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Simon N. Verdun-Jones*

1. Introduction

Jurisprudence means to me: any careful and sustained thinking about any phase of things legal, if the thinking seeks to reach beyond the practical solution of an immediate problem in hand. Jurisprudence thus includes any type at all of honest and thoughtful generalization in the field of the legal.¹

Alongside Roscoe Pound, Karl Llewellyn dominated the American jurisprudential stage for more than thirty years. Indeed, his diverse interests, broadly-based achievements and colorful personality compel the attention of any serious student of modern jurisprudence. Furthermore, the very profusion of roles played by Llewellyn render him one of the most remarkable legal scholars of the twentieth century: looking at the totality of his life’s work one may readily discern the ardent young realist brandishing the flag of reform and extolling the virtues of science; the accomplished law-teacher dedicated to the transfer of basic legal skills and the enhancement of legal education in general; the incurable romantic and amateur poet; the tireless Chief Reporter for the Uniform Commercial Code; and, finally, the wise old sage giving “common sense advice” to the appellate practitioner.²

As is the case with Roscoe Pound, Llewellyn’s jurisprudence must be seen as evolving over a long period of time and it is most helpful to view his work as falling into three more or less clearly defined stages; firstly, there is the period of Llewellyn’s flamboyant legal realism characterized by such leading articles as A Realistic Jurisprudence — The Next Step (1930) and Some Realism about Realism (1931); this period is followed by a stage during which

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2. Twining, op. cit., passim, note chapter 6 in particular.
Llewellyn developed an anthropological approach towards law and is most conspicuously marked by his joint-work with E. Adamson Hoebel, *The Cheyenne Way* (1943). Finally, Llewellyn’s jurisprudence entered a period during which his main concern was with the re-establishment of confidence in the American appellate system. Of course, this final stage is marked by Llewellyn’s massive tome, *The Common Law Tradition* (1960).

Perhaps the most fruitful—if not the most vociferous—elements in Llewellyn’s Jurisprudence are to be found in the middle period of his development and much of our analysis is drawn from the sources of *The Cheyenne Way* and the Yale Law Journal article, *The Normative, The Legal, and the Law-Jobs: The Problem of Juristic Method* (1940). This is not to deny the immense wisdom and influence of his earlier works but merely an attempt to tap the most mature and considered aspects of Llewellyn’s approach to law and society. We shall draw on Llewellyn’s early works primarily for their valuable insight into the fundamental pre-requisites for the development of an empirical legal science. On the other hand, since it was the only major project he devoted to a comprehensive analysis of a modern legal system, *The Common Law Tradition* will be utilized primarily in the identification of the basic intellectual tasks performed by Llewellyn’s Jurisprudence. However, it should be recognized that *The Common Law Tradition* represents a significant departure from the tone and substance of Llewellyn’s other works; for this reason the book will not be treated as a definitive exposition of Llewellyn’s approach—particularly in so far as questions of method are concerned.

The precise nature of the relationship between *The Common Law Tradition* and Llewellyn’s earlier publications is a matter of deep controversy. Llewellyn himself argued that it was an “authentic product” of realist thought. However, even well-disposed critics have pointed to the many inconsistencies between the Llewellyn of *The Common Law Tradition* and Llewellyn’s earlier publications is a matter of deep controversy. Llewellyn himself argued that it was an “authentic product” of realist thought. However, even well-disposed critics have pointed to the many inconsistencies between the Llewellyn of the realist era and the Llewellyn of *The Common Law Tradition*:

With all deference to those who extol the merits of *The Common Law Tradition* and with full appreciation of the surpassing merits thus attributed to it, I do not like this work so much as the *Jurisprudence*, nor do I feel any of the excitement experienced when reading some of his earlier writings. *The Common Law Tradition* is a quaint mixture of common sense, craftsmanship, poetry and religion. His metaphorical comparison of it to a Gothic structure is felicitous in that it is indeed a massive structure of 565 pages, with a pinnacle reaching towards legal certainty as if aspiring to the heavens. Within the cathedral one finds the exhertic and now saint Llewellyn who has long been
striving on the messianic mission of recapturing legal certainty from the abyss of skepticism. He is preaching in Llewellynese the "Grand Style" of the "Common Law Tradition" to the lawmen who have lost confidence in inscrutable appellate courts. 3

Where inconsistencies appear between *The Common Law Tradition* and earlier works we shall not consider the final book of Llewellyn's career to be necessarily representative of his most mature thought. 4

2. The Establishment of Observational Standpoint

Unlike many of his contemporaries, Llewellyn pays considerable attention to the vexed issue of observational standpoint. Fundamental to his whole position is the simple, although often misunderstood, premise that the values of the observer must be studiously set aside during the actual process of observation. This uncomplicated belief appears to be all that Llewellyn had in mind when he published his


Hayakawa's predilection for Llewellyn's early work stands in sharp contrast: "The contribution Llewellyn made in the early 30's to the cause of legal science was magnificent. This is why I like Llewellyn the young realist revolting against the traditionalists and charting new areas and methods for scientific exploration better than Llewellyn the old realist spending idle words on the "Grand Style", just as I like the Pound who addressed the American Bar Association in 1906 better than the Pound who addressed the same association in, say, 1963." (at 730).

4. This is not to deny the immense utility of *The Common Law Tradition*. Rather it is an attempt to stress that Llewellyn did not follow the precepts of empirical legal science which he had laid down in his more theoretical works. The rather amateurish methods employed in *The Common Law Tradition* certainly detract from the stature of the work but they do not render it valueless to modern legal science. As Professor Twining suggests; "the basic perceptions and analysis of the book are sound and show ways to a more profound understanding of appellate judicial decision-making than any prior analysis. It contrasts sharply with the graceful simplicities of Cardozo on the one hand and the facile and shallow scientism of much jurimetric analysis on the other. The chief weaknesses are remediable: the terminology can be refined; more orderly techniques for analysing and comparing judicial opinions may be evolved; better methods for testing predictability have begun to be devised, and so on. The crux of the matter is that *The Common Law Tradition* is founded on a number of apercus, some original, others neglected, which are of fundamental importance and which provide a starting-point for a wide range of potentially fruitful investigations: the steadying factors; the styles of judicial opinions; the range of techniques for interpreting cases and statutes; techniques of appellate advocacy and of other specialized roles; even the elusive 'situation sense' are among the ideas that could inspire valuable research. These are the more obvious ones related to the general argument; there are many other suggestive obiter dicta buried in the detailed analysis. Despite its faults, *The Common Law Tradition* promises to be a rich source of insight into judicial processes for many years to come." Twining, *op. cit.*, at 269.
controversial article, Some Realism About Realism (1931);\(^5\) in this famed treatise he urges a temporary divorce of the "'is'" and the "'ought'" as a means of enhancing the basic methodology of legal science.\(^6\) Drawing heavily upon his sociological mentor, Max Weber,\(^7\) Llewellyn asserts that while values may well dictate the objectives of any particular inquiry they can not be allowed to impinge upon the process of observation itself.\(^8\) His position is perhaps stated more comprehensively in another realist tract published in the same year; "We have to add value judgments as to where people ought to want to go; we have to criticize both their practices and their ethics with that in view. But what we must not lose sight of . . . is that as we move into these value judgments we desert entirely the solid sphere of individual ideals and subjectivity . . . Science does not teach us where to go. It never will. To fuse is and ought is to confuse the gradually accumulating semi-permanent data on which any science must rest with the flux of changing opinion as to social objective — that welter of objectives any of which a science can be made to serve."\(^9\)

In Llewellyn's view, the best way for the legal observer to maintain impartiality was for him to view law as an "ongoing institution".\(^10\) He believed that such a viewpoint was valuable because it placed legal rules, concepts, and ideals against the background of institutional practices which gives them meaning and life. Furthermore this viewpoint suggested two "vitally serviceable points of orientation": " . . . first, a going institution has jobs to do, and its

\(^6\) Ibid., at 55-56.
\(^7\) For the influence of Max Weber on Llewellyn's thought, see G. Gurvitch, The Sociology of Law (Philosophical Library and Alliance Book Corporation, New York, 1942) 178; E. A. Hoebel, "Karl Llewellyn: Anthropological Jurisprudence" (1964), 18 Rutgers L. Rev. 735, 740 n. 21; Twining, op. cit., at 107-108, 180, 183, 353. It is interesting to note that Llewellyn framed his early conception of a legal right on the basis of Weber's formulation: " . . . Max Weber's magnificent formulation in terms of probability: a right (or practice or "real" rule) exists to the extent that A can induce a court to squeeze, out of B, A's damages; more: to the extent that the likely collections which will cover A's damage" . . . For further discussion of this approach see K. Olivecrona, Law as Fact (Stevens and Son, London, second ed. 1971) 173-4.
\(^9\) "Legal Tradition and Social Science Method — A Realist's Critique" (1931), in, Jurisprudence, ch. 3, at 85-87.
\(^10\) My Philosophy of Law (Boston Law Book Co., Boston, 1941) 183 ff., 185.
function is to get them done effectively and well. This gives a pole of purpose and value to measure by. And, secondly, a going institution has results in life, and must be tested by them; and those results are capable of inquiry. The measure of the institution is, then, the measure of how its results check in fact, in regard to the actual doing of its jobs.'" It was this viewpoint that Llewellyn put into harness for his stimulating works, *The Cheyenne Way* (1943) and *The Normative, The Legal and The Law-Jobs: The Problem of Juristic Method* (1940).

It is instructive to note that Llewellyn's viewpoint is considerably broader than that adopted by many of his realist colleagues and in 1940 he devoted considerable space to a disparagement of the excessively narrow observational standpoint that characterized the writings of the early realists. In his view, the "newer Jurisprudence" began life almost exclusively as a lawyer's Jurisprudence; that is to say, it adopted the standpoint of the legal counsellor who is primarily concerned with the prediction of cases as a consequence of his duty to advise potential clients as to the probable state of the law. This early standpoint is perhaps most characteristic of those realists who espoused the legal pragmatism of Justice Holmes. From this beginning, realism expanded its viewpoint to include that of the advocate, who directs his energies towards persuading particular courts of the overwhelming 'rightness' of his legal submissions. One immediate result of the development of this standpoint was, according to Llewellyn, the stimulation of research into the subjective factors that sway the course of judicial decision-making. However, Llewellyn felt that even the adoption of these two standpoints was grossly misleading for it obviously excluded the standpoint of the most dominant participant in the legal process — namely the judge:

... obviously the branch of Jurisprudence which is concerned with the judge and the judge's work must see the judge in a wholly different light. A counsellor has to worry over what a judge will do, whether that doing is right or whether it is not right; right or wrong, it decides a case; right or wrong, decent or indecent, it may make or remake a rule. For a counsellor at work on counselling what the courts do is thus the important part of the law; whether, I repeat, the doing is right or not. But judges ... cannot see law that way, nor can citizens, as citizens, see law that way ... This is not to say that the 'Prediction-of-

11. Ibid., at 185.
12. "On Reading and Using the Newer Jurisprudence" (1940), in *Jurisprudence* ch. 7.
official-action' way of seeing law is a bad way or a wrong way to see law; it is to say that the prediction way is an incomplete way to see law.\textsuperscript{13}

