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# THE GERMAN LLEWELLYN

Michael Ansaldi\*

*Zwei Seelen wohnen, ach, in meiner Brust.*

## INTRODUCTION

Karl Nickerson Llewellyn (1893-1962) is generally considered to rank among the foremost legal scholars America has produced in this century. His place in the pantheon of American jurisprudence seems today, upon the hundredth anniversary of his birth and nearly a third of a century after his death, as secure as such places ever are.<sup>1</sup> Even so, legal academics, law stu-

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\* Associate Professor of Law, Boston College. A.B. 1975, Columbia; J.D. 1983, Yale; M.A. 1986, Oxford. I would like to thank George Brown, J. Allen Smith and Alfred Chueh-Chin Yen, who generously gave me the benefit of their acute responses to this work, as well as Lawrence George, Robert W. Gordon, Joseph Jacobs and Walter Weyrauch, who read an earlier version of portions of this Article, for their perceptive comments. Stephen Conrad, Michael Grossberg, Andrzej Rapaczynski, and Michael B.W. Sinclair shared their ideas about an earlier version of a portion of this paper presented to a panel on "Common Law Jurisprudence as a Social Science" at a conference of the Social Science History Association. Carlos Petit Calvo of the Universitat Autònoma de Barcelona helped me clear up a long-standing mystery in one of Llewellyn's German books and for that I am very much in his debt. I also wish to thank the University of Chicago's Law Library for permission to quote from materials in the Karl Llewellyn Papers, as well as Boston College and Florida State University for their generous support of the research and writing of this Article.

The translations in this Article are those of the author unless otherwise noted. The *Brooklyn Law Review* has relied on the author for citation style and substance for many of the foreign sources used in this Article. The *Review* would like to thank Brooklyn Law School student Cynthia Stone for her assistance in proofreading the German-language materials quoted in this Article.

<sup>1</sup> Some summary assessments of Llewellyn: "the undisputed guru of [Legal] Realism" (MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 171 (1992)); "[O]ne of the most interesting and original figures in twentieth-century American jurisprudence." (GRANT GILMORE, *THE AGES OF AMERICAN LAW* 115 n.11 (1977)); "the most fertile and inventive legal scholar of his generation" (WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* vi (Univ. of Okla. 1985) (1973)); "spokesman and most important leader of the legal realists" (Manfred Reh binder, *Karl N. Llewellyn als Rechtssoziologe*, 18 *KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE* 532 (1966)); "He was a man of uncommonly strong creative intellect, a forceful disposition [eine Kraftnatur], a fighter for law and justice, a man who marvelled at the Beautiful in art and nature. He was an American through and through, and through and through a citizen of the world." (Max Rheinstein, *Karl Nickerson Llewellyn, 1893-1962*, 27 *ZEIT-*

dents, practitioners and scholars from other fields would probably each describe that place somewhat differently, since the accomplishments of his career straddle the usual dividing lines.<sup>2</sup>

Nevertheless, one aspect of his work that has remained virtually unknown is the substantial body of German-language material Llewellyn produced at a formative stage of his jurisprudential development.<sup>3</sup> Consequently, this Article seeks to give an account of the Llewellyn *Germanica*, in particular of the two major, closely connected works Llewellyn wrote in German at a

SCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 601, 605 (1962)); "the greatest Realist of the 1930's" (Bruce Ackerman, *Book Review*, 104 DAEDALUS 119, 129 n.27 (1974)); "one of the ablest, subtlest most hard-working of Holmes' disciples" (Karl Llewellyn, *Law Expert*, *Dies*, N.Y. TIMES, Feb. 15, 1962, at 29 (quoting Jerome Frank)); "[Llewellyn's earlier work was] the most basic and thoroughly thought-out sociological theory of law which has yet appeared." (*id.*, quoting Roscoe Pound).

This is not to say that Llewellyn was without his detractors. TWINING, *supra*, at 114. But at least for the moment, the "Karlo-philos" seem to have carried the day over the "Karlo-phobes."

<sup>2</sup> The achievement for which practicing lawyers best remember him is probably his role in drafting the Uniform Commercial Code. See TWINING, *supra* note 1, at 270-340. He is also remembered for the groundbreaking CASES AND MATERIALS ON THE LAW OF SALES (1930); his 1929-30 Columbia lectures published under the title of BRAMBLE BUSH (1930), a *vade mecum* for beginning law students; and THE COMMON LAW TRADITION (1960), a magisterial study of the appellate decisionmaking process. Almost as well known is his collaboration, certainly the first of its kind in American law, with anthropologist E.A. Hoebel on field work on a southern Montana Indian reservation, resulting in THE CHEYENNE WAY (1941), applying the "case method" to a study of dispute resolution among the Cheyenne.

<sup>3</sup> The German-language works include:

1. PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA (1933) [hereinafter PRÄJUDIZIENRECHT], translated under the title THE CASE LAW SYSTEM IN AMERICA (Paul Gewirtz ed. & Michael Ansaldi trans. 1989) [hereinafter CLSA]. The work, written between 1928 and 1932, was published by Theodor Weicher Verlag, an academic press in Leipzig, Germany. Citations to this work will be to CLSA, the 1989 English translation, except where otherwise indicated. For information on the genesis of this book, see *infra* notes 31-41 and accompanying text;
2. the posthumously published RECHT, RECHTSLEBEN UND GESELLSCHAFT [LAW, THE LIFE OF THE LAW AND SOCIETY] (Manfred Rehbinder ed. 1977) [hereinafter RRG]. It has not yet been translated into English. For information on the genesis of the book, see *infra* notes 63-64 and accompanying text;
3. two essays in German law reviews, *Über den Rechtsunterricht in den Vereinigten Staaten* [Legal Education in the United States], 79 JHERINGS JAHRBUCH 233-66 (1928-29) and *Die deutsche Justiz vom Standpunkt eines amerikanischen Juristen* [An American Lawyer Looks at German Justice], 1932 JURISTISCHE WOCHENSCHRIFT 556;
4. *Das Recht in der Gesellschaft* [Law in Society] (unpublished manuscript); and
5. miscellaneous unpublished guest lectures at German universities and German-language poems, located among his papers in the collection of the library of The Law School of the University of Chicago.

seminal stage in his career, between 1928 to 1932: *Präjudizienrecht und Rechtsprechung in Amerika* and *Recht, Rechtsleben und Gesellschaft*.<sup>4</sup>

After first providing background information on the history and genesis of these works, this Article presents an overview of the arguments of greatest jurisprudential significance. This Article demonstrates that the works constitute a thematic whole, presenting a unified statement of the young Llewellyn's vision of, and hopes for, the nascent Realist movement. At the heart of both books is the enduring ideal of legal certainty. Although he rejects the pseudoscientific Langdellian schema for its attainment,<sup>5</sup> Llewellyn nonetheless continues to identify certainty as a primary value of legality, while offering an unorthodox, social-science assessment of how much there is and where it may be found. In so doing, he outlines an approach quite unlike the corrosive mockery of certainty articulated by his contemporary and sometime partner Jerome Frank. Llewellyn also provides a measured, rather than radical, critique of legal rules. He believes them to play a key, if not always dispositive, role in the highly predictable operation of the case law system, vital elements in the complex interplay of subjective and objective factors in adjudication. Yet using linguistic theory, he is also able to provide a persuasive account of how an ideologically static precedent system can make changes without violating its narrow conception of the judicial function. In Llewellyn's view, this mixture of change and continuity results less often from conscious and careful balancing than from the social forces at work on the judiciary and in the wider world. Thus, much of Llewellyn's effort is directed at championing a new, sociological understanding of how law works in the context of its social environment.

The Article then concludes with a brief assessment of the significance of these works and their place in the history of Legal Realism and the Llewellyn canon.

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<sup>4</sup> See *supra* note 3.

<sup>5</sup> See *infra* text accompanying notes 99-101. One topic with which this Article does not deal is the attempt to delineate the influence of German law and legal scholarship on Llewellyn's later work on the Uniform Commercial Code. See generally James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

## I. BACKGROUND

### A. *Llewellyn's German*<sup>6</sup>

Because of Llewellyn's undeniably Germanic first name "Karl," one is tempted to explain the existence of his German works by supposing that he was of German ancestry and thus, presumably, raised in a German-speaking household. But this was not the case: Llewellyn's father, William, was an immigrant to America from Wales; his mother Janet bore the equally Welsh maiden name of George.<sup>7</sup> To every appearance, the Llewellyn household was monoglot. Young Karl Llewellyn is likely to have made his first acquaintance with German at some point in his primary or secondary education, possibly at Boys High School in Brooklyn, New York where the Llewellyns had moved from Washington State shortly after Karl's birth.

By age sixteen, however, "such was his intellectual promise . . . [that the Boys High School had nothing to offer [Karl] academically]."<sup>8</sup> His parents therefore decided to send him to a German *Gymnasium* before he started college.<sup>9</sup> Llewellyn spent three years at school in Schwerin/Mecklenburg in northeast Germany, perfecting his knowledge of German as well as learning the local dialect. William Twining, Llewellyn's biographer, describes him as "bilingual" by the end of this period.<sup>10</sup> Several years later, as an undergraduate on leave from Yale College, Llewellyn returned to Europe where he served briefly as a volun-

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<sup>6</sup> See generally TWINING, *supra* note 1, at 89-91. Ulrich Drobni's unpublished manuscript "Llewellyn and Germany" is only known to the author through William Twining's account of it. See *id.* at 413 n.8 (indicating Twining's use of Drobni's paper as the chief source for his account of Llewellyn's sojourns in Germany).

<sup>7</sup> For the information that the surname "George" is Welsh I am indebted to my homonymous colleague thanked at the beginning of this article. Llewellyn's parents apparently chose the name "Karl" after a character in *THE STUDENT PRINCE*. TWINING, *supra* note 1, at 87.

<sup>8</sup> *Id.* at 89.

<sup>9</sup> It is apparently just a matter of chance that the book we have is *PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA* rather than *DROIT DECISIONNEL ET JURISPRUDENCE EN AMERIQUE*. Llewellyn's father happened to meet a German-American acquaintance in a drugstore and told him that he wished to send his son abroad to further his education, either in Germany or France. This acquaintance happened to have a brother living in Schwerin, in the Mecklenburg region of eastern Germany. Hence, it was to the *Realgymnasium* in Schwerin that Llewellyn went. Indeed, it was in the house of this brother, a teacher, that the young Karl lived during his time at the *Gymnasium*. Rehbindler, *supra* note 1, at 553 n.3.

<sup>10</sup> TWINING, *supra* note 1, at 89; see *id.* at 89-91 & 479-87.

teer in the German army during the Great War, a feat of der-ring-do requiring near-native fluency in the language of his fellow combatants.<sup>11</sup> Llewellyn's German obviously was very good,<sup>12</sup> if not perfect:<sup>13</sup> two knowledgeable scholars, readers of both English and German, stated that they very much preferred Llewellyn's German prose style to his English.<sup>14</sup>

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<sup>11</sup> A detailed discussion of Llewellyn's youthful contacts with Germany is beyond the scope of this Article. Nonetheless, I might just add one detail to Twining's account, TWINING, *supra* note 1, at 479-87, of Llewellyn's famous "war adventure" in which he volunteered and served in the German army in World War I, culminating in his being injured in the first battle of Ypres and receiving the Iron Cross (second class). Twining's account judiciously sifts a number of source materials, most of which, however, ultimately derive from Llewellyn's own accounts of his "adventure." Twining indicates that Llewellyn's motivations for joining up, while studying in Paris on leave from Yale College, were compounded of a desire for adventure, pro-German sympathies, revulsion at the extremes of anti-German sentiment in France, and the like.

To all these factors there can be added another factor of which Twining was apparently unaware: love or, more precisely, a desire to impress the highly patriotic family of a young woman, Else Hagen, with whom he was then "as good as engaged." This information derives from Llewellyn's close *Gymnasium* friend Hans Lachmund, with whom Llewellyn discussed his war adventure both at the time and subsequently. Letter from Hans Lachmund to Manfred Reh binder, cited in Manfred Reh binder, *Editor's Introduction*, RRG, *supra* note 3, at 10 [hereinafter Reh binder, *Editor's Introduction*]. Lachmund also says that Llewellyn explicitly denied enlisting because he considered the German cause just.

<sup>12</sup> The Llewellyn papers at the University of Chicago bear witness to an extensive correspondence that Llewellyn was able to carry on in German over most of his adult life, both with colleagues and personal friends. Furthermore, Llewellyn was able to teach two courses in German at the University of Leipzig.

<sup>13</sup> In his preface to PRÄJUDIZIENRECHT, Llewellyn thanks a number of people for going over and correcting the German of the manuscript. CLSA, *supra* note 3, at xxxv-xxxvi.

<sup>14</sup> TWINING, *supra* note 1, at 89. As someone who has spent a fair amount of time poring over and translating Llewellyn's German, and who finds his English at times rather trying, I mostly concur in this reaction (while recognizing that such things are, to a great extent, a matter of taste). The clarity of PRÄJUDIZIENRECHT seems startling when compared with the murky prose of, for example, Llewellyn's 1942 article *Common Law Tradition and American Democracy*, 1 J. LEG. & POL. SOC. 14, reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 282 (1962). Lon Fuller had a similar reaction:

If [PRÄJUDIZIENRECHT is translated into English], I should like to add the personal wish that the Teutonic sense of order which seems to pervade the style and arrangement of the present work may carry over into the English edition. For the book as it now stands offers an irrefutable demonstration of the fact that vigor and originality of thought are not necessarily incompatible with a degree of stylistic discipline.

Lon Fuller, *Präjudizienrecht und Rechtsprechung in Amerika*, 82 U. PA. L. REV. 551, 553 (1934) (book review). The "discipline" may derive from the German reader-editors of Llewellyn's manuscript. See *supra* note 13.

### B. *Leipzig I: 1928-29*

Upon discharge from the Kaiser's army, Llewellyn returned to Yale College, from which he was graduated in 1915. He went on to earn his LL.B. from Yale Law School in 1918. Thereafter he remained at Yale, teaching commercial law and partnership and also reading for the J.D. degree, awarded to him in 1920. In that year Llewellyn went to New York City to work in the legal department of National City Bank (a corporate ancestor of today's Citibank).<sup>15</sup> In 1922 he returned to Yale as an assistant professor, receiving a promotion to associate professor the year following.

After serving on the Yale Law School faculty for a short period, Llewellyn migrated back to New York in 1924. (His first wife Elizabeth Sanford was a graduate student in economics at Columbia University.) At first he continued to teach at Yale, commuting to New Haven, while also teaching at Columbia as a visiting professor. Ultimately, however, he found it necessary to relinquish his position at Yale and in 1925 he was appointed to the faculty of the Columbia Law School. There he devoted himself to teaching and research in the area of commercial law.

Shortly after Llewellyn's arrival, Columbia commenced its

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By the same token, Llewellyn's German also sounds rather "flatter" and less stamped with his distinctive personality than his English. This is admittedly the judgment of the author, a non-native speaker of German, who thus lacks a native's *Sprachgefühl*; others may well disagree. See, e.g., Rheinstein, *supra* note 1, at 604 (describing the German prose style of *PRÄJUDIZIENRECHT* as just as strongly idiosyncratic [*eigenwillig*] as Llewellyn's English writings). The chief virtue of Llewellyn's German is that it is largely, though not entirely, free of his besetting faults of catachresis and neologism. See *infra* notes 165 & 185. However, Llewellyn's posthumously published German book *RECHT, RECHTSLEBEN UND GESELLSCHAFT*, seems to suffer from that numbing hyper-abstractness characteristic of much high-academic German prose.

The author's reaction to Llewellyn's English is apparently shared by some German readers. While recognizing that Llewellyn was a published poet and citing Max Rheinstein's appreciation of Llewellyn as "an artist in his inmost being" (*im innersten Grunde Künstler*), Manfred Reh binder, the Swiss Llewellyn scholar who edited and oversaw the posthumous publication of *RECHT, RECHTSLEBEN UND GESELLSCHAFT*, went on to say that "[u]nfortunately, even in his works on legal sociology, he often abandons his footing in sober scholarly diction and lets himself get caught up in the flow of language and glides into poetry." Reh binder, *supra* note 1, at 535. Similarly, Reh binder approvingly cites another German scholar's reproach to Llewellyn for "[having] clothed his ideas in an impressionistic form that leaves a great deal unclear." *Id.* at 553 n.15 (quoting criticism of legal sociologist Nicholas Timasheff).

<sup>15</sup> The bank's in-house law department would shortly be absorbed by the law firm of Shearman & Sterling.

great internal debate on curricular reform. In this debate Llewellyn joined with Columbia's other Realists *avant le nom*, Underhill Moore, Herman Oliphant, Hessel Yntema and William O. Douglas, in seeking to reorganize the law school's courses along functional lines.<sup>16</sup> But Llewellyn was not entirely of one mind with them: he did not share the simultaneous enthusiasm of Oliphant, Moore and Yntema for turning the law school into a graduate research institute in law and the social sciences, at any rate not to the detriment of its traditional mission of professional training.<sup>17</sup>

In 1927, at about the same time as he was busily organizing a petition drive by American law professors on behalf of Italian anarchists Sacco and Vanzetti,<sup>18</sup> Llewellyn met the distinguished German jurist Hermann Kantorowicz,<sup>19</sup> who lectured at Columbia that summer. It was most likely Kantorowicz, a member of the law faculty at Freiburg, who arranged for Llewellyn to be invited to visit at the University of Leipzig for a semester.<sup>20</sup> Llewellyn accepted. Quite apart from the obvious appeal of a return to Germany and the intellectual stimulation promised by Leipzig, seat of the *Reichsgericht* and home to a distinguished law faculty, the tense atmosphere engendered by the "deanship crisis" at Columbia<sup>21</sup> and the collapse of his first marriage

<sup>16</sup> See generally TWINING, *supra* note 1, at 46-51 (discussing the study of curricular reform undertaken at Columbia); LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* 71-74 (1986) (same).

<sup>17</sup> TWINING, *supra* note 1, at 103-04.

<sup>18</sup> See Natalie E. H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism*, 1989 *DUKE L.J.* 1302, 1321-22 [hereinafter *Prequel*].

<sup>19</sup> Hermann Kantorowicz (1877-1940), legal historian and key adherent of the "Free Law" movement, was Professor of Law at the University of Freiburg and subsequently at the University of Kiel. After the Nazis stripped him of his post in 1933, he taught in the United States and England. His article *Some Rationalism About Realism*, 43 *YALE L.J.* 1240 (1934), was his contribution to the aftermath of the Llewellyn-Pound debate. For details of Kantorowicz's role as a leading *Freirechtler*, see James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 *VA. L. REV.* 399, 412-15, 446-47, 450-51 (1987).

<sup>20</sup> Samuel Klaus, *Karl Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika*, 43 *YALE L.J.* 516, 516-17 (1934) (book review).

<sup>21</sup> The "deanship crisis" came to a head in the spring of 1928, shortly before Llewellyn left for Germany. It was precipitated when Nicholas Murray Butler, the autocratic President of Columbia University, appointed Young B. Smith, a "moderate," as Dean of Columbia Law School, passing over Herman Oliphant, the candidate of the Realists/Scientists, who had been the prime mover behind the curricular reform study and whom Butler had previously hinted he would appoint. TWINING, *supra* note 1, at 47. Many

doubtless made a sojourn away from New York seem rather attractive.<sup>22</sup>

Llewellyn's first visit to Leipzig, during the winter semester of 1928-29, was supported by the Carnegie Foundation<sup>23</sup> and the Social Science Research Council.<sup>24</sup> Llewellyn would later describe himself as having had two basic "jobs" on this first trip: "1) To develop into coherent form a book on Law and the Social Sciences. This was the main job . . . 2) To teach a one-session-a-week course on American case law."<sup>25</sup> For reasons which will

faculty members were outraged that Butler had failed to consult with them on his selection of a Dean. The crisis culminated in the resignation, *en masse*, of Oliphant, Moore, Yntema, Douglas and Marshall. See *id.* at 52-54 (discussing deanship crisis); KALMAN, *supra* note 16, at 74 (same). Despite this exodus of most of his Realist colleagues, Llewellyn remained at Columbia where, together with Edwin Patterson, he was one of "the two most outspoken realists on the faculty." KALMAN, *supra* note 16, at 78. This decision to stay behind, according to Grant Gilmore, may have soured Llewellyn's relations with Underhill Moore. See TWINING, *supra* note 1, at 103-04 & n.77.

Ironically, Llewellyn afterwards indicated that he considered Young B. Smith to be a realist. See CLSA, *supra* note 3, at 93 n.2 (giving a list of judges and legal scholars Llewellyn regarded as modern in their thinking and/or engaged in research into "legal facts"). Smith, however, does not figure among the realists listed by Llewellyn in the two famous articles he wrote in his debate with Harvard Law School Dean Roscoe Pound, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 n.22 (1930) [hereinafter *Next Step*], reprinted in KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 3 (1962) and *Some Realism about Realism*, 44 HARV. L. REV. 1222, 1226 n.18 (1931) [hereinafter *Some Realism*], reprinted in KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 42 (1962). In the latter article, Llewellyn does include Smith in the ambiguous category of "some others," scholars in addition to the 20 explicitly labeled Realists against whose works Llewellyn attempted to test Dean Pound's assertions about characteristic features of Realist scholarship.

