

## Llewellyn's Lea\*-Ways—Julius Cohen†

It is comforting to find so much pride and hope in a period of nihilistic despair, even though the sun that is seen seeping through brightens but a small, though significant corner of the legal universe. If Llewellyn's *The Common Law Tradition* is buoyant in its estimate of what the appellate courts have in fact been doing, it is a buoyancy that is hard-won only after a massive, yet meticulously planned, attack upon the bastions of those who profess to be "realists," but who, in reality, are only pseudo-realists—a breed, whose most conspicuous badge is a contagious cynicism which allegedly threatens the underpinnings of a vaulted profession. It is Llewellyn's contention that the pseudo-realists, though purporting to don glasses designed to enable them to see legal nature in the raw, actually march blindly past, without as much as even bumping into the solidly built institutional structures that have for so long shaped, colored and controlled the law. Shorn of the external trappings of legal style and form, *they* see the decision-making process of appellate courts as pure fiat, with style and form serving as devices for concealing naked, arbitrary power. *He* sees style and form as constraining psychological forces—subtle, to be sure, and often sub-conscious, but as real as the cultural forces which draw the individual toward an image of himself which is not entirely of his own making. To them, deference to style and form is but a recognition of the public need to have insecurity transformed into security by means of ritual. To him, obeisance to style and form is, at once, an act of submission to external standards which tame and confine the judge in his decision-making role. Nor does the tethering of judicial impulse stop here. The host of other "steadying factors" that are painstakingly isolated, mounted and labelled—the imprisoning force of the taught tradition, the curbing power of group decision, the enmeshing hold of legal doctrine, the frozen limits of the trial record, the watchful eye of the profession, etc.—all of these suggest "Prometheus bound" as a more befitting description of the functioning appellate judge than the pseudo-realists' version of "rambunctious and free." What is significant is less the revelation of what even the unsophisticated should know—that judges are prisoners of institutional forces—than the timing of it. Judging from the sheer weight of Llewellyn's effort and the laboriousness of

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\* In the OXFORD UNIVERSAL DICTIONARY 1118 (3d ed. 1955), the word "lea" is defined as "Land that has remained untilled for some time; arable land under grass; land 'laid down' for pasture, grass-land." Deliciously tempting, but quickly withdrawn from application here, is an alternative definition: "A measure of yarn of varying quantity."

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proof that was deemed necessary to revive fallen spirits, one could infer that the situation savors of crisis, and that the patient, being near death, needs a massive injection for staying and turning the tide.

What is the affliction? As Llewellyn diagnoses the case, it is the failure to discern that law is a continuous interplay of constancy *and* flux, and that the areas of flux, though open, are nevertheless bounded and structured. To stress the unstable in law is to distort the extent to which stability flourishes; to give currency to the erroneous notion that the uncharted areas of law are open fields for judicial free-wheeling, generates an unwarranted disrespect for the judiciary and eats away at the institution itself.

Llewellyn, recognizing that the affliction is a deficiency of vision, offers the patient a specially ground pair of lenses, and in effect, says: "Now, if you don these you would be able to see as well as I. You would no longer be obsessed with the notion that the domain of the appellate courts is a Kafka-like world permeated only by dark shadows. You would see, instead, a great deal of clear, open sunshine. Come with me and I will show you. Let me retrace with you some of my old romps through the judicial woods, and if you feel that these brightly-lit areas might be hand-picked or chance aberrations, I will venture with you to some hitherto unexplored areas of judicial law-making, and take romps at random, and I will wager that there will be more sunshine than dark shadows even there. Of course, I would not satisfy the fussy social scientist who would insist on a random sampling procedure that would be more precise and elegant. But I assure you that anyone with a normal amount of 'horse-sense' would come back from the trip completely convinced that the judicial pathways, at the very least, are not *all* dark, and that many of them—perhaps most of them—are beautifully illuminated, with firmly rooted trees and occasional blossoms along the way."

Having tried these lenses and taken the suggested tours, not as a treatment for an ailment that I do not profess to have, but as a detached exercise in experimental method, I can now honestly report an empathic sharing of many of Llewellyn's feelings and experiences along the way. I was able to see external evidences of appellate judicial minds at work in several jurisdictions—minds obedient to the traditions of the craft; minds consciously searching to grasp the "situation sense," the magnetic fields to which facts in complex disarray might be properly attracted; minds seeking anchorage in the past, yet at the same time sensitive to the need for change; minds pragmatic in bent, skilled in the art of dulling the impact of change, of making the new appear to be considerably older than its age; minds straining to reach a just result. It is not improbable, either, that the methods of appellate judging in the states are sufficiently homo-

geneous to warrant the assumption that the time-jurisdiction samples which were sliced out of the total universe for observation were not especially untypical. Granted this, and the enormous labor that went into the task of proving a case, it is not untimely to step away from the detail, at this point, and endeavor to view a large effort in commensurably large perspective.

