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Llewellyn: Jurisprudence: Realism in Theory and Practice

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RECENT BOOKS

JURISPRUDENCE: REALISM IN THEORY AND PRACTICE. By *Karl N. Llewellyn.* Chicago: The University of Chicago Press. 1962. Pp. 539. $8.95.

When Karl Llewellyn rose to speak, the audience expected a good show. That fired his boiler. Up from the smoke and roar leapt a shower of sparkling ideas which his whole being joined in sending. He awed an audience with brilliance, captivated it with personality, and always left it better for having shared his wisdom and vision.[1]

In *Jurisprudence,* his words are freed from the spell of showmanship. Still they ring out loud and clear. He sets to work thinking on familiar facts; pretty soon he finds a hub and begins to hammer in spokes with examples, analogy and metaphor. A whole new scheme emerges in outline and structure, and we see the old and new and their relationship as only a stretching of the mind can make us see.

Here then, no longer scattered through library stacks, is an unparalleled opportunity to view law and government up close and overall through the keenest eyes of our time. This said, all that remains is to suggest how you may read the book for deepest understanding, and what you will better understand when you have read it.

With deference to the author's arrangement, and saving one exception, I suggest that you read the book backwards. That is, begin with the last chapter and wend your way toward chapter 1. Here's why:

A book is read with understanding when you "see," "hear," or say to yourself pretty much the same thing as the author said, and for the same reasons.[2] To do this you first identify the variables that controlled or influenced the author. Then, by responding to instruction, recollection, or manipulations (such as mental or penciled outlines and summaries) you connect the author's conclusions and the evidence; his theory, its supports and its applications. If as a result you could and might say the same thing that the author has written (under similar conditions), then you understand what he has written.

The difficulty in reading Llewellyn with understanding is that he says many original things, and it takes some doing for a reader to "say" them for the same reasons as did Llewellyn. However, it is easier to respond with understanding to the practical applications of his theory than to its philosophic justification because the applications occur in more familiar sur-

[1] The late Professor Llewellyn was America's most stimulating law professor. He taught at Yale, Columbia, and then Chicago. His major areas were Commercial Law, Advocacy and Jurisprudence. He was chief draftsman of the Uniform Commercial Code. He wrote numerous articles and his books include *Bramble Bush* (1930), an explosive introduction to law for law students; *The Cheyenne Way* (1941), a study of the resolution of problems by an informal system of law; and *The Common Law Tradition* (1960), a magnificent exposition of the deciding of appeals and the crafts of appellate judging and appellate advocacy.

[2] See SKINNER, VERBAL BEHAVIOR 277-80 (1957).

roundings. Therefore, since *Jurisprudence* concludes with applications of realism, one should begin there and so shall this reviewer.

Llewellyn's concluding vignettes of Holmes,[3] Pound,[4] and Hohfeld[5] show that as a realist he admired men who understood law as a system and who saw within it a continual reaction between tradition and the changing needs of society. Llewellyn believed that these men gained their understanding from a wide sweep of learning coupled with sustained digging in detail. They maintained a true picture by continually reviewing the system and each part's relation with each other part.

To identify the variables that are discovered by this mode of study and which produce a realist's understanding of the legal system, it is helpful to consider a specific social problem and the law's relation to it. A good example is group prejudice, which for Llewellyn was a key problem. His analysis begins with the fact that "us-groups" from the immediate family outward through kinfolk, school, church, etc., help channel energy and develop people.[6] However, an unfortunate by-product is prejudice in favor of any "us-group" against all "others-groups." Llewellyn believed there must ultimately be a wider unity—a "we-group" at least as broad as the nation. The trouble is that people tend to accept members of "others-groups" as individuals and not as members of that group. This process can be countered by working with many others from many "others-groups" and by good experience with any other group (such as often occurs in the high schools and in the armed forces). Further, teachers can soften the borders between "us-groups" and "others-groups" by pointing out at appropriate times while teaching literature, civics, history and the like that "others" have troubles similar to ours, that they may be getting a distorted version of "us," that maybe we don't have all the facts either, and that taking them one-for-one they are much like us.[7]

The law's institutions, symbols and machinery can join in the solution of such a problem by guarding an ideal (*e.g.*, human dignity) against attack, and by setting up a certain degree of tension to achieve the ideal.[8]