For an interesting study of Llewellyn's changing roll call of realists, see Natalie E.H. Hull, *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921 [hereinafter *Llewellyn-Pound Exchange*]. Professor Hull's research indicates that Smith figured on a preliminary list of Realists Llewellyn proposed to Pound in a letter dated April 6, 1931 where he is included in a category Llewellyn defined as "realists who are thorough-going, but probably less extreme in their positions," a category in which, incidentally, he in that letter also included himself. *Id.* at 967-68. But see *Some Realism*, *supra*, at 1226 n.18 (Llewellyn describing himself as "both vociferous and extreme").

<sup>22</sup> Rehinder, *Editor's Introduction*, *supra* note 11, at 11. Llewellyn and his first wife were finally divorced in 1930. *Id.*

<sup>23</sup> CLSA, *supra* note 3, at xxxiii. Llewellyn refers to himself as a "Carnegie International Professor."

<sup>24</sup> See Letter from Karl Llewellyn to Walter R. Sharp, Secretary of the Social Science Research Council Committee on Grants-in-Aid (Mar. 7, 1930) (Karl Llewellyn Papers, University of Chicago) [hereinafter *Sharp Letter*] (explaining failure to complete projected research project during Leipzig visitorship).

<sup>25</sup> *Id.*

be discussed below,<sup>26</sup> his first job, the book on law and the social sciences, was not completed on this visit. Ironically, it was his second job—his teaching—that first led to publication of a book.

The course Llewellyn taught in Leipzig was designed to be an introduction to the American legal system, with particular attention given to the role of case law. The chosen emphasis was provocatively apt for German law students, given the strongly deprecating attitude then taken by orthodox Civilians toward judicial decisions as sources of law. A second notable feature of the course was that Llewellyn was not to teach it in the standard Continental lecture format, but rather as a *Praktikum*, a discussion class devoted to the study of particular cases and actual court opinions, which would serve as a basis for firsthand observation of the methodology of Common Law.

The choice of the *Praktikum* format, however, turned up a major problem. As Llewellyn described it several years later:

[When I taught in Leipzig in 1928-29], it became clear to me that, even though English common law had received occasional discussion in German, and had at times been cited to illustrate the basic nature of adjudication, the American variety had scarcely been dealt with at all. And even with the English variety, German lawyers had never been given enough *original materials* to form a clear picture of what their common law counterparts were talking about, and certainly not enough to make up their own minds when common lawyers were divided in their opinions.<sup>27</sup>

To remedy this situation, Llewellyn either translated or had translated into German a number of English-language opinions for use in his course.<sup>28</sup> These translated cases formed the nu-

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<sup>26</sup> See *infra* text accompanying note 232.

<sup>27</sup> CLSA, *supra* note 3, at xxxiii.

<sup>28</sup> At first sight, the statement in the text might appear to be cast in doubt by CLSA, *supra* note 3, at xxxvii, which indicates that the "cases-and-materials" portion of PRÄJUDIZIENRECHT was not completed until the spring of 1931, well *after* Llewellyn's first visitorship at Leipzig ended. This doubt is strengthened by the identification, on the title page of PRÄJUDIZIENRECHT, of Llewellyn's chief case translator, Wolfram v. Metzler, as an apprentice lawyer [Referendar] in Berlin. It seems far likelier that Metzler was a law student whom Llewellyn met at Leipzig in 1928-29 and then commissioned to translate various cases into German, rather than someone the Leipzig faculty recommended long-distance to Llewellyn in New York preparing for his first visit to Leipzig. Furthermore, the period from the summer of 1927 through the winter of 1928 seems too short a time for the 60 odd cases (plus assorted supplementary materials) published as the second part of THE CASE LAW SYSTEM IN AMERICA to have been translated, revised and printed up for use by Llewellyn's students. Even so, Llewellyn's description of the course as a

cleus of the German book eventually published as *Präjudizienrecht*. These cases were supplemented by secondary materials written by Llewellyn and others, and by additional translated opinions not used in the course.<sup>29</sup>

Apart from his teaching, which later resulted in the publication of *Präjudizienrecht*, Llewellyn's first sojourn in Leipzig was of major significance to his scholarly development for another reason. It was during his time in Leipzig that he steeped himself in the writings of the German sociologists Max Weber and Eugen Ehrlich, thinkers who would occupy a central place in Llewellyn's intellectual firmament and whose names and ideas would frequently crop up throughout his subsequent writings.<sup>30</sup>

### C. *The Publication of Präjudizienrecht*

In Llewellyn's papers is a contract dated February 20, 1930 between Llewellyn and the Leipzig Faculty of Law.<sup>31</sup> In it the faculty agreed to support the publication of *Präjudizienrecht* with a subvention to the publisher,<sup>32</sup> in return for which Llewellyn

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*Praktikum* clearly implies that cases were used. The most plausible conjecture is that the Leipzig class read the cases Llewellyn is identified as having translated himself. In any case, the laconic notation "work concluded: Spring 1931" really does not say any more than that Llewellyn put the finishing touches on that portion of the book at that time.

<sup>29</sup> See *supra* note 28.

<sup>30</sup> Reh binder, *Editor's Introduction*, *supra* note 11, at 12. In the Llewellyn papers for this period is an invoice from a German bookseller relating to the purchase of Weber's works. It is not clear when Llewellyn first read Weber or Ehrlich. Llewellyn credited the Leipzig-born Harvard political scientist Carl Joachim Friedrich, who had emigrated to the United States in 1922, with having "led [him], decades back, to Max Weber." Karl Llewellyn, *American Common Law Tradition and American Democracy*, 1 J. LEG. & POL. SOC. 14, 15 (1942), reprinted in KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 282, 283 (1962). What is likely is that he was "introduced" by Friedrich to Weber in the United States, but used his time in Leipzig to deepen the acquaintance. Twining reports that Llewellyn devoted some time around 1935 to attempting a translation of Weber. TWINING, *supra* note 1, at 418 n.90.

<sup>31</sup> This document, although signed by Llewellyn and H. Siber, Dean of the Leipzig law faculty, was not the final contract agreement on the book. In a subsequent letter dated May 18, 1930 Siber tells Llewellyn not to execute the February 20 draft because certain changes had had to be made, most notably a decision to publish the bulky Part II (the translated cases and materials and Llewellyn's case notes) in a separate volume. But since the May 18 letter identifies the specific provisions to be changed, it is a fairly safe assumption that other provisions of the contract remained unchanged in the final document.

<sup>32</sup> The subvention was for an amount of 4000 Reichmarks. See Reh binder, *supra* note 11, at 9.

lyn assigned all rights in the work to the Leipzig faculty.<sup>33</sup> The latter also undertook to enter into a follow-up agreement with a Leipzig publishing concern, Theodor Weicher Verlag.<sup>34</sup> In its agreement with Weicher, the faculty presumably assigned its rights in the work to the publisher since the second page of the book bears Weicher's notice of copyright.<sup>35</sup> The book did not appear in print until 1933.

*Präjudizienrecht* was issued at about the same time as Hitler was named German Chancellor. Despite the inauspicious hour of its birth, the book received a number of favorable notices in German law reviews.<sup>36</sup>

No English-language version of *Präjudizienrecht* was ever published during Llewellyn's lifetime.<sup>37</sup> Even so, Llewellyn's cor-

<sup>33</sup> This is the apparent construction to be placed on sections 1 and 2 of the contract: §.1 The Faculty of Law undertakes the publication of the work written by Professor K.N. Llewellyn: "Introduction to the American Precedent System." It will enter into a publication contract in its own name, preserving the interests of the author, with Theodor Weicher Verlag, Leipzig, and will make more specific arrangements therein relating to typeface, format, number of copies, retail price and delivery of author's copies. Professor K.N. Llewellyn agrees to make no other use, including any partial use, of his work.

§.2 The expenses of printing will be borne by the Faculty.

Llewellyn Papers, University of Chicago.

<sup>34</sup> This publishing company no longer exists, having permanently disappeared from the relevant book listings some time during World War II. This is doubtless not unconnected to the fact that "Weicher" is a Jewish surname.

<sup>35</sup> The copyright was registered in the United States on January 9, 1933, but was never renewed or assigned. *Ex rel.* Paul Gewirtz, Professor of Law, Yale University.

<sup>36</sup> "German jurisprudence is very much in the esteemed author's debt for considerably expanding its horizons in this work, the finest product of contemporary American scholarship." H. Wüstendörfer [Professor of Law, U. of Hamburg], *Book Review*, 7 ZERTSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 739, 742 (1933). H. v. Mangoldt [Lecturer in Law, Univ. of Königsberg], *Book Review*, 27 ARCHIV FÜR RECHT UND WISSENSCHAFTSPHILOSOPHIE 304, 305 (1934):

The author has really been splendidly successful in bringing the features of this American system of precedent closer to German lawyers. . . . I regard the first part of this book, in which the author gives a connected, extremely interesting presentation of the American case law system, as that to which German readers will pay greatest attention.

<sup>37</sup> The author's translation of Books One and Two, or Part One of the entire work, was published in 1989. See *supra* note 3. Professor John Dawson of Harvard Law School had translated ten sections of Book Two, which were privately printed in 1951 for use in a law school course he taught.

As far as can be ascertained, Llewellyn wrote the original text of *PRÄJUDIZIENRECHT* in German. This conclusion is buttressed by several considerations. First, Llewellyn was basically fluent in German. See *supra* notes 9-14 and accompanying text. Second, the Llewellyn papers at the University of Chicago contain no trace of an English original of

respondence indicates that he mounted an extensive campaign to have the work reviewed in American and English law reviews and social-science periodicals.<sup>38</sup> One of the work's American reviewers was Lon Fuller. Fuller wrote both a short review of the book<sup>39</sup> and then used it as the focus of his well-known article *American Legal Realism*,<sup>40</sup> in which he opined that *Präjudizienrecht* was "the nearest approach" to "a comprehensive work which will both describe and apply the methods of legal realism, which can serve both as an exposition of the approach and as an exemplification of it."<sup>41</sup>

Max Rheinstein, one of Llewellyn's colleagues on the faculty of the University of Chicago—where Llewellyn taught after leaving Columbia in 1951—reported that Llewellyn was hoping to put out a new German edition of *Präjudizienrecht* in connection with his projected return to Germany in 1962-63, after his retirement from the University of Chicago.<sup>42</sup> He died before the plan could be realized. Contemporary German lawyers appear to make little use of the book.<sup>43</sup>

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the text, only a few scattered English-language notes outlining the work's subject matter. Third, in his introduction to the book, Llewellyn thanks two people for their "painstaking linguistic working-over" [*sorgfältige sprachliche Durcharbeitung*] of the text, a phrasing that suggests the editing of a text already written in German rather than a translation into German of an English original [*Übersetzung*]. *PRÄJUDIZIENRECHT*, *supra* note 3, at viii. In that same introduction, Llewellyn speaks of "translation" exclusively in the context of the cases and materials, Book 3, but never in the context of those portions of the book he himself wrote. Finally and most importantly, in a handwritten note on a 1939 letter sent to Llewellyn to inquire whether an English translation of *PRÄJUDIZIENRECHT* existed, Llewellyn wrote: "No. But much of the point of view of some of the theory is developed in June '38 - Nov '38 Yale L.J. And more in Mar. - April '39 Harv. L. Rev. Sorry — KNL." This letter is in the Llewellyn papers. (The articles to which Llewellyn is referring are respectively: *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938); *On Our Case-Law of Contract: Offer and Acceptance*, Part I, 48 YALE L.J. 1 (1938) and Part II, 48 YALE L.J. 779 (1939); *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); and *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939). It is difficult to believe that if an English text existed, Llewellyn would not have sought to have it published, particularly in light of how anxious he was for the book to be reviewed by American and English law reviews and social science periodicals. See *infra* note 38.

<sup>38</sup> The Llewellyn Papers contain copies of letters by Llewellyn to numerous law reviews and social-science periodicals requesting that the book be reviewed.

<sup>39</sup> Fuller, *supra* note 14, at 551.

<sup>40</sup> Lon Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

<sup>41</sup> *Id.* at 430.

<sup>42</sup> Rheinstein, *supra* note 1, at 604.

<sup>43</sup> *Ex rel.* Matthias Reimann, Professor of Law, University of Michigan, Ann Arbor. One possible reason for this may be the improvement in German lawyers' English lan-

D. *Leipzig II: 1931-32*

The period after his return from Germany in 1929 was one of enormous activity and scholarly productivity for Llewellyn.<sup>44</sup> For the next several years he continued to work sporadically on the Sacco and Vanzetti case.<sup>45</sup> In 1929 and 1930 he first delivered the set of lectures to Columbia law students that would become *Bramble Bush*.<sup>46</sup> In 1930, a year that saw a divorce from his first wife finalized,<sup>47</sup> Llewellyn also published his groundbreaking, thousand-page *Cases and Materials on the Law of Sales*.<sup>48</sup> Furthermore, in that *annus mirabilis* 1930, there was a major engagement with the work of another key Realist thinker: Llewellyn read and participated in a symposium<sup>49</sup> on Jerome

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guage skills since Llewellyn's day, such that original materials, by which Llewellyn set such great store, are now accessible to a far greater number of German lawyers. The contents of *Präjudizienrecht* will be discussed in Part II.

<sup>44</sup> To the works mentioned in the main text might be added Llewellyn's fantasmagorical *What Price Contract?—An Essay in Perspective*, 31 COLUM. L. REV. 704 (1931), which grew out of a commission he received to write the "Contracts" article for the ENCYCLOPEDIA OF THE SOCIAL SCIENCES. The editor of the Encyclopedia was unsatisfied enough with Llewellyn's essay, which he charitably dubbed "impressionistic"—wildly undisciplined would be nearer the mark—that he sought to enlist Roscoe Pound's help in getting the article into a shape more suitable for an encyclopedia. See *Prequel*, *supra* note 18, at 1327-33. The failure of the Llewellyn-Pound collaboration on the "Contracts" article has been highlighted by Professor Hull as one of the significant factors in the background of the Llewellyn-Pound debate. *Id.*

<sup>45</sup> *Prequel*, *supra* note 18, at 1324 & n.109; TWINING, *supra* note 1, at 346.

<sup>46</sup> KARL LLEWELLYN, *BRAMBLE BUSH* vii (Oceana Pub. 1960) (1930) [hereinafter *BRAMBLE BUSH*].

<sup>47</sup> Reh binder, *Editor's Introduction*, *supra* note 11, at 11.

<sup>48</sup> KARL LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930) [hereinafter *SALES CASEBOOK*]. Twining describes it as "a work of profound scholarship and originality . . . generally recognized as a landmark in the history of the American casebook." TWINING, *supra* note 1, at 131. Kalman, while noting the book's "strong impact" and "striking features," notes that, in at least one respect, it failed to deliver on one of Llewellyn's (and Realism's) promises:

In retrospect, it appears that candor was the major difference between the realists' and the traditionalists' approach to the social sciences during the 1930's. The conceptualists did not pretend that they were integrating law with the social sciences; the realists did. Although Llewellyn indicated in the introduction to *Cases and Materials on the Law of Sales* that he had drawn on modern psychology, experimental logic, social psychology, anthropology, and sociology, most of his annotations discussed business practices without using material from any of the social sciences to explain their significance.

KALMAN, *supra* note 16, at 79, 92.

<sup>49</sup> The symposium, in which the other participants were Mortimer Adler and Walter Wheeler Cook, appears in the Columbia Law Review. *Legal Certainty*, 31 COLUM. L. REV. 82-115 (1932).

Frank's controversial *Law and the Modern Mind*, a work that influenced many a passage of *Präjudizienrecht*.<sup>50</sup>

Of equal moment for the history of modern American jurisprudence, 1930 also saw the appearance of Llewellyn's remarkable, characteristically undisciplined essay *A Realistic Jurisprudence—The Next Step*,<sup>51</sup> which provided the eponym for a group of scholars who would become known as Legal Realists. The article was also the opening salvo fired in Llewellyn's famous exchange with Harvard Law School Dean Roscoe Pound, a battle that echoes in the pages of *Präjudizienrecht*<sup>52</sup> and one with baleful consequences for subsequent scholarship on realism.<sup>53</sup>

Llewellyn returned to Leipzig in 1931 and again took up his work on legal sociology, lecturing<sup>54</sup> on it one hour a week to students from all disciplines.<sup>55</sup> In these lectures he sought to identify with greater precision than in his *Next Step* article "the subject matter of a science of law"<sup>56</sup> and to offer some "daring hypotheses"<sup>57</sup> about what this science might reveal about the interrelationship between law and society.<sup>58</sup> Apart from his weekly lectures in Leipzig, Llewellyn delivered a number of successful guest lectures at other German universities.<sup>59</sup> He also formed re-

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<sup>50</sup> See *infra* text accompanying note 103 & 254-56.

<sup>51</sup> *Next Step*, *supra* note 21, at 431.

<sup>52</sup> [T]here is a battle raging in the United States between the purely deductive theory and the position espoused here, which, it seems to me, is truer to life. I am in the middle of this battle and can free myself from it only with difficulty. . . . [E]ven when writing in a foreign language, [a foreigner] may remain stuck in the quarrels of his homeland; for that, however, he craves indulgence, and especially understanding.

*CLSA*, *supra* note 3, at xxxvii.

<sup>53</sup> For the details of the Llewellyn-Pound debate, see *infra* text accompanying notes 231-48.

<sup>54</sup> Llewellyn describes the origin of the book as a *Kolleg* [course of lectures] as opposed to a *Praktikum*. *RRG*, *supra* note 3, at 19.

<sup>55</sup> Reh binder, *Editor's Introduction*, *supra* note 11, at 9.

<sup>56</sup> *Sharp Letter*, *supra* note 24, at 1.

<sup>57</sup> *RRG*, *supra* note 3, at 20.

<sup>58</sup> Even when lecturing in German, of course, Llewellyn remained Llewellyn: not content with neologism in English, he coined two words in German, *Trecht* and *Handle*, reportedly being disappointed when the former did not catch on. Reh binder, *Editor's Introduction*, *supra* note 11, at 8. Reh binder does not mention the reception given to *Handle*, but it is hard to imagine it was any more favorable. On the meaning of these coinages, see *infra* notes 176 & 199.

<sup>59</sup> The universities at which he delivered these guest lectures included Frankfurt, Heidelberg, Bonn, Freiburg, Berlin, Breslau, Kiel and Jena. Frankfurt even offered him a

relationships with a number of German legal scholars that endured long past his stay in Germany.<sup>60</sup>

On this second trip Llewellyn remained in Leipzig at least until early August 1932 when he wrote the preface to *Präjudizienrecht*, then in the final stages of preparation for publication.<sup>61</sup> Hence he was presumably in Germany to witness the crucial elections of July 31, 1932 when the Nazis won 13.7 million votes and 230 seats in the Reichstag, thereby becoming the largest political party and paving the way for Hitler's appointment as Chancellor early the following year.<sup>62</sup>

### E. *The Publication of Recht, Rechtsleben und Gesellschaft*

Llewellyn sought to have his 1931-32 Leipzig lectures on legal sociology, together with some additional materials, published in Germany under the title *Recht, Rechtsleben und Gesellschaft*. Llewellyn's contemporaneous notation on the typescript describes the work as "*publikationsreif* [ready for publica-

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position on its faculty. Rehinder, *Editor's Introduction*, *supra* note 11, at 12. One of Rehinder's informants, Ernst E. Hirsch, recalled the "lively impression" Llewellyn had made during a guest lecture in Frankfurt in 1931. *Id.* at 8. At a program of the Comparative Law Section of the Association of American Law Schools' Conference on January 6, 1987 Professor Stefan Riesenfeld of the University of California-Berkeley spoke of his own encounter with Llewellyn from this period.

<sup>60</sup> The great commercial lawyer and comparativist Ernst Rabel invited Llewellyn to Berlin and obtained his agreement to be an adviser to the International Institute for the Unification of Law ("UNIDROIT") on its project of unifying international sales law. Rehinder, *supra* note 11, at 12. Llewellyn attended a meeting connected to the project in Rome in 1932, which he found "interesting. laborious. unpractical." TWING, *supra* note 1, at 108. Before this project could ever reach completion, Llewellyn became involved with the effort to unify American domestic sales law, resulting in article two of the Uniform Commercial Code. The international project, interrupted by World War II, only reached fruition in 1980 with the United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention, which became law in the United States on January 1, 1988. U.N. Doc. A/CONF. 97/18/Annex 1 (1980) *reprinted* in 52 Fed. Reg. 6264 (1987) (U.N. certified English text).

Other scholars whom Llewellyn met or with whom he deepened his acquaintance during this period included Nussbaum, Kantorowicz, Koschaker, Jahrreis, Mitteis, the criminologist Exner and the sociologist Freyer. Rehinder, *Editor's Introduction*, *supra* note 11, at 12. Among the most affecting items I encountered in the Llewellyn papers was a series of letters from Arthur Nussbaum, a German Jew, written after Hitler came to power, seeking Llewellyn's help in getting out of Germany. He first escaped to Holland and later, with Llewellyn's help, obtained a position on the Columbia faculty.

<sup>61</sup> CLSA, *supra* note 3, at xxxvii.