What is implicit in the very thrust of the work is the recognition of the extent to which the phenomenon of indeterminacy has come to dominate legal thinking. It is, happily, a phenomenon not peculiarly indigenous to law—comforting as it might be to know that suffering is elsewhere shared. In law, Llewellyn is, in effect, contending that it is misconceived *indeterminacy* that has given the pseudo-realists their jaundiced look—a look that is based on their failure to realize the extent to which *determinacy* actually holds sway in this domain.

But what kind of indeterminacy (or determinacy) does he profess to deal with? In the main, it is the kind that connotes alleged inability to *predict behavior*—a kind at once familiar to the physical and the behavioral sciences. Llewellyn is both honest and modest in his claims concerning the predictability of appellate judicial behavior. He does not make the mistake of asserting that there is grist here for the professional quantifiers, for whom he apparently has no special kinship. Instead, he deals with a notion of prediction that is the common currency of businessmen and craftsmen. It is not a concept of prediction that is bottomed on rigorous probability statistics, but rather upon the *feelings* of those in the market place, who, because of personal exposure to the variables confronting them in their work, develop a *sense* of what most likely is going to happen. Their success, in the main, is measured by the extent to which their experienced hunches are confirmed by the events to follow—the lawyer in estimating how and why an appellate court will decide, the stockbroker in how the owners and purchasers of stock will most likely respond, the merchant in estimating how and why the public will take to certain lines of merchandise. That all that cannot be measured with the precision of the professional quantifier is not necessarily indeterminate; that professional or common *sense* is, under certain circumstances, worth more than no knowledge at all, are observations which even the fuzziest pseudo-realist would accept without serious challenge—especially so if such *sense* is employed in a zone of activity not beset with too much instability or change. It is not here that the issue of indeterminacy is meaningfully joined. It is rather at the points of tension between stability and change, where contests seem to be shaping up between those who feel the old legal molds as instruments of restraint and those who regard them as indispensable safeguards for security. It is at these points that judicial “leeway,”

as Llewellyn characterizes it, comes more clearly into play, and where the stage is more appropriately set for examining his charges that the pseudo-realists are the misguided villains that he claims them to be.

In Llewellyn's view, they have, by puncturing the myth of Aristotelean two-dimensional logic as a controlling factor in judicial decision-making, quite appropriately exposed the extent to which it is possible for the logical tail to wag with *any* journey of the judicial kite. Their error, as he sees it, is in drawing the inference from this that the judicial kite is therefore free to blow around in any direction that it chooses, and that, when leeway is available, the movements of the kite are indeterminate.

If by indeterminacy is meant the function of being unable reliably to predict the direction of the kite when the atmosphere is charged with tension, what evidence is offered that greater predictability is possible? Not any elegant theory of social change which would endeavor to establish invariant relationships between certain salient factors, on the model of the physical sciences. Not any probability judgments on a frequency theory on the model of economics. Rather it is a listing of those things that a highly skilled craftsman would, in a broad way, take into consideration in endeavoring to estimate if, when and where an appellate court will go. For Llewellyn, one of the best of legal craftsmen, appellate judicial behavior is, at bottom, rhythmic. There is a fairly regular beat even with respect to the way courts react to tension situations; there are conditioning factors which influence the direction of their flight—their training, their role expectations, the conceptual instruments used by members of the craft, even the psychological urge to reach a just result. To Llewellyn, a greater sensitivity to these factors would immeasurably improve the chances for hearing the rhythmic beat, and thereby reduce the area of presumed indeterminacy. Even more, they would improve the chances not only of the specially endowed craftsmen, but of the less-gifted, possessing only a modicum of plain old-fashioned "horse-sense."

From this, the inference is perfectly clear that indeterminacy in the law is less a reflection on the state of nature than on the state of those who, because of their own inadequacy, have failed to approach nature with more discerning eyes. But who are "those"—the targets of Llewellyn's spirited attack? From the directional lines of his well-aimed thrusts, one is able inferentially to piece together a clearer image of his intellectual adversaries than he has been willing—for reasons more of style and temperament than of ability—to draw at the very outset. At least two groups of so-called realists fall within the target area. In the first are those who believe that values are, at bottom, arbitrary human assertions, and that there is no way of