However, it must not be thought that Llewellyn was advocating that modern jurisprudence should adopt the standpoint of the judge nor, indeed, that of any other participant in the legal process; on the contrary, he urges a complete transformation in the level of legal analysis. It was clearly his firm belief that the modern jurist must adopt the standpoint of an impartial observer viewing the law in strictly functional terms with the objective of understanding rather than influencing the social process. By studying law as an ongoing institution, Llewellyn hoped to transcend the ‘participant’ standpoint favored by far too many of the legal realists.\textsuperscript{14}

3. \textit{Llewellyn's Conception of Science}

\ldots Knowledge does not have to be scientific, in order to be on the way toward science. Neither does it have to be scientific in order to be extremely useful. It is time that social 'scientists' should recognize this openly, it would save much confusion, and it would save more waste motion. What we need is knowledge moving carefully and cannily toward the scientific pole, accompanied by some rough indication of its present latitude. That is the scientific road toward science. And progress on that road is valuable step by step.\textsuperscript{15}

Llewellyn does not seem to have been influenced by any particular model of science nor did he engage in the type of philosophy of science thinking which characterized the work of such colleagues as Underhill Moore, Walter Wheeler Cook, or Hessel Yntema. Indeed,

\begin{itemize}
\item[\textsuperscript{13}.] \textit{Ibid.}, at 141-142.
\item[\textsuperscript{14}.] It is ironic to note that Llewellyn had great difficulty restraining himself from adopting a participant standpoint, however. For example, when Llewellyn undertook extensive fieldwork in New Mexico (during the summers of 1945-9, and 1951) he abandoned his original scientific viewpoint for the role of an activist in Pueblo Indian affairs. The result of the project was a series of legal codes [largely drafted by Llewellyn himself] rather than a development of the approach adopted in \textit{The Cheyenne Way}. Note that Llewellyn was struck by the apparent similarities between the "parentalism" of the Pueblos, on the one hand, and the Soviets, on the other. Unfortunately, Llewellyn's important theoretical insight was never brought to fruition — although outlines of his thinking on this matter are preserved in manuscript form. The failure to capitalize on this insight may well be attributable to Llewellyn's wish to render practical assistance to the exclusion of the more painstaking process of non-participant observation and theory construction. See generally Twining, \textit{op. cit.}, at 358-365 and Appendix F.
\item[\textsuperscript{15}.] K. Llewellyn, "'The Theory of Legal 'Science''" (1941), 21 N. Carolina L. Rev. 1-23, quoted in Twining, \textit{op. cit.}, at 191.
\end{itemize}
as professor Twining points out, Llewellyn was quick to recognize the latent dangers involved in drawing an overly rigid analogy between the social and the natural sciences:

... He was willing to accept that ultimately it is conceivable that empirical research in the social sciences could satisfy similar criteria of objectivity to those of natural science, but that only the most elementary beginnings had been made in that direction; second, that ‘objectivity’ is a matter of degree and that even casual impressionistic observation is better than complete ignorance, provided that it is recognized for what it is; thirdly, that stress on the scientific analogy may be dangerous in that either the coinage of the term ‘scientific’ may be debased or, worse, that would-be scientists will consider as worthy of study only topics which are as yet susceptible to rigorous quantification, a narrow and often infertile area. In short, he favoured a common sense strategy for research, based on a realistic appraisal of the obstacles in the way of quick advance, such as the cost, the lack of glamour in much of the work, and the shortage of personnel with appropriate training.1

However, in addition to his valuable discussion of observational standpoint Llewellyn contributed to the advancement of empirical legal science by his development of research methods specifically designed for the study of legal phenomena within their broader social context: these were the so-called “institutional” method and its more

16. Twining, *op. cit.*, at 195-196. While Professor Twining is perfectly correct in stressing Llewellyn’s “pragmatic and sensible approach” to the issues of empirical science, it is the present writer’s view that this characterization is seriously misleading [at least in so far as it suggests Llewellyn did not subscribe to a coherent philosophy of empirical science]. In at least two major articles, Llewellyn wrestles most successfully with the fundamental issues facing the social scientist engaged in the study of legal institutions and it is unlikely that Llewellyn ignored his own wisdom when he embarked upon such empirical projects as *The Cheyenne Way*. Indeed the two articles concerned are an eloquent and sophisticated statement of the fundamental pre-requisites for an empirical legal science [see “Legal Tradition and Social Science Method — A Realist’s Critique” (1931) and “Law and the Social Sciences — Especially Sociology” (1949)]. Inexplicably, Twining ignores these works in assessing Llewellyn’s approach to legal science. The admitted sloppiness of the research involved in Llewellyn’s early work, *Behind the Law of Divorce* (1932-33), and in his later book, *The Common Law Tradition* should not blind us to the fact that Llewellyn made a significant contribution to the *theory of an empirical legal science*. For example, the observational standpoint and conceptual categories developed by Llewellyn and Hoebel in *The Cheyenne Way* surely amount to a much more sophisticated approach to legal science than Twining’s characterization would at first suggest. While it is true that Llewellyn was justifiably skeptical about basing legal research upon a natural science model, it is also important to recognize that he did much to develop an empirical approach to law based on a model with an integrity of its own and with a more specific relevance to legal phenomena. It appears that Twining under-estimates Llewellyn’s contribution in this respect.
celebrated off-spring, the "trouble-case" method. The former of these techniques is admittedly more of a general orientation than a specific method but it is fair to say that it was an orientation which paved the way for concrete co-operation between lawyers and social scientists: In Llewellyn's words, "All you have to do is to borrow a concept from sociology: \textit{Institution}, and to make explicit that you include therein the relevant physical equipment and the manner of organization of the whole; and Pound's picture of the law — the \textit{institution} of law — becomes forthwith a something which any social scientist can look at, understand, make friends with, learn from, and can probably contribute to."

Now Llewellyn did not invent the "institutional method", indeed it was common coin in the 1930's, but he was responsible for giving it tangible utility in the form of the trouble-case method. This latter technique essentially consists of an in-depth analysis of the life-history of a dispute from inception to resolution. The context in which Llewellyn applied this method was the legal system of the Cheyenne Indians and its development was clearly the result of his close association with Hoebel during the years preceding the publication of \textit{The Cheyenne Way}.

By utilizing the trouble-case method, Llewellyn believed that the legal researcher was enabled to examine the whole complex of institutional processes involved in the settling of disputes: "The trouble cases, sought out and examined with care, are . . . the safest main road to the discovery of law. Their data are most certain. Their yield is richest. They are the most revealing." Furthermore, in Llewellyn's view, this novel focus on the trouble case was an absolutely indispensable supplement to the ideological approach to legal research (with its emphasis on rules) and to the descriptive approach (with its emphasis on bare physical operations).

The numerous claims made on behalf of the trouble-case method have been succinctly summarized by W. L. Twining:

\ldots by studying actual cases the phenomenon of competing norms can be perceived and understood; it overcomes the prob-

\begin{itemize}
\item \textbf{17.} "Law and the Social Sciences — Especially Sociology" in \textit{Jurisprudence} ch. 15, at 355.
\item \textbf{18.} See the influence of institutional economics on Thurman Arnold and Underhill Moore, for example. For an influential contemporary account of the institutional approach, see W. H. Hamilton, "Institution" in \textit{8 Ency. of the Social Sciences} (Macmillan, New York, 1937) 84.
\item \textbf{19.} \textit{The Cheyenne Way}, 29.
\end{itemize}
lem of refusal or inability of informants to articulate norms; the extent of coincidence or divergence between articulated norms and the outcomes of dispute-settlement processes can be checked; trouble cases show how established forms are in fact used, which is more illuminating than a bare statement of the form; the relationship between the "law" of the group and the "sub-law stuff" of each sub-group may be brought out by the study of disputes; in a crisis one can actually see the culture at work; and finally, trouble-cases are in themselves important phenomena.20

Unfortunately, it is one of the tragedies of Jurisprudence that Llewellyn and Hoebel never used their finely conceived intellectual tool in the study of an ongoing legal system. Instead the "cases" analysed in *The Cheyenne Way* date from the period 1820 through 1880 and were gleaned from elderly informants speaking through an interpreter; in other words, the data for the project was based entirely on memory and hear-say concerning incidents that happened up to one hundred and twenty years before the subjects were interviewed. Twining has defended the intellectual integrity of *The Cheyenne Way* by making the valid point that the informants' stories are significant (even if fictitious) because they are told in terms of Cheyenne concepts and against the background of actual institutions: "an essential part of understanding the institutions of a society is to grasp the ways of thought of the people whose institutions they are".21 However, Twining's argument is not really germane to the particular case of *The Cheyenne Way*; while a knowledge of the concepts prevalent in a culture is absolutely essential to a genuine understanding of legal institutions, it is important to recognize that such knowledge is — at best — only a supplement to a systematic examination of those institutions. Unfortunately, Llewellyn's reconstruction of the Cheyenne legal system was the result not of systematic historical research but of sketchy information relayed by a handful of elderly informants, many of whom had not actually seen Cheyenne legal processes in action. In these particular circumstances, it is difficult to comprehend how Twining can assert that the interviewees' stories were told "against a background of actual institutions"; quite clearly, Llewellyn and Hoebel had no reliable information in this respect.

Curiously enough, Llewellyn never applied the trouble-case method to a modern legal system or sub-legal system: it is probable that the method is far too unwieldy for research into the dispute-settlement procedures of a complex society. However, the method clearly had potential in so far as an ongoing legal system of reasonable simplicity was concerned: indeed, Twining asserts that the trouble-case became a "critical focus of attention" for modern anthropological research into "primitive" legal systems.\textsuperscript{22} Nevertheless, despite Twining's assertion to the contrary, it is difficult to find evidence for the view that the trouble-case method has become a fundamental tool in the methodology of modern research in this area: it appears that the method has influenced — but not dominated — such research.\textsuperscript{23} Whatever the present status of the trouble-case method may be, however, it is important to recognize that — aside from Underhill Moore — Karl Llewellyn was practically alone among legal scholars in developing concrete methods of research for the study of legal institutions; if for this reason alone, the method must retain a significant position in the history of twentieth century Jurisprudence.

