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The Idea of Juristic Method: A Tribute to Karl Llewellyn

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CENTENNIAL TRIBUTE

The Idea of Juristic Method: A Tribute to Karl Llewellyn

WILLIAM TWINING*

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I. INTRODUCTION

Karl Llewellyn was born on May 22, 1893. This paper was presented in slightly different versions at the Universities of Chicago, Leipzig, and Miami as part of events marking the centenary of his birth. Llewellyn taught at the University of Chicago from 1951 until his sudden death in 1962. He had been a Visiting Professor at the University of Leipzig in 1928-29 and again in 1931-32. These visits stimulated two of his most notable early works.¹

His connection with the University of Miami Law School was indi-

* Quain Professor of Jurisprudence, University College, London; Visiting Professor, University of Miami School of Law. This is a revised and expanded text of a lecture which was presented at the Universities of Chicago, Leipzig, and Miami during 1993 as part of occasions celebrating the centenary of Karl Llewellyn's birth. The Chicago version has been published in the series "Chicago Legal History Work in Progress" with the title "Karl Llewellyn's Unfinished Agenda: Law in Society and the Job of Juristic Method." A shorter version will be included in a symposium based on the Leipzig conference to be edited by Professor M. Rehbinder. The present text includes a new introduction and an additional note on Llewellyn's course on "Elements." See *infra* note 116.

1. KARL LLEWELLYN, *PRAEJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA* (1933) [hereinafter LLEWELLYN, *PRAEJUDIZIENRECHT*] (subsequently translated into English and published in abbreviated form as *THE CASE LAW SYSTEM IN AMERICA* (1989) (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) [hereinafter LLEWELLYN, *CASE LAW SYSTEM*]; KARL LLEWELLYN, *RECHT, RECHTSLEBEN UND GESSELLSCHAFT* (M. Rehbinder ed., 1977) [hereinafter LLEWELLYN, *RECHT*] (not yet translated into English)).

rect but nonetheless significant. After his death, his widow, Soia Mentschikoff,² came to Miami, first as a regular visitor, then from 1973 to 1982 as Dean. She lived in Coral Gables until her death on June 18, 1984. Dean Mentschikoff left her mark on the Law School in many different ways. Through her, Karl Llewellyn's ideas on law and legal education were applied in a more direct and coherent way than in any other institution.

Soia Mentschikoff was Karl Llewellyn's most devoted disciple. She accepted, promulgated, and applied his ideas in all her work. Her vision of law and of legal education were unmistakably Llewellynesque. Karl and Soia worked together, first as teacher and pupil, mentor and research assistant, then as colleagues on the great project for the Uniform Commercial Code, and at Harvard and Chicago. From 1946 until his death in 1962, they were husband and wife. This was an extraordinary partnership of two of the most talented and formidable lawyers of their time. Those who knew Soia in her later years can hardly imagine her as being subordinate to anyone. Yet there is no doubt that she consciously and deliberately took on the role of follower in respect of Llewellyn's jurisprudence. Naturally she interpreted and promulgated his ideas in her own way, but she always insisted that they were his ideas. As Dean of the University of Miami School of Law, she saw herself as applying his vision of law and legal education in a particular context. Accordingly, Karl Llewellyn is an important part of the Miami tradition.

Karl Llewellyn's reputation has grown steadily over the years. He was never uncontroversial. He has been widely discussed and differently interpreted.³ Whatever one's views on the style and substance of the many achievements of this remarkable phenomenon, his reputation is secure for four main reasons.

First, Llewellyn will be remembered as the outstanding commercial lawyer of his time. The Uniform Commercial Code, his seminal casebook on Sales, and at least a dozen articles on different aspects of commercial law and contracts are all lasting monuments to his achievements. It is worth remembering that, for much of his career, Commercial Law took priority over Jurisprudence. It is hardly surprising that most of his theoretical work reflected his private law orientation and exercised a strong magnetic pull toward particular jurisprudence.

Second, he made outstanding contributions to the anthropology and

2. Soia Mentschikoff used her original name professionally but liked to be known as Mrs. Llewellyn in her private life. I shall use her professional name throughout the paper.

3. Most discussions of Llewellyn up to 1973 are cited in WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). Some of the more important general discussions of his work are referred to in later footnotes.

sociology of law. The central thesis of this paper is that the full significance and potential of this aspect of his work were not fully realized in his lifetime and have yet to be recognized, especially in the United States. The seminal influence of *The Cheyenne Way* on the development of legal anthropology has been acknowledged.⁴ As we shall see, his contribution extends far beyond that.

Third, Llewellyn was extremely influential as a teacher, educator, and general stimulator. He was one of the great characters of the law school world. Not all students appreciated his teaching, and, it must be said, his classroom performances tended to be uneven. That conceded, it is clear that he had a profound influence on more than one generation of practitioners, judges, and law teachers. I shall refer in due course to the significance of his ideas on the direct teaching of legal skills. Sixty years later, the continuing appeal of that extraordinary, fascinating, and irritating lyric, *The Bramble Bush*,⁵ is indicative of a much wider impact. It has been my contention that this particular work has regularly been misperceived as an iconoclastic and skeptical attack on the very idea of legal rules.⁶ It is more likely that its success is due in large part to a feeling that it encapsulates in quite compelling rhetoric a romantic and aspirational vision of mainstream legal education and idealized legal practice. It embodies one version of the Great American Law School dream. In this, as in some of his other communications, Llewellyn was a traditionalist thinly disguised in a skeptic's clothing.

Fourth, Llewellyn is remembered as a leading interpreter and prophet of the American Realist Movement. Here, I think, his influence has not been entirely salutary. I agree with Morton Horwitz that the famous debate with Roscoe Pound in 1930-31 obscured as much as it illuminated.⁷ It inadvertently blurred the continuities with the wider Progressive Movement to which the young Pound was himself an important contributor. It glossed over the diversity of concerns and perspectives within the so-called Realist Movement. As a European, I find it very strange that most commentators continue to assume that a concern with being realistic about law is an American exclusive, further limited to a particular phase of American legal history. In my view, Llewellyn's pronouncements on R/realism in *The Common Law Tradi-*

4. See *id.* at 167-69, 433 nn.37-40. For a general appreciation of Llewellyn and Hoebel's contribution to legal anthropology, see the Festschrift for Hoebel in 7 *LAW & SOC'Y REV.* 531 (1973).

5. KARL LLEWELLYN, *THE BRAMBLE BUSH* (1930).

6. TWINING, *supra* note 3, at 140-52.

7. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 169-92 (1992); cf. William Twining, *Talk about Realism*, 60 *N.Y.U. L. REV.* 329 (1985); TWINING, *supra* note 3, at 70-83.

tion⁸ further confused subsequent interpreters by failing to distinguish clearly enough between contemporary or historical interpretation of certain trends in American legal thought up to about 1940 (Realism with a capital R) and the place of realism (with a lowercase r) in Llewellyn's own, especially later, thought.⁹ It is a truism of intellectual history that the least satisfactory aspects of a jurist's thought tend to attract the most attention. To me Llewellyn as an interpreter of the American Realist Movement should be sidelined, if not entirely forgotten, but his ideas on what constitutes a realistic perspective on law still have something to say to us within the context of his broader theory or, as he called it, his Whole View.

I had some difficulty in settling on a theme for this paper.¹⁰ I looked for a topic which would be historically significant and of contemporary interest. I chose to focus on an aspect of Llewellyn's work which has been relatively neglected, is relevant to interpreting his legacy, and has unfulfilled potential for application and development: the idea of "juristic method" or legal technology as part of his law-jobs theory.

8. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

9. The distinction between Realism and realism is developed in Twining, *supra* note 7.

10. This paper builds on and develops themes treated in a number of earlier works by the author. WILLIAM TWINING, *THE KARL LLEWELLYN PAPERS* (1968) [hereinafter TWINING, LLEWELLYN PAPERS]; TWINING, *supra* note 3; WILLIAM TWINING, *RETHINKING EVIDENCE* (1990) [hereinafter TWINING, *RETHINKING EVIDENCE*]; William Twining, *Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration*, 7 *LAW & SOC'Y REV.* 561 (1973) [hereinafter Twining, *Law & Anthropology*]; Twining, *supra* note 7; Twining, *Reading Bentham, Maccabean Lecture on Jurisprudence Delivered to the British Academy* (October 24, 1989), in *LXXXV PROCEEDINGS OF THE BRITISH ACADEMY* (1989), at 97-141 [hereinafter Twining, *Reading Bentham*]. Works by Karl Llewellyn that are cited in this essay include: LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 1; LLEWELLYN, *PRAEJUDIZIENRECHT*, *supra* note 1; LLEWELLYN, *RECHT*, *supra* note 1 (based on manuscripts developed during two visits to Leipzig in 1928-29 and 1931-32); LLEWELLYN, *supra* note 8; KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962) [hereinafter LLEWELLYN, *JURISPRUDENCE*]; KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941); Karl Llewellyn, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN SCHOLARS* 181 (A. Kocourek ed., 1941) [hereinafter Llewellyn, *My Philosophy*]; Karl Llewellyn, *The Place of Skills in Legal Education*, 45 *COLUM. L. REV.* 345 (1945) [hereinafter Llewellyn, *Skills*]; Karl Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355 (1940) [hereinafter Llewellyn, *The Problem of Juristic Method*]; Karl Llewellyn, *Law in Our Society: A Horse-sense Theory of the Institution of Law* (1950 ed., parts updated 1950-58) (unpublished course materials, on file with the University of Chicago Law School) [hereinafter Llewellyn, *Law in Our Society*].

The *Law in Our Society* materials were originally developed for a course given at Harvard Law School in 1948-49 and subsequently on a fairly regular basis at the University of Chicago from 1951-62. Various editions and supplements survive in the Llewellyn Papers in Chicago. The version used here is the set used in 1957-58 in a course taken by the author as a postgraduate student. Most of this work is still unpublished. A few extracts were printed in TWINING, *supra* note 3, at 497-516 (Appendix C). These represent about one-sixth of Llewellyn's text (excluding supplementary course materials by other authors).

There are three reasons for choosing this topic. First, most contemporary discussions of Llewellyn in the United States center on the Uniform Commercial Code and his place in the Realist Movement, which is interpreted, wrongly in my view, as focusing almost entirely on issues of adjudication. Apart from some acknowledgement of his historical role in the development of legal anthropology, Llewellyn's sociology of law is largely ignored.¹¹ This contrasts with his reputation in Germany.¹² These two reputations reflect an unresolved tension between his concern

11. Striking examples of ignoring the law-jobs theory include HORWITZ, *supra* note 7; WILFRED E. RUMBLE JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968); R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982). Rumble focuses almost entirely on judicial decision-making, as the subtitle suggests, and almost entirely ignores the law-jobs theory. RUMBLE, *supra*, at 3-4, 145-54, 235-40; *see also* THEODORE M. BENDITT, *LAW AS RULE AND PRINCIPLE* 100 nn.12-13 *passim* (1978) (distinguishing between Realism and Legal Sociology, treating Llewellyn solely as a Realist, and making no reference to the law-jobs theory, despite an extended discussion of functional concepts in legal theory).

Llewellyn's sociology of law has been given more prominence by British and Australian writers. *See, e.g.*, ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* (2d ed. 1992); HOWARD DAVIES & DAVID HOLDCROFT, *JURISPRUDENCE: TEXTS AND COMMENTARY* 446-70 (1991); ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* (1978); LORD LLOYD OF HEMPSTEAD & M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 679-803 (5th ed. 1985); JULIUS STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* (1966); *see also* Simon N. Verdun-Jones, *The Jurisprudence of Karl Llewellyn*, 1 *DALHOUSIE L.J.* 441 (1974); Kenneth A. Warner, *Trouble-cases and Socio-legal Processes*, 32 *AM. J. JURISPRUDENCE* 171 (1987).

Of course, apart from works specifically on legal anthropology, some American commentators have discussed the law-jobs theory. A notable example is Roscoe Pound, who generously stated: "In his paper on the problem of juristic method [Llewellyn] gives us much the best outline of the task of a sociology of law and of the way of going about performance of it which has appeared." ROSCOE POUND, 2 *JURISPRUDENCE* 196 (1959). In advancing an interpretation similar to that of Horwitz, William C. Heffernan treats *The Cheyenne Way* as the watershed in Llewellyn's intellectual development (a sharp break between the earlier and the later thought in which emphasis on technique is a new element). The interpretation is unconvincing, largely for reasons stated in the text in relation to Horwitz. Heffernan ignores the theories set forth in *Praejudizienrecht und Rechtsprechung in Amerika* and treats *The Cheyenne Way* as a late work, even though the research began and the law-jobs theory was developed within three years of the publication of *The Bramble Bush*. If Llewellyn did "retreat," it was much later, the main text being *The Common Law Tradition: Deciding Appeals* (perhaps backed by accusations of a "sell-out" on the U.C.C.). *See* William C. Heffernan, *Two stages of Karl Llewellyn's Thought*, 11 *INT'L J. Soc. L.* 134 (1983).