<sup>62</sup> See MARY FULBROOK, *A CONCISE HISTORY OF GERMANY* 176 (1990).

tion]."<sup>63</sup> But the economic situation of German academic publishers was so perilous that the manuscript could not be published without a substantial subvention. The Leipzig law faculty, having previously contributed 4000 marks toward the publication of *Präjudizienrecht*, was no longer in a position to provide an additional grant. Thus, a number of academic presses turned the manuscript down. After failing to have it published in 1932, Llewellyn appears simply to have laid the manuscript aside. It remained unpublished until 1977, fifteen years after Llewellyn's death, by which time its existence had come to the attention of the Swiss legal sociologist Manfred Rehbinder.<sup>64</sup> It has not yet been translated into English.

Upon his retirement from the University of Chicago in 1962, Llewellyn was planning to return to Germany to lecture on law and sociology in Freiburg and Hamburg. He intended to return to his project of thirty years earlier: to draft a systematic sociology of law. Before he could make that trip, he died on February 13, 1962.<sup>65</sup>

## II. THE JURISPRUDENCE OF THE *Germanica*: AN OUTLINE

### *Eppur' si muove*

Six common concerns animate the intellectual world of *Präjudizienrecht* and *Recht, Rechtsleben und Gesellschaft*. The first is a factual question: What is it that judges do? Is it correct to describe it as rule-following? If not, what do judges do? The second question is also factual: Is the operation of the judicial system still predictable if it turns out that judges do not simply follow rules? If they do not simply follow rules, what accounts for that predictability? The third question is technical: How, mechanically, can judges achieve legal change at all given the ideology and systemic constraints of the institution within which they operate? The fourth question is interpretive: Why is it *slow* change that is being achieved by the judicial system? The fifth question is normative: What *should* judges be doing? What is the charge to courts? The final question is sociological and it is a

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<sup>63</sup> Rehbinder, *Editor's Introduction*, *supra* note 11, at 9.

<sup>64</sup> For the circumstances of Rehbinder's involvement with the manuscript, see *id.* at 8-9.

<sup>65</sup> *Recht, Rechtsleben und Gesellschaft* will be discussed in conjunction with *Präjudizienrecht* in Part II.

preoccupation that underlies all the others: What is the nature of law's interaction with society, their reciprocal influences and effects?

#### A. Präjudizienrecht: *The Two Faces of Law*

The book that emerged from the 1928-29 visit to Leipzig, *Präjudizienrecht und Rechtsprechung in Amerika*, represents a compilation and expansion of the materials Llewellyn had developed for his *Praktikum*.<sup>66</sup> The work begins with a modest suggestion that it is something in the nature of a legal process casebook, filling in a lacuna in the German literature on the Common Law.<sup>67</sup> But there is much more to it than that. *Präjudizienrecht* is quite obviously also conceived, in part, as an exercise in comparative law:

Much of what follows will be of immediate use to German lawyers only insofar as the contrasts between German and American law make them more sharply aware of the fundamental character of their own legal system. By seeing how another relatively advanced culture can make entirely different arrangements for things they have always supposed to be matters of course—things that obviously must be this way and not the other—they also may gain a critical outlook and an expanded capacity for adapting their own system's traditional institutions to the practical needs of real life as they evolve. On the other hand, much in this book addresses problems that are virtually identical in both systems. Recognizing and solving a problem becomes remarkably easier when it shows up wearing a peculiar foreign costume.<sup>68</sup>

Throughout the work, in fact, two recurrent themes are played off against each other in a comparativist counterpoint: Llewellyn's proselytizing of Civilians on the merits of case law and his badgering of Common Lawyers over how much they have to learn from Civilians about statutes.<sup>69</sup>

Underlying Llewellyn's first claim, that precedent had something to offer Civilians, was his airing of the precedent sys-

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<sup>66</sup> See *supra* notes 27-28 and accompanying text.

<sup>67</sup> See *supra* notes 26-28 and accompanying text.

<sup>68</sup> CLSA, *supra* note 3, at 1.

<sup>69</sup> See, e.g., *id.* § 62, at 73. Llewellyn was naturally arguing neither for case law as a replacement for codification, nor vice-versa, but only for the merits of each methodology as embodying a set of supplementary techniques extremely beneficial to the sound development of legal systems that were each increasingly becoming mixed in character.

tem's strengths and weaknesses, particularly in its American incarnation. Were the Germans ever to be persuaded of the value, indeed the "inevitability,"<sup>70</sup> of case law, which he noted was on the rise in German law, despite the best efforts of legal scholars to ignore it or fend it off,<sup>71</sup> it was equally his hope that they would be put on their guard against the shortcomings and defects that had marred it in the United States.<sup>72</sup>

Llewellyn's critique of case law is unsparing. It is matched, however, by an equally vigorous defense of precedent against attacks he thought unjustified, from quarters both foreign and domestic.<sup>73</sup> The primary source of these attacks lay in a fundamental misunderstanding of the system, rooted in the misinformation put out by some of its own adherents, in particular by the advocates of *Doktrin* and *Dogmatik*, that is, by orthodox legal theorists of a black-letter or Langdellian stripe. To counter this and to present a true picture of precedent, Llewellyn proposed to take a page from the social sciences and adopt "a fundamentally sociological approach [*soziologische Grundeinstellung*],"<sup>74</sup> proceeding in the manner of an "anthropologist,"<sup>75</sup> whose job is "scientific observation [*wissenschaftlich Beobachtend*],"<sup>76</sup> description of what has been observed and reproduction of the raw data studied. It is from Llewellyn's rejoinder to the standard American legal theory of his day that the book derives much of its jurisprudential interest and most of its polemical animus.

*Präjudizienrecht* is divided into three "Books."<sup>77</sup>

### 1. Book One

Book One, comprising thirty-nine numbered sections, seeks to provide German readers with the basic knowledge necessary to read and understand American (and, to a lesser extent, English) case law. The bulk of Book One consists of bread-and-

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<sup>70</sup> *Id.* § 40, at 48-49.

<sup>71</sup> *Id.* § 40, at 48-50.

<sup>72</sup> Llewellyn's catalogue of shortcomings can be found in *CLSA. Id.* § 40, at 47 n.2.

<sup>73</sup> See *id.* § 73.

<sup>74</sup> *Id.* § 63, at 90.

<sup>75</sup> *Id.* § 74, at 113; cf. *id.* at xxxv ("an anthropological presentation").

<sup>76</sup> *Id.* at xxxv.

<sup>77</sup> *PRÄJUDIZIENRECHT* was apparently sold in two separate parts, Part One (consisting of Books One and Two) and Part Two (consisting of Book Three).

butter information about the American court system, the process of "finding the law," basic civil procedure and the law-equity distinction.<sup>78</sup> Llewellyn starts out with a brief discussion of the significance of judge-made (as opposed to codified) law and follows this with a succinct account of the history of Common Law, its ideology and characteristic features. He presents a fairly orthodox presentation of how to read cases and determine what rules of law they stand for, and notes the way these rules are regarded as governing the disposition of subsequent cases.

Anticipating his fuller treatment in Book Two, however, Llewellyn then proceeds to undermine this orthodoxy by sharply circumscribing the real value of verbal formulations of legal rules. First, he notes that the common law rules' very "malleability"<sup>79</sup> i.e., their typical lack of a fixed phrasing, allows for their unnoticed refashioning. Furthermore, if one does not assume major technical incompetence by the trial bar and judiciary in failing to ascertain an existing correct rule, the very phenomenon of successful appeals indicates that "rules" provide no certain guide to case outcomes. Indeed, virtually all cases on appeal to courts of last resort are legally ambivalent, "doubtful" cases that "could be decided just as easily, legally speaking, for the plaintiff as for the defendant."<sup>80</sup> Finally, Llewellyn even evinces a certain agnosticism about the part, if any, that rules actually play in the decision-making process. In the individual case, the "legally incalculable" human factor, the judge's personality, may be dispositive.<sup>81</sup> Over the run of cases, social and economic forces may be at work.

## 2. The Cases and Materials (Book Three)

While Book Two constitutes Llewellyn's "comprehensive

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<sup>78</sup> Book One is presumably based on, if not identical to, a 51-page pamphlet Llewellyn apparently gave his Leipzig students in 1928-29. See WILLIAM TWINING, *THE KARL LLEWELLYN PAPERS* 48 (1968) (giving as item number 17 in the bibliography of Llewellyn's published works: "*Einführung in das amerikanische Präjudizienrechtswesen* [Introduction to the American Precedent System] (for use at Leipzig University), Altenburg, Thüringen, Oskar Bonde (1928), 51 pp."). Book One is approximately the same size, taking up 46 pages in *PRÄJUDIZIENRECHT*. Furthermore, at the end of his Preface to the latter, Llewellyn indicates that Book One was completed in 1928. *CLSA*, *supra* note 3, at xxxvii.

<sup>79</sup> *Id.* § 4, at 3.

<sup>80</sup> *Id.* § 8, at 8.

<sup>81</sup> *Id.* § 8b, at 11.

discussion" of the case-law system,<sup>82</sup> the discussion to some extent presupposes a prior acquaintance with Book Three, the translated cases and materials. Llewellyn apparently expected his German readers (or at least his ideal German readers) to familiarize themselves with Book Three before going on to read Book Two.<sup>83</sup> The "anthropological"<sup>84</sup> material in the former, he believed, would either bear out or refute his portrait of case law in the latter.

Llewellyn's goal in selecting Book Three's cases was not to give German readers a representative overview of American substantive law.<sup>85</sup> Rather, his purpose was "to show how the doctrine of precedent actually works, and to provide an insight into the nature of case law adjudication, in fact into judicial decision-making more generally."<sup>86</sup> The cases were accordingly meant to illustrate the realist thesis that "the law is caught up in change, and much more so than is commonly supposed."<sup>87</sup> Some cases would show change effected through the "Janus-faced" case

<sup>82</sup> *Id.* § 40, at 47.

<sup>83</sup> See Llewellyn's "rallying cry" at the end of Book One, "ON TO THE CONCRETE MATERIALS! [HERAN AN DEN KONKRETEN STOFF!]," *CLSA*, *supra* note 3, § 39, at 46, and *PRÄJUDIZIENRECHT*, *supra* note 3, at 46; and his language at the very beginning of Book Two: "Now that readers have before them a number of specific decisions I can refer to and now that they can test and check my assertions against them . . .", *CLSA*, *supra* note 3, § 40, at 47; see *id.* § 40, at 48 n.2. ("The conclusions drawn really need to flow from Part II's cases and materials themselves once one has seriously set about working through them.").

The published translation does not reproduce these cases, but provides a list of the cases referenced, together with citations, for American readers interested in pursuing them further. See *infra* text accompanying notes 91-97 (discussing Llewellyn's selection of cases). Llewellyn obviously thought that Books One and Two were capable of standing on their own, inasmuch as he acceded to their publication separate from, and in greater quantities than, Book Three (the cases and materials).

<sup>84</sup> With regard to the "anthropological" character of the work, Llewellyn had stated in the Introduction:

As befits an anthropological presentation . . . I hope that the [cases and] materials themselves will enable the reader to make independent criticisms of my conclusions, and, where needed, even refute me with my own evidence. For the primary aim of this work is to observe, and to describe what it observes; it seeks to present American case law at the appellate-court level as it is, the dispiriting along with the inspiring.

*CLSA*, *supra* note 3, at xxxv. Significantly, Llewellyn's first citation in Book 2 is to BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). *CLSA*, *supra* note 3, § 40, at 47 n.2.

<sup>85</sup> *Id.* at 1.

<sup>86</sup> *Id.* at xxxiii (original emphasis omitted).

<sup>87</sup> *Id.* at xxxiv.

method,<sup>88</sup> that is,

[t]he accepted way unwelcome precedents are confined (distinguishing), and the equally accepted way welcome precedents are expanded (stating the rule of a case broadly, glossing over the origins of a particular rule in a passage of dictum, etc.). That the *work* method of our judges has harbored this dichotomy, we have long known. But it has not, I think, heretofore been claimed a) that each half of this dichotomy is just as correct, in legal doctrine, as the other; and b) that a case-law system finds its true essence and sustenance precisely in this "alternative" doctrine.<sup>89</sup>

Changes in legal substance, however, could often be found even in cases where the language of the opinion led readers to suppose that *no* change was taking place, that nothing more was happening than a common or garden application of some existing rule:

Insofar as change and growth are so immediately obvious in so many of the cases presented, my selection may actually give a *somewhat distorted picture* of normal American decisionmaking. . . . [T]o avoid having the selection needlessly distorted, I have also taken pains to put in a fair number of cases in which the court kept to its "old ways." I have, I grant, tried to show that even in such cases the court's decision was *in fact* breaking new ground, that only *in form* did precedent seem to dictate the decision.<sup>90</sup>

Like the good social scientist he was here aspiring to be, Llewellyn was not insensitive to the problem of evidentiary distortion inherent in choosing only corroborating cases to illustrate any particular thesis, a methodological failing for which he sternly took orthodox legal scholarship to task.<sup>91</sup> To counteract the problem, he chose only half the cases for Book Three. The other half, previously unknown to him, were pulled together by one William A. Leider, described as "a New York attorney," but who apparently had been an editor of the Columbia Law Review

<sup>88</sup> *Id.* § 40, at 49 n.4.

<sup>89</sup> *Id.* § 39, at 46 (omitting internal cross-references). Compare BRAMBLE BUSH, *supra* note 46, at 74.

<sup>90</sup> CLSA, *supra* note 3, at xxxiv-xxxv. Still Llewellyn thought that his principles of selection for the cases—the fact that they "embody something of formal significance to our case law system, or illustrate a recurrent topic (how statutes are treated) or a recurrent process (how an outmoded rule gets preserved or expanded, whether to base a decision on a broader legal 'institution' instead of a narrow legal rule, etc.)"—were "neutral or varied enough to come close to a 'natural' selection of cases." *Id.* at xxxv.

<sup>91</sup> See *id.* § 63, at 90-91.

working for Llewellyn as a research assistant,<sup>92</sup> "who had no idea what I might ultimately want to say about them."<sup>93</sup>

Generally, the cases included in Book Three, as Llewellyn describes them, are

more than fifty American decisions, unabridged or in the form of extended case synopses, which include a statement of the facts, the procedural posture of the question before the court, the reasoning of the opinion and the holding. Seven English cases are given similar treatment. . . . Thirty [of the American decisions] have been taken from the jurisprudence of New York State, seventeen of these from decisions of that State's highest appellate court over the last few years.<sup>94</sup>

Not surprisingly, there is a certain overlap with the cases Llewellyn had included in his roughly contemporaneous *Cases and Materials on the Law of Sales*.<sup>95</sup> Indeed quite a number of the cases deal with contract or commercial-law matters. Still, they were included not because of their subject matter but because they illustrated something characteristic of case-law adjudication and because Llewellyn was already familiar with them. Accompanying many of the cases are comments, long and short, in which Llewellyn provides a close reading and critique of those portions of an opinion that bear on some key feature of case law. Furthermore, Book Three also contains some primarily informational introductions to a particular line of decisions,<sup>96</sup> as well as a number of excerpts from treatises, law review articles, and the writings of various legal scholars, notably Cardozo (one of the book's two dedicatees), Holmes and Pound.<sup>97</sup>

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<sup>92</sup> See Karl Llewellyn, Jurisprudence Lecture, May 6, 1953, at 2 (Llewellyn Papers, University of Chicago). I am grateful to Professor Natalie Hull of Rutgers-Camden for drawing my attention to this lecture.

<sup>93</sup> CLSA, *supra* note 3, at xxxv.

<sup>94</sup> *Id.* at xxxiii. New York cases were emphasized in order "to show how a single court in a single state invokes a variety of formal doctrines while in practice reaching the same outcomes." *Id.*

<sup>95</sup> SALES CASEBOOK, *supra* note 48.

<sup>96</sup> See, e.g., PRÄJUDIZIENRECHT (Part 2), *supra* note 3, at 117-18 & 280-83 ("The substantive law of the seal" and "Bona fide purchase for value at Law"). Llewellyn used materials appearing in his casebook on the law of sales, see SALES CASEBOOK, *supra* note 48, at 340-43, as his introduction to a group of cases on consumer protection. PRÄJUDIZIENRECHT (Part 2), *supra* note 3, at 156-62.

<sup>97</sup> There are also three appendices to the work. In Appendix I, "Frequency test of the day-to-day work of a number of appellate courts," PRÄJUDIZIENRECHT (Part 2), *supra* note 3, at 343-46, Llewellyn analyzes the work product of the appellate courts published in volume 155 of the Northeastern Reporter, providing statistics on the number of reve-

### 3. Book Two

Book Two consists of sections forty through seventy-four. Llewellyn describes his project in this book as one of developing

first . . . a picture of a *specific*, historically conditioned precedent system, America's, with all its peculiarities, shortcomings and virtues—an anthropological undertaking. But, second, it is important to reveal what *general* significance this anthropological material may have, what bearing it has not only on how a case law system works and what it holds important, but also on the nature of adjudication more generally, indeed adjudication even in a system of written law, in which the written word maintains that it alone rules over the whole of law.<sup>88</sup>

#### a. *Court Portrait*

What was the usual "picture" of precedent in America against which Llewellyn's anthropological picture would be seen? The portrait generally painted in Llewellyn's day was of an applied science at work. Since the beginning of the modern age, many fields of learning had sought the prestige accruing to mathematics and the hard sciences from the enviable solidity of their results. By the last quarter of the nineteenth century the legal system had evolved a "scientific" model of the way it operated, a logical "science of law" purporting to explain the judicial process on a "deductive" or "syllogistic" model.<sup>89</sup> This science held that the outcome of every legal controversy could be determined by setting up a syllogism. Its major premise would be the applicable preexisting "rule of law" that could be gleaned from earlier cases; the minor premise was the facts of the controversy at issue as analyzed under the fact categories employed by the foregoing rule; and the logically required conclusion drawn

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sals and affirmances, dissenting votes and opinions, and separate concurrences. In Appendix II, "On the Zeiler-Blomeyer-Gerland Precedent Bill," *id.* at 347-50, Llewellyn expresses a generally positive reaction to draft legislation that proposed to allow individual panels of the German Supreme Court, whenever they so chose, to issue formally binding rules of law in their particular areas of expertise. Finally, in Appendix III, "Some recent literature on the precedent system," *id.* at 351, Llewellyn included a short bibliography of English-language materials. An English translation of Appendix II appears in *CLSA*, *supra* note 3, at 115-18.

<sup>88</sup> *CLSA*, *supra* note 3, § 40, at 47-48 (footnote omitted).

<sup>89</sup> See generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

therefrom would supply the "correct" decision of the case.<sup>100</sup>

Theoretically, such a "scientific" process ought to have been reproducible, with identical results, by all adepts of legal science, practicing attorneys and sitting judges alike. Thus, competent attorneys representing the interests of opposing parties ought to have been able to spare their clients the time and expense of litigation by jointly running through the same exercise in syllogistic reasoning themselves, thereby scientifically "predicting" the eventual outcome of any lawsuit. In fact, though such a consequence was presumably not often aired, syllogistic theory logically ought to have led to a kind of withering-away of the judicial estate.<sup>101</sup> Nonetheless, where litigation did ensue because of lawyers' ineptitude, judges' written opinions served to reconstruct the syllogistic reasoning for the dullards unable to figure it out for themselves.

### b. *The Warts Restored*

Llewellyn spurns this mechanistic explanation of the judicial process for the truly new case.<sup>102</sup> The initial focus of his re-

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<sup>100</sup> Besides the allure of "scientific" status, another appeal of a rule-based theory of adjudication was that it provided a mitigation, of sorts, of the questionable legitimacy under democratic theory of a partly unelected and largely non-accountable judiciary. If judges were bound to follow rules, they therefore were at least not wielding arbitrary power, a minimum requisite for a state based on law. One could, with a bit of squinting, see a kind of diachronic democracy at work in the way legal rules evolved over time, the dialogue between modern judges and their predecessors carried on in the various lines of cases, embracing the democratic process values of argument and persuasion and often yielding as its rules a kind of majoritarian consensus, "the weight of authority."

<sup>101</sup> The statement in the text is somewhat hyperbolic. Even under syllogistic theory, there would still be a need for courts of first instance to exercise a fact-finding function when disputants disagreed on what had happened. Still, the demotion is not inconsiderable: from lawgivers to detectives. Furthermore, for dim-witted attorneys recourse to the judicial process would continue as before.

<sup>102</sup> Llewellyn concedes that a deductive description of what actually takes place in the decision-making process may well be appropriate for a class of controversies that he appears to regard as numerically insignificant: those with facts that are truly "on all fours" with those of a prior case in every significant respect. This class of cases is numerically insignificant because Llewellyn defines "on all fours" quite narrowly. To him, it implies not just the same material facts but also the presence of an unchanged social setting against the background of which the facts of each occurred. When such cases are brought to court, Llewellyn is prepared to grant that deduction and syllogism are accurate accounts of the judicial process. Still, in such situations, the case is only brought to court because of the incompetence of the attorneys in failing to recognize the truly "applicable" rule that covers and should have led to an out-of-court settlement of the dispute. See *CLSA*, *supra* note 3, § 42, at 56 n.11 & § 54, at 75.

jection is on the deduction's minor premise, i.e., the statement of the facts of a case analyzed under the categories used in the rule of law (the major premise). In a strikingly Frankian passage, Llewellyn writes:

[A scholar] knows that it is impossible for anyone to have objective knowledge of the facts as they really are. Out of one and the same mass of facts, each of us, based on individual experience, decides what "the" facts are. What one has learned to regard as important is what one sees, what one most readily notes about a situation. This is what one looks for. This is also what one has a tendency to emphasize, *overlooking* many other elements in themselves no less important. This is true of anyone's observation of any fact situation. It is most certainly true when it is a matter of *classifying* facts for the purposes of description and further use. For lawyers in particular, such classifying is a tacit precondition for handling any legal dispute. A lawyer has no wish to deal with isolated facts, with the Unique. He wants to deal with facts as instances of fact *categories*. Within the raw factual matter, he seeks out the few "essential" facts, those which are of legal relevance because they fit into a legal fact category, thus providing a handle for "applying" a legal rule. We know this, we accept this, and call it good. But we are apt to slip into the belief that not only is there generally just one possible way to classify the facts, but also that *the particular classification made* in a specific lawsuit has something necessary, something foreordained about it.<sup>103</sup>

The intimation that "facts" are not susceptible to scientific treatment is borne out by the Anglo-American phenomenon of the separate opinion, a major key to Llewellyn's repudiation of the deductive theory. Among their many virtues,<sup>104</sup> dissents and concurrences often spotlight the refractory complexity and factual richness lying just below the smooth apodictic surface of many a majority opinion:

An observer will first note that the statements of facts in the separate opinion and the main opinion do not precisely coincide; often they are at loggerheads. . . . Without needing a separate opinion to prove it, a scholar might already have suspected that the facts of the case undergo reshaping as the decision is being made, but especially as the opinion is being written.