A further pre-requisite for an empirical legal science is the development of an adequate conceptual framework; in his theoretical articles, Llewellyn clearly recognized this need. For example, as early as 1931 he was making such clear statements as this: "... the framing of concepts and the integration of a conceptual scheme for the purpose of finding out where we are ... will remain eternally

\textsuperscript{22} Twining, \textit{op. cit.}, at 164.

necessary to scientific advance . . . without rigid definition of concepts no hypothesis which means anything is possible, and without a hypothesis which unambiguously means one thing attempted observation or research into new data or old is somewhere between 90 and 95 percent waste motion from which derives that fundamental of science: only the gift of posing meaningful hypothesis leads anywhere."24

However, it is fairly clear that Llewellyn was never really able to develop a conceptual scheme which could generate general hypotheses about law and the social system and which could guide empirical research in the future. Llewellyn's theory of the law-jobs is, as we shall see, only an analysis of basic functions performed by legal institutions: the theory does not provide for a study of such vital elements as the structure of social and legal institutions, the power process, and the creation of policy. The reason for Llewellyn's inability to develop a conceptual scheme is largely attributable to his deficiencies in method. As we have indicated above, Llewellyn's use of the trouble-case method was seriously deficient because it failed to examine the social and political structure of Cheyenne society: without such information, Llewellyn was unable to develop comprehensive theories about the integration of law and social process.25 More simply, Llewellyn fell into the snare which frequently besets the

25. It may be convenient at this point, to consider a statement made by one of the modern critics of Legal Realism, W. E. Rumble Jr. Rumble, in American Legal Realism (Cornell U. Press, New York, 1968) 34, asserts that Llewellyn writes under a "model of a natural science of law" yet it is most difficult to discover where he obtains the evidence for this. Surely there is a striking contrast between the work of Llewellyn and the work of such realists as W. W. Cook, Herman Oliphant, and Underhill Moore who do espouse the cause of a natural science of law? In particular, it appears that Rumble completely ignores the crucial influence of Max Weber upon Llewellyn's work. Of course, it is always possible that Rumble is not using the term "natural science of law" in its correct sense.

There is also considerable difficulty in accepting further comments of Rumble in this connection: "They (the legal realists) did not lack theoretical models from which operationalized hypotheses could have been inferred. The approaches urged by Llewellyn (in his articles of the 1930's) and Cohen are examples. Each of these men provided a framework in terms of which significant empirical investigations could have been undertaken . . . Nonetheless, most of the realists did not infer the kinds of hypotheses which are necessary . . . Llewellyn is a case in point. The model of legal science which he formulated in his early books and articles certainly provided a framework from which operationalized hypotheses could have been inferred and tested. To the best of my knowledge, however, the inferences were not drawn and the testing was not done:" Rumble, op. cit., at 172-173.
functional theorist, namely the tendency to postulate an a priori list of functions and then to find social institutions which perform them: in Llewellyn’s case, social institutions were not studied at close quarters and the result was a conceptual scheme which looked only to functions and dealt with actual institutions only as an afterthought. This is a theme to which we shall return in our discussion of Llewellyn’s focus of inquiry.

In sum, we may say that Llewellyn’s perception of the basic requirements for the development of an empirical legal science was most astute. However, in his attempts to fulfill these requirements he did not meet with similar success. The reasons for this gap in conception and execution are not simply stated but it is suggested that the failure of contemporary social scientists to devote their attention to the problems of “concretizing” social research in law was a major factor. Clearly Llewellyn did not lack ideas; however, he did lack the collaboration of mature social scientists capable of making those ideas amenable to satisfactory research.

It is difficult to grasp Rumble’s reasoning at this point. The early period of Llewellyn’s work surely lacks the binding unity of a theoretical model. Indeed, a contemporary comment makes this quite clear: “The problem which bothers me is whether such a description of the actual behaviour of officials can be undertaken without a conceptual scheme of some sort — no metaphysical scheme of “eternal truths”, but a hypothetical scheme of scientific concepts with which to order the social materials in terms of similar material elsewhere.” C. J. Friedrich, “Remarks on Llewellyn’s View of Law, Official Behaviour, and Political Science” (1935), 50 Political Science Qrtly. 419. Similarly, we have criticized Llewellyn’s middle period for its exclusively functional approach with its consequent lack of concern for questions of social structure; as a result, we have seen that The Cheyenne Way did not stimulate Llewellyn to develop any form of theoretical model from which general hypotheses about the relationship between law and society can be inferred. In the light of these observations, it must be said that while one may agree with Rumble that Llewellyn’s work is lacking in operationalized hypotheses one must also point out that this failing stems rather from the complete lack of an adequate theoretical model than from a mere reluctance to generalize from such a model. In this respect, Rumble seriously misrepresents the nature of Llewellyn’s work. For further discussion of the relationship between Llewellyn’s empirical work and legal realism, see F. K. Beutel, “The Relationship of Experimental Jurisprudence to Other Schools of Jurisprudence and to Scientific Method” (1971), 3 Washington U.L.Q. 385, esp. 392-393.


27. A further weakness of Llewellyn’s scheme stems from his tendency to analyse institutions in terms of individual psychology. See Hayakawa, op. cit., at 724-25: “The Cheyenne Way seems to have been inspired by Freudian psychology and the American anthropology of Ruth F. Benedict whose approach, characterized by emphasis on cultural configurations and cultural patterns, is also becoming obsolete. The authors . . . erred in the choice and use of conceptual tools and frames of
4. The Delimitation of a Focus of Inquiry

Llewellyn lays considerable emphasis upon the need to find a suitable ‘point of reference’ for legal research. In his view, rules should never be the focal point of jurisprudential investigation; on the contrary, if Jurisprudence is to be numbered among the social sciences then it must center thought on behavior — and in particular upon the interaction between behavior of law-officials on the one hand and that of laymen on the other. More precisely, Llewellyn places the dispute at the heart of legal inquiry: “Disputes are the eternal heart and core of the law. They do not mark its circumference but they will always mark its center”;

What, then, is this law business about; It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of the law . . . This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.

In The Cheyenne Way, Llewellyn carries this focus of inquiry one step further and centers his thought upon the concept of the ‘trouble-case’. By following this main road of inquiry, he believed that it is possible to shed light on three fundamental questions for any student of society; (1) in any particular society, who is it that takes official action? (2) and with what support of opinion or active aid? (3) and to what extent does any given legal norm penetrate to the variegated levels of the social fabric?

By adopting this focus of inquiry, Llewellyn makes it clear that Jurisprudence should not confine its energies to the study of judicial behavior alone; indeed, in his view, the behavior of other officials was of equal importance as an object of inquiry; in one of his very first articles he said: “. . . the focus, the center of the law, is not merely what the judge does, in the impact of that doing on the interested

reference for analysing and interpreting social facts. Social facts are to be analysed and interpreted in the context of society as a whole, not in terms of individual psychology. The “loose” structure and arrangement of the work and, more importantly, the weakness of basic empirical data gathered by inadequate field work are by modern standards serious deficiencies.”

party, but what any official does, officially.'”30 However, while Llewellyn did adopt a broad focus of inquiry when he studied the law-ways of the Cheyenne, he clearly did not maintain this focus when he turned his attention to the modern American legal system. Unfortunately, Llewellyn’s focus of inquiry was another instance of his failing to follow the precepts he had so eloquently stated in his theoretical works. Indeed, the vast bulk of his writings concentrate fairly and squarely upon the judicial decision and completely exclude the very factors he had so piously placed at the heart of his apocalyptic call for a “New Jurisprudence”. In particular, _The Common Law Tradition_ — the culmination of Llewellyn’s jurisprudential endeavors — merely follows the mainstream of legal realism in its slavish adherence to the study of judicial decisions. In the words of Professor Harry Jones: “‘What happened after 1930 is that realist scholarship came to be concentrated on the judicial process and to deal only incidentally with the work of nonjudicial officials and hardly at all with the area of contact between official action and societal behavior.’”31

The explanation for Llewellyn’s desertion of his principles may well be that, while the ‘dispute’ is an excellent focus for the study of relatively simple social systems such as that of the Cheyenne Indians, it is far too unwieldy an instrument for the productive examination of a complex modern legal system — particularly if the jurist has no adequate conceptual map of the social process as a whole. Nevertheless, this explanation hardly accounts for Llewellyn’s neglect of matters that he had frequently declared to be central to his program for a Modern Jurisprudence.

5. The Balance of Emphasis upon Operations and Perspectives

“‘What these officials do about disputes is, to my mind, the Law itself.’”32 “‘Without anybody’s reading either the context or the rest of the ‘Bramble Bush’... this lone sentence became, internationally, the cited goblin-painting of realism.’”33

32. _The Bramble Bush_ 2-3.
33. _The Common Law Tradition — Deciding Appeals_ (1960) 511. For a detailed discussion of the context in which _The Bramble Bush_ was written, see Twining, _op. cit._, at 140-152. Readers of the book need to remember that it represents a relatively young Llewellyn addressing first year students rather than the older Llewellyn addressing experienced lawyers or fellow jurists. (at 147-148).
The balance of emphasis upon operations and perspectives in the works of Karl Llewellyn is probably more even-handed than in the case of any other legal realist. In his early writings, no doubt the scales were somewhat weighted in favor of operations as a sharp reaction to what the realists perceived as the rule and concept oriented Jurisprudence of the past; as Llewellyn himself said, the realists wanted to "deal with things, with people, with tangibles, with definite tangibles, and observable relations between definite tangibles—not with words alone." Nevertheless, such inclinations did not prompt Llewellyn to place legal rules and concepts on a par with the squeakings of Watsonian rats. Unlike his behavioralist colleagues, he did not reduce legal science to a mere recording of physical behavior stripped of the meaning attributed to such behavior by the relevant actors in the social process. Indeed, Llewellyn's early acquaintance with the works of Max Weber encouraged him to campaign for a legal science of a radically different mould from the rigid natural-science methodology of his one-time Columbia colleague—Underhill Moore. As a consequence, Llewellyn avoided the behaviorist fallacy that bedevilled much of Moore's jurisprudential endeavors and he achieved an adequate balance in emphasis upon operations and perspectives.

As we have seen from our discussion of the focus of inquiry, Llewellyn's firm belief that Jurisprudence must be securely anchored on the base of an empirical legal science led him to stress in his early writings the urgent need for a science of observation and it is hardly surprising that he laid great emphasis upon the wide gulf often existing between the words and actual practices of legal officials:

Above all...what looms large...is the difference between the words and the practices of officials. It is not what stands on the books, but what happens, which is the center of attention. It is not the purpose of any legal rule, or the purpose of official action, but the kind and quality of the action itself which is of primary concern...we remain concerned primarily with what officials do and the effects of their doing. (Including of course their saying in their doing, if, as, and when their saying makes a difference). It is quite clear from this passage that Llewellyn's urgent appeal for a study of judicial behavior certainly does not entail a simultaneous abandonment of a study of their perspectives. Indeed, even when he is brandishing the flag of legal realism in his most vociferous manner,
Llewellyn deprecates the study of rules and concepts only insofar as such study encourages the spurious belief that they actually describe what courts or people are really doing.36

For example, in the very article which launched the realist movement — *A Realistic Jurisprudence — The Next Step* (1930), Llewellyn actually undertakes a detailed and searching examination of the nature of legal rules. From this examination it is clear that Llewellyn's so-called “rule-skepticism” was not directed at the negation of legal rules but at the clarification of their role in the judicial process.37 In Llewellyn's view, prescriptive legal rules must be divided into two categories. Firstly, there are mere paper rules — rules which have no observable counterpart in practice; in his own words, “paper rules” are “what have been treated, traditionally, as rules of law; the accepted doctrine of the time and place — what the books there say ‘the law’ is”. Secondly, there are “working rules” — rules that do have counterparts in practice, or else are “consciously normatized” by legal officials.38 Now Llewellyn's objection to traditional Jurisprudence was not that it studied legal rules but rather that it failed to distinguish between mere “paper rules” and the actual “working rules”.39 Quite how the jurist should set about discovering the “working rules” is left unstated but this analysis clearly distinguishes Llewellyn's approach from that of the prediction theory and from the behaviorist view of rules being mere stimuli to which legal officials respond by some unconscious — and unstated — psychological process.