In his introduction to the translation of *Praejudizienrecht und Rechtsprechung in Amerika*, Paul Gewirtz emphasizes the continuity of Llewellyn's thought and his sociological perspective. *See* LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 1, at 1-46. I disagree, however, with his statement: "But as *The Case Law System in America* suggests, for Llewellyn realism meant, above all else, a set of beliefs about courts and their methods." *Id.* at xv. This statement conflates Llewellyn's special interest in American appellate courts (of which this is one example) and his desire to be realistic about all "legal" institutions as part of a general sociology of law. For a valuable discussion of *Praejudizienrecht und Rechtsprechung in Amerika* and *Recht, Rechtsleben und Gesellschaft*, *see* MICHAEL ANSALDI, *THE GERMAN LLEWELLYN* (forthcoming 1993).

12. The Symposium held in Leipzig on May 21-23, 1993 to celebrate Llewellyn's centenary included nine papers on "Rechtssoziologische Themen," but some of these focused mainly on adjudication or the U.C.C. (M. Rehbinder ed., forthcoming 1994).

to develop a general sociological theory and his strong personal identification with American legal practice and the common law. Nowhere is this more apparent than in his last published magnum opus, *The Common Law Tradition*. I believe this is flawed mainly because Llewellyn failed to use his own general theory to set a specialized study of American state appellate courts in a broad institutional context.¹³ This tension suggests a possible discontinuity between Llewellyn's general and particular jurisprudence. This paper provides an opportunity to correct an imbalance and to explore the relationship between these two aspects of his thought.

A second reason for choosing this topic is that Morton Horwitz has recently argued that Llewellyn, by virtue of his commanding position in the American Realist Movement, has persuaded historians to treat value-free social science as both the essence and the fatal flaw of Realism.¹⁴ Horwitz "dispute[s] the view put forth by its most important spokesman, Karl Llewellyn, that Realism was simply a methodology or 'technology' unrelated to substantive intellectual disputes or to social and political struggle."¹⁵ Horwitz presents Llewellyn's emphasis on craft and method as being a late, conservative, even reactionary sell-out on the critical thrust of his earlier Realism:

In much the same way that scholarly fields as disparate as literary criticism and philosophy turned inward to technical questions of professional craft and technique, Llewellyn appears to have continued to do "open penance" for the destabilizing consequences of realism. In a period in which it was common to deplore the loss of a sustaining faith in legal objectivity, Llewellyn offered a new basis for belief in professional craft as the source of predictability and stability in law.¹⁶

I admire Horwitz's book, and I find much of his story illuminating. However, I believe that his attempt to depict Llewellyn as a radical who, like Pound in an earlier generation, sold out to conservative forces late in life is quite misleading in a number of respects. I wish to put forward a different interpretation of Llewellyn's interest in method and technology and its significance in his thought. First, it is easy to show that Llewellyn's interest, indeed fascination, with "how" questions was a constant theme throughout his life and that there is an essential continuity in his thought and his emphasis on tradition and craft as stabilizing factors.¹⁷ If interest in craft and technique is a symptom of

13. TWING, *supra* note 3, at 268-69.

14. HORWITZ, *supra* note 7, at 5, 247-50.

15. *Id.* at 5.

16. *Id.* at 250.

17. The most cogent evidence of continuity can be found in LLEWELLYN, *PREJUDIZIENRECHT*, *supra* note 1. The argument is developed in William Twining, *Review of*

conservative tendencies, which I doubt, then Llewellyn was always a conservative (which may well be true). Secondly, and more importantly, I shall suggest that Llewellyn's ideas on juristic method represent one of the most original, fruitful, and under-appreciated aspects of his contribution. Third, I agree with Horwitz and others that Llewellyn's interpretations of American Realism were, in important respects, profoundly misleading. However, our reasons for saying this are quite different. Horwitz depicts pre-war Realism as a legal wing of the Progressive Movement and as such essentially politically motivated. I think that he is correct to stress the connections with Progressivism, which have sometimes been underplayed or obscured;¹⁸ but in his enthusiasm to emphasize the political and ideological roots of some parts of the Realist Movement, Horwitz (like Llewellyn) obscures the diversity of concerns—educational, scholarly, technical, and professional—which account for the diversity of the reactions to an earlier tradition in both their negative and constructive aspects. I have argued elsewhere that it is dangerous to generalize about American Realism because of the diversity of concerns that stimulated the reaction against the predominating Langdellian orthodoxy and led to a corresponding variety of prescriptions on the positive side.¹⁹ I shall focus here on one aspect of Llewellyn's thought and merely content myself with a few sideswipes at Horwitz.

A third reason for focusing on the law-jobs theory and juristic method is that these form part of Llewellyn's unfinished agenda. Llewellyn planned to use the occasion of an invitation to revisit Germany to give a series of lectures that would be a final statement of his sociology of law. Unfortunately, he died suddenly before he had made much progress on this project. Fortunately, however, a great deal of material survives in the form of teaching materials for a course entitled "Law in Our Society" and transcripts of recordings of lectures on this course. To date, only portions of *Law in Our Society* have been published. In this paper, I shall draw heavily from this remarkable document. Although it is incomplete and large portions are in note-form, in a kind of cryptic telegraphese, it is the best evidence we have of Llewellyn's last views on a number of topics. The version I shall use is dated 1950-53 and is

Ansaldi, 100 YALE L.J. 1093 (1991) and corroborated by LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 1, and an incisive review of the same book by Roger Cotterrell, *Realism, Pragmatism and the Appellate Judge*, 54 MOD. L. REV. 594 (1991).

18. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973). *Karl Llewellyn and the Realist Movement* was published in the same year as this excellent book, which has helped greatly in explicating the political context of the time.

19. See Twining, *supra* note 7.

the version used in a course I took at the University of Chicago in 1957-58.

II. THE LAW-JOBS THEORY

A. *Concerns and Provenance*

The law-jobs theory was developed and restated over a period of more than 30 years. It dates back at least as far as 1927 to a paper titled *Mechanisms of Group Control*.²⁰ The theory is featured in *The Bramble Bush*, and it provided the theoretical basis for Llewellyn's collaboration with Hoebel on the Plains Indians which culminated in *The Cheyenne Way* in 1941. Almost contemporaneously Llewellyn wrote *The Normative, the Legal and the Law-jobs: the Problem of Juristic Method*, published in the *Yale Law Journal* in 1940.²¹ This remains the most detailed and elaborate statement of the general ideas in print. The theory was restated in summary form in a number of other essays and lectures, published and unpublished, until his death in 1962. In order to make my presentation manageable and to root it in specific texts, I shall confine my interpretation of the more general theory to four works: the *Law in Our Society* teaching materials, the *Yale Law Journal* article, *The Cheyenne Way*, and his short but revealing essay published in the volume entitled *My Philosophy of Law* in 1941.²² In considering juristic method I shall draw on more sources.

The numerous works from which one can reconstruct Llewellyn's sociology of law were written at different times and for a variety of purposes. Nevertheless, it is fair to say that the main ideas had stabilized by 1940 and that, with three notable exceptions (his general conception of jurisprudence, the idea of the parental, and the crafts of law), most of the later texts contain only minor variants or particular applications.

The provenance and concerns behind the 1940-41 version of the law-jobs theory are quite varied and complex. For present purposes one can isolate five rather different concerns that fed into the project. First, from an early stage, Llewellyn wished to construct a general framework for his ideas, what he called a "working whole view,"²³ which he rooted in social theory.

A second underlying concern is with inter-disciplinary cooperation and in particular with developing a picture of law and a theoretical

20. Karl Llewellyn, "Mechanisms of Group Control" (1934) (unpublished manuscript, on file with the University of Chicago Law School as part of its collection of the Karl Llewellyn Papers).

21. See Llewellyn, *The Problem of Juristic Method*, *supra* note 10.

22. See Llewellyn, *My Philosophy*, *supra* note 10.

23. See, e.g., Llewellyn, *Law in Our Society*, *supra* note 10, at 9-12.

vocabulary that might bridge the divide between law and other social sciences, especially sociology and anthropology, but also economics and political science.²⁴

A third source of concern was with the law-in-action and hence with "realistic" jurisprudence. Here it is worth making two points: Llewellyn's interest in general social theory and his paper on *Mechanisms of Group Control* predated both the Realist controversy and his first published attempts to develop an explicitly "realistic jurisprudence." More important is the point that from the outset Llewellyn was quite explicit that the ideas associated with "R/realism" formed only one part of his "whole view." In a later formulation he put it as follows: "If Jurisprudence of necessity includes a study of ideals for law, then realism is not [co-extensive with] jurisprudence. If, as I think, jurisprudence contains [seven] sub-disciplines, then realism deals with two out of the seven: craft-techniques and descriptive sociology."²⁵

This is worth emphasizing in order to counter two fallacies that are still widely prevalent: first, the idea that Llewellyn's "realism" was a theory of adjudication.²⁶ A realistic perspective on law deals with all legal phenomena, and, indeed, in my view, it is unrealistic to treat courts and litigation as *the* focal point of law, even in the United States. An obsession with courts tends to produce a distorted and "unrealistic" vision of law. The second fallacy is the idea that Llewellyn's "realism" was co-extensive with his general theory of law.²⁷

A fourth concern that underlies the law-jobs theory and is central to my theme is Llewellyn's fascination, some might say obsession, with "method." This is a statement about the man as well as his ideas. Even in his contemporaneous accounts of his 1914 German war adventure he

24. Two of his general papers mention this explicitly in their titles. See, e.g., Karl Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286 (1949). The offprint of this article contained an introduction and was subtitled "Being also an Effort to Integrate the 'Legal' into Sociological and Political Theory" (on file with the University of Chicago Law School as part of its collection of the Karl Llewellyn Papers). Llewellyn was conscious that interdisciplinary communication requires a shared vocabulary. That was one reason for adopting such terms as group, institution, function, role, dispute, process, legitimacy, ideology, power, and authority which were commonplace, if problematic, in social science; some terms, such as legal, imperative, supremacy, and normative, he borrowed from contemporary jurisprudence; and some, such as law-jobs, law-ways, law stuff, and juristic method, to say nothing of some others that are best forgotten, he tried to introduce into both social science and juristic discourse—on the whole with limited success.

25. TWINING, *supra* note 3, at 519 (footnote omitted). It is not clear what the other five sub-disciplines were. They probably included fundamental questions about the Good, the True, and the Beautiful (legal philosophy, legal science, and legal aesthetics) and the study of the relationship between means and ends (impact and engineering), but Llewellyn adopted different formulations in different contexts. See *id.* at 172-84.

26. See Twining, *supra* note 7, at 347-51.

27. See *supra* note 9 and accompanying text.

focused on logistics, tactics, process, and atmosphere and said almost nothing about his perception of the ideological issues surrounding the war.²⁸

Llewellyn's earliest formulations of his general sociology of law explicitly state that "science" (Wissenschaft) develops out of useful real world practices (praktische Lebenskunst) and institutionalized group responses to problems (Handlungsgefüge) and that a primary notion of "law" encompasses a variety of skills.²⁹ For example, *The Cheyenne Way* is about Cheyenne law-ways, in particular how the Cheyennes resolved the tension between established form and felt justice, the same tension that Llewellyn later claimed is resolved by the Grand Style of appellate judging and advocacy.³⁰ In addition, the famous report of the Committee on Curriculum, chaired by Llewellyn in 1944, had skills development as its central theme.³¹

Llewellyn's most important published version of the law-jobs theory is subtitled *The Problem of Juristic Method*. Llewellyn's work is shot through with "how" questions—he is par excellence the jurist of the "how." While some of Llewellyn's cryptic late statements about "R/realism" as technology are problematic, it is clearly wrong to treat his interest in method and technology as a late development.

A fifth concern was more immediate. His first meeting with Hoebel in 1933 and his involvement in three studies of the Plains Indians, which began with the Shoshones and the Comanches and culminated in the classic study of the Cheyennes, provided an immediate stimulus to solve a particular problem. Indeed, it is worth recalling Hoebel's account of their first meeting, as it illustrates how a specific problem generated a solution that in time suggested answers to questions of much wider significance.³²

In 1933, Hoebel was a graduate student in the anthropology department at Columbia University, which was adorned by Franz Boas, Ruth Benedict, and Margaret Mead, among others.³³ Hoebel's proposal that he should study the law of the Plains Indians was met by extreme skepticism on two main grounds: first, the Plains Indians had no courts, no sovereign, and no centralized sanctions and hence no law "properly so

28. TWINING, *supra* note 3, at 482-87.

29. LLEWELLYN, RECHT, *supra* note 1, at 32-34.

30. TWINING, *supra* note 3, at 169; *see also* LLEWELLYN, *supra* note 8, at 513.

31. *See* Llewellyn, *Skills*, *supra* note 10.

32. TWINING, *supra* note 3, at 153-55; *see also* Twining, *Law & Anthropology*, *supra* note 10. These accounts are based largely on interviews with Hoebel. *See* E. Adamson Hoebel, *Karl Llewellyn: Anthropological Jurisprude*, 18 RUTGERS L. REV. 735 (1964).