3 Chapter 29, *Holmes;* and chapter 28, *Mr. Justice Holmes.*

4 Chapter 27, *Roscoe Pound.*

5 Chapter 26, *Wesley Newcomb Hohfeld—Teacher.*

6 Chapter 22, *Group Prejudice and Social Education.*

7 Chapter 23, *Yes, It Takes Mass Production.* In this chapter Llewellyn moved beyond the problem of inter-group harmony to the more general problem of educating all the citizens of a democracy for democracy. He believed that to achieve this goal all children must learn the facts about political, social and economic matters and form judgments on what to do and get done about them. To do this job well it is necessary to mass produce good teachers. This, in turn, means that we need readily acquired techniques and behavior patterns utilizable in routine fashion even by the less expert teachers. As one example of such a technique, he suggested that teachers should always preface "truth" with "*X* says that . . ." so students will understand that most facts come from authorities and the basic problem is to make a choice among the opinions and solutions of authorities. He thought that use of the technique might lead students to inquire why an authority says what he does.

8 Chapter 24, *The Law, Human Dignity, and Human Civilization.*

Of course, it is difficult to know in advance how much tension is workable. The practical challenge, Llewellyn tells us, is to devise measures in terms of the particular problems posed by particular circumstances. For example, in matters of racial prejudice, he would deal separately with hospitals, hotels, restaurants, bars, beaches and schools.[9]

Thus did he recognize a need, when dealing with a social problem, to view law as one of many means to achieve a purpose in and for a specific kind of situation. He responded to this fact, as other realists have done, by crystallizing a variable that powerfully affects one's understanding of the legal system. One statement of it is this:

> "[F]or mass, as contrasted with individual, attempts at control, the problem of law making and of law enforcement centers on informed, sustained effort to find the particular persons whose conduct is concerned, and to devise means for affecting the conduct patterns of those particular persons."[10]

It follows that if legal rules are to be effective, they must follow the lines of the social problem. We may turn to crime for an example. In Llewellyn's opinion "theft of an automobile for temporary purposes" is not a satisfactory legal concept because in terms of conduct there are three varieties: the joy ride, theft for resale, or for use in crime.[11]

Other unconventional classifications and insights emerge when, in devising any legal measure for social control, attention is centered on behavior patterns and circumstances. Thus, says Llewellyn, one should ask (1) whether a law aids an established folkway or attempts to change the conduct of members of a group, (2) whether it affects conduct in a group, of a group, or between groups, (3) whether the activity is legitimate and subject to regulation, or entirely unlawful, and (4) whether the group activity is highly organized or not. Appropriate guides can be constructed for the different patterns formed by answers to these inquiries. For instance, we may want to change the conduct of loosely organized groups engaged in a legitimate activity that needs regulation (such as requiring disclosure of the ingredients of packaged foods). Here, the problem is education and devising ways of compliance that will not destroy the industry and will be reasonably uniform throughout the country.

The effectiveness of this behavioral approach is illustrated by the New York statute which prohibits exhibition of a book for sale if it bears a library stamp. Llewellyn recalls that librarians sent notice of the statute to every second-hand book dealer. The market for stolen library books became unprofitable; thefts decreased almost to nothingness.[12]

9 Chapter 25, *What Law Cannot Do For Inter-Racial Peace.*

10 Chapter 18, *Law Observance Versus Law Enforcement* at 399.

11 Chapter 19, *Theft as a Behavior Problem.*

12 Llewellyn deals with criminal procedure in chapter 21, *The Anthropology of Criminal Guilt.* Here he concludes that the problem is one of producing the coincidence of an individual's sense of guilt, and the group-feeling of guilt (which covers the group-imposed standard of guilt, a determination that the individual committed an offense,

It should be clear by now that the hub of Llewellyn's jurisprudence is not the rules of law, nor even the conduct of public officials. He is concerned with the interrelationship between the behavior of public officials and the behavior of the public. Legal rules—even those working rules which actually influence judicial decisions—do not adequately describe this relationship or provide a basis for administering the system or understanding change. The scope of one's interest must broaden to civilization, the total machinery which carries on society's work and traditions, and to the institution of Law-Government.