Of course, Llewellyn also stresses in the same article the need for a study of the actual behavior of judges and he causes no little degree of confusion by terming the practices of the courts “real rules” but it is quite clear that Llewellyn's conceptual scheme — even at this early stage — allows for an adequate balance of emphasis between operations and perspectives.40

It is interesting to note that during the 1930's Llewellyn actually wrote a tentative draft for a book called *The Theory of Rules*.41

36. “Some Realism about Realism” 43: “... what the proposed approach means is not the elimination of rules, but such setting of words and paper in perspective as can hugely step up their power and effect”.
41. See Twining, *op. cit.*, at 200-202 and Appendix B (in which Twining attempts to synthesize Llewellyn's many writings dealing with legal rules).
Professor Twining has indicated the degree to which this unpublished manuscript foreshadows *The Common Law Tradition* and it is certainly further evidence of Llewellyn's concern with maintaining an adequate balance between operations and perspectives — even in his most "realistic" period of development.

Llewellyn's awareness of the need to maintain this balance becomes increasingly evident as his later writings developed it into an explicit theme: for example, in 1940, having rejected the prediction approach to legal rules as being inadequate, he went on to say that "The Newer Jurisprudence must work out the relation, in the judge's actual work, of the ideal and ideological elements in our legal system to the words of the rules of the law; or the relation of either to the going institutional practices of courts and judges." In *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method* (1940), Llewellyn maintains this emphasis by drawing a sharp distinction between "Law-ways" and "Law-stuff" which must both be studied by a scholar purporting to pursue the goal of a comprehensive Jurisprudence. "Law-ways is used to indicate any behavior or practice distinctively legal in character, flavor, connotation or effect". "Law-stuff is used to mean any phenomena in the culture.

42. The relationship of the 'Theory of Rules' to the 'whole view' is quite straightforward: rules are one of the main instruments (no more, no less) for performing the law-jobs and as such they deserve special attention. Improving the quality of legal rules is one of the most important tasks of juristic method; the Grand Style offers the preferred model for rules of law- 'the rule with a singing reason' which at once provides guidance to judges, a reliable basis for prediction to practitioners and is, as far as is compatible with the other functions, capable of being understood by non-lawyers. Twining, op. cit., at 201-202. For a more full discussion of Llewellyn's early conception of the nature of legal rules and concepts, see L. L. Fuller, "American Legal Realism" (1934), U. Pa. L. R. 429. This article is largely a review of Llewellyn's early book, *Prajudizienrecht Und Rechtsprechung in Amerika, Eine Sprachauswahl Mit Besprechung* (Theodore Welcher, Leipzig, 1933). From Fuller's quotations it appears that Llewellyn devoted more thought to the nature of rules than many of his contemporaries.

43. "On Reading and Using the Newer Jurisprudence" 145. See also Llewellyn's further statement one year later: "Rules are measures based on ideals, practices, standards or commands, measures cast into verbal form, authoritative verbal form, with sharp-edged consequences. They are a well-nigh indispensable precondition to any degree of standardization of law-work across space and the generations. They stand with such relative conspicuousness to observation, they accumulate so easily, they can be gathered so conveniently, and they are so easy to substitute for either thought or investigation, that they have drawn the attention of jurisprudes too largely to themselves: to the rules — as if rules stood and could stand alone." Llewellyn, *My Philosophy of Law* (1941) 188-189. For the approach of legal realism generally, see F. V. Cahill, *Judicial Legislation: A Study in American Legal Theory* (The Roland Press Co., New York, 1952) 116-118.
which relate discernably to the legal; it includes rules of law, legal institutions of any kind, lawyers, law-libraries, courts, habits of obedience, a federal system: in short anything in the culture whose reference is discernably legal."

6. Conception of Authority and Control

Llewellyn delineates with considerable care both the aspects of law which we characterize as 'authority' and 'control' although it must be understood that he does not treat them as separate conceptions; rather, he lumps them together into a single compendious conception of "authority". The analysis here discussed appeared at a late stage in Llewellyn's jurisprudential development and is evidently one of the products of his close collaboration with the young anthropologist, E. Adamson Hoebel.

In Llewellyn's view, the "legal" pre-supposes a process of "socially significant normative generalization"; "All socially significant normative generalization which is in origin an eternal process of emergence from the mere living of any group" consists in "a projection and idealization" of "right patterns" of different degrees in precision and generality. Now this process depends, according to Llewellyn, on two crucial factors:

One factor urging powerfully in the direction of such socially significant normative generalization may be thought of as quantitative. If interlocking behavior gets patterned in fact, with a resulting back-and-forth of adjusted action and adjusted expectation, deviations will bother; generalizable pictures of rightness and of rights are pretty well bound to result . . .

A second factor urging in the direction of socially significant normative generalization may be thought of . . . as qualitative. The stress, the spectacular and memorable drama, the brain-sweat, of a trouble-case, though it be an utterly unique one, drives by its whole quality toward generalization; and this doubly, if the trouble-case becomes, as many do, the occasion

44. "The Normative, The Legal, and The Law-Jobs: The Problem of Juristic Method" (1940), 49 Yale L. J. 1355, 1357-1358. See generally G. Gurvitch, op. cit., at 172-183. It is clear that Gurvitch seriously underestimates the degree to which Llewellyn maintains a balance of emphasis between operations and perspectives. Finally, we may note Llewellyn's spirited reply to such critics as Roscoe Pound: "The misconception lies in conceiving that everyone thinks facts are all that Jurisprudence is concerned with, merely because he cries out for needed facts or in a particular preliminary study tries to report facts as objectively as possible . . ." "Through Title to Contract and a Bit Beyond" (1958), 15 New York University Law Quarterly Review 159, 162 n.
for awakening to, and voicing, normative drives which have been building unnoticed.\textsuperscript{45}

However, normative generalization is only a part of what goes to generate and to make up the "legal". The generalization, says Llewellyn, must somehow be "accepted, effective on or consonant with men's behavior."

It must be more; it reaches beyond the normation of oughtness into the imperative of mustness. The "legal" has to do with ways and standards which will prevail in the pinch of challenge. . . . it is vital to see the possibility of the emergence of a "legal" structure . . . which makes its own claim to its own variety of oughtness regardless of the "inherent" rightness or justice of its any part or of its net weight: its claim to observance, obedience, authority, effectiveness because, but merely because, it is the effective expression of the recognized going order of the Entirety concerned.\textsuperscript{46}

In other words, the "legal" is this process of patterned normative generalization insofar as it is bound to "authority" and regularity. By way of summary, Llewellyn identifies four attributes or "clusters of attributes" which can be drawn together into the compendious conception of "authority": (a) There is a necessary element of effectiveness or existence in and as part of the Entirety concerned: some quantum of de facto obedience to or acquiescence in a mandate or ukase, or in a disposition of a trouble-case . . . (b) There is an element of supremacy: in the pinch the "legal" must prevail as against any competing standard or authority . . . (c) There is an element of enforcement, of sanction, of perceptible teeth to call into play against the challenger . . . (d) There is an element of recognition that what is done or commanded or set as imperative or as norm is part of the going order of the Entirety concerned; not merely acceptance, but an attribute about the why of this acceptance: an element of officialdom."\textsuperscript{47} Unfortunately, Llewellyn never adapted this analysis for the purpose of empirical study of the modern legal system; indeed, the hear-say nature of the data used by Llewellyn and Hoebel meant that this analysis smacks more of the speculative than the empirical even in respect of a primitive legal system. Yet, the analysis nevertheless remains an impressive contribution to our understanding of the nature of law.

\textsuperscript{46} Ibid., at 1364.
\textsuperscript{47} Ibid., at 1367.
7. The Relationship Between Law and the Social Process

"... it would seem to go without demonstration that the most significant aspects of the relations of law and society lie in the field of behavior. ..." 48

Right from the beginning, Llewellyn laid great emphasis upon the need for a searching examination of the relationship between law and the social process. Indeed, in one of his earliest published articles, Law Observance versus Law Enforcement (1928), 49 he sets forth a most convincing statement of the limits of law as an effective instrument of social control: "Law observance to be generally effective requires that folkways in conformity with the purposes of the law shall have been first developed. It is the folkways, not the law, which are known; it is the folkways, not the law, which in our present scheme of things offers some guaranty of people learning and following." 50 Furthermore, once it becomes clear that law observance is a question of folkways rather than of rules it must also be recognized that such rules and folkways are not uniform but diversified at different levels throughout society. Consequently, according to Llewellyn, any problem of law enforcement must be viewed as a problem of altering the conduct patterns of specific individuals. 51

This became a theme to which Llewellyn returned on many subsequent occasions.

Llewellyn's concern with the relationship between law and the social process is similarly demonstrated by his functional analysis of the constitutive process in his article, The Constitution as an Institution (1934). 52 In this stimulating work, Llewellyn views the constitution not as a mere document but as a 'living institution': "An institution is in first instance a set of ways of living and doing. It is not in first instance, a matter of words and rules. ... Every living constitution is an institution; it lives only so far as that is true. 53 Any

49. Jurisprudence Ch. 18.
50. Ibid., at 401-402. This passage, with its emphasis on "folk-ways", lends credence to Twining's view that Llewellyn was influenced by the work of William Graham Sumner — particularly by the latter's Folkways (Dover Publications, New York, 1959). Llewellyn came into contact with Sumner's ideas while he was at Yale College and a pupil of Sumner's disciple, A. G. Keller. Twining also points out how Llewellyn's "law-ways" appear to be adapted from Sumner's "folkways". See generally, Twining, op. cit., at 92-93.
51. Jurisprudence ch. 18, at 410.
52. (1934), 34 Colum. L. Rev. 1. In J. Hall (ed.), Readings in Jurisprudence (1938) 970.
53. Ibid., at 970. We have already noted the crucial place which the concept of
working constitution, according to Llewellyn, is a highly complex type of institution and it can most profitably be seen as the interaction of the different ways and attitudes of three diverse categories of people; (a) the specialists in governing; (b) the “interested groups”; and (c) the “general public”. Of these groups, Llewellyn maintains that the specialists in governing stand at the center of the whole process. However, he did not pursue this analysis any further and it was not really until his collaboration with Hoebel that he developed this tentative institutional approach into a fully comprehensive theory of the functions of law in society.

Instead of concentrating on structural factors, Llewellyn developed the notion of a social institution so that he could highlight the functional aspects of law: “The central aspect of an ‘institution’ is organized activity, activity organized around cleaning up some job. In the case of the major institutions (of which the institution of law is one), the jobs concerned are vital to the continued existence of the society or group.” Llewellyn’s basic thesis is that every social system or social subsystem has certain fundamental needs that must be satisfied if the group is to survive. Llewellyn’s expression of the purpose of law is to be found in his enumeration of five so-called “law-jobs”: In *My Philosophy of Law* (1941), these jobs appear as follows:

1. The disposition of the trouble-case: a wrong, a grievance, a dispute . . .
2. The preventive channeling of conduct and expectations so as to avoid trouble, and together with it, the effective re-orientation of conduct and expectations in similar fashion.