33. Llewellyn had extensive contacts with Franz Boas and other members of the anthropology department at University of Columbia. Margaret Mead was a graduate student during this period, but it is not known whether Llewellyn knew her personally.

called"—a revealing example of the disastrous influence of Austinian jurisprudence. Secondly, the Plains Indians were perceived as unable or unwilling to articulate their "customary" rules or norms in general terms.³⁴ When asked about what would happen in particular hypothetical situations, the standard reply was: "It all depends." Whether this was an accurate perception is irrelevant. This combination of a particular conception of law with a perception of the Plains Indians as informants was considered to be a fatal bar to Hoebel's project. Fortunately, Franz Boas was sufficiently open-minded to suggest that there was someone in the law school who might hold a different view.

According to Hoebel, Llewellyn solved his problem at their first meeting in June 1933. The solution was simple: all societies and groups have disputes and the need to prevent and settle them. One can find out how a given group deals with these needs or "jobs," not by asking general questions that in any case invite misleading answers, but by asking detailed questions about particular cases, such as how they were dealt with, by whom, in what arenas, with what results, and how far these ways of solving problems of order were institutionalized. Later, Llewellyn recognized that myths and stories were almost as useful in getting at institutions and law-ways as historically accurate accounts. Thus, according to this version of history, the case-method was introduced into anthropology, and Llewellyn, who was already conscious that method is dependent on theory, was stimulated to develop a rounded statement of the law-jobs theory.

Of course, a detailed exegesis of the relevant texts would reveal a multitude of other concerns, questions, and themes. But these five general concerns—the quest for a whole view, interest in inter-disciplinary cooperation, realism, the focus on method, and Hoebel's presenting problem—are enough for our purposes. It is worth noting that all five are theoretical or academic in the sense that they are directly connected with a vision and methodology for the discipline of law. They are less directly connected with legal education or providing practical guidance to practitioners, judges, law reformers, and other participants in legal processes. This enterprise was more concerned with legal scholarship than with legal training, practice, or reform.

B. *The Theory Outlined*

At this point it is appropriate to provide a summary restatement of the bare bones of the law-jobs theory.³⁵ All of us are members of

34. For a penetrating analysis of the deficiencies of "custom" as a concept, see LLEWELLYN & HOEBEL, *supra* note 10, at 275-76.

35. For a more extended exposition, see TWINING, *supra* note 3, at 175-84.

groups, such as a family, a club, a teenage gang, a sports team, a school, a commercial organization, a trade union, a political party, a nation-state, or the world community. In order to survive and to achieve its aims, in so far as it has aims, *any* human group has to meet certain needs or ensure that certain jobs are done. These can, for purposes of convenient study,³⁶ be broken down into five or six rough categories.

First, and the most unmistakably "legal," is adjustment of the Trouble-case (dispute, grievance, offense).³⁷ When conflict or other trouble arises, it must be resolved or at least kept to a tolerably low level, otherwise the group will disintegrate or its objectives will be frustrated or impaired. The second, and perhaps the most important, job is the preventive channelling of conduct and expectations to avoid trouble. Third, as needs and conditions and relations change, the conduct and expectations of the group must be re-channelled. Fourth is the "Arranging for the Say and the Manner of its Saying" that is the advance allocation of authority and the advance regulation of authoritative procedure. This job is prototypically the primary function of a "constitution" of a club, organization, or a nation-state. Where power and authority diverge, as any realist knows, there tends to be a gap between what in fact happens and what is meant to happen. Therefore, giving a realistic account of a constitution as a kind of institution is problematic.³⁸ Fifth, is the job of "providing Net Positive drive: Integration, Direction, Incentive for the whole."³⁹ Llewellyn, like Bentham, explicitly linked positive and negative sanctions (rewards as well as punishments, for example) within his conception of law-government.

Finally, in any group but especially in complex groups, techniques, skills, devices, practices, and traditions need to be developed, institutionalized, and adjusted if the first five needs or jobs are to be dealt with adequately or well. This is what Llewellyn called the "Job of Juristic Method." He considered this to be his most original contribution to the sociology of law, and I will consider it in detail.⁴⁰

36. Llewellyn, *Law in Our Society*, *supra* note 10, at 24.

37. Llewellyn uses deliberately vague terms in some contexts to avoid definitional problems such as the use of "trouble." "Dispute" is another example of a term that is problematic in legal anthropology and in discussions of "alternative dispute resolution" because there is a temptation to extend the term to cover such diverse phenomena as welfare claims, criminal prosecutions, and clashes of interest of which one or more of the parties may not be aware. The broader word "trouble" can accommodate a much wider range of situations than "dispute" and can easily be linked to the idea of "problem-solving." See TWINING, *RETHINKING EVIDENCE*, *supra* note 10, at 353-56; William Twining, *Alternative to What?*, 56 MOD. L. REV. 380 (1993).

38. Llewellyn explicitly included procedures for decision as part of this law-job, but he did not develop ideas of procedural justice and due process very thoroughly in this context. On different conceptions of a "constitution," see *infra* note 134.

39. See Llewellyn, *Law in Our Society*, *supra* note 10, at 25.

40. *E.g.*, *id.* at 78; Llewellyn, *The Problem of Juristic Method*, *supra* note 10.

C. *Uses, Limitations, and Criticisms*

The law-jobs theory has been subjected to remarkably little sustained or detailed criticism in the Anglo-American literature.⁴¹ Alan Hunt treats it as an example of "extreme functionalism" and argues that, as such, it is vulnerable to the standard criticisms of structural-functionalism of the inter-war period.⁴² Roger Cotterrell suggests that it is too vague and general to be of much value but acknowledges that functional analysis still has a place in contemporary sociology.⁴³ Julius Stone, in a generally sympathetic account, impliedly criticizes Llewellyn for failing to say much of significance about the differences between groups and about social and legal change, both points signaling important limitations to Llewellyn's account.⁴⁴ I have suggested that on one level of interpretation the basic ideas can be reduced to a near tautology, but this is to clarify the nature of the theory rather than to condemn it.⁴⁵ In the light of modern developments in sociology and social theory, the law-jobs theory may be open to criticism that it underplays the importance of power, structure, and discourse, and there are some familiar conceptual problems associated with the use of such terms as "function," "need," and "group."⁴⁶

41. Some criticisms were advanced at the 1993 Leipzig Colloquium. The papers from the colloquium contain useful references to the German literature. See *supra* note 12.

42. HUNT, *supra* note 11 (perhaps the most sustained critique of Llewellyn from a Marxist perspective).

43. COTTERRELL, *supra* note 11 (Cotterrell's first edition contains a more extended discussion).

44. STONE, *supra* note 11, at 646-51.

45. TWINING, *supra* note 3, at 180-84.

46. It is beyond the scope of this paper to consider in detail how far standard criticisms of traditional functional analysis apply to the law-jobs theory. On a charitable interpretation, Llewellyn's position can be reconciled with the account given by Robert Merton in his classic essay, *Manifest and Latent Functions*. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 21-81 (1949). Specifically, Llewellyn can be exempted from the charge that some functionalists conflate "use, utility, purpose, motive, intention, aim, [and] consequences." *Id.* at 24. Llewellyn's "jobs" refer to group needs which can be interpreted in objective terms—that is, without reference to human purpose, motive or intention ("if the group is to survive, then certain needs must be met . . . somehow"). In addition, the law-jobs theory involves no necessary commitment to the fallacies identified by Merton as: (i) the postulate of functional unity of society (strong integration); (ii) the postulate of universal functionalism (that all institutions, customs, etc. must have functions); and (iii) the postulate of indispensable items (that some items have indispensable functions). The law-jobs theory can probably also be interpreted as not involving ideological commitment to the status quo or to the assumption that group-survival is always desirable and disputes are always undesirable (Llewellyn explicitly recognized the social functions of conflict). However, it is probably fair to say that some of Llewellyn's passages tend in this direction and that he too readily assumed a consensus about values. Llewellyn was also generally drawn more towards the consensual end of the conflict-consensus continuum of social theories. See, e.g., TWINING, *supra* note 3, at 219-26. I am inclined to agree with Irwin Stotzky that Llewellyn and Mentschikoff tended to have an optimistic vision of the role of law, especially in American society. Soia Mentschikoff & Irwin Stotzky, *Law—The Last Universal Discipline*,

Without wishing to exempt Llewellyn from all such criticisms, I believe that the law-jobs theory can be interpreted in a way that rescues it from nearly all of these criticisms but that it could be usefully refined and supplemented in the light of subsequent developments in social theory within the same intellectual tradition.⁴⁷ Detailed treatment of these issues, however, requires another occasion. Suffice it to say here that Llewellyn anticipated and side-stepped most of the charges against "extreme functionalism" of the kind associated with Talcott Parsons. If the law-jobs theory is considered not as an empirical theory but rather as a perspective and a heuristic theory that suggests a rich series of basic questions to ask about the ordering of any human group, then the charge of tautology is unimportant; and, insofar as Llewellyn's version does not stress discourse,⁴⁸ structure, and power, it can easily be supplemented for a given inquiry by additional questions.

The law-jobs theory's simplicity and generality are, in my view, a source of strength. It is easily grasped and extremely flexible. Its claim to be applicable to any human group from a one-parent family to the world community is breathtakingly ambitious and has, indeed, raised quite a few eyebrows. To test the theory, students in Llewellyn's course used such groups as a submarine, a boy's camp, and the world of the bee-hive as described by Maeterlinck.⁴⁹ On the whole, outside legal anthropology, the use of the law-jobs theory as such (as opposed to specific aperçus) has been rather limited. However, it did provide the framework for the Chicago Arbitration Project⁵⁰ and the study of the Pueblos of New Mexico, both of which were never completed.⁵¹ It also has been conspicuously underused in recent work on "alternative dis-

54 U. CIN. L. REV. 695, 705 n.14 (1986) (dissent by Stotzky). In my view, the law-jobs theory can be separated from this personal bias of Llewellyn and Mentschikoff.

47. Relevant social theorists include Robert Merton, Clifford Geertz, Anthony Giddens, and, perhaps, Victor Turner. Llewellyn was, in my view, closer to Merton than to Parsons, and I suspect that he would not have been very sympathetic to the more formal "systems" approach of Luhmann and Teubner. In this connection, Charles Sampford's *The Disorder of Law* is suggestive, but he takes the more formalized theories of Parsons and Bredemeier in his sustained attack on the "systematic" nature of law and does not explore in detail the implications of his thesis for the law-jobs theory. CHARLES SAMPFORD, *THE DISORDER OF LAW* ch. 5 (1989).

48. Hoebel later admitted in a personal communication to the author that they could fruitfully have submitted Cheyenne concepts and discourse to more intensive analysis. See TWINING, *supra* note 3, at 163.

49. Some copies of student papers are preserved in the collection of The Karl Llewellyn Papers at the University of Chicago Law School, including one on law-government in a submarine entitled *The Shining Way*. As a student in Llewellyn's course I tried, not very successfully, to apply the law-jobs theory to Maeterlinck's *The Life of the Bee*. MAURICE MAETERLINCK, *THE LIFE OF THE BEE* (1901). This led me to conclude that the theory was not empirically falsifiable in any significant respects and contained an element of tautology. TWINING, *supra* note 3, at 180-81.

50. Ex rel. Soia Mentschikoff Llewellyn.

51. TWINING, *supra* note 3, at 361-63.

pute-resolution.”⁵² In one project that was never started, Llewellyn and Mentschikoff planned to compare dispute-settlement among the tiny Pueblos and in the Soviet Union—a bold but abortive enterprise. In addition, Llewellyn did not really exploit the law-jobs theory’s potential for setting a broad context for his particular studies of American appellate courts or his courses on Elements and advocacy.⁵³

The value of the law-jobs theory can be summarized as follows:

1. It roots a general theory of law-government in an established and rich tradition of social theory;
2. It applies generally to all human groups;
3. It can be interpreted and used as a flexible perspective and set of concepts for asking open questions about any human group; it is open-ended in that it makes almost no universal empirical assumptions about human nature or methods of group ordering beyond the proposition that all groups are susceptible to internal conflict and changing conditions that may give rise to conflict; it makes no normative or empirical assumption that conflict and dispute are inherently bad or that there are uniform ways of performing law-jobs.
4. It is holistic or contextual in that it provides a lens for looking at particular institutions, devices, traditions, events, and other phenomena in the context of a total picture or whole view of an entirety; it makes no assumption that any entirety is self-contained or that a group or entirety is necessarily to be equated with a “system”;
5. It draws the semantic sting of obsession with definitions of law and related concepts by emphasizing focus without artificial confines, thereby sidestepping definitional problems at the most general level and emphasizing the continuities between legal and other social phenomena;⁵⁴
6. It focuses on actual events, disputes, and practices thereby providing a basis for giving concrete, particularized accounts of the relationships between what is meant to happen (aspiration, official views, and the law in books) and what happens in fact (“empirical reality,” interposed norms and practices, actual consequences and effects, and the law in action);
7. It is entirely compatible with the axioms of interpretive sociology that (i) descriptions and explanations are constructed by interpreters with

52. See Twining, *supra* note 37, at 385-88. The law-jobs theory offers a framework for setting so-called “ADR” institutions in a broader perspective than standard litigation-oriented treatments by lawyers. In addition, it is suggestive with respect to questions that might be asked about “the state of the art” from a broad technological perspective.