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To the sociologist it is clear . . . that a fact situation admits of

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<sup>103</sup> *Id.* § 42, at 53. Cf. JEROME FRANK, *LAW AND THE MODERN MIND* 114-15 & 144-45 (Coward-McCann, Inc. 1949) (1930).

<sup>104</sup> See Fuller, *supra* note 14, at 551-52 (singling out Llewellyn's treatment of separate opinions for special praise).

more than one of the constructions espoused; that *each* way of construing the facts will contain a degree of violence to either the fact situation or the classifying category. For the facts will typically require the making of some "adjustments" to a category which, before the court came to construe these facts, was not *quite* applicable to them. There is a slight shifting of either the facts or the category, and neither competing interpretation is "right" or "wrong." Rather, the interpretation either does or does not further a particular purpose, the interpreter tacitly choosing from among various possible purposes.

...  
We know too that a raw fact situation cannot be classified without shunting the bulk of the facts off to one side. . . . [I]f, when studying cases, one generally gets to see only a *single, officially presented statement of the facts*, if one takes this official statement as the basis for one's knowledge and criticism of the case . . . the "application" of the legal rule will seem deceptively simple. . . . But when one sees a second judge at work, when at a significant point in his opinion facts emerge that were completely glossed over in the majority's version, we cannot avoid realizing that everything is not quite as simple as it might first have seemed.<sup>105</sup>

Then Llewellyn joins battle with the regnant orthodoxy on a second front. A further reason to mistrust the conventional portrait of case law is provided by a line of argument in Book One<sup>106</sup> to which he now returns: the critique of legal rules, the major premises of judicial syllogisms. Earlier on, he had pointed to slippery phraseology, to the phenomena of successful appeals and "doubtful cases" and to our ignorance of the actual way cases are decided, so as to undercut the sweeping claims traditionally made for rules in the judicial process. But now, calling again on separate opinions, he notes that just as the *ex ante* ambivalence of most Supreme Court cases and the successful prosecution of appeals suggest the inadequacy of a purely rule-based theory of adjudication, separate opinions only serve to confirm that inadequacy, but synchronically, all on a single level of the judicial hierarchy, rather than diachronically, up and down the hierarchical ladder:

Where a dissent is written, the differing analyses would indeed lead to differing outcomes. It is here that one realizes that, if decision making

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<sup>105</sup> CLSA, *supra* note 3, § 42, at 52-54. In his second Leipzig book, Llewellyn complains that the lack of the institution of separate opinions in Continental European legal systems makes it difficult to gauge the exact influence of legal rules. *RRG*, *supra* note 3, at 60.

<sup>106</sup> See *supra* text accompanying notes 78-81.

is viewed as a *matter of pure deduction* from preexisting, clearly defined rules of law, there is less to be said for the predictability of decisions than one might readily think. Yet even where the separate opinion is in the form of a concurrence, one inevitably reaches the same conclusion. For if the same fact situation can be analyzed by learned judges in a variety of ways, it is only a matter of chance that the analyses eventuate in the same result, *if* the legal analysis is really the decisive factor in the decision. . . . On this view of things, the separate concurrence assumes a level of significance beyond even a dissent's. For here we can observe a majority of the panel, despite all their differences over the law, nonetheless reaching the same conclusion from the same fact situation.<sup>107</sup>

There now comes a final line of attack. While the collective import of majority opinions, dissents and concurrences is to assert the simultaneous applicability of mutually exclusive rules of law to one and the same fact situation—a claim scandalous, of course, to a logical “science”—even where rules are unanimously *accepted* as controlling, they are likely to be in some wise empirically defective:

Were one to make a special study of the way black-letter scholars state legal rules . . . one would usually find that, even though this process is *based* on empirical observation, it only *selectively* reflects prior observation. However conscious or careful they are about doing it, black-letter lawyers cull only *a few* cases from among the relevant ones decided, plus *a few* of those discussed in the literature or hypothesized, perhaps first giving a few they thought up themselves. Rarely will they even have all the relevant cases in front of them; and should they have them all, *they still regularly omit a number*. Indeed, even when they do not have all the cases, they exclude many of the cases looked at. What remains becomes the core, the framework of their legal rule, or what they would maintain is its “correct” content. . . . What they have done is somehow to forget both that their own procedure for framing legal rules has its basis in description [of what courts are doing], and that their rule has simplified what it meant to describe.<sup>108</sup>

Because a precedent system is grounded in past court practice, this descriptive inaccuracy of black-letter rules, the vice of overgeneralization, necessarily skews the true normative force of

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<sup>107</sup> CLSA, *supra* note 3, § 42, at 55 (footnotes omitted).

<sup>108</sup> *Id.* § 63, at 90-91. The magisterial division of the sheep from the goats described by Llewellyn is standard practice in many a law school classroom even today. The former are called into life eternal, the heaven of “correctly decided” cases; the latter, the “wrongly decided,” go away into everlasting oblivion.

prior decisions.<sup>109</sup> Not only might a sitting judge disagree with fellow decisionmakers on which of several vying rules correctly applied to the facts of a pending dispute, these precedential competitors might also themselves be, to some extent, summary misstatements of past facts and, hence, of the presently controlling rule of law.

c. *Back to the Appearances*

What would a true picture of precedent look like? Because he views his project as, in the first instance, one of "anthropological" portraiture, Llewellyn starts out by urging extreme diffidence in the vocal behavior of judges, *i.e.*, in the language of opinions. Citing Bronislaw Malinowski's recently published *Crime and Custom in Savage Society*,<sup>110</sup> Llewellyn commends to lawyers the increasing skepticism of ethnographers of "primitive" cultures, who had gone from credulous acceptance of the natives' own explanations [*herrschende Ideologie*] of what they were doing, to a disregard of these explanations altogether, and, finally, to an inclusion of these explanations as one element of their interpretations of "native" behavior.<sup>111</sup> Correspondingly, the initial focus of attention in Llewellyn's study would be the *outcomes* of cases, what the judges were actually *doing*, and on attaining as detailed a knowledge as possible of the underlying *facts*. The opinion, *i.e.*, the way judges described the process of rule-applying by which they allegedly reached a particular result, the recapitulation of the legal reasoning they claim to have followed, would be treated as "native explanation" and assigned only a second-order significance. Hence, an opinion was to be regarded as the "frock coat and black hat of black-letter law,"<sup>112</sup> how a decision had to be dressed up before being fit for polite

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<sup>109</sup> See Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928). Oliphant was a colleague of Llewellyn's on the Columbia faculty before the "deanship crisis." See *supra* note 21. Llewellyn thanked him in the sales casebook for "long-continued discussions . . . of analysis in terms of significant type fact set ups . . ." SALES CASEBOOK, *supra* note 48, at xxiii.

<sup>110</sup> See MALINOWSKI, *supra* note 84.

<sup>111</sup> CLSA, *supra* note 3, § 40, at 47 n.2. Cf. *Next Step*, *supra* note 21, at 454 (describing "the work of a modern ethnographer" as "substitut[ing] painstaking objective description of practice, for local report of what the practice is, or for (what is worse) a report either of local practice or of local ideology pleasantly distorted by the observer's own home-grown conventions").

<sup>112</sup> *Id.* § 63, at 93.

society. It reflected more a psychological need to rationalize, to provide a retrospective "justification" for "a conclusion *already* reached on *other* grounds."<sup>113</sup>

When studied with a close eye on the outcomes, on what judges were actually *doing*, these opinions and their "rules" displayed in reality a doctrinal "elasticity . . . allowing any case precedent, whenever there is some sort of doubt, either to expand or contract, as required by the question before the court."<sup>114</sup> Or, as indicated earlier, their verbal surfaces might conceal real substantive change beneath a deceptive continuity in the precedential formulae invoked.<sup>115</sup> The challenge to legal orthodoxy, the "natives' explanation" of their actions as rule-following, should be readily apparent. (Indeed, had Llewellyn been a Marxist, he might aptly have employed the concept of superstructure to explain the function of opinions.) Yet if judges were not engaged, or were not primarily engaged, in the following of rules, what exactly were they doing? Indeed, what then *should* they be doing? What was the charge to the courts?

Despite the conceptual impediments placed in their paths by the deductive theory of their function, Llewellyn clearly thinks that American judges by and large *are* doing what they should be doing, with greater or lesser self-conscious awareness (depending on the judge) of exactly what that is.<sup>116</sup> What that is essentially seems to be a leisurely adaptation of existing law to evolving social needs: reactive, accommodating and none too hasty legal change married to a decent observance of the protocols of immutability.<sup>117</sup> But what is to account for so sanguine an assessment? How is it that change is possible at all in a system institutionally fixated on the idea of boundeness? And when change comes about withal, how is its scope kept within institutionally tolerable limits? If the judicial process was indeed an arena of legal change, why were the changes so moderate and almost imperceptible? And why were "differences [between panel members] over *outcome* so relatively infrequent in Anglo-American law? . . . [W]hat is it that *makes* different

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<sup>113</sup> *Id.* § 42, at 55 (emphasis added).

<sup>114</sup> *Id.* § 41, at 50 (footnote omitted).

<sup>115</sup> See *supra* text accompanying note 89.

<sup>116</sup> *CLSA*, *supra* note 3, § 56, at 78-79 & § 63, at 94.

<sup>117</sup> See *id.* § 8b, § 47, at 58-59.

judges—apparently *despite their divergent analyses*—still reach the same result?”<sup>118</sup> Finally, why were the *right* changes so often made?

#### d. *Mum's the Word*

The beginnings of an answer lie in Llewellyn's theory of the nature of language and its use in the legal process. Linguists have theorized that, while new words are constantly being created, the basic wordstock of a language, its core vocabulary and fund of recombinant lexemes, is relatively stable, replaced on the order of once every 5000 years.<sup>119</sup> The inability of relatively stable human language to limn with precision newly perceived phenomena and newly felt emotional configurations is a commonplace of scientists and poets. Yet lumbering and inexact as they are, man's natural languages, hereditary and retrospective, are used perforce to assimilate and convey the data of experience, mixing stability with change in varying measures according to the age.

Law's relations with language naturally reflect those of the larger society, except that legal language is of course more conservative still.<sup>120</sup> It has an even more tenacious vocabulary, being less hospitable, once past its formative years, to coinage and foreign borrowings, less flexible in diction, less stratified into “literary,” “standard written” and “colloquial” variants.<sup>121</sup>

Drawing on the work of semanticists C.K. Ogden and I.A. Richards, Llewellyn analyzes the use of legal language in decisionmaking and concludes that, for disputes not squarely on all fours with any precedent, legal language plays a largely obfuscatory role in the account it renders of the judicial process. What it hides is precisely the presence of change. Two typical instances of this are the “immanent” expansion of a word's meaning and its “hidden” expansion in the doubtful case. It is pre-

<sup>118</sup> *Id.* § 42, at 56 (first emphasis added).

<sup>119</sup> H. A. GLEASON, AN INTRODUCTION TO DESCRIPTIVE LINGUISTICS 6 (rev. ed. 1961).

<sup>120</sup> See DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 13 (1963).

<sup>121</sup> While these characterizations are generally true of legal language over most of the contemporary legal landscape in America, one area where they are much less true is in the writings of legal academics, where the common language frequently seems to have fissured into mutually incomprehensible dialects, *mélanges* of standard legalese and pidgin economics, philosophy, social science etc. See generally David Barnhizer, *The Revolution in American Law Schools*, 37 CLEV. ST. L. REV. 227-69 (1989).

cisely because so many words are, by their nature, abstractions from observation of concrete objects and experiences that they often have at once an abstract and a concrete character. In this duality lie the seeds of dissembled legal change, of "immanent" and "hidden" expansion of legal rules.

The following illustrations will help to show what Llewellyn had in mind. Assume a rule reading "anyone who, without authorization from the sheriff, brings a weapon onto the fairgrounds shall be liable for a fine of ten shillings."<sup>122</sup> Further assume that the rule was promulgated in "Albion"—an Anglophone, Common Law country not unlike medieval England. On Llewellyn's theory of language, the framers of the rule, when employing the word "weapon," necessarily had to use it as a shorthand compendium for all the specific implements of battle or combat with which they were familiar, *viz.*, those that existing technology had theretofore made available. For the sake of simplicity, let us say these were four: the bow-and-arrow, the sword, the spear and the club.

The simultaneously concrete and abstract character of "weapon" should be readily apparent: when the rule was promulgated, the use of the word inevitably summoned up a mental image of one or more of the above implements. Yet, by virtue of not being the proper name of any of them—by rejecting the drafting alternative "anyone who . . . brings a bow and arrow, sword, spear or club . . ."—it indicated that some element of commonality had been intuited and singled out, abstracted from the specifics.<sup>123</sup>

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<sup>122</sup> The highly schematic hypothetical here developed, the author's variation on a familiar pattern, see, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); Fuller, *supra* note 40, at 445-47, makes no claim to historicity, only to enough marginal verisimilitude to satisfy a not particularly demanding reader.

<sup>123</sup> The precise degree of abstractness implicit in the English word "weapon" is by no means semantically inevitable or a trivial linguistic *datum*. Latin, for example, has no word that quite matches the meaning of "weapon": *telum*, properly "weapon used for fighting at a distance," "missile," came by extension to signify "an offensive weapon of any kind." CHARLTON T. LEWIS & CHARLES SHORT, *A LATIN DICTIONARY 1847* (1975). Its paired opposite, however, was the plural word *arma*, the original meaning of which, like the German *Wehr*, was "defensive armor," but over time it came to mean "implements of war . . . both of defence and offence (but of the latter only those which are used in close contest . . . in distinction from *tela*)." *Id.* at 162. Thus to the Romans the arrow and the spear would have been *tela*, the sword and the club *arma*. The more encompassing word "weapon," from a common Germanic root *wepna(m)*, is apparently unrelated to

Albion's rule against weapons was, at first, invoked chiefly against rival bands of sword- and spear-wielding adolescents for whom fairgrounds made an ideal site for their regular Friday-night rumbles. Indeed, these gang activities were the primary impetus for the creation of the rule in the first place. When caught, the youths regularly pled guilty and paid the fine, thus obviating the need for a trial and judicial discussion of the rule.

For Llewellyn, the fining of the Friday-night rumblers would most clearly be a straightforward instance of "application" of a rule: fairground gangfights were the rule's specific inspiration and "swords" and "spears" were unarguably part of the mental inventory of the drafters as they employed the concept "weapon."

The first reported prosecution of any significance brought under the "fairgrounds weapons" ordinance, *Rex v. Hood*, involved a young roisterer who was charged not only with bringing a bow-and-arrow onto a fairground, but also with going around and holding it, tensed and ready to shoot, at the throats of assorted mercers and silversmiths displaying their wares, until they finally coughed up the day's intake of ducats and florins. Before getting caught, Hood had made himself wildly popular with the country folk, using some of the loot to buy chickens for every pot, thereby indulging his own vision of distributive justice and a new world order while having a bit of fun on the side.

At trial Hood denied violating the substantive provisions of the rule at all: once having heard its proclamation by the town crier, Hood testified that he always took great care to carry only his bow onto the fairgrounds, leaving it to his clerical assistant and factotum, one Tuck—an early Franciscan adherent of liberation theology—to tote the arrow-holding quiver a few paces behind him, passing him arrows as needed. The judge rejected Hood's technical argument out of hand, holding in the alternative that Hood had either "constructively" brought a weapon onto the fairgrounds by acting as part of a conspiracy with Friar Tuck to transport weapon parts onto the fairgrounds for subsequent assembly, or that the bow itself could be deemed an "inchoate" weapon, inchoate weapons being, "of course," no less

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other Indo-European languages, so its semantic history cannot be traced further back. See CARL DARLING BUCK, *A DICTIONARY OF SELECTED SYNONYMS IN THE PRINCIPAL INDO-EUROPEAN LANGUAGES* 1383 (1949). But I digress. Back to the excursus.

weapons within the meaning of the rule.<sup>124</sup>

While the fining of the rumblers may have been a clearcut "application" of a legal rule, what happened in *Hood*, by contrast, was almost, but not quite, as simple. A bow, standing alone, can do little physical harm to anyone; it scarcely shares the common feature abstracted from bows-and-arrows, swords, spears and clubs and designated by the term "weapon." Thus, the judge deciding the case was required to make a leap, admittedly slight, from the concept "weapon" to "a part of a weapon, in itself non-noxious, for subsequent assemblage on the fairgrounds into a weapon" to reach the result he did. For Llewellyn, this would not be, strictly speaking, rule application. Rather, it is an instance of the "automatic" or "immanent" expansion of word content, automatic or immanent because virtually any jurist in that society would certainly, unhesitatingly, have made exactly the same expansion as that of the sitting judge.<sup>125</sup> But while even though such a case technically constitutes an instance of "expanding" rather than "applying" a rule of law, Llewellyn recognizes that cases of automatic or immanent expansion are "very similar" to cases of rule-applying.<sup>126</sup>

Now when Crusaders started to come back from the wars in the Levant, they brought back with them, as trophies, two-headed axes, reportedly used by their distant enemies in close fighting and hand-to-hand combat. Axes, *single-headed*, were of course known in Albion, but had only ever been used by the

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<sup>124</sup> The court also was unimpressed by Hood's other argument that he was only exercising his natural, God-given right of self-preservation and helping others do the same, inasmuch as the masses were starving while the gentry and the burghers grew fat. Prefiguring the best Anglo-Albionic tradition of Legal Positivism, the judge's opinion dismissed it cursorily: "An exception, demurrer, or plea founded on the law of God will never be heard in a Court of Justice, from the creation of the world down to the end of time." Cf. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Lecture V) (London, John Murray 1832).

Hood, incidentally, was fined ten shillings, which was the least of his worries, considering that he was also convicted of numerous counts of robbery, brigandage and attempted murder. Friar Tuck, of course, had benefit of clergy and thus was under the jurisdiction of the ecclesiastical courts. The church authorities, for their part, spirited him out of the realm; he was later believed to be in Rome, putting his considerable financial talents to work running a Vatican bank.

<sup>125</sup> CLSA, *supra* note 3, § 53, at 74 n.1.

<sup>126</sup> *Id.* § 42, at 56 n.11. Another instance of the "automatic" or "immanent" expansion of the rule would be present when prosecutions were later brought under it against the first fairground wielders of gunpowder weapons once that technology was introduced into Albion.

peasantry, *i.e.*, not by the aristocracy that primarily made up the military caste, and then mostly for homely tasks like chopping firewood.<sup>127</sup> But two-headed axes had previously been unknown in Albion.

While stories of axe-to-sword combat were making the rounds, two more prosecutions were brought under the anti-weapons ordinance. One involved an aristocratic Crusades veteran who was prosecuted for carrying a two-headed axe, bronzed and mounted on an oaken plaque as a trophy, across the fairgrounds on a fairday *en route* to a noble kinsman's manor. The other was brought against a peasant who, on a day when the fair was not in session, crossed the fairgrounds with a single-headed axe bound for the forest to chop some firewood, as was his customary right. What lay behind both of these rather odd prosecutions was that the defendants had each done something to earn the enmity of the sheriff, a powerful personage in the county. (The veteran's fault was having been born into a rival clan; the peasant's fault was his failure once to tug his forelock with sufficient alacrity.) Hence the sheriff, establishing a long prosecutorial tradition, now sought to use a criminal statute containing colorably open language to get back at people he did not like.