The central aspect of Law-Government, as indeed of any institution, is an activity organized around a job or group of jobs.[13] The full picture includes the going practices of the relevant specialists, the physical equipment, and the manner of organization. One must ask: what are (or should be) the jobs of the institution? How are they best accomplished?

The jobs of Law-Government, as Llewellyn sees them, are (1) to maintain the groupness of society by clearing up trouble cases, by channeling conduct to prevent or reduce the emergence of trouble cases, and by creating new behavior appropriate to changed conditions, (2) to allot the authoritative "say" and the manner of its saying in such matters, (3) to elicit leadership and administration which will organize and direct the team so as to produce an unfolding of constructive possibilities, and (4) to develop, maintain, and better the craft know how of the craftsmen engaged in jobs (1), (2), and (3).[14]

and fault in the offender, *i.e.*, that he has the mental wherewithal to commit the offense).

Llewellyn approved the ideals behind our system of criminal procedure—fair and full notice of charges, time to prepare, right to appear and answer, right to a fair and open-minded tribunal, to call witnesses, to a helper and spokesman who knows the ropes, and to fair advance notice that an act may be a crime. However, he believed that our adversary system of trial is sometimes form-ridden because the design of our machinery for carrying out the ideals was strongly influenced by a distrust of officials. Thus, the accused is dealt with at arm's length from the officials.

In simpler, primitive societies the criminal system is parental. Trial is not adversary; criminal guilt must be a sense of guilt in the culprit, an active drive to come back into society and do right—and he will be welcomed back in. There is a minimum of form. These are good features, thought Llewellyn, but he observed that the parental system can be abused to carry out personal grudges, to make corrupt gain, or to put down political dissent.

Llewellyn hoped that we will be able to work out machinery to preserve the best of both systems. He was encouraged by modern treatment procedures, juvenile courts, grievance procedure in some labor discharge cases, and even from military law when handled by an understanding C.O. He had hoped to work out this theme in greater detail, as he explained in the Preface, giving detailed attention to the need for a double standard of guilt: for the individual, one of complete personal responsibility; for officials, as regards an actual or prospective offender, a standard dominated by ideas of genetic and social conditioning.

Chapter 20, *Who Are These Accused?*, deals with the attitudes of the public toward criminal procedure, and elaborates on the thesis that faith in our form of government requires that a man whose views on government differ from our own should not more quickly be believed guilty of a specific offense than one with whose views we agree.

13 Chapter 10, *On the Nature of an Institution.*

14 Chapter 15, *Law and the Social Sciences—Especially Sociology.*

Rules are important means by which the institution of Law-Government gets jobs (1) and (2) accomplished. However, their doing depends far more upon sound craftsmanship; hence, the vital importance of jobs (3) and (4).

Since the concept of craftsmanship is not familiar to many lawyers, it may be helpful to consider it in detail. A craft, according to Llewellyn, is a recognizable line of work, practiced by recognized craftsmen. The crafts of any institution must be understood and transmitted for the institution to retain its strength. If an institution's specialists, that is, its craftsmen, study only its rules, and lose sight of skills, standards and goals, the institution risks technical and moral decay. On the other hand, to the extent that a craft-tradition is strong and soundly based, one can expect the same kind of classification of situations from any trained craftsman, and the same kind of reading and application of the rules.

To make this clear, let's take a specific example—Llewellyn's favorite —the craftsmanship of appellate judges. He points out that rules are not the only variables controlling judicial decision, nor are they the only factors identified by judges as supporting their decisions. Instead, the opinions of appellate courts in the United States today recognize the combined influence of Rules, Precedent, Reason (a desire to avoid injustice), and Situation-Sense (an attempt to identify the kind of situation before the court and what result makes sense for that kind of situation and for the particular case).[15]

The essence of the appellate judge's craft is an ability to harmonize these variables in each case and thus accommodate tradition and the need for change. In the early 1900's the style of deciding cases and writing opinions was to emphasize Rules and Precedent. Today, however, the courts are well on the way to recapturing what Llewellyn calls the Grand Tradition of the Common Law.[16] In this period-style, the "Grand Style," found previously in the mid-1800's, courts give first attention and heaviest weight to Situation-Sense and Reason. In the Grand Style, courts rework the Rules each time they are applied, the better to achieve and express their sense and reason. Thus, the basic rule for the craft of judging is not to follow precedent, but rather to "keep in mind the reason for the rule, to extend the rule as far as the reason extends, limit the rule where the reason stops, and alter the rule when the reason is discovered to have ceased or been mistaken . . . ."[17]