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“*Institution*” holds in Llewellyn’s Jurisprudence. Twining indicates that Llewellyn’s approach was most probably derived from the work of W. G. Sumner and from an article by W. H. Hamilton, in *8 Encyclopedia of the Social Sciences* (1937) 84. See Twining, *op. cit.*, at 93 and 176-177. In his unpublished manuscript, *Law in Our Society*, Llewellyn defines "institution" in the following manner: "An institution is in the first instance organized activity built around the doing of a job or a cluster of jobs. A craft is a minor institution. A major institution differs in that its job-cluster is fundamental to the continuance of the society (or group) with typical resulting complexity"; Twining, *op. cit.*, at 177.

(3) The allocation of authority and the arrangement of procedures which mark action as being authoritative; which includes all of any institution, and much more.

(4) The positive side of law's work, seen as such, and seen not in detail, but as a net whole: the net organization of the society as a whole so as to provide integration, direction, and incentive.

(5) 'Juristic Method', to use a single slogan to sum up the task of so handling, and of so building up effective traditions of handling the legal materials and tools and people developed for the other jobs to the end that those materials and tools and people are kept doing them better, until they become a source of revelation of new possibility and achievement.57

All groups develop institutions whose function it is to perform the law-jobs. As Professor Twining notes, in Llewellyn's later usage "law-and-government" or "law-government" is the term used to refer to such institutions.58

Each law-job presents primarily an aspect of "pure-survival". The job must be performed sufficiently well for the group to keep functioning. But beyond this "bare bones" aspect, each law-job has a "questing-aspect" — "a question of surplus and its employment". On the one hand, the questing aspect searches for a more efficient performing of the law-job and, on the other hand, it looks towards ideal values: "such organization and such ideals of justice as tend towards a fuller, richer life".59 As we shall see, Llewellyn refuses to treat such ultimate ideals as a legitimate object for his study; hence he stops short with the first element in the questing aspect of the law-jobs.

Apart from the law-jobs, one of the more interesting aspects of Llewellyn's work in The Cheyenne Way (1943) is its concentration on the events which precipitate the situations in which authoritative decisions are called for. Llewellyn stresses the need for an under-

57. My Philosophy of Law 186. In other works, Llewellyn sometimes split the second law-job into two parts thus arriving at a total of six law-jobs in all. See Twining, op. cit., at 175.
58. See Twining, "Two Works of Karl Llewellyn" (1968), 31 Modern L. Rev. 165, 175. In, Karl Llewellyn and The Realist Movement 179-180, Twining shows how "in the late 1940's Llewellyn adopted the concept 'law-government' in preference to 'law'. His justification for joining together 'law' and 'government' was that these two terms are often used to refer to institutions which are primarily concerned with the same basic function 'the job that is fundamental to the existence of any society and of any social discipline at all; it is the job of producing and maintaining the groupness of a group.'"
59. The Cheyenne Way 292.
standing of the dynamic tensions that shape the law and manifest themselves in claims; according to Llewellyn, investigation of claims reveals much about the social grouping which any given claimant may represent. The recognition of the need for a study of such precipitating events and of the claims process is thus an important contribution to our understanding of the relationship between law and the social process.

After Llewellyn's death, Hoebel summarized his colleague's approach to law and society in the following manner: "Llewellyn approached and studied both law and law-in-society as a process. Society is flux, and form exists only in enduring relationships of flowing action. Concentration on the law-jobs as a feature of theory-method has the virtue of relating the law (as all other components of the socio-cultural system) as a subsystem of the whole. For the jurist this is a powerful antidote to any law-centered tendency to treat law and its doctrine as sui generis. But for the anthropologists of the 40's, its value was to bring law directly into the swelling stream of functional thought in anthropology."

However, while Llewellyn's theory of the law-jobs is an impressive account of the basic functions performed by a legal system it hardly serves as an adequate account of the complex relationship between law and society. As we have seen, Llewellyn's failure to apply the trouble-case method to an ongoing legal system forced him to side-step many crucial issues of social and legal structure; furthermore, his exclusive concern with functions permitted him to ignore such vital issues as the patterns of control existing in a society, and the influence of goals and objectives on institutional development.

In short, Llewellyn's conceptual framework was tragically inadequate. If one views the social process as consisting essentially of the...

60. "The dynamic tensions which lead to law-stuff, feed it, and give it material to work on, show up peculiarly in claims-claims repudiated or resisted or merely unfulfilled; claims asserted as 'right' or 'rightful' in the context of the going order of some particular group or Entirety. For a claim never exists in vacuo. The particular group order which it pre-supposes is as much a part of it as the claimant. ibid., at 276.


62. These particular weaknesses have often been cited as undesirable tendencies of a functional approach; however, since Llewellyn never studied an ongoing legal system these weaknesses are even more apparent. See generally, O. Young, Systems of Political Science (1968) esp. 34. See also the criticism of a legal scholar; L. L. Fuller, op. cit., at 448-453.
interaction of human beings with human beings and with resources, it is clear that a systematic Jurisprudence must be capable of conceptualizing and then measuring the impact of law on the distribution of resources and vice versa: this Llewellyn’s Jurisprudence fails to achieve.63

Part of the problem with Llewellyn’s treatment of the relationship between law and the social process stems from its “abstractness”. This latter characteristic is — to some extent — a result of Llewellyn’s failure to apply this theory to an ongoing legal system; however, it is also a result of Llewellyn’s remoteness from the check of rigorous field-work. Without the stimulus of day-to-day acquaintance with the subject matter of social theory, the scholar is inclined to become more and more abstract in his theoretical formulations: unfortunately, as Professor Twining has suggested, Llewellyn was remarkably unenthused by the prospect of systematic field-work:

In respect of socio-legal research Llewellyn was more of a staff officer than a foot soldier. Neither by temperament nor by training was he suited to the systematic collection of data. He knew that he was incurably innumerate and was mildly worried by the knowledge. Typically he wrote almost entirely from his head; even the ordinary spadework of combing the law reports for relevant authorities did not come naturally to him although he often disciplined himself to do it; he was not methodical enough to be a good field worker, although his ‘artistic’ qualities sometimes produced spectacular results. He broke most of the rules of empirical method — not for him the carefully constructed research design, rigorous sampling techniques or the scrupulously tested questionnaire. He spent little or no time in the field for his principal works. He stayed only ten days among the Cheyennes; the rest of the collection of material for The Cheyenne Way was done by Hoebel. . . . For only one major project, the study of the Pueblo Indians, did Llewellyn do a considerable amount of fieldwork; instead of remaining a detached observer, he became emotionally and actively involved in Pueblo affairs; it is perhaps not a coincidence that this project was never completed.64

By way of summary, we might say that Llewellyn went considerably further than most of his contemporaries in plotting the interaction of

63. For the type of approach that might be adopted, see H. O. Lasswell, "Toward Continuing Appraisal of the Impact of Law on Society" (1967), 21 Rutgers L. Rev. 645. This work is perhaps too detailed and complex in many respects but the basic concepts are highly serviceable.
64. Twining, op. cit., at 193-194. Note also Llewellyn’s failure to submit himself to the discipline of scientific work during his research for his early work, “Behind the Law of Divorce” (1932), 32 Colum. L. Rev. 1281 and (1933), 33 Colum. L. Rev. 249; ibid., at 194-195.
legal and social processes; however, his endeavors came to grief largely because of his exclusive focus on one aspect of this interaction—namely the functions of "law-government". As we have indicated elsewhere, the reasons for this inadequacy stem partly from matters personal to Llewellyn but also from the general lack of intellectual aid and comfort from the ranks of the social scientists.65

8. The Intellectual Tasks Performed by Llewellyn's Jurisprudence

(i) The Clarification of Goals.

"... every man of conscience must hold his own perceptions of Justice to be the basic ones."66 "The democratic way... rests to my mind on preference and on faith. I am content to let it rest on faith. Faith is a good foundation."67 Along with the mainstream of pragmatic realism Llewellyn pays little direct attention to the task of goal clarification. The cardinal tenet of his early writings is the simple message that the function of legal science should be regarded as being purely descriptive and that it must be sharply distinguished from the normative "art" practised by the judge and advocate.68 Nowhere does Llewellyn deny that a comprehensive Jurisprudence must deal with attitudes and expectations in addition to overt behavior and nowhere does he renounce the jurisprude's task of considering the purposes of law together with the ideal pictures of society towards which such purposes may drive. Nevertheless, in Llewellyn's view, the function of a descriptive legal science is to inform the normative jurisprudential art and in order to do this effectively it must temporarily divorce itself from speculative ideals.69 For Llewellyn, therefore, an empirical legal science is the foundation stone for a modern...

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65. Typical of this lack of mutual understanding between jurisprudence and social science is the reluctance of the Columbia Anthropology Department to supervise a thesis about 'law'. Instead, E. A. Hoebel was supervised by Karl Llewellyn and out of this partnership grew The Cheyenne Way. See Twining, op. cit., at 154-155. This is not to suggest that individual social scientists were unsympathetic to the demand for greater co-operation between lawyers and social scientists. However, the gargantuan task set by the legal realists called for a commensurate effort by the social scientists to make the high hopes for modern Jurisprudence a reality: For various reasons, this concerted effort was not forthcoming until the post-war period.


67. "On the Good, the True, the Beautiful in Law" (1942) in Jurisprudence ch. 8, at 212-213.

68. See H. Yntema, "American Legal Realism in Retrospect" (1960), 14 Vand. L. Rev. 317, 325.

69. "Legal Tradition and Social Science Method" 86.
Jurisprudence: it seeks to inform — but not to deny — the traditional normative concerns of lawyer, judge, and jurist.

In his recent book on Llewellyn, Professor Twining draws attention to unpublished materials which make Llewellyn’s own basic values reasonably explicit: “Without committing himself to a fixed hierarchy of values, he claimed to give a high priority to four values: tolerance, basic minimum respect for human dignity, ‘decent attention to need as well as merit’, and ‘a fair hearing before a fair tribunal’. He was far from being a dogmatic egalitarian maintaining that equality was the residual value, which ought to operate unless inequality could be justified in terms of some other value such as merit or the need of the whole group.”70

However, in his published works, Llewellyn does not openly reveal these underlying values and his approach to the task of goal clarification is shrouded in obscurity. All that is certain is that Llewellyn rejected the view that discussion of “ultimate ends” was useful and staked his faith on the technique of pragmatism: “... when 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 check-up and correction... which is the method and the very life of case-law... 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.”71

Nevertheless, during the war years when criticism of the ethical foundations of legal realism reached its zenith,72 Llewellyn published an article which did imply certain basic goals. In On the Good, The True, The Beautiful, in Law (1942), Llewellyn undertook a brief discussion of the concept of “Justice”. In this article, he argues:

The first meaning of Justice which makes sense to me is what I shall call net Justice in the social scheme. It has to do with the organization of the whole society, of which the whole institution of Law [-Government] is for most purposes but an efflux and a voice — though the institution of law is of course also capable of being made one major tool for reorganizing society.

