

# Vanderbilt Law Review

---

Volume 17  
Issue 1 *Issue 1 - December 1963*

Article 23

---

12-1963

## Book Review

W. N. Ethridge, Jr. Honorable

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Judges Commons](#), and the [Jurisprudence Commons](#)

---

### Recommended Citation

W. N. Ethridge, Jr. Honorable, Book Review, 17 *Vanderbilt Law Review* 343 (1963)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol17/iss1/23>

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# BOOK REVIEW

JURISPRUDENCE: REALISM IN THEORY AND PRACTICE. By Karl N. Llewellyn. Chicago: The University of Chicago Press, 1962. Pp. 531. \$8.95.

The realists in juristic thought began in the 1930's a scattered yet coherent protest against myths surrounding judicial law. Karl Llewellyn was one of the early leaders in this movement. He did not accept the intellectually lazy attitudes of some contemporaries who mistook obfuscation for perception, who were content with a philosophy based on a hunch, intuition, or some indeterminate emotional preconception of judges. He thought the "very heart" of the matter was the "behavior of judges." Thus he suggested a "new approach to law as a social science, as a matter of behavior to be seen, recorded, and studied as we see and record the work of men in industry."<sup>1</sup>

The consummation of Llewellyn's particular interest in the craft of appellate judging was his classic *The Common Law Tradition: Deciding Appeals*, which he completed in 1960. After reading it, no appellate judge could decide a case or write an opinion without being affected to some extent by Llewellyn's method and criteria. He conceived of law as the product of a rational process. The traditional dichotomy of reason and experience are reconcilable by development of legal methods in a rational framework. This technique clarifies and supports the sociological jurisprudence of Holmes, Cardozo, and Brandeis. Llewellyn's analysis and description of the styles of common-law opinion writing, and his insistence in appellate judging upon a candid appraisal of the rules and the reasons for them, are a contemporary *tour de force*. That book was documented by an analysis of representative decisions from many state appellate courts. *The Common Law Tradition* is a guide for appellate judges and advocates. It requires both to reassess themselves and their work.

*Jurisprudence: Realism in Theory and Practice* is not a general collection of Llewellyn's papers, but an organization of a number of them around the theme of juristic realism. Llewellyn died eight days after he wrote the preface. The twenty-nine papers are divided into four parts: "Realism"; "Institution, Rules, and Craft"; "Controlling Behavior: How and Why?"; and "Men." The first and second occupy the largest portion of this volume.

---

1. LLEWELLYN, *Legal Tradition and Social Science Method*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 100 (1962); see Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317 (1960).

Llewellyn loved life with a continuing awareness of its brevity. With a forceful and somewhat bombastic style, he had the rare gifts of kindness and friendship. Despite many disagreements, his review of Pound's *Jurisprudence* concluded that Pound contributed "more than any other individual (unless perhaps John Dewey) to making legal thought in this country result-minded, cause-minded, and process-minded."<sup>2</sup> Other essays about Hohfeld and Holmes are about co-adventurers, men who also realized that judges have "molecular law-making power," and who sought to ascertain the full significance of that fact.

Two essays deal particularly with the control of behavior by law. Beyond the rules are the more important techniques, ideology, and unspoken ideals of the law. In "Group Prejudice and Social Education," written in 1944, Llewellyn said "there are ways of diminishing or conquering group prejudice, and . . . those ways can be put to work on adults as on children." At bottom it is a "prejudice *in favor* of 'My Own Group' as against *all* others . . . ." Corrective machinery must contain measures which are capable of employment now, "with means and personnel which are at hand," and such measures "do not depend on any preliminary wide-scale political or social reform . . . ."<sup>3</sup>

In 1957, discussing "What Law Cannot Do For Inter-Racial Peace," he thought "the machinery of law-government has no need to lag behind or to lag with or to uncreatively just fit into the existing ways of people in their race relations . . . ." The machinery of law-government can be built to set up ideals still far from attainment. "But the second thing is no less clear: put tension on too suddenly, too sharply, too hard, and your wire can snap, can even snap back into that devastation called destruction and reaction. It is a fine trite truth that the art of statesmanship lies in finding workable measures, in introducing them with patient skill, in following them through with firmness, and with courage, *and also with tact.*"<sup>4</sup>