This practical craft rule helps support a realist's understanding of the legal system. When it is applied, judicial opinions are not formal deductions from pre-established rules. To the contrary, like a realist's jurisprudence,

[15] This analysis is found throughout the book. See especially, chapter 12, *American Common Law Tradition, and American Democracy;* chapter 8, *On the Good, the True, the Beautiful, in Law,* 178-96; and chapter 4, *Frank's Law and the Modern Mind.* For more detail, see LLEWELLYN, THE COMMON LAW TRADITION (1960).

[16] Chapter 9, *On the Current Recapture of the Grand Tradition.*

[17] Chapter 6, *Impressions of the Conference on Precedent* at 117.

they are "open, reasoned, extension, restriction or reshaping of the relevant rules, done in terms not of the equities or sense of the particular case or of the particular parties, but instead (illuminated indeed by those earthy particulars) done in terms of the sense and reason of some significantly seen *type* of life-*situation*."[18]

To the extent that the sense and reason of a rule takes over its shaping and phrasing, the rule will not only have the potential power to stimulate responses which deal effectively with a social problem, but also it will talk alike to every craftsman who has been trained in and is responsive to that style.

A lawyer must become responsive to the current style. If he does not, and looks to opinions for their rules alone, failing to understand what was helping and what was bothering the court, he will never know which rules are working rules and which rules are merely paper rules, *i.e.*, rules that are outmoded and do not actually control or explain decisions. Further, with only a surface reading of judicial opinions a lawyer cannot understand the variables which will influence future development and application of the rules. Thus, he could not become an effective counselor or advocate.[19]

Llewellyn finds no excuse for wearing blinders while reading cases. He reminds us that the craft of appellate judging is easily studied because the significant evidence is readily accessible to all who will look and see. Further, this study is particularly important because by way of analogy, contrast and background, study of the craft of appellate judging provides an avenue to study of the less documented but no less important crafts of the practicing lawyer (advocacy, counselling, drafting, negotiation), of the trial judge (to whom the law tends to appear as an imperative), and of the legislator (to whom law is a means to affect the behavior of other persons).

Because craftsmanship is so essential to the institution of Law-Government, Llewellyn urged law schools to guarantee the minimum technical proficiency of every graduate. The best means to insure good practical training, he thought, was to teach law as a liberal art combining technical, intellectual and spiritual training.[20]

Thus, in addition to technical training in the skills of lawyering, each law student should have intellectual training in the law's crafts, its purposes and effects. Llewellyn advised that to promote depth of learning, students should study a series of judicial opinions on one topic from one jurisdiction, with background material provided on society, the court, the judges and the record. Breadth of learning could be promoted by requiring outside reading not necessarily connected with any course. The faculty should prepare reading lists and syllabi on the classics of law and

18 Chapter 9, *On the Current Recapture of the Grand Tradition* at 219-20.

19 Chapter 14, *The Modern Approach to Counselling and Advocacy*. See also chapter 7, *On Reading and Using the Newer Jurisprudence*.

20 Chapter 17, *The Study of Law as a Liberal Art*.

on books which present information about the current state and past achievements of law and lawyers.

The spiritual side of law is seen first in its esthetics—form suited to function in advocacy, draftsmanship, judicial opinions, and the various arts of action (such as trial presentation). Second, since Law-Government is a great service institution, there is a need for study of the ideals to which it is and should be directed (*i.e.*, its jobs and what constitutes their doing). Such ideals can be taught through discussion in depth of particular problems. Further, law teachers should not hesitate to preach ideals; though of course they should not demand agreement or punish dissent.

In the third year of law school, a course in jurisprudence should be required.[21] The course could emphasize any of the topics found in *Jurisprudence*, *e.g.*, philosophy of law, the nature of law and justice, legal method, the theory of legal institutions, the relations between law and what it accomplishes, the life of Holmes, law and the social sciences, or history read for its meaning. But whatever the central core, students should be made to think about it, putting together around it what they already know of law. The only essential subject matter is study of some part of legal techniques (such as how appellate judges decide cases and write opinions) and some study of the quest for justice.