71. “On the Good, the True, the Beautiful in Law” 211-212.
72. For the crucial role of the Second World War in forcing the realists to defend their position on the matter of legal ethics, see E. A. Purcell, “American Jurisprudence between the Wars: Legal Realism and the Crisis in Democratic Theory” Dec. 1969 American Historical Review 430-431 and 441.
This net Justice, as I conceive it, however, does not in first instance voice an appeal to Law, not even to change in Law. It voices in first instance a yearning that the less pleasant attributes of men-in-groups and indeed of men-as-individuals might disappear, and that something other and better might be substituted for them. It then expresses clearly that aspect of the Good, as the thinker sees it, which has to do with men's equal access to desired things — positions, powers, enjoyments, opportunities — things of which there are too few to meet all desires. The problem of social Justice — net Justice — begins, as I see it, with getting something to be just with; and that is a group-job. It takes precedence. That group-job calls for organization, discipline, leadership, and leaders. The ensuing problem of net Justice looks then peculiarly to the development of the disadvantaged. It looks to that development from two angles: the first angle is that of fairness and of the dignity of human beings; the second angle is that of wisdom, because refreshment out of the undeveloped is the way of hope for all. In this there is nothing concrete, and you could fit the formula, if you want to call it that, about as well to Hitler's state as to ours, or to some really ideal or actual democracy. With due hesitation, as I ponder on deep thinkers who have found otherwise, I conclude, thus far, that that is about as far as the available ultimate goals give guidance for concrete applications.

Quite what Llewellyn means by "net Justice" is by no means clear; however, the gist of the argument would appear to be this. Since societies or social groups only have limited resources at their disposal, "Justice operates under the principle of scarcity". In Llewellyn's view, each society or social group must therefore develop its own system of "distributive justice" for the sharing of the values actually at their command. Now Llewellyn's notion of 'social justice' would emphasize 'fairness', the 'dignity of human beings', and 'wisdom' [the adoption of the standpoint of society as a whole in the making of decisions].

According to Llewellyn, the attainment of 'social Justice' must be approached along pragmatic lines — within the context of a particular group or a particular dispute: ultimate goals can provide no clear guidance in these matters. Hence the task of Jurisprudence should be to concentrate on the concrete application of goals to specific problems rather than the postulation of high order goals without reference to any particular society or group. In Llewellyn's view, the "enrichment" of social life was also a vital task for those entrusted with the leadership of society but he was not personally

73. "On the Good, the True, the Beautiful in Law" 202-204.
74. Jurisprudence, ch. 5.
prepared to charter the course along which such “enrichment” might lie—that was a task for the philosophers and was an infinitely more abstract task than that of attaining ‘net social justice’. For Llewellyn, the latter task was necessary to the very existence of any social group. Once the task was being performed reasonably adequately, the jurisprude could simultaneously turn his attention to the application of those ultimate goals recommended by the philosophers: however, such application would necessarily be carried out as part of a process of accommodation and compromise. Once again, Llewellyn pinned his hopes for social improvement on pragmatism.

Another example of Llewellyn’s approach to the task of goal clarification is illustrated by his subtle reply to his natural law critics in the article, One “Realist’s” View of Natural law for Judges, published in 1939. Llewellyn’s adroit argument runs to the effect that both legal realism and natural law are essentially attempts to enhance the responsibility of judicial decision-making. Each school, he argues, endeavors to evaluate law in terms of its on-going value. Insofar as natural law is merely the name given to a universal human urge or drive for “right, or decency, or justice” it is “an interesting and highly useful complement to legal empiricism.” Yet Llewellyn parts company from his strange bedfellows by refusing to assert explicitly any value preferences whatsoever. According to him, the role of the legal scientist is to discover whether our present legal arrangements are adequate for the performance of their purpose within the social process as a whole and, in his view, such questions can only be dealt with on a pragmatic basis.

75. This is an argument later made by two leading commentators on American legal realism: (1) H. W. Jones, “Law and Morality in the Perspective of Legal Realism” (1961), 61 Colum. L. Rev. 799, at 801: “The ethical theory to be drawn from legal realism is, I suggest, that the moral dimension of law is to be sought not in rules and principles, but in the process of responsible decision, which pervades the whole of law in life.” (2) F. V. Cahill, op. cit., at 124: “In this aspect, therefore, legal realism is an assertion of judicial responsibility. The judge must employ more than “judgment” in the solution of human difficulties. The law offers solution to the problems that come before him; the judge must formulate his own solutions. In the end “(t)he only guarantee of judicial wisdom will remain the judge.” (quoting Llewellyn).

76. It is interesting to note that in an appendix to the Common Law Tradition, Llewellyn attempts to disarm those who criticize him for having failed to take responsibility for any definite value preferences by arguing that legal realism was, after all, only a “method”: “... realism was never a philosophy, nor did any group of realists as such ever attempt to present any rounded view, or whole approach... what realism was, and is, is a method, nothing more, and the only tenet involved is that the method is a good one. ‘See it fresh’, ‘See it as it works’ — that was to be the
While Llewellyn's reluctance to assert ultimate goals is understandable in the light of the philosophical and methodological assumptions underlying legal realism\(^7\) it is hard to grasp why he refused to undertake the task of surveying the goals cherished by the other participants in the ongoing social order. This failure is all the more remarkable when it is remembered that Llewellyn argued that law must give effect to the changing expectations of reasonable men: "In a regime of change, certainty in law is attained whenever change in the judge's ways moves in step with changes in the expectations of relevant laymen."\(^7\) One is entitled to ask why Llewellyn did not consider the demands of relevant laymen to be of equal significance as an object of study.

(ii) The Analysis of Past Trends in Decision.

"... If different judges find different lines of argument persuasive in leading to a single result, then it would seem to follow that judges' reactions to the facts are more nearly alike, at least are more predictable, than are their reactions to the forms of words we know as legal rules."\(^7\)

Like other former students of Wesley Newcombe Hohfeld, such as W. W. Cook, Llewellyn placed great emphasis upon the need for a foundation of any solid work, to any end." The problem with Llewellyn's argument is that it completely ignores the assumptions underlying the realist movement and—in particular—his own work. Note Rumble's criticism of Llewellyn's argument: "... any definition of realism as the method of "seeing it fresh," "seeing it clean," and "come back to make sure" is unsatisfactory. In the first place, such a definition is inconsistent with the much more fully documented interpretations of the realist movement forwarded by Llewellyn in his articles of the 1930's. In the second place, to define realism as a method is historically inaccurate. The advocates of "realistic jurisprudence" did believe that the use of the method so vividly described by Llewellyn is desirable; but they shared a number of other assumptions and theories as well. In the third place, to define realism in terms of the particular method alluded to in The Common Law Tradition is to reduce a rich and vital movement to something of almost trivial importance." Rumble, op. cit., at 135. The question is also discussed in Twining, op. cit., at Appendix D.

77. However, it is quite clear that the legal realists had very definite value commitments. For a spirited defence of the realists' ethical position, see M. S. McDougal, "Fuller v. The American Legal Realists: An Intervention" (1941), 50 Yale L.J. 827, 835-836: "... they have been hard at work for the achievement of certain humanitarian and democratic ideals of intermediate or relatively low-level abstraction, which most of us share today: civil liberties, social security, more goods to more people, healthful housing, conservation and full utilization of resources, collective bargaining, farm security, socialized medicine, protection of consumers, protection of investors, cheaper and better administration of justice and so on."

78. "Symposium on Law and the Modern Mind" (1931), 31 Colum. L. Rev. 82-90.

79. The Bramble Bush 59.
narrowing of legal categories so that the factual situations covered by
particular legal rules and concepts should not be too disparate.80 This
was a lesson that he applied to his analysis of past trends in decision.
A good example of this technique is his early venture Cases and
Materials on the Law of Sales (1931)81 in which the majority of the
cases dealt with were treated in the manner of a summary of the facts
together with the outcome of the decision; somewhat startlingly the
judicial opinions were often omitted altogether.82 However, it is
interesting to note that although Llewellyn maintained his concentra-
tion on the 'facts' of a case, The Common Law Tradition witnessed a
reinstatement of the judicial opinion to a central position in the
armoury of the legal scientist.

A further crucial factor in Llewellyn's approach to the analysis
of past trends in decision is his belief that we should not concentrate
solely upon the major 'key' cases which arouse the passions of Law
Review editors. In his view, we must learn to analyse the flow of
judicial decisions on a much wider time-frame: "For the long haul,
for the large-scale reshaping and growth of doctrine and of our legal
institutions, I hold the almost unnoticed changes to be more signifi-
cant than the historic key cases, the cumulations of the one rivalling
and then outweighing the crisis-character of the other."83 Thus,
although Llewellyn lists 64 techniques of dealing with precedents,
his analysis of a series of appellate cases in The Common Law
Tradition reveals that the use of the simple citation overwhelmingly
outnumbered the use of any other technique and that the technique of
citation in fact obscures the process of continuous judicial creativity
which takes place even in such run-of-the-mill cases: "beneath what
looks on the page as mere following there swirls a constant current of
creation".84

80. For the influence of Hohfeld on the realists and — in particular — on Cook, see
Twining, op. cit., at 34-37; for the influence of Hohfeld on Llewellyn, see 97-98.
See also Twining's assessment of the relationship between Cook and Llewellyn
at p. 98.
81. See generally Twining, op. cit., at 128-140; "Two Works of Karl Llewellyn"
(1967), 30 Modern L. Rev. 514.
82. Of particular interest is the enormously painstaking index. The purpose of the
time-consuming enterprise was evidently part of Llewellyn's attempt to classify
decisions in terms of their factual context rather than their wide-ranging legal
classification. For example, Llewellyn has a separate index in which commodities
are listed irrespective of any legal characterization.
84. Ibid., at 116-117; and see further p. 190: "... the present material may make
permanently untenable any notion that creativeness-choice or creation of effective
However, it is to be regretted that Llewellyn fails to consider for the purposes of trend-analysis any decisions other than those emanating from a judicial body. Similarly, it is a further point of criticism that he does not examine trends from the point of view of the goals towards which they are moving or from the point of view of their effect on the distribution of resources within the society. Perhaps the most important, and certainly the most original, aspect of Llewellyn's analysis of trends is his discussion of judicial "style". By this he means to refer "not to the literary quality or tone, but to the manner of doing the job, to the way of craftsmanship in office, to a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need".  