The esthetic phase of a legal system is related to architecture rather than painting. "Architecture and engineering strike most closely home—perhaps because both look so directly and so inescapably to use."<sup>5</sup> Llewellyn's functional approach to jurisprudence is illustrated in the definitive essay, "On the Good, the True, the Beautiful, in Law." Form and style, as in many of Holmes' opinions, have a functional duty: "They drive to a point . . . they drive to a policy; they

2. LLEWELLYN, *Roscoe Pound*, in *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 501 (1962).

3. LLEWELLYN, *Group Prejudice and Social Education*, in *id.* at 452-53.

4. LLEWELLYN, *What Law Cannot Do for Inter-racial Peace*, in *id.* at 481.

5. LLEWELLYN, *On the Good, the True, the Beautiful, in Law*, in *id.* at 174.

drive to technical accuracy, to justice in the case at hand, to right guidance for the future. Love them, or leave them, it is rare that you can miss in any of them any of these attributes. Their beauty is functional; the prose is clean by the nature of the man, but it is thrice clean because hewn powerful to purpose."<sup>6</sup>

One can distinguish in American history three marked style-periods in judicial opinions. In the 1830's and early 1840's, there was the formative style of reason, or the "Grand Style." In the early 1900's there developed the "Formal Style"—authoritarian, formal, superficially logical, emphasizing rules and precedents. The courts usually acted in terms "of the felt reason of the situation," but talked in terms of the formal style. A third style has emerged or returned today, in terms of a recapture of rationalism, or the "Grand Style." Its basic elements are a conscious, overt concern about policy and an emphasis upon reason and situation-sense, by relating the type of case to a sense-making result. Although carefully evaluating rules and precedent, the courts are constantly reworking them in order better to effectuate a "functional evaluation." Legal authority and ordinary common sense are supplemented with such technical data of fact and expert opinion as are available, or can be made available, to inform a judgment.

In short, the craft of appellate judging calls for an "open, reasoned extension, restriction or reshaping of the relevant rules, done in terms not of the equities or sense of the particular case or of the particular parties, but instead (illuminated indeed by those earthy particulars) done in terms of the sense and reason of some significantly seen *type* of life-situation."<sup>7</sup>

Llewellyn's interests ranged over any behavior touching the law. This book contains perceptive, original essays concerning a wide variety of problems affecting the law: the economic troubles of the bar, and some "poultices and cures"; the "American Common Law Tradition in American Democracy"; "The Modern Approach to Counselling and Advocacy"; "The Content of a Jurisprudence Course"; and "The Study of Law as a Liberal Art." Running throughout is a realist's evaluation of the "Is" aspect, "based on examination of law in terms of its effects, rather than in terms of the symmetry of its traditional rules."<sup>8</sup> Ironically, Llewellyn and some other realists viewed the positive law somewhat as do natural law jurists; as present and significant but requiring reexamination. Certainly society and the administration of justice will be served best by a continuing

---

6. *Id.* at 173.

7. LLEWELLYN, *On the Current Recapture of the Grand Tradition*, in *id.* at 219-20.

8. RAUSCHLEIN, *JURISPRUDENCE: ITS AMERICAN PROPHETS* 204 (1951).

reevaluation. The totality of Llewellyn's work cannot be appraised accurately at this time, but assuredly his penetrating mind, flashing wit, and probing beneath the surface have lighted up the interior of the massive external structure of Anglo-American law.

The once hotly debated position of the realists, and in particular that of Llewellyn, has now been generally accepted. Functional rather than conceptual, it emphasizes the "Is" rather than the "Ought," the living organism beneath the skin of the rules of law. Throughout both *The Common Law Tradition* and *Jurisprudence*, he removes any misconception and makes it clear that the law must be subject to moral evaluation. Perhaps to a greater degree than in his other books, *Jurisprudence* conveys to the reader Llewellyn's enthusiastic love for the law, the wide range of his scholarship and interests, and his superb originality and independence.

The life of the law is *both* reason and experience. It effectively serves society only when informed judges and advocates are engaged continually in reevaluating it, and restating the reasons for its particular applications. To the quest for this ideal, Karl Llewellyn perhaps has contributed more than anyone in our time. Light was his master image. In this sense, he was the intellectual heir of the Greek tradition. As Edith Hamilton once said, "Homer's hero who cried for more light even if it were but light to die in, was a true Greek. They could never leave anything obscure."<sup>9</sup>

HON. W. N. ETHRIDGE, JR.<sup>o</sup>

---

9. HAMILTON, *THE GREEK WAY* 28 (1963).

<sup>o</sup> Associate Justice, Mississippi Supreme Court.