideration of an alternative explanation for the selection hypothesis. Suppose the legal system were such that the rules of law were taken merely as transparent probabilistic guides (rules of thumb) to morally correct results. In such a system it would be legitimate for a legal decisionmaker, such as a judge, to disregard a legal rule even within the center of its linguistic extension when application of that rule to some case would produce a morally incorrect result. Were that the case, even competent lawyers would have reason to create a dispute, bring a case to trial, or appeal an unfavorable result whenever they felt they could maintain a plausible argument for moral correctness, even if the plain linguistic meaning of a plainly applicable legal rule inclined in exactly the opposite direction. This is not, however, to deny the operation of the selection hypothesis. Even were moral correctness a winning legal argument it would still be true that only those cases in which two competent lawyers felt somewhat confident in advancing opposing positions would be disputed, tried, or appealed. But the array of cases so selected, although still unrepresentative of all legal

12. I append the parenthetical to note that I am referring here to positivism in the sense of a limited and pedigreed set of materials extensionally divergent from a society's totality of accepted social norms. This is the sense of positivism that Dworkin attacks in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-130 (1977), and R. DWORKIN, *LAW'S EMPIRE* (1986), and that others defend. See R. GAVISON, *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 21 (R. Gavison ed. 1987); J. RAZ, *THE AUTHORITY OF LAW* 37-121 (1979). For quite contrasting approaches to what positivism is all about, approaches rejecting the centrality of the "limited domain" idea, see J. COLEMAN, *Negative and Positive Positivism*, in *MARKETS, MORALS AND THE LAW* 3 (1988); Lyons, *Principles, Positivism, and Legal Theory* (Book Review), 87 *YALE L.J.* 415 (1977); Soper, *Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute*, 75 *MICH. L. REV.* 473 (1977). The debate continues. Compare Postema, *Positivism, I Presume? . . . Comments on Schauer's "Rules and the Rule of Law,"* 14 *HARV. J.L. & PUB. POLY.* (forthcoming 1991) and Schauer, *Rules and the Rule of Law*, 14 *HARV. J.L. & PUB. POLY.* (forthcoming 1991) with Coleman, *Rules and Social Facts*, 14 *HARV. J.L. & PUB. POLY.* (forthcoming 1991).

events, would be different, now representing an array of cases of moral doubt rather than of linguistic doubt.

Most readers will recognize this picture as similar to Dworkin's picture of the legal system. And if we substitute "social" for "moral" we come closer to Eisenberg's account of the nature of the common law.¹³ Other variants could be added as well. But the point I wish to make here is that even if Llewellyn is right about the concentration of hard cases in appellate courts, and about the consequent fallacy of generalizing from those "borderline" cases to the operation and effect of law in society at large (p. 1), little about the nature of legal decision-making follows from this premise. Llewellyn appears to think that the chief distinction between hard cases and easy ones derives from their linguistic/doctrinal extension, hardly a radical and hardly a Realist conclusion, and one diverging substantially from the picture that one would get from reading Frank or others similarly inclined.

That Llewellyn is a "conservative" on this aspect of legal theory does not necessarily make him wrong. Indeed, if (as he himself suggests) we take his view of doctrinal dominance as presumptive rather than conclusive, his conclusions strike me as largely correct.¹⁴ Yet in terms of many enduring debates about the nature of legal decision-making, it is nonetheless true that Llewellyn's comparatively narrow view of the determinants of legal doubt hardly puts him in the forefront of extreme challenges to traditional understandings of how the law operates.

Llewellyn's doubts are limited in a quite different sense as well. Although he occasionally acknowledges the cultural contingency of the various stabilizing factors that his work is noted for identifying (p. 10), Llewellyn just as often transmits the message of inevitability, such as when he claims that the gravitation toward moderately strong precedential constraint is the natural course of all lawyers and all legal systems (pp. 48-49). Surely to describe as both inevitable and inevitably desirable the control by the past that is necessarily part of any system that takes precedent seriously requires far more showing than we get here or anywhere else in Llewellyn's work. Llewellyn's position presupposes views about either the desirability of an existing state of affairs or the desirability of stability for stability's sake that can hardly be called necessary or universal.¹⁵ This is not to deny that some states of affairs may be worth entrenching, nor that stability for stability's sake might sometimes be desirable. When such goals are sought, a system of precedent is often a valuable instrument. But at certain times and in certain places there can be reasonable doubts

13. M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

14. See Schauer, *Formalism*, 97 *YALE L.J.* 509, 544-48 (1988).

15. See Alexander, *Constrained By Precedent*, 63 *S. CAL. L. REV.* 1 (1989); Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987).

about whether to entrench a state of affairs and about the value of stability for stability's sake,¹⁶ doubts that Llewellyn rarely seems to express.

In similar fashion, Llewellyn rarely expresses doubts about the choices that are built into the constraining factors he properly identifies. His faith in judges (if only they become self-aware), in the bar, and in the legal institutions providing the constraints is largely unclouded by doubts about the choices built into these constraints. He is rarely critical, for example, of the process of selecting lawyers whose uniform training and acculturation provides one of his stabilizing factors, nor of an adversary system of decisionmaking whose special style dampens potential diversity of decisions. Nor is Llewellyn's faith tested by the consideration of alternative arrangements that might provide equally constraining but substantively different constraint. Just as he appears relatively confident that doctrinal and linguistic uncertainty is the major source of legal uncertainty, so too does he appear equally confident that the sources of legal certainty are as fixed a part of the social landscape as are the rules of language. What emerges from this book, therefore, is an impression, at least partly attributable to what happens to most of us when we are called upon to explain our own system in other countries,¹⁷ of a Llewellyn both far more committed to the existence of legal determinacy and far more uncritically appreciative of its sources than the standard picture either of Llewellyn or of Realism in general would have led many to expect.

Realism is as much a part of the American legal landscape as it is widely misunderstood, and much the same can be said of Llewellyn. In light of that, this sensitively translated and edited work, now accessible partly because of its brevity but mostly because of the skill of those who have brought it to us, should be required reading for those who seek to understand the development of American legal thought and the operation of the common law in appellate courts. None of my skepticism about Llewellyn's message applies at all to the enterprise of making it available.

16. See Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 *YALE L.J.* 561 (1977).

17. However much we may criticize or be skeptical of our own systems when we are home, explaining those systems abroad often brings out defenses and justifications that would otherwise seem embarrassing.