Llewellyn argues that trends in American appellate decision-making can best be classified according to their general period-style. In his view, the "Grand Style" is the term which best characterizes the craftsmanship of such outstanding judges as Mansfield, Marshall, and Cardozo, on the one hand, and the work of the American courts in general during the 1840's and 50's, on the other. By way of contrast, the decisions of American appellate courts from the 1860's to the early 1940's are characterized as representing the "Formal Style". For Llewellyn, the essence of the "Grand Style" is that "every decision is to be tested against life-wisdom, and that the phrasing of the authorities which build our guiding structure of rules is to be tested and is at need to be vigorously recast in the new light of what each new case may suggest either about life-wisdom, or about a clearer and more usable structure of doctrine." In his view, the grand style is the "best device ever invented by man for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice". In contrast the formal style has a devastating effect on the reckonability policy by appellate judges — is limited to the crucial case . . . the tough and exhausting case, the case that calls for lasting, conscious worry. My material aims to put beyond challenge that such creativeness is instead everyday stuff, almost every-case stuff, and need not be conscious at all".

85. Ibid., at 34. See Twining, op. cit., at esp. 210-215. Note, especially, a most useful diagrammatic representation of the differences between the formal and grand styles at 213.

86. See generally Rumble, op. cit., at 200-205. The period of the Grand Style apparently lasted from the time of Jefferson's Administration to that of Grant's. The shift away from the formal style supposedly began in the early 1940's.


of decision which Llewellyn feels every appellate lawyer has a right to expect; his cryptic definition of the style runs as follows; "Authority was authority; logic was logic; certainty was certainty; heart had no place in legal work; esthetics drove in the direction of cold clarity";\(^8\) unlike the grand style there was no conscious and overt concern with policy. Of course, Llewellyn was not pretending that considerations of "fairness, rightness and decency" were absent from proponents of the formal style; rather he was suggesting that such considerations were not articulated in an open and regular manner. Now Llewellyn's thesis was that the formal style which had dominated American appellate decision-making for some 80 to 90 years (and had aroused the passionate opposition of Holmes, Pound, and the realists) was on the wane; more specifically, he argued that the early 1940's witnessed a return to the grand style by the majority of appellate jurisdictions. Furthermore, Llewellyn's main objective in The Common Law Tradition was to bring the grand style to the attention of the average lawman and to advocate its use as the best means of tackling the problems facing an appellate court. As a consequence, Llewellyn considered style to be a fundamental factor in conditioning appellate judicial decision; hence we must now turn to a consideration of the scientific task.

(iii) The Scientific Task: The Analysis of Factors Conditioning Decision

The number of Factors "held equal" (in the judicial opinion) . . . is unbelievable if measured in terms of any known experimental techniques. Furthermore, in the same series of reports, one can simply move five or six years, and then commonly find a 'control group' in which again oodles of identifiable factors are held more equal that they are on any large scale in today's normal (and expensive) testing methods.\(^9\)

The Common Law Tradition represents a marked departure from the general reluctance of American legal realism to treat the judicial opinion as being anything more than a rather unhelpful \textit{ex post facto} rationalization of a decision. The nature of this departure is clearly formulated by Harold Lasswell:

By relying on this method — the examination of appellate opinions — Llewellyn puts himself in direct opposition to

\(^8\) "On the Good, The True, The Beautiful in Law" 183. For the argument that the Grand Style was largely confined to such fields as Labor Law and Constitutional Law, while the Formal Style flourished elsewhere, see Rumble, \textit{op. cit.}, at 212-213.

\(^9\) \textit{The Common Law Tradition}, at 514.
anyone who holds that opinions do not disclose the intellectual processes by which decisions are made . . . Llewellyn (holds) . . . that the style of thought exhibited in opinions is inescapably interwoven with the method of problem-tackling actually employed by the decision-maker. He asserts, then, that the way a judge thinks is to some extent inferrable from the content — whether the purport or the style — of what a judge says. When the mode of saying permeates the opinion-writing of an entire epoch or jurisdiction it is plausible to conclude that talk-ways are also thought-ways. 91

In other words, Karl Llewellyn made the judicial opinion the foremost tool in his performance of the scientific task.

On the basis of his detailed analysis of a long series of appellate opinions, Llewellyn devised a list of fourteen assorted factors that ‘steady appellate decision’ and which can thus be regarded as conditioning factors; they are: Law-conditioned officials; Legal Doctrine; Known doctrinal techniques; Responsibility for justice; The Tradition of one single ‘right answer’; An opinion written by the court; A frozen record from below; Issues limited, sharpened, and phrased in advance; Adversary argument by counsel; Group decision; Judicial security and honesty; A known Bench; The General Period-style and its promise; Professional judicial office. 92

Now if anything binds these fourteen factors into any kind of conceptual unity it is the twin-notions of “craft” and “tradition”. As to the former notion, Llewellyn’s work with the Cheyennes confirmed his belief that the techniques of use of any legal form or rule are often more important than the form or the rules themselves: indeed, in his article, On Reading and Using The Newer Jurisprudence (1940), he makes this point in a pungent manner:

On the particular matter of judging, the newer Jurisprudence is persuaded that the older by putting on the doctrines of law more weight than those doctrines do bear or can bear alone, have put too little weight on the art and craft of the judge’s office. One studies that art and craft by studying particular officers at work in their office, and seeking for the similarities in their attitudes and behavior. This has been misconceived as being a delving into the vagaries of individuals: what it is, instead, is a search for

91. H. D. Lasswell, “Review of the Common Law Tradition — Deciding Appeals” (1961), 61 Colum. L. Rev. 940, 943-944. For the paradox inherent in Llewellyn’s concentrating upon what he called “the lawyer’s ancient practice” and the departure from realist tenets, see G. Casper, Juristischer Realismus und Politische Theorie im Amerikanischen Rechtsdenken (Dunker and Humblot, Berlin, 1967) 60-61. See also Twining, op. cit., at 229-231.
predictabilities and proper lines of work in the judge's office which transcend individualities.93

Central to Llewellyn's discussion of "the art and craft" of appellate judging is his concept of period-style, which we have discussed in connection with his analysis of past trends in decision. However, Llewellyn's treatment of style as a conditioning factor is extremely unsystematic and vague.

As Lasswell points out, Llewellyn does not bring together a workable general statement of how to analyse appellate opinions for the purpose of comparing them with one another according to their degree of approximation to the Grand Style or to the Formal Style.94 Indeed, Llewellyn compounds matters by stressing three almost meta-physical concepts — situation-sense, reason, and wisdom — as criteria for identification of the Grand Style.95 Nevertheless, Lasswell manages to isolate three principal considerations involved in drawing a distinction between the two period-styles. "Firstly, the degree of emphasis put on relating a specific rule of doctrine to a general principle of the legal system"; secondly, "the care taken to characterize the factual context on which the original controversy arose"; and thirdly, "the attention given to estimating the future consequences of the possibilities considered, and especially to clarifying the norms ratified by the decision as binding upon future participants in contingent situations".96

Closely connected with — and indeed often overlapping with — the concept of "craft" is that of "tradition". In Llewellyn's view, "one of the more obvious and obstinate facts about human beings is that they operate in and respond to . . . traditions, and especially to such traditions as are offered to them by the crafts they follow".97 Among the more important of the traditions which condition judicial

93. "On Reading and Using the Newer Jurisprudence" 135-137.
94. Lasswell, op. cit., at 944.
95. "Situation sense will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with. Wisdom will serve well enough to indicate a goal of right decision weighted heavily with and for the future. Reason I use to lap over both of these, and to include as well the conscious use of the court's best powers to be articulate, especially about wisdom and guidance in the result.": The Common Law Tradition 60-61. See Twining, op. cit., at 216-229, for a detailed discussion of these concepts. In particular, the problem of the alleged 'meta-physical 'nature of the concept-situation-sense' — is discussed in detail. 96. Lasswell, op. cit. at 944-945.
decision are those surrounding the concept of "judicial office". According to Llewellyn, appellate judges have to a real degree become "pavlovized" in their views by office and especially by service. A further aspect of Llewellyn's emphasis on tradition is his discussion of the importance of legal doctrine; in his view, judges are "law-conditioned" and they perform their duties within an environment of authoritative legal doctrine and — strange as it may sound from the lips of a legal realist — he argues that it should be recognized that legal doctrine does "at times actually shape" the outcome of the decision-making process.

The problem with making an assessment of Llewellyn's performance of the scientific task, however, is that he wrote *The Common Law Tradition* primarily as a handbook for the practising appellate lawyer rather than as a systematic contribution to legal science. His objective, as we shall see, was to demonstrate that appellate decisions were much more 'reckonable' than was popularly believed and that the fourteen "steadying factors" operated in concert to produce a

98. "... a deep and rich as-of-course grasp of the idea and ideal of this office is revealed when our language to describe it has no need to strike close to the mark. The typical word, used as a sufficient word, is "impartial", which describes a condition: "not on either side, and without personal interest or desire re the outcome" is about as far as that word really takes you, though the dictionaries tend to add "just". But we mean when we use the word about a man in judicial office a great deal more. We mean, and definitely in addition, "upright". We also mean — and if we stop to think we know that we mean — not a passive but a positive and active attitude: the judge must be seeking, as best he can, to see the matter fairly, and with an eye not to the litigants merely, but to All-of-Us as well. We mean further, and importantly, still another attitude: "Open, truly open, to listen, to get informed, to be persuaded, to respond to good reason." Nay, more; we gather this into one weak, bleak word "impartial" a drive: an idea of effort, of self-denying labor, toward patience, toward understanding sympathy, toward quest for wisdom in the result." *The Common Law Tradition* 46-47. For professional judicial office as the "major restraint on the use of judicial freedom", see Rumble, *op. cit.*, at 152-153.


100. The kind of rule which Llewellyn believes can shape the course of decision is succinctly described in an earlier article; "Impressions of the Conference on Precedent" (1940) in *Jurisprudence* Ch. 6: "The precedents and the lines of precedent which do not fool us, but guide us clearly, and which guide the judges too, are the precedents which do two things together: first, they state a clear reason along with a rule which really sorts out different states of fact for easy sizing up; and second, they state a reason which satisfied us as making sense. Such rules, our best rules, control and guide and satisfy, and open clear lines for their own limitation or development. Such rules, and such rules only, afford dynamic certainty." The development of such rules became an integral part of Llewellyn's approach to the drafting of the Uniform Commercial Code, see generally Twining, *op. cit.*, at 270-340 and especially Appendix E.
reasonable regularity in appellate decision. Consequently, Llewellyn does not attempt to construct any sort of model of the decision-making process in which each factor is carefully weighed in terms of its relative impact upon the shaping of decisions. For example, Llewellyn ignores the possibility of systematic fact-analysis along the lines of Underhill Moore's institutional method or, alternatively, the possibility of intensive research into the effect of individual personality along the lines of study recommended by such scholars as Glendon Schubert.

101. See the appraisal of T. L. Becker, Political Behaviouralism and Modern Jurisprudence, (Rand McNally & Co., New York, 1964) 63-64: "Unfortunately, however, Professor Llewellyn jumps off in mid-stream and neglects to extrapolate upon the nature of the interrelationship between the elements, as well as many other problems raised by a mere listing. Bare mention and a brief description of each element is deemed to be sufficient by Llewellyn. Nevertheless, we do find what is probably the most elaborate analysis of the nature of those discrete elements that substantially contribute to a constraint upon a judge (as contrasted with all other types of policymakers) in arriving at a choice between alternatives." See generally, Rumble, op. cit., at Ch. IV.