Much of this vital subject matter is found in *Jurisprudence*. However, the book is far more than an aid to students. It is clear from what has already been said that Llewellyn has a message for judges. And he speaks also to practicing lawyers.[22] First, he advised the bar to pay greater heed to the law crafts. Second, he recommended that to further the quest for justice, the practicing bar should adopt better business methods (so as to lower the price of legal service), do a better job of letting the public know about legal services, and create new procedures by which to bring lawyers together with potential clients. Third, and most important, he urged the bar to broaden its vision. The lawyer's basic craft, he postulated, is doing and getting things done with the law—any kind of thing in any field.[23] Thus, a lawyer's vision must be of the whole—of right and justice—and not merely client service. Technique without ideals is a menace, he said, just as ideals without technique are a mess. Thus, in the practice, as in legal education, judicial decision, and in dealing with social problems such as group prejudice and crime: "Vision and sense for the Whole, and skills in finding ways, smoothing friction, handling men in *any* situation, with speed, with sureness: these mark our best."[24]

The path to this broader vision—for students, judges and practicing lawyers alike—is to approach law as a social science, as a matter of be-

21 Chapter 16, *The Content of a Jurisprudence Course.*
22 Chapter 11, *The Bar's Troubles, and Poultices—and Cures?*
23 Chapter 13, *The Crafts of Law Re-valued.*
24 P. 322.

havior to be seen, recorded and studied as we see and record the work of men in industry. As Llewellyn said,

> "A realistic understanding, possible only in terms of observable behavior, is again possible only in terms of study of the way in which persons and institutions are organized in our society, and of the cross-bearings of any particular *part* of law and of any particular *part* of the social in the social organization."[25]

To do this job well, Llewellyn tells us, an investigator must carry problems through all the way, using the best available techniques.[26] He should narrow the focus of inquiry to particular parts of law and society. He must seek all relevant observable data to add to his own experience and common sense.

Llewellyn cautioned that certain pitfalls must be avoided when one studies the details of law and society as a step toward understanding the legal system.[27] First, an investigator must be wary of the threat of the available. We tend to rely heavily on the materials most readily available; but they may not be truly representative of the facts. Second, there is the threat from apparent simplicity. We have an urge to see things as simple. We tend to see things as "either-or" and to arrive at a verbal simplicity even though the facts are not simple. Third, there is a danger in fusion and confusion of the realms of Is and Ought. It is true, of course, that ideals and value judgments help set problems for inquiry, and recur after the purely scientific problem has been solved as far as it can be solved. In the meantime, however, we must distinguish facts from evaluation, reform from observation, and rules *of* doing something (descriptive) from rules *for* doing something (ideals).

Llewellyn also has some advice on very subtle aspects of investigation. He first notes that for induction, data must be weighed and frozen into one form; but we mustn't forget that it is not so fixed in nature. Second, deduction is no better than the hypothetical with which it must begin (*i.e.*, if we deduce *B* from *A*, our conclusion is no stronger than the hypothetical "if *A* then *B*"). Further, he points out, unless you begin with an adequate hypothesis, one with rigidly defined concepts, deduction can lead somewhere only by accident. And, he concludes, "only the gift of posing meaningful hypothesis leads anywhere."[28]

I quite agree, and I submit that Professor Llewellyn's supreme gift

25 Chapter 1, *A Realistic Jurisprudence: The Next Step* at 40.

26 Chapter 2, *Some Realism about Realism.*

27 Chapter 3, *Legal Tradition and Social Science Method—A Realist's Critique.* In matters of method it appears that Llewellyn took the philosophic concepts most frequently associated with John Dewey and applied them to jurisprudence. The result, as in Dewey's reconstruction of philosophy, was (1) to break down traditional dichotomies and create new, more inclusive generalizations which included the old, and (2) to shift emphasis from the study of entities to the study of relationships and processes.