53. See *infra* note 116; LLEWELLYN, *JURISPRUDENCE*, *supra* note 10, at 3-6; TWINING, *supra* note 3, at 148-50, 177-79, 437-39.

54. Twining, *Law & Anthropology*, *supra* note 10, at 577-79.

different standpoints and perspectives; and (ii) that such interpretations have to include both an external interpretive conceptual scheme (etics) and the internal concepts and ways of thought of actors (emics);⁵⁵

8. It allows for change and for the consideration of dynamic processes, with participants, choices, contingencies, institutions, and traditions viewed over time, and it allows scope for questions about "the social functions of conflict" in such processes;

9. It presents rules, norms, principles, discourses, and concepts as important elements in legal phenomena without making them paramount; indeed, to what extent the law-jobs are in fact being done by rules or other norms (paper or real) and/or by other means is always an open question;

10. It takes "how" questions seriously, and these have often been neglected in legal theory; it links legal sociology with general rationalistic ideas about problem-solving, on the one hand, and unconscious or semi-conscious patterns of behavior and ways of thought within a general concept of group culture, including legal culture, on the other;

11. It is easily understood and applied in a wide variety of contexts.

D. *Law-Jobs and Legal Records*

A research project in which I was recently involved illustrates the value and flexibility of the law-jobs theory.⁵⁶ The Commonwealth Legal Records Project, an archival program, is concerned with the preservation and disposal of legal records of all kinds in what is now referred to as "the Old Commonwealth" (in contradistinction to the Commonwealth of Independent States), which includes most anglophone countries that were at some stage under British rule and have preserved a vestigial link with the Crown. The project arose out of three main concerns: first, many modern legal records of great potential archival value are in danger of being lost by virtue of neglect, oversight, or over-enthusiastic destruction by a new generation of cost-conscious records managers; second, it was felt that historians and other scholars have not adequately addressed the imperatives and dilemmas of selection in the face of the massive proliferation of paper and the costs of its preservation; and third, archivists have tended in the past to equate "legal records" with court records, occasionally and unsystematically including other classes, such as land records and papers of private practitioners. Archivists have lacked a coherent conceptual framework for

55. WARD GOODENOUGH, DESCRIPTION AND COMPARISON IN CULTURAL ANTHROPOLOGY (1970).

56. WILLIAM TWINING & EMMA VARNDEN QUICK, LEGAL RECORDS IN THE COMMONWEALTH (1994).

devising systematic policies of selection and retention in respect to records other than court records.⁵⁷ To put the matter rather simply, archivists have tended to adopt a narrow and not very coherent conception of law and an outdated, often court-centered conception of legal scholarship. In addition, many law-related categories of records have either been generally overlooked in archival policy or have been treated simply as administrative records. Examples include non-litigious business of law-firms (other than formal land transactions), alternative dispute resolution, material from legal departments of public corporations or large private sector enterprises, and law-related non-governmental organizations such as civil liberties groups, legal awareness programs, and neighborhood law offices. In most countries there is an almost complete vacuum in archival policy with respect to such institutions. Furthermore, historiography has moved away from top-down, great man, winners' history to focus on more diverse sets of perspectives, including greater emphasis on the ordinary, on the routine, on the modes of discourse, and on the perspectives of women, minorities, and underprivileged groups. Thus, selection criteria and priorities need to adjust to changing conceptions of scholarly significance. With respect to legal records, what contemporary and future historians and other scholars may consider to be significant has to be anticipated so far as is feasible. It is quite clear that the records of superior courts and formal land transactions will no longer be considered the only or the main kinds of records demanding a high priority.

In designing the project we found that from the available stock of legal theories Llewellyn's law-jobs theory best fitted our purposes. It offered a broad and flexible perspective on law and legal institutions that enabled us to include records relating to customary and religious law in plural legal systems, law-making and law-enforcement, alternative dispute-processing, and non-contentious professional legal work in public, parastatal, and private sectors in a variety of countries with very different state legal systems and cultures. Further, by substituting "institutions specialized to law" for "legal records" and by refusing to provide a formal general *definition* of the term, we killed two birds with one stone. In characteristic Llewellyn style, we side-stepped the definitional problem which had troubled many archivists by "drawing the semantic sting;"⁵⁸ we merely treated an institution as being specialized to law if it pragmatically fitted the objectives of this project.

57. Some records of governmental institutions specialized to law (e.g., ministries of justice) have been treated as administrative records for archival purposes and have not been entirely neglected, but this is less true of parastatal and private sector institutions.

58. On Llewellyn's reasons for refusing to commit himself to a general definition of "law" in most contexts, see TWining, *supra* note 3, at 177-80.

At the same time, focusing on institutions rather than on classes of records fits well with the archival principle of provenance in that records are to be collected, appraised, and classified by reference to their creating institutions rather than their content. Furthermore, orthodox archival and records management theory has strong functionalist tendencies. For example, in Schellenberg's classic text "records" are explicitly related to institutions having functions that are mainly exercised through transactions.⁵⁹

In a case-study of legal records in Accra, as part of the larger project, we started by compiling as comprehensive a profile as possible of all institutions which might be included in our survey (a demographic "total picture" of law-related institutions).⁶⁰ As we toured Accra in a mini-bus reading signs on buildings (in the absence of up-to-date directories), we added to our list a women's legal advice center, the Ombudsman, important administrative and military tribunals, the legal department of the Volta River Authority, the Ga House of Chiefs (which exercises important judicial powers), the Ghana Law School, letter-writers outside the law courts, and even the Committee for the Redistribution of Sequestered Property. Almost none of these had previously attracted the attention of the National Archive.

This is an example of the law-jobs theory, in its broader aspects, providing a simple, broad, coherent, inter-disciplinary perspective for an inquiry that crossed national and cultural boundaries and which, it is hoped, may change perceptions of the extent and value of legal records as part of a national heritage. It was also enormous fun and a good way of learning about law in Ghana.⁶¹

III. JURISTIC METHOD

The list of five or six law-jobs was, in fact, almost commonplace rather than novel. Llewellyn claimed that the most original aspect of the law-jobs theory was the isolation of "the job of juristic method" as an explicit focus of attention worthy of sustained study from a sociological point of view. The concept of juristic method in this context is very broad indeed. It is not confined to the skills and techniques of individual specialists, such as the crafts of the lawyer, the styles of judges, or the skills of different kinds of negotiators. It includes but is not confined to craft-traditions (for example, the organization and ways of work of Eng-

59. T.R. SCHELLENBERG, *MODERN ARCHIVES PRINCIPLES AND TECHNIQUES* (1975).

60. *Id.* at 15-16. For a discussion of Llewellyn's concept of "total pictures," see Twining, *supra* note 7, at 376-78.

61. The results of the study are reported in PINO AKOTIA ET AL., *LEGAL RECORDS IN ACCRA: A CASE STUDY* (1992). For a shorter version of this study, see TWINING & QUICK, *supra* note 56.

lish Chancery barristers in Dickens' time or in 1993);⁶² legal inventions (such as the trust, the letter of credit, legal fictions, or the ombudsman);⁶³ institutional design (different models of constitution, architectural styles of code, types of procedural system, or more specific institutions, such as modern alternative dispute resolution devices like rent-a-judge or the mini-trial); and any kind of machinery or institutionalized way of doing any of the law-jobs. Juristic method is "the *ways of handling* 'legal' tools to law-job ends, and of the ongoing upkeep and improvement of both ways and tools."⁶⁴

The term "juristic method" can easily be confused with "legal method," a much narrower category in ordinary legal usage that is typically confined to that narrow range of skills relating to interpreting and arguing about questions of law—what is commonly referred to by that justly-criticized phrase, "thinking like a lawyer." Llewellyn was among those who have emphasized that such rule-handling skills represent only one phase of the skills of the lawyer, but because he had a special interest in the crafts of judging and lawyering, his idea of "juristic method" can easily be interpreted too narrowly. Just as the concept of "law-jobs" is very much wider than "lawyer-jobs," so "juristic method" is very much wider than "lawyer-crafts,"⁶⁵ which in turn transcend individual skills to include craft traditions, practices, and settled ways of thought. Furthermore, the theory of crafts is not confined to "lawyers"⁶⁶ but extends to all participants in legal action. "Juristic method" encompasses all aspects of institutional machinery, which, said Llewellyn, include "ways *and* personnel *and* ideology about both."⁶⁷

62. Notable studies in Britain include JOHN A. FLOOD, *BARRISTERS' CLERKS: THE LAW'S MIDDLEMEN* (1983); JOHN MORISON & PHILIP LEITH, *THE BARRISTER'S WORLD AND THE NATURE OF LAW* (1992).

63. Llewellyn, *The Problem of Juristic Method*, *supra* note 10, at 1392-93 (contains an excellent general formulation).

64. For a discussion of aesthetics and "beautiful" inventions, see TWINING, *supra* note 3, at 197-99, 443 n.112. For a discussion of fictions, see Llewellyn, *Law in Our Society*, *supra* note 10, at 5.6.3-5.6.6.

65. Llewellyn, *The Problem of Juristic Method*, *supra* note 10, at 1392; LLEWELLYN & HOEBEL, *supra* note 10, at 309. For examples of conflating "law jobs" and "lawyer-jobs," see ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 9 (1983).

66. The concept of "lawyer" is context-dependent and quite unsatisfactory as a tool for cross-cultural study. See RICHARD L. ABEL & PHILIP S.C. LEWIS, 2 *LAWYERS IN SOCIETY* 2-5 (1988) (recognizing the problem but never resolving it satisfactorily). Llewellyn's "theory of crafts" is suggestive in linking "the law-crafts" to a general sociology of law and identifying certain tasks that "center on eternal human needs, in all human groups: spokesmanship, decision, advice: trouble-shooting, generally, in regard to the team-work of people." TWINING, *supra* note 3, at 510; Llewellyn, *Law in Our Society*, *supra* note 10, at 18. But one task for general jurisprudence is to develop a more precise meta-language and conceptual framework for the comparative sociology of legal professions (or legal work).

67. Llewellyn, *The Problem of Juristic Method*, *supra* note 10, at 1392.

From now on I shall substitute the term "legal technology" for Juristic Method and try to keep narrower categories such as "law-crafts," "lawyer crafts," skills, and techniques conceptually distinct.⁶⁸ In this context "technology" is broader than the systematic study of the practical or industrial arts. It refers to the sociological study of everything used in performing the law-jobs, especially institutionalized ways and means, including thought-ways and the organization and management of work.⁶⁹

The breadth of the general conception of legal technology is illustrated in *Law in Our Society*, which contains sketches for a series of sub-theories linked to the idea of Juristic Method: a general theory of law-crafts, with a sub-theory of lawyer-crafts; a general theory of problem-solution;⁷⁰ general theories of dogmatics and legal dogmatics;⁷¹ a general theory of legal aesthetics;⁷² and working theories on appellate judging, appellate advocacy, and counselling. The work also promised chapters on legislation and codification viewed from this perspective. Even this breakdown is not comprehensive on Llewellyn's own terms. For example, in the late 1930s, he drafted a major part of a book, provisionally called *The Theory of Rules*, in which he treated rules as one of the main instruments for doing the law-jobs.⁷³ It is ironic that the jurist who considered the development of better rules and more sophisticated methods of rule-handling to be one of the central tasks of legal technology, and who was himself the chief draftsman of a major code, should

68. A "skill" refers to mastery of one or more techniques and competencies in performing a task or series of tasks (an operation) to a given level of performance (i.e., skillfully). A craft refers to a congerie of skills and techniques institutionalized around the doing of certain "jobs" which typically involve more than one operation. NEIL GOLD ET AL., *LEARNING LAWYERS' SKILLS* 11 (1989) (developing the discussed terminology). Llewellyn implicitly recognized some of the conceptual difficulties surrounding "skills" and did not rely heavily on the concept. See, e.g., TWINING, *supra* note 3, at 506-07.

69. Llewellyn sometimes subsumed "technology" under "craft." See, e.g., TWINING, *supra* note 3, at 506. I am using it here as a generic term which includes but is broader than "craft."

70. Llewellyn, *Law in Our Society*, *supra* note 10, Lecture 13 (Theory of Problem-Solution in General).

71. Llewellyn, *Law in Our Society*, *supra* note 10, at Lecture 14 (Theory of Dogmatics in General); cf. LLEWELLYN, *JURISPRUDENCE*, *supra* note 10, at 369-71; LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 1, at 89-95, 104-05.

72. TWINING, *supra* note 3, at 156-57, 197-99, 443 nn.112-14; LLEWELLYN, *JURISPRUDENCE*, *supra* note 10, at 171-96, 389-94.

73. See Llewellyn, *Law in Our Society*, *supra* note 10. Lecture 13 of the 1953 edition of *Law in Our Society* is entitled *Building Materials for a Control Structure: Theory of Rules*. However, this is quite thin compared to the unfinished book, which survives in The Karl Llewellyn Papers. See KARL LLEWELLYN, *THE THEORY OF RULES* 40 (unpublished book on file with the University of Chicago Law School as part of its collection of The Karl Llewellyn Papers) (TWINING, *LLEWELLYN PAPERS*, *supra* note 10, also contains a print in full of *Rule of Thumb and Principle*). For an attempted restatement of Llewellyn's theory of rules, see TWINING, *supra* note 3, at App. B.

still be referred to as a "rule-skeptic."⁷⁴ It is also strange that the "the theory of rules" is not explicitly included in *Law in Our Society*.