102. For a discussion of Llewellyn's work in relation to judicial behaviouralism, see Ingersoll, op. cit., passim. It is clear, however, that the author tends to underestimate the degree to which Llewellyn ignores systematic prediction and fails to grasp the crucial importance of Underhill Moore's systematic approach; see G. Schubert, Judicial Behaviour: A Reader in Theory and Research (Rand McNally, Chicago, 1964). Introduction by Schubert. Professor Twining has made two important remarks in this connection. Firstly, he points out that Llewellyn perhaps surveyed far too many cases in his attempt to demonstrate the renaissance of the "Grand Style"; in Twining's view, the vagueness of such concepts as "situation-sense" and "grand" or "formal" style does not merit the laborious scanning of reports, undertaken by Llewellyn. However great the number of cases examined, the vagueness of the key concepts would militate against the ascription of the title "scientific" to Llewellyn's research: "Llewellyn claimed that he read his samples of opinions in much the same way as historical documents are read by historians. He reported at considerable length on his findings. Although the pages are enlivened by frequent incidental observations, he concentrated for the most part on indicia of the Grand Style and the Formal Style and on the precedent techniques that were being used by the courts. In fact in analysing the cases he was concerned with a rather limited range of variables; he did not, for instance, consistently have regard to factors relating to the socio-economic status of the judges or the parties, or some of the other factors that have been given prominence in jurimetric analysis. He made no attempt to quantify his findings and only spasmodically doffed his cap to systematic social science techniques. Nor did he always distinguish very closely between data and interpretation. A first condition of objective analysis is the establishment of precise categories with criteria of identification which eliminate personal judgment except in borderline cases. The limitations of 'Grand Style', 'situation sense' and other central concepts in Llewellyn's analysis have already been explored. When Llewellyn reads through twelve cases from Massachusetts and reports that he finds clear use of situation sense in at least six of them, an element of trust on the part of the reader is still demanded.
Perhaps the best summary of Llewellyn’s achievements in *The Common Law Tradition* is to be found in a most tactful passage of Lasswell’s review of the publication: “If Llewellyn’s pioneer forays are to be verified and extended it will be necessary to supplement his free-wheeling summary by methods that add preciseness and consensual validity to the research. It is not a matter of attacking studies of the kind supplied by Llewellyn; rather, the question is how to supplement and to verify the many hypotheses about trend and *conditioning factor* that have been introduced into the forum of discussion, study, and action.”\(^1\) However, not all the critics have been so kind; indeed, there is a measure of substance in the grumblings of Takeo Hayakawa who argues that there “does not seem to be much new except his peculiar way of presentation and terminology which operate to impair the scientific value of the work:” \(^2\) Llewellyn is a passionate poet who is fascinatedly singing the praises of the ‘Grand Style’. His esoteric terms lack communicability, but give the work the charm of mysteriousness and abstruseness . . . he seldom goes beyond common sense in approach or in insight . . .”\(^3\) As we have seen, Llewellyn did not really present *The Common Law Tradition* as a systematic contribution to legal science so it is really somewhat unfair that criticism has been heaped upon him for not achieving what he had no intention of achieving in the first place. Nevertheless, it must also be recognized that after all Llewellyn’s calls for an empirical or scientific Jurisprudence his followers had some cause to be disappointed with his *magnum

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\(^1\) Lasswell, *op. cit.*., at 944.

\(^2\) Hayakawa, *op. cit.*., at 728.
The Common Law Tradition has important implications for future research but, as it stands, it does not really go beyond the level of a brilliant, muddled, and unsystematic work representing the rushed attempts of a great scholar to muster all his common sense and experience before he died.

(iv) The Projection of Future Trends in Decision.

Llewellyn's belief when he wrote The Common Law Tradition was that the public's demand for certainty in the law had caused a crisis of confidence in the appellate system. He saw his last work as being an attempt to restore that confidence by showing that, if the material was handled correctly, there should be a considerable degree of reckonability in American appellate decision. It was to this end that Llewellyn drew up his celebrated list of the fourteen "steading factors". It was Llewellyn's firm belief that if the appellate lawyer was made aware of these fourteen factors — and particularly of the Grand Style — he would be enabled to understand the manner in which the judges actually tackle the problems presented to them for resolution; with this knowledge Llewellyn believed the appellate lawyer should then be able to forecast the probable shape of future trends in decision with a reasonable degree of certainty. Llewellyn also argued that the appellate lawyer can himself contribute to this reckonability by bringing to the court's notice an adequate understanding of the background facts which will enable the judges to see the instant case as falling within a situation-type: "One might derive a suspicion that development can almost be forecasted by the situation in suit. The situation-type could sometimes be seen by way of the opinion to be at work in shaping the decision and the rule. But

105. See Twining, op. cit., at 266 for critics' reaction to the book.
106. See Twining, op. cit., at 266-269, for a generous appraisal of the work.
107. The Common Law Tradition 5. Twining indicates that his alleged "crisis of confidence" was never fully analyzed or documented by Llewellyn and it is suggested that it may well have been little more than a "rhetorical device" Twining, op. cit., at 268.
108. Ibid., at 178. "I submit that the average lawyer has only to shift his focus for a few hours from "what was held" in a series of opinions to what those opinions suggest or show about what was bothering and what was helping the court as it decided. If he will take that as his subject matter, I submit that the average lawyer can provide himself, and rather speedily, with the kit of coarse tools we have been discussing and with evidence, too, of his own ability to use that kit to immediate advantage."
the situation must reach the ear and understanding of the particular court or judge." 109

However, as we have seen, Llewellyn does not take a systematic approach to the decision-making process; indeed, it is quite clear that he does not aspire to the prediction of individual cases on a scientific basis. This was a path that he did not care to tread in the company of Underhill Moore and the later judicial behavioralists. In sum, Llewellyn’s performance of the projective task once again paves the way for future research but it does not deserve the recognition of being either scientific or comprehensive.

(v) The Invention and Evaluation of Policy Alternatives

"‘Juristic method is the problem and the technique of solution, for the Entirety, and the problem of keeping the machinery of the law abreast of the needs of the Entirety.’" 110 In Llewellyn’s view, the core of the jurist’s art must always be the provision of wise counsel to the judicial decision-maker. Now although he clearly spurns the intellectual task of goal clarification Llewellyn nevertheless devotes considerable space to an exposition of the pragmatic methods which may facilitate the onerous task of rendering responsible — and effective — judicial decisions.

As a result of his work with the Cheyenne Indians, Llewellyn developed the firm belief that a judicial decision respecting any particular case must — as far as possible — simultaneously perform a variety of critical functions. Firstly, it must adjust the instant dispute with the maximum of speed, smoothness, and permanency together with a minimum outlay of effort and disruption of other legitimate social activities. Secondly, it must attempt to satisfy the ‘felt justice’ of the case while at the same time laying down a rule that will ultimately redound to the greater "‘social health’. 111 In *The Common Law Tradition*, Llewellyn puts it in this way:

... in a going life-situation, fairness, rightness, minimum decency, justice look not only back but forward as well, and so infuse themselves not only with past practice but with good practice, right practice, right guidance of practice: i.e., with felt values in and for the type of situation, and with policy for legal rules ... this drives the whole ‘justice’ idea, inescapably in some part ... forward, into prospect, not merely retrospect:

109. Ibid., at 156-157.
110. The Cheyenne Way 309.
111. Ibid., at 294.
into what one can perhaps call the quest for wisdom in the decision.\textsuperscript{112} Llewellyn argues that there are two main passkeys to the halls of wise decision. One such key is the judge’s open quest for what Llewellyn calls “situation-sense” or “situation-rightness”.\textsuperscript{113} By this he means that the judge must learn to sense the situation of which the immediate case is a type. On this basis, the important facts cannot be the detailed events of the present controversy but rather the background facts which pave the way for the judge to apply the “immanent law” of the situation: “Only as a judge or court knows the facts of life, only as they truly understand those facts of life, only as they have it in them to rightly evaluate those facts and to fashion rightly a sound rule and an apt remedy, can they lift the burden Goldschmidt lays upon them: to uncover and to implement the immanent law.”\textsuperscript{114} Professor Twining argues most convincingly that the use of the phrase “immanent law” is not intended to herald a headlong plunge into the realm of metaphysics — in his view, all Llewellyn means is that a judge who can categorize the facts of a particular case into a generalized type of situation will be in a perfect position to recognize the crucial issues of policy at stake. Often there will be an underlying consensus within a group which will dictate a ‘correct result’; if no such consensus exists, then at least the relevant conflicting policies will have been clearly identified.\textsuperscript{115} According to Llewellyn, the ‘formal style’ — with its absence of situation-sense —

\textsuperscript{112} The Common Law Tradition 60.
\textsuperscript{113} Ibid., at esp. 194-195.
\textsuperscript{114} Ibid., at 127. It is interesting to compare Underhill Moore’s research on business practices (and their affect on judicial decisions) with Llewellyn’s approach to “immanent law” in The Common Law Tradition. Both approaches bear some resemblance to Eugen Ehrlich’s “living law”. Twining analyses the phrase, “immanant law”, at great length but does not mention Ehrlich or Moore. (See Twining, op. cit., at 216-227). However, Twining suggests that Llewellyn’s use of Goldschmidt’s phrase may owe something to a similar passage in Corbin’s paper, “The Law and the Judges” (1914), Yale Review 234. In any event, the Goldschmidt passage, referred to, reads as follows: “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 in-dwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.” Quoted in The Common Law Tradition 122.
\textsuperscript{115} Twining, op. cit., at esp. 226-227.
is quite unable to identify such policies: hence the unsatisfactory nature of those decisions delivered under its influence.

The second key to wise decision rests in the judge's need on the one hand to refer to the past experience of judicial decision-makers as expressed in legal rules and doctrine and, on the other hand, to formulate rules that are clear both in application and in reason so that future decision-makers may be blessed with ever sounder and ever clearer guidance for the future.\footnote{116}

Of course, these so-called keys to wise decision do not furnish us with even the barest skeleton of a systematic procedure for evaluating policy alternatives; no doubt much of this bareness emanates from Llewellyn's refusal to evaluate such alternatives in the light of community goals. Furthermore, it is probably a fair comment that these keys of guidance smack more of the interests of the practising lawyer than of Karl Llewellyn, the legal realist. Yet — at the very least — these keys do furnish us with a vivid, albeit inadequate, account of the conflict of duties that rest on the shoulders of those judges purporting to make rational decisions.

\footnote{116. It is interesting to note that Llewellyn stresses the need for a form of rule-utilitarianism as opposed to calling for justice solely within the bounds of the instant cast (c.f. the approach of Frank). In this respect, Llewellyn's work far from being destructive of legal rules emphasizes their importance in achieving justice for the "Entirety": "...the lines of the best-built rules prove in their turn to cluster along two lines of non-rule factor in the picture; it is when the rule is clear both in application and in reason, and when the reason also makes sense in the application that it talks alike to Jones and Smith, the men, to Jones and Smith, the Americans, to Jones and Smith, the lawyers, and to Jones and Smith, J.J." *My Philosophy of Law* 197.}