proving their ultimate rightness or wrongness by methods known to science. Their realism would deny any merit whatsoever to the search for objectively verifiable norms towards which legal norms should point, or by which they should be judged; they would characterize any search for such norms as either meaningless or fruitless. Without even the hope for such anchorage, their despair is reflected in their insistence on the relativity of values. Transferred to the legal domain, this philosophy has served to root and feed the cynicism which insists on the inherent arbitrariness of judicial choice in the leeway areas, and on the fact that such choice can not, in the nature of things, be grounded on anything save personal whim or caprice. If I may again be pardoned the liberty of improvisation, Llewellyn's response would probably be along these lines (not the style, but the thinking): "The question of *ultimate* values is one that more meaningfully can be posed by the gods. The more modest and humble only address themselves profitably to what is humanly at hand—the specific culture, its values, aspirations, conventions and institutions. Assuming that there is presently no known method for extracting from nature *the* ultimate set of norms for judging a specific culture, it does not follow that judicial judgments in the leeway zone of any specific culture are therefore indeterminate. They may be indeterminate with respect to ultimate external standards, but not so with respect to the accepted, internal standards of that which is given. Within a given culture, even the implementation of discretion entrusted to public officials is not without the bounds of communal and craft expectations. It is error to assume that what cannot be found within what has been called the 'transtraditional' temple is necessarily absent from the traditional household of the homey."

The second group of realists who fall within Llewellyn's target area are those whom Llewellyn would perhaps accuse of expecting too much—of wanting to throw to the dogs, as the saying goes, what they think might not befit the altar of the gods. These realists, unlike those in the first target group, are anchored securely to the ground; they are not chasing metaphysical butterflies; they are concentrating, as Llewellyn is, on the brutish facts of the given. But they are uncomfortable, indeed contemptuous, of that kind of proof which is based on vague, unstructured, subjective "feelings" of the artist or craftsman. Accordingly, in their view, unless there are precise, objectively verifiable norms for hemming in discretion in the leeway zone, indeterminacy reigns. Particularly irksome to them would be Llewellyn's insistence that one of the central conditioning factors operating on a judge with leeway is his impulse to do what is "fair," "just," "reasonable," or some other such variant of the "good." It is the very fuzziness of such concepts that impels them to view the area in which such

standards are employed as indeterminate. What is “fair” or “just” or “reasonable” to one judge might be “unfair,” “unjust” or “unreasonable” to another, and there is really no reliable way for judging who is on or off the track. At best, there might be determinacy with respect to the *factors of decision*—the quest for justice being one of them—but not with respect to any particular decision. But there *is*, Llewellyn would insist. The proper judgment would somehow emerge and dawn upon the consciousness of any one in the craft with an ordinate amount of “horse-sense.” The answer is out there in objective reality to be *felt* by those with the capacity to feel. And why is this so? Because of this trenchant observation of lawyer-historian, Levin Goldschmidt, to which Llewellyn is deeply committed:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.<sup>1</sup>

This seems to be the touchstone for much of Llewellyn’s thinking in the field. It is the theoretical position that has guided and shaped his anthropological approach to the law, of which his Cheyenne study is an early example; it explains his admiration for such intellectual heroes of the institutional approach as Arthur Bentley, John R. Commons and Walton Hamilton; it gives deeper insight into the meaning of the present work. “But how does one proceed to uncover this so-called ‘immanent law’?” asks the hard-shelled realist. “Is this not a somewhat mystical notion, not subject to proof, and does it not suffer the same frailties as other ‘natural law’ theories that have met their not-too-uncertain fate?” Implicit in the question is the overlooking of multi-dimensional aspects of “proof.” Llewellyn’s type of “natural law” is clearly not from on high; it is subject to empirical verification, but not of the same kind that those working with physical science models are accustomed to. In addition to all the senses that they rely upon, there is the “feeling” sense—a sense of “rightness,” of “properness” in the way of doing things within a given situational context. It is psychological in quality and is subject to checking by *inter-subjective* reports—much in the same way that such reports help in locating pain centers in the human body. The accuracy of the subjective reporting increases in proportion to the extent of agreement among the reporters—not all reporters, but those qualified for

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1. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 122 (1960).

and sensitive to the task, those in the craft with average "horse-sense." "But how does one know whether or not one is endowed with enough 'horse-sense' to qualify?" the doubter would insist on asking. In Llewellyn's own words: "A man either has some sensitivity to the world around him and to the feel of the going body of the doctrine of his time, and to the interplay of these, or else he has none."<sup>2</sup> Beyond this, either Llewellyn does not choose to go, or most likely, it is, at the moment, impossible to go. This is the best that he has to offer. And, in his judgment, it is far better than the cynical nihilism that the hard-shelled realists have to offer in understanding the legal world around them.