The prosecution of the veteran was dismissed, while that of the peasant was successful. Both situations presented what Llewellyn would later call "trouble-cases"<sup>128</sup> because the exact bearing of the anti-weapons ordinance on the facts of each was unclear, at least at the outset of the litigation. In the veteran's case, while the court acknowledged that two-headed axes had indubitably been used as weapons in another society, it gave greater weight to the mounting and bronzing of *this* two-headed axe as a trophy, indicating to the court a clear pacific intent which effectively rendered it "not a weapon," even though the

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<sup>127</sup> Perhaps they had also been used by peasants in the occasional rural *vendetta* or domestic dispute, *cf.* *Harrington v. Taylor*, 36 S.E.2d 227 (N.C. 1945), but such events had never much impinged on the consciousness of the military caste, which was, unsurprisingly, also the rule-making caste. But as the war stories told by the Crusaders spread, a subliminal awareness began to dawn of the possibility of using the humble single-edged axe as a weapon, even though, because of its rustic associations, the swells instinctively disdained it as *infra dig.*

<sup>128</sup> KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 28-29 (1941); *see supra* note 2.

axe was easily dismountable and the bronzing did not in any way dull its cutting edges. In the peasant's case, decided that same day, the judge ran through the standard workaday uses of single-headed axes in Albion, noting that combat was not typically among them, but ultimately deemed that consideration overborne by three factors: the mere possibility that a single-headed axe *could* have injurious consequences comparable to those of the more widely recognized weapons; the fact that single-headed axes had been so used in a small number of reported peasant conflicts; and the lack of any clear indication of pacific intent with regard to the axe's use. Hence, it found that the single-headed axe "was a weapon" within the meaning of the rule and fined the peasant accordingly. Naturally the class origins of the defendants had nothing whatsoever to do with the respective outcomes.

Firmly believing he had been called on merely to "apply" a law he did not make, the judge's bewigged head lay easy that night, savoring the clear conscience afforded by the proto-Nuremberg defense that would prove so popular down through the years with most of his black-gowned successors: "I was only obeying orders." So he thought as he finally nodded off, sleeping the sleep of the just.

Whatever their intrinsic merits, the holdings that the two-headed axe "was not" a weapon while the single-headed axe "was" a weapon within the meaning of the fairgrounds weapon ordinance are each instances of "hidden" expansion of a rule in a "doubtful" case.<sup>129</sup> In the peasant's case there has been an expansion rather than an application of the rule for the same reason as in *Hood*: single-headed axes were not within the contemplation of the lawgiver when the rule was enacted. Hence, a finding that such an axe "was" a weapon necessarily expanded the rule's content. The expansion is effectively "hidden" from posterity by the subsumption of a new implement, the single-headed axe, under the old familiar term "weapon":

We regard language as if words were things with fixed content. Precisely because we apply to a new fact situation a well-known and fa-

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<sup>129</sup> *CLSA*, *supra* note 3, § 54, at 75. Lon Fuller saw in Llewellyn's treatment of the expansion of word content a close parallel to Wurzel's treatment of "projection." Fuller, *supra* note 40, at 445 n.37 (citing KARL GEORG WURZEL, *DAS JURISTISCHE DENKEN* (2d ed. 1924)).

miliar linguistic symbol, we lose the *feeling* of newness about the case; it seems long familiar to us. The word hides its changed meaning from the speaker. What political innovation cannot be introduced, provided that it is presented behind the mask of a familiar, acceptable linguistic symbol? Although in the law such innovation usually occurs on a smaller scale, this should not obscure the fact that the process is the same.<sup>130</sup>

Words, thus, are basically stereotypes with territorial ambitions.

In the veteran's case the judge declined to expand the rule. Again, the rule has not merely been "applied" or "interpreted":

If the new case is brought under an old category, the category thereafter is broader than it had been. But if the new case is excluded, the category has acquired a more determinate boundary where earlier its boundary was uncertain and there was still the *possibility* of its extending to cover this or a similar case. Whichever way the decision goes, the [word-]symbol thus acquires a new content. It refers either to the new along with the old or, more narrowly limited, to the old alone.<sup>131</sup>

#### e. *Arts and Crafts: Lawman's Intuition and the Big Lie*

The nature of language and its hospitality to dissembled semantic change explain how, mechanically, change can be accommodated by the institutional propaganda of a system obsessed with stasis. But before ever reaching that stage (the opinion-writing stage), a judge will first have had to mull a proper *outcome* for the new case, for a dispute that arises in life's "growth zone," some new problem thrown up by the struggle of social groups and insisting on legal resolution.<sup>132</sup> Faced with this novel concatenation of circumstance, the judge *must* step into the void and, wittingly or not, *choose* whether to expand an old rule to cover the new case or refuse to expand it.<sup>133</sup> How does he make the choice, given that the rule itself is agnostic on the issue presented?

Llewellyn identifies two factors that bear on the judge's ex-

<sup>130</sup> *CLSA*, *supra* note 3, § 54, at 75.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 66, at 99-100.

<sup>133</sup> "Naturally I do not deny that the deeply rooted belief that one is required to decide purely deductively has an influence on decision. I am only asserting this: If a new case is before him, the judge *must* move, one way or another. . . . Thus, the judge *cannot* but decide freely, whether he 'freely' decides or not." *Id.* § 55, at 78 n.4.

ercise of free choice. The first of these inclines toward conservatism: "the traditional way the law is *handled*, the *operating technique* of the trained lawyer as passed down to him . . . practice, not norm; way of acting, not verbal formula."<sup>134</sup> From legal rules that "really do not cover the case"<sup>135</sup> the judge has learned to derive

guidelines . . . which will bring the solution of the new case into harmony with the essence and spirit of existing law. It is precisely this art of solving the new case . . . that ensures the continuity of the judicial decisions of a particular time with prior law . . . [T]he freest judge's space for movement continues to grow smaller, and must remain so. The constraints and socialization resulting from his membership in society and from his legal training guarantee the continuity of decisions, the continuity of legal norms, and the predictability of the "freest" decision making.<sup>136</sup>

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<sup>134</sup> *Id.* § 55, at 77.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* § 55, at 77-78. This also seems an appropriate place to clear up a lingering mystery in the text of PRÄJUDIZIENRECHT. At the end of his discussion of judicial operating technique, Llewellyn appends the following somewhat obscure references:

It will presently become clear why in my view the conscious freedom of a trained lawyer means a greater real certainty than a blindly literalist attitude makes possible. (In all Europe I have heard of only one Bonjuge Maniou, and in my country of only one, on a high-court bench.)

*Id.* § 55, at 78 (omitting internal cross-reference). In preparing my translation of PRÄJUDIZIENRECHT, I was unable to locate any information on this "Bonjuge Maniou" or to identify the allusion to his American homologue. But it now seems virtually certain that "Maniou" was just Llewellyn's, or his German publisher's, mistranscription of the nearly homophonous surname of the so-called "Bonjuge" Magnaud, a French jurist made famous by the account of his judicial and political careers in 2 FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 287-307 (2d ed. 1919), and about whom Max Radin had also written. See Max Radin, *The Good Judge of Château-Thierry and His American Counterpart*, 10 CAL. L. REV. 300 (1922).

What Americans might today call a "result-oriented" jurist, Magnaud, a relation by marriage to the novelist George Sand, was presiding judge of the court of first instance in Château-Thierry in the late nineteenth and early twentieth centuries and subsequently a member of the French Parliament. He was a highly controversial judge whose decisions "leaned in favor of the weaker party, weaker . . . because of poverty or social status" and, among opposing legal theories, he would generally select "the conclusion most in harmony with his liberal political and social views." Radin, *supra*, at 301. He was renowned and by many reviled for deciding cases not according to traditional interpretations of the law but rather *ex aequo et bono*. For example, he imposed liability without fault, acquitted of theft a woman who pleaded hunger as her reason for stealing bread and granted divorce by mutual consent, explicitly *contra legem*. *Id.* at 301-02. Quite predictably, Magnaud became, in that characteristically French way, a literary *cause célèbre*, publically defended by no less than the academician Anatole France. Radin reports that the controversy generated by the "Good Judge" was indeed European, rather than purely French, in scope. *Id.* at 300, 303. If Magnaud was in fact that well known in Europe, this

Furthermore, one cardinal value a judge will certainly have absorbed from the legal environment, if only by osmosis, is the systemic preference for incremental over radical change, for movement a bit at a time along an emerging path of development.<sup>137</sup> These sociological factors obviously help to account for the high degree of predictability that obtains over the general run of cases.

But what of the "always unpredictable" individual case? Cohabiting uneasily in the judicial soul with the genius of conservatism is the irrepressible daemon of subjectivity and its name is intuition<sup>138</sup> or "fact-guided decision."<sup>139</sup> Llewellyn thus telescopes a description of its workings and an explanation of

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suggests that the spelling error was Llewellyn's rather than his publisher's. My surmise is that Llewellyn had read Radin's piece in the California Law Review but did not have it available to him as he read the proofs of *PRÄJUDIZIENRECHT* in Leipzig in 1932. Cf. *CLSA*, *supra* note 3, at xxxvii (Llewellyn's writing the preface to *PRÄJUDIZIENRECHT* in Leipzig in August 1932).

Radin's "American counterpart" to Magnaud, who was presumably also Llewellyn's member of a "high-court bench," was one James E. Robinson, an adherent of the controversial agrarian-socialist Non-Partisan League, elected in 1916 "by an unprecedented majority" to the North Dakota Supreme Court. Radin, *supra*, at 306. Radin describes him as "earnest; . . . immensely confident in [his] rectitude; [an] active politician . . . radical in [his] views and sympathies; 'who dislike[s] lawyers; and . . . ha[s] scant awe for [his] colleagues.'" *Id.* He was "our Dakotan 'bon judge' . . . much moved by the recitals of plain, hardworking, simple people," *id.* at 308, but also much given to "violent and picturesque" language, *id.* at 307, and far less consistent than his French counterpart in his rejection of the technicalities of statute or precedent. *Id.* at 306.

The key to the solution of this puzzle I owe to a conversation with Carlos Petit Calvo of the Universitat Autònoma de Barcelona, inspired by a reading of his then forthcoming article, "A Contributor to the Method of Investigation": *Sobre la fortuna de Gény in America*, in 20 *QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO MODERNO* 201, 240-41 (Paolo Grossi ed. 1992).

<sup>137</sup> *CLSA*, *supra* note 3, § 56, at 80.

<sup>138</sup> Llewellyn ascribes the identification of intuition as a factor in adjudication to Roscoe Pound, without citing to a specific place in the latter's work. *Id.* § 56, at 78. He presumably had in mind Roscoe Pound, *The Theory of Judicial Decision III: A Theory of Judicial Decisions for Today*, 36 *HARV L. REV.* 940, 951-52 (1923) (discussing role of intuition in the administration of justice). Llewellyn may also have had in mind a number of passages in chapter 3 of Pound's 1921 Storrs Lectures at Yale. See ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 54, 59 (2d ed. 1954) (discussing role of intuition in the application of the law). Pound in turn may have borrowed the idea from the French jurist François Gény, cf. CARLETON KEMP ALLEN, *LAW IN THE MAKING* 27 (6th ed. 1958) (discussing Gény's emphasis on intuition in the judicial process), inasmuch as Pound cites GÉNY, *supra* note 136, among his sources for chapter 3. Pound, *supra*, at 182. For an instructive and detailed account of the intellectual and personal contacts between early twentieth century American jurists and their Continental counterparts, including that between Gény and Dean Pound, see Petit, *supra* note 136.

<sup>139</sup> *CLSA*, *supra* note 3, § 56, at 78.

how it gets camouflaged:

If one observes a new fact situation *and is sensitive to its real-life meaning*, then there is a sudden and (so to speak) *ex post facto* change in the meaning of one's prior life experience in that area, and thus a change of content in the words used to describe and regulate the area . . . . [T]he new illuminates and *at the same time changes* the old. The "intuition" in this process lies in the judge's subconsciously using his prior experience and his sensitivity to the meaning of new fact situations. When a judge fails to reinterpret the law soundly, it is almost always because he lacks this sensitivity. He sees the new well enough with his eyes, but fails to see *what it means*. This lack of sensitivity is almost entirely due to a lack of those experiences that might have permitted him to recognize what the new facts mean. A judge's intuition extends only as far as his experience and sensitivity.<sup>140</sup>

He goes on, in his most radical vein:

If a decision is rendered [intuitively], one sees the following sequence of events: (a) understanding the facts; (b) deciding on the basis of the facts ("the outcome must be this way"); (c) searching for a legal justification; (d) writing an opinion which contains a justification, a construing of rights. In such cases, the construction is purely a means to an already determined end. One collects the rules needed for a justification, twisting and turning them until they seem to yield the result already decided upon. . . . If a judge is "tempted" even once to let facts guide his decision, he will see how unexpectedly fertile legal concepts and ideas are.<sup>141</sup>

Indeed, attorneys who develop an understanding of the mindset of the judges with whom they deal, of how intuitive and insightful about social phenomena they are, will have a leg up on those who only believe in legal certainty of the old-fashioned deductive kind. While complete legal certainty is unattainable, those lawyers who recognize intuition as a factor in adjudication *and* who have a sense of when a particular judge's intuition, rather than his merely deductive powers, will be brought to bear to resolve a legal question, will be able to achieve a much greater degree of legal predictability than their fellows.<sup>142</sup>

But why do the warring passions in a judge's breast, technique and intuition, not lead to a stand-off, or to victory for one and retreat for the other? How is it that adjudication devolves

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<sup>140</sup> *Id.* § 56, at 79.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* § 57.

neither into rule-captivity nor impressionistic caprice? If this "mixed" system of decisionmaking has not yet spiralled out of control, if the center holds, it is because mediating between "fact-guided decision" and tradition is self-delusion:

Perhaps [conscious awareness of judicial freedom] would be a gross political error. Perhaps legal training could no longer rein in a judge who *knows* where he stands. Perhaps the continuity in case law decision making as well as the constraints of taking one's directions from a statute would dissolve if a judge were to lose the *belief* that he was tied to one spot. Perhaps he must believe he is obeying in order to be a wise commander. . . . We do not wish to make our judges into law-givers on the scale of the legislature; perhaps we best achieve this by denying that judges actually have what is in fact the indispensable power to create law for specific cases—thereby inducing them, as far as possible, to exercise this power blindly, because unconsciously.<sup>143</sup>

Coming from anyone else, this might sound like the basis for an exceptionally cynical judgment. But all these factors working in tandem lead Llewellyn rather to the optimistic assessment that, on the contrary, the judicial system is basically working quite well. Most judges proceed gingerly, taking baby steps within the area roped off by rules and guidelines. The great judges—the Holmeses, the Mansfields, the Cardozos, the Scruttons—are more insightful than their run-of-the-mill brethren, able to take bolder, more far-reaching strides that promote the sound development of the law and to monitor the pace of legal change, making certain that one social group is not unduly harmed or benefitted.<sup>144</sup> And when one of the Bench's lesser lights gets a cockamamie idea or when even great Homer nods, the system has a self-cleansing mechanism:

To see an author's name right at the beginning of an opinion is both meaningful and extremely helpful[.] A certain judge's opinions may be dubious, his *dicta* dismissed, his experiments regarded with the greatest skepticism, his utterances construed narrowly. Another judge's opinions may be acute and insightful, his *dicta* more valuable than many people's decisions, his intuition prophetic, his formulation of rules well considered and confident. A leading judge thereby achieves greater esteem and, above all, far-reaching influence. The notation of who the author was has repeatedly been decisive for the law's forma-

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<sup>143</sup> *Id.* § 63, at 94.

<sup>144</sup> *See id.* §§ 65 & 67, at 67. In their innovations, the great judges are often aided by the practicing Bar's pioneering innovations with existing legal forms and institutions. *Id.* § 65, at 97-98.

tion in other states or in later times. This naturally is not without its dangers. "It seems to be the prerogative of a lofty mind not only to enlighten by its wisdom, but to enslave by its authority." But even the very greatest cannot ultimately prevail with their errors, while their names give their happy insights the strength to secure the public good.<sup>145</sup>

Llewellyn concludes *Präjudizienrecht* with the following passage, pointing the way to the concerns of the work that was shortly to follow:

Admittedly [*Präjudizienrecht*'s] exclusive focus on appellate court decisions and legal rules plays into the lawyer's peculiar prejudice that these decisions are precisely what matters, in and of themselves, regardless of the effects they may have on the society from which they spring. But perhaps it is precisely here that hope lies. Once we get to thinking about what these legal rules really are, what their meaning really is, what the nature *even* of supreme court decision making is, then we must already be drawing closer to Life and finding in ourselves the urge to obtain more firsthand knowledge about the whole purpose of law, its utility to society in general. But once our legal fraternity feels this urge within it, the smaller problems—like questions about the nature and growth of precedent—will be solved through a new wealth of illuminating facts.<sup>146</sup>

## B. Recht, Rechtsleben und Gesellschaft: *World Within World*

The argument of *Präjudizienrecht* was largely negative, seeking to demonstrate the inadequacy of the deductive theory of decisionmaking and to demolish the logical pseudo-science of law. It was also a somewhat inward-looking book, concerned mainly with the internal dynamics of case law. By contrast, *Recht, Rechtsleben und Gesellschaft* is a work far broader in scope. If the earlier book attempted to persuade lawyers that sociology had much to say about the law, Llewellyn's second Leipzig book made the complementary but more sweeping claim: a study of law had much to tell sociologists about society.

### 1. *Scienza Nuova*

Llewellyn's aim in these lectures on law and society is to inaugurate a *true* science of law, a "natural" or "social" science

<sup>145</sup> *Id.* § 43, at 60-61 (quoting *Brewster v. Hardeman*, Dudley 138 (Ga. 1831)).

<sup>146</sup> *Id.* § 74, at 114.

along modern empirical principles.<sup>147</sup> He is quick to recognize, however, that the sociology of law could not yet yield much of anything definite, as it was "a downright unexplored field" [*ein geradezu unerforschtes Gebiet*].<sup>148</sup> The lack of basic research, with a limited (if growing) number of exceptions, meant that there was no body of established facts to work with. Indeed, even with such acknowledged giants in the field as Max Weber and Eugen Ehrlich, one was dealing not with factual authorities but only with the insights of thinkers of genius. Hence, Llewellyn sees himself as a kind of Moses on the marches of Canaan, providing only "a glimpse of the Promised Land,"<sup>149</sup> aspiring merely to "open up"<sup>150</sup> the field of legal sociology, to offer it a possible program. He wished to speculate about what a fully developed sociology of law might one day have to offer, tentatively proposing a few daring hypotheses and "fantasies" [*Phantasiegebilde*]<sup>151</sup> about the way legal sociology might eventually organize its observations of the "life of the law" in the context of the larger society.

In presenting his program for legal sociology, Llewellyn first provides a schematic genealogy of the sciences in general and insists on a number of key distinctions. Every branch of knowledge, he maintains, starts out not as a science [*Wissenschaft*]<sup>152</sup> but as a practically useful real world skill [*praktische Lebenskunst*],<sup>153</sup> a livelihood, a group of interrelated actions [*Handlungs-gefüge*]<sup>154</sup> that comes into being because people have had some job to do. "The Law" encompasses a number of such skills: judging, advocacy, counselling and the like. These practical skills focus on the short term, on getting a job done.

From these occupations there slowly arises a "philosophy" of a sort, one that often owes its origins either to the reflective musings of ne'er-do-wells or malcontents on the significance of their occupation, or to an incipient system of instruction in practical skills. Such reflections generally lead to attempts to

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<sup>147</sup> See *infra* notes 151-53 and accompanying text.

<sup>148</sup> RRG, *supra* note 3, at 20.

<sup>149</sup> *Id.* at 39.

<sup>150</sup> *Id.* at 27.

<sup>151</sup> *Id.* at 39.

<sup>152</sup> *Id.* at 32.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

draw together everything theretofore learned about a particular branch of knowledge, to a "science" in the old-fashioned sense of the term, a somewhat organized collection and classification of prior knowledge, but one that jumbles knowledge with beliefs, with value judgments and prejudices, a "quasi-science." This philosophy coexists with, but does not supplant, the skills by which people earn their living.<sup>155</sup>

Some branches of knowledge, including law, also come to develop what probably can best be described as "doctrine" [*Dogmatik*].<sup>156</sup> The precondition for the development of doctrine is some recognized authoritative document, a holy book—a set of scriptures, the Church Fathers, the German Civil Code of 1896—containing fixed, mandatory language that prescribes rules for living and that brooks no dissent. The function of doctrine is to use these words to devise "correct" solutions for real-life cases. In law doctrine has the obvious value of instructing the all-too-human judge to let the law (not the judge) decide, so as to ensure that like cases are treated alike, a universal *desideratum*. Yet be it legal doctrine, theology or casuistry, all have one thing in common: not only do they purport to be the "proper" norms to follow, they also represent themselves as the norms that are actually *being* followed. Normative statements tend to glide over into empirical statements, an impermissible expansion of doctrine beyond its proper limits.<sup>157</sup>

While law certainly needs doctrine, doctrine, over time, has a way of hogging the spotlight. When legal doctrine makes the unsupported assertion that its norms are the ones actually being followed, it arrogates to itself the role proper to yet another species of "law," one existing alongside the art, the philosophy and the doctrine: a "science" of law in the modern sense of a descriptive or empirical science [*Seinswissenschaft, Erfahrungswissenschaft*],<sup>158</sup> the task of which is the slow and painstaking accumulation of facts, a science that, additionally, must forswear value judgments so as not to distort the accuracy of its observations. To Llewellyn, the development of this scientific attitude is perhaps the highest accomplishment of the modern age, one that

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<sup>155</sup> *Id.* at 32-34.

<sup>156</sup> *Id.* at 35.

<sup>157</sup> *Id.* at 37.