The development of a comprehensive theory of legal technology is an ambitious venture. In *Law in Our Society* we have a series of more or less complete sketches, one of the most developed being the theory of crafts.⁷⁵ This reflects Llewellyn's own interests, both generally and in his specialized work on judging, advocacy, drafting, and skills training. However, he tried, not always successfully, to differentiate between his general theory and his own particular contributions. He maintained that the idea of crafts was central to the law-jobs theory and was his own most important contribution to the intellectual tradition of Legal Sociology. His specific claim was that he was filling a gap in the work of Max Weber. It is worth quoting a key passage from *Law in Our Society* at length. After acknowledging the contributions of many forerunners, including Petrajitsky, Ehrlich, Sumner, Bentley, and Wigmore, he continues:

Max Weber did the deepest cutting of all (except, of course, Dewey), because he saw at once, in a sort of intellectual counterpoint, four things . . . and managed to keep them clear: first (the thing which nobody before had adequately stressed) the machinery of the man-stuff to get the jobs done (the "bureaucracy"); second, the impact of the prevailing (conditioning, but possibly helping) realm of ideas and views-of-goals; third, the different sources of ideas and ideals and the differing factual results according to their sources (e.g. "unquestionable", "rational"); fourth, the *method* of operation (e.g. "rational"—though with his curious failure to keep clear consistently the difference between "*really* rational"—as *we* now see it—and "rational on the given premise"—i.e. in *their* terms).

Weber's descriptive range (with its accuracy) is unmatched. His analytical power I rate the same. Yet it is amazing that the man who could build a sociology of music on the nature of available instruments ("leaving out," says Morris Cohen, with partial justice, "what makes music Music") could overlook, in the deep and needed idea of the man-stuff (bureaucracy) the *craft-skills*, and the *key-position of the individual*. I think, only because he was not a lawyer. But with these, the whole, though the finest job one can really hope to see, still has to miss contact with life. The *craft-skills, and the tradition of the craftsman and those men's judgment and uprightness* (Weber got adequately only the second and a part of the third) *are the place where all of Jurisprudence, and all of Law, comes together in its*

74. TWINING, *supra* note 3, at 200-02. Writers continue to repeat Frank's misleading distinction between "rule-skeptics" and "fact-skeptics": recent examples include DAVIES & HOLDCROFT, *supra* note 11, at 446-70; MORISON & LEITH, *supra* note 62, at 198.

75. TWINING, *supra* note 3, at 505-16 (reprint of *Law in Our Society* Lecture 2).

impact: The stuff for analysis, the focus for improvement, the place of key-meaningfulness.⁷⁶

This strong emphasis on personnel and on the individual craftsman could be interpreted as a form of extreme individualism. This, I think, would be a mistake. Llewellyn's craftsman is not an atomistic, isolated unit. She is part of and is created and constrained by received ways of thought, accepted practices, and bureaucratic organization. Rather, this is a plea to focus on the human element, especially the conscious and unconscious ways of thought and ideologies of individual craftsmen as social actors.

The theory of crafts is thus given a central place in Llewellyn's sociology of law. I shall not attempt here to expound the theory in detail. In *Law in Our Society* Llewellyn considers, inter alia, what a craft is, the ways (i.e. the institutionalization) of crafts, stability and change, the economic base, the law-crafts, and spokesmanship as illustrative of a craft, which can be divided up into any number of sub-crafts. The text of this section is available in print and many of the ideas are extensively developed in other writings, published and unpublished.⁷⁷ Rather, by way of illustration, I shall consider the potential of the theory of crafts in relation to recent developments in two areas: the sociology of the legal profession and skills development in legal education and training. Then, I shall briefly deal with criticisms of the craft concept as either a form of romantic nostalgia (Hayakawa) or as a retreat from engagement with serious political issues (Horwitz).

76. Llewellyn, *Law in Our Society*, *supra* note 10, at 78. Some of this is developed in transcripts of lectures. The allusion to Morris Cohen has not been traced. Llewellyn's precise relationship to Max Weber deserves closer study. Llewellyn started to translate Weber into English in about 1935 and regularly acknowledged him as a major influence. However, apart from using Weberian "ideal types" and some of Weber's ideas about bureaucracy and legal personnel, it is not entirely clear what specifically Llewellyn took from Weber. Llewellyn's copy of Rheinstein's edition of *Law in Economy and Society* was found in Professor Soia Mentschikoff's library and has been deposited with the Llewellyn Papers in Chicago. For about sixty pages there are detailed marginal comments by Llewellyn. Quite a few of these are critical:

Parliament arose originally as a judicial body [KNL: Nuts] and, in France, it becomes such to the exclusion of all other activities. This confusion [KNL: Fusion first] between legislative and judicial functions was conditioned by political circumstances. The budget, which is a purely administrative matter [KNL: Crass anti-realism!], is also treated as a legislative act, in adherence to a pattern established in England as well for political reasons.

MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 47 (Max Rheinstein ed. & Edward Shils & Max Rheinstein trans., 1954) (Llewellyn's marginal comments are in brackets). See Karl Llewellyn, Book Review, 24 U. CHI. L. REV. 616 (1957); 2 *Zeitschrift für Ausländisches und Internationales Privatrecht*, Heft 4, 720-1 (1957).

77. See, e.g., TWINING, *supra* note 3, at 505-12.

A. *Technology and Studies of the Legal Profession*

In 1968 Robert S. Merrill wrote:

Given the long history of concern with the social consequences of technology, it is puzzling that technological systems, unlike such similar aspects of culture as political, legal, economic, social, and magico-religious systems, are not the focus of an established specialty in any of the social sciences. The academic institutionalization of the social study of technology does not even approach that recently attained by its sister subject, science. One reason for this discrepancy is that technologies are not thought to be very interesting.⁷⁸

Merrill specifically excepted two pioneering scholars whom Llewellyn greatly admired: Bronislaw Malinowski and William F. Ogburn. Thanks in part to Merrill's own work, the study of technology is now an established field in the social sciences, but this does not seem to be the case in the sociology of law. For example, the sociology of legal professions (including comparative studies) has made enormous strides in the past thirty years. We now know much more than we did about stratification, recruitment, access, socialization, professionalization, and the demography, economics, ideologies, and power relations of lawyers in many countries. The work of Carlin, Johnstone and Hopson, Heinz, Flood, Abel and Lewis, and many others illustrates this.⁷⁹ Yet we do not systematically know very much more about what lawyers do in their daily work and how they go about doing it. At the start of one of five substantial volumes on lawyers in society, Richard Abel acknowledges as much:

Except for a handful of very recent ethnographic studies of lawyer-client interaction (e.g. Cain, 1979; Griffiths, 1986; Sarat and Felstiner, 1986), we know little more about what lawyers do than how they allocate their time among different subject matters. One reason for writing this book is my hope that its description of the social organization of the legal profession will enable and stimulate others to undertake the more difficult task of studying the content and form of their daily work activities.⁸⁰

This is a remarkable admission to make near the completion of a five volume study, which is widely recognized as representing the state

78. Robert S. Merrill, *The Study of Technology*, 15 INT'L ENCYCLOPEDIA SOC. SCI. 576 (1968). There is a useful bibliographical essay in THOMAS DIGREGORI, *A THEORY OF TECHNOLOGY* 191 (1985).

79. Useful bibliographies are to be found in RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) [hereinafter ABEL, *AMERICAN LAWYERS*] and RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988) [hereinafter ABEL, *ENGLAND AND WALES*].

80. ABEL, *ENGLAND AND WALES*, *supra* note 79, at 3; cf. ABEL, *AMERICAN LAWYERS*, *supra* note 79, at 14; Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspective*, in 3 ABEL & LEWIS, *supra* note 66, at 1.

of the art. However there is one area in which Abel's admission might be said to be overstated. A great deal of work, including some empirical research, has been done in relation to direct teaching of professional legal skills. Let us consider this currently fashionable concern in the light of Llewellyn's ideas.

B. *Skills and Legal Education*

Skills and competency are currently high on the agenda of debates about legal education in the common law world. From British Columbia to New Zealand, from Zimbabwe to Hong Kong, from Melbourne to London (England and Ontario), the merits of direct versus pick-it-up learning, of holistic versus abstracted approaches, of clinical versus simulated training, of the balance between know-how and know-what, are being vigorously debated in a plethora of experimental programs.⁸¹ In the United States the history of the skills movement is variously told: some with short memories start with Council on Legal Education For Professional Responsibility or the competency debates of the 1970s;⁸² some go back to an historic meeting in Asheville, Tennessee in 1965;⁸³ some treat the Lasswell-McDougal plan of 1943⁸⁴ or the report of the Association of American Law Schools Committee on Curriculum, chaired by Llewellyn in 1944⁸⁵ or a job-analysis by Wigmore in 1922⁸⁶ as marking the start of the modern skills movement; some trace the story back to the first law school clinics or to Langdell's switch from an emphasis on knowledge to rigorous, singleminded focus on a single set

81. A useful, international bibliography of the literature in English (mainly about particular skills) up to 1988 is JEANINE WATT, *THE LEGAL SKILLS SOURCEBOOK* (1989).

82. See WILLIAM PINCUS, *CLINICAL EDUCATION FOR LAW STUDENTS* (1980) (discussing the Council on Legal Education for Professional Responsibility). On the competency debates, see, e.g., Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973); A.B.A., *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS* (1979) [hereinafter *CRAMTON REPORT*]; and works cited in the extensive bibliography in A.B.A., *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (1992) [hereinafter *MACCRATE REPORT*].

83. *COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, PROCEEDINGS OF THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY* (1965).

84. Harold D. Lasswell & Myers S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

85. Llewellyn, *Skills*, *supra* note 10. Interestingly, the Committee gave credit to Wigmore for pioneering the idea of making a job-analysis of lawyers' operations a basis for skills training but considered his version too elaborate to be practical. *Id.* at 173.

86. John H. Wigmore, *The Job-Analysis Method of Teaching the Use of Law Sources*, 16 *ILL. L. REV.* 499 (1922), reprinted in 4 *AM. L. SCH. REV.* 787 (1922); cf. John H. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 *HARV. L. REV.* 812 (1917).

of intellectual skills;⁸⁷ some of us would even trace the story back through the long history of rhetoric to Quintillian, Cicero, and Aristotle.⁸⁸

The recent rapid increase in interest in the common law world outside North America is sometimes known as "the Gold Rush" in tribute to the influence of Professor Neil Gold. Professor Gold was the first to develop models for application in British Columbia and Ontario and then disseminated them to a number of jurisdictions in Africa, Australia, and South East Asia and most recently, and rather belatedly, to England.⁸⁹ In 1989 the English Inns of Court School of Law, in a remarkably radical move, substituted a year-long skills-based course for the traditional knowledge-based one that had fallen into disrepute.⁹⁰ The Law Society of England and Wales is in the process of introducing a new Legal Practice Course, starting in September 1993, which aims to move in a similar direction while maintaining a balance between knowledge and skill.⁹¹

Some academic lawyers fear that the profession will seek to off-load some of the substantive law topics that have been discarded at the vocational stage onto the undergraduate degree. To counter this "knowledge-backlash," they are vigorously claiming that, as liberal educators, "we are in the skills business too," at least in respect of intellectual skills.⁹²

For the past five years a very active Legal Skills Research Group has been stimulating and coordinating empirical research in this general

87. This theme is developed in KARL LLEWELLYN, *THE STUDY OF LAW AS A LIBERAL ART* (1960), reprinted in LLEWELLYN, *JURISPRUDENCE*, *supra* note 10, at 375-94.

88. The tension between skills training (know-how) and study about (know-what and know-why) runs through contemporary treatments of narrative, rhetoric, and reasoning in legal contexts. Given doubts about the validity and acceptability of "non-rational means of persuasion," few law-teachers openly claim to be directly teaching rhetorical and narrative skills. Practitioners' handbooks are only a little less inhibited. On the inevitability and potential abuses of story-telling in advocacy, see TWINING, *RETHINKING EVIDENCE*, *supra* note 10, at 219-61.

89. For accounts of some of these developments, see GOLD ET AL., *supra* note 68. Although the quip about the "Gold Rush" points, *inter alia*, to the delusion that one can get-wise-quick through short doses of skills training, Neil Gold should be exempted from any responsibility for this. He has regularly warned against expecting too much of direct teaching of skills and has pioneered important basic research into what constitutes excellence in advocacy and how it might be developed.

90. A good description and evaluation of the first year of this course is VALERIE J. JOHNSTON & JOANNA SHAPLAND, *DEVELOPING LEGAL TRAINING FOR THE BAR* (1990).

91. THE LAW SOCIETY OF ENGLAND AND WALES, *TRAINING TOMORROW'S SOLICITORS* (1990); THE LAW SOCIETY OF ENGLAND AND WALES, *LEGAL PRACTICE COURSE—WRITTEN STANDARDS* (1991); THE LAW SOCIETY OF ENGLAND AND WALES, *TRAINING TOMORROW'S SOLICITORS—SECOND REPORT* (1992).