Now, suppose the hard-shelled realists reluctantly relent, say "touché!" to Llewellyn, and acknowledge the reality and usefulness of the *softer* method of proof in producing something somewhat better than no knowledge at all. Using *his* method of proof, are his reported findings confirmed? In terms of shared inter-subjective experience, his sensitive reporting of the *factors* operative in the decision-making by appellate judges would undoubtedly strike a responsive chord in those directly participating in the process, as well as those watching it closely from the side-lines. But his reporting of the "justness," "rightness," "fitness" or "good sense" of the *particular* cases, which he has offered as proof of the on-the-job competence of the courts, suffers from lack of analytic refinement. Llewellyn has used a reporting model on the analogy of the *res ipsa loquitur* device in torts. He takes the reader to the cases that he, personally, is convinced make "sense," without detailing *why* they do. He assumes that the "good sense" of a decision should become obvious upon the mere reporting of it, and that it would somehow be intuited by those competent to know. Presumably, if they do not have the capacity to intuit at this point, they would lack that quantum of "horse-sense" requisite for the task. But the search for inter-subjective responses need not be confined to this level of communication. My hunch is that Llewellyn would have even a wider range of inter-subjective concurrence of feeling if he would, in the reported cases, have made a greater effort to isolate and lay bare the values which underlay the competing claims; if he would have made explicit the larger, dominant norm or norms which controlled the outcome; if he would have explained more fully just how the particular decisions properly fitted into the larger value pattern of the community—not of the legal community, but of the community at large which it is the office of lawmen to serve.<sup>3</sup> With this, Llewellyn's "See, it makes

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2. *Id.* at 449.

3. A recent study would cast some doubt on whether judges on their high perch, considerably distant from the pulse of the street, can be relied on securely to

sense!" would have been an invitation to check inter-subjective feelings at more precise points of reference than those used in his study.

And what of Llewellyn's claims of predictability? His hypothesis that such "sense" is a predictable judicial phenomenon in leeway situations seemingly would have had greater weight had he posed the problem of "sense" to lawmen *before* the judicial decisions, and tested the accuracy of their reactions later against the finished decisional product. How many lawmen, for example, would have sensed the "good sense" of *Palsgraf* before the case was decided, and could have predicted its outcome at that time? Llewellyn's experiment in inter-subjective reactions was not structured to account for this time variable. Instead, it attempts to assess *now* on the basis of the bias and conditioning of *hindsight*. Better than this for a testing of this hypothesis would have been an insistence on the freshness of *foresight*. This is meant less in criticism of the present work than as a suggestion for a future meeting ground between Llewellyn and the hard-shelled realists. For if the latter can profit much from the richness of Llewellyn's insights, then they can claim that he, too, can profit from the rigor which is theirs.

*The Common Law Tradition* is considerably more than its dull-sounding title might mean to the unsuspecting. It is more than a defense of appellate decision-making, it is more than a how-to-do-it for lawyers, it is more than a lecture to the courts on how they can make a good system even better. It is a first-rate jurisprudential work, the magnitude of which is not lessened by the fact that the jurisprudence oozes out inductively from the treatment of concrete legal materials, instead of being stated abstractly at the outset.<sup>4</sup> It deals strikingly with the vexing *is-ought* problem that has plagued much of modern jurisprudential thinking—but without identifying the problem in these terms. The central concept is "leeway," but what is "leeway" other than a situation describing a judge struggling with the problem of how a void *ought* to be filled with the materials of the given. Llewellyn's answer in effect is that what *ought* to be decided is what makes "sense" in a particular situational and cultural context. The "ought" with which he deals is one with a small, uncapitalized "o," cut down to fit the specific culture, situation and problem. Its function is limited to checking for internal consistency within the framework of a generally accepted structure of values, and for ascertaining whether a particular decision would be instrumental in

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intuit the values of the community at large in order to reach a result that makes "sense" in terms of *community* expectations. See COHEN, ROBSON & BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958).

4. "Let me write the songs of a bar, and I care not who writes its jurisprudence." LLEWELLYN, *op. cit. supra* note 1, at 398.



helping to achieve the goals within this given structure of values. To Llewellyn, as with Dewey, the concept of "Ought" with a capital "O" seems to serve no useful function. "Sense," at once is something to be discovered—a relationship of reasonable expectations in a given situational-cultural context. There are overtones here of the Gestalt theory of Köhler and others, in which is posited an objectively required direction for the correct filling of gaps or lacunae in problem situations. "Sense" is, at the same time, also a talent in the observer which enables him to intuit these expectations. It is something *felt*—not seen or heard; it is an emotional feeling, not tied to the sense of touch; it is akin to feelings aesthetic in nature. Its accuracy is "testable," not by the usual methods of the physical sciences, but by a mode of inter-subjective reporting and polling. Thus, "leeway" emerges as a basic jurisprudential and philosophical problem in subtle disguise. Llewellyn's attack on the problem is in the modern naturalist tradition. Its strength lies in its earthy insistence that the place to search for answers to many of the lofty problems of the law begins with the untilled soil right at our own feet—or, as he might put it—there is nothing lofty about the problems at all. He has done a striking job in clearing the jungled legal tracts; he has lovingly fondled, as no other worker in the field has fondled, handful after handful of judicial soil in order to learn the secrets of its texture and quality. More important, out of leeways have emerged significant lea-ways for future research in the law.

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