<sup>158</sup> *Id.* at 29 & 38.

has led to enduring progress in all fields where it has been introduced.<sup>159</sup>

The enthusiasm of his panegyric notwithstanding, Llewellyn is hardly a naive cheerleader for the scientific ideal. For he also displays a sophisticated understanding of modern science's epistemological problems. He recognizes, for example, that even a descriptive science is not exactly value-free. Its values are rather of a different sort: a responsibility only to facts; a skepticism about assumptions; a refusal to accept anyone's authority without proof; a need for results verifiable by others. He also freely admits that the way in which science poses a question and the particular conceptual abstractions the scientist uses to divide up his perceptions of raw existence will naturally determine both what is observed and how the observer sees it, *i.e.*, the problem that a modern philosopher of science has described as the "theory-laden" character of scientific observations. But at least this sort of science strives to be consciously aware of its own limitations, thus allowing for correctives to such distortions.<sup>160</sup>

With all its shortcomings, this is the model of science Llewellyn embraces for the sociology of law. This is, however, precisely the sort of science that has, for the most part,<sup>161</sup> been conspicuously lacking in the law:

I would maintain that in this topsy-turvy world the central problem of all of law has to do with this still almost completely neglected descrip-

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<sup>159</sup> *Id.* at 34.

<sup>160</sup> *Id.* at 34-35. See N.F. HANSON, *PATTERNS OF DISCOVERY* (1958) (discussing "theory-laden" character of scientific observations). This recognition of the limits of the scientific method suggests that Llewellyn's reading in scientific theory must have been fairly wide and deep, for one wonders how commonplace such a realization was in the early 1930's. See, e.g., Grey, *supra* note 99, at 21-22 (discussing "modern" ideas on the limitations of science and citing "contemporary" writers in the philosophy of science and epistemology, none earlier than 1958). See also Hannah Arendt, *The Conquest of Space and the Stature of Man*, in HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 265, 276-80, 300-01 n.23 (enlarged ed. Penguin Books 1977) (1968) (discussing the injection of the human observer into science and the limits of scientific measurement, based on Werner Heisenberg's "popular" statements of his Uncertainty Principle from the 1950s). If he had not already done so, one place he may have encountered such caveats was in Mortimer J. Adler's book review of Jerome Frank's *LAW AND THE MODERN MIND*, *supra* note 103, one of three contributions to the symposium on this work in which Llewellyn also participated. See Mortimer J. Adler, *Legal Certainty*, 31 COLUM. L. REV. 91, 92 (1931).

<sup>161</sup> Llewellyn attributed the beginnings of the descriptive science of law to the so-called "Free Law Movement." *RRG*, *supra* note 3, at 38. Cf. Herget & Wallace, *supra* note 19, at 443-45 (quoting passages from the works of Eugen Ehrlich and Ernst Fuchs advocating a more empirical, social-science approach to the study of law).

tive science, with this "legal sociology," this natural science of living law [*Naturwissenschaft des Rechtslebens*]. What we need to study, what we must know, is not how a legal rule reads, nor how a philosophically correct rule would read, but what the legal rule *means*. Not in its "intended sense," and not in the clouds, the heaven of legal concepts, but in human experience. What happens in life with it? What does a law mean to ordinary people? If ever it was enough, today it surely is not enough to set up an "ideal" norm and, whenever anything is found wanting in its "interpretation," to attribute it, with a shrug, to human weakness. *In Life, Law means what Law delivers* [*Im Leben bedeutet Recht, was Recht leistet*]; no more, no less.<sup>163</sup>

Llewellyn of course knew that legal sociology was not "the law."<sup>163</sup> He states, as he generally did in such contexts,<sup>164</sup> that he has no wish to supplant any of the other approaches to law, including the doctrinal, with his sociological approach. "It is not that words are unimportant, but that actions have been neglected."<sup>165</sup> Given their history of prior neglect, he believes he must now overemphasize them even at the cost of creating a caricature, a depiction that at least is very easy to understand.<sup>166</sup>

Yet the focus of the impending scientific inquiry into "what law meant in real life" and into "what law delivered" still needed considerable sharpening. Which slice of life was to be considered? How, in fact, would "law" be defined for purposes of sociological study? Llewellyn rejects as unusable the Historical School's<sup>167</sup> and Eugen Ehrlich's<sup>168</sup> virtual identification of law

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<sup>163</sup> *RRG*, *supra* note 3, at 38. For those who might think the phrase "the central problem of all of law" just a tad hyperbolic, Llewellyn does give an explanation. Accurate scientific knowledge of what legal rules "deliver" in real life is desirable not just because it satisfies a disinterested spirit of inquiry, but also because such knowledge is an indispensable element in devising effective answers to questions about what the law in the real world "ought" to be. *Id.* at 39.

<sup>163</sup> *Id.* at 32; see also *CLSA*, *supra* note 3, at xxxviii.

<sup>164</sup> *Cf.* the well-known discussion of the "temporary divorce of Is and Ought" in Llewellyn's roughly contemporaneous *Some Realism*, *supra* note 21, at 1236-37.

<sup>165</sup> *RRG*, *supra* note 3, at 53.

<sup>166</sup> *Id.* at 43.

<sup>167</sup> The "Historical School" was a nineteenth century movement in Continental jurisprudence begun by Gustav von Hugo (1764-1844), a Roman law Scholar at the University of Göttingen, and continued by Friedrich Carl von Savigny (1779-1861), Professor of Law at Berlin and later Prussian Minister of Justice, the movement's "unquestioned head." 1 KONRAD ZWIEGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 144 (Tony Weir trans. 2d rev. ed. 1987). In the Anglo-American world a well-known figure whose ideas had much in common with those of the Historical School is Sir Henry Sumner Maine (1822-1888), author of the oft-cited *ANCIENT LAW* (1861).

A Romantic reaction against the rationalistic, natural-law jurisprudence of the En-

with custom: were one to focus on "customary" behavior, this would leave nothing left to distinguish a sociology of law, of distinctively legal behavior, from sociology *tout court*.<sup>169</sup> Instead, he considers the approach of Max Weber, who, viewing law as a separate subsystem [*Sondersystem*] within society, focused his attention on the activity of a separate "law staff" [*Rechtsstab*], i.e., legal officialdom, the law's enforcement personnel in the widest sense of the phrase. He quotes with approval Weber's definition of law: "A [social] ordering should be called . . . law if it is externally guaranteed by the chance of (physical or psychological) compulsion through the activities of a staff of men who expressly focus on such matters directed at producing its observance or punishing its violation."<sup>170</sup> But Llewellyn's reaction to this definition was not uncritical; he had a number of reservations.<sup>171</sup> He thought, for example, that the "staff" under consid-

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lightenment, the Historical School

saw law as a historically determined product of civilization, having its roots deep in the spirit of the people and maturing there in long processes. Like language, poetry, and religion, law is the product not of the formative reason of a particular legislator, but an organic growth, rather like a plant, of the 'inner secret powers' of the 'spirit of the people' working through history. For the adherents of the Historical School, all true law is customary law, developed, handed down, and captured in usage and manners; the law-bearers are the people and, as the people's representatives, the lawyers.

ZWEIGERT & KOTZ, *supra*, at 144-45. See also Hugo, Gustav von and Savigny, Friedrich Carl von, in DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 590, 1103-04 (1980).

<sup>168</sup> Eugen Ehrlich (1862-1918), by many considered to be the founder of legal sociology, was for most of his career Professor of Roman Law at the University of Czernowitz in the Bukovina. An adherent of the "Free Law" movement, see *supra* notes 19 & 154, Ehrlich's best known work is his *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1913). The element of his thinking that Llewellyn here declines to adopt is Ehrlich's concept of *lebendes Recht*, "living law," by which he meant "law as expressed in social conduct" or "current customary law." See N.S. Timasheff, *Ehrlich, Eugen*, in 4 *INT'L ENCYCLOPEDIA Soc. Sci.* 540, 541 (David L. Sills ed. 1968).

<sup>169</sup> *RRG*, *supra* note 3, at 44-45.

<sup>170</sup> *Id.* at 45 (quoting MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* 17). It is impossible to tell from Llewellyn's citation whether he is citing to the original edition of 1922 or the "enlarged" edition of 1925. See Max Rheinstein, *Introduction to MAX WEBER, LAW IN ECONOMY AND SOCIETY* xxv n.1 (Max Rheinstein ed. & Max Rheinstein & Edward Shils trans. 1954) (describing publication history of *WIRTSCHAFT UND GESELLSCHAFT*).

<sup>171</sup> In addition to the other qualifications mentioned in the main text, Llewellyn also criticized Weber's unduly narrow definition of "action" as "behavior to which the actor(s) assign a subjective meaning," which Llewellyn, ever the pragmatist, saw as disturbingly ambiguous and indeed pointless. He noted that Weber himself seems to have ignored this definition virtually everywhere else in his work. *RRG*, *supra* note 3, at 46.

Furthermore, Weber's definition, by focusing on a "guaranteed" social order, appears to leave no room for change. Instead, Weber treated changes in social order under

eration should be limited only to the law staff set up by the State<sup>172</sup> and the relevant activities only those directed toward dispute resolution or aimed at "channeling" people's behavior in a particular direction.<sup>173</sup>

But thus qualified, Llewellyn essentially adopted Weber's discrete focus on the activities of the law staff<sup>174</sup> as his own definition of "law" for purposes of legal sociology, that is, "law in action"<sup>175</sup> or "law in fact."<sup>176</sup> This was decidedly *not* a definition of narrow interest only to specialists in the sociology of law; it was this very same "law-in-fact," rather than law-in-books, that was of greatest moment to practicing attorneys. Furthermore, the definition highlighted the opposition between law as "observable behavior," Llewellyn and Weber's usage, and law as "intended meaning," "rule," "ideal," "normative concept" and "explanation by the court," the latter all typical elements of *traditional* definitions of law.<sup>177</sup> All these surely existed and might influence the law staff's behavior, but they were phenomena of a second order.

Thus defined, it further became clear that a descriptive science of "law-in-action" is not, and cannot be, an abstract intel-

his concept of "*Herrschaft*," domination. Llewellyn agrees that, while conceptually it is very useful to keep separate the concepts "maintenance of order" and "change of order," in practice they are inextricably bound together. Hence, he proposed to blend some of Weber's *Herrschaft* into his treatment of "law." *Id.*

<sup>172</sup> Llewellyn notes that Weber's definition is broad enough to encompass the processes by which order is maintained in a four-person family, a school classroom or a workers' union. *Id.* at 46.

<sup>173</sup> The effect of this is to exclude such frequent law-staff activities as official announcements of what rules the staff is following or will follow in the future and investigative activities when violations are alleged to have occurred. *Id.* at 47.

<sup>174</sup> The phrase "law staff," while a "correct" translation of the German *Rechtsstab* and used by Rheinstein and Shils in their English translation of Weber, see *supra* note 169, is at best unidiomatic English. At times it helps in understanding the sense of certain passages in Llewellyn's second Leipzig book by mentally replacing "law staff" and "legal officials" with "the judiciary" and "judges," naturally at some cost to Llewellyn's full meaning. But while the concept of "law staff" quite obviously embraces more than just the judiciary, judges are a major component of that "staff" and in Common Law are seen as the most important.

<sup>175</sup> The phrase is that of Roscoe Pound and was occasionally borrowed by Llewellyn in his English writings. See *Next Step*, *supra* note 21, at 435 n.3.

<sup>176</sup> Llewellyn had qualms about using the ordinary German word for law, *Recht*, to describe these law-staff activities because of the deeply-rooted usage of *Recht* to mean "system of norms." Hence his coinage: *Trecht*, whose invented etymology he gives as *Tat* [deed, action] + *Recht* [law]. Hence, roughly: "law-in-fact." *RRG*, *supra* note 3, at 48.

<sup>177</sup> *Id.*

lectual discipline [*Geisteswissenschaft*]. Rather, it is and must be a social science.<sup>178</sup>

## 2. Have We Been Regular?

Llewellyn now poses a question that he had earlier broached in *Präjudizienrecht*: can any sort of "regularity"<sup>179</sup>—typically viewed as a hallmark of a *legal* system, in contradistinction to arbitrariness—be found in the law staff's actions? If regularity can be found, how can its presence be accounted for?

One infallible test that Llewellyn believed would demonstrate the presence of such regularity is if a trained lawyer, aware of the facts and circumstances of a case, is better able to predict its *outcome* than an otherwise equally capable layman. Clearly the answer is yes. Note that this does not mean the lawyer will be able to predict the court's asserted *basis* for the outcome, the "rule of law" on which it rests its decision, but only that, compared to a layman, a lawyer will be more likely to divine the ultimate upshot. But it is equally clear that this regularity comes coupled with some quantum of irregularity. Even a good lawyer cannot make predictions with 100 percent accuracy, and two good lawyers frequently disagree in their predictions. Thus, there is indeed regularity in the system, but much less than legal textbooks would have us believe. The precise amount of regularity cannot be studied as a general proposition, but only area by area and fact situation by fact situation.<sup>180</sup>

### a. *The Same Old Rut*

[W]hat is it that *makes* different judges  
—apparently *despite* their divergent  
analyses—still reach the same result?<sup>181</sup>

To what is this regularity, however paltry [*dürftige*],<sup>182</sup> to be

<sup>178</sup> *Id.* at 49.

<sup>179</sup> In *Präjudizienrecht* "regularity" went by the name "predictability" or "calculability." See, e.g., *CLSA*, *supra* note 3, § 8b, at 11.

<sup>180</sup> *RRG*, *supra* note 3, at 52-54.

<sup>181</sup> *CLSA*, *supra* note 3, § 42, at 56.

<sup>182</sup> *RRG*, *supra* note 3, at 54. It is somewhat odd that Llewellyn should here qualify the amount of regularity obtainable as "paltry" or "scanty." Cf. *id.* (opining that the hesitancy of practicing lawyers to predict the outcome of litigation is much truer to life than the specious predictability of textbook law). On the other hand, the whole tenor of

ascribed? In the first instance, it can most likely be ascribed to force of habit, present in all persons, including lawyers. It is simply easier to do over again what one has already done once before, particularly if it was hard doing it the first time. Often one is not even conscious of repeating something. When one always sticks the same arm into a coatsleeve first, or puts the same shoe on first in the morning, is it because considerations of practicality, a legal rule or some social norm so requires? Of course not. The way a legal official sets about attacking a case, Llewellyn thinks, is not fundamentally different from putting on a coat or a shoe. This rather inglorious explanation of legal certainty would no doubt have sat rather poorly with members of the American legal establishment, used to thinking of themselves as guardians of right and dispensers of justice.

Llewellyn then offers a few more unflattering metaphors for the judicial process, this time to describe how the law gets changed. Before a "law official"—typically, the judge—will ever try anything new, something has to be "not quite right" about the old solution: the standard solution will first have to provoke a feeling of unease [*Unwohlsein*] strong enough to exceed the threshold of irritation [*Reizschwelle*].<sup>183</sup> At this point, judges and legal officials behave like rats in laboratory cages, going over the same steps they did before in hopes of getting to their goal one more time. If this does not work, they treat the case as though it were an optical illusion [*Vexierspiel*],<sup>184</sup> twisting and turning it until the solution appears. Subsequent, retrospective

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his analysis in this work, see, e.g., *supra* text accompanying notes 170-178 (describing forces operating to promote consistency over time in law staff behavior), as well as in *PRÄJUDIZIENRECHT*, see, e.g., *CLSA*, *supra* note 3, § 8b, at 11, § 43, at 60, §§ 55-57, is that there is a fairly sizable amount of certainty to be had. Llewellyn was here probably just trying to be cautious, but it does give one pause.

<sup>183</sup> The concept of "irritation" as a stimulus for creative thought and the whole "habit/trial-and-error" description of the decision-making process is an obvious debt of Llewellyn's to the ideas of one of his intellectual heroes and Columbia colleagues, the Pragmatist philosopher John Dewey. Cf. JOHN E. SMITH, *PURPOSE AND THOUGHT: THE MEANING OF PRAGMATISM* 23 (1978) (discussing the role of "the irritation of doubt" in thought of Dewey and fellow Pragmatist C.S. Peirce); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 798, 802 (1989) (discussing habit, inquiry into habit-related problems and problem-solving in John Dewey's thought). For Llewellyn's relations with Dewey, see *TWINING*, *supra* note 1, *passim*, especially 422 n.130. The concept of trial and error in response to some stimulus also owes something to the American sociologist William Graham Sumner. See *id.* at 92.

<sup>184</sup> *RRG*, *supra* note 3, at 55.

reflection on how this actually happened is called an "opinion," and bears as much relation to how one actually got to the solution as does subsequent reflection on how one actually figured out an optical illusion.

Add to habit another kind of repetition: tradition. Legal apprentices—apprentice judges, apprentice advocates and apprentice lawyers in general—learn the traditional ways of doing things from the older generation, sometimes without being consciously aware that they are learning anything, such as a tone of voice for addressing the court or use of hand gestures in oral argument to heighten or relieve tension. They simply accept the craft's given ways of doing things [*Handwerks-Gegebenheiten*] as part of the environment. These craft habits play a powerful role in ensuring continuity of law.<sup>185</sup> An additional factor that helps to account for consistency in law staff behavior is simply the similarity in the law staff's personnel arising from their common training and experience, which gradually levels out some of the original differences in their personalities.<sup>186</sup>

#### b. *Doing About as Expected*

To repetition by force of habit there is then added, Llewellyn notes, an ethical or normative factor, providing a bridge from individual to social habit. What is repeated comes to be *expected*. "What is expected to happen, willy-nilly, instinctively becomes what is supposed to happen [*Das Erwartete wird triebhaft, ohne Wollen, zum Gesollten*]."<sup>187</sup> That it should happen is judged "good," "correct," "moral" and "just"; for it not to happen is judged "bad." What was at first merely a matter of fact now has become a matter of ethics, a process Ehrlich called "the normative power of the actual."<sup>188</sup>

This gradually developing ethical norm, "what has happened is what is supposed to happen," is one of two fundamental norms Llewellyn says the lay public (and legal officials too) impose on the legal system. It takes the form: "make sure this case is treated the way you have previously treated essentially

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<sup>185</sup> *Id.* at 56-57.

<sup>186</sup> *Id.* at 64.

<sup>187</sup> *Id.* at 56.

<sup>188</sup> *Id.* at 57. Cf. *infra* text accompanying note 202 (discussing the ethical force of "simplified" images of recurrent past behavior).

similar cases." The other norm is simply: "decide justly." To follow one norm or both norms consistently is, in Llewellyn's view, simply unattainable. In most difficult cases they are at odds. Lawyers and the public are asking the impossible.<sup>189</sup>

c. *A Role for Rules?*

This impasse between justice and regularity, however, leads to the discovery of leeway, a space, admittedly bounded, within which a judge may act freely. That is, a judge may adjudicate "justly" or may treat this case as all other such cases were treated. But it also leads to the creation of concrete rules of law. These rules aim either at striking a balance between the sense of justice and a need to abide by the old ways, or at defining, at "nailing down," "the Just" or "What Was Done in the Past" in order to control the future.<sup>190</sup> This relieves judges of some of the awful burden of responsibility and simultaneously protects the public against judicial missteps. The existence of legal rules, in turn, then leads to the development of another professional skill: the ability to disguise all innovations as decisions compelled by precedent or statute.<sup>191</sup>

Naturally, Llewellyn does not deny that the existence of legal rules is one more factor leading to some increase in the regularity of law staff action. Words are powerful, and acquire an aura of self-sufficiency, but one that is ultimately deceptive. Legal rules, he thinks, do not by their mere existence guarantee law staff behavior that conforms to their wording.<sup>192</sup> For legal rules, though we cannot get along without them, have only a limited power to ensure regularity. They make only for a bit more [*Bißchen*] regularity than would already obtain just from the similarity and continuity of law staff personnel.<sup>193</sup>

The limited efficacy of legal rules can be seen most clearly when changes in the law are made. For then the key question becomes: When do the new words of the law become sociologically valid? Or, in Weber's language, at what point is there a

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<sup>189</sup> *Id.* at 58.

<sup>190</sup> *Id.* at 59.

<sup>191</sup> For an amplification of this point in *PRÄJUDIZIENRECHT*, see *supra* notes 122-31 and accompanying text.

<sup>192</sup> *RRG*, *supra* note 3, at 59.

<sup>193</sup> *Id.* at 64.

chance people will act accordingly?<sup>194</sup> For clearly the words of the new law are not self-executing. A new provision of law is in the nature of an experiment. Its success or failure—the form in which the change is eventually manifested in real life, and how soon it occurs—is dependent on what a law staff does with it, on how it interprets and applies it, on whether the staff has empathy for the purpose behind the innovation, the understanding needed for the speedy transformation of prescriptive language [Sollwort] into legal reality.<sup>195</sup>

### 3. Social Studies

#### a. Order

Llewellyn, as noted, took over from Max Weber the notion that law staffs are just one of a number of discrete subsystems within society. Before trying to assess the relationship between law staff activity and the rest of society, however, he first needed to develop a picture, however sketchy, of society as a whole. But this was no easy task given the confused, anthill-like jumble [*wirres, ameisenhaufenhaftes Hin und Her, Drunter und Drüber*] that society appears to be.<sup>196</sup> Still, partly by tradition and partly from certain (though hardly rational) knowledge, we assume that some sort of unity must inhere in society. To let some sort of order, however fragmentary, emerge, there must be oversimplification: a focus on this ant, this tiny portion of the hill.

To Llewellyn the concept underlying society is neither legal rules nor public law, nor even law-staff activity, but order. The minimal conceptual requirement for "Society" is a notion of its members acting in such a way that the number, type and overall mass of their conflicts do not render the idea of a unity in their actions unimaginable. Similar to "Society" is his definition of a "Group": two or more people the totality of whose patterns of conduct respecting a particular matter can be viewed as an organized Whole. Society is a "Group" writ large, a complex and largely self-sufficient unit. Such a collection of people, when not self-sufficient but rather a discrete part of a larger unit, is a

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<sup>194</sup> See *supra* text accompanying note 170.