92. William Twining, *Legal Skills and Legal Education*, 22 *LAW TCHR.* 4 (1988); William Twining, *Intellectual Skills at the Academic Stage: Twelve Theses*, in *EXAMINING THE LAW SYLLABUS: BEYOND THE CORE* 93 (Peter Birks ed., 1993).

area.⁹³ Interestingly, the recent ABA Task Force on Legal Education and Professional Development (the MacCrate Committee) acknowledged that "the Commonwealth programs are perceived to be far more effective than our existing bridge-the-gap programs."⁹⁴ If this is true, which is debatable, it is largely because more time is available in the Commonwealth courses, many of which involve six to nine months of full-time study after the completion of the first law degree.

The modern skills movement is diverse and controversial. A predominant orthodoxy, however, can be discerned. This is exemplified by the 1992 MacCrate Report, the 1988 Marre Committee Report in England, and the writings of Professor Neil Gold.⁹⁵ The basic tenets of this orthodoxy can perhaps be restated as follows: one of the primary objectives of legal education and training is to enable students to achieve minimum standards of competency in basic skills before being let loose on the public. What constitute such basic skills depends on a job analysis of what different kinds of lawyers in fact do. Lawyer-jobs can be analyzed into transactions or operations, which can be further broken down into tasks or sub-operations;⁹⁶ a skill or skill-cluster denotes the ability to carry out a task to an acceptable, specified standard. Minimum acceptable competence is to be distinguished from excellence, and it is the main function of law schools and bridge-the-gap programs to ensure that all entrants to the profession satisfy minimum competence in a range of skills, measured by actual performances and which satisfy articulated criteria under specified conditions. Problem-solving is, in this view, seen either as one of the most important basic skills or, as some would have it, the master skill under which all lawyering tasks can be subsumed.⁹⁷ Finally, there is an ethical dimension: not only does the standard list of skills include the ability to recognize and to resolve ethi-

93. INSTITUTE OF ADVANCED LEGAL STUDIES, LONDON, LEGAL SKILLS WORKING PAPERS (1992).

94. MACCRATE REPORT, *supra* note 82, at 405.

95. *Id.*; LADY MARRE, A TIME FOR CHANGE: REPORT OF THE COMMITTEE ON THE FUTURE OF THE LEGAL PROFESSION (1988). For additional information, see the numerous articles and reports by Neil Gold on New Zealand (1986, 1989), Zimbabwe (1986), England and Wales (1987), and Hong Kong (1989-92). See GOLD ET AL., *supra* note 68, at 317-25; John Kilcoyne & Neil Gold, *Instructional Technology: The Systematic design of Legal Education*, in LEGAL EDUCATION IN CANADA (R.J. Matas & D.J. McAuley eds., 1987).

96. Irwin L. Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL EDUC. 301 (1961).

97. E.g., Philip A. Jones, *Skills Teaching in Legal Education. The Legal Practice Course and Beyond*, in EXAMINING THE LAW SYLLABUS, *supra* note 92, at 102-4; Stephen Nathanson, *The Role of Problem Solving in Professional Legal Education*, 2 J. LEGAL EDUC. 167 (1989); cf. Anthony L. Amsterdam, *Clinical legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); Charles D. Kelso, *In Quest of a Theory of Lawyering: Some Hypotheses and a Tribute to Dean Soia Mentschikoff*, 29 U. MIAMI L. REV. 159 (1975); Lasswell & MacDougal, *supra* note 84, at 216-17.

cal dilemmas,⁹⁸ but issues of ethics, values, and professional responsibility must pervade the learning of each skill. This supports the idea of a pervasive approach to professional responsibility.

At first sight this looks like a restatement of Llewellyn's views. In 1941 he wrote: "[S]ound sociology of law is the precondition to sound legal technique."⁹⁹ The 1943 Lasswell-McDougal plan and the 1944 Association of American Law Schools Report, which was mainly drafted by Llewellyn, are widely recognized as pioneering attempts to relate legal education to what lawyers in fact do in a systematic fashion and to move from one rather narrow set of intellectual skills to a broader and more systematic preparation for all important aspects of legal practice. Llewellyn helped to set the fashion of drawing up lists of skills, although his modest list of six looks rather meager compared to MacCrate's list of ten skills (each with sub-divisions) and Lady Marre's twenty-four. "Problem-based learning" is now in fashion, and, significantly, Llewellyn's *Law in Our Society* had a substantial section devoted to "Theory of Problem-solution in General."¹⁰⁰ His courses on Elements and Appellate Advocacy at the University of Chicago were clear attempts to develop direct teaching of specific skills.¹⁰¹ He summed up the importance of the ethical dimension in the much-quoted aphorism: "Technique without ideals may be a menace, but ideals without technique are a mess"¹⁰²

Undoubtedly many of the developments in skills-based legal education since 1944 in North America and beyond could be interpreted as attempts to implement, refine, and develop Llewellyn's own program. Contemporaries, such as Frank Strong and David Cavers, and former students, such as Irvin Rutter, Charles Kelso, and Terence Anderson, explicitly acknowledged Llewellyn's direct influence, which could also be seen in particular law programs at Cincinnati, Ohio, Antioch and Miami.¹⁰³ Soia Mentschikoff and Irwin Stotzky edited and expanded

98. E.g., MACCRATE REPORT, *supra* note 82, at 203.

99. Llewellyn, *My Philosophy*, *supra* note 10, at 197.

100. Llewellyn, *Law in Our Society*, *supra* note 10, at 93-104 (Lecture 13).

101. Extensive teaching materials for both courses survive and are contained in Llewellyn's unpublished course materials, on file with the University of Chicago Law School as part of its collection of The Karl Llewellyn papers (Elements is in File M and Legal Argument is in File N). The Elements materials provided the basis for SOIA MENTSCHIKOFF & IRWIN P. STOTZKY, *THE THEORY AND CRAFT OF AMERICAN LAW—ELEMENTS* (1981).

102. See Llewellyn, *Skills*, *supra* note 10, at 346; Karl Llewellyn, *The Adventures of Rollo*, L. SCH. REC. (The University of Chicago Law School) vol. 2, no. 1 (1952), at 3, 23; Llewellyn, *Law in Our Society*, *supra* note 10, at 26.

103. E.g., CHARLES D. KELSO, *A PROGRAMMED INTRODUCTION TO THE STUDY OF LAW* (1965); Terence J. Anderson & Robert S. Catz, *Towards a Comprehensive Approach to Clinical Education: A Response to the New Reality*, 59 WASH. U. L.Q. 727 (1981); David F. Cavers, "Skills" and Understanding, 1 J. LEGAL EDUC. 395 (1949); H. Russell Cort & Jack L. Sammons,

the Elements materials which are still used as the main book for the first-year foundation course at the University of Miami School of Law and a few other law schools.¹⁰⁴ In my own work on interpretation and fact-analysis and more generally in legal education I am happy to acknowledge Llewellyn as a seminal influence.¹⁰⁵

Thus, Llewellyn clearly has a place as an important pioneer in this area, and his influence lives on. Yet one wonders whether the powerful modern orthodoxy is entirely in tune with his vision and ideas. If Karl Llewellyn were to return today and read the MacCrate and Marre reports, one suspects that he would react with a mixture of enthusiasm and dismay. On the one hand, he would probably welcome the broadening of the focus of legal education and training, the concern to be more realistic about what lawyers do, the increased educational professionalism, the emphasis on professional responsibility and problem-solving, and the attempts to develop an empirical base for skills training.¹⁰⁶ However, let me on his behalf express some concerns.

First, consider the precept that "sound sociology of law is the precondition to sound legal technique."¹⁰⁷ It is very doubtful whether compiling lists of discrete skills that practitioners say they think are important goes very far in the direction of a sound sociology of law. This is not to denigrate the work of Zemans, Rosenblum, and Garth in Chicago¹⁰⁸ or that of Joanna Shapland in England.¹⁰⁹ But the outcome to date seems to be longer and longer check-lists, with little analysis of interconnections and only rather primitive efforts at setting priorities. As the lists get longer, the time available for study stays the same or even decreases. The almost inevitable result is the sacrifice of detail, depth, and transferability to the dragon of "coverage"—in this case coverage of longer and longer lists in the name of a mechanistic form of bureaucratic rationalism that is threatening to engulf legal education.¹¹⁰

In England, perhaps even more than in the United States, the legal profession has been obsessed by coverage, that is the idea that there are

The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies, 29 CLEV. ST. L. REV. 397 (1980); Rutter, *supra* note 96; Frank R. Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226 (1973).

104. MENTSCHIKOFF & STOTZKY, *supra* note 101.

105. E.g., WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* (3d ed. 1991); TERENCE J. ANDERSON & WILLIAM TWINING, *ANALYSIS OF EVIDENCE* (1991).

106. See JOHNSTON & SHAPLAND, *supra* note 90; GOLD ET AL., *supra* note 68.

107. Llewellyn, *My Philosophy*, *supra* note 10, at 197.

108. E.g., FRANCES ZEMANS & VICTOR ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981); Bryant G. Garth et al., *ABF Surveys*, in MACCRATE REPORT, *supra* note 82, at 379-84 (Appendix B).

109. See *supra* note 90.

110. See *supra* note 92.

certain fields of law that every student should have covered, however superficially, before being admitted to practice. This has been most obviously exhibited in the old style bar and solicitors' examinations, not very different from state bar examinations, which have traditionally tested short-term memory of masses of technical detail. The shift to skills has not reduced the obsession. Once competence has been defined in terms of a list of skills, the gatekeepers may even feel that they have to adopt the position that someone who has failed on even one item on the list must be treated as incompetent. As the list grows, so detail, depth, repetition, and skillfulness are sacrificed. At one institution, after I persuaded the powers that be that "fact-management" was an important skill-set, I learned that within two years it had been squeezed into three hours of classroom instruction. One symptom of this tendency is found in disclaimers for the new-style skills courses. For example, the Inns of Court School of Law claims that its one-year full-time course is no more than a preparation for pupillage, in other words apprenticeship.¹¹¹ Similarly, "bridge the gap" increasingly means the gap between law school and apprenticeship or starting practice under supervision. What is at risk in this primary school model is the idea of formal legal education as a long-term or lifelong investment.¹¹²

In his passionate plea for "The Study of Law as a Liberal Art," Llewellyn commented on Langdell's contribution, which involved an historic switch from emphasis on substantive knowledge to emphasis on one set of case-law skills, as follows: "The resulting technical skills, though sharp and well instilled, were narrow, and they remained so. The wherewithal for vision was not given."¹¹³ There is a danger that a future historian of the modern skills movement might write: "The resulting technical skills were broad, but they were neither sharp nor well-instilled. And there was a total neglect of the vision thing."

C. *Technology and Crafts: An Excursus*

Words ending in -ology tend to be loosely used to refer to the science or study of a subject, the subject itself, or even to the products of a process of applied science. Thus, "methodology" often conflates

111. Statements about the course indicate that it aims to prepare students to perform adequately in work they might do in their second six months of pupillage, and for this reason "the course aims to be extremely general, aiming at more or less the lowest common denominator for the practising bar." COUNCIL OF LEGAL EDUCATION, *THE NEW VOCATIONAL COURSE, INTRODUCTORY PAPER* (1988). Johnston and Shapland interpret the objective somewhat more broadly to cover "most of the work a junior barrister might expect to obtain in the first few years after call." JOHNSTON & SHAPLAND, *supra* note 90, at 2.

112. This theme is explored in William Twining, *Developments in Legal Education in the Commonwealth: Beyond the Primary School Model*, 2 *LEGAL EDUC. REV.* 35 (1990).

113. LLEWELLYN, *JURISPRUDENCE*, *supra* note 10, at 377.

method with the study of method.¹¹⁴ The word "technology" is commonly used to refer to the study of the practical arts, to the practical arts themselves, and to their products, such as machines, as in such phrases as "new technology." Similarly, "legal technology" can refer to the study of the law-ways, to the law-ways themselves, and to the products of the law-ways, such as particular legal inventions and devices. Llewellyn was interested in all three, but his emphasis was on the *study* of juristic method: the law-jobs theory treats "juristic method" as a focus of study and includes a methodology *stricto sensu*; "the job of juristic method" refers to the law-ways (that is, to method in a broad sense); but the study of juristic method encompasses practical arts (*techne*), practices, and legal artifacts or products, such as codes, devices, and institutions (means as well as ways).