28 P. 94.

was posing meaningful hypotheses. Thus, I have saved for last, and I suggest that you read last, the hypothesis which contained his broadest vision. He had intended to work it out in detail and would like to have included it in a pocket supplement to *Jurisprudence*. The subject was the quest for Justice as affected by each quester's view and by scarcity.[29] The hypothesis cannot now become a supplement, but has been left to us for further exploration. It is this:

> "[W]hen it comes to ultimate substance of the Good, I repeat that I can find no clarity, nor any conviction of reason or of deduction as to specific matters, from the broad ultimates others have found clear. I put my faith, rather, as to substance, in a means: In that on-going process of effort to come closer to the Good, that on-going process of check-up and correction, and further check-up and correction, which is the method and the very life of case-law. 'Reason acting on experience'—better: 'Reason at work upon experience, to find and state *explicit guidance for the future;* Reason, responsibly and explicitly accounting for *why* a rule or principle seems reasonable; Reason, re-examining in the light of reasonableness, on further experience, any and every prior ruling or prior reason given, and then reshaping, reformulating, redirecting, each time need may appear in further reason.' That is the common law at its high best: the Grand Style. Perhaps because I know nothing better, perhaps because Judicial Justice has been so much discussed, let me leave it at that. But do not let me leave it at that without insisting that when law ceases to be remote, when law comes home, then a process works out among the citizenry of a democracy which is the exact analogue of the common law judicial sequence of self-correction, of judicial review of prior judicial decision—which is, indeed, its twin and needed brother. . . .
>
> "[F]aith in the essential method of the common-law tradition as that tradition has stood in this country in its best years, and as it has come to stand again—that faith opens a new grasp of our political philosophy. When individual citizens or officers in office, from whatever sequence of divergent absolutes, come to cope as responsible citizens or officers with working out concrete 'applications' of their absolutes to the problems of their fellows and themselves, answers are not to be had by deduction, nor out of authority. As in the common law, the new light of the fresh case recolors each problem of 'application.' One does his best. But the knowledge that review impends from his successors, in the new light of a new fresh problem, must come to any officer or citizen who thinks—new light, too, from a swing of administration, built on other ultimates, or on other immediate views of wisdom. The pragmatic way is no way to reach an ultimate or absolute, but it is the only sound way to *apply* an ultimate, however reached. The finest common law tradition sums up the manner in which the parties, the

[29] Llewellyn noted in the Preface that the justified desires and demands of people have always exceeded the wherewithal to fulfill them, and they always will. One of the most important functions of civilization, he said (in chapter 24, *The Law, Human Dignity, and Human Civilization*), was to provide the necessary surplus to permit some degree of human dignity to be realized by all. In addition, our own variety of civilization must refresh itself and leave some room for individuals to build themselves into different kinds of people.

generations, the clashing groups of a democracy must work their way to wisdom."[30]

I hope you are now ready and eager to take the book in hand and join Professor Llewellyn in the search for a deeper understanding of law. Perhaps you may even want to begin with page one.

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30 Chapter 8, *On the Good, the True, the Beautiful, in Law* at 211-13. Llewellyn's reconciliation with those who seek absolutes is recorded in chapter 5, *Natural Law for Judges.*

This broad vision also appeared in chapter 12, *The American Common Law Tradition, and American Democracy* at 314-15, where, in regard to the possible danger of irresponsible citizenry, he said:

"[A] craft-minded, craft-proud corps of administrative personnel, announcing policies in advance, and both acting and feeling need to give reasons—life-reasons—in the grander manner of the common law, offer a leverage both upon service-consumers and upon legislators which holds workable possibility of meeting and countering the danger. Such a pattern of personnel serves as a model of responsibility not only within but without. It stirs confidence, and pride, and a different attitude toward 'the' government at large, in any citizen who meets with it, anywhere. A citizen's *general* attitude toward 'government' builds importantly in terms of the contacts he has firsthand or has on close hearsay with particular government officers. Let these be reasonable, and give intelligible reasons, be firm, and insist on the citizen's reasonable participation where he has the wherewithal to participate, and the citizen's responsible 'democratic' attitude is built. . . .

"From one end to the other of the problems of democracy, I thus submit that the grander manner of the common law tradition offers a pattern and a method for effective work, plus a demonstration that even under adverse conditions such patterns and methods can be made to spread on an effective mass or 'democratic' scale, and to take hold, on an effective mass or 'democratic' scale, of the relevant citizen consumer and participant."