<sup>195</sup> *Id.* at 61 & 78.

<sup>196</sup> *Id.* at 78.

"Group," *e.g.*, a trade union, a political party or a club. A "category" is two or more people with common interests, lacking a corresponding organization.<sup>197</sup>

### b. *Folkways*

The basic phenomenon of a group or society is the relatively regular, calculable and interconnected activities of its members. These, when sufficiently repetitious, are to be regarded as "ways-of-behavior" [*Handlungsweisen*]: supra-individual abstractions from many particular instances of people behaving the same way<sup>198</sup> that are taught, passed on to or, more likely, picked up by newcomers to the society or group. Note that there is absolutely no normative component to Llewellyn's concept of "groupways," "folkways," "practices" or "behavior patterns."<sup>199</sup> His is a minimalist, purely descriptive concept, containing no implication that the society or group attaches moral or ethical value to the practices (although it may). Folkways are enormously powerful in exacting conformist behavior, able over time to transform the explosive threat to society represented by all newborn babies, squalling little monsters of domination and uncontrollability, into Frenchmen, Japanese, members of the middle class, and the like. Folkways, indeed, like all principles of order, Llewellyn sees as unswervingly bent on their own preservation.

How can folkways ever change at all, if their power to control behavior is so strong? Folkways change because they are not a narrowly linear concept, prescribing in detail one and only one type of behavior, but are more akin to a band or a spectrum

<sup>197</sup> *Id.* at 80-81.

<sup>198</sup> Though some ways of behavior are generally followed, others may perhaps be followed only at particular seasons, *e.g.*, Christmas folkways; or on particular occasions, *e.g.*, wearing black to funerals; or only by some individuals in society, *e.g.*, workers versus management; officers versus enlisted men. *Id.* at 83.

<sup>199</sup> Here Llewellyn again felt constrained to resort to his own German coinage: *Handle*, from the root of *Handlung*, "action." He believed that the available German words all had unavoidable overtones of normativeness, which the quoted English words in the main text, used by Llewellyn himself in the German original, lacked. *Id.* at 82.

The concept of "folkways" derives from the thought of William Graham Sumner (1840-1910), an early American sociologist. Llewellyn had studied with one of Sumner's students while a Yale College undergraduate. See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS* (1907); see also TWINING, *supra* note 1, at 92-93.

[*Streifenbegriff*],<sup>200</sup> encompassing a range of generally similar instances of concrete behavior. The greatest numerical accumulation of particular instances is around the middle of the spectrum, where concrete examples of behavior are most alike. (The similarity between instances at the left and right ends of the spectrum is less readily apparent.) This "spectrum" quality of folkways thus provides leeway to accommodate both individual characteristics (lefthandedness) and conscious individual initiative. For example, in medieval painting, most elements were prescribed, but there was still some room left for an individual's powers of synthesis. Folkways thus change when instances of concrete behavior begin to accumulate in greater numbers elsewhere on the spectrum than before, causing the statistical center to shift.<sup>201</sup>

One cleavage that may develop over time, Llewellyn notes, occurs between behavior patterns in their scientifically describable form—given their "spectrum" character, these present a highly complex and polymorphous appearance—and people's *notions* about what those behavior patterns in fact are. The toleration of folkways for a somewhat wide range of behavior has as a consequence that, when people, even those of scientific bent, *think* about the folkways that are actually operative in their society, they inevitably simplify the complications present in Reality, editing it along the lines of the behavior patterns they *wish* were actually being followed. Thus, while expectations for the future are generally based on what has occurred in the past, here people's expectations come to be based on a distorted, simplified image of the past. "What Has Actually Happened" is far too complex to be described accurately. While people may be dimly aware of a norm that *is* in fact based on *actual* behavior, their conscious norm, a distorted and, in turn, distorting social norm, is the norm that comes to acquire an ethical character. Such

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<sup>200</sup> RRG, *supra* note 3, at 97. Cf. CLSA, *supra* note 3, at 85 ("[Social norms] are slow to become established, often settling in in a variety of forms simultaneously.") (emphasis added).

<sup>201</sup> Nowhere is such unremarked shifting in folkways more obvious, notes Llewellyn, than in the law's use of unconscious fictions: newly arising situations in need of regulation simply get swept under an old wording, such as the old Common Law forms of action, the concept of "good faith." RRG, *supra* note 3, at 98. With this compare Llewellyn's discussion of the expansion of word content in THE CASE LAW SYSTEM IN AMERICA, see *supra* text accompanying notes 119-31.

"streamlined" norms, having become completely separated from their basis in sociological observation, often take on a life of their own, and assert their validity, as directive norms, to *control* behavior. These norms are also able to expand, in fairly predictable ways, to cover unforeseen situations.<sup>202</sup>

### c. *Folkway Clusters*

Just as individual folkways exist, Llewellyn observes that relatively discrete *groupings* of behavior patterns, "folkway-clusters" [*Handlengefüge, Handlengebilde*] also exist that need to be seen as a composite.<sup>203</sup> Llewellyn claims no *a priori* validity for such folkway-clusters. Indeed, it may be hard to say where the boundaries are when trying to decide which groups of practices are to be viewed as composites. These clusters of folkways have at most only a heuristic value: while faithfully reflecting only known facts, they help us see order in the midst of confusion. One intuitive principle to follow in seeking to identify such composite behavior patterns is to look for them in connection with particular persons—(behavior toward a monarch or behavior of the old Polish nobility), places (the Leipzig fair or a courtroom) and times (Christmas, Thanksgiving or Carnival). But one can also expect to find them in a particular subject-matter context. The same set of behavior patterns may naturally often be interpreted equally well in connection with more than one of these principles of organization: a tobacco business, for example, can be viewed with equal plausibility in its personal, local and temporal contexts as well as in its subject-matter context. But it is hardly possible to interpret *the* tobacco business other than in its subject-matter context.

### d. *Institutions*

Larger still than either folkways or folkway-clusters, one also can ascertain the existence of social constructs Llewellyn calls "Wholes" or "Totalities" [*Ganzheiten*], large-scale entities ultimately composed of many individual folkways and folkway-clusters, but whose existence as integrated "Wholes" seems to some extent to take on a life of its own, independent of their

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<sup>202</sup> RRG, *supra* note 3, at 107-11.

<sup>203</sup> *Id.* at 95.

components. These larger "Wholes" that Llewellyn focuses on are the institutions at the forefront of the sociologist's and the average person's interest: state, church, social status, class, party, nation and the like. Llewellyn also groups with these institutions those similarly large-scale structures often spoken of as "systems of culture": the economy, science, religion, politics and art.<sup>204</sup>

Llewellyn asks what we can learn by examining these institutions separately from their component parts, as discrete units that in themselves have effects [*wirkende oder schaffende Einheiten*].<sup>205</sup> He notes that, at least in modern times, people in society generally first perceive them as "Wholes" rather than as haphazard agglomerations of individual subparts. The purpose these "Wholes" seem to serve in society is twofold. First, they organize existence, taming it and ultimately making it comprehensible. Second, they deal with the unforeseen. These large structures should be seen as a series of canals through which action is constantly flowing, the articulated organization of the relatively fixed portion of social behavior [*die gliedhafte Organisation des verhältnismäßig festen Teiles des gesellschaftlichen Tuns*].<sup>206</sup>

These larger "Wholes" can be tightly or loosely organized. A fluid "Whole" is when there is only one major organizing principle, e.g., an artistic society, a gymnastics club, a purchasing cooperative. When there is more than one organizing idea, however, they may either be in conflict or mutually reinforcing. The greater the number of binding interests and their mutual reinforcement, and the greater the density of folkways and folkway-clusters in the institutional "Whole," the more one can speak, graphically, of the "Whole's" being raised to a higher power. One might even say that the higher the exponent, the more capable the structure is of defending itself against change. But generally, what is gained in solidity is sacrificed in adaptability. In the modern world, most "Wholes" have clearly declined in their "exponential" force.<sup>207</sup>

One frequent feature of these large structures is that they

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<sup>204</sup> *Id.* at 115.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 119-21.

are largely preserved by inertia. Change, when it takes place, is generally the result of an accumulation of small changes on a "molecular" level, rather than sudden, catastrophic social change, which is scarcely more frequent than catastrophic changes in the earth's geography. The nature of large institutions is such that they contain homeostatic forces working to integrate molecular changes into their existing shape, trying to make the new elements fit into the prior structure without upsetting the internal dynamics among the institution's other component parts, to reestablish a balance along the lines of what has gone before [*im Sinne des Gewesenen*]. Hence the longevity of the larger "Wholes" as recognizably continuous entities, even when their component subparts have undergone an enormous amount of incremental change over time.<sup>208</sup>

It also often happens that a particular staff of individuals is charged with carrying out the task or tasks associated with a particular institution, i.e., the phenomenon of the specialization of labor. These staffs need not be "official" or "governmental." In a caste society or corporate state, for example, economic activity and modes of social intercourse can be assigned in traditional ways: theological, legal or social. Once such a division of labor is present, people begin to divide themselves up by their folkways, their norms and their whole mode of being. Every such staff is in the nature of a component "member" or "limb" of society, with other members of society relying on the staff for the performance of its staff work.<sup>209</sup> Exclusive reliance on a staff need not be officially enforced. It is just that the staff is presumed to have the special knowledge to perform the work. This knowledge may be a professional secret or it may simply be that the lack of time, or the need to do one's own work, prevents outsiders from appropriating the staff's "cultural property" [*Kulturgut*] to themselves.<sup>210</sup> In such situations there is constant pressure for the staff to exploit its monopoly position for its own ends at a cost to its role as "member" or "limb" of society. This pressure is counterbalanced, to some degree, by professional ethics, by internal reform movements, by the limits of society's tol-

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<sup>208</sup> *Id.* at 125-26.

<sup>209</sup> *Id.* at 116.

<sup>210</sup> *Id.* at 117.

erance and, if need be, by state intervention.<sup>211</sup>

#### 4. Law and Order

Perhaps the most readily obvious feature of *Recht, Rechtsleben und Gesellschaft* lies in Llewellyn's attempt to link up his particularized lawyer's understanding of how law works with a broader social theory. In that context, a number of key ideas underlie his analysis of the relationship between the law staff (basically judges and other legal officials) and the rest of society.

First, not only is the law staff a social subgroup in Weber's sense, but, like all subgroups, it replicates in microcosm the same principles of order, the regular, predictable behavior patterns, that characterize the larger social order generally. For precisely this reason a scientific study of the legal system holds the additional promise of illuminating the nature of its surrounding society.

Second, because most advanced societies tend to set up a separate, governmentally sanctioned staff of specialized "lawmen" to resolve disputes and channel people's behavior, this staff cannot but develop distinctive normative principles of its own and its own set of distinctive staff folkways and folkway-clusters that, viewed as a whole, constitute the institution known as the administration of justice. Hence, the staff's ideas about what justice means and accordingly the results of its collective practices will inevitably differ somewhat from the ideas and desired results of non-staff members. Legal officials' ideas about justice, though ultimately springing from the same sources as those of laymen, drift away from the latter because to some extent they develop in isolation.<sup>212</sup>

Llewellyn then proceeds to look more closely at the role played by behavioral composites (folkways, folkway-clusters and institutions) in the activities of the law staff.

##### a. *Queensberry Rules*

Within a group, Llewellyn observes, the constant contacts among members and the feeling of oneness or community are likely to eventuate in "groupways" that sharply delimit the

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 45-50 & 92.

space for truly free action. *Between* groups, however, such frequent contacts and harmonious feelings are typically lacking and thus the space for free action, a space not permeated with folkways, is accordingly larger. Of course the contacts made in this free space seldom lead to outright hostilities. Common interests may be discovered. One party may simply acquiesce in the "victory" of the other, *e.g.*, letting the other person go through the door first. Or the dispute may be settled by conventional usages: 'one at a time'; 'the line forms to the right.' There may be attempts at persuasion or negotiation, threats and about-faces. Finally there is always the possibility of an out-and-out struggle, by physical, economic or intellectual means, with its outcome determining the shape of future relations between the combatants.<sup>213</sup>

All these means of settling disputes are, in a certain sense, folkways too. But here a distinction crucially significant for the law must be made between folkways that precisely specify the way (or the socially permissible alternative ways) participants ultimately will or may *behave*, and those folkways that, in a predicament, only offer a *procedure* for arriving at an as yet undetermined way to act. The former eliminate the conflict, shrinking the space for free actions. The latter, by contrast, apply only *within* this free space, regulating the way to "attack" the Unregulated [*den Angriff auf das Ungeregelte*].<sup>214</sup>

The significance of this distinction to law is that it leads to an illuminating division of existing legal materials. For "Law" [*Recht*], before it gets separated out as something distinct from "the Right" [*das Richtige*], consists almost entirely of concepts similar to behavior-specifying folkways. Legal procedures, by contrast, have always had the task of bringing conflicts to an orderly resolution, although one whose content cannot be foreseen in advance. Thus they belong to the category of the dispute-resolving folkways. Of course, once a difficult conflict has been resolved, the resolution, the "Law" resulting from the resolution of the conflict, will itself contribute to creating a new *behavior-specifying* folkway.<sup>215</sup>

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<sup>213</sup> *Id.* at 102-03.

<sup>214</sup> *Id.* at 103.

<sup>215</sup> *Id.* at 103-05.

b. *The Eye of the Beholder*

Of particular importance to the law, being a "staff" means, in a very real sense, having professional leeway. This is of course related to the presumption of the staff's specialized knowledge. All that people ask is that, should they have dealings with judges and other staff members, the results be satisfactory within limits set by the culture and their needs and wants. By the same token, one distinctive feature of law staffs, unlike, for example, medical staffs or religious staffs, is that laymen are likelier to get involved with, and are more prone to express opinions at variance with the results of the performance of staff activity. Laymen do not think special expertise is required to judge "justly." In simple societies, this acts as a significant brake on the law staff's leeway in performing its job. But in more complicated societies, laymen typically no longer have as much time to sit in on the process. Also, staff members will usually have developed the art of hiding behind legal rules.<sup>216</sup>

Another insight relates to what might be called the "lag" factor. When folkways change, people's ideas about their society's folkways and folkway-composites do not change at the same pace. Llewellyn quotes Thorsten Veblen: "A man's ethics are modelled on the conditions of his grandfather's time."<sup>217</sup> Because these composites are more easily grasped in connection with concrete persons, times and places than in their "sense" or "subject matter" contexts, the earliest notions people have about the specifics of a folkway cluster will be strongly determined by the particular concrete form it took in its early period of existence, rather than by any abstract "sense" or "significance" the composite may carry.

As with laymen in general, so it is with judges and other legal officials. It is precisely such "early notions" that provide the law staff (and legal thinking in general) with the basic ideas to use in thinking about "folkway clusters." In fact, it is often the specific form a folkway cluster took in its earliest days that lingers on as the *sole* image of this folkway in the minds of the law staff. One example might be drawn from the law of sales. The behavioral composite connected to the concept of a "sale"

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<sup>216</sup> *Id.* at 117-18.

<sup>217</sup> *Id.* at 100.

was wide enough, given its spectrum character, to encompass both the sale of an object for delivery here and now as well as the sale of an object for future delivery. While at earlier periods in social history the greatest accumulation of real-life instances of sales was at that point on the spectrum where "the sale of an object here and now" was located, as time went on a far greater number could be found at that point where "the sale of an object for future delivery" was located. Nonetheless, the law's basic notion of a "sale" quite obviously continued to be based upon an image of a cash sale *inter presentes*, long after the typical sales transaction generating legal disputes had become the sale for future delivery. Like Procrustes, lawyers force new social phenomena into old concepts, only unwillingly making an occasional concession to the new form in which lay folkways appear. Legal concepts far more tenaciously retain the form of an earlier cluster of folkways than the actual behavioral composite itself.<sup>218</sup>

Contributing to the same result is an important related force tending toward equilibrium in law staff activity: the force of inertia—of tradition, of accrued rights, of not wanting to

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<sup>218</sup> *Id.* at 89-90. Llewellyn provides additional examples. What, he asks, is the connection between our concepts of "property" and "possession," for example, deriving from notions of a small artisan or peasant farmer, and the actual way a factory is run? The peasant's or artisan's notions indicate that use, opportunity to make and draw profits, the right to exclude others, risk, responsibility and management are not to be disaggregated.

But nowadays a factory is "used" by the workers and not by the "possessors" or "owners." The right to draw profits often belongs more to non-owners (bondholders) than to shareholders. The workers who use the factory only secondarily participate in its enjoyment and accompanying risks, hard though it is for us to see the extent of their participation through the veils of the "property" concept. It is precisely the "enjoying" shareholders and mortgagees who are "excluded," but not workers. Running the business is the job of management, which may be made up only of employees. There is a division of responsibility. At this point, the application of "concepts" becomes more and more artificial, until finally even lawyers cannot make do with them. Yet there is still the desire to see through one's old spectacles: a legal "person" is construed and its existence is then made into an article of faith. Sophistic word usage is resorted to as necessary to fit the new occurrence into pre-existing categories. *Id.* at 100-01. The use of this example probably derives from Llewellyn's discussions with his Columbia colleague and corporations scholar Adolf Berle. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). For a similar line of argument, compare Karl Llewellyn, *Across Sales On Horseback*, 52 HARV. L. REV. 725, 728-736 (1939) (criticizing use of outdated concept of "property" in the law of sales).

In the final chapter of these Leipzig lectures, Llewellyn provides further examples of this same phenomenon, drawn from the law of contracts and bills and notes. *RRG, supra* note 3, at 169-71 & 185-87.

know, not wanting to be bothered. Yet in the final analysis, the forces favoring equilibrium may ultimately be overcome by the forces of change, indeed by factors such as the law staff's self-interest,<sup>219</sup> which may play a beneficial role in changing legal institutions. Llewellyn believes tension between the two forces will always be present and cannot fail to have significant consequences for the law.

Lay behavior patterns naturally do not stop changing and evolving when law staffs issue a pronouncement, either by decision or by legislation. This cleavage between real life and staff practice then sets the stage for further disputes requiring law staff attention: one side will appeal to what happens in real life, the other to the law staff's past practice. Such disputes are always the chief impetus for the law staff to reform its practices.<sup>220</sup> The inevitability of legal officials looking at new developments through the "old spectacles" provided by existing concepts—for without them they couldn't see a thing—is offset by their nitty-gritty [*erdnahe*] "feel" for the development of new folkways in society and for the needs of the fact situation before them.<sup>221</sup> These new developments may slink into cases as blatant fictions, or appear openly in the form of distinctions or, indeed, as avowed refashionings or creations of legal concepts.<sup>222</sup>

Still, when change does occur in the law, it typically occurs at the "molecular" level, as with change in other social institutions. No large scale change like a codification, the introduction of a new legal system or a reform of the administration of justice should deceive anyone into thinking otherwise.

### c. *All-Purpose Makeshift*

The final major observation Llewellyn makes is that only rarely does society use a folkway-cluster, or the law staff a professional tool, to perform one and only one task. Even if the "tool" started out having only one purpose, there is a constant tendency, over time, to use it for more than one purpose. When

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<sup>219</sup> *RRG*, *supra* note 3, at 183-84. Llewellyn cites as an example the self-interested expansion of the jurisdiction of the English royal courts at the expense of the other courts.

<sup>220</sup> *Id.* at 105.

<sup>221</sup> *Id.* at 172.

<sup>222</sup> *Id.* at 172-73.

a need arises, there is a tendency to use means that are already available provided they do the job. But when an institution is also used to serve new purposes, there is a high probability that this will have a detrimental effect on its ability to achieve its other ends.<sup>223</sup> Llewellyn provides two examples of this phenomenon in *Präjudizienrecht*, the gradual expansion of warranty liability for purposes of consumer protection and the development of the chattel mortgage:

Something is needed, so it is created out of the available legal materials, indeed the materials right at one's hands. . . . But right away the misuse begins, as inferences start to be drawn from features of the institution that were *not* decisive factors in adapting it to its new use (as with warranties, where the view is that no rights are acquired by non-purchasers, even a purchaser's wife or child). One who emphasizes the *conveyance* aspect [of a chattel mortgage] wants the item in question to be forfeitable to the creditor, irrespective of the consequences. At this point, everything will depend on whether the judge can . . . just say A and not also say B.<sup>224</sup>

The store of existing concepts always provides the tools with which judges and other members of the law staff must work.

## 5. Law of Desire

Llewellyn proposes that it would be profitable for the future sociology of law to examine law-staff activity in its interactions with folkway-clusters and social institutions. As an example he takes up the institution of marriage for closer examination.<sup>225</sup> Quite naturally, Llewellyn's account of marriage has an obviously dated feel about it, given the passage of time and the enormous social changes that have intervened since the early 1930s, but it is his method of approach, rather than the particulars, which is of most interest.

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<sup>223</sup> *Id.* at 90-92. Llewellyn offered the following as examples: a vehicle's speed compared to its load capacity and durability; a speedy trial versus a thorough investigation of the facts; management flexibility in unforeseen circumstances compared to corporate controls, corporate democracy.

<sup>224</sup> *CLSA*, *supra* note 3, § 62, at 88.