"Legal technology" (my term) has a modern, industrial ring. "Craft," Llewellyn's favorite, is old-fashioned, even quaint and mildly embarrassing. As one Japanese commentator shrewdly observed, Llewellyn's emphasis on craftsmanship conjures up a nostalgic image of legal practice as a kind of tradition-bound cottage industry at a time when it was moving into an era of factory mass production.¹¹⁵ There is something awkward about the term, but it revealingly links some central strands in Llewellyn's own thought, such as the importance of tradition as a steadying factor and the idea of the craftsman who is both an individual and yet who is formed by and is part of a communal enterprise. The craftsman occupies a middle-brow position between the technician and tradesman on the one hand and the scientist, statesman, or artist on the other (Llewellyn's self-image was of "a half-way artist").¹¹⁶ Legal

114. Twining, *supra* note 7, at 366.

115. Takeo Hayakawa, *Karl N. Llewellyn as a Lawman from Japan Sees Him*, 18 *RUTGERS L. REV.* 717 (1964).

116. LLEWELLYN, *supra* note 5, at 126. Llewellyn introduced the Elements course in Chicago in 1951 and continued to teach it until he died. From 1962 Soia Mentschikoff took charge of the course, first at the University of Chicago and later at the University of Miami. In 1973 I wrote: "Although there were a number of Llewellynesque features, in many respects it resembled other 'legal method' courses and it lacked the unique qualities of the *Bramble Bush*." TWINING, *supra* note 3, at 151. In retrospect this does an injustice both to the course and to his materials which formed the basis for Mentschikoff and Stotzky's *The Theory and Craft of American Law*, *supra* note 101. In addition to being a concrete application of some of Llewellyn's main ideas on judicial process and legal education, the emphasis on the interdependence of theory and method and the extended use of sequences of cases on the same topic from a single court are noteworthy.

Dean Mentschikoff made "Elements" the principal foundation course at the University of Miami Law School when she moved there. Despite mixed reactions from students, it still performs this role with the basic conception unchanged. The course has nearly always been taught by graduates of the University of Chicago who were taught by Llewellyn or Mentschikoff or both. In recent years I have participated in teaching Elements at Miami, and over time my respect for the course has increased, despite a number of reservations, which I shall touch on below.

aesthetics was explicitly, perhaps fancifully, part of the theory of the crafts of law, but the idea of beauty is quite functional and down-to-earth. The images and analogies are most commonly with carpentry, architecture, and sculpture, and Llewellyn himself was a versifier rather than a poet.¹¹⁷ The craftsman is neither a plumber nor Pericles; he is more than just a technician but only exceptionally aspires to greatness. The distinguishing mark of the craftsman is pride in a job well-done for its own sake. Money and fame are secondary. Craftsmanship is more akin to a form of love.¹¹⁸

"Craft" also suggests licensed craftiness, the ethically ambiguous Odysseus as none-too-scrupulous hero. Here one finds a deep ambiva-

To do justice to Llewellyn's original course and its successors would require an article. For earlier interpretations, see Leslie Gerwin & Paul Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and Teaching Materials*, 33 J. LEGAL EDUC. 64 (1983) (an evaluation of Mentschikoff and Stotzky, *supra* note 101) and John Gaubatz, *Of Moots, Legal Process, and Learning to Learn Law*, 37 U. MIAMI L. REV. 473 (1983).

Llewellyn's course and its successors provide another example of the unresolved tension between his sociological vision of law and his particular concern with appellate courts and a limited range of particular skills. The course was developed in part as a reaction to over-use of the case-method in American law schools, especially in teaching substantive law. See especially Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948) and the discussion by Gerwin & Shupack, *supra*, at 67-68. Llewellyn emphasized that this was a course on theory and method, not on substantive doctrine: "The subject matter is elements of law which means an introduction to the whole in its various aspects." Gerwin & Shupack, *supra*, at 68 n.23. However, neither the course nor the materials really live up to this claim. Granted that students were expected to read *The Cheyenne Way*, *supra* note 10, and a few basic texts on Jurisprudence; granted also that the course consistently emphasized "why?" and "how?" rather than "what?" questions. The emphasis on theory and method is aptly caught by Mentschikoff and Stotzky's title, *The Theory and Craft of American Law*, especially if one bears in mind that "American Law" is a fiction. Granted this and more, the fact remains that most of the theory is quite narrowly focused on appellate courts and the treatment of skills is highly selective. The focus of study is still litigation with an almost exclusive emphasis on appellate judging and advocacy, and the main materials are appellate cases or texts which deal with these. Little more than lip-service is paid to statutes, constitutional interpretation, or other texts in fixed verbal form. There is an admirable emphasis on procedure, but almost nothing on fact-finding, fact-analysis, let alone non-contentious legal practice. There is a strong private law bias with hardly more than passing mention of public law or foreign or international law. A narrow and selective focus could be justified on the grounds that one should not try to cover too much ground in a single course, but as in *The Common Law Tradition*, *supra* note 8, Llewellyn failed to use the law-jobs theory to provide the basis for a sustained "Whole View" of law or even for setting a narrow and traditional conception of "legal method" in a broader context. *Elements* tends to reinforce rather than modify traditional law school assumptions that legal practice is about litigation and that the law reports are the primary materials of law study. I suspect that in *Elements* Llewellyn succumbed to the gravitational pull towards traditional case law skills that is especially strong in a curriculum that is still litigation-oriented and case law dominated. In trying to broaden the focus of the course while retaining its emphasis on theory and method, I have myself found the gravitational pull of tradition and of students' expectations very difficult to resist. From this perspective, *Elements* is a highly sophisticated contribution to a tradition which in other contexts Llewellyn was trying to broaden, if not to subvert.

117. TWINING, *supra* note 3, at 117-23.

118. *Id.* at 197.

lence in Llewellyn's attitudes. "[C]rafty," he says, "reflects abuse by the craftsman unless, as in negotiation or war, manoeuvres and even deception are part of the craft."¹¹⁹ Llewellyn regularly proclaimed the importance of ideals and ethics, the quest for beauty, and the quest for justice, but in his course on advocacy he was not above teaching the tricks of the trade, including some that might be thought to be ethically dubious. His model advocate puts the interest of the client first, plays the adversary game hard, and seemingly treats the idea of the role of "officer of the court" as an important, but secondary, side-constraint.¹²⁰

In 1993 the idea of a theory of law-crafts seems not just quaint, but dubious and outdated. The associations of craft, craftsman, and craftsmanship, are largely positive; they suggest a vision of legal practice that is optimistic, sentimental, and uncritical. When Llewellyn writes in this vein, we are a long way from washing the law in cynical acid or even mild skepticism. When he waxes lyrical about the Grand Style or Cheyenne "legal genius" or revels in the skills and tactics of Elihu Root or John W. Davis or R. Muir Q.C. (who prosecuted Crippen), has he not succumbed to an uncritical form of romanticism?

Jeremy Bentham, no lover of the legal profession or judges, referred to the perversion of sensibility that occurs when sportsmen, craftsmen, or professionals become attached to techniques and technicalities as ends in themselves as "the technical prejudice":

What sensation is ever produced in the breast of an angler by an impaled and writhing worm? in the breast of a butcher, by a bleeding lamb? . . . in the breast of an undertaker, by the death of the father or mother of an orphan family? If a fly were to be put on the hook, in a month when a worm is the proper bait—if the lamb were to be cut up into uncustomary joints . . . if, in the decorations of the coffin, the armorial bearings of the deceased were to be turned topsy-turvy . . . these are the incidents by which, in the several classes of professional men, a sensation would be produced; meaning always a sensation of the unpleasant kind.¹²¹

This, in more forceful terms than Horwitz himself used, is the essence of Horwitz's challenge: Llewellyn sold out to an uncritical and romantic view of law and legal practice by taking refuge in the study of crafts.

Can Llewellyn be rescued from such charges? He is clearly not guilty on some counts. First, his craftsman is not an isolated individual,

119. Llewellyn, *Law in Our Society*, *supra* note 10, *quoted in* TWining, *supra* note 3, at 505.

120. Several annotated versions of Llewellyn's course materials survive in the University of Chicago Law School's collection of the Karl Llewellyn Papers (Legal Argument materials are in File N).

121. JEREMY BENTHAM, 1 *RATIONALE OF JUDICIAL EVIDENCE* 10-11 (J.S. Mill, ed. 1827).

as Hayakawa suggests. "The fact and idea of *crafts focus as nothing else does* (except the rearing of the young) *the homely daily processes of interaction between individuals and the closer groups and the larger society around them.*"¹²²

Second, and related, Llewellyn consistently emphasized that crafts were means to ends that had to be considered in relation to goals and ideals. He reinforces this by explicitly linking his theory of crafts to his theories of justice and aesthetics: the quest for justice and the quest for beauty.¹²³ He may be vulnerable to charges of viewing some aspects of the common law tradition and American legal practice through rose-tinted spectacles, but only at the margins (for example, in some remarks on advocacy and negotiation) does he get so carried away with enthusiasm for skill, tactics, and virtuosity that he can be said to have succumbed to "the technical prejudice." What lover of the law is immune from such charges?

Thirdly, insofar as Llewellyn idealizes the honest craftsman, the Grand Style judge or advocate, and the beauty of the letter of credit, he is clearly in the sphere of the normative and the aspirational. At the very point at which we may be tempted to be skeptical, Llewellyn is a romantic enthusiast rather than the arch-positivist and the behavioral scientist that Horwitz depicts.¹²⁴

This point is worth developing. If ever Llewellyn was at all attracted to positivistic social science it was when he was relatively young and flirted with behavioral psychology for a time. He never espoused it, however, and in one of his most thoughtful but neglected essays he considered "legal science" to be at most a remote aspiration, while sociology and psychology were at a "pre-pre-science stage."¹²⁵ Early on he distanced himself from the empirical work of Cook and Moore, as he did later with jurimetrics and other forms of "number-crunching."¹²⁶ Max Weber was Llewellyn's main hero in social theory and interpretive sociology, especially in Llewellyn's rather free-wheeling and empathetic interpretation; this is hardly to be equated with Comteian positivism. Weber was, of course, concerned about rationality and objectivity, but the tensions between rational method and subjective

122. Llewellyn, *Law in Our Society*, *supra* note 10, *quoted in* TWINING, *supra* note 3, at 506.

123. See the table of contents for Llewellyn, *Law in Our Society*, *supra* note 10, *quoted in* TWINING, *supra* note 3, at 497-98.

124. HORWITZ, *supra* note 7, at 5, 169-92, 210-11.

125. Llewellyn, *Law in Our Society*, *supra* note 10, at 8-10, *quoted in* TWINING, *supra* note 3, at 501-03. For a discussion of "science," see Karl Llewellyn, *Theory of Legal "Science,"* 20 N. C. L. REV. 1 (1941) (reviewing HUNTINGTON CAIRNS, *LAW AND THE SOCIAL SCIENCES* (1935)); see generally TWINING, *supra* note 3, at 53-55, 188-96.

126. TWINING, *supra* note 3, at 53-55, 103-04.

meaning were for him the central problem, as Stuart Hughes has elegantly shown.¹²⁷

What of legal positivism? Llewellyn was a legal positivist of a kind, but a rather weak one. In the much-quoted statement of a positivist starting-point for Legal Realism (1931), he includes two qualifiers, one in italics: "The *temporary* divorce of Is and Ought for purposes of study."¹²⁸ His later statements of a legal positivist position are even more guarded. Llewellyn was never as unequivocal a positivist as Bentham, Holmes, or Hart. But it is fair to say that he belongs to that tradition.¹²⁹

Llewellyn's tendency to don rose-tinted spectacles was in spite of rather than because of his positivism. This is the nub of the difference between Horwitz's and my interpretations. Horwitz sees Llewellyn as a young, critical radical, who retreated from some of the ideas of his youth into a form of romantic conservatism and took refuge in "a new basis for belief in professional craft as the source of stability and predictability in law."¹³⁰ He associates this, strangely, with his "later advocacy of a 'temporary divorce' between the empirical and the normative,"¹³¹ although the most famous formulation of this was in 1931, only a year after the publication of *The Bramble Bush*. Horwitz seems to suggest that Llewellyn's "austere positivism" (surely an overstatement) was in some way incompatible with "the intellectually fertile alliance between reformist social science and Realism."¹³²

The three major points of difference in my alternative interpretation are first, that the continuities in Llewellyn's thought are much greater than Horwitz suggests; second, that he was never as austere positivist or wedded to science as Horwitz asserts; and third, and most importantly, like many other American commentators, Horwitz omits from his account both Llewellyn's concern about developing a general sociology of law as the unifying element in his thought and the tensions between this aspect of his work and his close personal identification with the American legal profession and the common law.¹³³

On the first point, it is easy to show that Llewellyn was always

127. STUART HUGHES, *CONSCIOUSNESS AND SOCIETY* 278-335, 430-31 (1959); cf. TWINING, *RETHINKING EVIDENCE*, *supra* note 10, at 127.

128. *E.g.*, LLEWELLYN, *JURISPRUDENCE*, *supra* note 10, at 55.

129. Llewellyn, *Law in Our Society*, *supra* note 10, is a rich source for a reappraisal of Llewellyn's later relationship to positivism.

130. HORWITZ, *supra* note 7, at 250.

131. *Id.* at 248.

132. *Id.* at 5.

133. Horwitz gives a perceptive account of some of the tensions and polarities in Llewellyn as man and thinker. See HORWITZ, *supra* note 7, at 185-87. These, of course, open the way to multiple interpretations. In my view Horwitz, by ignoring the law-jobs theory, downplays the

centrally concerned with method, technique, and technology, that he was never a committed political radical, that he always had a romantic conservative streak, and that most of the ideas in *The Common Law Tradition* are anticipated in his 1928 Leipzig lectures. The arguments about positivism and science have already been dealt with. The important point is the tension between his particular and his general jurisprudence.