<sup>225</sup> *RRG*, *supra* note 3, at 130-66. I suspect that Llewellyn's then very recent divorce from Elizabeth Sanford, *see supra* text accompanying note 22, may have had something to do with his selection of this example and with his more or less contemporaneous article *Behind the Law of Divorce*, Part I, 32 COLUM. L. REV. 1281-1308 (1932) and Part II, 33 COLUM. L. REV. 249-94 (1933). There also exists an unfinished manuscript for a projected Part III. TWining, *supra* note 78, at 66.

Llewellyn sees marriage as an institution that, from the medieval period through the eighteenth century, was typically perceived as a coherent "Whole" by people in society, rather than a loose congeries of folkways associated with a variety of distinct social purposes. In its earliest form, marriage was able to fulfill most of these purposes without making contradictory and inconsistent demands on spouses. Medieval marriage thus was generally able to regulate sexual congress, avoid disputes over the possession of women, provide an economic unit of production and consumption, provide a stable basis for one's emotional life and provide for the propagation and rearing of children. Furthermore, in achieving these goals, the institution of marriage received reinforcement from other institutions in society, such as church, village, neighborhood and guild. Llewellyn also finds that marriage served a number of other social functions, such as the promotion of hygiene, the propagation of one's social group or one's culture, the protection of the mother after her childbearing years are over and the regulation of how income and inherited property are to be used and enjoyed.

As one moves into modern times, however, one finds different demands being made of marriage: demands for greater personal fulfillment; for better-educated and economically better-off children; for a more specialized division of labor in society; for a more interesting social environment and hence for the creation of big cities. Those other institutions that had previously provided a great measure of reinforcement for marriage grew less and less able to do so over time. Actual social patterns, the folkways out of which the concept of marriage developed, underwent significant change. The various specialized tasks that had been fulfilled by the unified "Whole" of medieval marriage seem gradually to have separated themselves out, with the development of institutions adapted to its sub-tasks, *e.g.*, schools, acting as both symbol and agent of the separation process. Nonetheless, the ideological conception of marriage employed by the law staffs and others did not, typically, keep pace with these social changes. Their conception of marriage continued to be based, to a large extent, on the circumstances of an earlier age.

But what is the role of law and law staff activity here? Under what circumstances do lawmen, with their outmoded idea of marriage, have occasion to interact with the social institution? Cannot all of the above social purposes be fulfilled without law

and law staffs? Do the law and the law staff do anything other than give the state's nugatory stamp of approval to the social institution?

To Llewellyn law and law staffs perform a valuable role in achieving a number of those purposes. Law staff activity serves chiefly to reinforce social conventions where, by themselves, these are at their weakest. The underlying idea is that law staff activity acts to shore up elements of social order that society itself is able to create but not entirely to maintain. Because law staff activity operates with an image of marriage as permanent, it is able to ensure that the social purposes promoted by marriage *endure*. Without legal sanction, for example, the social institution of two people joining together might not be able to survive a waning of mutual attraction. The chief function of the law in this context is to make decisions about when parties have claims to *continuing* rights, such as to support.

Similarly, it is the activity of legal officials, rather than purely social pressures, that can act to force an irresponsible husband to support his family or to force parents to send their children to school. When a spouse is cruel, uncontrollable, irresponsible or violent or when the wife has grown old, law and law staffs play a similar role of providing organized support for less efficacious social pressures, precisely at a point where the latter threaten to crumble and collapse. It can intervene to stop domestic violence and can prevent husbands from disposing of older wives like superannuated employees.

As for inheritance, law and law staffs provide not just a fairly unambiguous set of rules for determining rights of inheritance—a particularly contentious area where society, left to its own devices, proves quite ineffective—but they also provide a readily available mechanism for answering the related questions of fact: Was she his wife? Is this his child? Did he leave a will? Was the marriage ended by divorce?

Furthermore, while both society and law find it equally easy to determine whether a marriage has been initiated, *e.g.*, by some ceremony, society finds itself much harder pressed to answer the question of whether a marriage has ended, unless the ending of the marriage is to be left solely up to the parties (which for other reasons society might not want). The legal system, by its nature, is better suited to make the necessary adjudications about when a marriage has ceased, *i.e.*, divorce, and

hence about when claims to rights of a continuing nature should be cut off.

Llewellyn's basic thesis is that the then standard conception of marriage, with its origins in older folkways, no longer accurately reflected contemporary behavior patterns. Yet it valiantly sought to preserve its old form in people's thinking, and especially in written law and the law staff's official activity. Thus, it had some success in shaping behavior to accord with its praiseworthy image of marriage as an institution: this image had been able to exert pressure to keep extramarital sexual relations within "tolerable" limits of time, place, manner and frequency. But actual folkways, diverging more and more from the ideological construct, had at times been able to extract concessions from the older conception. The attempt both to maintain the old conception and to provide a safety valve for emergencies, *i.e.*, divorce, had also led to amusing or tragic incongruities in the way particular applications for divorce were handled. Finally, the relatively modern notion that the development of one's personality is a major purpose of marriage, the increasing amount of choice in reproduction and the phenomenon of social fragmentation and atomization, had taken the problem of divorce in new directions, despite the tenacity of the law staff's attachment to its outmoded ideological conception of marriage.

### III. THE "GERMAN" ACHIEVEMENT OF KARL LLEWELLYN

*Monstrum horrendum, informe,  
ingens, cui lumen ademptum.*

In his 1973 work on the life and career of Karl Llewellyn, William Twining accurately described *Präjudizienrecht* as "Llewellyn's first project to fall squarely within the area of jurisprudence,"<sup>226</sup> in which "[a]lmost all [his] references were to American works."<sup>227</sup> *Recht, Rechtsleben und Gesellschaft* is not substantially different in this last respect, despite Max Weber's supporting role and Eugen Ehrlich's cameo appearances. The works are stronger evidence of Llewellyn's early engagement with the ideas of Oliver Wendell Holmes, Jr., Benjamin Cardozo, Roscoe Pound, Jerome Frank, the American philosopher John

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<sup>226</sup> TWINING, *supra* note 1, at 106.

<sup>227</sup> *Id.* at 108.

Dewey, the American sociologist William Graham Sumner and Anglo-American linguists C.K. Ogden and I.A. Richards, than with German thinkers. The Leipzig books are thus not some sort of *exotica*, but rather key components of the Llewellyn canon, essential for an understanding of the germination of the mature Llewellyn's thinking. Despite their language and the testimony they obviously bear to the breadth of Llewellyn's reading, both *Präjudizienrecht* and *Recht, Rechtsleben und Gesellschaft* are profoundly American books, steeped very deeply in the crosscurrents of the American jurisprudence of their day. Ironically, as Lon Fuller was among the first to recognize,<sup>228</sup> it may have taken the discipline of writing in a foreign language to get the young Llewellyn to make some of his most significant early contributions to American legal thought. For taken together, the *Germanica* provide—more than any of his other published works—the most detailed exposition of the origin, nature and function of legal rules. These German works thus round out the sociological study of law that Llewellyn later undertook in his “Law in Our Society” lectures, which Twining identifies as somewhat defective in this respect.<sup>229</sup> Moreover, the Leipzig books’ focus on explaining the phenomenon of legal certainty and regularity through social theory seems decidedly different, at least in emphasis, from those later lectures’ concentration on a more particularized analysis of the specific tasks set for law, i.e., his theory of “law-jobs” and the “crafts” of law, such as judging, advocacy and counselling.<sup>230</sup> Thus, they significantly complete our knowledge of Llewellyn the theorist of American legal sociology.

It is, however, not enough merely to plant the flag, claiming the works of Llewellyn's Saxon sojourns for American jurisprudence. For *Präjudizienrecht* and *Recht, Rechtsleben und Gesellschaft* arose at the same crucial time, springing from the same intellectual environment and reflecting the same concerns, as one of the defining moments in twentieth century American jurisprudence: the debate between Llewellyn and Dean Roscoe Pound of Harvard. This was the event that was, if not the birth,

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<sup>228</sup> See *supra* note 14.

<sup>229</sup> TWINING, *supra* note 1, at 201.

<sup>230</sup> *Id.* at 175-84.

then at least the christening of American Legal Realism.<sup>231</sup>

This debate began with the publication of Llewellyn's article *A Realistic Jurisprudence—The Next Step*<sup>232</sup> in the Columbia Law Review in 1930. Twining nicely describes the article's contents and manner of execution:

In 1929 Llewellyn was invited to give a paper on "Modern Concepts of Law" at a Round Table on Current Trends in Political and Legal Thought. . . . Llewellyn was particularly well qualified to identify some of the new trends, to place them in the context of their intellectual history, and to suggest possible lines for future development. In the first round of the realist debate he missed the opportunity. Instead he wrote a loosely organized paper which starts with the rejection of a general definition of "law," explores perceptively some of Pound's limitations as a theorist, mixes in some quasi-Hohfeldian ideas about remedies and rules, and ends with a plea for an interdisciplinary approach to legal research, with human behaviour as an important focus. A *pot pourri* of interesting ideas, some of them as yet only half formed, this paper represents a definite step in Llewellyn's development as a theorist, but it is not to be recommended to someone who seeks a coherent introduction to realism.<sup>233</sup>

It was also an article that came directly out of Llewellyn's first trip to Germany and broached themes that he would return to on his second. In a 1930 letter to the Social Science Research Council Llewellyn indicated that he had not completed the first "job" he had planned to do during his first academic trip to Leipzig, a book on law and the social sciences. He describes his problems with it as follows:

The book on Law and the Social Sciences did not develop . . . [I]t proved, as soon as a chapter or two had been worked out, that "law" was itself an unanalyzed subject-matter. I had known that "law" contained a philosophy, an art and a hope for a science, and had thought that knowledge enough. I had not realized that a worthwhile comparison with other social disciplines was impossible until the *subject-matter* of a science of law in the descriptive sense had been pieced together, at least in careful outline.<sup>234</sup>

Llewellyn went on to indicate that, from his work on this "preliminary job," he had produced "an article on the subject matter

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<sup>231</sup> The following account draws heavily on the work recently done by Nátalie Hull on the origins of this debate. See *supra* notes 18 & 21.

<sup>232</sup> *Next Step*, *supra* note 21, at 431.

<sup>233</sup> TWINING, *supra* note 1, at 70-71.

<sup>234</sup> *Sharp Letter*, *supra* note 24.

of a science of law, now in press with the Columbia Law Review."<sup>235</sup> This article was in fact *A Realistic Jurisprudence—The Next Step*,<sup>236</sup> published in April 1930. It thus emerges that one of Llewellyn's most significant writings—indeed, the work that effectively named the Legal Realist movement—grew directly out of his German experience. The article addressed the very topics that Llewellyn would return to treat with greater felicity in the book that resulted from his second Leipzig visit, *Recht, Rechtleben und Gesellschaft*.

The Columbia piece, quite apart from its substance, also had a fair amount to say about Roscoe Pound. While praising him for his lapidary phrasings and illuminating insights, Llewellyn criticized Pound for failing to follow through systematically and for the indeterminate level of discourse in his writings, which fluctuated between "considered and buttressed scholarly discussion . . . bedtime stories for the tired bar . . . [and] thoughtful but unproved essay."<sup>237</sup> Pound's initial response to the piece was quite positive, indeed magnanimous, very much the ox disdaining to swat the mosquito. He wrote to Llewellyn: "May you be spared the necessity of making bar association addresses and popular talks which falls to the lot of a voice crying in the wilderness as mine had to be so long. Very likely it got injured in the process. . . . Better things are at hand with the next generation. *Veni fortior me post me* [Come after me, stronger than I]."<sup>238</sup> Pound's mention of "bar association addresses," however, suggests that Llewellyn's stinging phrase "bedtime stories for the tired bar" had found its mark.

In the same year that *A Realistic Jurisprudence—The Next Step* appeared, *Bramble Bush* and *Law and the Modern Mind* were also published, with Llewellyn and Jerome Frank apparently forming a mutual admiration society, at least temporarily.<sup>239</sup> In October of that year Frank sent a copy of his book to his former University of Chicago professor, now the Dean of the

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<sup>235</sup> *Id.*

<sup>236</sup> *Next Step*, *supra* note 21, at 431.

<sup>237</sup> *Id.* at 435.

<sup>238</sup> Letter of Roscoe Pound to Karl Llewellyn, April 29, 1930, *quoted in Prequel*, *supra* note 18, at 1326.

<sup>239</sup> Karl N. Llewellyn, *Frank's Law and the Modern Mind*, 31 COLUM. L. REV. 82 (1931). Indeed, Frank told Llewellyn that his review of *LAW AND THE MODERN MIND* "showed a curious empathy." *Llewellyn-Pound Exchange*, *supra* note 21, at 943.

Harvard Law School, Roscoe Pound.<sup>240</sup> The work devoted an entire chapter and an appendix to a critical examination of Pound's views. Despite the generally respectful tones in which the criticisms were delivered and the not ungenerous admixture of praise, Dean Pound could not have been pleased to find portions of his work characterized as "patently superficial,"<sup>241</sup> "irrational"<sup>242</sup> and "a small boy with a grown-up vocabulary talking of an ideal father."<sup>243</sup> Furthermore, Pound probably was not amused to find his thinking on the key question of legal certainty exposed as extremely inconsistent.<sup>244</sup> One mosquito could be ignored; two were beginning to seem like a swarm. Additionally, the book contained a very pointed attack on his fellow Harvardian, the eminent conflicts scholar Joseph Beale. Pound's wounded *amour propre* indeed led him to imagine things about the book's treatment of him that were not true: in a letter to Llewellyn, Pound accused Frank of misquotation, a charge that enraged Frank and one that proved to be entirely baseless.<sup>245</sup>

Late in 1930 Pound turned down an invitation from the editor of the *Encyclopedia of the Social Sciences* to write an article on contracts. Llewellyn was the second choice, but his idiosyncratic work product induced the editor to entreat Pound to work with Llewellyn on fixing the piece up. Despite much correspondence on the subject, the collaboration never got off the ground. What almost certainly aborted it was the entirely unanticipated appearance of Pound's *The Call for a Realist Jurisprudence*<sup>246</sup> in the March 1931 *Harvard Law Review*. Pound had never mentioned the article in all his correspondence with Llewellyn.

Even if the appearance of the article surprised Llewellyn, he should not have been surprised by the manner in which it was written, having previously diagnosed Pound's propensity for writing "thoughtful but unproved essay[s]."<sup>247</sup> What Pound in fact attempted was a composite portrait of "The Realist," a

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<sup>240</sup> *Id.* at 940.

<sup>241</sup> FRANK, *supra* note 103, at 5.

<sup>242</sup> *Id.* at 227.

<sup>243</sup> *Id.* at 316.

<sup>244</sup> *Id.* at 312-26.

<sup>245</sup> Llewellyn-Pound Exchange, *supra* note 21, at 944-49.

<sup>246</sup> Roscoe Pound, *The Call For A Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); *Prequel*, *supra* note 18, at 1327-32.

<sup>247</sup> *Next Step*, *supra* note 21, at 435.

creature who resembled no living scholar but who, as stitched together by the hand of the wily Dr. Pound, combined the fact-skepticism and psychologism of Frank, the social-scientism of Underhill Moore and the rule-skepticism and business orientation of Llewellyn. Pound gave no citations or evidence to support his charges. Llewellyn took him to task for this failure in the response to Pound's article—*Some Realism about Realism*<sup>248</sup>—on which he collaborated with Frank and which he waged a strenuous campaign to have published in the Harvard Law Review.

What Pound is responsible for in his article, in fact, is the very first appearance of the "Franklynstein Monster," that is, the tendency for many critics of Realism to see it as both monolithic and extreme. The very different images presented to the world by Jerome Frank and Karl Llewellyn got conflated for posterity or at least for the posterity that did not read very carefully or read German—when clearly they ought not to have been. This the later estrangement between Llewellyn and Frank showed: Frank, with his single-minded focus on the judicial personality and his contemptuous dismissal of any need for legal certainty, was the true radical, while Llewellyn was only a raving moderate, or, as Frank perceptively dubbed him and his fellow rule-skeptics, "left-wing adherents of a tradition."<sup>249</sup>

There are portions of the early Llewellyn that can certainly be read to support Pound's handiwork. What tended to sum up Llewellyn's jurisprudence, for want of English versions of his Leipzig writings, was *Bramble Bush* and, in particular, its "indeterminist," nay, antinomian, discussion of the "Janus-faced" doctrine of precedent<sup>250</sup> and its most (in)famous sentence: "*What these [legal] officials do about disputes is, to my mind, the law itself.*"<sup>251</sup> How Frankian this rings in isolation and how

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<sup>248</sup> *Some Realism*, *supra* note 21, at 1222. It was a charge similar to that later leveled against Llewellyn himself by Lon Fuller. Compare *Some Realism*, *supra* note 21, at 1226, with Fuller, *supra* note 40, at 449 n.46. For details of Llewellyn's campaign to get the piece accepted by the Harvard Law Review, see *Llewellyn-Pound Exchange*, *supra* note 21, at 949-53.

<sup>249</sup> FRANK, *supra* note 103, at xii.

<sup>250</sup> BRAMBLE BUSH, *supra* note 46, at 74-76.

<sup>251</sup> *Id.* at 3. Indeed, so startled was Llewellyn by the extent to which this sentence had been made to represent the thinking of the whole work that, for a new edition in 1951, he felt compelled to drop a cite to this sentence giving references to other passages in the work containing "necessary expansion and correction." *Id.*

falsely! It suggests a single-minded focus on people, like Frank's elevation of judicial personality in *Law and the Modern Mind*,<sup>252</sup> as the key to understanding. Its implied antithesis was presumed to be "what *rules* tell officials to do about disputes." Hence Llewellyn was assumed to stand for a conception of law as untrammelled official discretion, a hair's breadth from caprice. The later Llewellyn, the Llewellyn of *The Common Law Tradition*,<sup>253</sup> interested in "major steadying factors in our appellate courts,"<sup>254</sup> could be seen as the standard story of the Young Turk mellowing with age, repenting his early radicalism as *péchés de jeunesse*.

But this story clearly was not true. Had the Leipzig books been rendered into English, its falsity might have been more widely realized. Llewellyn never was a radical, prose and personality style to the contrary notwithstanding. He looked at the legal system and found not patternless subjectivity or Solomons deeming dooms, but regularity, consistency and a large quantum of interpersonal objectivity. Unsatisfied with orthodox explanations, he sought to find out whence they came. He was engaged by the ideas of Jerome Frank but passed them through the sieve of his own mind. In so doing, he assimilated them into his own vision. "In [*Law and the Modern Mind's*] eager attack on the illusion of complete certainty it under-emphasizes what certainty there is; in its perception of the importance of particulars it well-nigh denies the importance of generals."<sup>255</sup>

*Präjudizienrecht* has an early section, 8b, entitled "New Perspectives on Legal Uncertainty."<sup>256</sup> What first strikes one about it is its numbering: Why 8b? Why not 10? Presumably because it was added after the rest of the sections had already been numbered and internal cross-references could no longer be altered. This had most likely happened by January 1930 at the latest.<sup>257</sup> Frank's book came out in September of that year and

For just one example of the phenomenon referred to in the text, see Hart, *supra* note 122, at 614-15 & n.40.

<sup>252</sup> See FRANK, *supra* note 103, chapter 12.

<sup>253</sup> KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

<sup>254</sup> *Id.* at 19.

<sup>255</sup> Karl Llewellyn, *Legal Illusion*, 31 COLUM. L. REV. 82 (1931) (reviewing JEROME FRANK, *LAW AND THE MODERN MIND* (1930)).

<sup>256</sup> CLSA, *supra* note 3, at 11-12.

<sup>257</sup> Sections 1-39 of the CLSA were finished in 1928, when Llewellyn taught the course; sections 40 through 74, containing most of the jurisprudential "meat" of the

Llewellyn reviewed it for Columbia early the following year. Section 8b is Llewellyn's response in *Präjudizienrecht* to having read *Law and the Modern Mind*. It accepts the force of Frank's argument that to hope for certainty is unrealistic and foolish, but only at the "micro" level, the level of the individual case, the outcome of which was indeed "virtually unpredictable."<sup>258</sup> By the same token, it insists on Llewellyn's own central insight, that at the "macro" level, over the great run of cases, there is a large amount of certainty to be had.

Frank was clearly a better writer than Llewellyn and his slash-and-burn argumentation, in the service of an arresting *idée fixe*, has far more verve and panache. Llewellyn's ideas, however, are less reductionist and monochromatic, subtler and more textured and, in the final analysis, more accurate about what they are meant to describe.

## CONCLUSION

*Präjudizienrecht* and *Recht, Rechtsleben und Gesellschaft* are among the earliest witnesses to Llewellyn's obsession with knowing the truth about law, and knowing it sociologically, through a knowledge of society and of law's relations with society. Starting out in Leipzig, he took it with him through his career; it informed the jurisprudence of the Uniform Commercial Code and his classes on "Jurisprudence" and "Law in Our Society" in particular. He was planning to bring it back with him to Germany for final, definitive statement when he died. One thinks of nothing so much as of Jacob wrestling with his angel: "I will not let thee go except thou bless me."<sup>259</sup>

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book, "around January 1930"; the cases and materials were completed in Spring of 1931; the Preface is dated "Leipzig, 4 August 1932," at the end of his second visitorship. *CLSA*, *supra* note 3, at xxxvii.

<sup>258</sup> *Id.* § 8b, at 12.

<sup>259</sup> *Genesis* 32:26.