The sociology of the legal profession and skills training are just two examples of specialized areas in which the idea of juristic method provides a potentially illuminating perspective and a crucial link to broader social theory. I could as well have taken some other examples of contemporary interest to make similar points, such as constitution-making and constitution-mongering, alternative dispute resolution, or the comparative study of procedural systems.¹³⁴ Llewellyn had suggestive things to say about such matters as recruitment and the career-development of legal personnel, specialization, the sociology of dogmatics, and legal writing.¹³⁵ But his own specialized interests focused largely on more parochial concerns of American law teachers, such as appellate courts, basic lawyering skills, and arguments about questions of law. Here it is probably fair to say that there was a tension between the general ideas of Llewellyn as a sociologist of law and some of the specialized work of Llewellyn as a professionally-oriented, American scholar-teacher of law.

While the two phases of his work often fed into each other, the transition from sociologist to technologist to technician is not always easy to make. There is, I think, sometimes an awkward disjuncture between Llewellyn's more general ideas and some of his particular work. This point has already been made about *The Common Law Tradition*, but it might also be applied to his materials on *Elements* and to their development by Mentschikoff and Stotzky, in which the idea of "the theory and craft of American Law" gives the impression of being mainly concerned with litigation, arguments about questions of law, and Llewellyn's own version of case-law skills.¹³⁶

tension between Llewellyn's particular commitments and his continuing concern to develop a "whole view."

134. On constitutions, see William Twining, *Constitutions, Constitutionalism and Constitution-Mongering*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin Stotzky ed., 1993); on alternative dispute resolution see Twining, *supra* note 37; on procedural design, see MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

135. See Llewellyn, *Law in Our Society*, *supra* note 10; Llewellyn, *The Problem of Juristic Method*, *supra* note 10. Few of these ideas are developed very far.

136. The *Elements* materials, like *The Bramble Bush*, need to be read in the specific context of courses that purport to be building-blocks for particular degree programs that emphasize litigation and appellate cases. It has been my experience in teaching "Elements" at the University of Miami

At one level, there should not be a sharp divide between insider and outsider perspectives. Interpretive sociology teaches that in order to understand a social practice one has to grasp the perspective of the actors. In order to describe chess one must understand the rules, moves, strategy, and tactics as the players see them. In order to understand Tiv or Barotse legal processes one must grasp the concepts of the actors (the emics) as well as the language of the external observer (the etics).¹³⁷ Conversely, it often helps participants to have some understanding of the context in which they are operating, the role expectations, the factors that constrain and allow leeways of discretion, the economic realities of their situation, the likely consequences of their actions, among other things. Such awareness may not always be a necessary condition for effective action, but it is often a useful part of the equipment of the reflective practitioner. A degree of empathy with actors is a necessary part of interpretive sociology, but the standpoint and role of the sociologist are different from those of the participant. The sociologist of food does not need to become a skilled cook or vice versa.¹³⁸

Llewellyn wanted to be an observer, a participant, and a trainer of participants. A capacity for empathy was one of his strengths. In a private note about *The Common Law Tradition* he wrote: "[I]f the book is to convey its message, somebody from inside must echo Loughran: 'It reads as if you had been present at the consultations.'"¹³⁹ The concern to catch the "flavor" of the law in action is sometimes closer to that of a novelist than a social scientist. It is a far cry from the kind of positivistic scientism attributed to him by Horwitz. It is no coincidence that when addressing German audiences Llewellyn claimed to be adopting an anthropological or a sociological perspective, but even then he was giving a particularistic and evocative insider's account to a foreign audience, rather than a genuinely social scientific interpretation.¹⁴⁰

Llewellyn's theory of the crafts of law is a sub-theory of his law-jobs theory. Even so, it is much broader than orthodox studies of judges

that the gravitational pull of the context greatly inhibits radical broadening of the concept of "legal method," which here means the perspectives, methods, and techniques of *law students* in *this* program. Any deviation from the traditional materials of law study tends to strengthen student resistance to the direct study of theory and method. That said, Llewellyn, Mentschikoff, and their followers are vulnerable to charges that this is a sell-out to a tradition that is difficult to reconcile with the broad perspective of the law-jobs theory. For a fairly cautious attempt to broaden the concept of legal method, see William Twining, *Reading Law*, 24 VAL. U. L. REV. 1 (1989).

137. See GOODENOUGH, *supra* note 55 and accompanying text.

138. *Id.*

139. TWINING, *supra* note 3, at 456-57 n.249.

140. Paul Gewirtz, *Editor's Introduction*, in LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 1, at vix-xxii. At the Leipzig Colloquium, Lawrence Friedman argued that neither *The Case Law System in America* nor *The Common Law Tradition: Deciding Appeals* could be claimed as truly sociological studies of judicial decision-making; I agree. Cf. TWINING, *supra* note 3, at 203-69.

and private practitioners in that it encompasses all personnel involved in operating and developing institutionalized machinery for performing the law-jobs in any group. It includes not only clerks, paraprofessionals, and debt-collectors in American society, but also functionaries like the Ifugao *monunkalon*, the letter-writers, and the professional witnesses in Ghana. More importantly, many law-ways are institutionalized as part of the practices of ordinary citizens or non-legal specialists, such as teachers, social workers, or parents. *Au fond* the law-jobs theory is a broad humanistic theory, which, unlike most legal theories, emphasizes the continuities between legal and other phenomena rather than concentrating on what is uniquely or characteristically "legal." For example, everyone interprets rules, everyone weighs evidence, everyone is involved in negotiation, and everyone applies rules to facts.¹⁴¹ Lawyers and jurists often speak as if they are the only people to do such things or as if the path to wisdom is to isolate what is unique or special about the application of such skills in legal contexts. Llewellyn's refusal to define law, his rejection of the idea of law as an autonomous discipline, the bold claim to universality of his basic theory, and his faith in horse-sense are all part of a vision of law as a basic human enterprise, which, in its essentials, is quite easily understood. Specialization, local knowledge, historical contingency, and professional peculiarities are, of course, important, but they are in this context particular glosses on phenomena which are mostly part of "general experience."¹⁴²

IV. CONCLUSION

From the nineteen-twenties until his death in 1962, one of Llewellyn's main projects was the development of a general horse-sense sociology of law. This concern to develop a coherent "Whole View" was in constant, often healthy, tension with his particularistic and practical projects. *Rechts, Rechtsleben und Gessellschaft*, several major essays and many minor ones, and in particular *The Cheyenne Way* were published outcomes of this continuing interest in developing a general theory. Several more projects, including a book on the theory of rules, a translation of parts of Max Weber, the Pueblo study, and the project on Soviet law, were left unfinished or were aborted. His recognition that he had an unfinished agenda is quite clear from the record.

The 1950 edition of *Law in Our Society* acknowledged that this version fell short of even a semi-popular summation of his position: "The ten years which would have been needed for a proper full canvass and assessment . . . those years have gone instead into the Uniform

141. Cf. William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 263 (1984).

142. Llewellyn, *Law in Our Society*, *supra* note 10, at 8-11.

Commercial Code.”¹⁴³ Much of the next ten years were invested in *The Common Law Tradition*. One wonders whether the stimulus, detachment, and discipline of giving a series of formal lectures in Freiburg would have in fact resulted in a systematic, rounded statement that matched his ambition. Could he, in his sixties, have had the single-mindedness and energy to go beyond a restatement to further development of key ideas and new issues?¹⁴⁴

We are left then with the fragments of an unfinished draft and a rather mixed bag of supplementary materials, published and unpublished, including a substantial collection of transcripts of informal lectures delivered over several years. *Law in Our Society* is almost entirely in note-form—a collection of fragments, some quite detailed and rich, some little more than headings for topics yet to be developed. Even the table of contents is sketchy and unsystematic. The emphasis and arrangement of the text make too many concessions to an audience of American law students oriented to private practice and appellate courts for it to be satisfactory as a systematic outline of Llewellyn’s most general theory.

In considering this fascinating legacy today it is important to distinguish a number of different, but related, tasks. There is first the editorial project of reconstructing from a number of sources an accurate and reasonably comprehensive compilation of Llewellyn’s own words. Although incomplete and uneven, the course materials for *Law in Our Society* deserve to be treated as one of his most important works. In 1971, I decided, with some regret, not to undertake the challenging task of working the material up into publishable form. Unfortunately, twenty years later the challenge still remains unanswered.

The task, though difficult, is clearly worthwhile. Apart from topics touched on in this paper, and I have not done justice to the detail, *Law in Our Society* contains Llewellyn’s most developed views on jurisprudence as a subject, on justice, and on the heritage of western legal theory, including many comments and asides on particular thinkers. It also contains a great deal of specific material that glosses his published writings. Perhaps more important, it provides a basis for interpreting his work as a whole. While falling short of a Germanic “system” (and who would want that of Karl?), *Law in Our Society* provides a general con-

143. *Id.* at 9.

144. A recently discovered private manuscript fragment, addressed to himself and almost certainly written shortly before he died, suggests that Llewellyn had some severe self-doubts as to whether he still had “the gumption” for “the hard labor of squeezing a Big Job into clean form.” It ends: “I know I’m fading. . . . I Know also that—thank God—it is I who uncorked more than any other man except Langdell in American legal education.” This manuscript fragment has been presented to the University of Chicago Law School for deposit with the Karl Llewellyn Papers.

text for relating and, in some cases, reinterpreting his particular contributions. Above all, it confirms the importance of a sociological-cum-ethnographic perspective as the unifying element of all his work.

On its own, however, the text of *Law in Our Society* has some important limitations: it is incomplete, much of it consists of first rather than last thoughts and afterthoughts, and it is a text geared to a specific educational context (it is difficult to sell a full-blooded sociological theory of law to a class of vocationally-oriented American law students, even at the University of Chicago). In my view, the organization and emphasis of the text clearly reflect an unresolved tension between a concern to develop an overarching "Whole View" and the gravitational pull of the immediate context and of Llewellyn's own personal identification with one rarified phase of American legal practice. One reason why Llewellyn still claims our attention is because of this tension in his own work between the general and the particular, the scientific and the pragmatic, the search for understanding and the desire to be immediately useful.

Resurrecting reliable texts of the work of past thinkers is a worthy scholarly enterprise. However, a more ambiguous task is the job of reconstructing and constructing a coherent statement of what Llewellyn's general theory of law might have looked like had he been able to complete it to his own satisfaction. Even if true to the surviving texts, this task would involve a considerable amount of extrapolation, construction, and imaginative invention. As is true about any jurist worth studying, much of Llewellyn's thought is open to different interpretations, especially at points of tension. The leeways for interpreting his general sociology of law are quite wide, not only because the record is incomplete, but also because he was not by temperament or practice a systematic thinker. At least one critic has taken me to task for failing to construct a coherent account of Llewellyn's "system."¹⁴⁵ In my view, he did not have one.

The study of past jurists is not solely a matter of editing texts, intellectual history, or exegesis, and even less of hagiography. Jurists also have their uses. Our heritage of juristic texts and ideas is one kind of resource that can aid the process of posing, refining, and addressing questions of current concern. When we read texts for their "contemporary significance," a dangerous, question-begging term, it is important to distinguish clearly, though not too sharply, between historical, exegetical, and conversational readings and what might be called polemical

145. E.g., Manfred Weiss, 174 *Archiv für die civilistische Praxis* 90 (1974) (reviewing TWINING, *supra* note 3).

non-reading.¹⁴⁶

A third task, then, is to move beyond our heritage of texts to develop fresh answers to questions that are of contemporary significance. One can debate with Llewellyn or any other thinker as an aid to developing one's own ideas.

At first sight the law-jobs theory looks like a simple version of 1930s functionalism, and, interpreted as such, it could easily be dismissed as out-dated or even discredited.¹⁴⁷ I have suggested that Llewellyn's theory can be interpreted in a way which rescues it from most, if not all, of the charges that have been levelled against "extreme functionalism." I have also suggested that it still has heuristic value as a starting-point for asking basic questions about the ordering of any group and about institutionalized legal phenomena. One can readily concede that in Llewellyn's formulations little attention was paid to questions about power, structure, change, discourse, and meaning. It is, indeed, a rather simple and unsophisticated theory. How far it can be fruitfully developed within Llewellyn's own framework is too large a question for me to address here. I would defend the view that a sound understanding of law as a social phenomenon must be rooted in a sound sociology and social theory. As part of such understanding, concepts such as group, order, need, norm, conflict, problem, process, institution, tradition, and even function are as fundamental and as much in need of elucidation as "fundamental legal conceptions" such as right, obligation, principles, sanction, state, sovereignty, and law. The vocabulary of social theory is as necessary to legal theory as the vocabulary of analytical jurisprudence and political philosophy. The tradition of sociology within which Llewellyn worked has been enriched and refined by Merton, Goffman, Giddens, Geertz, and Turner, among others. In constructing a sophisticated sociology of law as part of a general jurisprudence for an interdependent world, one would need to draw on ideas from many diverse thinkers within a broad intellectual tradition. It is my contention that Llewellyn's law-jobs theory still has something of unique value to offer to that enterprise and that a large part of this is inherent in his idea of juristic method.

146. Twining, *Reading Bentham*, *supra* note 10, at 97-141.

147. *See supra* note 46.